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I. Introduction.

The New Mexico Acequia Association (NMAA) provides the following comments on the New Mexico Department of Health's (DOH) and the New Mexico Regulation and Licensing Department's (RLD) proposed cannabis production license rules.

NMAA's mission is to protect water and our acequias, grow healthy food for our families and communities, and to honor our cultural heritage. We represent traditional rural communities throughout New Mexico that will be impacted by the legalization of recreational cannabis and are concerned with negative unintended consequences large-scale and cumulative small-scale cannabis production may have on our communities. Negative impacts include, but are not limited to, impacts on scarce water supplies, increased degradation of water quality, loss of land and water rights ownership, cultural erosion and other deleterious socioeconomic impacts.¹

¹ These negative impacts have been documented in other states that have legalized commercial cannabis, as discussed below. Moreover, Ultra Health, New Mexico's largest medical cannabis producer and dispensary, has publicly recommended that current and future cannabis producers acquire their own water rights or purchase water rights through a water transfer, instead of relying on municipal water supplies for grow operations. Such advise

Responding to the concerns of our communities, NMAA worked hard during the regular and special 2021 legislative sessions to ensure that the final Cannabis Regulation Act (CRA) contains robust water protection provisions and social equity requirements for the emerging commercial cannabis production market. We continue to offer our expertise on these issues through our comments submitted herein, and to ensure that these proposed rules meaningfully implement the CRA's water protection and equity mandates.

Of primacy, NMAA has a number of concerns with several procedural aspects of this proposed rulemaking proceeding, which are more fully discussed below. Based on our procedural concerns, NMAA requests that DOH and RLD 1) publish a Notice of Termination of Rulemaking, or alternatively, 2) defer the June 29th hearing until a) the Cannabis Regulatory Advisory Committee (RAC) is created and has been provided a reasonable opportunity to provide advice regarding these proposed rules, and b) that associated rules, procedures and the legally mandated technical assistance resource guide are drafted and considered in a single, comprehensive rulemaking proceeding.

NMAA's comments are presented as follows: Section II provides background on key water protection and social equity provisions NMAA advocated for in the final Cannabis Regulation Act, Section III discusses numerous reasons as to why the proposed rulemaking is premature at this time, Section IV provides NMAA's substantive comments with suggested changes to the proposed rules in the event DOH and RLD proceed with the June 29th hearing, and Section V conveys NMAA's conclusory remarks.

indicates an impending race to buy up existing water rights once the CRA goes into effect on June 29, 2021. <https://www.cannabisbusinesstimes.com/article/3-quick-tips-securing-water-access-ultra-health-new-mexico/>, last accessed May 28, 2021. Ultra Health itself has been aggressively buying up land and appurtenant water rights throughout the state, with its most recent purchase of 350 acres of traditional farmland and 1,750 acre feet of appurtenant water rights in Tularosa. <https://www.globenewswire.com/news-release/2021/06/01/2239855/0/en/Ultra-Health-Deploys-Capital-Expansion-Projects-in-Several-Regions-Across-State.html>, last accessed June 11, 2021.

II. Background Regarding Key Water Protection and Social Equity Provisions NMAA Advocated for in the Final Cannabis Regulation Act.

A. Water Protection Provisions.

Water is a critical resource for cannabis production, regardless of production method. Whether grown outdoors, in a greenhouse, or in a warehouse, cannabis requires water throughout all stages of plant growth for various applications. Uses include irrigation for production, water for heating and cooling processes such as hydronic heating systems and wet wall cooling systems, fogging for humidification processes, fogging for application of pest management solutions, and water used for cleaning activities. Furthermore, a new study released by UC-Berkeley expects the overall legal U.S. cannabis industry to grow at a compound annual growth rate of 21% through 2025, and total water use in the legal cannabis market to *increase by 86 percent*.² Unfortunately, an alarming trend regarding illegal use of water in cannabis³ and hemp

² Cannabis H2O: Water Use & Sustainability in Cultivation, pp. 1 (February 2021), attached as Exhibit A. This report can also be accessed at: https://f.hubspotusercontent10.net/hubfs/3324860/Reports/NFD-CannabisH2O.pdf?utm_campaign=Cannabis%20H2O%20Webinar%20and%20Report&utm_medium=email&_hsmi=111972176&_hsenc=p2ANqtz-9THYIHvGAdML2s6KiXNFQ3n12NG1hVQznUFWShrveq3TShk8t8c_d4vuzXc24RiYgePEsoOqVVbm1HrTz6btHc9Gurww&utm_content=111972176&utm_source=hs_automation, last accessed May 28, 2021.

³ “Wallets are Out, Water is In: Thieves of 2017 Find New Focus,” University of Denver Water Law Review, Rebecca Spence (April 4, 2017), at <http://duwaterlawreview.com/wallets-are-out-water-is-in-thieves-of-2017-find-new-focus/>, last accessed June 15, 2021. Author Rebecca Spence noted:

As the interest in the cannabis industry grows, so does the need for water by marijuana grow operations. This demand has inspired many water thieves to sell to black market grow houses across the West. These occurrences have taken place around the state, but most recently and most detrimentally, in the San Luis Valley in Colorado during August 2015. According to local officials [the majority of the theft was happening](#) in Costilla County, a county that requires grow operations to obtain local permits. The permits require the operators to disclose their water source because these cultivation endeavors require a large amount of water to operate. If grow operations continue to grow without a local permit, finding a source of legally obtained water is not typically economically attainable. In cases where medical or recreational grow operations cannot locate a legal water source, the operation does not typically cease operations, it finds a legally illegitimate water source and continues to operate as an unlicensed entity.

