

NEW MEXICO DEPARTMENT OF HEALTH  
MEDICAL CANNABIS PROGRAM RULE PROMULGATION HEARING

Public Hearing: Proposed Amendments to Medical Cannabis Program Rules

Actions in Question: Rule Promulgation Hearing for 7.34.2 NMAC (“Advisory Board Responsibilities and Duties”); 7.34.3 NMAC (“Registry Identification Cards”); and 7.34.4 NMAC (“Licensing Requirements for Producers, Couriers, Manufacturers”).

Hearing Date: July 12, 2019

Report Date: August 7, 2019

**REPORT OF HEARING OFFICER**

A Public Hearing was held on Friday, July 12, 2019 at 9:00 a.m. at the Harold Runnels Building Auditorium in Santa Fe, New Mexico for the purpose of considering the Department of Health (“DOH” or “the Department”) Medical Cannabis Program’s (“MCP” or “the Program”) proposed amendments to Parts 7.34.2 NMAC (“Advisory Board Responsibilities and Duties”); 7.34.3 NMAC (“Registry Identification Cards”); and 7.34.4 NMAC (“Licensing Requirements for Producers, Couriers, Manufacturers”). Craig T. Erickson, Esq., who was appointed as hearing officer to preside at the Public Hearing by DOH Cabinet Secretary Kathyleen M. Kunkel on June 2, 2019, presided over this rulemaking hearing. The DOH was represented by Chris Woodward, Assistant General Counsel, and Kenny Vigil, MCP Program Manager.

Other individuals who were present at the Public Hearing were:

1. Kristina Caffrey
2. Daniel Jacobs
3. [REDACTED]
4. Andy Lyman
5. Jaylene Kost
6. Tommy Laborin
7. Jennifer Torres
8. Steve(?) Cosner (?)
9. Drew Stuart
10. Sean McAfee
11. Debbie Muscau
12. Len Goodman
13. Erik Briones
14. Ben Feuchter
15. Duke Rodriguez

16. John Mancin
17. Clinton Greathouse
18. Joe Krukar
19. Jennifer Merryman
20. Tim Van R\_\_\_\_\_
21. David Belcher
22. Malcom Rush
23. Naomi Rayes
24. Tina Gooch
25. Andrew Gordon
26. Nadine Delgarito
27. Ben Lewinger
28. [REDACTED]
29. Andrew Fertal
30. Kylie Safa
31. Leigh Jenke
32. Brian G. Lax
33. Grace White
34. Sarah Dalb
35. [REDACTED]
36. Cecilia Barajo (?)
37. L \_\_\_\_\_ G \_\_\_\_\_
38. [REDACTED]
39. Steve Perez
40. Dominic Levato
41. Beth Foote
42. Matt Clarke
43. Dexter Russell
44. Claudia Armijo
45. William Ford
46. Ruben Asuilar
47. Gina Lucero, RN
48. Ron Anderson
49. Kelly O'Donnell
50. [REDACTED]
51. Steven Jenison
52. Josh McCurty
53. Chad Lozano
54. [REDACTED]
55. Monica Morales
56. Tyler Postal
57. Ann Conway
58. [REDACTED]
59. Jessica Gelay
60. Eli Goodman
61. Robert Stranahan

62. [REDACTED]
63. Colette Kubichar
64. Will Costello
65. Jeff Curtis
66. Cassandra Gurule
67. Monique Chavez
68. Bryan Flamm
69. Aaron Lombardo
70. Zeke Shortes
71. Dan Weaks
72. P. Hayward
73. Carlos R. Gonzales
74. Brooke Duverger
75. Savannah Duverger
76. [REDACTED]
77. Cristina Gasca
78. Kelsey Kouri
79. Nicole Flores
80. Roger Barton
81. [REDACTED]
82. Seth Nedelman
83. William Dougherty, M.D., FACS
84. Walter Torres
85. Jason Greathouse
86. Billy Baldwin
87. Amanda Fratzola
88. Shanon Jaramillo
89. Lee DeFrancesco
90. Stephanie Waddell
91. Garth Wilson
92. Richard H. Davis
93. Michael Silva
94. Kevin Phillips
95. Robert Candlaria
96. Mario Gonzales
97. Robert Munro
98. Erin Beger
99. Michael Hallberg
100. Antonio Corrales
101. Kelly Curtis
102. Sean Chris (?)
103. Dan Boyd—Albuquerque Journal
104. Steven Rosenberg
105. Marg Carrabajal
106. [REDACTED]



The sign-in sheet for the Public Hearing is provided with this Report and marked as DOH Exhibit No. 17. Some names, as indicated by blanks and question marks in the names above, were partially illegible.

The proceeding was electronically recorded, and the recording was monitored by Chris Woodward. The recording is in the possession of the DOH, Office of General Counsel.

## SUMMARY OF PROCEEDINGS

### *Preliminary Matters*

The Hearing Officer opened the proceeding by introducing himself and the others on the podium, Mr. Woodward and Mr. Vigil. The Hearing Officer stated as follows:

The Hearing Officer welcomed the audience to the Public Hearing, and informed them that the hearing was on proposed amendments to Parts 7.34.2 NMAC; 7.34.3 NMAC; and 7.34.4 NMAC. The Hearing Officer briefly summarized the proposed amendments by stating that the amendments included changes to some definitions in the rules, the addition of more qualifying conditions to the definition of “debilitating medical condition,” and the revision of the number of cannabis plants a non-profit licensed producer is permitted.

The Hearing Officer also stated in his opening remarks that his authority was limited to addressing the proposed amendments to the foregoing rules and does not extend beyond those proposed amendments. *See* DOH Exhibit No. 13. The public comments included commentary that was not necessarily related to the current issues raised by the proposed amendments to the rules. Those comments are summarized below, but not addressed in the analysis that follows. They are included for the DOH to consider in the future.

The Hearing Officer further stated that the proceeding was being held in accordance with NMSA § 9-7-6(E). He also requested that anyone present at the hearing who had not yet signed the attendance sheet at the entrance to the auditorium should make the effort to do so.

In his opening remarks, the Hearing Officer explained that Mr. Vigil would be offering comments that summarize that proposed amendments to the rules, and that Mr. Woodward would then read the titles of the DOH’s exhibits into the record. He further explained that members of the public who chose to would be given the opportunity to make public comment. He explained that each individual who offered public comment would be allowed five minutes, with a warning at three minutes that the speaker had two minutes remaining, in order to make their public comments. All individuals who offered public comments complied with the time requirements.

The hearing then progressed as follows: Mr. Vigil summarized the proposed amendments to the rules. Mr. Vigil stated as follows:

Mr. Vigil stated that the DOH had prepared a written summary of the proposed amendments, which is found at DOH Exhibit No. 5, and which outlines the changes, as well as the rationale for the changes. He noted that some of the changes include changes to licensed non-



profit producer (LNPP) plant counts. They include a proposed change to allow an increase in plants with demonstrated need for LNPPs. He stated that there is also a change in the definition of a “seedling” that will allow LNPPs to grow seedlings without it counting against the plant count. He further noted a change to LNPPs’ licensing fees, removal of the prohibition against promotional and volume discounts and new requirements for the destruction of cannabis.

Mr. Vigil advised the LNPPs that there are also proposed changes to some of the definitions. He further stated that there are other changes in the proposed rules that relate to recent changes in the Lynn and Erin Compassionate Use Act. Some of those changes include changes the patient registry identification card from one year to three years with an annual medical certification, allowing a caregiver to have a personal production license to grow for a patient, and allowing a patient with a personal production license to keep their harvest. There is a proposed change which removes a fee to replace a lost or stolen registry ID card. Further, he noted the removal of the THC concentration limit. The changes also include an amendment to create immunity for school personnel who administer cannabis in a school setting. The changes further include changes in advisory board membership to increase membership from eight to nine members and changing a quorum from three to five members.

Mr. Woodward read the names of the exhibits into the record, and the exhibits were admitted by the Hearing Officer into the record. The exhibits are as follows:

DOH Exhibit No. 1: Notice of Hearing

DOH Exhibit No. 2: 7.34.2 NMAC Proposed Amendments

DOH Exhibit No. 3: 7.34.3 NMAC Proposed Amendments

DOH Exhibit No. 4: 7.34.4 NMAC Proposed Amendments

DOH Exhibit No. 5: Summary of Proposed Amendments

DOH Exhibit No. 6: Cannabis Patients Survey Report

DOH Exhibit No. 7: Cannabis Producers Survey Report

DOH Exhibit No. 8: Freedman & Koski Report

DOH Exhibit No. 9: O’Donnell Report

DOH Exhibit No 10: R. Greenleaf Report

DOH Exhibit No. 11: Order of 11/1/18 in N.M. D. Ct. Case No. D-101-CV-2016-01971

DOH Exhibit No. 12: Materials from 3/1/19 Emergency Amendment to 7.34.4.8 NMAC

DOH Exhibit No. 13: Letter Appointing Hearing Officer

DOH Exhibit No. 14: Affidavit of Notice to the Public

DOH Exhibit No 15: Notices Published in NM Register and Albuquerque Journal, with Affidavit

DOH Exhibit No. 16: Written Public Comments [in second of two exhibit binders]

DOH Exhibit No. 17: Sign-in Sheets from Public Hearing

Mr. Woodward also stated that there was an ambiguity in the DOH's Notice of Public Hearing, which stated that all written comments must be received by 5:00 p.m. on July 11, 2019. He stated that he understood that the Hearing Officer would accept any written comment submitted during the July 12, 2019 hearing, and the comments would be included in DOH Exhibit No. 16.

At that point in the hearing, a member of the public, Daniel Jacobs, asked to be heard. Mr. Jacobs stated that he is the former chief privacy officer and chief records custodian for the New Mexico Department of Health. He is now retired. He objected and requested that the hearing be held in abeyance until such time as proper notice of the hearing could be given for the public because of the ambiguity in the language of the notice. He stated that there are many people in the public who did not have the opportunity to submit comments through email by 5:00 on July 11. He also stated that there are some who had wanted to attend the hearing and wanted to submit written comments but were not able to do so.

The Hearing Officer stated that Mr. Jacobs' objection was noted. However, having considered the objection, the Hearing Officer now overrules the objection. By allowing until July 11, 2019, at 5:00 p.m., the day before the July 12 Public Hearing, there was an adequate opportunity to submit written comments, which were also allowed to be submitted on July 12.

The DOH's Exhibits were all entered into the record. The Hearing Officer noted that they are in two separate binders. DOH Exhibit No. 16, the written public comments, are in the second binder. DOH Exhibit Nos. 1 through 15, and No. 17, are in the first binder.

After the Public Hearing concluded, the Hearing Officer learned that the recording of the proceeding did not begin until a few minutes after the hearing began. The opening remarks of the Hearing Officer were not recorded. However, the Hearing Officer has thoroughly summarized his opening remarks in this report, as set forth above.

### **Public Comments**

The following is a summary of the public comments offered into the record at the July 12, 2019 Public Hearing.



*The Comments of Drew Stuart*

Drew Stuart stated that he represents High Desert Relief. He stated first that he wanted to express his appreciation for the work of the MCP and how it has enhanced and enriched the lives of thousands of New Mexican since its inception. He also thanked the Governor for her support which was instrumental in the creation of the Program when she was Secretary of the DOH, and when the original rules were implemented. He also thanked the current Secretary, Kathy Kunkel, who also helped draft the initial rules, and has been very supportive. He also thanked the staff of the MCP who have worked so hard on this Program, to make sure it stays in compliance and to serve the patients of New Mexico.

Mr. Stuart stated that over the 10 years his company has been involved he has seen improvement in the livelihood of the people who chose to use this medicine. He recognized that in the rulemaking process nothing is ever perfect. However, he said they think a lot of the proposed rule changes are very positive and will have a great impact on the Program.

He raised “two issues of note” that his company would like to raise. First, he raised a concern about the definition of a seedling as “8 inches” as it pertains to the potential 1,750 plant count. He said that they believe the 8-inch definition is “somewhat arbitrary.” From a cultivation standpoint, it is somewhat hard to adhere to. Once plants are rooted, and most producers use a propagation clone technique, the plants start already at 5 to 6 to 7 inches sometimes. Once there are established roots, there is a rapid growth process. Overnight you can have a 7-inch plant and based on that quick growth during that time the plants can exceed 8 inches the following morning, and, unbeknownst to the producer, they would be out of compliance. He thinks this proposal is not a standard grow protocol. He recommends instead a rule that provides for 1,750 mature female plants, as defined by the rule.

Mr. Stuart recognizes that the DOH spent a lot of time and effort in their research. He stated that the 1,750 plant-count is acceptable. However, he thinks something that is more defined and divisible between a vegetative plant and a flowering plant is “both very obvious and intentional.” He thinks the requirement should be 1,750 flowering plants, and then whatever is needed to support those. This allows for greater selection in genetics for the producer. It also helps them to use the healthiest plants. He believes this proposal would also improve their access of plants for patients that would not grow negatively against their plant count.

He recommended that the 1,750 plant-count and the 8-inch seeding rule be accepted but recommended using the difference of 1,750 mature female plants and then whatever vegetative plants are needed to support that.

Mr. Stuart’s second concern relates to the expanded renewal fees. He stated that he believes that the fees are excessive when you look at the 33 medical cannabis programs that exist in the country. The proposed fees would be the third highest in the nation, following Michigan and Ohio. He said that if you consider the states with successful programs in our region, Arizona has a \$1000.00 renewal fee and in Colorado the top tier is \$5300.00. Oklahoma has a \$2500.00 renewal fee, with an unlimited plant count. Fees that are applied to the produces are passed down to the qualified patients in New Mexico. They do not do 180,000 transactions in a year; it’s closer



to 100,000, so \$1 plus must be added on to each transaction. He said he knows that the MCP is supported solely by licensure fees, producers, labs, PPLs, and they want to support them and give them all the resources that they need. However, he does not think the expanded Program correlates with doubling the budget.

### *The Comments of Len Goodman*

Mr. Goodman is the CEO of Best Days, one of the producers who was licensed in the last round in 2015. He stated that he is the oldest guy in the medical cannabis Program chronologically, and one of the five producers who has been licensed since 2009, when he started New Mexican, where he was CEO until 2015.

Mr. Goodman stated that he wanted to mirror what Mr. Stuart said. He stated that he really wanted to support the Department, particularly since the new Governor came into office, and since Kathy Kunkel took over as Secretary. He said that the producers have had a breath of fresh air in their relationships with the Governor and with the Secretary. He said that they are back in dialogue again, which they had previously been shut out of for the last four years.

Mr. Goodman stated that he has no criticisms of the rules whatsoever. He wanted to voice licensed producer support. He said that they have had no shortage of material in this state for several years now. They are going close to that with the increase in plant count. If you look at quarterly reports, they have been holding two to three months of inventory of useful cannabis on hand each quarter. Based on sales, they have had ample supply. With the increased patients, that is starting to shrink. If the increase is to 1,750 plants, that is *more* [Mr. Goodman's emphasis] than they need right now. He thinks most producers would not be going after the full plant count; some will. He thinks people will ramp up as demand develops. He is fully supportive of the 1,750 plant count. He thinks that will last for a long time coming, and there are provisions for an increase as well, for another 500. He said that the "plant count is great."

As to the fees, Mr. Goodman stated that if the money is needed, he is "all for it." They had argued for a long time that the fees were too high. They were paying \$200 a plant. At 450 plants they were paying \$90,000 in fees. What has happened now is that the entry level has gone from the maximum of 450 to a low now of 500 but the fee is \$40,000.00. They dropped the fee from \$200 a plant to \$80 a plant. That gives the opportunity for new producers on a small scale to come in. The only access question they have from patients is that there are not enough dispensaries in rural areas. He said they must step up to the plate, which they will with increased plant count, to service smaller stores. If not, with the new structure, the Department will have the ability to issue a license for a smaller plant for a low entry fee of \$40,000 and create new production where it's needed for rural patients.

In closing, he stated that he wanted to thank the Department and the staff of the Department.



### *The Comments of Erik Briones*

Erik Briones represents Minerva Canna, which has been a licensed producer since 2010. He wanted to reiterate what Len Goodman said, and noted how eloquently Drew Stuart opened the hearing. He also thanked the Hearing Officer for the hearing and thanked that MCP staff as well.

