



December 4, 2017

Office of Administrative Law
OAL Reference Attorney
300 Capital Mall, Suite 1250
Sacramento, CA 95814

California Department of Public Health
Manufactured Cannabis Safety Branch
ATTN: Linda M. Cortez
P.O. Box 997377, MS 7606
Sacramento, CA 95899

Transmit Via E-Mail: staff@oal.ca.gov and regulations@cdph.ca.gov

**RE: Emergency Regulation Comments – Regulations for Cannabis Manufacturing Licensing
OAL File No. 2017-1127-04E**

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 Public Health, Manufactured Cannabis Safety Branch (CDPH) emergency regulations relating to cannabis manufacturing licensing, 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 CDPH to addressing these remaining issues during the development of permanent cannabis manufacturing licensing regulations in 2018.

- **Section 40126, subdivision (a)(2) – 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 document "indicating that the local jurisdiction acknowledges the operation of the commercial cannabis business at the location specified in the application."

The proposed definition is unclear regarding the types of documentation that will qualify under this provision. (For example, what does a "acknowledges the operation" mean in this context?) Further, some plausible interpretations of this definition might 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, affirmatively sanctioning* the operation – not merely “acknowledgement.” We consequently recommend the following revision to this subdivision:¹

(2) A copy of a local license, permit, or other authorization officially issued by the local jurisdiction indicating that the local jurisdiction ~~acknowledges~~ specifically authorizes the operation of the commercial cannabis business at the location specified in the application. Upon receipt of the application, the Department shall contact the applicable local jurisdiction to confirm the validity of the authorization. If the local jurisdiction does not respond within 10 calendar days, the Department shall consider the authorization valid.

- **Sections 40129, subdivision (b) and 40159, subdivision (b) – Clarity**

The regulations propose to clarify the process applicable when an applicant "voluntarily submit[s] a copy of 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 CDPH 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 CDPH. (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) For these reasons, we recommend the following revision to Sections 40129(b) and 40159:

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.

§40129. Annual License Application Requirements – Business Information

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 CDPH properly performed *its own functions* under Business and Professions Code section 26055, *not* factual or legal review of the local jurisdiction's determination.

(b) Pursuant to section 26055(e) of the Act, applicants may voluntarily submit a copy of a license, permit, or other authorization to conduct commercial cannabis manufacturing activities issued by the local jurisdiction. Upon receipt of the application, the Department shall contact the applicable local jurisdiction to confirm the validity of the authorization. If the local jurisdiction does not respond in writing within 10 calendar days, the Department shall ~~consider~~ presume the authorization valid. Notwithstanding a presumption by the Department that an authorization is valid pursuant to this subdivision, the Department shall deny an application if the local jurisdiction notifies the Bureau 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. If an applicant does not submit a copy of a license, permit, or other authorization from the local jurisdiction, the Department will follow the process and timelines set forth in subdivision (g)(2) of Section 26055 of the Act.

§40159. Denial of License.

(b) (1) The Department shall deny an application for new or renewal license if the proposed manufacturing operation or premises would violate the applicable local ordinance.

(2) The Department shall deny an application for new or renewal license if the local jurisdiction has notified the Department in accordance with Section 40126 or 40128 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 40182 – Clarity, Authority, and Consistency**

This section proposes to authorize CDPH to provide licensees affected by declared disasters with "temporary relief from specific licensing requirements." While CDPH likely has the power to thus relieve obligations *imposed by these regulations*, it lacks the authority to waive requirements *specified by statute*. In particular, CDPH lacks the authority to permit any commercial cannabis activity, temporary or otherwise, that would violate local ordinance. To the extent that Section 40182'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:

§40182. Disaster Relief.

(b) The Department, in its sole discretion, may 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.

(h) 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.

- **Sections 40262, subdivision (c) and 40131, subdivision (l) – Clarity and Consistency**

These sections propose to recognize certain information submitted by a manufacturing license applicant as trade secrets that are not subject to public disclosure. For purposes of clarity, and to avoid inconsistency with the various provisions of MAUCRSA providing for information sharing between licensing authorities and local jurisdictions (e.g., Bus. & Prof. Code, §§ 26067, 26162, 26162.5), these sections should be revised as follows:

§40262. Master Manufacturing Protocol.

