

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE MARIJUANA CONTROL BOARD**

In the Matter of	)	
	)	
ESTER HORTICULTURE AND	)	OAH No. 17-0445-MCB
RESEARCH	)	Agency No. AB-17-0089
_____	)	

**DECISION**

**I. Introduction**

Ester Horticulture and Research applied for a Limited Marijuana Cultivation Facility license. The Marijuana Control Board issued a license, with delegation to the director. During the initial inspection of the facility, the inspector found 33 flowering plants. The inspector issued a notice of violation of state marijuana regulations. The Marijuana Control Board ordered the seizure and destruction of the plants. Ester Horticulture and Research appealed.

Because the plants were not properly logged into the marijuana inventory tracking system, in violation of the regulations, the board’s decision to seize the plants should be affirmed.

**II. Facts**

On August 18, 2016, Ester Horticulture and Research (Ester) applied for a limited marijuana cultivation facility license.<sup>1</sup> On October 12, 2016, the Alcohol and Marijuana Control Office (AMCO) acknowledged receipt of a complete application, and notified Ester that the license would “not be finally issued and ready to operate until all necessary approvals are received and a preliminary inspection of your premises by AMCO enforcement staff is completed.”<sup>2</sup>

On October 28, 2016, the Marijuana Control Board voted to approve Ester’s limited marijuana cultivation facility license, with delegation to the director. The Director notified Ester, explaining: “Delegation means that the board has authorized me to issue your license once all outstanding approvals are received.”<sup>3</sup> The Director’s letter also asked that Ester “not plan to

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<sup>1</sup> Record at 97 - 149.  
<sup>2</sup> Record at 1.  
<sup>3</sup> Record at 23

operate your license until the final steps to licensure, including Metrc credentialing and a preliminary inspection, are completed.”<sup>4</sup> Finally, the director wrote “To get an idea of the final steps once your license is changed to ‘active’ in our database, please review the post-approval instructions in the attached email. Please remember that you will remain in delegated status until all approvals are received.”

The post-approval instructions the director referred to a nine-step process a licensee must go through after approval by the board and before operating the licensed business. These include getting a marijuana handler permit for the licensee, and getting the business credentialed into METRC.<sup>5</sup> METRC is the marijuana inventory tracking system the board requires licensees to use.<sup>6</sup> The steps culminate in an initial inspection of the establishment by AMCO. If the establishment passes the inspection and everything is in order, the inspector will give the license to the licensee.<sup>7</sup> The instructions tell licensees not to schedule an inspection “unless you are within two weeks from being 100% ready to operate your business.” Furthermore, they advise licensees to “[m]ake sure that you are within approximately seven days of your inspection when you tag your plants. The plants will be approximately 6 - 18 inches tall on the day of your initial inspection.”<sup>8</sup>

It took nearly three months after the board voted to approve Ester’s license with delegation for Ester to obtain the required approvals. Ester submitted the last required approval from the state fire marshal on January 27, 2017.<sup>9</sup> AMCO printed Ester’s license on January 28, 2017, which is also the “issue date” shown on the license.<sup>10</sup> Although it printed the license on this date, it did not deliver the license to John Collette, the designated licensee.<sup>11</sup> The last step in the post-approval instructions provides in part: “On the day of your inspection, the enforcement officer will bring your license. If your facility matches what you’ve submitted to the board and all requirements are in place, you will receive your license and the administrative hold will be removed from METRC.”<sup>12</sup>

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4 Record at 23  
5 Record at 62.  
6 Testimony of Franklin.  
7 Record at 62.  
8 Record at 62.  
9 Record at 59 - 60.  
10 Record at 96, 194.  
11 Record at 207.  
12 Record at 62.

AMCO inspected Ester’s facility on February 15, 2017.<sup>13</sup> The inspector found 33 flowering marijuana plants, which the inspector estimated were between four and five feet tall.<sup>14</sup> The inspector did not give the license to Ester on February 15, 2017. Instead, the inspector filed a notice of violation, alleging that once Ester was credentialed into the METRC system on February 2, 2017, it “backdated the plants and entered them in flowering stage on 1-18-17; skipping the clone/seed and vegetative stages in the system.”<sup>15</sup> Ester responded to the notice of violation, acknowledging that it had planted the plants on January 18, 2017.<sup>16</sup>

