



January 30, 2020

VIA FEDERAL EXPRESS

Kathyleen M. Kunkel, Cabinet Secretary
New Mexico Department of Health
Office of the Secretary
1190 St. Francis Drive, Suite N4100
Santa Fe, NM 87505

Re: *Medical Cannabis Program Rule Amendments Public Hearing*

Dear Secretary Kunkel:

Enclosed is the Report of Hearing Officer on Proposed Rule on Reciprocity pertaining to the above-referenced public hearing. Also, enclosed is the official file for the hearing which contains two exhibit binders for Exhibits 1 through 15 and Exhibits 16 through 30.

Thank you for the opportunity to serve as a Hearing Officer in this matter.

Very truly yours,

SHEEHAN & SHEEHAN, P.A.

A handwritten signature in blue ink, which appears to read "Craig T. Erickson", is written over a horizontal line.

By: CRAIG T. ERICKSON

CTE:tmm
Enclosures

Copy (Report only): Chris D. Woodward, Esq. (chris.woodward@state.nm.us)

NEW MEXICO DEPARTMENT OF HEALTH

MEDICAL CANNABIS PROGRAM RULE PROMULGATION HEARING

Public Hearing: Proposed Repeal and Replace and Amendments to Medical Cannabis Program Rules

Actions in Question: Rule Promulgation Hearing for Proposed Rule 7.34.4.28 NMAC – “Reciprocity”

Hearing Dates: November 22, 2019 and January 16, 2020

Report Date: January 30, 2020

REPORT OF HEARING OFFICER ON PROPOSED RULE ON RECIPROCITY

A Public Hearing began on Friday, November 22, 2019 at 10:30 a.m. and continued on January 16, 2020, 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 to repeal and replace 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 October 7, 2019, presided over both of the rulemaking hearings. The DOH was represented by Chris Woodward, Assistant General Counsel, and Dominick V. Zurlo, Ph.D., MCP Program Director.

This Report addresses only the proposed Rule 7.34.4.28¹ NMAC – “Reciprocity,” because of an approaching deadline to adopt and promulgate rules related to medical cannabis program reciprocity in SB406, as follows:

By March 1, 2020, the secretary of health shall adopt and promulgate rules related to medical cannabis program reciprocity. The department may identify requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program.

SB406, codified at NMSA 1978, § 26-2B-7(I).

The Department has requested a report from the Hearing Officer by January 31, 2020 on the reciprocity rule to facilitate meeting the March 1, 2020 deadline (which applies only to the reciprocity rule.) This report is provided at this time to facilitate the Department’s meeting of that deadline. Given the extensive scope of the issues heard by the Hearing Officer at the November

¹ Previously designated as 7.34.4.27 NMAC.

22, 2019 and January 16, 2020 rulemaking hearings, the Hearing Officer is not able to complete his Report on all of the proposed rule changes by January 31, 2020. A separate Report on all the additional proposed rule changes will be submitted separately to the Secretary.

The individuals who were present at the Public Hearing on November 22, 2019 were:

1. Robert Candelaria
2. Aaron Randle
3. Kathleen O’Dea
4. Robert Romero
5. [REDACTED]
6. Rubon Aguilar
7. Ben Lewinger
8. Caity Maple
9. Brooke Duverger
10. Donnie Romero
11. Carlos R. Gonzales
12. Robert Jackson
13. [REDACTED]
14. David Muscarella
15. Chris Thompson
16. Taylor Trodden
17. Alex Spra ____ [illegible]
18. Jennifer Merryman
19. Leigh Jenke
20. Lynn Ambrosino
21. Cory Duor_____ [illegible]
22. Tim Van Rixel
23. Erica Rowland
24. Erik Briones
25. Ryan Gomez
26. Sheri Vallejos
27. Len Goodman
28. E__ Goodman [illegible]
29. Jaylene Kost
30. Josh Alderete
31. Tyler Heeman [Hydro Lyfe]
32. [REDACTED]
33. [REDACTED]
34. Tara Hedricks
35. Andy Lyman
36. [REDACTED]
37. Cade Guerrero [Santa Fe Reporter]
38. Gloria Montoya
39. Rosa Estrada
40. William Ford

41. Roger Burton
42. Christopher Castillo
43. Nicole Morales
44. Sharon Jaramillo
45. [REDACTED]

The sign-in sheet for the Public Hearing is provided with this Report and marked as DOH Exhibit No. 15. Some names, as indicated by blanks and question marks in the names above, were partially illegible.

