Re: Comments – Draft Environmental Impact Report for Amendments to Humboldt County Code Regulating Commercial Cannabis Activities

Dear Mr. Lazar,

The following comments are offered on behalf of the board, staff, and supporters of Friends of the Eel River. FOER advocates for the protection and restoration of our Wild and Scenic Eel River, with a focus on the fisheries that are the keystone of ecosystem health in our watershed. FOER has been working for years to identify effective solutions to the environmental impacts resulting from the ongoing explosion in commercial marijuana cultivation, until now nominally for medicinal purposes, in the Eel River watershed.

Nobody has ever been in the pivotal position Humboldt County finds itself in today. Collectively, we have realized enormous private, and not inconsiderable public, wealth and revenues from an industry that was incredibly lucrative precisely because it was illegal. Because it was illegal, it couldn't be regulated, or taxed, or effectively monitored. Now, it must be.

Humboldt County’s commercial cannabis industry is already too large. It has far too many impacts, because the County has been unable or unwilling to regulate land use to prevent significant impacts to public trust values like our fisheries, wildlife, and the waters and habitat they require to survive. In fact, of all California’s 58 counties, Humboldt has the biggest problems, the largest impacts, suggesting the County’s policy choices have been key drivers of the evolution of its cannabis industry.

The proposed Ordinance and DEIR do not break from the County’s history of abdicating responsibility for the consequences of its land use decisions. It’s a tragic failure of leadership that is likely to cost Humboldt County dearly. Worst, it squanders this moment of possibility, when we could begin to build the better history of effective governance and responsible land use our descendants will wish for.
GENERAL COMMENTS

The basic questions about Humboldt’s commercial cannabis industry are land use issues. It is the County’s responsibility, delegated by the state, to regulate land use to protect public trust values, held by the state in trust for the benefit of its citizens.

The County gives the impression that it would prefer to shrug off its responsibilities to protect public trust resources, including watercourses, fish, and wildlife, onto the state and federal agencies with primary trust responsibility for those resources. But where those public trust resources are affected by the land-use decisions the County makes (including decisions to systematically forgo enforcement of its Ordinances and state law), the County cannot disavow that responsibility without abdicating its authority to regulate. The power and the duty to regulate local land use cannot be separated.

In November 2015 comments to the Humboldt County Planning Commission, we wrote:

*The county must provide clear means to distinguish the minority of such operations which may be permitted under an effective system of regulation from the majority which should never have been established. Given the county’s long history of feckless land-use regulation, it is particularly important that the county establish straightforward enforcement mechanisms, including the use of common-law nuisance, that can and will be used to shut down thousands of large, damaging operations which cannot be, should not be, or simply are not properly permitted.*

*(emphasis added)*

Optimally, the county would systematically use the contemplated Ordinance to shut down and force remediation of the vast majority of the class of large operations that generate disproportionate harms. Such enforcement would itself constitute perhaps the most effective potential mitigation of the environmental impacts generated by the commercial marijuana industry.

*But there can be no question that significant environmental harms could – and should – have been prevented if only the county had seen fit to enforce its existing regulations as the Green Rush swept over the Humboldt hills.*

To date, the County has not only failed to establish such means to distinguish viable operations from those that must be shut down, and such mechanisms by which that enormous task can be accomplished. It has continued to tolerate, and even to create incentives which invite, the establishment of additional new, large, commercial marijuana growing operations across the county, leading inevitably to new and increased environmental impacts.

In our comments to the Board in December of 2015, we wrote that:

*That those operations decline to obtain permits does not allow the County to ignore their impacts in order to determine that operations it does permit will incur no significant watershed impacts. We note here that the County’s practice of ignoring violations of its grading Ordinance may have some relationship to the significant*
sediment inputs that are causing continuing harms to the Eel River and its fisheries.

The environmental and social consequences of a legal pot industry operating at a given scale in Humboldt cannot be meaningfully evaluated in isolation from the key questions about the (still booming, bigger this year than ever) illegal industry, which operates on the same landscape, takes water from the same sources, and puts the same dirt in the same fish habitat as the legal industry – except all at a much larger scale.

We have repeatedly requested that the County establish a reasonable cap on the overall number of operations that will be permitted. We have asked that the County provide an analysis of watershed impacts and carrying capacity before issuing permits in key fisheries watersheds. The County refuses to do so.

Thresholds matter. If the impacts of the illegal industry can be, and are, sharply reduced – as a whole, or at least at a watershed scale, not merely on the level of this or that specific operation – then there may be ‘room’ for the impacts of an enlarged legal industry. But if the illegal industry remains unrestrained, its impacts remain unbearably large, and the addition of even limited impacts, however legal they may be on a per-operation basis, must be considered at least potentially intolerable for watersheds already over thresholds. The failure to set any time limits on the issuance of permits under the proposed Ordinance only makes it more difficult to assess or to limit the industry’s impacts.

Throughout the course of the County’s moves to regulate marijuana cultivation, there has been a consistent chorus that we must “lower barriers to participation” by existing black market growers, even to the extent of offering incentives by dramatically increasing the level of cultivation allowed on most sites. We have heard from members of the Planning Commission, growers, and grower’s representatives, among other things, that we must lower the fees and taxes proposed for commercial cultivation operations. That we should go easy on the environmental cleanup and remediation required on damaged sites. That we should spend public monies raised by finally starting to tax the industry not on enforcement of the new regulations, or even to fix the County’s public roads system, but on subsidies to growers to fix their roads.

All this happy talk about carrots has tended to displace the necessary, if unpleasant, discussion of sticks. For the purposes of the DEIR’s analysis, incentives alone cannot be relied upon to produce any meaningful reductions in watershed impacts.

The County, its leaders, and its planning staff are under considerable pressure to come up with a plan here that will make a lot of people happy. The problem is that many of these people are operating under a series of misapprehensions, which, in combination, may rise to the level of delusions. For its part, Humboldt County has enjoyed tremendous economic benefits from the black market pot industry. Now it wants to secure similar benefits from a legal California industry. But it does not wish to have to clean up the mess the black market industry has created.

In the aggregate, however, it’s clear that most of the industry wants to stay black market. That’s not supposed to be an option. But the evidence strongly suggests that Humboldt
County has zero intention of ever undertaking enforcement measures of the scope and intensity necessary to insure that the vast majority of existing operations either genuinely comply with the proposed permitting requirements or shut down and clean up.

The same problem of enforcement undermines the DEIR’s promises of mitigation. The DEIR depends to a great extent on unenforceable promises that various mitigation measures will be fully employed and effective as advertised to support the document’s claim that the proposed Ordinance will not lead to significant unmitigated environmental impacts. These representations are starkly at odds with generations of experience in Humboldt County, which instruct us that land-use and building codes go unenforced far more often than not. There is no hint in the Ordinance or the DEIR that the County is prepared to significantly increase the resources and staff dedicated to even basic code enforcement.

Piling unenforceable and unenforced regulatory schemes atop one another may create the appearance of a comprehensive framework, but there’s a way in which the accumulating and overlapping inadequacies of the Regional Board and County’s approaches to protecting water quality and fisheries appears to be leaving a lot of Humboldt County’s weed industry – most of it, by all appearances – outside of permitting’s burdens but largely free of even the threat of enforcement. DFW will continue to focus on the very worst environmental offenders with their very limited resources. But they’ll be doing a great deal if they bring down more than a few dozen operations in a year.

The DEIR presents little analysis of the implications of the implementation of the County’s Medical Marijuana Land Use Ordinance (MMLUO). Both the application data and the actually issued permits offer important lessons for the proposed Ordinance. Although the County’s expressed intent was to bring existing operations into environmental and legal compliance, relatively few even applied for permits. Of the applications approved to date, the vast majority are reported to be new operations. Both facts may reflect the difficulty of bringing existing operations into legal and technical compliance with the requirements the Ordinance and DEIR rely upon.

There are of course, a range of reasons that existing operators of commercial cannabis cultivation sites don’t choose to pursue permitting. The cost of compliance with environmental remediation requirements is a factor in any setting. But it is impossible to ignore, though difficult to address, the fact that over the course of these generations of pot growing, the County has incubated a set of behaviors, an attitude, a culture, that is fairly contemptuous of rules and regulations. And this slice of our communities has now been conditioned to view environmental protections as just another smokescreen for illegitimate government action. After all, weed’s legal now, right? Incentives are not going to crack this nut. Nor is the same level of effort that the industry has evolved under.

The question for the County as it proposes to issue an unlimited number of additional permits is then, how many additional staff are being added to ensure that existing permits are being adequately supervised? How many more will be needed to address the new
permittees? And how many will be needed to address the remaining number of already existing operations, and new illegal operations sure to come?

As the county has now learned, it’s an entirely different thing to process, let alone monitor and inspect, 1000 permit application than 10 or even 100. If the truly intractable portion of the black market weed industry were only 100 operations, that would be one thing. A lot of work, but a few summers might hope to see them all gone and cleaned up. A thousand, though, is quite another matter. But again, the number in question here today appears to be much closer to 10,000 than 1000 at this point.