Mr. Briones stated first that he was there to support the stated plant count of 1,750 plants. He stated that it is a more than adequate supply. He stated that he believes it is probably an “abundant” or “overabundant” supple of what is currently needed. He noted that the patient count has been steadily rising at a pretty good pace but compared to other markets it is still on a slower pace than other markets. He also wanted to say that he operates in Oklahoma, and Oklahoma started receiving patient applications the end of October. As of July 1, 2019, after eight or nine months, they had 148,000 patients. New Mexico is at 70,000 something after 12 years. Thus, there has been a slow, gradual patient count in New Mexico.

His fear is that with a 1,750 plant-count there will be an overabundant supply. When this has happened in other states such as Washington, Oregon, Colorado, California, and others, they find other avenues to get rid of their product. Mr. Briones stated: “We don’t want that to happen in New Mexico.” Thus, he thinks it is a perfectly reasonable increase in plant count to go to 1,750 plants, and that will sustain us for years. If the law goes to adult use, we’ll have to look at those numbers at that time. He again stated that he is “fully supportive.”

### *The Comments of Duke Rodriquez*

Duke Rodriquez appeared on behalf of Top Organics-Ultra Health (hereinafter “Ultra Health”). He stated that he was also presenting for the record a written communication from 13 producers representing 51% of the volume of the state. Thirteen producers have signed on to the statement, some with additional comments. *See* DOH Exhibit No. 16. These include Ultra Health, PurLife, MJ Express-O, Sacred Gardens, Natural Rx, Pecos Valley Production, Urban Wellness, Southwest Wellness, Shift, Sandia Botanicals, Kure, G & G Genetics, and Red Barn Growers. Mr. Rodriquez noted that it is difficult to get that many producers to agree upon anything. Here, they agreed to about thirteen major concerns related to the current proposed rulemaking. He stated that he believes their views are representative of the industry. They include legacy producers and new producers. It includes small producers, medium producers and large producers, as well as rural and urban producers.

Mr. Rodriguez stated that his comments address thirteen different areas and that Ultra Health<sup>1</sup> submitted 133 pages of written materials to support their comments, which include the following:

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<sup>1</sup> In summarizing the July 11, 2019 Comments on Proposed Rules, the Hearing Officer recognizes that the Comments were submitted by Ultra Health and the 12 other LNPPs listed on page 1 of the Comments as a group. For ease of reference in this Report, the Hearing Officer refers to Ultra Health in the summary without repeated reference to the 12 other LNPPs who participated in the report. However, the Hearing Officer recognizes that the Comments were submitted on behalf of all 13 LNPPs who participated in the report, and that they constitute 51.1% of the LNPPs in New Mexico.



- 1) 7.34.4.7 and 4.8 NMAC regarding “seedlings” “does not work. It is not operable.” When the plants get to six and seven inches the plants grow very quickly. It is a hard cap at 1,750 plants. The 8-inch rule does not work. They provided documentation on that point.
- 2) 7.34.4.7 and 4.8 NMAC—the plant limitation based on seedling vs. non-seedling is irrational and not based upon evidence, not based on actual practice of producers, and not based on actual agricultural practices. It is arbitrary, capricious, and contrary to law. They recommend the use of a mature and immature plant approach--flowering female plant and nonflowering plant. They do not necessarily recommend a plant counts, but if they are used, they should be based on mature vs. immature plants (flowering vs. non-flowering), not seedlings vs. non-seedlings.
- 3) 7.34.4.8 NMAC—the provision for increasing plant limitation individual producers is arbitrary, capricious, and “encourages further arbitrary decisions by DOH.” This group of 51% do not believe 1,750 is adequate. They provide additional written evidence. Others have numbers of 3000 or 3500. They recommend 5,000 mature plants, and unlimited immature plants.
- 4) 7.34.3.9 NMAC [sic]—patient personal possession limits are arbitrary and capricious. The 230 unit does not work. Most states at a minimum have 5 ounces per patient per month. 230 units is less than 2.3 ounces.
- 5) The definition of qualified patient is now in conflict with state law. Regulations do not allow for reciprocal patients. State law requires that any person can qualify, not just in state residents.
- 6) 7.34.8 NMAC [sic]—there is no logical relationship between personal production limitations, adequate supply, and user plant limitations. They should balance out what PPLs can buy, what patients can buy, and how much each person holds.
- 7) 7.34.8 NMAC [sic]—the fee schedule is exorbitant. It will harm small business and drive up patient costs and prices and is an unconstitutional tax.
- 8) 7.34.3 NMAC—the quarterly reporting requirements are onerous and bear no relationship to producer practices.
- 9) 7.34.7 NMAC—producers do not have to be non-profit. Its not in the statute. The rule is reemphasizing rulemaking. All classes of operations should be non-profit or for profit. They’d like to go back to what SB406 adopted. It is very clear. Producers have the power to produce, dispense, distribute, and manufacture.
- 10) Disciplinary actions and fines. Included in the proposed rules are fines of up to \$50,000.00. They are arbitrary, capricious, and unconstitutional.
- 11) Lastly, DOH cannot require additional documentation with respect to patients.



### *The Comments of Daniel Jacobs*

Mr. Jacobs stated that he was appearing in representation of himself. His concern is as follows. When he reviews all the reports commissioned by the DOH, the clear evidence shows that the predominant purchases across the marketplace are edibles. Each of the reports commissioned by the DOH shows that there are not enough plants in the marketplace to meet the demand in the marketplace, especially in rural areas. The Research & Polling report shows that patients are waiting days if not weeks in order to obtain medication.

The plant count limit that is proposed included plant material that would be needed to manufacture edibles to meet the current patient demand. A limitation of 1,750 plants is just not realistic when it takes substantially more plant material to create an edible. He proposed that the DOH create another section for the sole purpose of another count in addition to the 1,750 for the producers to grow for the purpose of manufacturing edibles. He stated that this will relieve the issue of the needed plant material, which is almost two times to three times as much in order to make the medicine as potent as it has to be than it does for individuals who use flowering buds to satisfy the medical need.

Mr. Jacobs has another concern that relates to PPLs. The rule does not distinguish or state anywhere in the rules that PPLs are required to report the amount of grow or the yield of their medicine per quarter as licensed producers are required to do. The rule also does not enforce any of the requirements of quality assurance, as it does for licensed producers. Under the new rule, the proposal is that a PPL has the ability to get or provide another qualified patient in the Program cannabis. However, what the rule fails to do is provide protections for the public health, like those PPLs who are distributing medicines to other qualified patients. His concern, from a public health standpoint, is that there will be plant material in the marketplace that has not been tested and for which there is no quality assurance and no reporting requirements.

Finally, the PPLs are not restricted by rule from also purchasing up to the maximum allowed amount of cannabis through a dispensary each and every 90 days. For that reason, it seems that there is a disparity between the qualified patient, who may not be able to afford the start up cost for a PPL, and those who do have the benefit of a PPL. It would be good governance of the DOH to rectify those contradictions.

### *The Comments of David Belcher*

Mr. Belcher is with Pecos Valley Production. He expressed his thanks for being allowed to come to the public hearing and express his comments regarding the proposed rule changes. First, he stated that it is a common goal amongst all LNPPs, and the State to provide safe and cost-effective medicine to their patients. They appreciate the efforts of the DOH to develop and enforce the rules of the MCP. They believe that regulation is an important part of keeping the Program safe. They agree with a significant portion of the proposed rule changes.

That being said, they have concerns about several of the proposed modifications to the rules that will not lead to more cost-effective cannabis production for patients. He referenced the



fact that they have provided written comments. He wanted to highlight the biggest potential negative impacts on consumer health.

First, he addressed the proposed limit of the 1,750 flowering plant count, combined with the nonmature plants of less than 8 inches. The way the rule modification is written with nonmature plants defined as less than 8 inches, he asserted that that would effectively reduce the supply of cannabis from the current requirements. He stated that it is not clear that that was the intention of DOH. However, he stated that will be the result. Further, he said, we all know what the reduction of supply will do to pricing. To remedy that, and allow for more cost-effective production, they recommend removal of the 8-inch height restriction for nonmature plants and increase the floral plant count in accordance with the number of patients that an LNPP serves and the consumption needs. They request that these changes occur immediately and not wait until June 2021.

The next issued Mr. Belcher raised was his concern about the “extreme fees” in the proposed rules. He asked the DOH to reconsider the new license fee schedule. He stated that \$180,000 to maintain a plant count of 1,750 is an extremely large amount of money for a small nonprofit business. They must plan that amount out 12 months in advance in order to make that payment. It is a huge burden on them. Further, the way the proposed structure is written is that the first 500 plants would cost about \$80.00. The last 750 plants that a producer would grow would be 50% more, or \$120.00. He stated it is not clear how you would pass that on to the customer. In other words, is the last person in the door going to pay 50% more? He stated that that does not seem fair. The overall increase will hinder the ability of small producers to compete within the market and will result in passing on that cost to patients.

They recommend that the DOH not increase the license fees and consider consistent per plant fees to charge producers resulting in fair and cost-effective production of product.

In closing, Mr. Belcher stated that they went to work together with the DOH and industry stakeholders as part of the process and correct anything that will end up reducing the cost-effectiveness of the Program.

*The Comments of* [REDACTED]

[REDACTED] has been a patient in the Program for [REDACTED]. She is [REDACTED]. She states that she has [REDACTED]. She came into the Program using 27 different pharmaceuticals, seven of which were narcotics, prescribed by her physician. She has found the Program very beneficial. She no longer uses prescriptions on a regular basis.

She supports the 3-year period for the registry cards. She understands that a physician must sign-off on the card. The least amount of burden for that to occur would be the best. She has a concern about conserving the MCP considering the possibility of recreational use of cannabis for adults. She hopes there will be a patient participation opportunity in that process.

She is a strong supporter of product safety, which is critical to her safety and the safety of others, and that testing be done in a safe and consistent manner. She believes that there should be



a methodology for possession and access for patients who cannot afford their medicine—for medical cannabis. Under the current IRS code, it cannot be deducted as a medical expense.

██████████ also spoke in support of a patient role in the Medical Advisory Board.

She also requested that there be in the future a publication of the agenda for public meetings of this nature, because many patients are unable to attend and may want to attend for just a couple of hours. She also suggested that public hearings be set from 9:00 to 5:00 and held open so that those who could only come later in the day could appear.

She also asked that the Secretary appear in at least one of the public hearing where patients and concerned citizens are present.

#### *The Comments of Ben Lewinger*

Mr. Lewinger stated that, for two very long weeks, he has been the Executive Director of the Medical Cannabis Chamber of Commerce. He stated that they are a trade organization representing producers, manufacturers, and a growing number of cannabis adjacent businesses. To echo everyone else's sentiments, he wanted to thank DOH, particularly for the process of rulemaking.

Overall, Mr. Lewinger stated that he believes that are several pieces in the proposed rulemaking process that are very beneficial. The 3-year renewal for patient ID cards, the renewal of the PPL replacement fee, telemedicine, the provisions making it easier for young patients to get their medicine on school property and school buses, and more closely defining the caregiver's ability to get medicine to their patients are all appreciated.

While there is much that the Chamber likes and appreciates, there are a couple of places where they would like clarification. They agree with others that the 8-inch definition of a seedling is problematic. He stated that it is unclear where the 8 inches is measured from. Is it measured from the soil level? The root of the plant? 8 inches seems like an arbitrary number. He thinks it is too small for what he believes the purpose to be.

The Chamber would also like clarification regarding the need to videotape the destruction of plants. If you are getting plants from a grow room, for example, producers would have to hire a full-time videographer to videotape the destruction of plants.

Mr. Lewinger stated that the definition of cannabis might be problematic for manufacturers, having the unintended consequence of limiting what they are able to work with. The manufacturers have submitted a lot of comment on that issue, and he encouraged the Hearing Officer to listen to their concerns.

#### *The Comments of Kylie Safa*

Ms. Safa is the COO for Ultra Health. She commented on the definition of "qualified patient" in the proposed regulations, stating that it is inconsistent with the statute. In the statute,



“qualified patient” means a person who has been diagnosed by a practitioner having a debilitating medical condition. In the rule, it is defined as a New Mexico resident. She thinks the rule should reflect what the statute says.

She also stated that the definition of cannabis producers is consistent with the statute. Previously, they were given the title of “licensed producers.” That phrase was changed in SB406 to “cannabis producers,” who have the right to produce, possess, distribute, dispense, and manufacture. They recommend that the rule reflect that same definition.

Further, she stated that the proposed rule will create a new definition for a non-profit producer. She stated that it is not required anywhere in the statute that licensed producers or any other class of licensee is a non-profit. They are asking for equality across the classes of licensees. If cannabis producers are required to be non-profit, then all licensee classes should be non-profit.

Finally, Ms. Safa addressed patient possession limits, which are set at 230 units. She stated that this is arbitrary, capricious, and inconsistent with the definition of “adequate supply.” She noted her submission of a petition this year which requested a rulemaking process to increase the patient possession limits to the industry standard of 5 ounces per month. She stated that Secretary Kunkel responded to that petition stating that the Department anticipated addressing that in this current rulemaking process, and that it would do producer and patient surveys. Ms. Safa stated that unfortunately it was not included in this rulemaking process. When patients cannot purchase what they need, they are forced into the black market or grey market. Ultimately, they will buy medicine that is unregulated and untested and unsafe, creating a public health crisis in our state.

Ms. Safa stated that they recommend that patients be allowed to purchase what they need, 5 ounces per month at a minimum. Finally, she reiterated that the recommended plant count from Dr. O’Donnell is 5,000 mature flowering plants; they support that proposal.

#### *The Comments of Leigh Jenke*

Ms. Jenke is the Compliance Officer for Ultra Health. She offered comments on the requirements in the rules related to quarterly reports. She stated that she believes that they require too much information and most of the information can already be gleaned off BioTrack. If they are allowed to turn in BioTrack reports, which DOH can log into, then the MCP can see everything that is tracked through BioTrack. That would be a better option for Ultra Health.

With respect to the weights of edibles, she noted that that include weights other than cannabis, such as flowers and whatever else goes into the edible. She stated she thinks that requirement should be amended.

Ms. Jenke next commented on compliance violation fees. She stated that she thinks that they are exorbitant. She stated that the fees should be capped at \$1,000.00 because most of the violations are very, very minor and can be fixed within just a few minutes. Unless it is a serious public health crisis, the fees should not go up to \$50,000.00.



Ms. Jenke stated that she believes there is a disconnect between producers and manufacturers and the rules that they must follow currently. She said that they are having issues with pay delay and the manufacturers do not have to follow the same rules as the producers, which means they incur violations for those things. She argued it would be best to have rules that apply consistently to everybody, and everyone should have the same penalties.

She next addressed the issue of requesting additional information from patients. She stated that the MCP should be able to do that. If a person is unlucky enough to have a qualifying condition, you should not be able to single people out and request additional information for them to become a patient. She argued that seems very arbitrary. She said that it should be the same rules across the board for all patients.

Ms. Jenke also commented on the manufacturing fees. She stated that producers must bear the brunt of the \$180,000.00 fee while the manufacturers are paying a minimal fee. She noted that producers grow the plants, they build the distribution locations, they have the employee workforce, and the fees will be passed down to the patients. She argued the fees should be readdressed, and not that high.

*The Comments of* [REDACTED]

[REDACTED] is the mother of a son who was present at the hearing and a medical cannabis patient. [REDACTED] stated that she has been coming to Santa Fe for three years, voicing for him as medical cannabis patient.

[REDACTED] stated that there is no true voice for all medical cannabis patients in the rulemaking process. She stated that there is still criminalization being allowed in and out of school. She stated that it is unjust to allow opt out for schools with regard to administering medical cannabis.

She stated that she has asked her state government repeatedly to take into consideration that they made cannabis medicine in 2009 and it is not being treated like medicine in 2019. She stated that SB404 and SB406 do not work equally for the whole Program. It sets up participants for severe legal harm. Her son has been out of school for almost three years now. This is an unacceptable and repulsive fact.