On April 13, 2017, the board held a hearing in the matter. The board concluded that the notice of violation was correctly issued and ordered staff to seize and destroy the 33 plants, but not to issue a misconduct charge.<sup>17</sup> AMCO then seized the marijuana from Ester.<sup>18</sup>

On April 14, 2017, the Director of AMCO notified Ester of the board’s determination that having 33 plants in the flowering stage on the date of the initial inspection violated 3 AAC 306.400, 3 AAC 306.425, and 3 AAC 306.730, adding that it was contrary to the board resolution adopted July 14, 2016.<sup>19</sup>

On April 26, 2017, Ester’s limited marijuana cultivation facility license took effect.<sup>20</sup>

On April 27, 2017, Ester appealed the board’s decision concurring with the notice of violation and order the plants seized and destroyed. The matter was referred to the Office of Administrative Hearings. A hearing was held on August 8, 2017. John Collette represented Ester Horticulture and Research. Assistant Attorney General Harriet Milks represented the staff of the Marijuana Control Board. Erika McConnell, Director of the Marijuana Control Board, Cynthia Franklin, former Director of the Marijuana Control Board, and Amanda Stonecipher, an Investigator for the Marijuana Control Board, testified.

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<sup>13</sup> Record at 207.  
<sup>14</sup> Record at 194; 232 - 234.  
<sup>15</sup> Record at 207.  
<sup>16</sup> Record at 211.  
<sup>17</sup> Record at 203, 339 - 340.  
<sup>18</sup> Record at 321.  
<sup>19</sup> Record at 203.  
<sup>20</sup> Record at 341.

### III. Discussion

The notice of violation issued to Ester described the violation as follows:

During your initial inspection on February 15, 2017 it was discovered there were 33 flowering plants approximately 4 - 5 feet tall in your facility. According to licensing records, you did not receive Fire Marshal Approval until 1-25-17, your Marijuana Handler's Permit until 2-1-17, and credentialed into METRC until 2-2-17. METRC shows once you were credentialed into the system on 2-2-17, you backdated the plants and entered them in flowering stage on 1-18-17; skipping the clone/seed and vegetative stages in the system.

The notice of violation cited three regulations: 3 AAC 306.400 (relating to activities for which a marijuana cultivation facility license is required and requirements for obtaining a marijuana cultivation facility licensee); 3 AAC 306.425 (requiring all marijuana cultivation facility licensee to obtain a marijuana handler permit); and 3 AAC 306.410 (relating to marijuana inventory tracking).

However, the action the board took on April 13, 2017 in response to the notice of violation was limited in scope. The board specifically instructed the enforcement staff not to issue a misconduct charge. Ester's limited marijuana cultivation facility license had not yet moved into "active" status, or taken effect. The action the board took on April 14, 2017 was to concur that a violation had occurred, and to order that the plants be seized and destroyed.

It is this action of the board that Ester is appealing. Although there was considerable argument at the hearing addressing whether Ester violated the law by "jumping the gun" in its planting schedule, the board did not direct staff to issue a misconduct charge, rather, it simply ordered the marijuana plants seized.<sup>21</sup> Less than two weeks later, Ester had an active limited marijuana cultivation facility license.<sup>22</sup> Therefore, the discussion here will focus on the seizure of the 33 plants.

#### ***A. The 33 flowering plants were not properly logged into the METRC Inventory Control System***

Under 3 AAC 306.435, all marijuana establishments, including limited marijuana cultivation facilities, must use a marijuana inventory tracking system. Marijuana must be identified and tracked in the marijuana inventory control tracking system "from the time the marijuana is propagated from seed or cutting."<sup>23</sup> AMCO may seize marijuana from a licensed

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<sup>21</sup> See Director's Prehearing Brief;

<sup>22</sup> Record at 321.

<sup>23</sup> 7 AAC 306.730(a).

establishment if the establishment has “any marijuana . . . not properly logged into the marijuana establishment’s marijuana inventory tracking system.”<sup>24</sup> Once marijuana has been seized, if after a hearing the board finds that seizure of the marijuana was justified, the marijuana will be destroyed.<sup>25</sup>

The notice of violation cited the regulation requiring the use of a marijuana tracking system, and charged that Ester had backdated its plants and skipped the clone/seed and vegetative stages. In other words, the notice charges that Ester failed to properly identify and track the plants in the METRC system.