The County has no credible plan to address that many operations in any meaningful way. If the three, soon to be five, Code Enforcement staff were each to inspect and / or serve a nuisance violation on one operation a day on average – and that was all that was required to make it permitted and perfectly compliant, or to magically do away with that operation and all its impacts – the team would clear 780 operations in a solid year’s work. More realistically, assuming a code enforcement officer could clear one operation a week on average, the county would need something like 200-300 staff to visit 10,000 operations in a year. That’s setting entirely aside the question of law enforcement escorts.

This is a crisis at least in some measure of the County’s own making. It has allowed the construction, generally without permits, of more than ten thousand existing cultivation sites. At least a significant minority have graded in excess of fifty cubic yards of material without permit. Many have built new roads. Nearly all have at minimum increased the use on road systems never designed to modern standards. And yet somehow these impacts become “speculative” when perpetrated by the unpermitted.

The County appears to be incapable of regulating the commercial cannabis industry, even if it had the will to do so. Because the County lacks the personnel, the resources, the institutional capacity, the enforcement procedures, and the will necessary to regulate the industry, many, if not most, of the benefits promised by the various mitigation measures proferred by the DEIR must be heavily discounted as uncertain and unenforceable.

Because the DEIR does not even attempt to clearly state either a numeric limit on new permits, effective geographic limits (e.g. no new permits in key watersheds), or even an estimate of the number of existing operations that appear eligible for permitting under the proposed Ordinance, the reader is left to speculate as to how the County intends to insure compliance with this set of land use regulation, when it has always declined much lesser challenges in the past.

The County has the information, or the access to the information, that it needs to conduct adequate analyses of the existing industry and its proposed permitted industry. It has the resources necessary to count greenhouses. That the County has failed to do so is not because evidence is lacking, but because it does not wish to face its implications.

The County Assessor’s office seems to have a decent handle on the number, location, function, and value of structures on parcels countywide. Friends of the Eel River was able
to develop a detailed, accurate picture of the industry using Google Earth imagery and a laptop over the course of a few months in 2013. The Regional Board has managed to mail notices to the owners of parcels with grow operations across the region. It is not credible for the county to suggest that it could not have conducted an analysis of the existing industry’s very visible footprint over the last two years.

Increasing legal grow sizes under the County’s MMLUO allowed unpermitted growers to continue to increase the size of their operations – and thus their potential revenue – without calling additional attention to their operations. The County should not have allowed larger operations to become established, and it should take steps at this point to reduce the average size of cultivation operations. If the County wants to have a commercial marijuana industry that is widely beneficial, it should reduce the size of the operations that are being permitted.

To lawfully entrain more and greater impacts in watersheds where existing cumulative impacts mean that take is already occurring – under both CESA and ESA – the county must now (a) effectively characterize the mechanisms of harm in those watersheds; (b) analyze the relative contribution of key sources, including especially roads, stream crossings, and water diversions; (c) develop and implement mitigation and enforcement programs that effectively and reliably reduce impacts (d) to the extent of at least enough carrying capacity in that area to account for the new impacts and a margin of safety to prevent future take.

We finally have the chance to bring this industry into the light, yet the county insists on continuing to turn a blind eye to its very real impacts. Refusing to look doesn’t make the problem go away. It does, however, make it impossible to address the problem effectively.

Comments on proposed Ordinance

55.4.2 PURPOSE AND INTENT

The purpose of this Section is to establish land use regulations concerning the commercial cultivation processing, manufacturing, distribution, testing, and sale of cannabis for medicinal or adult use within the County of Humboldt in order to limit and control such activity.

These regulations are intended to ensure the public health, safety and welfare of residents of the County of Humboldt, visitors to the County, persons engaged in regulated commercial cannabis activities including their employees, neighboring property owners, and end users of medicinal or adult use cannabis; to protect the environment from harm resulting from cannabis activities, including but not limited to streams, fish, and wildlife, residential neighborhoods, schools, community institutions and Tribal Cultural Resources; to ensure the security of state-regulated medicinal or adult use cannabis; and to safeguard against the diversion of state-regulated medicinal or adult use cannabis for purposes not authorized by law. To this end, these regulations identify where in the County the various types of commercial cannabis activities can occur, and specify what type of permit is required, the application process and the approval criteria that will apply.

Will the proposed Ordinance accomplish these noble purposes? Only to a very limited extent, unfortunately.
55.4.5.3 Penalties and Enforcement

The Ordinance appropriately asserts the nuisance power. It falls short of proposing a programmatic application of the power that might be used to address the many thousands of operations which apparently will be subject to County abatement. The Ordinance does not specify that persons associated with operations subject to enforcement or abatement, as well as the parcels where those operations took place, are ineligible for future permitting, even temporarily. Such a measure would provide additional disincentives that should make enforcement efforts more effective.

Whenever permit applicants seeking permits for new commercial activities initiate operations ahead of permit issuance or Pre-Existing Cultivation Site operators seeking permits expand cultivation operations ahead of permit issuance the Director shall have discretion to:

55.4.5.3.1 Issue stop work orders and financial penalties to applicants found to have engaged in the above activities, and require restoration of the site to prior condition; or,

55.4.5.3.2 Disqualify the pending applications, with no refund of fees submitted, and initiate enforcement proceedings.

55.4.5.3.3 Resolve the violations and proceed with processing of the application.

At a minimum this section should state clear standards under which each option is appropriate. Better, the County should lay out narrative standards to ensure that the Planning Department does not allow a high-impact site to be improperly developed simply because the applicants were sympathetic or hired a very persistent consultant. In general, the assumption should be that 1 and 2 are going to apply unless some very good reason is presented.

However, the section leaves enforcement decisions to the discretion of the Planning Department via the Planning Director. The Planning Director reports to the Board of Supervisors. This raises an issue that pervades questions of enforcement and compliance at the heart of the proposed Ordinance and the DEIR. Members of the Humboldt County Board of Supervisors are deeply involved with the commercial cannabis industry in its various manifestations, including accepting campaign contributions from commercial growers.

Against the background of the Planning Department's pattern of failure to enforce most land use regulations in most rural parts of the county over the last forty years, the framework proposed in this section does not appear to provide adequate security against improper influence or bad judgment. Similarly, to ensure the effectiveness of the rules in every other part of the proposed Ordinance, it is essential that penalties actually be imposed where appropriate and necessary to accomplish the purposes of the Ordinance. To avoid improper influence, it would be better for the County to assign authority over penalties and enforcement to an independent Code Enforcement team.

Outdoor grows and mixed-light operations are not the same in terms of their impacts. Failing to distinguish between the lower impact outdoor grows and much higher
impact mixed light operations means that all outdoor operations must now be presumed to be mixed lights. This is a mistake. Mixed light operations can’t be justified when sunlight is ample to provide far more marijuana than the market demands. If permitted, mixed light operations should be limited to locations where their compliance with light restrictions can readily be monitored and they can be on grid power.

**Annual Inspections are not adequate to detect and prevent violations and significant environmental impacts.** Annual, announced inspections are not adequate given the issues and history presented by this industry. Enforcement is not only a question of what penalties will be imposed under what circumstances, but more critically of discovering and documenting the violations in question.

Given the glaring mismatch between the scale and scope of the industry’s impacts and the very limited resources the County directs to land use regulation, it is unlikely the County will discover most actual problems on its own. It’s doubtful County staff will be able to even perform a cursory inspection on permitted operations every year with current levels of staffing. That the County is announcing its intent to hobble its limited enforcement staff is additional evidence that it cannot and will not ensure proposed mitigations are implemented.

**55.4.5.10 Restrictions on water use under special circumstances**

This is feel-good regulation that is unlikely to ever be implemented, and will do little or nothing to protect our watersheds.

With this section, the County has retreated from the straightforward statement that the County has the right to reduce the extent of any commercial cannabis activity at any time in the future for any valid regulatory reason, to a position that appears to require a finding of sustained drought or low flows in the watershed where the activity is located, i.e. “in the event that environmental conditions, such as a sustained drought or low flows in the watershed where the Commercial Cannabis Activity is located, will not support water withdrawals without substantially adversely affecting existing fish and wildlife resources.”

This requirement should be superfluous. The County should not permit or allow any marijuana operations which do not forbear entirely from dry-season diversion.

This requirement is also likely to prove impossible to enforce in practice. By the time we know that we are facing a drought in any given year, outdoor cultivation operations are already well-established. The idea that the county will go around telling everyone to cut down half their plants is simply ludicrous. So, too, is the suggestion that growers will accede to prospective reductions issued on the basis of a previous year’s drought. Surely next year there will be plenty of rain!

