

To: Chair Bongio, Humboldt County Planning Commissioner
Re: Mitigated Negative Cannabis Declarations
cc: Mr. John Ford
From: Mark Thurmond

January 26, 2022

I write to ask that documents and information related to Negative Declarations (ND) and to Mitigated Negative Declarations (MND), which are required by CEQA, be included in packets for permits to be considered at the February 3, 2022, meeting, and in all future cannabis permit considerations.

Below, I provide CEQA background for this request, and an example. The CEQA background summaries are obtained from the CEQA statute and from the AEP CEQA Portal web site (<https://ceqaportal.org/>),

A. Planning Commission Motions to Approve:

As part of the current approval process, the Planning Commission may vote on a motion to approve a permit, subject to CEQA requirements regarding MND and ND.

B. Environmental Impacts and Thresholds of Significance (from EAP CEQA Portal):

“CEQA requires a Lead Agency [eg. Humboldt County] to determine the significance of all environmental impacts (California Public Resources Code [PRC] § 21082.2; 14 CCR [State CEQA Guidelines] §150641). A threshold of significance for a given environmental impact defines the level of effect above which the Lead Agency will normally consider impacts to be significant, and below which it will normally consider impacts to be less than significant (See State CEQA Guidelines § 15064.7(a)). Lead Agencies are responsible for establishing the thresholds of significance for all documents they prepare.”

C. Mitigation Background:

CEQA (Section 15126.4 (a)) states:

“(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, (2) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments.” (underline is mine)

CEQA (section 15370) defines ‘mitigation’ as:

- *Avoiding the impact altogether,*
- *Minimizing the impact by limiting its degree or magnitude,*
- *Rectifying the impact by repairing, rehabilitating, or restoring the impacted environmental resource,*
- *Reducing or eliminating the impact over time, through actions that preserve or maintain the resource, and*
- *Compensating for the impact by replacing or providing substitute resources or environmental conditions, including through permanent protection of such resources in the form of conservation easements.”*

Purposes of mitigation measures (from EAP CEQA Portal):

“Mitigation measures modify a project “...to substantially lessen or avoid significant effects on the environment...”, thus fulfilling a basic purpose of CEQA to:

“Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.” (State CEQA Guidelines § 15002(a)(3))

Responsibilities of Humboldt County (as the ‘Lead Agency’) (from EAP CEQA Portal):

“The set of mitigation measures that are made a part of an MND or EIR must include not only the measures that are the responsibility of the lead agency [eg. Humboldt County], but also any measures that will be imposed by responsible agencies [eg. Water Boards, DFW]. Coordination with responsible agencies required by CEQA can be helpful in identifying such mitigation measures (see Lead Agency, Responsible Agencies, and Trustee Agencies [eg DFW]Topic Paper).

When approving an environmental document containing mitigation measures, the lead agency must adopt a mitigation monitoring and reporting program (MMRP) to ensure the measures falling under its responsibility are implemented. (CEQA Guidelines, § 15097). The lead agency [eg. Humboldt County] is responsible for ensuring that mitigation measures are implemented in accordance with the program ---.” (underline is mine)

Mitigated Negative Declaration (MND) and Negative Declaration (ND) :

“Mitigation measures are required to be included in an initial study (IS) when the analysis identifies potentially significant or significant environmental impacts. When an IS identifies a significant environmental impact, a negative declaration (ND) or mitigated negative declaration (MND) maybe prepared for the project only if the analysis in the IS:

- Shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a reasonably foreseeable significant effect on the environment (in which case a ND would be prepared), or*
- Identifies potentially significant effects, but includes revisions or mitigation measures, prior to public review, that would clearly avoid or reduce the effects of the project to a less-than-significant level (in which case an MND would be prepared) (CEQA Guidelines, § 15070).*

“The prerequisites for adopting a MND include:(see CEQA Technical Advice Series, https://opr.ca.gov/docs/MND_Publication_2004.pdf)

- 1. Making a good faith effort to determine whether there is substantial evidence that the project would result in any significant environmental effect.*
- 2. Incorporating effective revisions or mitigation measures into the project to alleviate potential significant effects prior to circulating the draft Negative Declaration for public review.*
- 3. Evidence in the record to support the agency's determination that there will be no significant effect as a result of the project.*

Mitigation measures must be included in an MND prior to public circulation. (CEQA Guidelines, § 15071). When the IS finds that there may be a significant impact and feasible measures are not available to reduce the impact to a less-than-significant level, the lead agency must prepare an environmental impact report (EIR) for the project.” (underline is mine)

D. Decision Making Process Requires Public Dissemination of MND and ND Documentation

As described above, documents relating to a MND or to a ND are expected to be provided to the public, as well as to the Planning Commission, before approval. These documents are necessary to

understand the Staff's findings, reasoning, and justification for an MND or a ND. Documents must include at least:

1. The *"Mitigation measures must be included in an MND prior to public circulation.*
2. *Evidence in the record to support the agency's determination that there will be no significant effect as a result of the project.*", which would necessarily encompass observations, findings, reasoning, and justification as to why a proposed mitigation could effectively negate any impact.
3. Defined threshold(s) of significance
4. *"---- not only the measures that are the responsibility of the lead agency [eg. Humboldt County], but also any measures that will be imposed by responsible agencies [eg. Water Boards, DFW]*
5. Convincing and documentable evidence that *"Mitigation measures [are] fully enforceable through permit conditions, agreements, or other legally-binding instruments."*, including *"--- any measures that will be imposed by responsible agencies [eg. Water Boards, DFW]"*.
6. Convincing evidence that *" --- the lead agency [eg. Humboldt County] [can ensure] that mitigation measures are implemented in accordance with the program ---."*

These requirements have not been fulfilled, either in part or in total, and, as a consequence cannabis permit applications have not received the necessary and appropriate review.