The text of 3 AAC 306.435, the tracking system regulation cited in the notice of violation, requires a marijuana cultivation facility to

use a marijuana inventory tracking system in compliance with 3 AAC 306.730 to ensure all marijuana propagated, grown, or cultivated on the marijuana cultivation facility’s premises is identified and tracked *from the time the marijuana is propagated* through transfer to another licensed marijuana establishment or destruction. The marijuana cultivation facility shall assign a tracking number to each plant over eight inches tall. . . . Clones or cuttings must be limited to 50 or fewer plants and identified by a batch tracking number.<sup>26</sup>

This regulation refers to 3 AAC 306.730, which in turn requires all marijuana establishments (including testing facilities, product manufacturing facilities, and retail stores as well as cultivation facilities) to use a marijuana inventory tracking system to “ensure all marijuana cultivated and sold in the state . . . is identified and tracked *from the time the marijuana is propagated from seed or cutting*.”<sup>27</sup>

Together, 3 AAC 306.435 and 3 AAC 306.700 clearly require that a marijuana cultivation facility ensure that all marijuana propagated, grown, or cultivated on the premises be identified and tracked from the time it is propagated from seed or cutting. The term “propagate” is defined in the regulations as meaning “to cause a marijuana plant to grow by planting clones or cuttings, and nurturing them into viable plants up to eight inches in height.”<sup>28</sup> The regulations emphasize that the marijuana inventory tracking system is intended to track plants from the time they are propagated and less than 8 inches tall.

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<sup>24</sup> 3 AAC 306.830(a)(1).

<sup>25</sup> 3 AAC 306.830(c).

<sup>26</sup> 3 AAC 306.435(a) (emphasis added).

<sup>27</sup> 3 AAC 306.730(a) (emphasis added).

<sup>28</sup> 3 AAC 306.990(34).

The regulations also distinguish between “immature” marijuana plants, referring to plants “with no visible crystals, buds, or flowers, and in which the exposure to light is scheduled with the intent to prevent formation of crystals, buds, or flowers” and “flowering” marijuana plants, referring to plants “with visible crystals, buds, or flowers, or for which the exposure to light is scheduled with the intent to produce crystals, buds, or flowers.”<sup>29</sup>

The investigator who performed the initial inspection of Ester’s limited marijuana cultivation facility testified that Ester’s flowering plants had been logged into METRC at the flowering stage, rather than tracked from the time they were propagated.<sup>30</sup> She also testified that the entry of the plants into METRC had been backdated to indicate the plants were planted on January 18, 2017. Mr. Collette in his testimony confirmed that the plants were first entered into METRC at the flowering stage.

The investigator estimated that Ester had started growing its plants in November or December 2016, well before January 18, 2017.<sup>31</sup> Mr. Collette estimated that he had planted the plants in April or May, and referred to having invested four to five months in them. He explained that he had planted the plants in the “grow area” of the facility on January 18, 2017. The plants were existing before that date, but they were not yet planted in the grow area.<sup>32</sup>

Also, the inspector knew that Ester had not entered the 33 flowering plants into the METRC system when plants were propagated, or tagged them when they reached eight inches, because Ester first gained access to, or “credentialed into” the METRC system on February 2, 2017. The inspection took place on February 15, 2017. The thirteen days between the date Ester credentialed into the METRC system and the date of the inspection is a much shorter period than the investigator estimated it must have taken for the plants to develop from propagation to the flowering stage.

Mr. Collette acknowledged that he “planted” the plants on January 18, 2017, and explained that by “planted” he meant that he had planted the plants in the growing room at the limited marijuana cultivation facility.<sup>33</sup>

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<sup>29</sup> 3 AAC 306.990(4) and (5).

<sup>30</sup> Testimony of Stonecipher.

<sup>31</sup> Testimony of Stonecipher.

<sup>32</sup> Testimony of Collette.

<sup>33</sup> Testimony of Collette.

It is undisputed that Ester first entered the 33 plants into METRC when they were in the flowering stage, rather than when they were first propagated. Based on the testimony at the hearing and the administrative record, it is more likely than not that the plants were propagated long before they were logged into the system. The plants were not identified and tracked in METRC from the time they were propagated, which inconsistent with the requirements of 3 AAC 306.730. Thus, the notice of violation correctly identified that a violation of 3 AAC 306.730 had occurred.

