

California's Cannabis Appellations Plan Charts A New Frontier

By **Omar Figueroa, Lauren Mendelsohn and Andrew Kingsdale** (July 12, 2022)

Whether you realize it or not, you're probably familiar with the concept of appellations of origin. Appellations of origin, often referred to simply as appellations — which comes from the Latin word meaning "to name" or "designate" — are a type of geographical indicator used to designate that certain products come from a particular region and, in most cases, are produced in a particular way.

This serves to inform customers, as well as to add value to products bearing such a designation.

Appellations of origin are most famous in the context of wine, cheese and meats. For example, a sparkling wine can only be called Champagne if it comes from the Champagne region of France; Prosciutto di Parma must be made from pigs raised in Italy's Parma province and certified by a special institute in order to bear that name; and Roquefort cheese must be aged in the natural Combalou caves of Roquefort-sur-Soulzon in southern France.

What you might not know is that California is in the process of rolling out an appellations program for cannabis — the first attempt in the world to create a formal system like this for cannabis and cannabis products.

Origins of the Cannabis Appellations Program

California's groundbreaking Cannabis Appellations Program, or CAP, originates from the state Legislature's adoption of the Medicinal and Adult Use Cannabis Regulation and Safety Act in 2017 following voter approval of the Adult Use of Marijuana Act in 2016.

MAUCRSA merged California's medical and recreational cannabis laws and set forth a comprehensive regulatory framework with different license types overseen by three different regulatory agencies.

MAUCRSA also expressly tasked the California Department of Food and Agriculture, or CDFA, with developing "a process by which licensed cultivators may establish appellations" for cannabis "grown in a certain geographic area in California" and in compliance with required standards, practices and varieties.[1]

Shortly after MAUCRSA became law, cannabis cultivators started debating whether indoor or mixed-light cultivators would be eligible for the appellations program, because those cultivation methods minimize the impact of natural environmental factors upon cannabis cultivation.

For example, with indoor cultivation it is possible to precisely control temperature and humidity and to protect the crop from the elements, while outdoor cultivators sometimes wish they could exercise such control, such as when hailstones start falling from the sky.



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Yet while Mother Nature might make outdoor growing less predictable, it is these natural environmental factors that make up the terroir that influences the character of the end product. Terroir refers to the combination of natural environmental factors such as soil composition, altitude, wind, humidity, temperature and sunlight, which together give agricultural products grown or raised in that area a distinctive character.

In 2020, California adopted S.B. 67, which limited the CAP to outdoor cultivation in order to implement a terroir-based system.

The authors of S.B. 67 represented counties located along California's North Coast — e.g., Humboldt and Mendocino counties — and in forested regions where multigenerational outdoor cannabis cultivation historically occurred.

They were concerned that appellation standards would be subverted if indoor grows, or where plants are potted and exposed primarily to artificial light, were allowed to participate because appellations of origin are intended to create consumer expectations about how a product was influenced by its environment.[2]

Rulemaking, public comments and workshops occurred between 2020-22, with final rules adopted for the CAP on Nov. 23, 2021.[3] With the consolidation of cannabis regulatory agencies under the new Department of Cannabis Control, the CAP is now under the control of the CDFA's Office of Environmental Farming and Innovation.[4]

Comparison to American Viticultural Areas

Hoping to develop a connoisseur's market for premium sustainable cannabis, California's CAP is intentionally more rigorous than its wine industry counterpart, American Viticultural Areas. AVAs delimited grape-growing regions distinguishable by geographic or climatic features, with boundaries defined by the Alcohol and Tobacco Tax and Trade Bureau, or TTB.[5]

AVA petitions must include evidence that the name of the proposed AVA is locally or nationally known and some evidence of distinguishing features such as climate, geology, soils, elevation and physical features. They also must describe "in what way these features affect viticulture and how they are distinguished viticulturally from features associated with adjacent areas outside the proposed AVA boundary." [6]

Once the TTB approves an AVA, any vintner may use it on a wine label if "[n]ot less than 85% of the volume of the wine is derived from grapes grown in the labeled viticultural area," with certain exceptions.[7]

AVAs do not limit the types of grapes grown, grape growing methods, or the processes or standards for vinification, or require that AVA designations are linked to specific legacy wines.

