



July 31, 2017

California Department of Food and Agriculture
ATTN: Amber Morris
CalCannabis Cultivation Licensing
Draft Program EIR Comments
1220 N Street, Suite 400
Sacramento, CA 95814

Transmit Via E-Mail: calcannabis.peir@cdfa.ca.gov

RE: CalCannabis Cultivation Licensing Program EIR Comments

Dear Ms. Morris:

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 Draft Program Environmental Impact Report (PEIR) for the CalCannabis Cultivation Licensing program.

Counties will be responsible for local regulation and permitting of many cannabis cultivators licensed under the proposed program, and will often serve as the lead agencies for site-specific environmental review of these operations. The goal of our comments is to assist CDFA in developing a more robust and thorough Program EIR that will both fully comply with CEQA and provide a solid foundation for future, more specific environmental reviews at the local level.

We have limited our comments to matters relating to environmental analysis, impacts, and mitigations within the scope of CEQA. The county organizations continue to have policy concerns with respect to certain other aspects of the proposed program, and respectfully request CDFA's attention to our comment letter dated June 12, 2017 on those issues. We have also limited our discussion of the areas where the proposed program, as described in the PEIR, will require revision in light of Senate Bill 94 (Stats. 2017, ch. 27), except as they relate to the environmental analysis, impacts, and mitigations contained in the PEIR.

Comment No. 1: The PEIR should not exclude evaluation of reasonably foreseeable site development activities from the scope of the proposed program.

The PEIR asserts that the proposed program "does not include . . . [s]ite development activities, including new construction or modifications to existing structures used for

cultivation . . ." and consequently wholly declines to evaluate the potential environmental effects of such activities, except with regard to "cumulative considerations."¹

Counties certainly appreciate that the full extent of such activities and their impacts cannot be ascertained at the programmatic level – and further, that local jurisdictions will typically exercise primary regulatory authority to address any such effects. However, this does not justify complete refusal to evaluate these activities as *direct effects* of CDFA's proposed program. This is both a potentially serious CEQA concern,² and also inappropriately shifts the entire burden of assessing such impacts and developing appropriate mitigation measures to permitting agencies (typically local jurisdictions) on a case-by-case basis.

Contrary to certain suggestions in the PEIR, CDFA has broad discretionary authority over virtually every aspect of licensed cultivation operations, including ancillary activities.³ Moreover, while some site development activities may occur prior to an application for licensure under the program, or may have dual use for non-cannabis functions outside of the program, the potential for the proposed program to *induce* cannabis cultivation site development in areas where such cultivation was not previously conducted (e.g., more populous areas with higher potential for detection by law enforcement) cannot be wholly ignored, and should be considered in the PEIR.⁴

CDFA consequently has both the ability and the obligation to consider and mitigate the potential impacts of those activities *to the extent reasonably foreseeable at the programmatic level*. Further, in those other areas where the PEIR has engaged in such program-level evaluation, it has resulted in meaningful regulatory measures to reduce impacts that might otherwise have difficult to address on a piecemeal project-by-project basis – such as the nighttime illumination measures,⁵ pesticide use rules,⁶ restrictions on generator usage,⁷ and tribal cultural resource protections.⁸ While the potential impacts of site development activities will indeed often require further consideration at the project level, some

¹ (See, e.g., PEIR pp. 2-17, 3-3, 4.0-3, etc.)

² (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal. 5th 918, 937-939; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 442, fn. 8 ["The city justified the omission by claiming the corps would act to protect wetlands during the permit process. The court was not persuaded. *Each* public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives. Lead agencies in particular must take a *comprehensive* view in an EIR".])

³ (See, e.g., Bus. & Prof. Code, §§ 26013, 26060.)