Another reason Costilla County was so popular with water thieves during this time was because of the price of land. Cheap land encouraged those looking to acquire monthly camping or RV permits to move in and [“go off the grid”](#). These outsiders then are required to obtain a water and septic system, and are often unable to find a cheap, legal source of water to supply to their new homesteads. This causes many

production, both legal and illicit⁴, has emerged in states where recreational cannabis and hemp production have been legalized, such as unlawful diversions of surface and groundwater, as well as illegal use of domestic groundwater supplies for commercial production.⁵ Oregon and California, for example, have had to launch campaigns educating cannabis producers on legal sources of water in hopes of stopping illegal use of water in cannabis production.⁶

Additionally, while environmental conditions for cannabis production have traditionally favored the Western United States (Arizona, California, Colorado, Nevada, New Mexico and Oregon collectively account for 71% of the nation’s total cannabis supply, both legal and illicit), and a recent study has found that cannabis production currently uses less water than other major agricultural crops, these states are experiencing historic drought conditions, with water shortages expected to become increasingly pronounced.⁷

In New Mexico, 94.88 percent of the state is in either severe, extreme or exceptional drought.⁸ New Mexican chile farmers, for example, both large and small scale, are finding that

newcomers to turn to non-legal sources in order to stay in compliance with the county’s rules, a practice causing many of the locals to come into conflict with these new communities. The most prominent ways of stealing water in Costilla County were from private wells, community irrigation ditches, and local streams.

⁴ “Pot, water theft, and environmental harms in the US and Mexico,” published on The Brookings Institution blog, Vanda Felbab-Brown (April 12, 2021), at <https://www.brookings.edu/blog/order-from-chaos/2021/04/12/pot-and-water-theft-and-environmental-harms-in-the-us-and-mexico/>, last accessed June 15, 2021. The author discusses in depth how the 2016 California legalization of recreational cannabis did not radically reduce water theft from illicit growers: “Even at the end of 2020, illegal cannabis grows sucked up between 11.4 million and 36.3 million liters of water daily!” and, “The Klamath County Sheriff’s office, for example, has identified cases of cannabis growers directly diverting water from water canals, stealing from neighbor’s irrigators, filling up portable tanks from rivers in violation of regulations, purchasing water illegally sold from community wells, and placing illegal water pipes.”

⁵ <https://www.hempgrower.com/article/oregon-state-audit-hemp-farms-water-use/>, last accessed May 28, 2021; See also <https://www.kdrv.com/content/news/Jackson-County-flyover-shows-pervasive-cannabis-grows-Sheriffs-Office-says-574408821.html>, last accessed June 14, 2021; and

⁶ https://www.scribd.com/document/495979061/Options-for-Obtaining-Water-Legally-An-Overview-for-Hemp-Medical-Marijuana-and-Recreational-Marijuana#from_embed, last accessed May 28, 2021. Also attached as Exhibit A; See also, https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_water_rights.html, last accessed May 28, 2021.

⁷ Supra footnote 2, pp. 1, 4, 6.

⁸ <https://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?NM>, last accessed May 28, 2021. 74.71% of the state is in extreme or exceptional drought (46.72%), which involve substantial reductions or total loss of livestock, crop yields, and surface water supplies.

their paper water rights are not enough to get them through an irrigation season in this time of megadrought.⁹ New Mexico's State Engineer has asked farmers to not irrigate this year,¹⁰ is implementing a farmland fallowing incentive program in the Lower Rio Grande,¹¹ and has issued several basin closure orders due to dwindling groundwater supplies.¹² It is during this time of extreme megadrought, of catastrophic economic hardships to New Mexico's traditional farming and ranching communities, that our state government has legalized industrial level cannabis production.

Because of the illegal use of water apparently unique to the cannabis industry, the insatiable market demand for recreational cannabis, along with the current and future climatic conditions and our scarce water resources, NMAA worked hard to advocate for the following key water protection provisions in the final Cannabis Regulation Act: 1) inclusion of a Water Resources Expert on the Cannabis Regulatory Advisory Committee¹³, 2) the requirement that rules specific to water use in the cannabis production industry be promulgated in consultation with the Office of the State Engineer¹⁴, and 3) the requirement that an applicant for a cannabis producer license demonstrate that it has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the needs of a proposed production operation, as

⁹ <https://www.krwg.org/post/new-mexico-farmers-adapt-drought-grows-harsher?fbclid=IwAR1YH59DUvm9KF5BIIdpoy2MOIfXkCgjnLWTvEQpZvmy1xUI4s15Zdx4otKI>, last accessed June 14, 2021.

¹⁰ <https://www.abqjournal.com/2354734/nm-water-managers-warn-communities-to-prepare-for-low-rio-grande.html>, last accessed May 28, 2021.

¹¹ <https://www.ose.state.nm.us/LRGPilot/>, last accessed June 11, 2021. The Middle Rio Grande Conservancy District is also implementing its own farmland fallowing incentive program. *See* https://issuu.com/waterstrategies/docs/il_march_2021/s/11854654, last accessed June 11, 2021.

¹² <https://www.ose.state.nm.us/ProgramSupport/News/2021/PRESS%20RELEASE%20CAPITAN%20etc%203%2025%2021.pdf> and

<https://www.ose.state.nm.us/ProgramSupport/News/2021/PRESS%20RELEASE%20SE%20ISSUES%20ORDER%20TO%20PROTECT%20GROUNDWATER%20EAST%20MTN%20AREA%203%2015%2021.pdf>, both last accessed May 28, 2021.

¹³ CRA, Section 3.G(5)(k).

¹⁴ CRA, Section 3.D(2).

evidenced by documentation from the office of the state engineer or the identified water provider with a cannabis producer license application.¹⁵

The intent of these water protection provisions is to 1) provide notice to an applicant for a producer license, a water provider, and other third parties likely to be affected by the proposed water use that a new use of water for cannabis production may occur, 2) ensure that the applicant is not unlawfully taking surface or groundwater and impairing existing water rights owners, or unlawfully taking water from a water provider, and 3) minimize disputes over new uses of water by the cannabis production industry, establishing on the front end that the applicant must have a valid water right or legal access to a commercial source of water.