Beginning three years ago, she came to Santa Fe asking the question why the Lynn and Erin Compassionate Use Act is being used against all participants. That question still stand unanswered. She wants to know what the Program is not being fully bettered and expanded for all considering how many lives it has saved.

After years of participating in the process and petitioning repeatedly for better results, she has no further course of action except for legal action against applicable state government officials. She never wanted this course of action.

She asked that the DOH take action to protect and save this Program, and to not allow it to get run over by the recreational use of cannabis.



*The Comments of [REDACTED]:*

[REDACTED] has a son who has a seizure disorder and he stated he was at the hearing to speak on behalf of his son. First, he thanked Governor Grisham for “bringing us this far.” He also thanked [REDACTED].

[REDACTED] that his son suffers from [REDACTED]. He said that he had shown video of [REDACTED] to Kenny Vigil and Andrea Sundberg, who he described as really sweet people.

[REDACTED] said they tried 21 different pharmaceuticals for [REDACTED], and none had worked over the last 13 years. The only thing that works is cannabis. The problem is that he can only grow four mature plants and have 12 immature plants. He said this is extremely arbitrary and they cannot afford it anymore. He and his wife has spent about \$250,000.00 in the past several years. When [REDACTED] is out of his cannabis oil, [REDACTED] would break your heart and tear you to pieces. [REDACTED] started at [REDACTED] and he is [REDACTED] now.

[REDACTED] said [REDACTED] is allowed to carry more than normal. He can carry 200 lbs. the problem is that they cannot afford it. He has been begging the Department to allow [REDACTED] to grow 33 mature plants. He noted that a lot of them die. He argued for a special use form. His wife, who is [REDACTED], and he created a form, it’s just a draft, but provides the groundwork to allow for special situations where a patient needs more than 4 plants. His 4 plants only last 15 days. He requires 4 grams of oil per day. When he does not have oil, [REDACTED] begin and all he can do is apologize to him for being broke. This needs to be addressed immediately. They fear they will lose him to [REDACTED] when he is out of medicine.

*The Comments of Gina Lucero*

Ms. Lucero is a registered nurse. She works for Aspen \_\_\_\_ [not audible], a patient advocacy and educational clinic run by a group of nurses in New Mexico. She is also a contractor for charter schools. She stated that she appreciates that rules have been developed for cannabis administration in the schools. However, she thinks it is very poorly written. The problem they are facing now is that school starts next month. They are just now developing rules and procedures on how to go about this.

The option to opt in or out for the administration of cannabis oil in the schools has become problematic. Currently, right now, they have one public school and one charter school that is allowing cannabis oil. They have more than two children in the medical cannabis Program.

They have already established that the Board of Nursing will not allow nurses to administer cannabis oil because it does not come with a prescription that shows when and how to administer it and shows adverse reactions. Consequently, the burden has gone back to the patients and the parents to find a staff member who is eligible to administer the oil. Without a training Program, staff members are afraid to administer the oil because they do not have enough knowledge or education about it.



She then discussed a PED rule related to school exemptions. However, she said we are a medical cannabis state, so we should have protections here. By allowing schools to opt out, it does not help children who need medical cannabis. She asked that the Department look at the rules so that the schools don't have an option to opt out.

### *The Comments of William Ford*

William Ford is the medical director of R. Greenleaf & Asso. They submitted written materials that support the plant count to a degree. They feel that the proposed plant count may even be higher than necessary. He stated that years ago, Len Goodman told him, when he was applying to be a producer that “we don't need more producers, we need better producers.” That is still true today. The producers out there are not doing a great job in meeting their responsibilities in providing medicine. If you look at the numbers, it's just rational math. Like it or not, there is a restriction on purchase and possession, that patients in the Program can have. If you take the number of patients and multiple it by the amount of cannabis the patients can possess, you come up with a finite number that the total amount of cannabis that the Program can have.

He stated that if producers were doing what they are supposed to do in becoming more efficient and meeting the responsibility of the license itself in providing for patients, there would be no shortage at all. In fact, there would be a surplus of cannabis. Thus, R. Greenleaf supports the proposed plant count change to 1,750 plants.

Mr. Ford stated that the rule change is not perfect, and there are a lot of problems related to all the issues that have been brought up at the public hearing. He urged that DOH to adopt a sense of urgency to address those problems. He supports Mr. Jacobs' contention that manufacturers and PPLs need more oversight and regulation for public safety issues. This are serious and significant issues that affect the public health and safety. At a time when the state is looking at legalization of recreational use, it would be a sign of good faith for the State to begin to address some of these issues.

He stated that the definition of “manufacturer” is one of the places where there is a major problem. They are concerned that PPLs are not restricted in the amount of their harvest. They are not recording that harvest. They are able to go to manufacturers under the proposed rule, and manufacture. A PPL has the ability with four plants and five harvests a year to grow up to 20 lbs. of cannabis. He does not see how it is possible that the Department wants to be able to go to a manufacturer and have the manufacturer manufacture three pounds of PHO, a very highly concentrated cannabis product.

Although not perfect, they feel it is imperative that this rule change be adopted and promulgated. The plant count must be put in place. If not, there is a good chance that this Program could be pushed into chaos—the chaos that comes with the litigious nature of some of the producers. That comes with uncertainty.



### *The Comments of Kelly O'Donnell*

Kelly O'Donnell is a consultant for Ultra Health and an Economist and Research Professor at the University of New Mexico. She has been working in New Mexico public policy for over 20 years, both in state government and more recently as an economic consultant.

She stated that she has both researched and observed the rapid growth of the cannabis industry in New Mexico and in surrounding states. Because of that research, she believes the proposed plant count of 1,750 is too low to meet future patient demands and assure that all qualified patients have access to high quality affordable medication.

She stated that the process by which the Department arrived at the proposed 1,750 plant count is somewhat inexplicable to her. The limit appears to reflect neither the DOH survey, nor the input received from DOH's own consultants. She argued that neither the Department nor its consultants took into consideration what she considers to be two major factors. First, latent demand in the marketplace. The practice up to this point, by the DOH and other consultants, has been to estimate the demand for cannabis in New Mexico based on current purchases. She sees this as a somewhat flawed methodology because it implies or assumes that the market in its current state is functioning well and that everyone who wants to purchase cannabis can afford to purchase cannabis at the current prices. In fact, she said, when supply has been artificially constrained, as it has been with the 450-count plant limit, current purchases are not going to be an accurate barometer of market demand.

Dr. O'Donnell stated that the second oversight in conserving the plant count is that she believes very little consideration was given to SB406. If the statute is implemented, she said it has many different impacts on producers and on demand. Further, she noted the addition of qualifying conditions of autism and opioid use disorder as additional factors driving demand that she does not see are reflected in the DOH rules. She said that these are profound oversights.

She argued that the Department's use of purchases in the market as a barometer of demand is one of the key factors that lead to the overturning of the 450-plant count. She argued that what happens when people cannot afford to buy the cannabis, they need is that there is a great deal of pent up demand that is not reflected in the current market place. She stated that demand is reflected in purchases from dispensaries in Colorado.

Dr. O'Donnell stated that the changes reflected in SB406, the additional of new qualifying conditions and the pent-up demand will all serve to accelerate the demand for cannabis in New Mexico. She believes that the proposal of a 5,000-count plant limit would be sufficient to meet that demand.

### *The Comments of Steven Jenison*

Steve Jenison is a retired public health physician. He worked for the DOH for about 15 years. He retired in 2010. He is currently "thankfully and happily" a licensed paramedic for the Dixon Volunteer Fire Department. Although he is a graduate of Iowa State University, he has no interest in the horticultural aspects of the medical cannabis industry. He has seven years of



experience who represented the DOH in the New Mexico legislature while the Lynn and Erin Compassionate Use Act was under consideration. He also helped draft the initial regulations. He was the first Medical Director for the MCP from 2007 to 2010. He was also the chair of the Medical Advisory Board for a number of years after he retired in 2010. He appeared at the public hearing to address a concern he has about the relationship between the MCP and the Medical Advisory Board.

He began by stating that the Medical Advisory Board is just that—it is the advisory board to the Secretary of the Department of Health. After hearing comments from the public regarding new conditions to be eligible for the Program, the Medical Advisory Board makes a recommendation to the Secretary, that ultimately the Secretary acts upon, by accepting it or rejecting it. He thinks it has always been assumed that the Secretary would act on the recommendation of the Medical Advisory Board within a six-month period before the next hearing. That is important because if the Secretary does indeed get the recommendation of the Medical Advisory Board, which happened multiple times over the past eight years, then someone would have an opportunity to bring a new petition to the attention of the Medical Advisory Board prior to the next hearing. Unfortunately, it was repeatedly the practice during the past eight years for the Secretary to not act upon the recommendation of the Medical Advisory Board in a timely enough fashion to allow for someone to submit a new petition in time for the deadline for the next hearing. He strongly recommends that it be put into regulations that the Secretary must act on a recommendation of the Medical Advisory Board within a reasonable period time, say three to four months.

Dr. Jenison also commented as a matter of concern that there were one or two occasions over the past eight years where the DOH changes regulations on the issue of the amount or type of cannabis preparations that someone was allowed to have as part of the Program. He stated that it's very clear from the statute that one of the roles of the Medical Advisory Board is to advise the DOE on the amount of medical cannabis that is available to a patient. He does not think that anyone imagined that the DOH would not consult the Medical Advisory Board before changing that because it is so clear in the statute. Since the Department did not do that over the last eight years, he strongly recommends that a regulation be written that clearly defines the policy and procedure by which the DOH is required to consult the Medical Advisory Board before making changes in those aspects of the Program over which the medical advisory board has statutory authority.

#### *The Comments of Josh McCurdy*

Mr. McCurdy is the president of New Mexico Medical Patients Advocacy Alliance. He came to the public hearing to talk about the plant count issue. He stated to the audience that if they wanted 5,000 plants, they need to grow better. He further stated that he believes the plant count of 1,750 is a little high. He said: "you should be a better grower."

Mr. McCurdy stated that the dispensaries are running out of medicine now in rural areas. He said you can give some people more plants than they would ever need, and they still won't be able to grow. He thinks we need more competition and open up the licenses, because you look at Albuquerque's market and they pay the \$10 a gram and under. You go to rural areas and they are



at \$12 – 14 all day every day. That's if a dispensary has product. You might have two or three strains. Opening up the licenses more would be great.

He also stated that the plant count for PPLs needs to be increase as well. They can only have four flowering plants. Most PPLs are not professional growers. They might grow a maximum of one to two ounces. They're trying to save money; he can't afford 230 units from a dispensary; that's roughly \$2500.00 or more.

### *The Comments of Chad Lozano*

Chad Lozano is from New Mexico Medical Patients Advocacy Alliance. He said PPL growers do not get paid for the cannabis that they grow, unlike the LNPPs. They grow it for themselves. Having more restrictions will hurt PPLs, because they are already hurt by restrictions and regulations. He focused in particular on the landlord clause. The landlord clause forces them to get written permission from their landlord that they are allowed to grow at that location. They are also told that they are not allowed to tell anyone where their cannabis is growing. At the same time, they are told to tell their landlords about it. He noted that is a conflict right there.

He also stated that a lot of PPLs don't know their landlord. Thus, they are put in a position of telling someone they don't really know that they are cannabis patients and may get kicked out of home. They may get threatened with eviction. Further, he said that he spoke to a lawyer, who told him that having a landlord sign a document giving them permission to grow cannabis put the landlord in jeopardy with the federal government, because they are now an accomplice to what the PPL is doing.

He said this issue should just be between the landlord and the tenant without getting the state involved. If the landlord does not want it, he can say no and put it in the contract.

Mr. Lozano stated that he understands that there are 8000 PPLs in the state. He said only about 20% grow cannabis. He said only about 1% grow enough for a whole year supply. Putting more regulations on them does not make sense. They don't make any money from this. Growing cannabis is not easy. If PPLs were just allowed to have the grower's rates, they could have collectives.

He added that the 8-inch rule "doesn't make any sense." Anyone in the business can tell you the difference between a cannabis plant that is mature and a cannabis plant that is in a vegetative state.

He further advocated for opening the licenses instead of just increasing plant counts. HE said it would help the rural because there are people who want to be producers. He cited Otero County as a place where they need greater access.

### *The Comments* [REDACTED]

[REDACTED] is a patient in the Program and is a PPL. He stated that he was evicted from his house. He was evicted because he had to have landlord permission. His landlord requested



that he give her an ounce of cannabis a month for rental. He told her that was not necessary and illegal due to the rules and regulations of the MCP. Consequently, she raised his rent. He was then evicted. Before he could move out of the house, he was taken to court twice. He was then taken to court again for damages, which never happened. The person who did work on the house did it.

██████████ does not believe that the landlord clause should be allowed, because when you sign a rental agreement with a landlord you take it upon yourself to be responsible for damages to a house. Further, he said there is no need to violate any kind of HIPAA law or for his landlord to violate HIPAA because they are not bound by it.

He also said that because of this situation he had an entire crop stolen. That is \$3500.00 worth of medicine for some. It's six months-worth of medicine for him, which he lost. His grow room was ruined, and he lost \$1000.00 worth of equipment. He does not think he should have to tell his landlord that he is growing because of this.

██████████ also argued that caregivers should not have to set up grow rooms in each of their patient's houses. It would be more cost effective for the caregiver to grow all the plants at his house. It is more compact and more efficient. Consequently, the patient is better taken care of.

He also advocated opening the licenses. He talked about the many miles people must drive in rural areas to get their medicine.

#### *The Comments of Jessica Gelay*

Ms. Gelay is a staff member from the Drug Policy Alliance. She appeared at hearing on her own behalf. She has worked on these issues for the last seven years. She worked as an expert witness in the legislature on SB406. She thanked DOH staff for working quickly to get so many rules rewritten to match the law.

She raised a couple of issues that were not addressed in legislation, but she urged should be changed in rules. First, people with criminal histories for substance abuse violations and other felonies should not be restricted from working in cannabis businesses. Two measures signed by Governor Grisham—the law that extends Ban the Box law to private employers and the Record Expungement law—support the need to reduce hurdles to reentry into the job market after incarceration. She urged the DOH to continue the effort to expand employment opportunities for formerly incarcerated people by formally changing the MCP rules to allow people with controlled substance violations and other felonies to be a part of medical cannabis businesses, allowing them to be caregivers for loved ones in the Program.

People coming out of incarceration need employment but there is a known lack of job opportunities for people with felony records. People reentering the community after incarceration also experience post-traumatic stress at greater rates than the average person in the population. Post-traumatic stress is a condition that makes them eligible for medical cannabis in New Mexico. However, medical cannabis use limits employment possibilities for any patient and even with



changes in the new law that support a patient's right to use medicine and also be employed discrimination against employees for lawful medical use of cannabis persists.

Ms. Gelay stated that combining medical cannabis use and having a criminal record can make finding employment extra difficult. However, changes can be made that will support employment opportunities for people with criminal records, support the medical cannabis industry, and is the right thing to do. That would be in line with proposed legislation that was introduced in the last legislative session that would not prohibit people with controlled substance violations from being part of this industry.

Ms. Gelay argued that New Mexico should remove the disqualification provisions barring people with felony convictions from being medical cannabis caretakers. Provisions that should be removed from the rules are 7.34.4.8(I)(2) NMAC and 7.34.4.10(F)(2) NMAC. She argued that these provisions should be stricken in their entirety.

#### *The Comments of Robert Stranahan*

Mr. Stranahan is a partner in and Chief Legal Counsel for the Harvest Foundation. He focused on a couple of areas in the proposed rules.

First, he stated his support for the plant count limit of 1,750, with a caveat. The caveat arises of the new definition of "seedling." They do not support the 8-inch maximum height restriction. They do not believe that the 8-inch limitation makes sense. Anyone who grows cannabis plants knows that the 8-inch seedling definition is arbitrary and does not makes sense from a grower's perspective. He stated that the discussion that has been put forward regarding mature and immature plants is a better construct for defining the 1,750.