⁴ The foreseeable prospect that the proposed program will induce cannabis cultivation in new locations affects concerns beyond site development, including possible nuisance odors and increased groundwater usage in more heavily populated areas. The portions of the PEIR addressing these issues (pp. 4.3-33 [odor] and 4.8-34 [groundwater]) should be expanded to include discussion of the potential impacts (of lack thereof) of thus relocating cannabis cultivation from their current, mostly remote locations to more intensely developed areas.

⁵ (PEIR pp. 2-10, 4.1-18, 4.4-22.)

⁶ (PEIR pp. 4.4-26 through 4.4-28; 4.7-17)

⁷ (PEIR pp. 4.6-16 through 4.6-17.)

⁸ (PEIR pp. 4.13-8.)

program-level evaluation would be both feasible and beneficial, and should be included in the Final PEIR.⁹

Comment No. 2: The PEIR should include the proposed "cultivation checklist tool" that will be used to assess future commercial cannabis cultivation activities.

The PEIR defers any effort to evaluate site-specific impacts of licensed cultivation operations by committing to "prepare written checklists for future Proposed Program activities (e.g., for individual licenses) as necessary to determine to what extent the environmental review for such activities may rely on the PEIR" in compliance with CEQA Guidelines section 15168, subdivision (c)(4).¹⁰ However, the proposed checklist and guidelines are not included with the PEIR, nor otherwise available for public review. This is potentially problematic under CEQA, as previous caselaw involving such deferral has relied heavily on the content of any proposed "written checklist" in determining the sufficiency of the programmatic EIR - which is impossible here.¹¹

Moreover, this omission potentially exposes future lead agencies who do rely on the PEIR to unnecessary disputes and litigation, as the protocols for determining whether any given impact has been "adequately addressed" by the PEIR may themselves be open to challenge. CDFA is therefore strongly encouraged to include the proposed checklist (and any associated guidelines) with the Final PEIR.

Comment No. 3: The PEIR's repeated assumption that cannabis cultivation sites "would be of limited size" should be validated through regulatory provisions preventing circumvention of statutory limitations on size and intensity of cultivation site activities.

Many of the PEIR's impact analyses depend upon the assumption that licensed cultivation operations will be limited in size to conclude that the impact of such operations will be less than significant.¹² In concept, this assumption accords with the applicable statutory provisions, which – even as amended by Senate Bill 94 – establish size limitations for the various cultivation license types.¹³ However, the draft regulations appended to the PEIR include provisions that could circumvent these limitations – and thereby undermine the

⁹ (The PEIR's effort to consider these activities under the rubric of "cumulative considerations" does not fully satisfy CDFA's obligations under these circumstances. A cumulative or regional impact analysis cannot be used to trivialize or mask project-specific impacts. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718.) Perhaps more importantly, the PEIR's cumulative analysis discounts the proposed program's contribution to environmental effects *actually identified as potentially significant cumulative impacts* based on the same erroneous conception of program's scope, authority, and responsibility – thereby undermining this analysis as well. (See, e.g., PEIR p. 6-22.)

¹⁰ (PEIR pp. 1-5 through 1-6; 2-6.)

¹¹ (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 239-240.)

¹² (See, e.g., PEIR pp. 4.4-24; 4.8-35; 4.12-7; 4.14-8.)

¹³ (Bus. & Prof. Code, § 26061.)

analysis and conclusions set forth in the PEIR (i.e., result in undisclosed and potentially significant environmental impacts).

Specifically, the proposed provisions authorizing “multi-tenant cultivation”¹⁴ do not contain any limitations regarding the maximum aggregate size of such an operation – or any alternative measures to ensure that allowing such combined operations does not cause foreseeable impacts not evaluated in the PEIR.¹⁵ Similarly, the proposed regulatory provisions limiting the definition of “canopy” – and allowing extensive cannabis activities to occur outside of the canopy area without limitation on intensity or scope – make it difficult to predict the actual footprint of even a single licensed cultivation operation.¹⁶ Finally, one stated objective of Senate Bill 94 was to allow collocation of certain medical and adult use cannabis facilities (although the statutes continue to require that each licensed premises must be “separate and distinct”) – but the details of such collocation, and any associated limitations, are left to the licensing authorities’ discretion.¹⁷

