

MAY 16 2019

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April 12, 2019

Lisa Plowman, Director of Planning and Development
123 E. Anapamu Street
Santa Barbara, CA 93101
and
624 W. Foster Road
Santa Maria, CA 93455

COUNTY OF SANTA BARBARA
CLERK OF THE
BOARD OF SUPERVISORS

2019 MAY 29 PM 12:09

SUBJECT: Board Direction on Stream Setbacks for Hoop Structures EIR 17 EIR 00000-00004 and Compliance with Fish & Game Code §1602 and County Comprehensive Plan Policies under CEQA Section 15206 as to arbitrary setback requirements for rural areas and Tepusquet EDRN.

Dear Ms. Plowman:

On April 9, 2019 the Board of Supervisors directed you to return with an arbitrary footage setback requirement in response to the Planning Commission recommendation of 100 feet for Hoop Structure siting location next to streams. This instruction ignores entirely Sections 4.6 of the EIR beginning on Page 4.6-51 and continuing through page 4.6 – 67 to include MM-BIO-03. This is an impossible and illegal task within the statutory CEQA process.

I agree with Mr. Marc Chitillo that the BOS is engaged in post impact CEQA analysis, and attempting to legalize a failed EIR process. Not only is the direction to ignore the case-by-case analysis required under CEQA for specific potentially significant impacts upon different site specific riparian habitats, and related species; it attempts to circumvent Fish and Game Code Section 1602, which is nowhere referenced in the now suspect EIR. To correct my prior letter to Ms. Harris of March 15, 2019 Tepusquet Canyon is briefly mentioned in the EIR at pages 4.2-8, 4.4-9 and 4.6-2. Setback analysis for impacted streams and creeks has to be on a case-by-case analysis under DFG Code §1602 and requires a separate state permit with a separate CEQA analysis for in stream water diversions and grading, and any stream bed alteration, (see enclosed notification DFW 7.9 2018). By not complying with State Law the BOS is sailing in harms way with a

conflicting attempt to preempt State law for DFG Code Section §1600 et seq. compliance. Recent case law supports this analysis, (see enclosed *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* 237 Cal App. 4th 411, 436 (June 4 2015) citing the Santa Barbara County case of *People vs. Weaver* (1983) 147 Cal. App. 3d Supp 23.

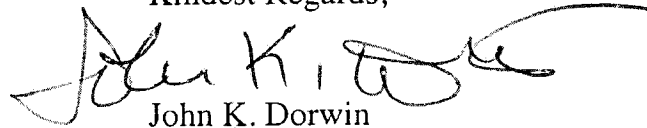
Noncompliance with State and Federal law requires a case by case analysis under Fish and Game Code Section 1602 for potentially impacted streams, creeks, and water courses. Proposed amendment MM-BIO-03 is preempted by State law.

Regrettably this County wide Hoop Structures Ordinance Amendment program has already adversely impacted Tepusquet Canyon as shown on the 2015 USGS 7.5 minute quadrangle map, and the aerial images, which have now been shown to the Board. We now know that there has been no legal compliance with either CEQA, or the policies discussed in the EIR Section 4.6. The proposed mitigation and exemption of MM-BIO-03 will conflict with State law in the Fish and Game Code, and sound soil conservation practices for development next to and within riparian corridors and related habitat, such as Tepusquet Canyon. These documented impacts are now both significant and irreversible.

I agree that the environmental impacts of cannabis cultivation have completely compromised the hoop structures ordinance and EIR such that the EIR needs to be re-circulated, and possible exclusion or mitigation of cannabis related projects in Tepusquet Canyon since 2015 requires separate analysis and review as a project alternative based upon new information of LUDC violations.

Please feel free to call me if you have any questions regarding this most disturbing omission and direction by the Board of Supervisors.

Kindest Regards,



John K. Dorwin

encl. 5 pages

cc: Board of Supervisors,
County of Counsel, Michael Ghizzoni



COMMERCIAL CANNABIS CULTIVATION LICENSING
– COMPLIANCE WITH FISH AND GAME CODE SECTION 1602 –



- **Fish and Game Code section 1602** requires an entity to notify California Department of Fish and Wildlife (CDFW) before commencing an activity that will:
 - Substantially divert or obstruct the natural flow, or substantially change or use any material from the bed, channel or bank of any river, stream, or lake.
 - Deposit or dispose of debris, waste or other material where it may pass into any river, stream, or lake.