The CRA's water protection provisions are necessary given the examples of water theft in California, Oregon and Colorado, and because it is reasonably expected that cannabis producers from out-of-state who are not familiar with New Mexico's water code will mistakenly think they can 1) use a domestic groundwater well for commercial production, 2) use acequia water whether their land has water rights or not, 3) use as much water as they want without regard to how water is allocated and shared on the acequia by the mayordomo, 4) use water from a mutual domestic water consumer association despite local rules that water is for domestic purposes only, or 5) use water by pumping directly from a river or other water body despite not having any surface water rights.¹⁶

¹⁵ CRA, Section 7.B(3): the division shall require as a condition of licensing pursuant to the Cannabis Regulation Act that the applicant demonstrate that the applicant has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs as determined by the division related to the license *as evidenced by documentation from the office of the state engineer of a valid water right or from a water provider that the use of water for cannabis production is compliant with that water provider's rules.* Emphasis added.

¹⁶ There have also been numerous reports of alleged water theft by medical cannabis producers here in New Mexico: <https://www.abqjournal.com/1406718/states-water-takes-a-hit-from-cannabis-farms.html>, last accessed June 15, 2021.

Now more than ever, it is critical that these proposed rules meaningfully implement the CRA’s water protection mandate by requiring and verifying that an applicant has a legal source of water, conducting data collection on water use, utilizing water efficiency methods, and establishing benchmarks for monitoring water use and evaluating efficiency – not only for the protection of our scarce water resources and existing water rights holders, but for the creation of an equitable cannabis production economy. Regulatory compliance, coupled with the economic advantage of reducing operational costs, “leads to more careful management of water resources and heightened focus on minimizing water use in the legal market.”¹⁷

B. Social Equity Provisions.

Social equity has been a selling point of recreational cannabis legalization in many states across the country, including New Mexico. For example, New York’s cannabis legalization law has set a goal of getting 50% of licenses to minorities and other social equity applicants.¹⁸ Colorado administers a social equity licensing program that provides reduced fees and mentoring to encourage the growth of new businesses owned by communities of color, particularly communities disproportionately impacted by cannabis prohibition.¹⁹

NMAA advocated for the following social equity provisions incorporated into the final CRA:

- 1) requiring the Cannabis Control Division to promulgate procedures specific to promoting and encouraging full participation of rural communities likely to be impacted by cannabis production and agricultural producers from economically disadvantaged communities.²⁰
- 2) requiring the Cannabis Control Division to promulgate procedures specific to promoting and encouraging New Mexico residents to apply for retail and production licenses and to comprise the future industry’s employment pool.²¹

¹⁷ Supra footnote 2, p. 12.

¹⁸ <https://coloradosun.com/2021/04/30/social-equity-marijuana-industry/>, last accessed June 11, 2021.

¹⁹ Supra footnote 15.

²⁰ CRA, Section 3.B(7).

²¹ CRA, Section 3.B(8).

- 3) requiring the Cannabis Control Division to promulgate rules for a certification process identifying cannabis products specifically from underserved communities that include tribal, acequia, land grant-merced and other rural historic communities.²²
- 4) requiring the development of a technical assistance resource guide for rural New Mexico residents who are seeking to establish cannabis producer and retail microbusinesses.²³

Of note, Governor Michelle Lujan Grisham’s Marijuana Legalization Work Group (“Work Group”) Recommendations included creating social equity and economic opportunity in recreational cannabis legalization. The Work Group expressly recommended that new revenue from recreational cannabis legalization be dedicated “to a fund helping communities and small businesses access capital needed to start and grow NM-based businesses,” with an initial dedication of \$1.2 million in the first year of legalization.²⁴ NMAA worked tirelessly for this recommendation to be included in the final CRA, but for reasons unknown to NMAA, it was not.

For cannabis microproducers to become and remain competitive in an already corporate-dominated market, they must plan for downward price pressure relating to water sources as this new market matures, and must identify ways to reduce operational costs early, on the front end of establishing their business.²⁵ Knowing the costs associated with water use, energy conservation measures, and environmental compliance in cannabis production is vital for developing social equity funding assistance programs and the legally mandated technical assistance resource guide for New Mexicans disproportionately impacted by cannabis prohibition attempting to enter this emerging economy. NMAA therefore has suggested several friendly

²² CRA, Section 3.B(9).

²³ CRA, Section 3.B(10). NMAA advocated for the creation of a Social Equity Fund providing microbusiness grants for rural New Mexican residents and small-scale farmers, but unfortunately this was not incorporated into the final CRA.

²⁴ Work Group Recommendations, p. 8 (October 2019).

²⁵ Supra footnote 2, pp. 5-6.

amendments to these proposed rules to ensure that the CRA's equity mandate is meaningfully implemented, as further discussed below.

III. The Proposed Rulemaking is Premature at this Time, Requiring Deferral of the June 29th Hearing.

A. The Cannabis Regulatory Advisory Committee, Tasked with Advising the CCD on the Development of Rules, Has Yet to Be Created.

The CRA expressly mandates that a Cannabis Regulatory Advisory Committee be created to:

...advise the division on the development of rules pursuant to the Cannabis Regulation Act, including best practices and the promotion of economic and cultural diversity in licensing and employment opportunities and protection of public health and safety while ensuring a regulated environment for commercial cannabis activity that does not impose unreasonable barriers that would perpetuate, rather than reduce and eliminate, the illicit market for cannabis.

CRA, Section 3.G. This Regulatory Advisory Committee (RAC) is to be created no later than September 1, 2021. Id. The RAC shall consist of the following members:

- 1) the chief public defender or the chief public defender's designee;
- 2) a district attorney appointed by the New Mexico district attorney association;
- 3) a municipal police chief appointed by the New Mexico association of chiefs of police;
- 4) a county sheriff appointed by the executive director of the New Mexico association of counties; and
- 5) one member for each of the following groups or professional qualifications, appointed by the superintendent:
 - a) a cannabis policy advocacy organization;
 - b) a labor organization;
 - c) a qualified patient;
 - d) a state or local agency with relevant expertise as the director and the superintendent deem appropriate;
 - e) an Indian nation, tribe or pueblo with relevant experience as the director and the superintendent deem appropriate;
 - f) expertise in public health;
 - g) expertise in regulating commercial activity for adult-use intoxicating substances;
 - h) expertise and experience in cannabis laboratory science;
 - i) expertise in environmental science;
 - j) expertise in small business development;
 - k) expertise in water resources;
 - l) expertise in other relevant areas as the director and the superintendent deem appropriate; and

- m) previous experience as a cannabis retailer, cannabis producer or cannabis manufacturer and who is a nonvoting member.

