

March 1, 2019

State Records and Archives
Attn: Pamela Lujan y Vigil
Rules Management Analyst
Administrative Law Division
Commission of Public Records
1205 Camino Carlos Rey
Santa Fe, NM 87505

Regarding Emergency Amendment to 7.34.4.8 NMAC, “Producer Licensing; General Provisions”

Dear Ms. Lujan y Vigil:

The New Mexico Department of Health (“Department”) is filing an emergency amendment to 7.34.4.8 NMAC. This amendment is necessary to ensure the protection of our State’s citizens and to avoid federal intervention in New Mexico’s medical cannabis program.

A. The State of New Mexico may properly regulate cannabis plant count limits.

The rule at 7.34.4.8 NMAC specifies the maximum number of medical cannabis plants that a licensed nonprofit producer (“LNPP”) may possess. Until recently, LNPPs could possess “a combined total of no greater than 450 mature female plants, seedlings and male plants”. The Department was forced to reconsider its plant count limitation after the First Judicial District Court for the District of Santa Fe, New Mexico, issued an opinion in the case of *Nicole Sena and New Mexico Top Organics – Ultra Health v. New Mexico Department of Health and Lynn Gallagher*, case no. D-101-CV-2016-01971 (“*Sena v. DOH*”). There, the Court “enjoined [the Department] from enforcing the 450 quantity limitation against producers set out in NMAC 7.34.4.8(A)(2).” In reaching its decision, the Court expressly noted that the Department has authority to regulate the medical cannabis industry by means of a plant count, “as long as such count is based in fact and does not impede the purpose of the [Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1 through 7].”¹ This emergency rule amendment comports with that judicial mandate.

The Medical Cannabis Program was established in 2007 by the Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1 through 7 (referred to hereafter as “the Act”). The purpose of the Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments. NMSA 1978, §

¹ The Department subsequently sought an extension of the stay of the injunction to afford the agency additional time to conduct surveys of qualified patients and LNPPs and complete a full rulemaking process according to the timelines in the State Rules Act, NMSA 1978, §§ 14-4-1 through 14-4-11. However, that request was denied by the Court.

26-2B-2. The Program currently serves approximately 67,000 enrolled patients, and licenses 35 LNPPs statewide to produce medical cannabis and distribute cannabis and cannabis-derived products to qualified patients and primary caregivers. Patients may qualify for enrollment in the Program based on various qualifying medical conditions and treatments under statute and regulation, including but not limited to cancer, multiple sclerosis, epilepsy, chronic pain, and post-traumatic stress disorder.

While the Act is intended to allow medical patients to obtain proper therapeutic treatment, the legislation is not intended to abrogate our State's police powers. To that end, the Department has determined regulation of cannabis production is necessary to ensure the health and safety of New Mexico residents. Further, regulation will help to ensure that our State's citizens may access medical cannabis without fear of interference from the federal government. These two considerations are discussed in turn below.

B. The Department must regulate growth of cannabis plants in order to mitigate adverse outcomes resulting from diversion.

The Court's decision invalidating the State's 450 plant count limit will take effect on March 1, 2019. In the absence of an emergency rule limiting supply, and until subsequent permanent rules are promulgated and in place, LNPP's would have unfettered authority to grow and produce cannabis and cannabis-related products. A LNPP would face no restrictions on possession or production, and the Department would be without any authority to manage the production of cannabis in New Mexico. Our State cannot countenance such a result.

New Mexico has an interest in limiting the over production of cannabis because excess production gives rise to health and public safety issues. As other states have pointed out, there is a connection between excess cannabis inventory and diversion. See e.g., An Initial Assessment of Cannabis Production, Distribution, and Consumption in Oregon 2018 – An Insight report, Oregon-Idaho High Intensity Drug Trafficking Area, First Edition (2018). Diversion of cannabis inventory occurs when: (1) producers that are unable to sell their cannabis in the legal market choose to illegally divert cannabis rather than incurring economic loss from the destruction of excess product; (2) persons enrolled in the medical cannabis program purchase cannabis and sell it on the black market. In either instance, diversion may lead to crime (either in New Mexico or our sister states) and adverse social outcomes such as sales to minors. See e.g., May 18, 2018 Memorandum from The United States Attorney for the District of Oregon (noting that "significant overproduction" has resulted in an "a thriving black market [that] is exporting marijuana across the country"). The State may properly exercise its police powers to mitigate these negative outcomes of not having a plant count limit in place.