In order to avoid potentially serious weakness in the PEIR’s environmental analysis and conclusions, the draft regulations (i.e., the proposed program) should be revised to clearly limit the *entire* operational area for each individual cultivation licensee, and to incorporate reasonable limitations for “multi-tenant” and collocated facilities. Such limitations need not – and should not – preclude such operations, but should include quantitative or qualitative measures that are both consistent with statute and serve to avoid the prospect of foreseeable environmental impacts not disclosed in the PEIR.

Comment No. 4: The PEIR erroneously indicates that California law designates cannabis as an agricultural product for all purposes.

The PEIR erroneously states that “California law designates cannabis as an agricultural product for Williamson Act purposes” – and makes this statement the centerpiece of its conclusion that the proposed program will have no impact on farmland conversion.¹⁸ This assertion is wrong as a matter of law. MCRSA, AUMA, and Senate Bill 94 all expressly provide that cannabis is an “agricultural product” *only for the limited purposes of this particular state regulatory program*.¹⁹ It does not designate – or otherwise address – the compatibility of cannabis with the Williamson Act (or any other state or local laws pertaining to agriculture). Consequently, this portion of the PEIR should be revised and re-written to remove this statement and associated analysis. (Note that this does not necessarily dictate a conclusion

¹⁴ (Proposed Section 8206; PEIR Appendix A, p. 22.)

¹⁵ The PEIR mistakenly treats the prospect of “procurement of multiple licenses” resulting “in combined impacts that exceed those associated with an individual license” as “cumulative considerations.” (PEIR pp. 6-14 through 6-15.) For the reasons discussed in fn. 9 above, these are *not* cumulative but are instead *direct* impacts of the proposed program that must be evaluated accordingly.

¹⁶ (Proposed Sections 8302, 8309, 8311; PEIR Appendix A, pp. 25-30.)

¹⁷ (Bus. & Prof. Code, § 26053, subd. (c).)

¹⁸ (PEIR p. 4.2-20. The PEIR makes a similarly broad – and similarly mistaken – statement on page 4.2-18 [“Under Health and Safety Code Section 11362.777(a), and Business and Professions Code Section 26067(a), respectively, medical and adult-use cannabis are agricultural products.”].)

¹⁹ (Bus. & Prof. Code, § 26069, subd. (a) [Senate Bill 94]; Former Bus. & Prof. Code, § 26067, subd. (a) [AUMA]; Former Health & Saf. Code, § 11362.777, subd. (a) [MCRSA].)

that cannabis cultivation *will* have a potentially significant impact on agricultural lands conversion – local agencies' agricultural land use regulations and Williamson Act administration may certainly be considered in this connection – but any conclusion that there is no such impact must be supported by accurate evaluation of the legal and regulatory background.)

Comment No. 5: The PEIR's repeated assumption that indoor cannabis cultivation facilities will comply with fire code requirements should be validated through regulatory provisions requiring site inspection by the local fire department prior to licensure.

The PEIR repeatedly assumes that indoor cultivation operations will comply with (among other things) the applicable fire code – and depends upon this assumption to support the conclusion that there are no potentially significant impacts related to public services or hazards and hazardous materials.²⁰ However, the proposed regulations requiring only that indoor license applicants *notify* the local fire department.²¹ To ensure that the PEIR's assumption of code compliance is justified and factually supported, we encourage CDFA to revise the regulations to explicitly require that indoor cultivation sites receive an actual inspection for Fire Code compliance - not merely notification to the Fire Department.

We appreciate the opportunity to provide these comments on the proposed 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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²⁰ (PEIR pp. 4.7-20 through 4.7-23; 4.11-12.)

²¹ (Proposed Section 8102, subdivision (b)(30); PEIR Appendix A, p. 10.)