Please note that “any river, stream or lake” includes those that are dry for periods of time as well as those that flow year round.

- **Annual licenses for cannabis cultivation** issued by California Department of Food and Agriculture (CDFA) require the applicant to demonstrate compliance with Fish and Game Code section 1602. Compliance must be demonstrated with a CDFW Lake or Streambed Alteration (LSA) Agreement or written verification that an LSA Agreement is not required.
- **Temporary licenses for cannabis cultivation** issued by CDFA do not require an applicant to demonstrate compliance with Fish and Game Code section 1602. However, some counties currently require an LSA Agreement or statement from CDFW that no LSA Agreement is needed. Check with the county where your activity will occur. Fish and Game Code section 1602 requires an entity to notify CDFW if their activity will alter a river, stream, or lake as specified above.
- **To comply with Fish and Game Code section 1602**, submit an LSA Notification and appropriate fee to CDFW and enter into an LSA Agreement if required. The LSA Notification application, fee schedule, instructions, and locations of CDFW regional offices are available at <http://www.wildlife.ca.gov/Conservation/LSA>.

Ensure that your LSA Notification is complete and identify all existing and proposed activities and infrastructure associated with cannabis cultivation and site access. Activities include but are not limited to water diversion and storage, stream crossings (i.e., bridges, culverts, rock fords), road construction near streams and lakes, and riparian vegetation removal. Upon receipt of a complete LSA Notification, CDFW will begin review and may conduct a site visit.

An LSA Notification with associated unresolved violations or fines will not be processed until these issues are addressed.

- **Issuance of an LSA Agreement, or written verification that one is not required**, will be based on CDFW findings. An LSA Agreement is required when CDFW determines that the activity, as described in a complete LSA Notification, will (1) substantially alter a river, stream, or lake and (2) may substantially adversely affect existing fish or wildlife resources, as specified in section 1602 of the Fish and Game Code. An LSA Agreement identifies approved activities and measures necessary to protect fish and wildlife resources, which may limit the work period. Consider designing your project to avoid activities that require an LSA Agreement.

- **New! General Lake or Streambed Alteration Agreement for Activities Related to Cannabis Cultivation (General Agreement).** The General Agreement applies only to certain covered activities for the purpose of cannabis cultivation. The General Agreement expedites the CDFW authorization for eligible projects, pursuant to Fish and Game Code sections 1602 and California Code of Regulations Title 14 Section 722, and is exempt from the California Environmental Quality Act.

Eligibility for the General Agreement:

- ✓ **Covered Activities** are limited to construction, reconstruction, maintenance, or repair of a *stream crossing (bridge, culvert, rock ford only) or water diversion*, for the purpose of cannabis cultivation.
- ✓ **Design Criteria** specified in the General Agreement must be met. These include, but are not limited to sizing, placement, and operation.
- ✓ **Finfish species are not present** in the stream or lake, year-round or seasonally.
- ✓ **Take of Listed or Fully Protected species will not occur.**
- ✓ **Activity is not the subject of a complaint or order** by CDFW, City Attorney, District Attorney, Attorney General, or an order by a court.

Learn more at <https://www.wildlife.ca.gov/Conservation/LSA/Cannabis-Cultivation/General-Agreement>. Entities with activities that do not meet eligibility criteria for the LSA General Agreement for Cannabis Cultivation will need a Standard Agreement.