C. Regulation of plant count limits will help to ensure that our State's citizens may access medical cannabis without fear of interference from the federal government.

The New Mexico Medical Cannabis Program is in tension with federal law that prohibits the use and possession of cannabis, which is designated in the U.S. Controlled Substances Act as a Schedule I controlled substance. The tension between state and federal laws on this subject creates unique difficulties and concerns for the administration of the Medical Cannabis Program. The

purpose of the Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments. NMSA 1978, § 26-2B-2. This maxim, however, runs afoul of the federal government's admonition that "marijuana is a dangerous drug and that marijuana activity is a serious crime." See, January 4, 2018 Memorandum from United States Office of the Attorney General to all United States Attorneys. Thus, the augur of federal interference in New Mexico's Medical Cannabis Program remains. The removal of all limits on cannabis production is likely to attract greater scrutiny from federal law enforcement and would jeopardize the continued operations of the Program. By limiting the number of plants within the Program, the Department intends to further the purposes of the statute and to limit the potential for federal interference with this critical public health program.

D. The emergency amendment to the regulation will more than triple the current limitations on plant count caps.

Through this emergency amendment, the Department is increasing the operative plant limit count from 450 to 2,500—an increase of over 500 percent.² This upping of the plant count limit acknowledges growing enrollment in the Medical Cannabis Program, and seeks to ensure future availability of cannabis products.³ Further, this plant count limit is consistent with the Department's estimates of maximum consumer demand, which is the polestar for assessing adequate supply. See NMSA 1978, 26-2B-7(A) (2007) (stating that adequate supply is the amount of cannabis "that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted source of cannabis for a period of three months).

For the reasons addressed above, The Department now amends the rule 7.34.4.8 NMAC via emergency rulemaking, consistent with NMSA 1978, § 14-4-5.6 ("Emergency rule"). This emergency amendment is temporary, and will expire in 180 days pursuant to NMSA 1978, § 14-4-5.6(E) unless a permanent rule is adopted under the normal rulemaking process in that period.

Yours truly,



Kathyleen M. Kunkel
Secretary of the New Mexico Department of Health

² Because some LNPP's have management agreement with other licensees, those LNPP's will have a 2,500 plant-count limit for each license over which they have control. While the Department has concerns about these management agreements, they are presently a business arrangement that exists within the Medical Cannabis Program.

³ Any perceived or actual shortage in medical cannabis will not be immediately remedied. As UltraHealth's counsel pointed out during a hearing in the Sena matter, it will take sixteen weeks for a producer to grow new cannabis plants and bring products to market. Sena v. DOH, Transcript of Proceeding on February 22, 2019, at page 13, lines 7-12.

NMAC

Transmittal Form



Volume: Issue: Publication date: Number of pages: (ALD Use Only) Sequence No.

Issuing agency name and address: Agency DFA code:

Contact person's name: Phone number: E-mail address:

Type of rule action: New Amendment Repeal Emergency Renumber (ALD Use Only) Most recent filing date:

Title number: Title name:

Chapter number: Chapter name:

Part number: Part name:

Amendment description (If filing an amendment): Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes No Please list attachments or Internet sites if applicable:

If materials are attached, has copyright permission been received? Yes No Public domain

Concise Explanatory Statement For Rulemaking Adoption:

Specific statutory or other authority authorizing rulemaking:

This emergency rulemaking by the secretary of the department of health is made in accordance with the following authorities: Sections 9-7-6, 26-2B-2, 26-2B-7, 24-1-3, and 14-4-5.6 NMSA 1978.

Notice date(s): Hearing date(s): Rule adoption date: Rule effective date:

Findings required for rulemaking adoption:

Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

The findings in support of this emergency amendment to 7.34.4.8 NMAC are as stated in the attached letter dated 3/1/19, which is hereby incorporated by reference.