(c) Nothing in this chapter requires disclosure of the master manufacturing protocol to any person other than the individuals conducting activities that utilize the protocol or to the Department and its inspectors and agents, or any city, county, or city and county to perform official duties pursuant to the Act or a local ordinance, or other law enforcement agencies. The licensee may consider the master manufacturing protocol subject to trade secret protection.

§40131. Annual License Application Requirements – Manufacturing Premises and Operations Information

(l) Any manufacturer submitting operating procedures and protocols to the Department pursuant to the Act and this chapter may claim such information as a trade secret or confidential by clearly identifying such information as “confidential” on the document at the time of submission. Any claim of confidentiality by a manufacturer must be based on the manufacturer’s good faith belief that the information marked as confidential constitutes a trade secret as defined in Civil Code section 3426.1(d), or otherwise exempt from public disclosure under the California Public Records Act in Government Code section 6250 et seq. No claim of confidentiality under this subdivision shall preclude the Department from providing such information to authorized employees of the State of California or any city, county, or city and county to perform official duties pursuant to the Act or a local ordinance.

• **Section 40550 – Consistency**

Section 40550 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:

§40550. Inspections.

(a) The Department and its inspectors or agents may conduct an on-site inspection prior to issuing a new or renewal license.

(b) The Department and its inspectors or agents and state and local agencies shall have free access at reasonable times to the manufacturing premises, storage areas, records, production processes, labeling and packaging processes, and conveyances used in the manufacture, storage or transportation of cannabis products so that it may determine compliance with the provisions of the Act and these regulations and other applicable laws, regulations, and ordinances. ~~Departmental Inspections shall~~ may include all pertinent equipment, raw material, finished and unfinished materials, containers, packaging, and labeling that has a bearing on whether the cannabis product complies with the Act and these regulations and other applicable laws, regulations, and ordinances.

(c) The Department and state and local agencies may inspect any record or document that has a bearing on whether the labeling, advertising or marketing of a cannabis

product complies with the requirements of Chapter 15 (commencing with section 26150) of the Act and other applicable laws, regulations, and ordinances.

(d) To the extent necessary for the enforcement of the Act and this chapter or other applicable laws, regulations, and ordinances, the Department and state and local agencies may secure any sample or specimen of any cannabis product or ingredient used therein by the manufacturing operation. When the sample is secured by the Department, the Department's inspector or agent shall leave a receipt for the licensee describing any sample obtained prior to leaving the premises.

(e) The Department and state and local agencies may make analyses or examinations of any sample obtained. If an analysis is made of a sample by the Department, a copy of the results of the analysis shall be promptly furnished to the licensee by the Department.

(f) The Department and state and local agencies may conduct investigations concerning the adulteration, misbranding, false or misleading advertising or marketing, or unlicensed production of any cannabis product including the ability to enter and inspect any place where any cannabis product is suspected of being manufactured or held in violation of the Act or these regulations or other applicable laws, regulations, and ordinances.

- **Section 40600 – 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 on the license.”

This section is unclear in several respects, and may exceed CDPH’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 manufacturer 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” manufacturer to utilize an “M” distributor, supplying an “M” retailer – which is more likely within CDPH’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” manufacturer’s local permit might strictly limit them to medicinal cultivation, and thus preclude them from supplying an “A” retailer. CDPH

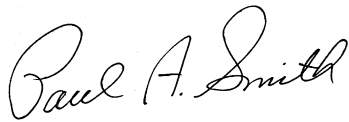
lacks statutory authority to override these local limitations. For these reasons, we recommend the following revision to this section:

§40600. License Designations

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 on 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.

We appreciate the opportunity to provide these comments on the emergency 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,



PAUL A. SMITH
Senior Legislative Advocate
RCRC



CARA MARTINSON
Legislative Representative
CSAC



JOLENA L. VOORHIS
Executive Director
UCC

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).)