

No April Fools: Starting April 1st, Cannabis Operators Face CEQA Compliance Requirements for State License

By: Whitney Hodges

For many in the cannabis industry, April 1, 2022 is seen as a day of reckoning following the July 2021 passage of Assembly Bill 141 and Senate Bill 160 (collectively, the Cannabis Trailer Bill). In an attempt to transition to an annual licensure program, April 1st marked the beginning of the end for provisional cannabis licensure. It also ushered in significant changes to renewal process for previously granted provisional licenses. These modifications now require applicants to comply with the California Environmental Quality Act (Pub. Res. Code §§ 21000 *et seq.*) (CEQA), a complex statewide policy of environmental protection fraught with potential traps for those unversed in the law, *before* an operator is eligible to be awarded a cannabis state license. This requirement alone carries the potential to create a much higher barrier to entrance into the cannabis market.

I. California's Statewide Cannabis Regulatory Scheme

California has a dual regulatory scheme for cannabis licensing – meaning licensure or permitting is required at both the state and local level.

At the onset of statewide cannabis legalization, California's Bureau of Cannabis Control, now part of the Department of Cannabis Control (DCC), rolled out a program that would issue cannabis operators a "temporary license" starting January 1, 2018. Under the state's original licensing scheme, temporary state licenses were only issued to applicants that have a local permit, license, or other authorization. Once issued, temporary licenses were valid for 120 days, though a license could be extended for 90 days and possibly longer. During this period, a company with a temporary license was expected to be working towards submitting its full state license application. Companies that had received a temporary license were only able to do business with other companies that had received temporary or permanent licenses.

Nearing the end of 2018, California established its provisional licensing program as a stopgap measure to give operators more time to transition from the temporary licenses to "annual" licenses. Originally, the program was only intended to have a 1-year life span. However, in 2019, California lawmakers reauthorized the program, this time with a 2-year window. This extension gave regulators the authority to issue or renew provisional licenses until December 31, 2021.

Under the Cannabis Trailer Bill, March 31, 2022 was the last day to submit applications for provisional licenses with few exceptions.¹ Under the law, the DCC will cease issuing provisional licenses as of June 30, 2022. By January 1, 2026, all cannabis licensees will be required to operate under a state annual license.

II. CEQA Compliance and Consequences to Cannabis Operators

In order to obtain a state-issued annual license, a cannabis operator must demonstrate full compliance with CEQA – a law that has been a leading cause for bottlenecking the cannabis licensure process and delaying the transition to annual licenses. In fact, CEQA compliance, or the lack thereof, was the reason the provisional license program was even created.

Under the provisional license program, to obtain a license, the applicant must (i) have held a temporary license for the same commercial cannabis activity for which it seeks a provisional license; and (ii) submit a completed annual license application with proof that CEQA compliance is *underway*. As discussed above, under the Cannabis Trailer Bill, new provisional licenses will sunset and, eventually, no longer be issued. So long as an existing provisional licensee can demonstrate that it is "actively and diligently" pursuing an annual license, such licensees may continue to operate and will be eligible for renewal every 12 months until January 1, 2025. Applications for provisional license renewal submitted after June 30, 2022, will "require evidence demonstrating that the local jurisdiction has achieved one or more of the benchmarks specified in the regulations of

¹ Certain outdoor cultivators may apply for provisional licenses through June 30, 2022. Additionally, some local equity applicants may apply through March 31, 2023. See California Code of Regulations, Title 4, §15001.1 for list of exceptions.

effort towards completion of the environmental review process and compliance with CEQA.” After July 1, 2023, all provisional license renewals will require a demonstration of CEQA compliance.

CEQA is triggered whenever a public agency issues a discretionary approval for projects – cannabis-related or not – that have a potential to result in “physical change in the environment.”² Once triggered, compliance with the law is not a “one size fits all” endeavor. Instead, what constitutes compliance for cannabis operators will depend on the business model and type of operations (i.e., cultivation, manufacturing, distribution, retail, etc.). Not only can CEQA compliance be convoluted and cumbersome, but it is also incredibly time-consuming and costly. Additionally, CEQA provides an abusive tool for competitors to attack and delay applicants higher up in the licensing queue or for litigious members of the public aimed at preventing cannabis operations in their neighborhoods (a practice known as “Not In My Backyard” or “NYIMB-ism”).

Unless the project is otherwise expressly exempt,³ CEQA review includes analyzing the project’s impacts to the following environmental categories, among others:

- Aesthetics
- Agriculture and forest resources
- Air quality
- Biological resources
- Geology and soils
- Greenhouse gas emissions
- Energy consumption
- Hazards and hazardous materials
- Hydrology and water quality
- Land use and planning
- Noise
- Traffic/transportation
- Utilities

If the project will result in impacts above a certain level of significance in any environmental category, CEQA review and compliance also requires the implementation of mitigation measures. CEQA-acceptable mitigation means measures or mechanisms that will: (i) avoid or reduce the impact; (ii) provide restoration subsequent to the impact; or (iii) offset or compensate for the impact.