Second, he addressed the fee structure for the Program. He argued that going from 450 plants to 1,750 plants and changing the maximum fee structure from \$90,000.00 to \$180,000.00 is not supported by a sufficient nexus between the funds necessary to operate the Program and the \$180,000.00 figure. He does not feel there has been a sufficient explanation for how that number was derived. He thinks it would make more sense to look at the overall Program to figure out what that Program is going to cost with the increased oversight for the increased number of plants and then establish a fee structure that reflects that.

He argued that the penalty structure also seems somewhat arbitrary. He argued it would be nice to revisit that to figure out what a proper fine or penalty should be.

Finally, he stated that a number of producers would like to find a way to discount from a volume standpoint the patients that need high amounts of cannabis for their particular ailment. They would like to find a way to work with the administration on that issue.



*The Comments of [REDACTED]*

[REDACTED] is a New Mexico cannabis patient, advocate, and attorney. She submitted written comments on the day of the public hearing, and her oral comments are reflected in detail in her written comments. *See* DOH Exhibit 16.

*The Comments of Monique Chavez*

Ms. Chavez is the owner of Southwest Cannabis, and is also a business consultant, and a lawyer. She started in this industry about six years ago as a lawyer. She has been involved in production for about 16 years. She founded Students for Sensible Drug Policy when she was a student at the University of New Mexico Law School. She also founded New Mexico NORML and then started her own business.

She stated that she echoes [REDACTED] in saying that we need more licensure. Producers have been in business for about 10 years now and sufficient growth has not happened yet, so there is a need for more licenses and competition. She does not agree that the need is for better quality producers. The need is for more producers and more competition.

She said that licensure fees have lowered but they are still among the highest in the nation. With more licensees there will be more money for the Program.

Ms. Chavez stated that it is virtually impossible for a person of color to become a license holder and gain entry into the industry. She said this is not small business friendly. She said you cannot not have a situation where people of color are not allowed entry and not have a way to get into the industry.

With that, she requested removal of the felony requirement. The very people who have created this industry and some of the founders of this industry are now being shunned.

She urged the Department to develop an intelligent plan in designing collectives. The patients very much need them, especially in rural areas. If they do not get enough producers, they need a way for patients in rural areas to get access.

Ms. Chavez also suggested removing the non-profit status of producers. The non-profit status restricts these businesses, which is what they truly are—businesses. LNPPs are treating licenses like commodities. They are using loopholes to change board membership so that the nonprofit status is almost harmful to patients.

She said that they are very much looking forward to rules regarding consumption spaces. She offered thanks for the Department for removing the stigma of cannabis, and not making patients hide alone in their homes.



*The Comments of Zeke Shortes*

Mr. Shortes is with Sacred Garden. He expressed a concern he has had about the re-licensing fee of \$90,000.00 and is even more concerned about the fee at \$180,000.00. He noted that we are the second poorest state in the country. The patients are the ones who end up paying these fees. The average producer makes less than \$1,000,000.00 a year. If they are paying \$180,000.00, that amounts to an 18% tax, which together with sales tax amounts to 26% tax on the patients. He argued that that seems absurd in a state with so many poor patients.

He noted that in Colorado his re-licensing fee would be \$2,000.00 to \$3,000.00. He acknowledged that the State needs to have enough money to run the Program, but “why don’t we have the pharmaceutical companies pay for it, with the opioid addiction issues we have in this state.” “They have more money than God, so let’s have them pay for it.” It is silly to argue that a giant re-licensing fee will not impact patients because it just is. He argued that producers cannot lose money year after year. If they have to pony up \$15,000.00 a month, just to pay a re-licensing fee, that is significant.

His business supports 95 employees and their families. They want to continue doing that.

He also urged the industry and the State to collaborate and work together on these issues as partners. He is tired of the fight; he just wants to work together for patients.

*The Comments of [REDACTED]*

[REDACTED] is a molecular biologist and a patient in the Program. He suffers from [REDACTED]. He is also [REDACTED].

[REDACTED] stated that he was appearing at the public hearing to speak for research science. He argued that if we are really going to treat medical cannabis as medicine, we need to use research science as the basis for it, in particular to use pharmacology. He recommends this approach particularly in how we describe the term “cannabinoids.” He noted that we describe THC as a “psychoactive cannabinoid.” He argued that totally neglects the therapeutic value of THC.

He argued that the way to define THC is pharmacologically, as the causal agonist endo-cannabinoid receptors.

*The Comments of [REDACTED]*

[REDACTED] is a patient in the Program. She suffers from [REDACTED]. She was [REDACTED] for her community. She argued that as a patient, they do not have adequate supply. Those with a PPL license can have a crop that gets wiped out by one bug. She is fortunate that her caregiver makes sure that her medicine has no insecticide. Her own family protects her and makes sure she has quality of life.

She also has a problem with [REDACTED] probably due to some of [REDACTED]. That takes away from her way of living, because she is an artist and uses art to make her living. She does not



always make enough money to buy her medication. She argued us to look at the patient and not all the rules, the money and the production.

*The Comments of William Dougherty, M.D., FACS*

Dr. Dougherty is a surgeon, and a founder of one of the LNPPs. He stated that he does not understand the idea about the Lynn and Erin Compassionate Use Act and having the doctor get in the way of the doctor-patient relationship. Medical cannabis is the only medicine controlled by the State in terms of how much, when and where. He stated that he does not understand that. He stated that we could rewrite the regulations so that patients could be treated and provide in the regulations so that a doctor's order could be resented in the school for children who are taking medical cannabis.

He urged that how much medicine a patient gets should be up to the patient's physician, not up to the Department. He stated that the rules are arbitrary and don't reflect that. He has many patients who tell him that have cards, and they are going to buy cannabis on the black market or go to Colorado. He said that out of 50 patients, that is 20% or more, because they cannot get enough medicine, and "it's a get out of jail free card" for them to go to the black market.

Dr. Dougherty stated that he understands that the MCP wants to limit diversion, and he respects that. However, he argued that the MCP is not limiting diversion, and the regulations are not doing it. He argued that the regulations are not written well enough to encourage people to go to the dispensaries.

He stated that his LNPP offers discounts for Medicaid patients, Veterans, and indigent people because they realize that medical cannabis is expensive stuff. However, he said that their margin is not great. He said it looks like they would make a lot of money, but the fees are draconian and need to be reviewed.

He asked, what about equal protection under the law? There are different fees for different people at different times. He thinks that is not right.

Dr. Dougherty argued that the Department is way out of line and violating federal law with the HIPAA issue by requiring a patient to tell their landlord that they are using medical cannabis. He said he is an expert in HIPAA and "it's an absolute violation." He argued that the Department cannot require someone to violate HIPAA.

*The Comments of Shanon Jaramillo*

Ms. Jaramillo is from Cannabis New Mexico Staffing. For the past 2 ½ years she has been working to develop the work force or the labor market in the medical cannabis industry. She originally got into this business to staff the licensed businesses and be helpful regarding staffing. She quickly found that there was a huge gap of information, "as we are seeing here today." She said that we need more education. She feels that the legislators, the individuals writing regulations, and the medical professionals in the field require more education.



She stated that other states have created Programs for the workforce to qualify themselves to be part of the medical cannabis industry. This helps the businesses but also helps with compliance.

She stated that the fees going up to \$180,000.00 is a huge concern for her. She stated it will have a negative impact on the labor market. Right now, it is hard for them to staff over a minimum wage rate. There are plenty of people looking for jobs, but there are not plenty of qualified people for the jobs. She set out to put together material for nurses helping kids at school to educate them about the Program. She is concerned that the Department has not focused on education.

Ms. Jaramillo proposed that the DOH put together a source of funding so that producers get provide education, through companies such as her company, so that they can be helpful. She urged that New Mexico should be proactive.

She also supports dropping the felony requirement.

#### *The Comments of Mario Gonzales*

Mr. Gonzales is a representative of Budding Hope, which has been licensed for nine years now. He said they are one of the smaller producers in the state. He noted that there has been a progression in how the Program has developed. With supply and demand, there is always a force that is pulling on the Program to really perform.

He talked about the shortages in the Program. He does not operate everywhere. The state of New Mexico is very geographically challenging. People come into his dispensary and they are looking for a basic hand cream. They can't find it. And they say no one in town has a hand cream. How does that look for us?

For eight and one-half years, his business grew roughly about 200 plants. They buy about 200 plants a year, typically. Early on, there were not thousands of people coming into their stores. They have about 2500 people coming into their stores; they can only serve about 1500 of them. There are a lot of people who cannot get service at all.

Budding Hope is OK with the maximum plant count of 1,750. He could not afford to purchase that many plants anyway. The fee structure is "a little steep." Budding Hope would be buying the minimum amount of plants. That probably still would not cover the amount of people coming into their stores. However, he does not think we hold a candle to some states that are able to get that supply out. He said we must look at whether we are meeting the patients' expectations. If we look at the data behind demand, and by the time you analyze the data the demand has risen. He stated that we are always playing catch-up.

He repeated that Budding Hope is OK with the maximum plant count, but we need to look at what we really need to do to meet patient needs. It's a Program of scarcity.



Mr. Gonzales stated that using a standard of what is flowering and what is not would be better than the 8-inch seedling rule.

*The Comments of [REDACTED]*

[REDACTED] is a patient, No. [REDACTED] in the state. He videotaped the public hearing and urged the Department to do so in the future, and send it out to the public, especially for those from outlying areas who must drive two or three hours.

*The Comments of [REDACTED]*

[REDACTED] is a medical patient. She noted that Governor Grisham had recently announced that Richland Corporation was coming into build jobs for our state. She said that they are a multistate operation. She urged that rather than seeking companies from out of state to provide jobs, we have a Program through the DOH that would assist New Mexicans in being the owners of these corporations, not just the workers.

*The Comments of Dr. Steven Rosenberg*

Dr. Rosenberg is a medical cannabis practitioner. He started doing this in 2011. He served as the Medical Director for the Program from 2013 to 2017. In that capacity, he has seen many thousand patients and has reviewed thousands of medical charts.

Dr. Rosenberg commented on the producers. He noticed that some producers say we don't have enough plants; some say the count is too high. Some people say it's just right. Dr. Rosenberg thinks it is not only a question of quantity it is a question of quality. You have to have the right products for the right patients. He bases this on seeing patients on a daily basis. There may be a tincture that they need which has a one to one ratio of CBD to THC. They are not going to be able to find this in every dispensary. All along, he thought the increase in the plant count would solve these problems. He still hopes that it does, but he would ask the producers to think about the diversity of the patients and try to reflect that diversity in their products. Micro-dosing is way underrepresented. CBD strains are underrepresented. Strains that are in equal amounts are underrepresented.

Dr. Rosenberg stated that the Program is about patients. It is not about what is the most profitable thing to go. He understands these are businesses but asked them to keep the patients in mind.

He stated that there has been a shift in the patient population to the elderly. The average age in his practice is probably 65. They have different needs and different desires. Finding products for them that will help them function without impairment is exceedingly difficult. He asked the producers to take the product and make it happen for all the patients who need the products.

During the last legislative session, Dr. Rosenberg attended multiple committee meetings and spoke with multiple legislators during the process of crafting SB404 and SB406. It was his



understanding that the change in definition of a patient being a “person” to a “New Mexico resident” was included to make the reciprocity workable. He stated that the DOH has until December of this year to craft reciprocity regulations. This was all understood when the bill was passed. To say that anyone who comes to New Mexico to get a card is really not there for the patients because they are not residents. They have to go back to their state with that cannabis. If they do not have a card in their own state, it is not reciprocity. Further they are at risk. If they go from Arizona to Nevada, they will not have much of a problem. But when they have to cross that border back to Texas, they are risking a felony conviction. He has no doubt that Governor Abbott will make it miserable for those patients who have to go back into Texas. He asked the DOH to please take into account what it does and how it is done to the patients.

#### *The Comments of Robert Munro*

Mr. Munro is the Executive Director for Seven Clover. He is also the board president for the New Mexico Cannabis Chamber of Commerce.

Mr. Munro stated that Seven Clover supports the plant count at 1,750. They believe that will be more than enough medicine throughout New Mexico’s 35 LNPPs to get sufficient medicine to patients. There are still shortages, as described at this public hearing all over the state, because of access and the big challenges that they need to face that are not addressed in this rule change. He looks forward to partnering with this administration to come up with solutions so that they can tackle that in December.

Mr. Munro stated that he believes that personal production licenses for patients are essential. He said that part of that is making sure they have success. He heard a lot of patients talk about the fact that they are not professional growers and that they need assistance in getting going. Part of that is giving them viable plant life to work with. If he were able to sell clones, cuttings, and give patients something that is rooted, would make a big difference for the patients. The 8-inch rule should either be changed or provide for allowing the selling to PPLs for their successful growing.

Mr. Munro said that the \$180,000.00 renewal fee should be looked at more carefully as to how those numbers were derived.

#### *The Comments* [REDACTED]

[REDACTED] is with [REDACTED]. She is a patient advocate and a patient herself. She discussed the issue of testing for PPLs. She said that if that issue is going to be considered, she also wants PPLs to be able to share with dispensaries or sell it to them. If testing is imposed on PPLs, she said it’s only right to make the growers pay some kind of compensation. She said that this would also help with opening licensing. If the State cannot do that, then if the PPLs can sell to the dispensaries, that would create an overflow for edibles and oils.



The Comments of [REDACTED]

[REDACTED] is a patient. He spoke about his concern regarding the three-year rule on applications for patients. He stated that it is confusing to a lot of patients, particularly with respect to why they have to go to a doctor and check in every year even though they still have a three-year license with accessibility. It is confusing to know how the patients will go about getting the stamps or how its going to be implemented with the particular licenses that they have. If that could be clarified, it would be greatly appreciated.

He also stated, with respect to PPLs, with the State “wanting to go recreational,” as a patient, he needs to have some certainty that he will be protected under the law, and not have to worry about recreational use getting into the window of him taking care of himself, and then not allowing patients to grow for themselves.

### *Closing of the Public Hearing*

In closing the hearing, the Hearing Officer briefly describe the process that would occur after the hearing. He stated that, following the hearing, he would be writing a Report and Recommendation to Secretary Kunkel, which would include recommendations regarding what she should do with the proposed amendments to the rules. The Hearing Officer stated that the process would include his reviewing all the written materials that had been submitted to the MCP and made part of the record. He stated that his goal was to get the Report to the Secretary by August 1.

The Hearing Officer thanked all the participants for coming to the hearing and participating in the process and told them their participation is an important part of the process. The hearing was then closed.

### **HEARING OFFICER’S ANALYSIS AND RECOMMENDATIONS**

The Hearing Officer stated at the commencement of the Public Hearing that he was authorized only to make recommendations as to the proposed changes to the rules. There were many comments that are not germane to the issues related to the proposed amendments to the MCP rules that are before the Hearing Officer. However, they are summarized in detail above so that the Department can consider them.

Guidance in determining whether a rule adopted by an administrative agency will be upheld can be found in *New Mexico Mining Ass’n v. New Mexico Mining Com’n*, 1996-NMCA-098, 122 N.M. 332, which states as follows:

Rules adopted by an administrative agency will be upheld if they are in *harmony* with the agency’s express statutory authority or *spring from those powers that may be fairly implied therefrom*. [Citations omitted.] Similarly, regulations adopted by an agency are presumed to be valid if they are shown to be *reasonably consistent* with the statutory purposes of the agency. [Citation omitted.] [Emphasis added.]



*See also Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

The Hearing Officer addresses each of the current group of proposed amendments to the Medical Use of Cannabis Rules as follows:

### **7.34.2 NMAC – Advisory Board Responsibilities and Duties**

#### ***7.34.2.7(A) NMAC – Amendments to DEFINITIONS***

The proposed amendments to the Definitions in 7.34.2.7 NMAC are identical to the proposed changes in 7.34.3.7 NMAC and 7.34.4.8 NMAC. Consequently, the comments in this subsection apply to all three sets of proposed amendments to Definitions.

The proposed changes to Definitions in 7.34.2.7 NMAC are as follows:

The definition of “***Advisory board***” at 7.34.2.7(E) NMAC has been revised to change the number of members of the board from eight to nine, based upon statutory changes enacted by the passage of SB406 during the 2019 legislative session. The definition was also changed to remove fields of specialty for the same reason. *See* Lynn and Erin Compassionate Use Act, NMSA 1978, § 26-2B-6.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment

The definition of “***Approved laboratory***” at 7.34.2.7(G) NMAC has been amended based on the statutory definition from SB406. *See* NMSA 1978, § 26-2B-3(I) to reflect the statutory definition of licensed “cannabis testing facility.”