Individuals who were present at the Public Hearing on January 16, 2020 were:

1. Joel Krukar
2. Jake White
3. Scott Till___ [illegible]
4. Mark Santiago
- [REDACTED]
6. Grace White
- [REDACTED]
8. Ariel McDougal
9. Len Goodman
10. Ben Lewinger
11. Don Romero
12. Chad Lozano
13. Les Hopkins
14. Kenn Maxwell
15. James Franzen
16. Amanda Fratz [illegible]
- [REDACTED]
19. Seth Nocklman
- [REDACTED]
21. Erica Rowland
22. Dan M_Field [illegible]
- [REDACTED]
24. L. Adam White
- [REDACTED]
26. Jalen Kost
27. Josh Alderete
28. Amy Milder
29. C___ G___ [illegible]
30. John Murray
- [REDACTED]
32. Sam Thomas
33. Eli Goodman
34. Scott McMillan

35. Billy Garcia
36. Cece McMillen
37. Andy Lyman



40. Leigh Jenke
41. Kathleen O'Dea
42. Robert Stranahan
43. Eric Baade
44. Sharlyn S___ [illegible]
45. Walter Torres
46. Robert Romero
47. David Lara
48. Victor Zupian

The sign-in sheet for the Public Hearing on January 16, 2020 is provided with this Report and marked as DOH Exhibit No. 30. Some names, as indicated by blanks and question marks in the names above, were partially illegible.

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

SUMMARY OF PROCEEDINGS—November 22, 2019

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 7.34.2.7 NMAC; 7.34.3.7 NMAC; and the proposal to repeal and replace 7.34.4 NMAC.

The Hearing Officer further stated that the proceeding was being held in accordance with NMSA 1978, § 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 Dr. Zurlo would be offering comments that summarize that proposed amendments to the rules, and the proposal to repeal and replace 7.34.4 NMAC. The Hearing Officer further stated 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. Each individual who offered public comment would be allowed three minutes, with a warning when the speaker had 15 seconds remaining, in order to make their public comments. All individuals who offered public comments complied reasonably with the time requirements.

The hearing then progressed as follows: Dr. Zurlo summarized the proposed amendments to the rules. Dr. Zurlo stated as follows with respect to the proposed rule on Reciprocity:

Dr. Zurlo stated that in 7.34.4.28 NMAC, the proposed revisions include a new section which identified standards for reciprocity for individuals who hold proof of authorization to participate in the medical cannabis program of another state, territory, or commonwealth of the United States, or a New Mexico Indian nation, tribe, or pueblo. This was also added to SB406 in 2019, and codified at NMSA 1978, §26-2B-7(I). The proposed reciprocity standards would permit reciprocal participations to purchase cannabis products from LNPPs using the medical cannabis ID card or other proof of authorization obtained from their home state or territory. The rule proposes a reciprocal limit for possession of cannabis and cannabis products, which is identified to the 230-unit “adequate supply” limit that applies to enrolled qualified patients. Reciprocal participants must be registered by an LNPP, and sales and transfers to reciprocal participants must be tracked in the electronic tracking system specified by the Department. LNPPs are required to provide informational materials to reciprocal participants at the time of the sale or transfer, which identify the possession limit, as well as a notice concerning prohibitions against interstate transfer of cannabis under state and federal law.

