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Of Counsel

MEMORANDUM

To: Board of Supervisors

From: William Abbott

Date: February 19, 2021

Re: CEQA pathways for Cannabis Regulation

I have been asked to advise Mendocino County as to options for pre-existing cultivators to comply with CEQA given the existing County and state regulations. My understanding is that the County potentially has 1,100 legacy growers (defined for purposes of this memorandum as growers in operation as of January 1, 2016, many of whom have been growing for decades.) These cultivators are at various stages of obtaining provisional or annual licenses.¹

Summary

The County approved a negative declaration in 2017 when it adopted its initial regulations following enactment of Proposition 64 in advance of state regulations, potentially a unique situation. Unlike the scenarios envisioned in CDFA's program EIR ("PEIR"), the County regulations and approvals including a negative declaration preceded the State's PEIR certification. The County and CDFA can and should rely upon the County's 2017 negative declaration as it relates to legacy growers in Mendocino County seeking state licenses. The County, based upon its local knowledge, is better equipped to determine what kind of regulations and development requirements are appropriate for activities with localized impacts. While CDFA prepared a program EIR on its regulations, this PEIR has limited or no value in terms of CEQA evaluation of legacy growers and localized impacts because: (a) the CDFA PEIR assumed that all of these cultivators are part of the CEQA baseline and thus the EIR focuses its analysis on new cultivation activities, not existing cultivators; (b) the PEIR recognized the lack of information available to the state regarding individual cultivators; and (c) the PEIR acknowledges CDFA's lack of regulatory control over ancillary activities and its ability to require mitigation.

¹ Not all of the legacy growers are expected to meet County standards.

A. Regulatory Framework

1. Initial Local and State Regulations.

On November 8, 2016, California voters approved Proposition 64, which expanded existing regulations to allow for adult use. Among other provisions, Proposition 64 created a statewide regulator scheme for cultivation. The statutory scheme acknowledges for regulation at two levels of government; local (cities and counties), and state (CDFA and potential state environmental regulators like CDFW.) Local governments are allowed significant discretion as to how to regulate cultivation for purposes of land use impacts.

Proposition 64 in turn triggered both local and state regulations. Mendocino County adopted its initial regulations immediately following voter passage of Proposition 64. In adopting its regulations in 2017, the County utilized a negative declaration for its CEQA documentation, filing a notice of determination in 2017 (“2017 Ordinance”, as subsequently amended.) Pursuant to County regulations, the activities of legacy growers are subject to development standards appropriate for Mendocino County.²

2. The State Programmatic EIR.

In anticipation of adopting implementing regulations, CDFG released a draft programmatic EIR in June 2017 and a final EIR in November 2017. The state adopted its initial regulations in 2017 as emergency regulations and readopted the regulations in June 2018. CDFG adopted implementing regulations which provide more detail with respect to the State’s CEQA review requirements.

§8012 (r) Evidence of exemption from, or compliance with, division 13 (commencing with section 21000) of the Public Resources Code, California Environmental Quality Act (CEQA). The evidence provided shall be one of the following:

- (1) A signed copy of a project specific Notice of Determination or Notice of Exemption and a copy of the associated CEQA document, or reference to where it may be located electronically, a project description, and/or any accompanying

² Pursuant to the County Code, growers are required to obtain one of the following, as applicable: a zoning clearance, an administrative permit, or minor use permit. The overwhelming majority of legacy growers qualify for and have obtained zoning clearances. A zoning clearance under the County code is ministerial as it does not involve the exercise of discretion by the reviewing authority. Staff is not permitted to impose any conditions of approval in order to issue a zoning clearance. Administrative permits and minor use permits may involve sufficient discretion so as to not meet CEQA’s definition of ministerial [“Ministerial describes a governmental decision involving little or no personal judgment by the public official.... CEQA Guidelines §15369.] CEQA requirements for this second category can only be determined on a case by case basis. Regardless, all three administrative options were evaluated as part of the 2017 negative declaration.

permitting documentation from the local jurisdiction used for review in determining site specific environmental compliance;

(2) If an applicant does not have the evidence specified in subsection (1), or if the local jurisdiction did not prepare a CEQA document, the applicant will be responsible for the preparation of an environmental document in compliance with CEQA that can be approved or certified by the department, unless the department specifies otherwise.