**Recommendation:** There were no public comments on this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment

The definition of “***Cannabis***” at 7.34.2.7(J) NMAC has been amended to reflect the statutory definition of “cannabis” from SB406. *See* NMSA 1978, § 26-2B-3(B).

**Recommendation:** The proposed amendment to the definition of “cannabis” mirrors precisely the definition of “cannabis” found in NMSA 1978, § 26-2B-3(B). Thus, the proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment

The definition of “***Debilitating medical condition***” 7.34.2.7(N) NMAC has been amended to reflect the statutory definition of “debilitating medical condition” from SB406. *See* NMSA 1978, § 26-2B-3(J).



**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

The definition of "*Manufacturer*" at 7.34.2.7(Y) NMAC has been amended to read as follows:

'Manufacturer' means a person that is licensed by the department to manufacture cannabis products; package, transport or courier cannabis products; have cannabis products tested by a cannabis testing facility; purchase, obtain, sell and transport cannabis products to other cannabis establishments; and prepare products for personal production license holders.

In a July 23, 2019 email message to Chris Woodward at the DOH Office of General Counsel, the Hearing Officer requested information about the basis for the Department's proposed amendment of this rule. In his July 31, 2019 correspondence in response to the Hearing Officer, Mr. Woodward stated on behalf of the DOH that this proposed definition was revised to mirror the definition of "manufacturer" in the recently amended NMSA 1978, § 26-2B-3. Sean McAfee, who represents the New Mexico Beneficial Products Manufacturers Cooperative Association, has proposed in a written comment the addition of the following to the definition of "manufacturer" to provide for the "purchase, obtain and transport cannabis for the purpose of manufacturing cannabis-derived product" in addition to the other listed activities. *See* DOH Exhibit 16, Written Comment of Sean McAfee.

Mr. McAfee argues that the addition of the foregoing language would clarify any potential ambiguity or confusion by specifically including the listed activities related to the manufacturing of cannabis-derived products. *Id.* He asserts that this addition to the proposed rule would make clear the manufacturers' ability to acquire raw cannabis to make products for the Program's patients. *Id.*

In the DOH's July 31, 2019 letter to the Hearing Officer, the Department agreed that the express intent of the Legislature is that licensed manufacturers should be able to obtain cannabis from producers and manufacture cannabis-derived products from that cannabis. *Id.* at 5. The Department further states that the ability of manufacturers to obtain cannabis is implicit in their authority to manufacture cannabis-derived products, which implicitly requires the receipt of cannabis for that purpose. *Id.* at 6. However, the Department states that while the statute permits manufacturers to purchase cannabis-derived products from LNPPs, it does not state that the manufacturers are permitted to purchase cannabis. *Id.*; *see also* NMSA 1978, § 26-2B-3(F). Given the definition of "cannabis product" at NMSA 1978, § 26-2B-3(H), which defines that phrase as "a product that contains cannabis, including edible or topical products," the DOH does not believe that the statute authorizes manufacturers to purchase cannabis, as opposed to cannabis products. *See also* NMSA 1978, § 26-2B-3(B) for the definition of "cannabis," which focus on the "plant *Cannabis sativa* L." *Id.* at 6.

The Department asserts that in practical terms, the distinction between "cannabis" and "cannabis products" has little consequence, because manufacturers will enter into contracts with



LNPPs to transfer ownership of cannabis-derived products upon manufacturer's creation of the products. *Id.* at 6.

The Department also notes that some commenters suggested that licensed manufacturers should be compelled to be nonprofit corporations, as producers are in the rules. *Id.* The Department argues that, since the inception of the MCP, producers have been required to be nonprofit corporations in recognition of the purpose of the statute, and the fact that producers control the medical cannabis marketplace. By contrast, manufacturers do not control prices of products in the market, and do not have the same revenues or resources as the producers, according to the Department. For these reasons, the Department states that it does not intend to require that manufacturers be nonprofit corporations.

**Recommendation:** This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

The definition of "*Non-profit producer*" at 7.34.2.7(FF) NMAC has been added at 7.34.4.7(FF) NMCA to reflect existing producer licensure requirements in the DOH rules. Ultra Health argues that the proposed definition of "Non-profit producer"<sup>2</sup> is inconsistent with the language of the statute. Ultra Health argues that the Compassionate Use Act never mentions the phrase "non-profit" anywhere. In other words, they assert that the statute has never and still does not require producers to be non-profit corporations. *See* DOH Exhibit No. 16, Ultra Health's Comments on Proposed Rules at 18.

Ultra Health further argues that producers are treated unequally with manufacturers, couriers, and laboratories, none of which are required to be non-profit corporations. *Id.* at 18. They assert this "may" violate equal protection principles. Ultra Health proposes that all references to "non-profit" producers be eliminated from the rules, and that a definition of "cannabis producer" be added in accordance with the Compassionate Use Act, as "a person that is licensed by the department to possess, produce, dispense, distribute and manufacture cannabis and cannabis products wholesale or by direct sale to qualified patients and primary caregivers." *Id.* at 18. They argue that this revision would clarify ongoing issues with the department and producers over wholesale activity. *Id.* at 18-19.

In the DOH's July 31, 2019 letter to the Hearing Officer, the Department states that it has been a long-standing requirement of the Department that producers be nonprofit corporations, in furtherance of the stated purpose of the Lynn and Erin Compassionate Use Act to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments. *Id.* at 7. *See also* NMSA 1978, § 26-2B-7(A) ("After consultation with the advisory board, the department shall promulgate rules in accordance with the State Rules Act to implement the purpose of the Lynn and Erin Compassionate Use Act.")

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<sup>2</sup> Ultra Health also argues that the reference to "a non-profit producer" in 7.34.4.8(A)(2) NMAC is also inconsistent with the statute.



The Department argues that the stated purpose of the statute is not to enrich for-profit corporations, but rather to benefit patients in a regulated system. The Department further argues that requiring nonprofit status is intended to further the statute's purpose by requiring producers to comply with New Mexico nonprofit laws and attempting to diminish the producers' profit motivations. *See* DOH July 31, 2019 letter to the Hearing Officer at 7. The Department argues that this requirement is clearly within the Department's authority under NMSA 1978, § 26-2B-7(A)(5), which requires that the Department promulgate rules consistent with the purpose of the statute, but also grants broad authority to "identify requirements for the licensure of cannabis producers and cannabis production facilities."

The Department argues that despite recent changes to the statute by the Legislature, there has been no legislative statement expressing disagreement with the requirement that producers be nonprofit corporations, despite that requirement having been in place for over 10 years. The Department argues that this fact indicates the Legislature's acquiescence in this requirement. *Id.* at 7. The Department notes that when the Legislature disagrees with a rule, it demonstrates that disagreement by affirmatively prohibiting a rule, as it did with the 70% TCH limit in the previous rules.

Finally, in response to public comment from Kylie Safa that the definition of "non-profit producer" should more closely reflect the definition of "cannabis producer" that was recently added to NMSA 1978, § 262B-3(G), the Department proposes to amend the definition as follows:

FF. "Non-profit producer" means a New Mexico corporation that has been designated as a non-profit corporation by the New Mexico Secretary of State, that has been licensed by the department to possess, produce, dispense, distribute and manufacture cannabis and cannabis products and sell wholesale or by direct sale to qualified patients and primary caregivers.

**Recommendation:** The revised definition of "non-profit producer" as set forth in the paragraph just prior to this **Recommendation** tracks the definition of "cannabis producer" found at NMSA 1978, § 26-2B-3(G) with the exception of the use of the term "non-profit." Thus, all the language in the revised, proposed rule is in harmony with the express language of the statute.

The use of the phrase "non-profit" is reasonably consistent with the purposes of the agency as established by NMSA 1978, § 26-2B-2, which establishes that the "purpose of the Lynn and Erin Compassionate Use Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical condition and their medical treatments." For the reasons stated above by the Department, the Hearing Officer recommends that the Secretary adopt the revised, proposed definition of "non-profit producer."

The definition of "**Personal production license**" at 7.34.2.7(II) NMAC has been amended to reflect the statutory definition of "personal production license" from SB406. *See* NMSA 1978, § 26-2B-3(Q).



**Recommendation:** There were no public comments in opposition to this proposed amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment

The definition of “*seedling*” 7.34.2.7(YY) NMAC was proposed to be amended to state that “seedling” means a cannabis plant that has no flowers and is “less than eight (8) inches in height.” Following the July 12, 2019 rulemaking hearing, the DOH revised the proposed rule to state that a seedling should be less than twelve (12) inches in height in its July 31, 2019 letter to the Hearing Officer. The revised definition of the term “seedling” is closely related to the issues related to the increase in the rule related to the plant count limit. Consequently, the proposed amendment to the definition of “seedling” is discussed in the section below at pages \_\_\_\_ to \_\_\_\_, which addresses the plant count limit rule.

The definition of “*Telemedicine*” at 7.34.2.7(CCC) NMAC has been amended to reflect the statutory definition of “telemedicine” from SB406. See NMSA 1978, § 26-2B-3(Z).

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

#### ***7.34.2.8(A) and (D) NMAC – Advisory Board Membership Requirements and Responsibilities***

7.34.2.8(A) NMAC has been amended to reflect statutorily approved conditions in SB406, changing the number of Advisory Board members from eight to nine, removing specialty requirements and expanding the organizations which may propose members to be appointed to the board. See NMSA 1978, § 26-2B-6. The same change to the number of board members was changed in 7.34.2.8(D) NMAC.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

#### ***7.34.2.10(H)(1) NMAC – Advisory Board Public Hearing Procedures***

This rule was revised to change the quorum required for the Medical Cannabis Board Advisory Board from three to five members of the board. The amendment was made pursuant to a statutory revision in NMSA 1978, § 26-2B-6.

There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment

### **7.34.3 NMAC – Registry Identification Cards**

#### ***7.34.3.7 NMAC – Amendments to DEFINITIONS***



The proposed changes to Definitions in 7.34.3.7 NMAC are identical to the changes in 7.34.2.7 NMAC and 7.34.4.8 NMAC. The proposed changes to are discussed above in the analysis for the proposed revisions to 7.34.2 NMAC.

**Recommendation:** The Hearing Officer recommends that the Secretary adopt the proposed changes to the Definitions in Part 3 in the same manner as set forth in the Recommendations related to the Definition in Part 2 above.

#### ***7.34.3.8 NMAC – Qualifying Debilitating Medical Conditions***

7.34.3.8(A) NMAC—“Statutorily-approved condition”—has been amended to include qualifying medical conditions recently approved by the legislature in SB406. 7.34.3.8(B) NMAC—“Department-approved conditions”—has been amended to include qualifying medical conditions recently approved by the Department, which include the following: autism spectrum disorder, Friedrich’s ataxia, Lewy body disease, spinal muscular atrophy, Alzheimer’s disease, and opioid use disorder as conditions qualifying for enrollment in the MCP.

Ultra Health offered written comments in opposition to the proposed 7.34.3.8(A)(13), (16), and (18) NMAC. Ultra Health opposes the requirement under each of those subsections that the individual applying for enrollment submit medical records that confirm the diagnoses for arthritis, painful peripheral neuropathy, and post-traumatic stress disorder. Ultra Health also opposes the requirement in 7.34.3.8(A)(19) NMAC that an individual applying for enrollment in the Program who has “severe chronic pain” submit “objective proof of the etiology of the severe chronic pain” and “a practitioner familiar with the patient’s chronic pain shall provide written certification that the patient has an unremitting severe chronic pain condition.”

Ultra Health argues that the Lynn and Erin Compassionate Use Act, NMSA 1978, § 26-2B-7(B) requires that the DOH “shall issue registry identification cards to a patient . . . who submit the following . . . a written certification.” Ultra Health further argues that the statute defines “written certification” as a “statement made on a department-approved form and signed by a patient’s practitioner that indicates, in the practitioner’s professional opinion, that the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient.” NMSA 1978, 26-2B-3(BB). Ultra Health further argues that the amendments to the statute eliminated from the definition of “written certification” the phrase “in a patient’s medical records.” Ultra Health thus claims that the DOH cannot require the submission of a patient’s medical records.

Ultra Health also argues that if the Department wishes to ensure that certain qualifying conditions are not overused, they should add questions to the certification form for a doctor to answer.

**Recommendation:** The Annotation to NMSA 1978, § 26-2B-3(BB) specifically states that the legislature revised the definition of “written certification” by removing the phrase “in a patient’s medical records or a statement” after the phrase “means a statement,” and adding the phrase “made on a department-approved form and.” Thus, the statute prior to the amendment in relevant part reads as follows:



‘[W]ritten certification’ means a statement in a patient’s medical records or a statement signed by a patient’s practitioner that indicates, in the practitioner’s professional opinion, that the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient.

There is nothing in the removal of the phrase “in a patient’s medical records” that supports that conclusion that, by removing that phrase, the Legislature was barring the DOH from asking for medical records from individuals applying for enrollment in the Program.

In the DOH’s July 31, 2019 letter to Craig Erickson, the Department states that it is required by statute to “verify” the information contained in the application, and, consequently, it is authorized to obtain applicant medical records concerning an applicant’s asserted qualifying diagnosis. *See* NMSA 1978, § 26-2B-7(C). Requiring medical records, the Department argues, is part of that process.

The Department also argues that Ultra Health’s assertion that the decision in *Kieve v. New Mexico Department of Health*, New Mexico District Court, Case No. D-101-CV-2014-00140, prohibits the proposed requirement for producing medical records is incorrect. The Department asserts that the Court in the *Kieve* case specifically held: “It is within the Department’s authority in verifying the application to ask for a medical record that confirms the diagnosis.” *Kieve, supra*, at 15 ¶28.

**Recommendation:** For the foregoing reasons, the Hearing Officer recommends that the Secretary adopt the proposed amendments to 7.34.3.8(A) and (B) NMAC.

7.34.3.8(C) NMAC has been amended to specify that a written certification be included with the patient’s application for enrollment in the MCP. This is a simple administrative clarification.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.8(D) NMAC has been amended to reflect the annual submittal requirements for qualified patients that were specified in SB406. *See* NMSA 1978, § 26-2B-7.1.

**Recommendation:** This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.



**7.34.3.9 NMAC – Quantity of Usable Cannabis That May Be Possessed by a Qualified Patient of Primary Caregiver**

7.34.3.9(C) NMAC has been revised to remove the THC concentration limit to reflect statutory changes made in SB406. *See* NMSA 1978, § 26-2B-8.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.9(D) NMAC: “Medical exception” has been revised to remove reference to the THC limit, as required by NMSA 1978, § 26-2B-8.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

**7.34.3.10 NMAC – Qualified Patient and Primary Caregiver Registry Identification Card Application Requirements**

7.34.3.10(C) NMAC has been revised to remove the fee for replacement of registry identification cards, reflecting a statutory amendment in SB406.

**Recommendation:** There was substantial support for this amendment at the Public Hearing. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.10(D) NMAC has been revised to remove a requirement of a federally issued photo. This change was made because the Department is not aware of any federally issued cards that can be used to verify New Mexico residence.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is reasonably consistent with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.10(E)(1) NMAC is revised to remove a reference to federally issued ID cards for the same reason as 7.34.3.10(D) NMAC.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is reasonably consistent with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.10(G)(3) NMAC is revised to delete a statement that a primary caregiver cannot independently produce medical cannabis. This change is made based on a statutory revision in SB406 that permits primary caregivers to grow cannabis on behalf of qualified patients. *See* NMSA 1978, § 26-2B-3(R).



**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.10(H)(3) NMAC includes an amendment to specify that a practitioner may issue a written certification to a patient on the basis of telemedicine if the practitioner has previously examined the patient in person. This change was also made based upon SB406. *See* NMSA 1978, § 26-2B-3(V).

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.11(B) NMAC is revised to require that the enrollment period for a qualified patient or primary caregiver is three years instead of one year. This change was made based upon SB406. *See* NMSA 1978, § 26-2B-7(D).