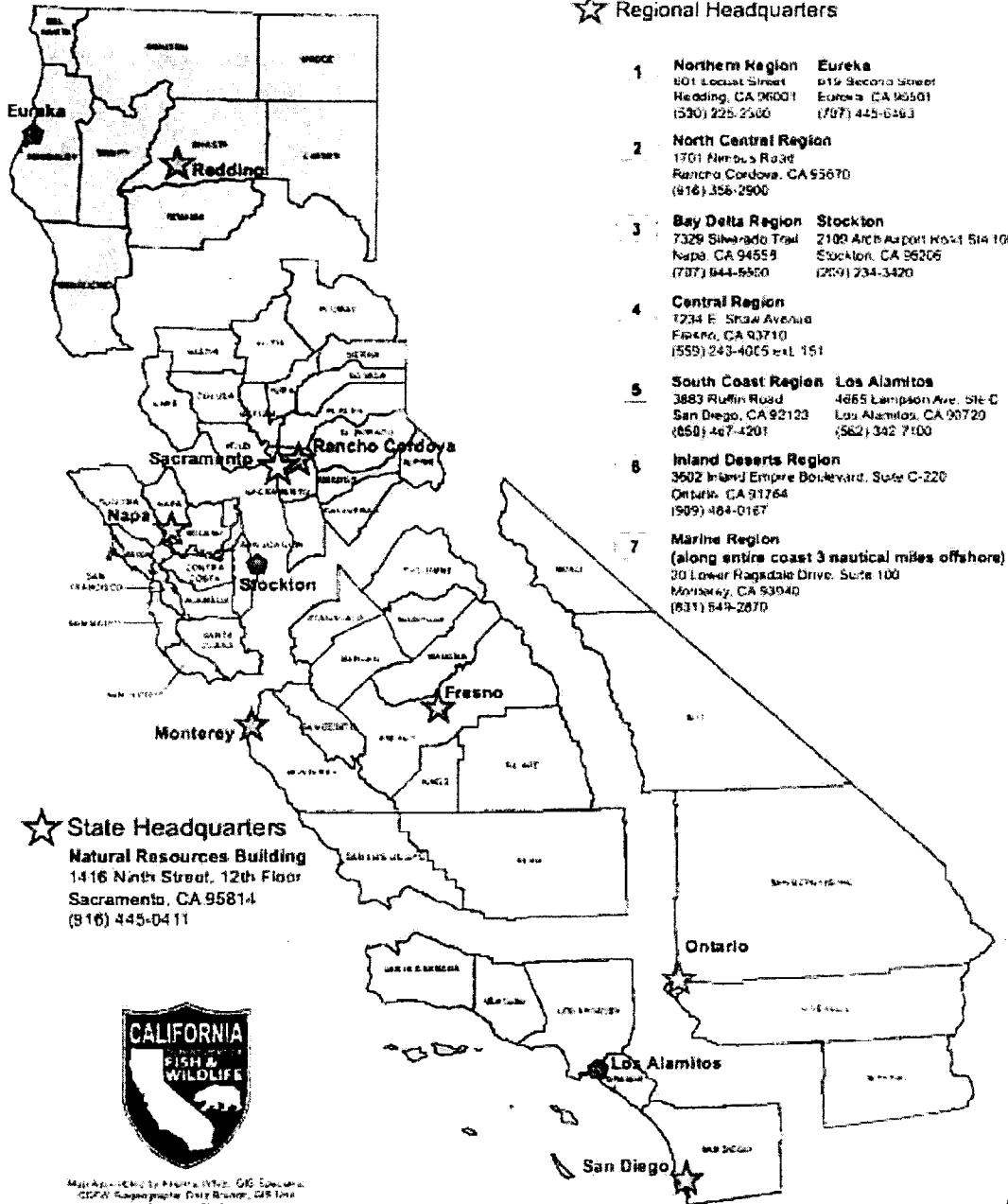
- **New! Online notification submittal is available for cannabis cultivation projects.**
 - Notifications requesting a General Agreement **must** use the online submittal process.
 - Notifications for cannabis cultivation projects requesting a Standard Agreement (term of 5 years or less) may use the online **or** paper submittal process. To request a term of greater than 5 years, use paper submittal.
 - Visit <http://www.wildlife.ca.gov/Conservation/LSA/Notify-CDFW>
- **If you have an existing LSA Agreement**, be sure that it covers all of the activities subject to Fish and Game Code section 1602 and that it has not expired. If all activities are not included in the LSA Agreement, you will need to submit a new LSA Notification to receive an LSA Agreement for the additional activities. If the LSA Agreement has expired before the work has been completed, you will need to submit a new notification to obtain a new LSA Agreement.
- **For more information and updates**, please visit CDFW's websites or contact the regional office that serves the location of your cannabis cultivation (see attached map):

