



December 4, 2017

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California Department of Food and Agriculture
CalCannabis Cultivation Licensing
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Transmit Via E-Mail: staff@oal.ca.gov and CalCannabisRegs@cdfa.ca.gov

RE: Emergency Regulation Comments – Licensing of Commercial Cannabis Cultivators
OAL File No. 2017-1127-02E

Dear Sir or Madam:

On behalf of the Rural County Representatives of California (RCRC), the Urban Counties of California (UCC), and the California State Association of Counties (CSAC), we offer our comments on the California Department of Food and Agriculture emergency regulations relating to licensing of commercial cannabis cultivators, presently under review by OAL.

We have limited our current comments to matters considered by OAL under Government Code section 11349.1. These comments consequently do not represent the full range of policy concerns and recommendations that our organizations may have regarding these regulations. We look forward to working with CDFA to addressing these remaining issues during the development of permanent cultivation licensing regulations in 2018.

- **Section 8100, subdivision (b)(6) – Clarity and Consistency**

This section proposes to define the term "license, permit, or other authorization, issued by a local jurisdiction" in Business and Professions Code section 26050.1 to "include . . . a written statement or reference that clearly indicates the local jurisdiction intended to grant permission to the applicant entity to conduct commercial cannabis activity at the premises."

The proposed definition is unclear regarding the types of documentation that will qualify under this provision. (For example, what does a "written . . . reference" mean in this context?) Further, some plausible interpretations of this definition would impermissibly deviate from the plain meaning of the underlying statute. "License, permit, or other

authorization” clearly connotes an *official* document duly issued by the local jurisdiction through appropriate process – not some nebulous “statement” or “reference” to the jurisdiction’s “inten[t].” We consequently recommend the following revision to this subdivision:¹

- (6) *A copy of a valid license, permit, or other authorization, issued by a local jurisdiction, that enables the applicant entity to conduct commercial cannabis activity at the location requested for the temporary license. For the purposes of this section, “other authorizations” shall include, at a minimum, a written statement or reference that clearly indicates the local jurisdiction intended to grant permission to the applicant entity to conduct commercial cannabis activity at the premises mean an official document granted by a local jurisdiction that specifically authorizes a person to conduct commercial cannabis activity in the local jurisdiction.*

- **Sections 8110 and 8115 – Clarity**

The regulations propose to clarify the process applicable when an applicant "provides a license, permit, or other authorization from the local jurisdiction" - for which our organizations are deeply appreciative. For purposes of clarity, we believe that the regulations should additionally reference the process (set forth in statute) applicable when the applicant does not submit such local documentation.

In particular, consistent with BPC 26055, subdivision (g)(2)(B), the regulations should clarify that in the event a local jurisdiction notifies the department that an applicant is not in compliance with a local ordinance or regulation, the application "shall" be denied, and such local determination will not be second-guessed or countermanded by the department. (The applicant's remedy to review or challenge the local jurisdiction's determination of compliance, whether administrative or judicial, lies at the local level alone.²)

Additionally, the regulations propose to require that local jurisdictions “respond” within 10 days of a licensing authority’s request to verify whether a license, permit, or other authorization provided by an applicant is valid. The regulations should clarify the type of response that local jurisdictions are required to provide. For these reasons, we recommend the following revision to Sections 8110 and 8115:

¹ Compare the analogous former provision of the Medical Cannabis Regulation and Safety Act, Business and Professions Code section 19300.5, subdivision (aa): “‘Local license, permit’, or other authorization” means an official document granted by a local jurisdiction that specifically authorizes a person to conduct commercial cannabis activity in the local jurisdiction.”

² While an applicant denied a state license for this reason would appear entitled to hearing rights under Business and Professions Code section 26058, such a hearing (or subsequent appeal under Section 26040 et seq.) would encompass only whether the department properly performed *its own functions* under Business and Professions Code section 26055, *not* factual or legal review of the local jurisdiction's determination.

§ 8110. Proof of ~~Local License, Permit, or Other Authorization~~ Consistency with Local Ordinances and Regulations.

(a) When the applicant provides a license, permit, or other authorization from the local jurisdiction where the licensed premises will be or is located, the department will notify the contact person identified pursuant to Section 26055 of Business and Professions Code. If the local jurisdiction does not respond in writing to the department's notification within ten (10) calendar days, the department may issue a license to the applicant.

(b) The Department shall deny an application if the local jurisdiction notifies the Department pursuant to subdivision (g)(1) or (g)(2)(B) of the Business and Professions Code that the commercial cannabis activity proposed by the application is prohibited or the applicant is not in compliance with a local ordinance or regulation.

(c) If an applicant does not provide a license, permit, or other authorization from the local jurisdiction where the licensed premises will be or is located, the department will follow the process and timelines set forth in subdivision (g)(2) of Section 26055 of Business and Professions Code.

§ 8115. Notification and Grounds for Denial of a License.