The county should instead assert its clear authority to reduce the level of permits for any reason consistent with the purposes of this Ordinance, at any time. Permits are not entitlements.
55.4.6 COMMERCIAL CANNABIS CULTIVATION, PROPAGATION, AND PROCESSING –
OPEN AIR ACTIVITIES

Outdoor and Mixed-light Cultivation Activities, On-Site Processing, and Nurseries shall be principally permitted with a Zoning Clearance Certificate when meeting the following Eligibility and Siting Criteria and all applicable Performance Standards, except when otherwise specified.

55.4.6.1 Eligibility Criteria - Resource Production and Residential Areas

55.4.6.1.1 Zoning AE, AG, FR, and U when accompanied by a Resource Production General Plan land use designation (not including Timberland) or Residential land use designation requiring parcel sizes of more than 5 acres.

While the County's move to bar establishment of additional large-scale operations on Timber Production Zone lands makes sense, it would make a lot more sense if Forest Recreation lands were also included in this prohibition. FR zoned areas are the epicenters of a disproportionate degree of continuing environmental harms driven by cannabis cultivation. By prohibiting additional grows in FR lands, the County would take an important step toward beginning to protect watersheds that have already been overwhelmed by unpermitted cultivation and associated unplanned and unregulated development.

55.4.6.1.2 Minimum Parcel Size and allowed Cultivation Area

One of the crucial mistakes the County has made to date is allowing grow operations to get too large. By allowing large quasi-legal medical grows, and now by permitting excessively large commercial operations, the County has given cover to a black-market industry that has also grown very large at the individual scale. The County should compare the average size of its permitted and unpermitted grows with those in Mendocino County, where much lower sizes have been allowed, for an illustration of the effect of this policy across the landscape.

The proposed regulations continue this pattern of allowing individual operations to be so large that there are incentives to continue developing new sites, to the detriment of existing smaller-scale growers. If the County were choosing to focus the its pot production on a few large sites to minimize the associated environmental impacts, this policy might at least make some sense from a watershed and fisheries perspective. But this is a policy of allowing more large grows to be permitted across the landscape, perpetuating exactly the practices that have created the watershed crises we now face.

The county should reduce the sizes of the operations it will allow as follows: (changes marked in **bold plain text.**)

a) Five (5) acre minimum parcel size, on parcels between 5 and 10 acres in size: 1) up to 3,000 sq. ft. of Cultivation Area with **Special Permit;** 2) up to 5,000 sq. ft of Cultivation Area with **Special Permit.**

b) On parcels 10 acres or larger in size: 1) up to 5,000 sq. ft. of Cultivation Area with **Special Permit;** 2) up to 10,000 sq. ft of Cultivation Area with **Special Permit.**
c) On parcels 320 acres or larger in size, up to 10,000 sq. ft of Cultivation Area per 100 acres with a Use Permit

It is not clear what standards the County intends to employ to decide whether to grant Special Permits. No Special Permits should be granted in watersheds that have not fully demonstrated the capacity to absorb additional cumulative impacts without harm.

Two (2) acre minimum parcel size a) Open Air Cultivation Activities of up to 10,000 sq. ft. of Cultivation Area may be permitted with a Zoning Clearance Certificate b) Additional Open Air Cultivation Activities in excess of 10,000 sq. ft. may be allowed with a Use Permit.

Cultivation sites proposed on developed commercial or industrial properties must comply with the Performance Standards for Adaptive Reuse.

We must further note that, given the deficiencies of the DEIR’s analysis and mitigation of cumulative impacts, it is entirely inappropriate to issue Zoning Clearance Certificates for operations situated in watersheds with listed or special status fish species which are already suffering significant cumulative effects from unregulated pot-driven land development. Until the county has prepared an adequate CEQA analysis, including mitigations sufficient to protect the public trust values of our watersheds, additional permits should only be issued with comprehensive site-specific CEQA analysis of that proposed operation, including all appurtenant roads and existing operations which may contribute to cumulative effects within that watershed.

55.4.6.5 Accommodations for Pre-Existing Cultivation Sites

Pre-Existing Cultivation Sites on FR zoned parcels should be restricted to their existing footprint, as in TPZ and U zones. In general, such operations should be encouraged to relocate to lower-impact sites appropriate for agricultural uses. The DEIR provides no meaningful analysis of the potential impacts attendant on the maximum buildout scenario that this section would allow for existing operations. We are particularly concerned that given the substantial cumulative effects of existing sites, this provision may provide incentives to continue commercial cannabis cultivation in watersheds or off roads systems which cannot continue to support such intensity of use without causing significant watershed effects.

55.4.6.5.6 Energy Source for Ancillary Propagation Facility or Mixed-Light Cultivation

The county should not allow any use of generators in association with commercial cannabis production. The air and noise pollution are not necessary to produce high-quality weed. There are abundant suitable sites for operations that require lots of power. The DEIR fails to analyze the potential impacts of ubiquitous generator noise and artificial lights on wildlife, including listed species of birds and bats. It should be noted that the relatively remote sites least likely to produce the complaints on which the County evidently means to rely to drive enforcement are those relatively more likely to have wildlife impacts. The DEIR fails to illuminate these questions.
Forbearance Period & Storage Requirements

55.4.12.7.2 The County may shall require that operators of Cannabis Cultivation Site(s) forbear from diversions of Surface Water for Irrigation during periods of low or reduced stream flows. Unless otherwise specified, the default forbearance period shall occur between May 15th thru October 31st of each year.

The use of the word “may” in this section is dangerous and impermissible. County must absolutely and clearly require all operators to forbear from surface diversions during dry seasons. Where the County allows itself the ability to step back from requiring full protection for surface waters, we must assume – and the DEIR must assume – that the County will not effectively require forbearance in dry seasons. If the county’s standards and enforcement are uncertain, we, and the DEIR, must assume that compliance will similarly be less than comprehensive.

In determining the appropriate Forbearance Period, the County shall review the past record of water use at the Parcel(s) or Premises, the volume and availability of water resources and other water use and users in the local watershed, as well as relevant gaging information. Under certain circumstances, limited diversion during the forbearance period(s) may be authorized.

It is more than a little ironic that the County is here imposing more stringent analytic requirements on itself to limit stream diversions known to be a critical cause of watershed and fisheries harms than it is in its own analysis of the current impacts of existing operations on fisheries and watersheds. Again, it would be more appropriate to simply and clearly require that all surface water users forbear from any and all diversion during the dry season as a condition of any permit for commercial cannabis cultivation operations.

55.4.6.5.7 Provisional Permitting

Given the scale and scope of the industry and its impacts and the vast oversupply of existing operations and their product, this section is very difficult to justify. It appears to contemplate allowing existing operations to continue to cause potentially serious, lasting harms to watersheds and wildlife while effectively being given a permit that would shield the operation from the code enforcement and law enforcement.

No provisional permitting should be allowed. Focus on permitting operations that actually have their act together. Shut the rest down.

Violations and areas of non-compliance subject to a compliance agreement shall be related to land conversion, on-site grading, electricity usage, water usage, agricultural discharges, and similar matters and limited to those improvements, facilities, buildings, and sites that are used for the Commercial Cannabis Activity and shall not extend to personal residences or other structures that are not used for Commercial Cannabis Activities.
This is frankly ridiculous. Compliance with the basic provisions of county code, across the entire property and all structures, should be a fundamental requirement of any and every commercial cannabis permit. If this provision is left in place, the County is basically saying that it is only regulating the specific structures associated with cannabis production. That means a lot of potential harms aren’t going to be prevented. That means this whole regulatory effort can be undermined by “off book” impacts. The fish don’t care whether the bad, unpermitted grading was for a house or a greenhouse.

55.4.8 INDOOR CULTIVATION AND MANUFACTURING

We still think indoor cultivation can’t be justified. Even renewable grid power imposes substantial carbon costs.

55.4.12.1.8 Performance Standard—Road Systems

Category 4 Roads are not the same as roads that have minimal impact on watersheds. The standard appears chosen out of concern for emergency access and egress, which are far from unreasonable concerns. However, roads and especially road crossings are very significant sources of sediment inputs into surface waters.

There are private roads and road systems which have, are, and will contribute levels of sediment to surface waters that cannot be sustained without lasting harm to public trust values. This section must clearly articulate standards for roads that makes it clear when permits will not be issued unless roads and crossings are rebuilt to avoid those impacts. Best management practices are helpful guides but often do not provide the clarity needed to insure that the work that can be done and should be done actually does get done.

It is not enough to require that new roads be well-designed, though that is essential. Many roads now in existence present very serious problems for water quality. The County must take affirmative action to ensure they are remediated. The use of the phrase “to the greatest extent feasible” provides an escape hatch to virtually any compliance the Planning Department can be persuaded to overlook. Specific standards must be articulated and enforced.

No permits should be granted for operations whose impacts cannot be appropriately and effectively mitigated. Especially in key fisheries watersheds, roads that cause continuing watershed impacts should preclude the issuance of any commercial cannabis cultivation permit.