As I discussed below, the above regulations for implementing CEQA recognize alternative approaches that could be applied to legacy growers in Mendocino County.

3. The Environmental Baseline in CDFA’s Programmatic EIR Correctly Recognizes that Existing Cultivators are Part of the Environmental Baseline.

The CDFA PEIR correctly identified that existing cannabis activities as part of the baseline (PEIR chap. 4). Such an approach is consistent with the CEQA Guidelines which provides that the baseline is ordinarily set as the physical conditions existing at the time of the notice of preparation is issued. (Guidelines §15125(a)(1).) This approach is consistent with case law as well. (*Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428.)³ Consistent with recognizing existing cultivation activities as part of the baseline, the PEIR impact analysis similarly focuses on incremental impacts associated with new cannabis regulated activities. (See Responses to Comments 46-1 to 46-3.) Thus, by CDFA’s own analysis, Mendocino County’s legacy growers are an assumed, existing activity for purposes of impact analysis.

B. Options For Coordinating County and State CEQA Practices

Given the history of the County and State CEQA documentation, local and CDFA regulations and the CEQA Guidelines, there is more than one approach in complying with CEQA. As is discussed below, although CDFA could operate as the lead agency, as to cultivators operating at the time of passage of the initiative, there are advantages to Mendocino County serving as the lead agency, relying upon its existing negative declaration. Both approaches are discussed.

1. CDFA is the Lead Agency.

For new cannabis growing activities, this regulatory pathway is consistent with CDFA’s programmatic EIR. As explained in CDFA’s statement of reasons in support of the regulations it states at page 110, “If the local agency did not take on the role of lead agency pursuant to

³ The PEIR also cites these cases and others for the same proposition. PEIR, Vol. 3, p. 2-222.

CEQA⁴, then the Department would take on that role prior to issuing the license.” As the lead agency, CDFG would be required to comply with the Permit Streamlining Act (Government code §65920) including all applicable timelines for both the Streamlining Act and CEQA. The County would have no responsibilities.

However, selection of CDFG as the lead agency as applied to pre-existing cultivators has no or minimal CEQA utility. First, as recognized by the CDFG PEIR, legacy growers are part of the CEQA baseline.⁵ Those activities were never directly assessed by the State and only considered in the context of cumulative effects. Second, the PEIR acknowledges a lack of critical information regarding baseline activities. (Final PEIR, p. 2-220, 2nd bullet.) Third, CDFG lacks authority to regulate ancillary activities. The PEIR disclosed ancillary activities (“e.g. road construction, stream crossings, clearing of vegetation, well or septic tank development, construction of homes located at cultivation sites” were evaluated only in the cumulative context for the reason that “CDFG does not have discretionary authority over these ancillary activities....” (Final PEIR p. 4.0-3.) Case law subsequent to the EIR certification underscores the critical question of does CEQA apply in circumstances in which the regulating agency lacks the legal authority to impose mitigation measures? In those circumstances, CEQA analysis serves no purpose and the activity is not subject to CEQA. (*McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80.) The holding in *McCorkle* coupled with the CDFG’s own regulatory limitations genuinely presents the legal issue of can CDFG even qualify as the lead agency for baseline cannabis operations?

Should the State take over as lead agency for pre-existing cultivators, it raises the question of “is the state required to do a new EIR”? Impact regulation of pre-existing cultivators was never examined as part of the original EIR. This new regulatory pursuit may require a re-examination of feasible alternatives and mitigation measures as none of those were discussed in the PEIR.