By contrast, California's CAP is more akin to appellations of origin defined under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, which factors in not just the physical location in which a product was created, but also the product's interaction with, and expression of, the unique terroir of that specific location.[8]

To use a California cannabis appellation on a product, the cannabis must be grown outdoors without any artificial light or structures. Additionally, the cannabis plants must be grown in the ground, not in pots. These reflect a desire by California for the CAP to be a truly terroir-

based system; cannabis appellations will not just identify a unique geographical region, but also the region's features that are tied to the end product.

Also different from AVAs, California's cannabis appellations will require a historical connection between people and the regions. Petitions must provide evidence of "the legacy, history, reputation, and economic importance of cannabis production in" the area.[9]

Genine Coleman, founder of the legacy advocacy group Origins Council[10] and co-founder of the Mendocino Appellations Project, notes that "[t]he Cannabis Appellations Movement has been driven by California's legacy cannabis producing community." And, she explains, "CDFA's Cannabis Appellations Program will be paramount to the success and the stature of the California cannabis industry within a mature global marketplace for cannabis."

Petitioning Process for a California Cannabis Appellation

California cannabis appellations can be created via a petition that will be reviewed by a panel of experts and also will be open to public comment.

The panel of experts is still being created, and according to a recent CAP webinar, will consist of in-house subject matter experts from the CDFA's Office of Environmental Farming and Innovation, as well as outside experts to be selected via a request for proposal process.

Petitions must be submitted by a group of three or more licensed cultivators located within the proposed cannabis appellation region. Nonrefundable petitioning fees include \$2,850 to submit a petition proposing a new cannabis appellation; \$14,250 to activate a cannabis appellation proposed by an approved petition; \$1,425 to submit an amendment to an existing cannabis appellation; and \$7,125 if that amendment is approved.

Petitions to establish a cannabis appellation must include, among other things:

- A description of the geographic area covered by the petition;
- Evidence of the proposed cannabis appellation name being used in that area;
- The geographic boundaries of the proposed cannabis appellation and a description of unique geographic features affecting cannabis production in that area;
- Identification of specific standard, practice and cultivar requirements associated with cannabis cultivation in the proposed cannabis appellation; and
- A description of the legacy, history and economic importance of cannabis cultivation within the cannabis appellation.[11]

CAP petitions will require consensus among established cultivators within the boundaries of a proposed appellation about their traditional practices and standards for cultivation. These practices and standards must include measurable, scorable or certified requirements applicable to the cannabis or cultivation, as well as allowable or prohibited methods of cultivation.[12]

These and the other requirements are described further in the CAP regulations, which have been codified in Chapter 2 of Title 3, Division 8 of the California Code of Regulations.[13]

For cannabis that is not grown outdoors, or that is grown using light deprivation or in pots, city of origin, county of origin, or city and county of origin designations remain an option, if 100% of the cannabis in the product bearing such a label was produced in that city, county or both.[14]

Potential Economic Impacts of California's CAP

Appellations of origin are viewed by many as a potential means of helping small cannabis farmers survive and compete in an increasingly challenging marketplace by leveraging the power that comes along with an exclusive government-recognized designation.

The market is increasingly challenging for small farmers for several reasons: Small farmers are competing with an illicit market unburdened by taxes and regulations as well as with massive agribusiness-type grows funded by wealthy investors, which have enough runway to operate at a loss for multiple years; there are insufficient retail storefronts across the state and expensive slotting fees to get shelf space; and the price of regulated cannabis in California crashed in 2022 as a result of overproduction.[15]

In other industries, relatively small craft producers of other agricultural products have become known and respected internationally by using the power of their appellation. (That's not to say that appellations are the only or main driver for economic growth; some research shows that traditional branding and trademark protection can be more important in this area.)[16]

Given the rise in cannabis tourism and the wider interest in farm-to-table-type experiences, combined with the seemingly unlimited reach of social media, appellations are not such a far-fetched idea for the cannabis industry.