Id. Applications were solicited for the RAC and the names of applicants have been published on the CCD website, however, the RAC has not yet been created.²⁶ Though it is unclear as to who has advised the RLD Superintendent on the proposed rules at issue, it is very clear that the proposed rules have not benefitted from the expertise and guidance the CRA has mandated the RAC provide for the development of rules. *See* Section NMAA's Substantive Comments, Section IV, below.

These proposed rules pertain to the processing, approval, and denial of license applications for cannabis producers, cannabis producer microbusinesses and any person properly licensed and in good standing as a licensed cannabis producer pursuant to the Lynn and Erin Compassionate Use Act. The proposed rules also address plant count, canopy or square footage limit for each license type (excluding licenses for integrated cannabis microbusinesses or cannabis producer microbusinesses), as well as per-plant fees applied to licensees growing in excess of 200 plants. The subject matter of these proposed rules is clearly within the expertise of numerous RAC positions and should therefore be reviewed by this statutorily mandated committee.

Most importantly, these proposed rules are the foundation for a functioning, equitable commercial cannabis production economy, further necessitating the expertise and guidance of the RAC to ensure program success. The legislature clearly intended that the RAC be created *before* rule promulgation began when it mandated that the RAC be created no later than September 1, 2021 and rule promulgation occur no later than January 1, 2022. CRA, Section 3.

²⁶ <https://ccd.rld.state.nm.us/cannabis-regulatory-advisory-committee-applicants/> (last accessed May 27, 2021). Over 160 individuals submitted applications for consideration. Applications have not been posted online.

The CRA also intended for the RAC to be created before licenses are issued. CRA, Section 7.B provides that “no later than September 1, 2021” shall the CCD accept and begin processing license applications for cannabis producers, cannabis producer microbusinesses and any person properly licensed and in good standing as a licensed cannabis producer pursuant to the Lynn and Erin Compassionate Use Act. This provision does not mean that such licenses must be issued by September 1, 2021, but that the CCD must at least accept and begin processing of license applications starting September 1, 2021.

NMAA therefore requests that the June 29th hearing on the proposed rules at issue be deferred until after the RAC has been established and has been provided a reasonable opportunity to advise the RLD Superintendent and CCD on these proposed rules, as mandated by the CRA.

B. Proposed Rules Pertaining to License Applications for Cannabis Producers Should be Considered with Proposed Rules, Procedures and the Technical Assistance Resource Guide Addressing Social Equity in the Emerging Commercial Cannabis Production Market to Ensure Meaningful Implementation of the CRA’s Equity Provisions.

The CRA’s Section 3 expressly delineates the many rules and procedures the division is to promulgate and provides a deadline of January 1, 2022 by which to do so. CRA, Section 3.B. Though the CRA does not expressly state that proposed rules should be promulgated simultaneously or handled in a singular yet comprehensive rulemaking process, piecemealing specific rules and procedures may result in an ineffective and inequitable commercial cannabis production market, undermining the CRA’s equity provisions. For example, the CRA mandates the CCD to promulgate procedures that:

promote and encourage full participation in the cannabis industry by representatives of communities that have been disproportionately harmed by rates of arrest through the enforcement of cannabis prohibitions in law and policy, rural communities likely to be

impacted by cannabis production and agricultural producers from economically disadvantaged communities...[and] procedures that promote and encourage racial, ethnic, gender and geographic diversity and New Mexico residency among license applicants, licensees and cannabis industry employees.

CRA, Section 3.B(7),(8). The CRA also mandates that the CCD, in consultation with the economic development department, develop a “technical assistance resource guide for rural New Mexico residents who are seeking to establish vertically integrated cannabis establishments, cannabis producer microbusinesses or integrated cannabis microbusinesses.” CRA, Section 3.B(10).

The CRA further mandates the Regulatory Advisory Committee to advise the CCD on best practices and the promotion of economic and cultural diversity in licensing. CRA, Section 3.G. As discussed above, the RAC has yet to be created and therefore has not advised the RLD or CCD on how the proposed rules at issue could incorporate best practices and the promotion of economic and cultural diversity in licensing.

Finally, the CCD must promulgate rules for a certification process “to identify cannabis products for consumers from integrated cannabis microbusinesses or cannabis producer microbusinesses or owned by representatives of communities that have been disproportionately harmed by rates of arrest through the enforcement of cannabis prohibitions in law and policy and underserved communities that include tribal, acequia, land grant-merced and other rural historic communities.” CRA, Section 3.B(9). Neither RLD nor CCD have indicated when that rulemaking will occur.

RLD and DOH’s proposed rules for licensing cannabis production will go into effect on July 20, 2021, if adopted as is.²⁷ Proposed 16.8.1.5; 16.8.2.3. Yet there is no companion

²⁷ NMAA disputes the legality of this effective date. See Section IV.A of these comments below for a detailed discussion of the State Rules Act requirements for when an adopted rule shall take effect.

technical assistance resource guide that will be provided to those seeking to apply for a cannabis producer microbusiness license or associated procedures promoting and encouraging social equity in cannabis producer licensing for CCD staff to follow. Posting a New Mexico Economic Development Toolbox dated September 2019 that is not specific to the cannabis production industry nor to rural New Mexican residents, as mandated by the CRA, does not satisfy the CRA's technical assistance resource guide requirement. CRA, Section 3.B(9).

NMAA therefore requests that the June 29th hearing be deferred until associated procedures, rules and the technical assistance resource guide addressing social equity in the commercial cannabis production industry are drafted, and until the RAC has been established and provided with a reasonable opportunity to review and advise on the proposed rules at issue, ensuring that the proposed licensing rules are dealt with in an informed and comprehensive manner, resulting in meaningful implementation of the CRA's equity requirements.

C. Proposed Rules Pertaining to License Applications for Cannabis Producers Should be Considered with Proposed Rules for Environmental Impacts, Natural Resources, Quality Control, and Inspection to Ensure that License Applicants are Informed About Applicable Production Operation Requirements and Associated Costs.