The Ordinance should specify the qualifications appropriate to evaluate the impacts of a road system. With all due respect to licensed engineers, we would suggest that evaluations of aquatic impacts would be more appropriately conducted by independent consulting biologists or state or federal agency biologists than by consulting engineers working for project proponents.
Where an evaluation has determined, to the satisfaction of the County, that all private road segments comply with relevant best management practices, no further work is needed.

If someone can show me even a single road in Humboldt County where “no further work is needed,” I’d be astonished. There has to be a standard for maintenance and inspections. Roads that were okay become not at all okay over the course of a bad winter, especially under hard use. This strongly suggests that the County views this aspect of permitting as a one-time matter. If we are to effectively reduce the watershed impacts of roads associated with commercial cannabis cultivation, it has to be a constant priority for decades to come.

Comments on DEIR

The Draft Environmental Impact Report (DEIR) fails to fully analyze, disclose, and specify mitigations necessary to address a range of serious and significant environmental impacts directly associated with the commercial cannabis industry. It must be rewritten to incorporate analyses and information not considered in this draft and recirculated.

It is well within the County’s power to dramatically reduce the significant environmental impacts of the commercial cannabis industry in Humboldt County today, and thus to create a licensed, regulated pot industry that does not damage public trust values over time. The defects in the DEIR reflect no fundamental disability on the County’s part, but rather a profound reluctance to act, to do what it knows perfectly well would have to be done to accomplish the reduction in impacts it wants us to pretend can be achieved with voluntary compliance and unenforced mitigations.

The DEIR’s claims that the significant cumulative watershed, fisheries, and wildlife impacts of Humboldt County’s commercial cannabis industry, or even the relatively small permitted subset of that industry, will be adequately mitigated are not supported by the evidence at hand. The effectiveness of the proposed mitigations depends entirely on the extent to which they will be implemented. Without adequate enforcement resources, the County cannot begin to insure that will be the case.

Areas of Controversy

#1 Concerns regarding the County’s ability to conduct enforcement activities against illegal cannabis operations.

#2 Biological and watershed impacts from land disturbance associated with existing and new cannabis operations.

The DEIR is correct to flag these, and a number of other key questions around environmental impacts. Unfortunately, the document does not provide the evidence and analysis necessary to conclude that these questions will be effectively addressed by the proposed Ordinance.
Local and State Permitting Requirements

We find it hard to credit the County’s suggestion that it is now going to require compliance with the Grading Ordinance that has been routinely ignored for the last twenty years.

2.3 PROJECT LOCATION AND EXISTING CONDITIONS

*It has been estimated that there may be as many as 15,000 cannabis operations in the County.*

That’s not an unreasonable estimate for the number of outdoor operations. We have no useful estimate of the number of indoor operations in the county, but we’re pretty sure it’s a lot. What we want to know is why the County does not provide any inventory of currently existing operations. There are any number of sources ready to hand, the most obvious being the County Assessor’s office, the Regional Board, the Department of Fish and Wildlife, and Google Earth.

*Based on review of the applications, cannabis cultivation operations in the County typically have the following characteristics: ...

- *Distance from County – maintained roads: typically located one mile or greater from a County-maintained road.*

This is a key point with respect to existing operations. Many of them have very large watershed impacts not because they are huge sites but because of the roads used to reach the sites. The County’s unwillingness to bar commercial cultivation from such remote, high-impact sites, or to adopt strict standards – not just best management practices – to ensure that roads don’t generate real watershed harms is one of the fatal flaws in the County’s approach to these problems.

The DEIR notes in its discussion of Construction water quality impacts that

*Poorly constructed unpaved roads are prone to accelerated wear and erosion that can lead to catastrophic failure. Road failure, especially at culverts or other types of watercourse crossings, can degrade water quality and destroy riparian habitats.*

The mitigations offered by the Ordinance and the discussions of road impacts scattered through the DEIR never quite manage to address the fact that the road systems serving large proportions of the existing cannabis industry create significant cumulative effects on public trust resources, including wildlife habitat and especially surface waters and fisheries habitat. For example, the wetland protection mitigations don’t protect against fisheries impacts from road crossings and inadequate road design and maintenance.

On page 2-13, the County summarizes the permit applications received under its existing permitting program. It has been widely reported that California’s domestic legal market for marijuana is going to require some 1100 acres of weed. As we noted in our previous comments, even if that estimate is off by 100%, Humboldt County already has far more than its share of productive capacity in its permitting process. The DEIR notes a total of 1250 acres were covered with some 2000 applications submitted under the MMLUO. How
many acres of cultivation is Humboldt County going to permit? Apparently the answer is “as much as possible.”

OBJECTIVES OF THE PROPOSED ORDINANCE

... support the local cannabis industry through maximizing participation of existing non-permitted cannabis farmers in the County's permitting program;

There’s a logical disconnect between the Ordinance’s ostensible aim, on the one hand, to permit operations that will sell to – and only to – legal California distributors and manufacturers, and the County’s evident determination to issue permits to operations which already produce far more marijuana than the state system will ever demand.

“Maximizing participation of existing non-permitted cannabis farmers in the County’s permitting program” is clearly an overriding priority for the County and its political leaders. This policy goal appears to be at least potentially in conflict with the County’s stated purpose, “to protect the environment from harm resulting from cannabis activities, including but not limited to streams, fish, and wildlife.”

Presumably, “maximizing participation of existing non-permitted cannabis farmers in the County’s permitting program” is at least part of the reason the County is not willing even to consider in its DEIR analysis limits on the number, size, and location operations necessary to define an industry which can be sufficiently mitigated “to protect the environment.”

The DEIR truly founders on its inability to square the County’s desire to maximize the number of existing operations with the resulting requirement under CEQA to reflect the potential impacts under that system.

Pre-existing cultivation sites are defined as parcels where cultivation activities occurred at any time between January 1, 2006 and December 31, 2015.

Cultivation sites are not the same thing as the parcels where they are located. Both specific sites and particular parcels must be considered for their impacts and suitability.

The decade in question is a window that’s open to a lot of impacts. A lot of half-considered development in unsuitable areas happened across Humboldt County between 2006 and 2015. Sites that were abandoned before 2015 should not necessarily be allowed to be re-established. We would suggest that these provisions apply only to existing homesteads with permanent occupancy and clear evidence of cultivation on the site proposed for the operation as of 2015. That would limit “pre-existing sites” to a smaller set of more sustainable locations. Similarly, generators should not be permitted on pre-existing sites.

We note here that the County is essentially legalizing not only the cultivation operations, but all the development that has happened on these parcels. It is not appropriate to disregard the impacts associated with these operations, which have in many cases included significant sediment impacts which will continue to cause watershed harms for years and decades to come. The DEIR must consider not just the potential impacts of potentially
permitted sites, but the broader context of continuing impacts from the commercial cannabis cultivation industry the County has allowed to flourish across its landscape, particularly over the last two decades when it declined to attempt to regulate medical marijuana production.

**Generators should be prohibited for commercial cannabis production.**

Generator noise limits set to human audibility standards will not prevent impacts on wildlife. It would really make a lot more sense to ban generator use than to pretend that the County is ever really going to enforce the complex and subjective standards suggested by the DEIR. Please note that Northern Spotted Owls and other species highly sensitive to noise do not necessary respect parcel lines. They have a habit of nesting and roosting where the habitat is. So a standard that sets impacts based on fencelines may fail entirely to protect wildlife. The DEIR fails to reflect such information.

**LIGHTING PERFORMANCE STANDARDS: NEW AND EXISTING SITES**

- *Structures used for mixed-light cultivation and nurseries would be shielded so that no light escapes between sunset and sunrise.*
- *No mixed-light cultivation may occur within 200 feet of a riparian zone.*
- *All security lighting would be shielded and angled in such a way as to prevent light from spilling outside of the boundaries of the site or directly focusing on any surrounding uses.*

Again, these projected mitigations depend on enforcement that simply is not going to happen. Note, for example, that the proposed “annual inspection” for each site could only happen during business hours. Which means that inspectors won't be inspecting any light-prevention systems, nor the shielding and angling of outdoor lighting.

**SITE RECONFIGURATION CRITERIA: EXISTING SITES**

Who is a “qualified professional” in this context? What would be done if the biological resource protection plan concludes that unpermitted development or disturbance has occurred within a protected area or community? More importantly, will this plan assess the potential impacts generated from the site that are not necessarily within protected areas?

This section suffers from the focus on specific sites, to exclusion of their setting, that is a consistent problem throughout this DEIR. It will be difficult enough to conduct the kind of review and remediation suggested in the draft, but without considering the larger landscape context of the watershed(s) within which the operation and its roads exist, the reader cannot begin to assess whether a reconfigured site will continue to impose significant impacts on public trust values.