LSA at <http://www.wildlife.ca.gov/Conservation/LSA>

Cannabis at: <https://www.wildlife.ca.gov/Conservation/Cannabis>

California Department of Fish and Wildlife

★ Regional Headquarters



- 1 **Northern Region** **Eureka**
 801 Locust Street
 Eureka, CA 96001
 (530) 225-2500
- 2 **North Central Region**
 1701 Nimbus Road
 Rancho Cordova, CA 95670
 (916) 356-2900
- 3 **Bay Delta Region** **Stockton**
 7329 Silverado Trail
 Napa, CA 94558
 (707) 844-9500
- 4 **Central Region**
 1734 E. Spaul Avenue
 Fresno, CA 93710
 (559) 243-4005 ext. 151
- 5 **South Coast Region** **Los Alamitos**
 3883 Ruffin Road
 San Diego, CA 92123
 (619) 467-4201
- 6 **Inland Deserts Region**
 3502 Inland Empire Boulevard, Suite C-220
 Ontario, CA 91764
 (909) 464-0167
- 7 **Marine Region**
 (along entire coast 3 nautical miles offshore)
 30 Lower Ragsdale Drive, Suite 100
 Monterey, CA 93040
 (831) 549-2870

★ **State Headquarters**
Natural Resources Building
 1416 Ninth Street, 12th Floor
 Sacramento, CA 95814
 (916) 445-0411



Map Adapted by Patricia White, GIS Specialist
 CDFW, Esri, and the Daily Reader, GIS User
 December, 2013
 This map is a free publication of the Department of Fish and Wildlife, January 1, 2007



Fish & Game Code Section 1602 Is Unambiguous, Now Requiring More Water Users To Provide “1602 Notification” To “Substantially Divert” Water



By Wes Miliband and Tom Henry on June 15, 2015

Posted in [Agribusiness](#), [CEQA](#), [Energy](#), [ESA](#), [Oil and Gas](#), [Regulations](#), [Water](#), [Wine](#)

On June 4, 2015, the Court of Appeal ruled that California Fish and Game Code section 1602 (“Section 1602”) unambiguously requires notification to the Department of Fish and Wildlife (“Department”) if an entity or individual plans to “substantially divert” water, *even when the legal right to use the water was previously established*. (*Siskiyou County Farm Bureau v. Department of Fish and Wildlife*, June 4, 2015, Third Appellate District, Case No. C073735.)

Siskiyou County Farm Bureau (“Farm Bureau”) sought clarification of the rights and duties of its members under Section 1602 by alleging in part that local ranchers and farmers diverted water for decades without the Department enforcing Section 1602. By reversing the trial court, the Court was not persuaded by this or the Farm Bureau’s other contentions.

Establishing early in its Opinion that “substantial” is unambiguous, the Court focused on why “divert” also is unambiguous due to the trial court finding that the plain meaning of “divert” – lack of alteration to the streambed – would lead to absurd results, among other things.

The Court navigated through historical effects of the Gold Rush on rivers and streams, California water law principles, historical background and interpretations of Section 1602, and whether extrinsic evidence admitted by the trial court established an equally plausible statutory interpretation (which, if found to exist, would render Section 1602 ambiguous). Of particular note, the Court addressed a “concern” raised in *People v. Weaver* (1983) 147 Cal.App.3d Supp. 23 that Section 1602 might have been written more broadly than intended by encompassing “ordinary” agricultural pumping. Dispelling *Weaver’s* concern, though concluding pumping alone may trigger Section 1602’s notification requirement, the Court traced back to a 1973 Attorney General opinion while also analyzing the ordinary meaning of “divert” and related legal and administrative interpretations of the word.

What *Siskiyou County Farm Bureau* means is: (1) a broad set of water users – agricultural and others – must provide

the Department with Section 1602 notification, which will typically require the applicant to enter into an agreement with the Department to take measures to protect fish and wildlife resources; (2) CEQA and other regulatory processes and compliance measures will be triggered by Section 1602 water diversion plans; and (3) proposed water diversions might be limited despite holding vested water rights for those proposed diversions.

Ultimately, California's ongoing drought clearly was on the Court's mind given its statement that "...a severe drought, which has the effect of further damaging the habitat of endangered fish species, must be part of the factua matrix..." (Opinion, p. 37.) As the Court indicated, a remedy for fixing a perceived policy defect with Section 1602 may lie "on the other side of Tenth Street, in the halls of the Legislature." (Opinion, p. 3.) The Opinion is available at: <http://www.courts.ca.gov/opinions/documents/C073735.PDF>.

California Environmental Law

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