Though the May 25th Notice of Proposed Rulemaking states that the proposed rules pertain to health and safety, food and product safety, environmental impacts and natural resources, quality control and inspection, after proposed 16.8.2, the following is provided:

The following parts are intentionally omitted in this round of rulemaking:

PART 6: HEALTH AND SAFETY, FOOD AND PRODUCT SAFETY, ENVIRONMENTAL IMPACTS, AND NATURAL RESOURCES; AND

PART 7: QUALITY CONTROL, INSPECTION, AND TESTING OF CANNABIS PRODUCTS

Applicants for cannabis production licenses will therefore be applying blindly, without any knowledge of actual legal requirements pertaining to environmental protection rules and protocols ensuring compliance with state and local laws and ordinances governing water use and quality, water supply, hazardous materials, pesticide use and wastewater discharge, because those rules have yet to be written. These impending requirements will require substantial financial resources on the part of licensed cannabis producers to ensure compliance with applicable law and prevent termination of a producer license or imposition of a civil penalty.

In order for a license applicant to make an informed decision regarding start-up and continuing operation costs for a cannabis production operation, particularly a cannabis microproducer operation, environmental regulations specific to the cannabis production industry must either be considered simultaneously *with* proposed rules for licenses or *before* proposed rules for licenses. Sections 16.8.2.8, General Operational Requirements for Cannabis Establishments, and 16.8.2.21, Minimum Requirements for the Production of Cannabis, of the proposed rules fail to provide notice to producer license applicants of impending costs associated with environmental, water use and quality, and hazardous waste requirements specific to cannabis production.

Furthermore, any technical assistance resource guide developed pursuant to the CRA's Section 3.B(10) must provide guidance on how a cannabis producer microbusiness may secure funding to achieve and maintain compliance with environmental, water use and quality, and hazardous waste regulations specific to the cannabis production industry. This cannot be accomplished in the absence of such proposed rules. NMAA therefore requests that the June 29th hearing be deferred until these associated rules and technical assistance resource guide are at least drafted, but preferably promulgated.

D. DOH and RLD Rulemaking Authority Under the CRA Also Indicate That a Deferral of the June 29th Hearing is Warranted.

1. DOH has no rulemaking authority under the CRA.

The May 25, 2021 Notice of Proposed Rulemaking provides that the “New Mexico Department of Health and the New Mexico Regulation and Licensing Department will hold a rule hearing on Tuesday, June 29, 2021.” However, the Department of Health (DOH) has no legal authority to promulgate rules pursuant to the Cannabis Regulation Act (CRA). CRA, Section 3. In fact, the DOH only has authority to promulgate rules pursuant to NMSA 1978, Section 9-7-6 (as amended through 2017). That authority will end on June 29, 2021, when the CRA goes into effect, thereby transferring DOH’s medical cannabis program licensing duties to the newly created Cannabis Control Division (CCD). CRA, Section 5.

The DOH, therefore, is prohibited from promulgating regulations for commercial cannabis licenses and may only advise the CCD on establishing standards and determinations on requirements for reserving cannabis products for sale to qualified patients, primary caregivers and reciprocal patients. CRA, Section 3.E.

2. RLD May Not Have Legal Authority to Begin Rule Promulgation under the CRA until June 29, 2021, Which Includes Publication of Notice of Rulemaking.

Additionally, the CRA expressly delegates rulemaking authority to the CCD or to the Superintendent of the RLD. CRA, Section 3, Section 56 (amending NMSA 1978, Section 9-16-6). However, the CCD will not be lawfully established as a department of RLD until June 29, 2021. CRA, Section 55, amending NMSA 1978, Section 9-16-4. The Superintendent will not have the authority to promulgate rules on behalf of the CCD until June 29, 2021. This means that RLD cannot file a formal Notice of Proposed Rulemaking until June 29, 2021, when the CRA goes into effect.

NMAA hereby requests that the DOH and RLD publish a Notice of Termination of Rulemaking in the New Mexico Register, pursuant to NMSA 1978, Section 14-4-5 (as amended through 2017), and publish a new Notice of Proposed Rulemaking after June 29, 2021, when the CRA becomes effective, and after the Cannabis Regulatory Advisory Committee has been created and has had an opportunity to review and provide guidance on these proposed rules, and after associated rules, procedures and the legally mandated technical assistance resource guide are drafted.

Alternatively, NMAA reiterates its request that DOH/RLD defer the June 29th public hearing until the conditions identified above are met.

IV. Substantive Comments on Proposed Rules.

In the event that DOH and RLD do not publish a Notice of Termination of Rulemaking or do not defer the June 29th hearing, NMAA submits the following substantive comments with suggested amendments for consideration.

For clarity, language proposed to be deleted by NMAA is indicated by **~~bold strikethrough (red in color copies)~~**. Proposed new language by NMAA is indicated by **bold underlining (blue in color copies)**. NMAA reserves the right to amend its comments and to propose additional changes that are a logical outgrowth of these proposed rules, along with additional arguments at the June 29th public hearing, if DOH and RLD proceed with that hearing.

A. 16.8.1.7, Definitions.

As previously discussed, the CRA requires cannabis producer license applicants to “demonstrate that it has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs as determined by the division related to the license as evidenced by documentation from the office of the state engineer of a valid water right

or from a water provider that the use of water for cannabis production is compliant with that water provider's rules." CRA, Section 7.B(3).

In order to provide clarity regarding what is meant by "water rights," NMAA suggests that the following definition be included under 16.8.1.7:

W. Definitions beginning with "W":

(1) "Waste" or "wastage" means the process of rendering cannabis or cannabis products unusable and unrecognizable, including the destruction of cannabis or cannabis products.