Under CEQA, local jurisdictions are required to inform the DCC about the potential environmental impacts of any proposed cannabis operations. However, because California has instituted dual licensing, either a local jurisdiction (city or county) or the DCC may be the public agency tasked with ensuring CEQA review has occurred prior to the issuance of a cannabis-related license or permit. This role is referred to as the “lead agency.”⁴

A local jurisdiction would be the lead agency responsible for CEQA compliance (i) when it adopts its local cannabis ordinance⁵ or (ii) on a project-by-project basis. When a local government prepares and certifies/adopts a programmatic CEQA-compliant environmental document, such as an environmental impact report or mitigated negative declaration, that addresses all potential environmental effects of the local cannabis ordinance and projects permitted thereunder, subsequent project-specific permit applications would be subject to streamlined CEQA review, typically handled in a “within the scope” analysis.⁶

licensees who do not wish to or cannot comply with CEQA. For those operators well positioned to take advantage of these situations, the Cannabis Trailer Bill could be ripe with possibility.

If the local government has not certified/approved a CEQA-compliant environmental document, the DCC is the lead agency for all CEQA purposes. Applicants are required to submit a complete description of the proposed project, including information about the project site, existing conditions and facilities, proposed facilities and improvements and the construction methods and operation’s practices. The DCC will then perform CEQA review and compliance in advance of issuing a state annual

² Under CEQA, a project can be an activity taken directly by a public agency or public agency approval of a private activity.

³ Common exemptions for project-specific cannabis operations include the following categorical exemptions identified in the statute: existing facilities (Class 1), replacement or reconstruction (Class 2), new construction or conversion of small structures (Class 3), minor alterations to land (Class 4), minor alterations in land use limitations (Class 5), minor land divisions (Class 15), and in-fill development projects (Class 32).

⁴ As defined by CEQA, a “lead agency” is the public agency that has the primary responsibility for carrying out or approving a project. (CEQA Guidelines § 15367.) To be a CEQA lead agency, the public agency must have discretionary authority over the proposed project

⁵ See *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, holding that the City of San Diego’s approval of a medical marijuana dispensary ordinance at issue was a project under a CEQA.

⁶ Pub. Res. Code § 21166; CEQA Guidelines § 15162.

license. Additionally, the DCC is the lead agency when a local jurisdiction has determined that a project-related approval is a ministerial action instead of discretionary.

If the local government does not comply with CEQA concurrently with the adoption of a jurisdiction-wide cannabis ordinance, then CEQA compliance is handled on a project-by-project basis – whether the local government or the DCC is the lead agency. In such instances, the applicant is on the hook for the costs associated with expensive and time-intensive CEQA coverage and any related legal challenges from the public or other regulatory agencies.

III. Consequences

While CEQA compliance was always required in order for cannabis operators to obtain an annual license, the provisional license program allowed applicants to run operations while local governments and operators kicked the CEQA can down the road. This oftentimes permitted operators to open their businesses without having to undergo confusing, pricey and time-consuming CEQA review. With the sunset of the provisional license program, this luxury is eliminated. There is no question that CEQA compliance will create much higher barriers of entrance into the cannabis market. The Cannabis Trailer Bill also puts substantial pressure on local agencies to perform CEQA review and adopt/certify a CEQA-compliant environmental document in conjunction with its local cannabis ordinance.

While there are clearly cost and delay implications related to the implementation of the Cannabis Trailer Bill, there may remain silver linings to these significant changes. The changes in the state's licensing program could serve to weed out (pun intended) operators without the proper capital or sophistication for successful operation in the cannabis industry. This, in turn, could free up local permits, which are often limited or capped by the local jurisdiction, for established players in the cannabis game. It could also mean existing provisional licenses are up for sale from licensees who do not wish to or cannot comply with CEQA. For those operators well positioned to take advantage of these situations, the Cannabis Trailer Bill could be ripe with possibility.

About the Author



Whitney Hodges is a partner in the Real Estate, Land Use and Natural Resources Practice Group in the firm's San Diego office. She is the leader of the firm's Cannabis Industry Team and serves on the firm's Pro Bono, Recruiting and Diversity & Inclusion committees, as well as numerous industry specific teams.

Areas of Practice

Whitney's practice focuses on the representation of clients involved in real estate development. She advises and represents major residential, industrial, commercial and mixed-use development projects, as well as Native American Indian tribes and renewable energy developers through all phases of the land use regulatory process and environmental compliance. Her land use experience includes real estate due diligence investigations, negotiating and drafting development agreements, processing land use entitlements, advising tribal governments on environmental and natural resources law, and appearing before governmental agencies and commissions. She also represents developers and management in traditional labor law issues, including union negotiations. Whitney also advises cannabis companies and ancillary businesses on state and local regulatory compliance and real estate transactions.