(b) In addition to the reasons for denial in Section 26057 of Business and Professions Code, a license may be denied for the following reasons:

(6) The application is for a license for a commercial cannabis activity that the local jurisdiction has notified the Bureau is prohibited in accordance with subdivision (f) of Section 26055 of Business and Professions Code. In the event of a denial under this subparagraph, the department shall notify the contact person for the local jurisdiction of such denial.

(7) The local jurisdiction has notified the department in accordance with Section 8110 that a local license, permit, or other authorization provided by the applicant is not valid, or that the applicant is not in compliance with a local ordinance or regulation. In the event of a denial under this subparagraph, the department shall notify the applicant that the local jurisdiction's determination is not subject to review by the department, and that any dispute regarding this determination must be submitted to the local jurisdiction.

- **Section 8207 – Clarity, Authority, and Consistency**

This section proposes to authorize CDFA to provide licensees affected by declared disasters with "temporary relief from specific licensing requirements." While CDFA likely has the power to thus relieve obligations *imposed by these regulations*, it lacks the authority to waive requirements *specified by statute*. In particular, CDFA lacks the authority to permit any commercial cannabis activity, temporary or otherwise, that would violate local ordinance. To the extent that Section 8207's reference to "licensing requirements" contemplates relief from any requirement to comply with local rules and regulations, or could be interpreted to permit any such actions, it is inconsistent with Business and Professions Code sections 26055, subdivision (d) and 26200.

The foregoing may not have been the intent of this section; however, it should be clarified to avoid both statutory inconsistency and the particular hazards that regulatory ambiguity poses for this emerging industry. We consequently recommend the following revision to this section:

§ 8207. Disaster Relief.

(b) The department may exercise its discretion to provide temporary relief from specific licensing requirements set forth in this Chapter for licensees whose operations have been impacted by a disaster.

(e) A licensee shall not be subject to an enforcement action by the department for a violation of a licensing requirement set forth in this Chapter in which the licensee has received temporary relief.

(i) Nothing in this section or any action taken by the department hereunder shall be construed to relieve the licensee of any obligation to comply with applicable local ordinances and requirements.

- **Section 8214 – Clarity, Authority, and Consistency**

This section proposes a six-month transition period, during which "licensees may conduct commercial cannabis activities with any other licensee, regardless of the A or M designation of the license."

This section is unclear in several respects, and may exceed CDFA's authority. To begin with, authorizing "commercial cannabis activities with *any* other licensee" could be

interpreted to condone transactions and activities *beyond the scope of the applicable license type(s)* of the participants – e.g., allowing a cultivator to supply and transport cannabis directly to a retailer, without utilizing a licensed distributor. This would clearly contravene the statutory provisions of MAUCRSA delineating the permissible activities for each license type. Alternatively, this section could simply have been intended to allow licensees to disregard only the “A” or “M” designation of the *otherwise appropriate licensee* with whom they are dealing – e.g., allowing a licensed “A” cultivator to utilize an “M” distributor, supplying an “M” retailer – which is more likely within CDFA’s regulatory authority.

Additionally, in order to avoid inconsistency with Business and Professions Code section 26055, subdivision (d), this section should be revised to clarify that such activities are allowed *only if permitted under the applicable local ordinances* (and the licensees’ local permits, if any). For example, an “M” cultivator’s local permit might strictly limit them to medicinal cultivation, and thus preclude them from supplying an “A” retailer. CDFA lacks statutory authority to override these local limitations. For these reasons, we recommend the following revision to this section:

§ 8214. Transition Period.

Notwithstanding any other provision, until July 1, 2018, licensees may conduct commercial cannabis activities with any other licensee acting within the scope of their license classification,³ regardless of the A or M designation of the license. This section does not authorize any commercial cannabis activities in violation of any applicable local ordinance or otherwise contrary to the terms of any local license, permit, or other authorization issued to a licensee.

- **Section 8500 – Consistency**

Section 8500 provides that the licensee’s premises and records, etc. are subject to inspection and audit by the Department. This section should expressly reference a local jurisdiction’s rights to conduct the same inspections, which are granted to local authorities pursuant to Business and Professions Code section 26160, subdivision (c). We therefore recommend the following revisions to this section:

§ 8500. Inspections, Investigations and Audits Applicability.

All licensees and applicants shall be subject to inspection, investigation or audit of their licensed premises and records by the department and state and local agencies to determine compliance with state applicable laws and regulations.

³ “Classification” is the term used in Business and Professions Code section 26050, subdivision (a) to describe the various license types and corresponding activities, as distinct from the “A” or “M” “designation” superimposed upon any such classification. (§ 26050, subd. (b).)

We appreciate the opportunity to provide these comments on the emergency regulations. We appreciate the opportunity to provide these comments on the proposed Bureau of Marijuana Control Regulations. If you have any questions, please contact Paul A. Smith at psmith@rcrcnet.org, Jolena Voorhis at jolena@urbancounties.com or Cara Martinson at cmartinson@counties.org.

Sincerely,



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