(2) "Water Rights" means an administrable water right defined by its elements as set forth in:

- a. **a partial final decree or a final decree entered by an adjudication court of competent jurisdiction, subject to any state engineer permit issued subsequent to entry of said adjudication decree; or, if no decree has been entered, then:**
- b. **a subfile order entered by an adjudication court of competent jurisdiction; or, if no subfile order has been entered, then:**
- c. **an offer of judgment signed by the defendant in a water rights adjudication; or, if no offer of judgment has been signed, then:**
- d. **a hydrographic survey conducted in accordance with Section 72-4-17 NMSA or Section 72-4-16 NMSA; or, if no hydrographic survey has been filed, then:**
- e. **a license issued by the state engineer, or if no license has been issued, then:**
- f. **a permit issued by the state engineer, accompanied by proof of actual beneficial use; or if no permit has been issued, then:**
- g. **a determination made by the state engineer based on the best available evidence, consisting of, where available, any filings with the office of the state engineer, field or documentary evidence of beneficial use associated with the right including historical aerial photography, diversions records of historical diversions, historical studies containing evidence regarding water use, and data regarding irrigation and water delivery system requirements.**

NMAA's suggested definition aligns with language provided at 19.25.13.27 NMAC, Administrable Water Rights regulation of the Active Water Resource Management regulations.

B. 16.8.1.5, 16.8.2.5, 16.8.8.5, 16.8.11.5, and 16.8.12.5, Effective Date.

All throughout the proposed rules can be found an effective date of July 20, 2021.

However, such an effective date may be in violation of the State Rules Act. NMSA 1978, Section 14-4-5.A (2017) provides that, “Except in the case of an emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State Rules Act.” The May 25th Notice of Proposed Rulemaking does not state that these proposed rules are proposed emergency rules pursuant to NMSA 1978, Section 14-4-5.6 (2017).²⁸ In fact, the May 25th Notice of Proposed Rulemaking makes no mention of the State Rules Act at all.²⁹

NMAA’s concern is that RLD/CCD have indicated through its proposed effective date that public comment will not actually be taken into consideration and no further amendments will be made to these proposed rules, that the proposed rules at issue will be adopted as is or with minor changes at the June 29th public hearing. Given the State Rules Act’s requirements regarding effective dates of adopted rules, there are only two ways by which the July 20th effective date can be achieved: 1) adopting these proposed rules as emergency rules, which violates § 14-4-5.6 because the May 25th notice does not designate these proposed rules as emergency rules, or 2) adopting these proposed rules at the June 29th hearing, so that the state records administrator can publish the rules as soon as possible.

²⁸ Confusingly, the RLD/CCD has posted online in support of its proposed rules DOH “Emergency Rule Recommendations” for the medical cannabis program, prepared by Freedman&Koski, dated May 29, 2019. See <https://ccd.rld.state.nm.us/wp-content/uploads/2021/05/NMAC-2019-MCP-FK-Report.pdf>, last accessed on May 27, 2021. NMSA 1978, Section 14-4-5.2.A(7) requires an agency proposing a rule to provide notice to the public that includes “a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.”

²⁹ The Notice only cites to New Mexico Regulation and Licensing Department Act, the Cannabis Regulation Act, the Lynn and Erin Compassion Use Act, and the Department of Health Act under the “Statutory Authority” section. There is no mention of the New Mexico State Rules Act or of the New Mexico Uniform Licensing Act, which these proposed rules are subject to. CRA, Section 3.A; Section 6.B.

According to the 2021 New Mexico Register Submittal Deadlines and Publication Dates, Volume XXXII, Issues 1-24, the publication dates after the June 29th hearing are July 7th and July 20th.³⁰ The State Rules Act mandates that the “state records administrator or the administration’s designee shall publish rules as soon as practicable after filing, but in no case later than ninety days after the date of adoption of the proposed rule. Unless a later date is otherwise provided by law or in the rule, the effective date of a rule shall be the date of publication in the New Mexico Register.” § 14-4-5.

With this provision and the proposed effective date in mind, at most, the RLD/CCD will take a week after the June 29th public hearing to incorporate public comment and suggested amendments; at minimum, the RLD/CCD will file the rules adopted at the June 29th hearing and the rules are published either on July 7th or July 20th.

NMAA therefore suggests that all “effective date” provisions throughout the proposed rules be changed to “date of publication in the New Mexico register, pursuant to NMSA 1978, Section 14-4-5 (as amended through 2017), to ensure that RLD/CCD actually take into consideration public comment and suggested amendments to the proposed rules after the June 29th public hearing and deadline to submit comments.

C. 16.8.2.14, Cannabis Producer Licensure: General Provisions.

As explained above, NMAA was able to secure a number of key water protection provisions in the final Cannabis Regulation Act. A foundational water protection provision is the CRA’s Section 7.B(3), which requires a license applicant to provide proof of a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water

³⁰ <http://164.64.110.134/nmac/nmregister/pdf/2021-schedule.pdf>, last accessed on May 27, 2021.

needs related to the license. In order to ensure that the CRA, Section 7.B(3)'s requirement is complied with, NMAA recommends that public notice be provided of applications submitted.

Online publication of cannabis producer license applications will provide public notice to existing water rights owners and other water users of a potential new water use that may result in impairment of existing water rights, detriment to the public welfare, or be contrary to conservation. Providing public notice of applications will help minimize harm to existing water rights owners on the front end, before a cannabis producer license without a legal and sufficient source of water is unlawfully approved by the CCD and engages in unlawful use of water.

NMAA therefore suggests a new subsection C to be added, as follows (with current subsections C and D being re-lettered accordingly):

D. Notice of applications; online posting. The division shall provide public notice of applications submitted by posting electronically on the division's website a notice that contains a link to the application with all associated application documents, including proof of a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license.

NMAA's suggested change closely aligns with language provided at NMSA 1978, Section 72-2-20 (as amended in 2019), requiring the Office of the State Engineer to provide notice of water applications online. This amendment to the water code was also the result of NMAA's expertise and commitment to public notice and governmental transparency in water matters.

Additionally, online posting of applications is consistent with the proposed rules' requirement for online publication of settlement agreements reached between the CCD and a licensee over denial, suspension, or revocation of a license and sanctions, plans of correction and civil monetary penalties, found at 16.8.12.14.C.