E. No documentation, Justification, or Evidence for Cannabis MND; an Example

Many permit applications involve surface water diversion. The County's FEIR recognizes the possible cumulative negative impacts on watersheds and salmonid streams from diversions and provides a means for mitigation through the state water boards. The FEIR concluded that this mitigation, on its own, would reduce the impact to 'less than significant'.

"Implementation of Mitigation Measure 3.8-5 and State Water Board Policy will require cannabis-related surface water diversions to meet flow rate standards during a limited period of time through the year, ---. Monitoring of flow and inspection and repair of leaks and old equipment will ensure that cannabis cultivation activities are consistent with permitted diversion rates established by legal water rights. Because implementation of this mitigation measure would ensure that Numeric Flow Requirements and aquatic base flow requirements are met throughout Humboldt County, this impact would be less than significant. " FEIR page 3-21

It states further that

"Mitigation Measure 3.8-5 would require cannabis-related surface water diversions to meet instream flow and aquatic base flow requirements --- set forth in the State Water Board Policy ---. This mitigation measure would offset project impacts to surface water resources because it would restrict diversions to ensure that Numeric Flow Requirements and requirements for groundwater diversions associated with the aquatic base flow during the dry season are met ---. Thus, after implementation of Mitigation Measure 3.8-5, the proposed ordinance's contribution to cumulative impacts to surface water would not be cumulatively considerable. FEIR Page 3-34,

and with respect to ground water, as well -

"The State Water Board will monitor instream flows during the dry season and evaluate whether the number or location of groundwater diversions to determine whether imposition of a groundwater forbearance period or other measures. State Water Board will notify cannabis cultivators the possibility of a groundwater forbearance period or other measures may be imposed to address the low flow condition "FEIR Table 4.1.

The FEIR also notes the County's responsibility:

"Unless otherwise specified herein, the County is responsible for taking all actions necessary to implement the mitigation measures under its jurisdiction according to the specifications provided for each measure and for demonstrating that the action has been successfully completed." page 4.1

Conclusion:

We see none of the above FEIR description in permit packets. If we did, we would want to know, based on CEQA requirements, if the county has an agreement with the state agency (water boards) and, if so, where is the document? What does it say? Who agrees to do what and when? Information presented should address, among other things, who conducts the flow measurements, who ensures compliance with State Water Board Policy, how is compliance determined, who inspects for leaks, what evidence exists that instream flow testing actually takes place, and who inspects diversion rates? How will mitigation be fully enforced by the county? In other words, how will “ --- *the lead agency* [eg. Humboldt County] [ensure] *that mitigation measures are implemented in accordance with the program ---.*”? We see no evidence that the County, as the lead agency, has ‘--- *adopt[ed] a mitigation monitoring and reporting program (MMRP).*’, as necessary to ‘ensure’ implementation.

These requirements, which are necessary for an MND, beg some simple questions about implementation. I asked the State Water Boards in Sacramento and Santa Rosa, as well as the Department of Fish and Wildlife, which streams in Humboldt County were having in stream flows measured. Answer: none. How do they determine if diversions meet instream flow requirements or are in compliance with their Policy? Answer: they don’t. Do you inspect for leaks? Answer: no. How are these requirements enforced? No answer. The same questions posed to County staff yielded the same answers. An obvious conclusion is that the County has not ‘---*ensured that mitigation measures are implemented in accordance with the program.*’, and that the permitting does not meet a CEQA mandate that ‘*Mitigation measures must be fully enforceable ---.*’.

After peeling back the layers of the County’s process, we see that there is little or no reason to believe any mitigation is, or ever would be, in place. With respect to MND and to mitigation, ‘the Emperor has no clothes’. Thus, for previously approved permits involving diverted water, and with what staff refer to as a MND, there is no evidence that impacts or potential impacts of water diversion will (ever) be mitigated, and, consequently, harm to watersheds caused by diverted water used by permitted cannabis operations will be considerably significant and cumulative.

Many other examples can be cited, including so-called mitigation for fertilizers and chemicals, which are used on all operations and which can have profound impacts on water quality and on fish viability. I have been told, again by water quality board, the county, and DFW, that no nitrate or nitrite testing is done. There is no program to do this. None.

We will not know the extent of cannabis impacts on the environment until the County, as the lead agency, engages with the state agencies to actually engages in legitimate mitigation and enforcement, including measurements of water flow and water contaminants, among other impacts, which is required by the county’s own FEIR. Until then, further evaluation of permit applications would be inappropriate and not defensible.

Thank you.

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