Continued on next page

Findings required for rulemaking adoption:
continued



[Empty box for findings]

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Kathleen Kunkel

Check if authority has been delegated

Title:

Cabinet Secretary

Signature: (BLACK ink only)

Kathleen Kunkel

Date signed:

3-1-19

STATE OF NEW MEXICO
GENERAL SERVICES DEPARTMENT- PURCHASING DIVISION
TERMS AND CONDITIONS UNLESS OTHERWISE SPECIFIED

SPD-101A (07/92)

1. GENERAL: When the State Purchasing Agent issues a purchase document in response to the Vendors bid, a binding contract is created.
2. VARIATION IN QUANTITY: No variation in the quantity of any item called for by this order will be accepted unless such variation has been caused by conditions of loading, shipping, packing or allowances in manufacturing process, and then only to the extent, if any, specified elsewhere in this order.
3. ASSIGNMENT:
 - A: Neither the order, nor any interest therein, nor claim thereunder, shall be assigned or transferred by the Vendor, except as set forth in subparagraph 3B below or as expressly authorized in writing by the STATE PURCHASING AGENTS OFFICE. No such assignment or transfer shall relieve the Vendor from the obligations and liabilities under this order.
 - B: Vendor agrees that any and all claims for overcharge resulting from antitrust violations which are borne by the State as to goods, services, and materials purchased in connection with this bid are hereby assigned to the State.
4. STATE FURNISHED PROPERTY: State furnished property shall be returned to the state upon request in the same condition as received except for ordinary wear, tear, and modifications ordered hereunder.
5. DISCOUNTS: Prompt payment discounts will not be considered in computing the low bid. Discounts for payment within 20 days will be considered after the award of the contract. Discounted time will be computed from the date of receipt of the merchandise or invoice, whichever is later.
6. INSPECTION: Final inspection and acceptance will be made at the destination. Supplies rejected at the destination for non-conformance with specifications shall be removed, at the Vendors risk and expense, promptly after notice of rejection.
7. INSPECTION OF PLANT: The State Purchasing Agent may inspect, at any reasonable time, the part of the contractors, or any subcontractors plant or place of business, which is related to the performance of this contract.
8. COMMERCIAL WARRANTY: The Vendor agrees that the supplies or services furnished under this order shall be covered by the most favorable commercial warranties the Vendor gives to any customer for such supplies or services, and that the rights and remedies provided herein shall extend to the State and are in addition to and do not limit any rights afforded to the State by any other cause of this order. Vendor agrees not to disclaim warranties of fitness for a particular purpose or merchantability.
9. TAXES: The unit price shall exclude all State taxes.
10. PACKING, SHIPPING AND INVOICING:
 - A: The States purchase document number and the Vendors name, users name and location shall be shown on each packing and delivery ticket, package, bill of lading and other correspondence in connection with the shipment. The users count will be accepted by the Vendor as final and conclusive on all shipments not accompanied by a packing ticket.
 - B: The Vendors invoice shall be submitted in triplicate, duly certified and shall contain the following information: order number, description of supplies or services, quantities, unit prices and extended totals. Separate invoices shall be rendered for each and every complete shipment.
 - C: Invoices must be submitted to the using agency and NOT THE STATE PURCHASING AGENT.
11. DEFAULT: The State reserves the right to cancel all or any part of this order without cost to the State, if the Vendor fails to meet the provisions of this order and, except as otherwise provided herein, to hold the Vendor liable for any excess cost occasioned by the State due to the Vendors default. The Vendor shall not be liable for any excess costs if failure to perform the order arises out of causes beyond the control and without the fault or negligence of the Vendor, such causes include, but are not restricted to, acts of God or of the public enemy, acts of the State or of the Federal Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargos, unusually severe weather and defaults of subcontractors due to any of the above, unless the State shall determine that the supplies or services to be furnished by the subcontractor where obtainable from other sources in sufficient time to permit the Vendor to meet the required delivery scheduled. The rights and remedies of the State provided in this paragraph shall not be exclusive and are in addition to any other rights now being provided by law or under this order.
12. NON-COLLUSION: In signing this bid, the Vendor certifies he/she has not, either directly or indirectly, entered into action in restraint of free competitive bidding in connection with this proposal submitted to the State Purchasing Agent.
13. NON-DISCRIMINATION: Vendors doing business with the State of New Mexico must be in compliance with the Federal Civil Rights Act of 1964 and Title VII of that Act, Rev., 1979.
14. THE PROCUREMENT CODE: Sections 13-1-28 through 13-1-199 NMSA 1978 imposes civil and criminal penalties for its violation.
In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kickbacks.
15. All bid items are to be NEW and most current production, unless otherwise specified.
16. PAYMENT FOR PURCHASES: Except as otherwise agreed to: late payment charges may be assessed against the user state agency in the amount and under the conditions set forth in section 13-14158 NMSA 1978.
17. WORKERS COMPENSATION: The Contractor agrees to comply with state laws and rules pertaining to workers compensation benefits for its employees. If the Contractor fails to comply with Workers Compensation Act and applicable rules when required to do so, this (Agreement) may be terminated by the contracting agency.
18. PAY EQUITY RECORDING: The Contractor agrees to comply with New Mexico Pay Equity reporting requirements as detailed in Executive Order 2009-049 Implementation Guidance available at <http://www.generalservices.state.nm.us/spd/guidance.pdf>