E. 16.8.2.15.B, Verification of Information.

NMAA suggests the following amendments to ensure CRA, Section 7.B(3)'s requirement pertaining to proof of a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license is complied with:

The division **shall may** verify information contained in each application and accompanying documentation by:

- 1) contacting the applicant or controlling person by telephone, mail, or electronic mail;
- 2) conducting an on-site visit; or
- 3) requiring a face-to-face or virtual meeting and the production of additional documentation-; **and**
- 4) **consulting with the office of the state engineer or water provider identified in an application.**

It is unclear what type of training and familiarity CCD staff will have in reviewing and evaluating water documents provided by the office of the state engineer or a water provider, therefore requiring CCD staff to consult with these entities is both necessary and critical to ensure the CRA's mandate is meaningfully implemented.

F. 16.8.2.15.A(7), Application Requirements for Cannabis Producer License.

In order to comply with CRA, Section 7.B(3), the following proposed rule must be amended as follows:

(7) proof of a **legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license, as determined by the division, as evidenced by documentation from:**

- a) **the office of the state engineer of a valid water right; or**
- b) **a water provider stating that the use of water for cannabis production is compliant with that water provider's rules.**

Documentation from either the office of the state engineer or a water provider shall include the amount of water. The applicant shall also include its estimated water usage related to the license, to assist the division's determination that the application's identified water source is sufficient to meet the needs related to the license.

~~valid water right as evidenced by documentation from the office of the state engineer or from a water provider that the use of water for cannabis production is compliant with that water provider's rules, and that the applicant has a legal right to:~~

- ~~a) A commercial water supply;~~
- ~~b) Water rights; or~~
- ~~c) Another source of water; and~~
- ~~d) The water supply is sufficient to meet the water needs as determined by the division;~~

The way the proposed rule is currently written does not mirror statutory language, contains redundancy, and incorrectly requires the applicant to provide proof that the division has determined the identified water supply is sufficient to meet the needs related to the license at the time of application submittal. The division, *after* receiving an application for a producer license with the required documentation pertaining to a legal right to a commercial water supply, water rights or another source of water *then* makes a determination regarding whether the identified water source is sufficient to meet the water needs related to the license application. CRA, Section 7.B(3). When determining whether the identified water source is sufficient to meet the water needs related to the license application, it is critical that the maximum amount of a water right or water source identified in a license application not be exceeded during actual production operations.

NMAA also recommends either including in proposed rules or in guidelines the criteria CCD will use in determining whether a producer license application's identified water source is sufficient to meet the water needs related to the license. The criteria should take into account the amount of water the applicant has a legal right to use, the number of plants grown per year, the grow method, average water use per plant, number of harvests per year, average water use outside of irrigation needs, and any plans for the use of treated effluent or other recycled water.

This will ensure notice to applicants and the public at large regarding how much legally valid water must be secured for cannabis producer licenses and will foster government transparency.

Finally, NMAA strongly encourages the CCD to develop guidance, in consultation with the office of the state engineer, regarding documentation to be provided by the office of the state engineer demonstrating a valid water right, as well as public education materials educating interested cannabis producers on how to obtain legal access to a commercial water supply, water right or another source of water.³¹

G. 16.8.2.15.A(8), Application Requirements for Cannabis Producer License.

The Cannabis Regulation Act requires producer license applicants to submit a water and energy conservation plan or certification that the applicant cannot feasibly use water and energy reduction measures with its application. CRA, Section 7.B(4). The CRA expressly identifies specific water and energy conservation measures producer license applicants should include in a conservation plan or certify that they cannot feasibly implement: drip irrigation, water collection, natural lighting and energy efficiency measures, and renewable energy generation. Though NMAA is not responsible for this particular provision of the CRA, it nevertheless supports the promotion of water and energy conservation measures in an industry notorious for its alarming energy consumption.

The cannabis production industry has an energy problem, consuming substantial amounts of electricity and causing high greenhouse gas emissions.³² A recent study out of Colorado State University has determined that location is the deciding factor when it comes to the size of cannabis cultivation's carbon footprint, with California operations having the smallest carbon

³¹ Supra footnote 6 for Oregon and California examples of public education materials regarding how to legally access water sources for cannabis production.

³² https://www.hcn.org/issues/53.6/infographic-marijuana-cannabis-has-a-carbon-problem/print_view, last accessed June 11, 2021.

footprint because California’s energy grid is virtually coal-free. The majority of Western states, including New Mexico, that have legalized recreational cannabis rely heavily on coal and natural gas for their energy grids, which emit large amounts of greenhouse gases.³³

The National Oceanic and Atmospheric Administration (“NOAA”) recently announced that the amount of carbon dioxide in Earth's atmosphere reached 419 parts per million in May, its highest level in more than four million years. After dipping last year because of pandemic-fueled lockdowns, emissions of greenhouse gases have begun to soar again as economies open and people resume work and travel. The newly released data about May carbon dioxide levels show that the global community so far has failed to slow the accumulation of heat-trapping gases in the atmosphere.³⁴ It is therefore critical that these proposed regulations meaningfully implement the CRA’s mandate regarding water and energy conservation in cannabis production.

Moreover, this is not the first time that the legislature has instructed a particular industry to use water and energy efficiently. For example, in the New Mexico Produced Water Act, our legislature has provided numerous incentives for the oil and gas industry to reuse its produced water within that industry, reducing its reliance on fresh water resources. 2019 N.M. ALS 197. Our state also encourages municipalities, counties and other water suppliers to create water conservation plans. NMSA 1978, Section 72-14-3.2 (2003).

NMAA therefore suggests the following amendment to clarify that the required energy and water conservation plan, or certification that the applicant cannot feasibly use energy and water reduction opportunities, both include estimated water and energy use related to the license application, in order to meaningfully implement this requirement of the CRA:

³³ Supra footnote 19; See also, <https://www.nature.com/articles/s41893-021-00691-w>.

³⁴ <https://research.noaa.gov/article/ArtMID/587/ArticleID/2764/Coronavirus-response-barely-slows-rising-carbon-dioxide>, last accessed June 14, 2021.