Mr. Woodward offered the Department’s exhibits into the record. The exhibits are designated as follows:

DOH Exhibit No. 1: Notice of Public Hearing

DOH Exhibit No. 2: 7.34.2.7 NMAC Proposed Amendments [clean version]

DOH Exhibit No. 3: 7.34.3.7 NMAC Proposed Amendments [clean version]

DOH Exhibit No. 4: 7.34.4 NMAC Proposed Repeal and Replacement [clean version]

DOH Exhibit No. 5: 7.34.4 NMAC Proposed Repeal and Replacement (with Technical Revisions Redlined). Mr. Woodward stating that the Department discovered some formatting issues with this set of rules, which were corrected in red-line. Another issue was the incorrect designations for micrograms as “mg” which would incorrectly refer to milligrams. A correction was made to the discussion of cannabinoid testing where a table referred to mandatory when the reference should have been to optional testing.

DOH Exhibit No. 6: 7.34.2.7 NMAC Proposed Amendments-Redlined Comparison Version

DOH Exhibit No. 7: 7.34.3.7 NMAC Proposed Amendments-Redlined Comparison Version

DOH Exhibit No. 8: 7.34.4 NMAC Proposed Repeal and Replacement-Redlined Comparison Version (Includes Technical Revisions)

DOH Exhibit No. 9: Summary of Proposed Amendments

DOH Exhibit No. 10: Letter Appointing Hearing Officer

DOH Exhibit No. 11: Affidavit of Notice to the Public

DOH Exhibit No 12: Affidavit of Publication in NM Register

DOH Exhibit No. 13: Affidavit of Publication in Albuquerque Journal

DOH Exhibit No. 14: Public Comments

DOH Exhibit No. 15: Sign-in Sheets from Public Hearing²

The DOH's Exhibits were all admitted into the record by the Hearing Officer.

SUMMARY OF PROCEEDINGS—January 16, 2020

The Hearing Officer opened the second hearing on this rulemaking process on January 16, 2020 by welcoming the public to the hearing, and announcing that this was continuation of the hearing held on November 22, 2019, involving the proposed repeal and replacement of the licensing requirements found in 7.34.4 NMAC and the proposed amendments to 7.34.2.7 NMAC and 7.34.3.7 NMAC, the definitions sections for Parts 2 and 3 of the Medical Cannabis rules.

Mr. Erickson announced that he had been appointed by Cabinet Secretary Kathyleen Kunkel to preside over the hearing, and that Assistant General Counsel Chris Woodward would be advising the Department in the proceeding. Mr. Erickson also announced that Dr. Dominick Zurlo, the MCP Director, was also present on the stage.

Mr. Erickson further stated that the rulemaking proceedings was being held in accordance with NMSA 1978, § 9-7-6(E). He also asked that any member of the audience who had not signed in as present at the hearing to do so.

Dr. Zurlo then offered a brief summary of the statue of the rulemaking process. With respect to the proposed rule on Reciprocity, he stated as follows:

Dr. Zurlo stated that the Medical Cannabis Advisory Board met on December 20, 2019 and reviewed the portion of the rule on reciprocity. The Board ensured that the amount of cannabis for reciprocal patients was considered adequate for those individuals. At that time, the Board considered this, and voted to approve the proposed rule.

Mr. Woodward then introduced the additional exhibits from the Department for the continuation of this rulemaking hearing process. He introduced the exhibits as follows:

² The sign-in sheets were not available when Mr. Woodward read the exhibit titles into the record. They were added by the Hearing Officer later when they were available.