Instructions for completing the NMAC TRANSMITTAL FORM



Your agency must complete the following:

Volume, Issue and Publication Date. Example: Volume: XXIX , Issue: 10, Publication date: May 29, 2018.

Provide the total number of pages of the paper version of the new rule, amendment, repeal, or emergency document. Note: Do not include the pages of the transmittal form, billing sheet, PO, etc.

Sequence number is for **ALD use only**.

Issuing agency's name and mailing address.

Agency's 3-digit DFA code. Example: 123

Contact person's Name, Phone number, E-mail address.

Check type of rule action: **New** (brand new rule or replacement rule), **Amendment**, **Repeal** (repeal and do not replace or repeal and replace), **Emergency**, or **Renumber**. **For a repeal and replacement rule, the agency must provide TWO signed transmittal forms; one for the repeal statement and another for the new (replacement) rule.**

Most Recent Filing Date of the Part for **ALD use only**.

Identify NMAC Title, Chapter and Part numbers and Title, Chapter and Part names.

Example:

Title 19 Natural Resources and Wildlife
Chapter 30 Wildlife Administration Aquatic
Part 14 Invasive Species

Description of Amendment: (if amending) Example: "Amending three sections".

Amendment's NMAC citation: (if amending) Example: "Sections 9 and 18 of 7.1.13 NMAC".

Are any materials incorporated by reference? Check: Yes or No. If Yes, please list attachments or provide Internet site.

If incorporated, has copyright permission been granted? Check Yes or No or check if document is in the public domain.

Concise Explanatory Statement for rulemaking adoption See 1.24.25.14 NMAC:

Provide your agency's specific statutory or other authority authorizing rulemaking: Check with your agency's general counsel office to determine the correct citation(s) authorizing your agency to make rules.

Provide your Notice date(s) (when notice of rulemaking was published in Register): Hearing date(s) (if agency has board or commission): Rule adoption date: and Rule effective date (date rulemaking becomes effective)

Note:

- There must be at least **30** days between the notice date and hearing date.
- Your agency **must file** your rule within **15** days from rule adoption date. The date of adoption of the proposed rule shall be the date the concise explanatory statement is signed by the agency, unless otherwise specified in the concise explanatory statement. Unless your rule is an emergency filing, the rule effective date cannot be any earlier than the publication date in the New Mexico Register.

Findings required for rulemaking adoption. If attaching a separate document as findings or as concise explanatory statement, please indicate as such in findings section.

Check with your agency's general counsel office regarding substance of any required findings to be filed.

Issuing Authority: Name, Title Date signed and original Signature of issuing authority or their delegate in **black** ink:

Note: If authority has been delegated, this box must be checked. A letter of delegation must be on file with the State Records Center and Archives, Administrative Law Division.

This is an emergency, short-form amendment to Subsection A of 7.34.4 NMAC, Section 8, effective March 1, 2019. Subsections B through W were not published as no changes were made.

7.34.4.8 PRODUCER LICENSING; GENERAL PROVISIONS:

A. The department may license two classes of producers:

(1) A qualified patient who holds a valid personal production license. A qualified patient who holds a valid personal production license is authorized to possess no more than four mature female plants and a combined total of 12 seedlings and male plants, and may possess no more than an adequate supply of usable cannabis, as specified in department rule. A personal production license holder may additionally obtain usable cannabis, seeds, or plants from licensed non-profit producers. The primary caregiver of a qualified patient who holds a personal production license may assist the qualified patient to produce medical cannabis at the designated licensed location that is identified on the personal production license; the primary caregiver may not independently produce medical cannabis.