(8) a plan to use, or certification that the applicant cannot feasibly use, energy and water reduction opportunities, including:

- a) drip irrigation and water collection;
- b) natural lighting and energy efficiency measures; and
- c) renewable energy generation;

The water and energy conservation plan or the certification that the applicant cannot feasibly use energy and water reduction opportunities shall both include estimated water and energy use related to the license application.

When evaluating conservation plans or certifications that an applicant cannot feasibly use energy efficiency measures, CCD staff should include the use of LED lighting technology in its determination that an applicant cannot feasibly use energy efficiency measures in its proposed grow operation. NMAA also recommends that the division either provide in these proposed rules or through guidelines the criteria for determining whether an applicant cannot feasibly use energy and water reduction opportunities. Criteria should include a cost-benefit analysis with an emphasis on cost effective measures, and reduction of the operation's carbon footprint, including an operation's CO2 emissions.

H. 16.8.2.16.A, Submittal of Application for Amended Cannabis Producer License.

NMAA suggests the following amendments to ensure that CRA, Section 7.B(3)'s requirement that a license applicant demonstrate that it has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license is complied with:

- A. Application: A licensed producer shall submit to the division an application form for an amended license, pay the required fee, and must obtain approval from the division, prior to implementing any of the following:
 - 1) change in ownership of the premises;
 - 2) material or substantial change of the size or location of the premises;
 - 3) change of licensee's legal or business name;
 - 4) ~~material or substantial~~ change in water source;

- 5) material or substantial change in water and energy conservation practices and plans, including but not limited to the reuse of water and disposal of effluent;
- 6) increase in plant count beyond which licensee is currently licensed to produce;
- 7) addition of a controlling person;
- 8) material or substantial change to a license’s security system;
- 9) material or substantial modification of the premises; or
- 10) engaging in an activity which requires an addition or change of a license type.

The CRA requires that ALL water used in a cannabis operation be verified as a legal source of water sufficient to meet the needs related to the license. CRA, Section 7.B(3).

Therefore, “material or substantial” must be deleted from 16.8.2.16.A(4). If a licensee makes *any* change to its water source, the licensee is required under the CRA to submit proof that it has a legal right to a new water source, and the mechanism to do so is through an application for an amended license, which is subject to the same public notice and information requirements as an initial license application.

I. 16.8.2.21.A(3), Minimum Requirements for the Production of Cannabis, General Requirements.

The following suggested amendment will ensure that compliance with CRA, Section 7.B(3)’s requirement that an applicant has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license is achieved:

- 3) the water supply is safe and sufficient for the operations intended, as determined by the division, and the licensee has a legal water right to a commercial water supply, water rights or another source of water for cannabis production, as evidenced by the requirements provided in 16.8.2.15.A(7). ~~water source is legally capable of providing a safe and adequate supply of water to meet the production facility’s needs;~~

The way the proposed rule is currently written indicates that the identified water source need only be legal in terms of water quality, and not legal in terms of water quantity, as

mandated by the CRA's Section 7.B(3). NMAA's suggested amendment ensures that this proposed rule is consistent with statutory language.

J. 16.8.2.28.H, Monitoring of Licensee, Quarterly Producer Reports.

Because New Mexico has not required medical cannabis producers to provide data regarding water and energy use, the state has failed to properly analyze cannabis production impacts to scarce water resources and impacts of cannabis production's significant energy use on the environment and public health and welfare. NMSA 1978, Sections 26-2B-1 through 26-2B-10 (as amended through 2021). As previously stated, this data is critical now more than ever due to megadrought conditions gripping the state and increasing severity of climate change impacts.

NMAA therefore suggests the following amendments:

A cannabis producer licensee shall submit reports on at least a quarterly basis, or more frequently if requested by the division ~~as otherwise requested~~, and in the format specified by the division. The quarterly report shall include at a minimum:

- 1) number of cannabis plants and cannabis inventory;
- 2) revenue from the wholesale of cannabis;
- 3) total number of transactions;
- 4) number of units provided without charge;
- 5) number of cannabis plants in production, including mature and immature plants;
- 6) number of cannabis plants harvested;
- 7) total yield of usable cannabis harvested from cannabis plants (in grams);
- 8) average yield per plant (in grams);
- 9) amount of cannabis (in grams) sold by wholesale;
- 10) amount of cannabis (in grams) purchased by wholesale;
- 11) number of live cannabis plants (including clones) and cannabis seeds sold;
- 12) amount of dried cannabis leaves and flowers in stock;
- 13) average price per gram of dried cannabis leaves and flowers;
- 14) total amount of dried cannabis leaves and flowers sold (in units);
- 15) total sales of dried cannabis leaves and flowers (in dollars and units);
- 16) amount of gross receipts tax paid to the New Mexico taxation and revenue department; **and**
- 17) all quality testing reports, to be included as attachments. ;
- 18) actual water and energy use;
- 19) future water and energy conservation plans; and
- 20) a detailed plan on acquiring additional water if the production operation expands.

Licensee reports shall be used by the division to monitor and enforce license compliance, and in determinations to terminate an approved license, evaluate an application for an amended license, to require a licensee to apply for an amended license, or to reach a settlement agreement with the licensee.

V. Conclusion.

New Mexico has an opportunity to build a cannabis economy that yields equitable benefits for producers and entrepreneurs, both rural and urban. It is through public policy that the cannabis industry can be grown in a manner that protects our limited water resources and provides economic opportunities with an emphasis on social equity. The NMAA has carefully reviewed the proposed regulations for licensing of cannabis producers and requests that the rulemaking process be more rigorous in terms of administrative procedures and compliance with the State Rules Act. NMAA also requests that all of our suggested friendly amendments are incorporated into any final rules adopted.

For the above reasons, the June 29th hearing should be deferred until 1) the Cannabis Regulatory Advisory Committee is created and is given a reasonable opportunity to review and advise the RLD/CCD on these proposed rules, 2) and associated rules, procedures and the legally mandated technical assistance resource guide as drafted and considered in a single, comprehensive rulemaking proceeding. Alternatively, if the June 29th public hearing is not deferred, NMAA's suggested friendly amendments should be incorporated into any final rules adopted.

Submitted on June 16, 2021 by:



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