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.11(E) NMAC was revised to change the one-year enrollment period from one year to three years as well, for the same reasons the change was made to 7.34.3.11(B) NMAC. The requirement that certifications be obtained within 90 calendar days from expiration of a registry identification card was modified to 90 days prior to submission of the patient's application. This revision was made to assist the Department in verifying that an applicant's diagnosis is current and correct, and to provide patients greater flexibility in the event that there is a gap between expiration of their enrollment and submittal of a renewal application.

**Recommendation:** There were no public comments on this amendment. This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.11(H) NMAC was revised to remove the reference to the fee for a replacement registry ID card, as required by SB406.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH's express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.15(D) NMAC was revised to remove references to potential for criminal prosecution or civil penalty for possession of cannabis in a school bus or public vehicle, or on school grounds or property, to reflect changes made by SB406. *See* NMSA 1978, § 26-2B-5(A)(3).



**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.17(B) NMAC was revised to include a statement that a qualified patient or primary caregiver can collectively possess a qualified patient’s harvest of cannabis from a personal production license grow. This revision was also based on SB406. *See* NMSA 1978, § 26-2B-4(A).

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

7.34.3.19 NMAC was revised to remove the prohibition against transfer of cannabis from a qualified patient or primary caregiver to another qualified patient or primary caregiver, as set forth in SB406. *See* NMSA 1978, § 26-2B-3(R).

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

#### **7.34.4 NMAC – LICENSING REQUIREMENTS FOR PRODUCERS, PRODUCTION FACILITIES AND DISTRIBUTION**

##### ***7.34.4.7 NMAC – Amendments to DEFINITIONS***

The proposed changes to Definitions in 7.34.4.7 NMAC are identical to the changes in 7.34.2.7 NMAC and 7.34.4.7 NMAC. The proposed changes are discussed above in the analysis of 7.34.2 NMAC.

**Recommendation:** The Hearing Officer recommends that the Secretary adopt the proposed changes to the Definitions in Part 4 in the same manner as set forth in the Recommendations related to the Definition in Part 2 above.

##### ***7.34.4.8(A)(1) NMAC – The Department may license two classes of producers***

7.34.4.8(A)(1) NMCA is revised to add “primary caregivers” to the classes of licensed producers. Primary caregivers are added to reflect statutory amendments found in SB406 to remove the prohibition against primary caregivers independently growing medical cannabis for qualified patients. *See* NMSA 1978, § 26-2B-3(R).

**Recommendation:** With one exception, there were no public comments on the proposed amendments to this rule. Ultra-Health objects to a reference in the proposed rule to licensed producers at “non-profit” producers. The rule is otherwise consistent with the statute, and for that reason, in conjunction with the analysis of the Hearing Officer above at regarding the use of the



term “non-profit” in these rules, the Hearing Officer recommends that the Secretary adopt the proposed amended rule.

**7.34.4.8(A)(2) NMAC – Increase maximum plant count to 1,750 plants, not including seedlings to non-profit producer plant limit**

The DOH proposes to amend 7.34.4.8(A)(2) NMAC to increase in the plant limit for non-profit producers to “a combined total of no greater than 1,750 plants, not including seedlings, and an inventory of usable cannabis and seeds that reflects current patient needs.” The plant count of 1,750 plants represents an increase from the original limit of 450 plants, and a decrease from the plant count limit of 2500 plants that was established with the emergency rule established by the Department following the order of District Judge David K. Thomson in *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. In that case, Judge Thompson enjoined the DOH from enforcing the 450-plant limit which applied under a previous version of this rule and invalidated that version of the rule. The Court also decided in that the DOH has authority to regulate the medical cannabis industry by means of a plant limit, so long as the plant limit is based in fact and does not impede the purpose of the Lynn and Erin Compassionate Use Act.

The proposed amendments to 7.34.4.8(A)(2) NMAC also include the provision that “[a] non-profit producer may possess any quantity of seedlings, as defined by this rule.”

The MCP provided a Summary of Medical Cannabis Program Rule Amendments in the binder of exhibits that summarizes the basis for the Departments proposed revisions to 7.34.4.8(A)(2) NMAC. See DOH Exhibit No. 5 at 3-5. First, the DOH states that it contracted with Research & Polling, Inc. to conduct surveys of qualified patients and LNPPs to gather information regarding supply and demand in the Medical Cannabis Program. The DOH also contracted with Freedman & Koski, Inc., a cannabis consulting firm, in order to obtain an evaluation from that entity regarding their findings from patient and producer surveys, and from two reports of industry representatives.

The *Freedman* report, DOH Exhibit No. 8, identified various methods of measuring demand within the Program and specified the number of plants that would be necessary to satisfy each of those measures. The first measure calculated patient demand by referring to patient consumption as summarized from patient surveys, as follows:

- The report calculated the estimated demand for each class of cannabis flower and products based on data that current patients reported in the survey.
- It also calculated the equivalent amount of cannabis in pounds required to produce cannabis-derived products.
- Using the foregoing calculations, the report found that 13,858.22 pounds of cannabis would be required for a three-month period to meet demand.



- Applying a national average of 0.75 pounds of cannabis harvested per plant, the report found that demand could be met with 18,477.63 plants over a three-month period.
- Dividing the 18,477.63 plants by 34 for the number of LNPPs in New Mexico results in a plant limit of 543.46 plants per producer, assuming each producer harvests on average a quantity of cannabis equal to their maximum plant count four times a year.

The second approach in the *Freedman* report is based upon a methodology offered by Kelly O'Donnell, the consulting expert who is affiliated with Ultra Health and the other producers identified in the written public comment submitted by Ultra Health. *See* DOH Exhibit Nos. 5 and 16. Dr. O'Donnell's methodology multiplied the number of enrolled patients by the absolute maximum quantity that patients can possess in a three-month period, and subtracted the quantity produced by personal production license holders. That approach resulted in a patient demand figure of 32,884 pounds per quarter, which required a plant limit of 1,289 plants for each of the 34 current LNPPs. The DOH argues that this figure far exceeds the quantity of cannabis that is actually consumed by qualified patients as identified in the patient survey, and for that reason, is a less realistic measure of patient demand.

The DOH states in DOH Exhibit No. 5, at page 4, that the third measure of demand considered in the *Freedman* report is a revised version of the methodology proposed by R. Greenleaf and Associates. This approach produced a calculated demand of 44,677 pounds per quarter, which would require 1,752 plants per LNPP, assuming an average yield of 0.75 pounds per plant. [The R. Greenleaf report assumed a yield of 0.875 pounds per plant.] *Id.*

The last methodology considered in the *Freedman* report was as follows. The total number of actively enrolled patients was multiplied by the absolute maximum quantity of cannabis that a qualified patient could possess pursuant to the adequate supply use and possession limit, including the amount of cannabis in pounds required to produce cannabis-derived products. This approach did not consider amounts produced by PPL holders. This calculation resulted in a demand amounting to 36,188 pounds per quarter, requiring 1,419 plants per producer. *Id.* at 4-5.

Based upon the foregoing methodologies, the DOH proposes to increase the plant limit from the previous limit of 450 plants per LNPP to 1,750 plants per producer. *Id.* The DOH argues that a limit of 1,750 plants meets or exceeds the totals suggested by the industry models presented, using a conservative estimate of yield-per plant, and a conservative harvest standard that assumes only quarterly harvests. The DOH further argues that a plant limit of 1,750 plants far exceeds the limit of 543 plants per producer that was calculated to meet actual demand based upon the patient survey.

The DOH further argues in DOH Exhibit No. 5 that in addition to the foregoing provisions related to plant count, 7.34.4.8(B) NMAC provides a mechanism for LNPPs to request an increase of plants to exceed the total plants allowed by 7.34.4.8(A)(2) NMAC. The proposed Subsection B allows LNPPs to request an increase of 500 plants during their renewal cycle and by an additional 500 plants on an emergency basis, provided that the LNPPs can demonstrate the need and meets the requirements articulated in the proposed rule, within the Department's sole discretion.



In addition, the DOH notes in DOH Exhibit No. 5 that the proposed plant limit does not factor in other actions that could occur outside the context of rulemaking, such as the DOH deciding to license additional LNPPs beyond the current total of 34. Additional factors that could result in increased production include anticipated increases in production resulting from improved growing methods and “other effects of improved economies of scale.” *Id.* at 5.

The DOH also argues that LNPPs will experience a positive impact as a consequence of seedlings no longer counting against the plant limit for LNPPs, allowing producers to possess an even greater number of plants than the limit of 1,750. Further, the DOH notes the positive impact of patients, including PPL holders, being able to gift cannabis to one another, which is expected to increase availability of supply to patients (although this was not factored into the proposed patient limit.)

Finally, the DOH notes in DOH Exhibit No. 5 that the proposed limit of 1,750 plants is also designed to address a concern about the potential for over production of cannabis, which contributes to a greater potential for diversion of cannabis. *Id.* at 5.

Ultra Health and the 12 other licensed cannabis producers that signed off on the written statement submitted by Ultra Health oppose the limit of 1,750 plants. This group comprises about 51% of the LNPPs in New Mexico. They oppose the limit of 1,750 plants greater than 8 inches in size in part because, they believe it results in an absolute limit of 1,750 plants.

Ultra Health argues against the 8-inch limit in height for seedling because, they assert it is inconsistent with industry practice. They argue that the basic premise is that producers primarily grow from clones not seedlings. *See* DOH Exhibit No. 16, July 11, 2019 Comments on Proposed Rules submitted by Ultra Health at page 1. They argue that clones are cuttings taken from a mother plant in cuttings of approximately 6 inches. *Id.* It takes less than seven days for a cannabis plant to grow from 6 to 8 inches in an indoor growing system. *Id.* This occurs in an indoor growth cycle of eight weeks, making a very small proportion of the life of a cannabis plant being smaller than 8 inches. *Id.* Thus, Ultra Health argues that the number of plants a producer can keep which are smaller than 8 inches is very small, and not a meaningful contribution to overall capacity. *Id.* Consequently, Ultra Health argues that the 1,750 is effectively a hard limitation on the number of plants they can grow. *Id.* at pages 1-2.

Ultra Health also opposes the limit of 1,750 because it argues that the it is not clear how producers who participated in the surveys understood the question of how many plants per year would be sufficient. That it, whether the question meant “actual number of plants cut down and harvested per year” or “number of plants kept in circulation.” Ultra Health argues that without knowing what producers understood about the meaning of the question, DOH’s reasoning is unsupported, arbitrary and capricious. *Id.* at 2.

Ultra Health further argues that DOH’s analysis is overly simplistic because it is based on achieving only sufficiency, not optimization. They argue that the “beneficial use” provision in the Lynn and Erin Compassionate Use Act and the statutory mandate to assure an adequate supply mandates a system where cannabis is available in an amount which can benefit patients. *Id.* at 2-



3. They argue that the patient survey measure only what patients are purchasing, not what they would like to purchase and not what they would purchase under better circumstances. *Id.* They also argue that the survey shows that there is a greater need for variety and supply of products. *Id.*

Ultra Health also argue that DOH's analysis does not take into account that demand is being lost to Colorado, and that many patients are going to Colorado to purchase cannabis. They argue that the survey shows that there is better selection and better prices in Colorado. *Id.* at 3. Furthermore, Ultra Health states that the survey shows that 48% of patients say that they would buy more cannabis and cannabis products in a 90-day period. *Id.* at 4.

Based upon the demand model of their consultant. Kelly O'Donnell, Ultra Health proposes that the plant count limit should be 5,000. *Id.* at 5. They argue that, unlike the DOH, Dr. O'Donnell takes into account latent demand, future patients, the need for greater variety, and future patients. *Id.* They note the addition of two new qualifying conditions which will likely add "thousands" of patients: autism and opioid use disorder. They argue that a figure of 3,000 plants would be sufficient for current patients, and 5,000 for the expected growth in future years.

With respect to the proposed definition of "seedling," Ultra Health further argues that the proposed definition of "seedling" ("a cannabis plant that has no flowers and that is less than eight (8) inches in height") and its role in plant count limitations has no rational relationship to the actual production practices of Ultra Health and many other licensed producers. *Id.* at 6. They report that many producers grow from clones, not seedlings. When they are cut from the mothering plant, clones are already approximately six inches high. *Id.* They argue that maturity is tied not to the height of the plant but relates to the flowering stage of the plant. *Id.* at 7. They note that 7.34.4.7(Z) NMAC defines a "mature female plant" as "a harvestable female cannabis plant that is flowering." *Id.* They argue that the "seedling" phase as defined by DOH lasts only a few days, from when a 6-inch clone is planted to when it passes the 8-inch threshold established by the proposed rule. *Id.* Consequently, they argue that when DOH allows an unlimited number of seedlings, it does not appreciably extend a producer's numbers, because a seedling will only be a seedling for a few days. *Id.*

Ultra Health proposes a plant limitation that distinguishes between flowering and non-flowering plants, in which producers would be allowed a certain number of flowering plants, and an unlimited number of non-flowering plants. *Id.* at 8.

With respect to the proposed rule that provides a mechanism for increased plant counts, 7.34.4.8(B) NMAC, Ultra Health argues that the proposed rule is "arbitrary and unworkable." *Id.* at 9. First, they argue that the rule give authority for increases to DOH without specifying whether that means the Secretary, the MCP director, or "some unidentified DOH employee. *Id.* They argue that the authority should be clearly vested in the Secretary, the MCP director, or "some kind of panel." *Id.* They recommend that it be vested in the Medical Cannabis Advisory Board.

Ultra Health also argues that the proposed rule is problematic because it indicates the decision about whether to increase the plant count will be based in part on "any other information requested by the department." *Id.* They argue that this provision is arbitrary and may result in too much intrusion in producers' business.



They argue that the proposed rule allows the department to make its determination based on whether the producers “inventory and average yield of usable cannabis is consistent with current averages from other licensed producers.” They argue this provision is problematic because it encourages collusion between producers to achieve “consistency” with others. *Id.*

Finally, Ultra Health argues that the proposed rule regarding increased plant counts discourages high performance and fails to reward high performers. *Id.* They claim it will result in producers trying to keep their yields consistent with one another in order to gain more plants, and thereby will have a “perverse incentive to stagnate, rather than innovate.” *Id.*

Ultra Health and the signatories to their written statement do not believe that the increase of 500 plants is workable at all. They argue instead that the DOH should commit to an annual or biannual survey of patients and producers and should commit to regular review and revision of plant limitations. *Id.*

In the DOH’s July 31, 2019 letter to the Hearing Officer, the DOH provides additional argument regarding the issues related to the definition of the term “seedling.” The DOH explains that the purpose for providing a clear definition of a “seedling” limiting the size of a seedling is to ensure that the DOH and law enforcement have clear parameters to determine LNPPs’ compliance with the rules when counting plants at a production facility. *Id.* at page 1. The DOH argues that it would be challenging to implement a rule by which DOH employees and law enforcement personnel were required to distinguish between large non-flowering plants and large flowering plants. *Id.* Likewise, the DOH seeks to have a rule by which licensees are able to clearly distinguish their plants from their seedlings. *Id.*

However, in response to concerns raised at the public hearing about the rule being too restrictive, the DOH proposes to establish a 12-inch height limit for seedlings, replacing the 8-inch limit previously proposed by the Department. *Id.* at page 1-2. The DOH argues that this revision of the rule should mitigate some of the LNPPs’ concerns, and also satisfy the Department’s objectives. *Id.* The DOH also notes that the 12-inch standard is consistent with other states, including Maine, New Hampshire, New Jersey, and Pennsylvania. *Id.* The DOH also seeks to clarify how the height of a seedling should be measured.

Thus, the DOH proposes to modify the proposed definition of “seedling” as follows:

‘Seedling’ means a cannabis plant that has no flowers and that is less than twelve (12) inches in height, as measured vertically in the plant’s natural position from the uppermost part of the root system (or from the soil line, if the plant is planted in soil) to the tallest portion of the plant.