On the other hand, CAP is by no means a panacea for small cannabis farmers. Significant reforms, including tax restructuring and removal of red tape, are needed to truly benefit the struggling mom and pop operators.

Some relief recently came in the form of A.B. 195, a budget trailer bill specifically about cannabis that was adopted by the Legislature and signed into law by Gov. Gavin Newsom last month.[17] That bill eliminated the cultivation tax as of July 1 and provided some tax incentives to certain licensees.

The benefits of this could be limited though, given that the bill also allows for future increases in the excise tax rate to make up for what was lost by removing the cultivation tax.

Additionally, until federal law changes, there may be a limit to the value that a cannabis appellation brings to a brand on the international stage. Because cannabis remains a Schedule 1 substance under the Controlled Substances Act, interstate commerce involving cannabis is not federally legal, so use of California's appellations on product labels and packaging will be confined to the California market.

Similarly, federal registrations for trademarks and certification marks are limited only to those marks that are legally used in interstate commerce — i.e. not on cannabis or other plant-touching products.

Regardless of the potential limitations of CAP, it is a pioneering program that reflects California's progressive stance on cannabis as well as its agricultural and entrepreneurial

values. We look forward to the creation of a new California map that delineates the world's first cannabis appellations of origin.

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[1] California Business and Professions Code § 26063; see also CDFA, CalCannabis Appellations Project Fact Sheet, available at https://static.cdfa.ca.gov/MCCP/document/P45_Appellation%20Fact_Sheet_ADA.pdf.

[2] McGuire (D), et al., Senate Rules Committee, SB-67 Bill Analysis, 8/31/20 Senate Floor Analyses, pg. 5, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB67.

[3] The final regulations are available here: https://www.cdfa.ca.gov/oefi/cap/docs/text_of_regulations.pdf.

[4] The CAP website can be accessed here: <https://www.cdfa.ca.gov/oefi/cap/>.

[5] 27 CFR part 9, <https://www.ecfr.gov/current/title-27/part-9>.

[6] 27 CFR section 9.12.

[7] 27 CFR section 4.25(e); see also TTB, Wine Appellations of Origin, <https://www.ttb.gov/appellations-of-origin>.

[8] 3 Cal. Code of Regs. §9102(j) (cannabis must be produced without artificial light or any structures covering the plant or modifying the natural light received by the plant in the canopy area).

[9] 3 Cal. Code of Regs. §9102(h).

[10] Origins Council's website can be found here: <https://originscouncil.org/about/>.

[11] 3 Cal. Code of Regs. §9102.

[12] 3 Cal. Code of Regs. §9000(d), (e); 3 Cal. Code of Regs. §9107.

[13] 3 Cal. Code of Regs. §9000 et seq.

[14] California Business and Professions Code § 26063; 4 Cal. Code of Regs. §17408(a)(1).

[15] <https://www.kron4.com/news/california/marijuana-industry-warns-legal-market-could-collapse/>.

[16] Malorgio, Giulio & Camanzi, Luca & Grazia, Cristina, "Effectiveness of European Appellations of Origin on the International wine market" (2007), available at https://www.researchgate.net/publication/23508887_Effectiveness_of_European_Appellations_of_Origin_on_the_International_wine_market.

[17] Assembly Bill 195 (2021-2022), available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB195. See also Lauren Mendelsohn, "Governor Newsom Signs Cannabis Trailer Bill, Resulting in Largest Changes to State Cannabis Tax Policy Since Prop. 64" (July 1, 2022), available at <https://www.omarfigueroa.com/governor-newsom-signs-cannabis-trailer-bill-resulting-in-largest-changes-to-state-cannabis-tax-policy-since-prop-64/>.