The above analysis illustrates a number of obstacles facing CDFG and the legacy growers in the event that CDFG takes on lead agency status for pre-existing cultivators. Alternatively, the legacy growers, the County and CDFG can rely upon the County’s CEQA compliance for the 2017 Ordinance. This approach requires no speculation and is a proven strategy given that the

⁴ In the case of Mendocino County, it acted as the lead agency when it adopted the 2017 Ordinance.

⁵ The CDFG PEIR discusses the future use of the PEIR for tiering only in the context of future cultivation activities. “To facilitate the determination of whether applications for *proposed* cultivation activities and related management approaches have been sufficiently described in the Proposed Program and adequately addressed in the PEIR, a CEQA Tiering Strategy and checklist are being developed by CDFG. A draft of this strategy and checklist are included in this PEIR as appendix J. Using these tools, *future* commercial cannabis cultivation activities would be assessed to determine the extent to which potentially significant environmental impacts have been adequately addressed in this PEIR, and if not, what additional measures or CEQA compliance documents may be necessary.” (*Emphasis added.* FPEIR, p. ES-8.) Mendocino County’s legacy growers are neither “proposed” nor “future”.

California Department of Fish and Wildlife since 2017 has repeatedly relied upon the County's 2017 negative declaration in granting discretionary approvals.

2. **The County is the Lead Agency.**

CDFWA regulation §8102(r) permits CDFWA to rely upon a notice of exemption or notice of determination.

The County relied upon a negative declaration⁶ in approving the 2017 Ordinance⁷. Pursuant to the ordinance, later County processing is ministerial for the significant majority of legacy cultivators⁸. The statute of limitations has long expired to challenge the 2017 Ordinance and the companion CEQA document. This negative declaration fully satisfies the CEQA clearance required by the CDFWA regulations. To illustrate how a state agency can reasonably rely upon the County's negative declaration, CDFW has relied extensively upon the County's 2017 negative declaration in issuing discretionary approvals related to cannabis cultivation projects. This is reflected on the State Clearinghouse Website for SCH Number 2016112028⁹ which lists out numerous state approvals which expressly relied upon the County's 2017 negative declaration. (Included as **Attachment A** is an example of a CDFW NOD relying upon SCH 2016112028, posted as recently as January 2021.) Additional examples are readily available through the State Clearinghouse.

CEQA provides additional legal framework and guidance applicable to a responsible agency following approval of a CEQA document by the lead agency. The general rule is that the CEQA document approved by the lead agency serves as the CEQA document for all responsible agencies except under narrow exceptions not applicable here. Guidelines §§15050, 15052. CDFWA does not have the right by statute to simply reject the County's negative declaration. Public Resources §21166.¹⁰

In the case of legacy growers, the County has already acted as the lead agency when it approved the negative declaration for its 2017 Ordinance and later amendments. The County having conducted the required CEQA clearance, responsible agencies options are prescribed by

⁶ Filed with the State Clearinghouse on April 10, 2017.

⁷ As it did for subsequent amendments to the 2017 Ordinance.

⁸ The suitability of the 2017 negative declaration for a minor use permit requires an individualized analysis, and is beyond the scope of this memorandum.

⁹ <https://ceqanet.opr.ca.gov/Project/2016112028>

¹⁰ Although the statute is phrased in terms of EIRs, the CEQA Guidelines applies the same principle to negative declarations. Guidelines §§15050, 15052. The limitation on a state responsible agency unilaterally rejecting a lead agency's CEQA document was added to CEQA in 1977 along with the Permit Streamlining Act. These amendments were in direct response to the State's handling of the proposed Dow Chemical plant proposed to be located in the Montezuma Hills in Solano County following certification of an EIR by Solano County. A explanation of the history leading to these statutory changes can be found at <https://escholarship.org/content/qt1gk2d9b2/qt1gk2d9b2.pdf?t=mv7xvvy>.

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statute and CEQA Guidelines. Given that the PEIR never critically examined pre-existing cultivators for purposes of impact analysis, mitigation measures and alternatives, there is no particular advantage and numerous potential significant legal disadvantages to CDFA assuming lead agency status for legacy growers. CDFA should follow the practices of its peer agency CDFW.

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