The DOH provided also additional information in response to Ultra Health’s assertions on the Department’s July 31, 2019 letter to the Hearing Officer at 3-5. The Department argues that the plant limit of 1,750 is expected to significantly exceed demand for the foreseeable future. *Id.* at 3. This conclusion is based upon the patient and producer surveys and the reports from R. Greenleaf and Kelly O’Donnell. The Department asserts that is one assumes that LNPPs engage



in four harvests per year on average, the 1,750 plant count limit will result in production of 7,000 plants a year, “a figure that exceeds all requested figures.” *Id.*

The Department further argues that if one uses the requested 5,000 plant count limit, when factored at four harvests a year, the 34 LNPPs would each be able to harvest 20,000 mature plants per year, a total of 680,000 plants, or a total annual yield of 850,000 pounds of medical cannabis. The Department notes that Dr. O’Donnell’s estimate of annual yield needed to satisfy current maximum patient demand is 143,195. *Id.* at 3-4. The DOH argues that this would result in an estimated surplus of 708,800 pounds of cannabis. These numbers do not factor in the effect of harvests from PPLs.

The Department also argues that qualified patients consume considerably less medical cannabis than the amount permitted under the “adequate supply” use and possession limit of 230 grams/units per three months, or 920 per year. According to the patient survey, patients consume an average of 50.4 grams of product in a three-month period. *Id.* at 4. Even adding in consumption of concentrates, edibles, and topical products, DOH argues, the average patient consumes about 50% of the maximum supply that qualified patients are permitted to consume in three months. *Id.* DOH argues that the *Freeman* report states that current demand could be met with a plant limit of 543 plants per each of the 34 LNPPs. *Id.* at 4.

The Department argues that the survey question producers were asked in assessing the number of plants necessary to meet current demand was clear. The question was as follows: “How many plants do you estimate your company needs to grow, per year, in order to meet current patient demand (including products your company does not currently produce)?” *Id.* at 4.

The Department disputes the assertion of Dr. O’Donnell that Judge Thomson endorsed her comments that LNPP plant limits should factor in various theoretical measures of demand, including “pent-up” demand. *Id.* at 4. The Department argues that Judge Thomson made no findings regarding the alleged existence of “pent-up” demand, nor did he hold that the Department is obligated to meet this or any other theoretical measure of future demand. Instead, the Department argues that the Court held that the Department can set a per se plant limitation based on current data. *Id.* at 4.

### **Recommendation:**

The proposed plant count limitation rule of 1,750 plants per producer elicited more public comment than any of the other proposed amendments to the Medical Cannabis Rules. There were also a substantial number of comments regarding the revised definition of the term “seedling” which places an 8-inch limitation on the height of seedlings. As stated by Dr. Steven Rosenberg, some participants in the public hearing think the plant count limit of 1,750 is too high, some think it is too low, and some think it is just right.

Ultra Health and the twelve co-signers to Ultra Health’s written comments argue vigorously that the plant count limit should be 5,000, not 1,750, and that the proposed rule regarding seedlings should be abandoned and replaced with a regulatory framework that focuses



on mature (flowering) plants and immature (non-flowering) plants. There were representatives of other LNPPs who spoke persuasively in support of the plant limit of 1,750, as follows:

- Drew Stuart, from High Desert Relief, recommended that the proposed plant count limit of 1,750 flowering plants be accepted.
- Len Goodman, from Best Days, stated that he has no criticisms of the proposed rules whatsoever. He stated that the increase to 1,750 represents a number that is *greater* than the current need. He is “fully supportive” of the 1,750 plant count limit.
- Erik Briones from Minerva Canna stated that he was in support of the comments made by Drew Stuart and Len Goodman. He stated he came to the Public Hearing to support the plant count of 1, 750, which he believes will produce a more than adequate supply. He stated that he thinks it probably represents an “abundant” or “overabundant” supply. He raised a concern that this could result in a surplus that may give rise to producers finding “other avenues” to get rid of their product.
- William Ford is the medical director for R. Greenleaf & Associates. He supports the plant count of 1,750, which he said may be even higher than necessary.
- Robert Munro, the Executive Director of Seven Clover and the board president for the New Mexico Cannabis Chamber of Commerce supports the plant count of 1,750. He believes that will be more than enough medicine through New Mexico’s 35 LNPPs to provide sufficient medicine for qualified patients.

Thus, there are two significantly different points of view on the topic of an appropriate plant count limitation in the MCP rules. The task of this Hearing Officer is to determine whether the proposed amendment of the plant count from 450 plants to 1,750 is reasonably consistent with the statutory purposes established in the Lynn and Erin Compassionate Use Act, which states as follows:

The purpose of the Lynn and Erin Compassionate Use 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.

Consideration of the purposes established by the statute invokes consideration of the term “adequate supply,” which is defined in the statute as:

[A]n amount of cannabis, in any form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient’s primary caregiver that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source.



NMSA 1978, § 26-2B-3(A).

The bases for the increased plant count limit of 1,750 plants that have been articulated by the Department, and the practical experience articulated by the producers who support the plant count limit of 1,750 plants support the conclusion that the Department's proposed plant count limit will provide an adequate supply of medical cannabis for qualified patients in the Program. The increase in the plant count limit from 450 plants to 1,750 plants, with a mechanism for individual producers to seek a limit greater than 1,750 plants, represents a significant increase of the plant limit. It is based upon patient and producer surveys, consultant with Freedman and Koski, and analysis of the materials presented by Kelly O'Donnell. The support for the foregoing bases for the conclusion that the increase plant count limit of 1,750 plants are summarized in detail above.

The proposal of Ultra Health and its co-signers for a plant count limit of 5,000 plants represent a number that is more than 10 times the plant count limit of 450, or an increase of more than 1000%. This number is not consistent with the results of the patient and producer surveys, nor is it consistent with the comments of the producers who did not participate in the submission of the Ultra Health written comments.

The proposed plant count limit of 5,000 plants also presents the risk of producing a substantial surplus of medical cannabis in New Mexico, which in turn presents a risk of product being moved to the black market. This risk is recognized by producers who commented at the Public Hearing, as set forth above.

The arguments presented regarding latent or "pent-up" demand are not persuasive and are too speculative. Similarly, the claims made regarding future demand are too speculative. Although there likely will be increased demand arising out of the addition of new qualifying conditions, the evidence to quantify that possibility does not support the massive increase to a plant count limit of 5,000 plants.

**Recommendation:** For the foregoing reasons, the Hearing Officer recommends that the Secretary adopt the proposed amendment of 7.34.4.8(A) NMCA.

The proposed amendment of 7.34.4.8(A) (2) NMCA provides that the plant count limit of 1,750 plants does not include "seedlings," and that a producer "may possess any quantity of seedlings, as defined in this rule." "Seedlings" are defined at the proposed amendment to 7.34.4.7(YY) NMAC (and its counterparts in Parts 2 and 3), as "a cannabis plant that has no flowers and is less than eight (8) inches in height.

As set forth above, there were a substantial number of written and oral comments regarding this proposed amendment to the rule. The vast majority of the comments were made in opposition to the rule. Chief among the complaints related to this proposal amendment to the rule were the complaints that most plants are planted not from seeds, but from clones, which quickly achieve the height of 8 inches, and complaints that the rule was not clear regarding how the plants would be measured.



In a July 19, 2019 letter to Chris Woodward, counsel for DOH, the Hearing Officer asked the DOH to respond to the public challenges made in response to the proposed amendment to the definition of “seedling” in 7.34.4.7(Y) NMAC. *See* July 19, 2019 letter from Craig Erickson to Chris Woodward. In its July 31, 2019 response, the Department recognized the concerns raised by the producers, and in response, it revised its proposed definition of “seedling” as follows:

‘Seedling’ means a cannabis plant that has no flowers and that is less than twelve (12) inches in height, as measured vertically in the plant’s natural position from the uppermost part of the root system (or from the soil line, if the plant is planted in soil) to the tallest point of the plant.

*See* Department of Health’s July 31, 2019 letter to Craig Erickson Re: Proposed Medical Cannabis Rule Amendments at 1-2.

The Hearing Officer agrees with the Department that an important purpose of the rules related to plant limits is having a clear expression of what qualifies as a seedling for purposes of enforcement by DOH employees and for law enforcement. Likewise, producers need to be able to distinguish between mature plants and seedlings. The Department states that the 12-inch limit is consistent with the rules in medical cannabis programs in several other states.

**Recommendation:** The Hearing Officer, for the foregoing reasons, recommends that the Secretary adopt the July 31, 2019 revision of the proposed amendment of the definition of “seedling,” which establishes the 12-inch height restriction.

#### **7.34.4.8(M) NMAC – Destruction of Usable Cannabis**

The Department proposes to amend 7.34.4.8(M) NMAC to remove the 70% THC limit to reflect the statutory amendments from SB406. *See* NMSA 1978, § 26-2B-8.

**Recommendation:** There were no public comments in opposition to this amendment. This proposed amendment to the rules is in harmony with the DOH’s express statutory authority. The Hearing Officer recommends that the Secretary adopt this amendment.

The Department also proposes to amend 7.34.4.8(M) NMAC to add the requirement of video-taped recording of the destruction of usable cannabis by LNPPs in order to ensure that LNPPs’ destruction of usable cannabis is appropriately documented and to ensure that the video is made available to the DOH upon request.

Ben Lewinger, Executive Director of the New Mexico Cannabis Chamber of Commerce requested clarification regarding the meaning of the word “destruction” in the proposed rule. In the DOH’s July 31, 2019 letter to the Hearing Officer, the Department stated that in this context, the word “destruction” refers to destroying usable cannabis so as to waste the usable cannabis. The Department states that this typically occurs when a plant is sick or plant material is moldy or has some other contaminant which requires destruction of the plant. *Id.* at 8-9. The Department also states that “destruction” does not refer to the act of converting cannabis plant material to cannabis-derived products.



A concern was also raised about this rule potentially requiring producers to employ a full-time videographer to comply with the rule.

**Recommendation:** The Hearing Officer recommends that the Secretary adopt this proposed amendment to 7.34.4.8(M) NMAC. The proposed amendment serves a valid purpose that is reasonably consistent with the Department's obligations to regulate producers' plant counts. It appears likely that it requires videotaping on an infrequent basis, such as when a plant is sick or moldy. It would likely not require full-time videographer.

#### ***7.34.4.8(Q)(1)(a) NMAC – Licensure periods for non-profit producers***

7.34.4.8(Q)(1)(a) NMAC addresses the licensure period for LNPPs during the transition to 2019 rules and provides that the licensure period for LNPPs that would otherwise end on August 1, 2019 is extended to September 30, 2019. This change was made in recognition of the proposed changes to plant limit and licensing fees, and in recognition of the fact that the proposed anticipated rules will not take effect until sometime after August 1, 2019.

**Recommendation:** There was no opposition to this provision and the Hearing Officer recommends that the Secretary approve this change.

#### ***7.34.4.8(S)(3) NMAC – Application for renewal of annual production license***

7.34.4.8(S)(3) NMAC has been revised to delete and remove to 7.34.4.8(W)(5) NMAC a \$50 fee for replacement of PPL cards.

**Recommendation:** There was no opposition to this provision and the Hearing Officer recommends that the Secretary approve this change

#### ***7.34.4.8(W)(2) NMAC – Non-profit producer licensure fee***

7.34.4.8(W)(2) NMAC has been modified to revise the licensure fees for LNPPs. The rule previously required the following licensure fees: (1) \$30,000.00 for the first 150 plants (including seedlings); and (2) \$10,000.00 for each additional 50 plants, up to 450 plants. The proposed revised fees are: (1) \$40,000.00 for the first 500 plants; (2) \$5,000.00 for each additional increment of 50 plants to up to 1000 plants, and (3) \$6,000 for each additional increment of 50 plants over 1,000 plants.

This rule would result in the following fees if adopted:

- An LNPP that grows 500 plants at a time would pay \$40,000 per licensure year (which amounts to \$80 per plant as compared to the current \$200 per plant under the existing rule.) *See* DOH Exhibit No. 5 at 6.
- An LNPP that grows 1,000 plants at a time would be \$90,000 per licensure (a rate of \$90 per plant.) *Id.*



- An LNPP that grows up to the proposed plant count limit of 1,750 plants at a time would pay \$180,000.00 per licensure (approximately \$103.00 per plant). *Id.*
- The plant limits do not include seedlings, and, consequently, the fee schedule does not require payment of fees for seedlings. *Id.*

In support of its amended fee schedule, the DOH argues first that it is not funded through the State of New Mexico General Fund. It is funded primarily by nonprofit producer licensing fees. The DOH states that it assesses substantially higher fees to LNPPs than other license holders in the Program because LNPPs make substantially greater revenue than other licensees and have much larger budgets. *Id.*

The DOH further argues that the LNPPs control the production and sale of cannabis and are in a superior position to bear the expense and build it into their retail prices. *Id.* The DOH states that fees are greater for LNPPs also because, among the commercial licensees in the Program, LNPPs require a “significantly greater expenditure of administrative resources to regulate.” *Id.*

The DOH asserts that it is difficult to anticipate with certainty either the revenue which the produced fees will produce, or the costs of the MCP. *Id.* Nevertheless, the DOH anticipates that the Program may receive added revenue from the proposed fee changes. It also anticipates increased costs related to hiring additional full-time employees, various software improvements, and other costs beyond the Program’s current budget. *Id.*

Ultra Health argues that the revised fee schedule is exorbitant, will harm small businesses, will drive up patient prices, and will effectively result in an unconstitutional tax. *See* DOH Exhibit No. 16, Ultra Health’s Comments on Proposed Rules at page 15 to 16. They argue that the proposed fees will result in an 11.1% increase over current fees “for the same number of plants.” *Id.* They argue that it’s not apparent why DOH needs an increase in fees of 11% to manage the Program, nor is it apparent what increased regulatory burdens would justify the increase in licensure fees. *Id.*

Ultra Health argues that these numbers must be considered in the context of producers’ tax situations. They assert that producers cannot take the same tax deductions that any other small businesses take. They cannot deduct their expenses from federal income taxes. They cannot take standard deductions from state income taxes. They are not allowed to take the gross receipts tax exemption for prescription sales. Thus, Ultra Health argues that the producers are subject to very high taxation, which they claim distorts the perception of cannabis’ producers’ revenues and profits.

If producers are required to pay the proposed licensing fees, Ultra Health argues that they will have to pass the fees on to consumers. They argue that customers have already been driven to the black market because of price, and the very purpose of the Lynn and Erin Compassionate Use Act has been stymied by this dynamic.



Ultra Health argues that while DOH has labeled the licensing fees as “fees,” they cross the line into unconstitutional taxes, and only the legislature may levy taxes. They argue that when a fee exceeds the amount reasonably necessary to cover the costs of regulation, then it has effectively become a “tax.” *Id.* at 16.

Notably, Trevor Reed, a representative of Natural Rx, stated in a written comment that the “fees are not bothersome” to him. *See* DOH Exhibit No. 16. Len Goodman from Best Days stated that he had no criticisms of the new rules at all. With respect to the increased fees, he stated that if the money is needed, he is “all for it.” He recognized that the new fees represent a substantial decrease for new producers, dropping from \$200.00 per plant to \$80.00 per plant.

In response to the opposition to the proposed increase in licensure fees, the DOH provided additional information regarding the basis for its proposed amendment of 7.34.4.8(W)(2) NMAC. *See* DOH’s July 31, 2019 letter to Craig Erickson at pages 2-3. The DOH reiterates its position in DOH Exhibit No. 5 that the proposed fees are substantially less per plant than what LNPPs have historically paid. *Id.* at page 2. In addition, the DOH argues that the fees also accomplish the objective of enabling smaller producers with fewer resources to grow 500 plants (2,000 plants in the course of a year, assuming four harvests annually) for \$40,000.00, less than half of the \$90,000.00 fee that producers previously paid for 450 plants. *Id.*

The Department further argues that although the new fee structure requires that producers who grow more plants pay a greater fee, the cost-per-plant is substantially less at an average of \$102.84 for 1,750 plants, or about \$25.00 per plant per year assuming four harvests annually. *Id.* The DOH notes that by contrast, Ultra Health’s recommended \$30,000.00 fee for 500 plants and \$105,000.00 for 5,000 plants would result in per plant fees of \$60 for 500 plants and \$21 for 5,000 plants. *Id.*

The Department also states that the LNPPs have considerable revenues, noting that Ultra Health reported the highest revenues at over \$16 million, and Budding Hope reported the lowest revenue at nearly \$500,000.00.