The section does not make clear when reconfiguration will be required. What are “certain eligibility requirements?” The section suggests that reconfiguration “may be permitted.” Does this mean it is up to the Planning Department? What if it is not permitted? Will the County allow the site to continue in use?
RETIREMENT, REMEDIATION, AND RELOCATION OF PRE-EXISTING CULTIVATION SITES

The County has placed a lot of emphasis on the environmental benefits that will be achieved by encouraging existing operations to move into lower-impact sites. That a policy is politically palatable, or even popular, doesn’t make it effective.

The DEIR provides very little evidence or analysis of any cognizable reduction in impacts that will be achieved by these provisions. This is not to say that there will be none. But we have no way to know if they will be enormously effective or meaningless for the fish that need clean water in the creeks without more analysis and information than is provided in the DEIR.

The DEIR and Ordinance do not provide adequate guidance or enforceable measures to ensure that abandoned or remediated cultivation sites will be restored to ecological function. The DEIR states only that such sites will be restored to “natural habitat conditions,” without defining what that means or what standards and processes will be used to ensure such restoration is achieved.

These should apply equally to cultivation sites relocated under the County’s RRR program, those shut down by official action, as well as those simply abandoned by their operators. Nor does the DEIR provide an adequate analysis of potential cumulative effects at the sites to which increased production will be directed under the relocation program. Relocated operations should not be permitted on FR zoned lands, given the density of operations already existing on many such lands and their overlap with critical fisheries habitat.

2.4.5 Reasonably Foreseeable Compliance Responses

This analysis is not informative. The Bustin study, as we have pointed out, is the most misleading of all the studies done to date of the extent of Humboldt County’s outdoor commercial cannabis cultivation industry. By selecting watersheds at random in a landscape that is highly structured by parcel size and zoning, the authors seriously underestimate the extent and severity of the Green Rush in the County.

The DEIR describes law enforcement and resource agency estimates as "anecdotal." But the County is deliberately refusing to take the hard look that CEQA requires at the information available to it about the extent and impact of the cannabis-driven development that the County has allowed to happen over the last two decades.

Owners and operators of pre-existing sites that continue to be used for cultivation activities, and who did not seek permits under the existing regulations and who do not participate following adoption of the proposed Ordinance are considered illegal, and subject to code enforcement. Enforcement activities would be taken by the County in coordination with other agencies that could result in bringing some cultivation operations into compliance with County and state standards and the closure and remediation of other operations. However, it is acknowledged that illegal cannabis operations would continue to occur in the County after adoption and implementation of the Ordinance.
This provides zero useful information about how many operations the County intends to shut down, or how that’s consistent with its objective to “maximize” the number of existing operations that get new permits. The DEIR fails to present any analysis of how the existing pattern of development is causing severe watershed impacts, information necessary to evaluate how changes will affect those impacts in the future. “Some” operations will be brought into compliance. “Others” will be closed and remediated. But “illegal cannabis operations would continue to occur.” How many? Where? What efforts would be necessary to significantly change those numbers?

For purposes of evaluating the potential environmental impacts of new cannabis operations from implementation of the proposed Ordinance, this EIR assumes that an additional 941 applications over an area of 283.35 acres of new commercial cannabis operations could be approved and established over the next three years.

And in the years after that? The logic here appears to be that the County has gotten 941 applications in the last process, so it will get a similar number in this one. Why is that a reasonable basis for the consideration of potential environmental impacts this document is meant to reflect?

The DEIR must consider the potential impacts associated not with the level of permit applications the County wants to get, or suspects it might get, but with those it is allowing with the proposed regulations. At a minimum, it must do the math on a maximal scenario in which every eligible parcel and site is built out to the extent allowed under the Ordinance. How much weed would Humboldt be producing under such a scenario? What impacts would likely be entailed?

As well, it is remarkable that the County should on the one hand refuse to impose any reasonable limit on future permit numbers, but on the other hand insists on using a low number of “reasonably foreseeable” permits as the basis for its impacts analysis. This is wildly inconsistent, entirely illogical, and a natural consequence of the County’s refusal to decide between its competing desires to maximize the potential economic returns from legal and illegal cultivation and to minimize its responsibility for the accompanying impacts.

The bottom line, though, is that the DEIR presents no detailed, substantive analysis of readily available information, either of existing or projected commercial cannabis operations, or of their potentially significant impacts on public trust resources in watersheds, water quality, fisheries, wildlife, and habitat. This absence of analysis makes it impossible to evaluate the cumulative impacts of those effects taken together.

Cannabis is identified as a Schedule 1 controlled substance under the federal Controlled Substance Act. Operations related to the growing, processing, and sale of cannabis products are in violation of federal law. Federal agencies are prohibited from issuing permits or approvals for any operation that is in violation of federal law. Thus, compliance with federal permitting requirements that would usually address
environmental impacts (e.g., filling of waters of the U.S. and incidental take authorization under the federal Endangered Species Act) cannot be utilized.

The actions that are causing harms to listed species and their habitat, including wetlands and waters of the US, are not people stuffing salmon with pot, or whacking owls with cannabis plants. They are land use actions – grading, road building, road maintenance, and so forth – which are routinely the subject of consultation with federal agencies.

Nor does this argument address the parallel responsibilities of the Department of Fish and Wildlife under the California Endangered Species Act to consult on projects which may cause take of species listed under California law.

The County appears to be stating its intention to proceed in violation of federal environmental law. We would advise against this course of action. If it cannot obtain incidental take and wetland modification coverage from relevant federal agencies, the County’s only option to avoid serial and significant violations of the Endangered Species Act and Clean Water Act is to prevent take of listed species and modification of wetlands altogether. Significantly, the Ordinance does not even attempt to prevent all take of listed species. Thus, significant unmitigated impacts will occur which the DEIR has not disclosed or analyzed. The document must be recirculated.

For the purposes of this EIR, the description of the existing or baseline conditions of cannabis cultivation in the County has been informed by the County’s recent registration and time-limited permit application process that closed December 31, 2016, which resulted in 2,936 applications. Approximately 68 percent of these applicants claim to have historically cultivated cannabis and are seeking a permit for continued cannabis operations. In some cases, applicants are choosing to retire and remEDIATE existing cultivation sites, and are requesting to relocate to new properties that qualify to receive them, with the benefit of allowing applicants to expand the total cultivation area. A smaller percentage of the total applications received are linked to projects proposing to establish new cultivation sites. The smallest percentage of applications received involves proposals for indoor cultivation, or the development of manufacturing operations or wholesale distribution facilities. Additionally, the baseline also includes existing commercial cannabis operations for which no permit applications have been submitted. The EIR assumes that these applications will seek to participate in the state’s legal and regulated marketplace.

The County could simply have provided a table with far more information than is actually presented here. How many of the applications approved to date are existing operations? Where are they located, by watershed and subwatershed?

Cultivation operations that do not comply with the proposed Ordinance would be considered illegal upon its adoption. Enforcement activities would be taken by the County in coordination with other agencies that could result in bringing some cultivation operations into compliance with County and state standards and the closure and remediation of others. However, it is acknowledged that illegal cannabis
operations would continue to occur in the County after adoption and implementation of the Ordinance. While this Draft EIR acknowledges the adverse environmental effects of continued illegal cannabis operations as part of the environmental baseline condition, the Draft EIR does not propose mitigation measures to address illegal operations as they are not part of the project.

Same hillsides, same roads, same dirt, same water, same fish, same weed. Same set of impacts. This is the County trying to absolve itself of its failure to regulate land use over the last twenty years. “Some” and “other” are not sufficient for a cumulative effects analysis under CEQA, though.

The impact analysis would also consider the environmental protections provided by existing regulations, unrelated to the proposed Ordinance, that would apply to cannabis facilities (e.g., County Code Title III – Land Use & Development, Division 3 – Building Regulations, Chapter 5 – Flood Damage Protection, and Chapter 6 – Geologic Hazards).

How does the County plan to enforce those existing regulations, which it almost never actually enforces, on hundreds or thousands or many thousands of operations? The DEIR appears to provide no information regarding the extent to which its regulations, including those regarding the diversion of surface waters, grading, disturbance of streams and riparian areas, and so forth, have actually been followed, or at least enforced, across the landscape of existing operations.

It’s not like this is information that would be difficult for the County to examine. How many permits has it issued for grading and road construction and so forth over the last two decades? What proportion of the existing operations who have applied for permits are able to comply with existing Ordinances and codes? If existing operations fail to comply with key environmental requirements at a high rate, that would be important information for the DEIR to analyze and disclose.

To recap: the County wants to claim the putative environmental benefits of regulations it does not enforce, but seeks to obscure the actual environmental costs of not enforcing its regulations for any commercial cannabis operations that don’t seek a permit. Which is nearly all of them.