***B. Because the plants were not properly logged into METRC, and seizure was authorized by regulation, the director's actions in seizing the marijuana should be affirmed.***

The director has the duty to enforce the statutes and regulations regulating the cultivation of marijuana.<sup>34</sup> The director also has authority to seize marijuana from a licensed marijuana establishment if the marijuana establishment has any marijuana “not properly logged into the marijuana establishment’s marijuana inventory control tracking system.”<sup>35</sup> As discussed above, the plants the investigator found the day of Ester’s initial inspection, February 15, 2017, had first been logged into METRC at the flowering stage. Because the regulations require that plants be logged in when propagated, well before they reach the flowering stage, the plants were not “properly logged” into the METRC system.

The investigator did not immediately remove the plants from Ester’s facility. Instead, she placed the plants on “hold” status in METRC “so they could not be sold or transferred to another facility.”<sup>36</sup> She informed Mr. Collette that he could continue to care for the plants pending a board ruling on the matter.<sup>37</sup> The investigator issued the notice of violation on February 23, 2017. The notice informed Mr. Collette of his right to request to appear before the board and be heard regarding the notice of violation.<sup>38</sup> Mr. Collette addressed a written defense to the board, which was received by AMCO on March 6, 2017.<sup>39</sup> On April 13, 2017, the board held a hearing in the matter. Mr. Collette participated. The board concluded that the notice of violation was correctly issued and ordered staff to seize and destroy the 33 plants.<sup>40</sup> The marijuana was taken

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<sup>34</sup> AS 17.38.150.

<sup>35</sup> 3 AAC 306.830(a)(1).

<sup>36</sup> Record at 321.

<sup>37</sup> Testimony of Stonecipher.

<sup>38</sup> Record at 258.

<sup>39</sup> Record at 259.

<sup>40</sup> Record at 339 - 340.

from Ester's facility on April 14, 2017. The marijuana was bagged and placed in an evidence locker pending the outcome of this appeal.<sup>41</sup>

Under 3 AAC 306.830(a), the director and the investigator's authority to seize plants not properly logged into the METRC system is discretionary. In this case, the investigator did not seize the plants, but merely put them in hold status in METRC pending board action.

Ester did not argue that the board did not have authority to seize the plants. The board also had other options -- it could have fined Ester, or recommended that the investigator file criminal charges.<sup>42</sup>

Because the director and employees of the board have authority to seize marijuana not properly logged into METRC, because the 33 flowering plants found at Ester's initial inspection were first logged into METRC at the flowering stage, and because the board itself considered the matter before the plants were actually taken from Ester, the seizure of the marijuana can be upheld. While the board has discretion to forebear from seizing the plants, and even now could overturn its seizure, no persuasive reason has been advanced why the board should leave a grower in possession of plants that so clearly were grown outside the regulatory structure.

***C. What about the policy adopted at the July 14, 2016 board meeting?***

As discussed above, the 33 flowering plants found at Ester's facility during the initial inspection were not properly logged into METRC, and therefore, the issuance of the notice of violation citing 3 AAC 306.730 and the seizure of those plants was authorized.

However, the director's letter of April 14, 2017 explaining the board's decision to uphold the notice and ordering the seizure and destruction of the plants also found that having the 33 flowering plants at the facility on the day of the preliminary inspection was contrary to the board resolution adopted on July 14, 2016.<sup>43</sup> At that meeting, the board adopted a policy on preliminary inspections. The policy stated that "[u]pon initial inspection, a licensee may have any number of immature (non-flowering) plants" and 12 additional plants designated as mother plants.<sup>44</sup>

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<sup>41</sup> Testimony of Stonecipher; Record at 321.

<sup>42</sup> AS 17.38.121, 17.38.131; 3 AAC 306.840.

<sup>43</sup> Record at 203.

<sup>44</sup> Record at 335 - 338. *See also* Director's Prehearing Brief.



Ester did not dispute that having 33 flowering plants on the day of the initial inspection was contrary to the policy. Instead, Ester argued that the policy was a regulation, and that it was not properly adopted and “therefore cannot be honored as possessing the power of law.”<sup>45</sup>

Ms. Franklin testified that the policy adopted at the board meeting was adopted in response to a request by the director and staff for clarification. She said the policy did not have any effect on 3 AAC 301.730, and was “further clarification for the staff in terms of what .730 meant to the board.”