The Department further states that it is difficult to determine the amount of revenue it will receive under the fee structure by it anticipates that the fees will not significantly exceed the Program’s operating expenses, if at all. *Id.* The DOH argues that the MCP’s operating budget covers payroll, contracts for services and temporary contract labor, legal services, and costs for vehicles, office supplies, etc. Currently, the budget is approximately \$3,200,000.00.

The Department states that the Program’s expenses will increase due to continued expansion of the Program, as well as changes arising out of the 2019 legislative session in SB406. It has plans to create 8 additional full-time employee positions in its Patient Services section, and 4 additional full-time employee positions in its Licensing and Compliance section, at a combined cost of \$600,000.00.

The Department estimates that about half of the LNPPs will decide to grow 1,750 plants. It argues that if one assumes that the remaining producers will grow between 500 and 1000 plants,



revenue from the LNPP licensing fees would not exceed \$4,050,000.00. The Department estimates that that figure would be close to the MCP's anticipated expenses.

**Recommendation:** The Department has provided an adequate basis for the need for the increase for the fees, which are necessary for the Program, given the fact that the fees are the only funds that fund the Program, and the MCP gets no money from the State General Fund. It is also clear that the proposed fees per plant result in a significant decrease in this proposed amendment to the rules. As such, they cannot fairly be characterized as an unconstitutional tax on the producers. Thus, the fees are reasonably consistent with the requirements of the statute that the MCP regulate and administer the Medical Cannabis Program. *See* NMSA 1978, § 26-2B-6.1(A) and (C). The Hearing Officer recommends that the Secretary adopt the proposed amendment of 7.34.4.(W)(2) NMAC.

7.34.4.8(W)(3) NMAC requires that fees be paid no earlier than September 21, 2019 and not later than October 4, 2019. This amendment is proposed in recognition of the fact that the proposed rules will not likely become effective until sometime after August 1, 2019. This amendment is also due to the fact that LNPPs will have benefitted from the expansion of the 2018-2019 licensure period to September 30, 2019. During that time period, the old fees, which were capped at \$90,000.00 are applied to the 2,500-plant limit established by the emergency rule of March 1, 2019.

**Recommendation:** The amendment is reasonably consistent with the requirements of the statute, and the Hearing Officer recommends that the Secretary adopt it.

7.34.4.8(W)(5) NMAC requires payment of a \$50.00 fee for replacement of an ID card for an employee of an LNPP, and for replacement of a PPL license card.

**Recommendation:** There was no opposition to this provision and the Hearing Officer recommends that the Secretary approve this change

#### ***7.34.4.18 NMAC – Qualified Personal Production and Licensure Requirements<sup>3</sup>***

7.34.4.18(A) NMAC was revised to add a reference to the ability of either a qualified patient or a primary caregiver to hold a PPL to grow cannabis for the qualified patient's use, as set forth in the statutory changes adopted in SB406. *See* NMSA 1978, § 26-2B-3(R).

**Recommendation:** There was no opposition to this proposed amendment, and the Hearing Officer recommends that the Secretary adopt this amendment.

Subsection (B) of 7.34.4.18 NMAC of this rule was revised to remove the requirement that the location of a PPL license holder's grow be either the patient's primary residence or other property owned by the patient. The proposed amendment allows the PPL holder to grow cannabis at locations other than their home or property that they own. The revised rule is also proposed in recognition of the ability of a primary caretaker to hold a PPL to grow cannabis on behalf of a qualified patient, as established by SB406. *See* NMSA 1978, § 26-2B-3(R).

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<sup>3</sup> This rule was mistakenly misidentified in the DOH's Exhibit No. 5 as 7.34.4.9 NMAC at page 7.



**Recommendation:** There was no opposition to this proposed amendment, and the Hearing Officer recommends that the Secretary adopt this amendment.

**7.34.4.19(B) NMAC – Production and distribution information and materials**

This rule was revised by replacing the reference to “mature female plants, seedling, and male plants” with the phrase “cannabis plants.” The purpose of this change was simplification, and to remove the reference to seedlings being counted against LNPP’s plant limit, based upon the revisions to 7.34.4.8(A)(2) NMAC.

**Recommendation:** There was no opposition to this proposed amendment, and the Hearing Officer recommends that the Secretary adopt this amendment.

**7.34.4.23(B)(1) NMAC – Financial records**

This rule was revised to add the statement “including data from point of sale systems” and allowing inspection and copying in the rule related to access of LNPPs’ financial records, including but not limited to data from point of sale systems.

**Recommendation:** There was no opposition to this proposed amendment, and the Hearing Officer recommends that the Secretary adopt this amendment.

**7.34.4.23(B)(3) NMAC – Quarterly Reports**

This rule sets forth the information required to be set forth in LNPPs’ quarterly reports. The amendment sets forth those requirements in detail, articulating the specific requirements for the information to be included in the producers’ quarterly reports to the Department.

Leigh Jenke and Ultra Health argue that the quarterly reporting requirements are onerous and bear no relationship to producer practices. *See* DOH Exhibit No. 16, July 11, 2019 Comments on Proposed Rules submitted by Ultra Health at pages 16-17. They argue that the propose rule requires 22 separate pieces of information. *Id.* at 17. While they agree that the DOH should collect data and be informed by data in making decision, they argue that many of the requirements are redundant. They argue that much of the information sought by the rule is already available through BioTrack. *Id.* They argue that preparing reports in the manner required by the rule would require significant employee time and would drive up consumer prices. *Id.*

In the DOH’s July 31, 2019 letter to the Hearing Officer, the Department responds to the issues raised by Ultra Health by stating that much of the information listed in the rule has already been required as a matter of practice to be included in LNPPs’ quarterly reports. *Id.* at 9. The Department acknowledges that some of the requested information is entered into BioTrack, but states that the information in BioTrack is not readily accessible to the Department, nor is it readily compiled. The Department considers the information to be valuable for monitoring and regulating the Program, and that it is not especially onerous.



**Recommendation:** The Department has provided an adequate basis for the need for the information required by the revised 7.34.4.23(B)(3) NMAC. The information required is reasonably consistent with the requirements of the statute that the MCP regulate and administer the Medical Cannabis Program. *See* NMSA 1978, § 26-2B-6.1(A) and (C). The Hearing Officer recommends that the Secretary adopt the proposed amendment of 7.34.4.23(B)(3) NMAC.

#### ***7.34.4.24(A) NMAC – Grounds for Disciplinary Action***

The Department proposes that 7.34.4.24(A) NMAC be revised to remove provisions regarding disciplinary actions that may be taken by the Department against LNPPs, manufacturers, laboratories, and couriers, as well as applicants for those licensing designations. In place of the removed provision, the Department proposes to establish a tiered structure that classifies licensee violation in terms of severity. The classifications include (1) major violations implicating public safety; (2) major violations which do not implicate public safety; and (3) other violations. Each category includes specified violations, which include specified violations from the existing rule as well as others. The revisions were made in part based upon the recommendations of one of the consultants, Freedman & Koski, in its report to the DOH.

**Recommendation:** The proposed revision of 7.34.4.24(A) NMAC is reasonably consistent with the requirements of the statute and the DOH's statutory obligations to regulate licensees. The Hearing Officer recommends that the Secretary adopt this rule as amended.

#### ***7.34.4.24(B) NMAC – Fines***

The Department proposes to amend 7.34.4.24(B) NMAC by increasing the amounts for fines that could be imposed related to the tiered structure set forth in the revised 7.34.4.24(A) NMAC. The DOH states that it proposes to revise this rule enable more substantial fines for violations of the MCP rules. *See* DOH Exhibit No. 5 at 8. The proposed revision to the structure of fines were made in part by the recommendations of one of the DOH's consultants, Freedman & Koski.

The current fine structure under the rule is \$100.00 for the first assessed monetary penalty in a calendar year, \$500.00 for the second assessed penalty in a calendar year, and \$1000.00 for every monetary penalty thereafter assessed in a calendar year. The Department proposes to revise that penalty structure with a structure that provides as follows: (1) up to \$50,000.00 for each major violation implicating public safety; (2) up to \$20,000.00 for each violation not implicating public safety; and (3) up to \$5,000.00 for each other violation. The Department states that it makes these proposed revisions because it is concerned that the current fine structure of \$100.00/\$500.00/\$1000.00 per violation is not significant enough to encourage regulatory compliance or discourage regulatory noncompliance by licensees. *See* DOH Exhibit No. 5 at 8.

Ultra Health agrees that reform is needed regarding disciplinary processes, and that whether a violation implicates public safety or not is a valid criterion to consider in developing disciplinary penalties. *See* DOH Exhibit No. 16, July 11, 2019 Comments on Proposed Rules submitted by Ultra Health at page 19. However, they argue that the disciplinary penalties proposed by DOH are "unauthorized and unconstitutional." *Id.*



Ultra Health argues that agencies are required to have explicit statutory authority to impose fines and monetary penalties. See *Marbob Energy Corp. v. New Mexico Oil and Conservation Comm'n*, 2009-NMSC 013, 146 N.M. 24. Ultra Health argues that the Lynn and Erin Compassionate Use Act does not authorize any governmental body to fine producers or issue monetary penalties to producers. Ultra Health argues that an argument that a state agency has implicit authority to issue fines is not adequate under the decision in *Marbob*. *Id.* at 20.

Ultra Health further argues that even if DOH has authority to issue penalties, its disciplinary system is “incomplete and unfair.” *Id.* This argument is based upon Ultra Health’s assertions that the system allows the imposition of penalties without any pre-deprivation process, without any notification or opportunity to cure, and it does not provide a process for commencing an action in district court. No citation to legal authority is offered for this argument.

In addition, Ultra Health argues that the proposed amendments violate the prohibition against civil fines and forfeitures in the Eighth Amendment. *Id.* at 20. Ultra Health argues that payments of up to \$50,000.00 constitute punishment for an offense that cannot be fairly said to solely serve a remedial purpose and can only be explained as serving a retributive purpose. *Id.* at 21.

Finally, Ultra Health argues that the proposed provision for a penalty of up to \$5,000.00 for “each other violation” is highly subject to abuse by DOH. Ultra Health claims that many producers are routinely cited for packing violations, although many of the violations originate with the manufacturers. They argue that it would be excessively harsh to force producers to pay up to \$5,000.00 every time a packing error occurs, when the packing error is often out of their control. *Id.* at 21.

In the DOH’s July 31, 2019 letter to Craig Erickson, the DOH responds to Ultra Health’s opposition to monetary fines. *Id.* at 5. DOH argues that *Marbob* does not support the proposition that the DOH cannot impose monetary fines on licensees. The DOH argues that *Marbob* relied on a holding that the New Mexico Attorney General held more explicit statutory authority to impose fines on licenses than did the Oil Conservation Commission. Here, DOH argues, the Attorney General does not possess statutory authority to impose fines on medical cannabis licensees for violations of Department of Health rules.

The DOH also argues that Ultra Health’s recommendation that it should allow licensees to cure all deficiencies prior to being penalized would not discourage non-compliance with licensing requirements, but would actually encourage non-compliance, because it would enable licensees to violate the rules without repercussion. *Id.*

### **Recommendation:**

Ultra Health relies heavily on the *Marbob* case to argue that the DOH does not have authority to impose fines and monetary penalties. In particular, Ultra Health relies on dicta in the *Marbob* case which states that in the context of that case, the New Mexico Supreme Court decided that the Oil Conservation Division’s argument that its broad jurisdiction and statutory authority



gave it authority to do whatever was reasonably necessary to enforce the Oil and Gas Act did not support the efforts of the Oil Conservation Division to impose fines. *See Marbob, supra*, 2009-NMSC-013, ¶13. Ultra Health uses that statement to argue that state agencies must of explicit statutory authority to impose fines and monetary penalties.

The *Marbob* case should not be read so broadly. In *Marbob*, the New Mexico Supreme Court made it clear that the Attorney General had explicit statutory authority to bring suit for penalties under the Oil and Gas Act to bring an action in court to assess civil penalties for violations of the Act, and that specific authority shows that the Legislature intended that the Attorney General bring suit on behalf of the Oil Conservation Division to impose civil penalties authorized under the Act. *Id.* at ¶¶ 14 and 24. Consequently, the Court found that the Oil Conservation Division did not have the authority to impose and prosecute fines, because the Legislature established in the relevant statute that the Attorney General was explicitly designate in that arena to take that action. The statutory framework established by the Lynn and Erin Compassionate Use Act does not put the authority to impose and prosecute fines and penalties in the hands of the Attorney General.

The Lynn and Erin Compassionate Use Act establishes that the Legislature intended to create a “regulated system” for the use of medical cannabis. NMSA 1978, § 26-2B-2. It gave the Department broad authority to promulgate rules in accordance with the purposes of the Act. NMSA 1978, § 26-2B-7(A) NMAC. The Legislature established the authority of the Department to “regulate and administer the medical cannabis program.” NMSA 1978, § 26-2B-6.1(A) NMAC. The Act is silent as to the administration of fines and penalties. However, it is reasonable to conclude that the authority for the Department to impose fines and penalties is inherent, and “springs from” its statutory obligation to regulate and administer the Medical Cannabis Program. *See New Mexico Mining Ass’n, supra*, 1996-NMCA-098, ¶ 15.

Despite Ultra Health’s argument that the DOH has no authority to impose penalties against licensees in the Program, Ultra Health includes proposed penalties in its proposed revisions to the rules. *See* “Undersigned Producers’ Proposed Revision to the Rules” at 19-20 in DOH Exhibit No. 16. Ultra Health proposes a regulatory framework in which the Department would be required to issue a notice of violation prior to levying “any fine” or taking any disciplinary action. If there is a failure to cure a notice of violation, the Department would be required to hold a hearing to determine whether any sanctions “including civil penalties” should be assessed. *Id.* Ultra Health’s proposal also includes a tiered framework of fines in the amounts of \$1,000.00 per day unless there is a risk to health or safety or of causing significant harm, or \$3,000.00 per day if those risks occur. The proposal further provides that in no case should any penalty exceed \$25,000.00. Ultra Health’s proposed rule further provides that any suspension of a licensee shall not cause a licensee to forego more than \$30,000.00 of gross revenue, unless there is a risk related to health or public safety of causing significant harm to the public. *Id.*

Given the significant risks of harm to public safety and health, such as contaminated product, as just one example, a penalty structure which allows fines of up to \$50,000.00 is not on its face unconstitutional.

**Recommendation:** For the foregoing reasons, the Hearing Officer recommends that the Secretary adopt the proposed amendments to 7.34.4.24(B) NMAC.



**7.34.4.25(C) NMAC – Exemptions from State Criminal and Civil Penalties**

This proposed rule creates an exemption from state criminal and civil penalties for public schools and school districts, as well as other public-school related entities and designated public school personnel. The rule is proposed in recognition of statutory changes arising out of SB406. See NMSA 1978, § 26-2B-5(A).

The Department states that the proposed rule arises out of SB406, which includes various amendments to the Public School Code to enable designated school personnel to possess and store medical cannabis products in school settings and administer those products in school settings to students who are qualified patients. See DOH Exhibit No. 5 at 8. With this proposed rule, the Department will recognize public schools, school districts and other public-school entities as licensees, as that term is used in NMSA 1978, § 26-2B-4(G). As such, the foregoing entities would be entitled to immunity from prosecution of civil penalties for activities conducted within their licensure and in accordance with the Public School Code.

The Department further states that the proposed rule is proposed to further the purposes of the statutory amendments and specifically to enable the administration of cannabis to qualified students in the public schools in a manner consistent with state laws. *Id.* The Department expressly states, however, that it does not have the authority to create rules for the administration of cannabis in school settings. The authority for that rulemaking is held by the New Mexico Public Education Department, as set forth in SB406. See DOH Exhibit No. 5 at 8.

**Recommendation:** The proposed amendment of 7.34.4.25(C) NMAC is reasonably consistent with the purposes of the Lynn and Erin Compassionate Use Act. The Hearing Officer recommends that the Secretary adopt the proposed amendment.

  
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Craig T. Erickson

  
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Date