The Regional Board’s waiver program, including its suite of self-enforced Best Management Practices, lacks a substantial enforcement component. While the provisions of the Waiver might in theory be enforceable with adequate inspection and enforcement, the Regional Board lacks the staff, resources, and will to conduct on-site reviews of more than a tiny fraction of the operations it is permitting. Reports of widely variable performance by independent, unsupervised third party compliance consultants only amplify these concerns. With each added layer of uncertain enforcement, the connection between regulatory requirements and environmental benefits grows more and more attenuated.
The DEIR does not reflect this reality. Instead, it appears to assume that the Regional Board’s Waiver will result in perfect compliance, flawless implementation, and definite achievement of the hoped-for reductions in impacts. Given the nature of the industry we’re talking about here, that’s the one scenario we can absolutely rule out.

The County may not rely on the Regional Board’s indiscriminate permitting as evidence that operators are actually following the Waiver’s requirements or proceeding on schedule with required remediation actions. To the extent the mitigations required by the Regional Board are necessary to prevent or reduce potentially significant impacts which may contribute to cumulative environmental effects that are the subject of this DEIR, it is not appropriate for the County to analyze the potential impact of Regional Board-permitted operations as if those impacts will be fully mitigated, unless the County demonstrates that it will itself insure that it will provide the inspection and enforcement resources necessary to ensure that is the case.

The DEIR states (p 3.4-34) that the Foothill Yellow-Legged Frog is a species of special concern under the California Endangered Species Act. The species is actually a candidate species for listing, which means it’s entitled to the protections due to listed species, including the prohibition on take. The DEIR fails to reflect this fact, and fails to provide any meaningful analysis of potential, current, or cumulative effects on the species or its habitat, or of the trends that may affect its prospects for survival and recovery. Naturally, then, the DEIR and Ordinance also fail to provide enforceable and certain measures to mitigate potential impacts, including take of the species. This appears to be an admission that the County will allow operations which, individually or in aggregate, will violate state law by causing take of FYLF. In addition to consulting with DFW to obtain programmatic incidental take coverage, the County must recirculate the DEIR with adequate treatment of these issues.

As mitigation for potential impacts on amphibians, including foothill yellow-legged frogs, the DEIR and Ordinance propose to require relocation of proposed cultivation sites on an immediate basis. The DEIR does not analyze how such relocation would affect, or be consistent with, the various permitting and compliance requirements which the Ordinance requires and depends upon. Both here and in the Ordinance’s provisions regarding impacts on special status plant species, the Ordinance appears to contemplate allowing impacts which are not reflected in any detailed analysis in the DEIR.

The DEIR correctly notes that “critical habitat” is limited to federally-designated areas on federal lands. However, such areas are hardly the only areas necessary to the survival and recovery of species listed under both the California and federal Endangered Species Acts (CESA and ESA, respectively). The South Fork Eel and its various tributaries contain a lot of habitat that is absolutely essential to the survival and recovery of coho salmon and steelhead.

Such areas include, for example, tributaries of the South Fork Eel River which have little or no federal land ownership – Redwood Creek, Sprowel Creek – but are home to native runs of coho salmon and steelhead. Cumulative development impacts have wrecked habitat in
nearby Salmon Creek that had been the focus of longstanding restoration efforts. If the County fails to restrain current impacts in Redwood Creek, it is allowing take of coho and steelhead to continue. This is contrary to both the California and federal Endangered Species Acts.

If the County allows continued cannabis-driven development in the Barnum Timber lands in Sprowel Creek – and there is nothing in this Ordinance or DEIR which suggests it will not – then it may well be foreclosing the possibility of recovering coho in the South Fork Eel at all. The failure of Eel River coho has grave implications for the regional population, the Southern Oregon – Northern California Coho ESU, of which the Eel are an indispensable part. The DEIR does not reflect any consideration of these questions at all.

**EXISTING STRESSORS ON BIOLOGICAL RESOURCES IN HUMBOLDT COUNTY**

*Historic and modern development in Humboldt County that has resulted in adverse effects to natural resources in the region includes timber harvest (beginning in the mid-19th century), watershed alteration because of dam construction, mining, agricultural activities, urban development, and introduction of invasive plant and wildlife species. More recently, illegal cannabis cultivation operations within public and private lands have led to illegal water diversions, unpermitted removal of sensitive vegetation, and direct mortality to protected species from exposure to rodenticides and insecticides (Gabriel et al. 2012 and 2013). The magnitude of impacts from illegal cannabis operations to wildlife and plant species are difficult to fully quantify due to the clandestine nature of the sites.*

The “clandestine nature of the sites.” Again, the DEIR might start by asking the County Assessor how they count buildings and assess property taxes every year. FOER and several other independent groups and researchers, including DFW, have used Google Earth’s public imagery since 2013 to estimate the number, size, location, potential impacts, and rate of change for now-ubiquitous greenhouse grow operations across the County. The Regional Board managed to send letters to the owners of parcels with marijuana grow operations on them.

This analysis doesn’t begin to meet the need for a detailed examination of cumulative impacts to inform future land use decisions, including enforcement, across this landscape. CEQA defines cumulative effects at §15355:

"Cumulative impacts" refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (a) The individual effects may be changes resulting from a single project or a number of separate projects. (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

The thresholds of significance offered by the DEIR appear to represent an attempt by the County to define itself out of liability for the cumulative effects of weed-driven
development on watersheds and wildlife across the County. For example, the relevant legal threshold is not, whether there is a “substantial adverse effect” on wetlands, but whether any wetlands are affected by removal, filling, drainage, or similar manipulation. Under CEQA, a “threshold of significance” is “an identifiable quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.” (CEQA Guidelines §15064.7)

Similarly, the County should provide authority to support its claim that it is enough for it to merely avoid allowing activities that might rise to the level of jeopardizing listed species, e.g. which: “substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; or substantially reduce the number or restrict the range of an endangered, rare, or threatened species.”

Even if this quasi-jeopardy standard were appropriate and adequate, which it is not, the DEIR may not assume for the purposes of its analysis that the County will actually act to prevent impacts which rise to such a level. We know this because the County is still allowing precisely such impacts to listed species to continue in China Creek, a tributary to Redwood Creek and one of a number of creeks in that watershed which provide habitat critical to the hope of coho survival and recovery.

In China Creek, the County has evidence of take under CESA, clear evidence of willful and repeated water rights violations, and of refusals to comply with DFW and Regional Board permitting requirements. Yet the County has failed to act to abate at least a dozen unpermitted commercial cannabis operations in the China Creek watershed for years during which diversions continued to contribute to disastrous conditions for native fish. If China Creek is not a proper focus of enforcement action, what is? If China Creek is not a priority for limited enforcement resources, what is? And if China Creek is a priority, when will it be addressed? What does the County’s performance in that watershed suggest about its ability to address what may be literally a thousand times more problems than those presented in China Creek?

In many instances, the proposed mitigations for wildlife habitat fail to preclude continued incremental degradation of wildlife values. The proposed 24 hour and 48 hour site inspections are at best going to be partially effective in preventing harm to target species. Operators are invited to suggest modifications to areas around raptor nests outside breeding season.

This is particularly troublesome for corridor and fragmentation issues. Because the DEIR avoids detailed analysis of existing operations, newly permitted operations, and critical biological resources, it does not provide any meaningful and specific analysis of the impacts of habitat loss and fragmentation. Such habitat and fragmentation impacts are generalized in their cumulative consequences for larger population, but specific in their causes and consequences.
To effectively mitigate fragmentation and habitat degradation impacts requires detailed consideration of the particular landscape and causes of fragmentation and habitat loss. The failure to analyze these impacts with specificity means that the DEIR is left to make broad claims about habitat loss and fragmentation without providing any certainty about the degree to which its proposed mitigations might effectively address those impacts.

There are abundant sites available, even in Humboldt County, where such wildlife conflicts are not likely because of previous impacts. Commercial cannabis cultivation should locate there rather than relocating wildlife.

**Northern Spotted Owl**

It’s kind of amazing that the County would think that the level of analysis presented in the DEIR is adequate to evaluate and avoid impacts on the NSO. But the DEIR does not conduct even a simple comparison of known activity centers and home ranges against the existing inventory of commercial pot operations. Such an analysis is standard protocol for a Timber Harvest Plan. But the DEIR appears to analyze NSO populations as if they are limited to designated critical habitat on federal lands.

Nor does the DEIR provide the mitigation measures that would be necessary to avoid ongoing impacts to the birds and their habitat. The Ordinance would allow noise, light, and habitat impacts, any of which might cause continuing take of the species. Again, we note that it is impossible to evaluate the cumulative effects of either proposed or existing operations if you don’t look at where on the landscape the things that might be subject to those effects are.

**FISHERIES**

**Impact 3.4-2: Disturbance to or loss of special-status fisheries.**

Surface water diversions from new commercial cannabis cultivation that may occur under the proposed Ordinance could adversely affect several special-status fish species. Special-status fish species are protected under ESA, CESA, or other regulations. The alteration of surface water conditions that support special-status fish species would be a potentially significant impact.