However, whether the policy on initial inspections was adopted by the board on July 14, 2016 should have been adopted as a regulation according to the Administrative Procedures Act is not an issue that has to be decided in the context of this case.<sup>46</sup> The notice of violation did not cite the policy. As described above, the board’s order to seize the plants finds adequate support in the notice of violation and the regulations.

***D. Mr. Collette’s argument that the regulations and policy did not take into account the practical necessities of starting a marijuana cultivation business***

In 2014, the voters of the state passed an initiative legalizing the commercial cultivation of marijuana.<sup>47</sup> The initiative took effect February 24, 2015. It created the Marijuana Control Board, and gave the board nine months to adopt regulations.<sup>48</sup> The initiative specified that “[s]uch regulations shall not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable.”<sup>49</sup> The initiative went on to define “unreasonably impracticable” as meaning “that the measures necessary to comply with the regulations require such a high investment of risk, money, time or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.”

Although Mr. Collette did not specifically invoke this provision of the initiative in his argument, he did argue that the regulations and policies of the board did not take into account the practical necessity of starting plants months in advance of the planned start of operations of a marijuana cultivation facility. He argued that there had to be plants grown prior to licensure in

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<sup>45</sup> Ester Horticulture and Research’s Pre-Hearing Notes on Hearing of August 8, 2017.

<sup>46</sup> See *Jerrel v. State*, 999 P.2d 138 at 143 - 144 (Alaska 2000) and *Alaska Center for the Environment v. State*, 80 P.3d 231, 243 - 244 (Alaska 2003) for discussion of what constitutes a regulation.

<sup>47</sup> 2014 General Election Ballot Measure 2; AS 17.38.070.

<sup>48</sup> AS 17.38.190.

<sup>49</sup> AS 17.38.190.

order for there to be an industry at all, and he argued that the inventory tracking system requirements “applied to no one in the initial wave of licensing.” He cited examples of other individuals who had four-foot-tall plants on the day of their initial inspection and nonetheless received a marijuana cultivation facility license. He argued that if a person followed the “strict dictates” of the regulations, the person “would be probably bankrupt by the time [the person] ended up with any product because of the delay built in.”<sup>50</sup>

Mr. Collette argued that it would have been impossible for him to fully comply with the regulations, including the inventory tracking regulation, and the director’s instructions. He argued that no one else fully complied. However, Cynthia Franklin’s effectively rebutted this argument. Ms. Franklin was the director from September 22, 2014 through January 6, 2017, so she was the director when the regulations were developed and adopted, and when the METRC system was selected as the marijuana inventory control system. Ms. Franklin specifically addressed the difficulty of getting the new industry started, and the tight timeframes set for the board to adopt regulations. She discussed the board’s action in adopting the policy relating to initial inspections at its July 14, 2016 meeting. She specifically discussed the director’s instructions to applicants for marijuana cultivation facilities, testifying convincingly that “no other cultivator ever had an issue with this,” and “[t]his was a very clear very detailed instruction method and every other cultivator got it and did it right.” Finally, she addressed Ester’s situation, observing that “no one else that had a delay in getting their inspection had full on flowering plants when we arrived.”

In light of Ms. Franklin’s testimony, Mr. Collette’s argument was not persuasive. The practical challenges set up in the regulations and the director’s instructions to applicants were not such that they made it “unreasonably impractical” to obtain a marijuana cultivation facility license and begin operations, because applicants other than Ester managed to navigate the process.

#### **IV. Conclusion**

The regulations applicable to marijuana establishments and to marijuana cultivation facilities specifically require that marijuana be identified and tracked in a marijuana inventory tracking system from the time it is propagated. The 33 flowering plants Ester had on the date of

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<sup>50</sup> Testimony of Collette.

its initial inspection were first logged into the inventory tracking system as flowering plants. Because the plants were not properly logged into the inventory control system when propagated, Ester was in violation of the regulations. The board's decision to seize the marijuana is upheld.

DATED: November 8, 2017.

Signed  
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Kathryn L. Kurtz  
Administrative Law Judge

## Adoption

The Marijuana Control Board adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 24 day of January, 2018.

By: Signed  
\_\_\_\_\_  
Signature  
Mark Edward Springer  
\_\_\_\_\_  
Name  
Chair, Alaska MCB  
\_\_\_\_\_  
Title

[This document has been modified to conform to the technical standards for publication.]