(2) A non-profit producer that operates a facility and, at any one time, is limited to a combined total of no greater than [450] 2,500 mature female plants, seedlings and male plants, and an inventory of usable cannabis and seeds that reflects current patient needs, and that shall sell cannabis with a consistent unit price, without volume discounts or promotional sales based on the quantity purchased. A non-profit producer shall not possess a quantity of either mature female plants or seedlings and male plants that exceeds the quantities authorized by their licensure and associated licensing fee. A licensed non-profit producer may sell and distribute usable cannabis to a person or entity authorized to possess and receive it. A licensed non-profit producer may obtain plants, seeds and usable cannabis from other licensed non-profit producers.

[7.34.4.8 NMAC - Rp, 7.34.4.8 NMAC, 2/27/2015; A, 2/29/2016; A/E, 3/1/2019]

Billing Information Sheet



Your agency must complete the following:

Publish in the *New Mexico Register*

Volume: Issue: Publication date:

Agency's 3-digit DFA code:

Purchase order 15-digit number:

Agency name:
Division name (if applicable):
Street address or P.O. Box:
City, State and Zip code:

Contact person's name:
Contact person's phone number:
Contact person's e-mail address:

Notice name (if submitting a notice):
Example: Notice of Rulemaking Hearing

Or Rule NMAC number and rule name (if filing an amendment, repeal & replace, repeal, new rule etc.)
Example: 19.31.3 NMAC, Hunting and Fishing License Application

Electronic file name(s):
(ALD Use Only)

Analyst's initials:

(ALD Use Only)

Instructions for Completing the BILLING INFORMATION SHEET



Your agency must complete the following:

New Mexico Register

Volume number:

Issue number:

Publication date:

Example: Volume: XXVIII , Issue: 19, Publication date: October 17, 2017

Agency's 3-digit DFA code: Example: 123

Agency's 15-digit purchase order number: Example: 12300-0000004567

Agency's name:

Division name (if applicable):

Street address or P.O. Box:

City, State and Zip code:

Contact person's name:

Contact person's Phone number:

Contact person's E-mail address:

Note: Complete one or the other of the following fields unless submitting a notice AND filing a rule.

Notice name, if submitting a notice of rulemaking

Example: Notice of Regular Board Meeting and Rulemaking Hearing

OR

Rule NMAC number and rule name, if filing a new rule, an amendment, a repeal or replacement.

Example: 19.31.3 NMAC, Hunting and Fishing License Application

Last 2 fields are for Administrative Law Division staff use only.



State of New Mexico Purchase Order

PO Number to be on all Invoices and Correspondence

Page: 1

Department of Health

1190 St. Francis Dr
P. O. Box 26110
Santa Fe NM 87502-6110
United States

Dispatched

Dispatch Via Print

| | | |
|---|---|-----------------------------|
| Purchase Order 66500-0000159759 | Date 02-27-2019 | Revision |
| Payment Terms Pay Now | Freight Terms FOB Destination | Ship Via Best Way |
| Buyer THERESA M RIVERA- GALLEGOS | Phone | Currency USD |

Supplier: 0000000729
STATE RECORDS CENTER &
ARCHIVES
COMMISSION OF PUBLIC
RECORDS
1205 CAMINO CARLOS REY
SANTA FE NM 87507
United States

Ship To: 1190 St. Francis Dr
P. O. Box 26110
Santa Fe NM 87502-
6110
United States

Bill To: 1190 St. Francis Dr
P. O. Box 26110
Santa Fe NM 87502-
6110
United States

Origin: EXE **ExclExcl#:** 13-1-98-A

| Line-Sch | Item/Description | Quantity | UOM | PO Price | Extended Amt | Due Date |
|------------------------|--|----------|-----|------------|-------------------|------------|
| 1 - 1 | Publish Amendment to Medical Cannabis Program Rules: The Department of Health Medical Cannabis Program is implementing an emergency rule change for plant count, as a result of litigation with a March 1, 2019 deadline to comply. 66500-11415-7870010000-546900- - - -119-C0000 | 1.00 | EA | \$1,000.00 | \$1,000.00 | 02/27/2019 |
| Schedule Total | | | | | <u>\$1,000.00</u> | |
| Item Total | | | | | <u>\$1,000.00</u> | |
| Total PO Amount | | | | | <u>\$1,000.00</u> | |

Agency Approval - I certify that the proposed purchase represented by this document is authorized by and is made in accordance with all State (and if applicable Federal) legislation rules and regulation. I further certify that adequate unencumbered cash and budget expenditure authority exists for this proposed purchase and all other outstanding purchase commitments and accounts payable.

Authorized Signature