The DEIR’s assertion that impacts to surface waters would continue to be a “potentially significant” impact appears, in the absence of such analysis, optimistic at best. The evidence is strong that existing operations, including permitted operations, are causing impacts to fisheries that are significant. The Ordinance and DEIR do not provide sufficient analysis and mitigation measures to ensure they are reduced to less than significant levels.

Similarly, the DEIR’s analysis of surface water withdrawals is frankly conclusory. No information or analysis by watershed is provided. The DEIR points out, as if it means anything, that

*Humboldt County Code Coastal Zoning regulations prohibit withdrawal of water from anadromous fish streams if such activity is likely to result in adverse effects to the fish species.*
It's clear that, notwithstanding this section of County code, such withdrawals have occurred and continue to occur within the Coastal Zone. Has the County ever enforced these regulations in the cannabis context? The DEIR should provide at least some information to assess the methods and practices which the County follows, or intends to follow, in enforcing this rule. Does the County have a clear policy, numeric standards, or any other meaningful metric which can be relied on to indicate the circumstances in which the regulation will be enforced?

**Mitigation 3.4-2: Implement Mitigation Measure 3.8-5: Implement water diversion restrictions and monitoring and reporting requirements.**

**Significance after Mitigation**

> When State Water Board Policy is adopted, Mitigation Measure 3.8-5 will require cannabis-related surface water diversions to meet flow rate standards during a limited period of time through the year, which correlates to the greater level of water availability within watersheds in Humboldt County. Monitoring of flow and inspection and repair of leaks and old equipment will ensure that cannabis cultivation activities are consistent with permitted diversion rates established by legal water rights. Because implementation of this mitigation measure would ensure that Numeric Flow Requirements are met throughout Humboldt County, this impact would be less than significant.

The DEIR provides no substantial evidence or analysis to support the claim that implementation of the proposed water diversion restrictions and monitoring and reporting requirements will reduce the impacts of cannabis-related diversions to less than significant levels. First, as elsewhere, the DEIR insists here on focusing on the relatively tiny subset of permitted operations to ignore the cumulative effects of cannabis-related diversions. Second, as throughout the DEIR, the analysis begins and ends with rules, with no consideration of how they will be enforced.

Is the County seriously suggesting that scheduled annual inspections conducted by its not at all overwhelmed staff of Code Enforcement officers will magically reveal illegal diversions at permitted sites? Because it definitely won’t help the County’s argument to insist, as various elected and appointed officials have suggested, that such concerns are best left to DFW and DWR. The DEIR may not rely on those agencies’ overstretched staff and resources to do what the County declines to do.

The implication of the County’s argument here is that Redwood Creek’s tributaries could continue to be entirely dewatered by pot farmers as they have been in recent years, destroying year-class after year-class of coho and steelhead reproduction, without any violation of the County’s cannabis cultivation Ordinances, or any cumulative impacts that the County’s DEIR must address – because those growers don’t choose to ask the County for a permit.
The County must explain how annual, scheduled inspections are going to reveal illegal diversions. It must explain how it will review and verify water logs that are certain to be falsified in at least some cases. And the County must recirculate this DEIR with an adequate analysis of the cumulative and specific effects of pot-related surface water diversions on listed and special status fisheries, and the specific measures that will be taken to reduce those impacts to less than significant status on a watershed and subwatershed basis.

**Impact 3.4-5: Disturbance to or loss of waters of the United States.**

*Potential land use conversion and development under the proposed Ordinance could adversely affect waters of the United States, such as streams, rivers, lakes, and wetlands. This would be a potentially significant impact.*

Failure to consider cumulative effects undermines the DEIR’s analysis of potential impacts on waters of the US and wetlands. Given the DEIR’s relatively clear admission that wetland impacts must be entirely avoided to avoid liability under §404 of the Clean Water Act, our largest concern is whether wetlands will be accurately identified. Who is a “qualified biologist?” for purposes of site surveys? Wetland delineations are not necessarily the province of amphibian specialists. It’s important that the consulting experts actually have relevant expertise in the issues the County is here relying on them to accurately assess. Such delineations should be subject to review by trust agencies.

**Aquatic Corridors**

*Aquatic wildlife movement corridors within the County include all major rivers and their tributaries. Several anadromous fish species, including steelhead, Coho salmon, and Chinook salmon, have runs within Humboldt County’s rivers and streams from the spring to the fall. Adverse effects to these aquatic wildlife corridors could include degradation to streams and rivers (e.g., inadvertent fill) or improper surface water diversion which could create isolated pools which could decrease survival of young salmonids.*

**Significance after Mitigation**

*Implementation of Mitigation Measure 3.4-6a would reduce impacts to aquatic corridors to a less-than-significant level because it would require approval and permits from CDFW, RWQCB, and USACE and result in no net loss of functions and acreage of wetlands, including aquatic corridors through implementation of USACE mitigation guidelines.*

The DEIR fails to show that, or indeed how, the proposed mitigations would actually prevent the serious and continuing impacts that cannabis-related diversions and development are creating for aquatic corridors in Humboldt County. The permitting requirements cited do not necessarily protect watersheds from severe harms to fisheries habitat, including fish passage, spawning, and rearing habitat.

Punting the County’s responsibility to regulate these impacts to state and federal agencies is neither an adequate policy nor a sufficient analysis under CEQA. As well, by focusing on the regulation of individual sites without even considering the cumulative impacts on
aquatic corridors, the DEIR only compounds the segmentation of impacts analysis that has undermined the effectiveness of the Regional Board’s approach to regulation of cannabis impacts on water quality.

**Terrestrial Corridors**

*Future cannabis activities under the proposed Ordinance would likely not significantly alter the habitat quality and connectivity within the range of these species, as most development involves fencing in the immediate vicinity of the cannabis activity, leaving adjacent areas free from barriers. Additionally, the North Coast RWQCB Order prohibits cannabis cultivation within at least 50 feet of any surface water. Deer migration areas, and thus mountain lion occurrences, are largely associated with waterways and riparian areas within the County. By requiring compliance with the North Coast RWQCB Order through establishment of stream setbacks, development under the proposed Ordinance would have a less-than-significant impact on migratory corridors for mule deer and mountain lion. No further mitigation is required.*

The DEIR provides no analysis whatsoever of cumulative effects of cannabis cultivation on these issues. There is no analysis of populations, corridors, existing human activities and development trends, nor of areas where future development will occur. The suggestion that compliance with the Regional Board waiver will reduce the impacts, including cumulative impacts, on mule deer and mountain lion to less than significant levels is not supported by the evidence and analysis presented by the DEIR.

**Geology**

The same points we’ve made repeatedly above with respect to cumulative effects and the DEIR’s paucity of analysis of the existing industry apply to geologic and soil issues. The DEIR fails entirely to address the question of how road systems as well as individual sites may affect “dormant” landslides ubiquitous in the County’s mountainous regions. Such features may be affected by road use, construction, or maintenance above, below, or within them. They may result in impacts clearly significant under CEQA for single large slides, let alone the dozens or hundreds which may occur when intense rainfall events or seismicity adds to human impacts.

The DEIR’s note with reference to hydrologic issues would appear relevant to the question of landslides:

> Environmental impact analyses under CEQA generally are not required to analyze the impact of existing environmental conditions on a project’s future users or residents. But when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users.
The analysis and data presented in the DEIR do not suffice to assure the reader that the County’s Ordinance will prevent or reduce these potential impacts to a less than significant level.

**Wildfire**

The DEIR’s suggestion that small reductions in wildfire risks achieved by requiring less inappropriate locations for some number of cannabis cultivation operations are an environmental benefit of the proposed Ordinance amounts to an admission that the cumulative impacts of the existing industry in this area are likely to be quite large. The DEIR provides no information or analysis on this front, however.

**Hydrology and Water Quality**

As we have noted at length, the DEIR fails to consider the cumulatively significant effects of the existing cannabis cultivation industry on hydrology, water quality, and beneficial uses of surface waters, particularly including fisheries habitat, at the watershed scale necessary to avoid those impacts.

**EXISTING STRESSORS ON HYDROLOGY AND WATER QUALITY FROM CULTIVATION**

*Predominantly unregulated for years, thousands of cannabis cultivators have developed cultivation sites in remote areas of California near streams. In many cases the routine cannabis cultivation practices result in damage to streams and wildlife. These practices (e.g., clearing trees, grading, and road construction) have been conducted in a manner that causes large amounts of sediment to flow into streams during rains. The cannabis cultivators have also discharged pesticides, fertilizers, fuels, trash, and human waste around the sites, that then discharges into waters of the state. In the North Coast region, the state has invested millions of dollars to restore streams damaged by decades of timber harvesting. Cannabis cultivation is now reversing the progress of these restoration efforts (SWRCB 2017b). In addition to these water quality discharge related impacts, cannabis cultivators also impair water quality by diverting water from streams in the dry season, when flows are low. Diversion of flow during the dry season have caused complete elimination of stream flows. The effects of these diversions have been exacerbated in recent years by periods of drought (SWRCB 2017b). Water quality related constituents of concern associated with cannabis cultivation discharges include nitrogen, pathogens (represented by coliform bacteria), phosphorus, salinity, and turbidity. Water quality can be affected by excessive use of fertilizer, soil amendments, or other sources. The constituents have the potential to discharge to groundwater by infiltration and to other waters of the state by either surface runoff or by groundwater seepage (SWRCB 2017b).*

While the DEIR admits to the existence of water quality impacts, it fails to outline mitigation measures sufficient to reduce those impacts to less than significant levels. The DEIR claims that but for the exemption of smaller cultivation sites from Regional Board’s waiver, its mitigations would be sufficient, and that by requiring such sites to comply with
the waiver’s terms, water quality impacts can be adequately mitigated. However, in the absence of any commitment by the County to effective enforcement and long-term remediation efforts, the DEIR cannot rely on mitigations that are uncertain.

Neither the Ordinance nor the DEIR address the vast majority of the industry's operations or their impacts on water quality. Given that those cumulative effects will apparently continue indefinitely, any additional impacts from even the County’s regulated program which contribute to water quality violations and impairment of beneficial uses must be analyzed as significant.

The point of CEQA analysis is to illuminate critical environmental questions, not to obscure them. The question that faces Humboldt County is whether it will continue to allow an industry to impose serious, lasting harms on its watercourses. The DEIR fails by refusing to address this question squarely. The Ordinance fails by pretending that regulating a small fraction of the industry with various half-hearted and barely-enforced rules will suffice to protect our streams and rivers.

**Groundwater impacts**

Groundwater data must be made public. The process described for mitigating potential groundwater impacts appears to rely entirely on the County to note and address the pumping impacts associated with cannabis operations. There is no suggestion that the County will engage in any monitoring of potentially associated surface waters, including springs. The DEIR fails to analyze such impacts as they may affect amphibians, fish, and other wildlife. Southern torrent salamanders can’t call the County and complain that their spring has dried up.

**Impact 3.8-5: Effects of diversion of surface water.**

*New commercial cannabis cultivation operations in the County that may occur under the proposed Ordinance could result in decreased flow rates on County streams and rivers because of surface water diversion. Low flows are associated with increased temperature and may also aggravate the effects of water pollution. While available data indicates that some rivers in Humboldt County would not be substantially affected by surface water demand during typical water years, data is not available for the potential effects on individual tributaries. Thus, substantial decreases to some individual tributary flows could occur, which could result in degraded water quality conditions. This impact would be potentially significant.*

It is not the case that “no data” are available to allow the consideration of potential impacts on key tributaries. Please reference the Salmonid Restoration Federation’s Redwood Creek stream-monitoring data, which is on the Regional Board’s website among others.

The DEIR fails to address the serious cumulative impacts of cannabis-related water withdrawals in key tributaries of the Eel River, in addition to other Humboldt County watercourses. That the DEIR must admit, even in the absence of such analysis, that impacts
on water quality are potentially significant, strongly suggests that they are significant indeed.

As throughout the Ordinance and DEIR, the County places a confidence which cannot be justified on the available facts in the efficacy of its proposed mitigations. Without committing to a level and intensity of enforcement orders of magnitude greater than the County has ever maintained, history and experience tell us that most operators will continue to ignore rules and requirements that are inconvenient, expensive, or even novel, to the extent they can.

Cumulative Effects

The following is the DEIR’s analysis of the cumulative effects of the existing industry.

4.2.2 Existing Cannabis Cultivation Operations in Humboldt County

A study of 2012 satellite imagery conducted by Butsic and Brenner (2016) revealed the presence of 4,428 outdoor cultivation sites within 60 of the 112 subwatersheds visible in Humboldt County. In 2015, during a presentation before the Humboldt County Board Supervisors, Mr. Butsic (2016) confirmed that the 60 watersheds selected and surveyed were chosen randomly and that it was, therefore, reasonable to extrapolate almost double that number could exist within Humboldt County in 2012. Anecdotal information received from observations by local regulatory and enforcement agencies suggests a pattern of rampant growth in the industry during the past decade, with some estimates of as many as 10,000 to 15,000 cultivation operations currently in existence. As identified in Table 2-2, the County has received cannabis applications in response to the 2016 CMMLUO that cover approximately 1,252 acres of existing and proposed new operations (8 to 13 percent of the total estimated cultivation operations in the County).

Historic and on-going cannabis cultivation practices have resulted in damage to streams and wildlife. More recently, illegal cannabis cultivation operations within public and private lands have led to illegal water diversions, unpermitted removal of sensitive vegetation, and direct mortality to protected species from exposure to rodenticides and insecticides (Gabriel et al. 2012 and 2013). In addition, these practices (e.g., clearing trees, grading, and road construction) have been conducted in a manner that causes large amounts of sediment to flow into streams during rains. The cannabis cultivators have also discharged pesticides, fertilizers, fuels, trash, and human waste around the sites, that then discharges into waters of the state. Furthermore, diversion of flow during the dry season have caused complete elimination of stream flows in some areas of the County. Water quality related constituents of concern associated with cannabis cultivation discharges include nitrogen, pathogens (represented by coliform bacteria), phosphorus, salinity, and turbidity. Water quality can be affected by excessive use of fertilizer, soil amendments, or other sources.
Cultivation operations that do not participate in the proposed Ordinance would continue to be considered illegal upon adoption of the Ordinance. Enforcement activities would be taken by the County in coordination with other agencies that could result in bringing some cultivation operations into compliance with County and state standards and the closure and remediation of other operations. The removal of illegal cultivation sites is on-going, and consideration of general locations where this would occur and number of future illegal sites is unknown and cannot be known at this time. While it is acknowledged that illegal cannabis operations would continue to occur in the County after adoption and implementation of the Ordinance, details on the full extent of the environmental effects of existing cannabis operations are considered speculative and are not assessed in this evaluation of cumulative impacts.

While this passage does concede obvious generalities, it is fatally incomplete as an analysis of cumulative effects which can guide policy choices to avoid, prevent, and mitigate those impacts in the future. CEQA states at Section 15355: "Cumulative impacts" refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (a) The individual effects may be changes resulting from a single project or a number of separate projects. (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

The DEIR fails to adequately consider the impacts of the proposed project, especially given its uncertain mitigations. But its greatest defect is its failure to analyze the impacts of the project “when added to other closely related past, present, and reasonably foreseeable probable future projects.”

The County claims, in the section quoted above, that “The removal of illegal cultivation sites is on-going, and consideration of general locations where this would occur and number of future illegal sites is unknown and cannot be known at this time. ... details on the full extent of the environmental effects of existing cannabis operations are considered speculative and are not assessed in this evaluation of cumulative impacts.”

The County’s continued reliance on the Butsic study, which systematically understates the extent of the industry and its impacts, and the County’s refusal to consider information it can readily access, including information already in its possession, all reflect an unwillingness to address cumulative effects that is not consistent with CEQA’s requirements.

The County has not even bothered to count existing sites or analyze their locations. The County has not analyzed the impacts of areas where there is a high density of cultivation operations, or the correlation between such areas and smaller parcel sizes. The County has presented no meaningful discussion of the overlap of high-density or high-impact operations with critical public trust and biological resources.
Friends of the Eel River prepared such analyses and produced a series of such maps in 2014. Here are two.

**Distribution of Marijuana Grows in the Eel and Mattole River Watersheds**

**Is there a relationship between parcel density and marijuana?**
It is not credible for the County to suggest that the “general location” of existing operations “cannot be known.” It is, however, a real shame that the public and our fish and wildlife can’t decide that those impacts are “speculative” and dismiss them as easily as the County has here.

FOER is concerned that the County has engaged, and is here engaging, in a pattern and practice of allowing, through a systematic failure of enforcement, truly significant development across much of the County, to the detriment of its public resources, public health, and welfare. This pattern and practice now apparently extends to creating a system of cannabis regulation which will allow cultivators who want to sell to California’s domestic system to obtain permits, while allowing the majority of current growers who market to the national black market to continue to do so with a level of enforcement pressure similar to that which has failed to prevent serious environmental harms over the last two decades.

We are concerned that this exposes both the County and the state’s project of marijuana legalization, and its citizenry, to risks from federal government action. As the County is well aware, the federal government is refraining from interfering with state legalization efforts which take effective measures to keep their weed out of the black market. It’s difficult to mount much of a defense of Humboldt County’s efforts in that respect, especially on the basis of the policies and information presented in the proposed Ordinance and DEIR.

**Conclusion**

The DEIR must be recirculated. The Ordinance should be reconsidered in light of adequate environmental review.

As proposed, the Ordinance will not prevent significant and severe environmental impacts, including impacts to listed species and their habitat and other critically important biological and public trust resources.

Sincerely,

Scott Greacen
Conservation Director