- Mr. Woodward noted that Exhibits 1 through 15 had already been accepted into evidence at the first hearing on November 22, 2019.
- Exhibit 16 is the Notice of Public Hearing for the hearing on January 16, 2020, which was published in the New Mexico Register and the Albuquerque Journal.
- Exhibits 17 and 18 are two different versions of the proposed amendments to 7.34.2.7 NMAC, as revised since the time of the November 22, 2019 hearing. Exhibit 17 is the clean, non-marked up version and Exhibit 18 is a marked up version that shows all the edits that have been made to 7.34.2.7 NMAC.
- Mr. Woodward noted that all of the exhibits are available online on the Department's website.
- Exhibits 19 and 20 are the proposed amendments to 7.34.3.7 NMAC, with Exhibit 19 being the clean version and Exhibit 20 being the marked up version that shows all of the changes.
- Exhibit 21 is the clean version of the proposed repeal and replacement of 7.34.4 NMAC.
- Exhibit 22 is a marked up version of 7.34.4 NMAC that incorporates all of the proposed changes, including the ones proposed at the previous hearing.
- Exhibits 23 and 24 are also the proposed repeal and replacement of 7.34.4 NMAC. These exhibits include certain corrections that primarily are typos and formatting issues, as well as numbering issues. Exhibit 23 is the clean version that incorporates all of the proposed changes to 7.34.4 NMAC. Exhibit 24 shows certain changes tracked, which just includes the changes made in Exhibit 21.
- Exhibit 25 is the Summary of Medical Cannabis Program Rule Amendments for Public Hearing January 16, 2020, which addresses the changes made since the previous hearing. This is the document that Dr. Zurlo was referring to earlier. It includes a description of the changes that have been made in response to public comment. It also includes the DOH response to various comments that were made at the prior hearing and written comments.
- Exhibit 26 is the Affidavit of Notice to the Public, completed by a paralegal in the Office of General Counsel for the DOH. It attests to the various forms of notice that were given for this hearing in accordance with the requirements of the State Rules Act.
- Exhibit 27 is the Affidavit of Publication of the Notice in the New Mexico Register.
- Exhibit 28 is the Affidavit of Publication of the Notice in the Albuquerque Journal.
- Exhibit 29 the public comments that were submitted for the January 16, 2020 hearing. These are also posted in the DOH website.

- Mr. Woodward stated that written comments provided to the DOH during the hearing would be accepted as well, but the record would close after the hearing.

Mr. Woodward requested that Exhibits 16 through 29 be admitted into the record. Exhibits 16 through 29 were admitted by the Hearing Officer into the record. The Sign-In Sheets for the January 16, 2020 public hearing became available after the hearing and were added by the Hearing Officer as Exhibit 30 to the exhibit binder for the second hearing.

Andrea Sundberg from the MCP then described the rules for offering public comment. She stated that each speaker would be allowed 5 minutes, and she would give a warning 15 seconds before that time elapsed for each speaker. Public comments directed to the reciprocity rule are discussed in the Analysis and Recommendation section of this Report below.

ANALYSIS AND RECOMMENDATION

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 the issues related to the proposed rule on reciprocity as follows:

7.34.2 NMAC – Advisory Board Responsibilities and Duties

7.34.2.7 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 7.34.4.7 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 related to Reciprocity are as follows:

The definition of “**Reciprocal limit**” at 7.34.2.4(CCC) NMSA has been added to reflect amendments made to the statute by SB406 (2019), codified at NMSA 1978, § 26-2B-4(B) & (C), which established reciprocity, and which require that the quantity of cannabis possessed by a “reciprocal participant” not exceed “the limit identified by department rule.”

The definition of “**Reciprocal participant**” at 7.34.2.4(DDD) NMSA has been added to reflect amendments made to the statutory definition by SB406 (2019), codified at NMSA 1978, § 26-2B-3(W)

Recommendation: There were no public comments on this proposed rule, and the proposed rule is consistent with the authority the legislature has given the Department to engage in rulemaking. The Hearing Officer recommends that the Secretary adopt this proposed rule.

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. 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.

7.34.4 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.

7.34.4.28 NMAC – Reciprocity

There were no oral public comments on the reciprocity rule offered by the participants in the November 22, 2019 public hearing. Written comments were submitted as part of that hearing process, and are summarized as follows:

DOH Summary of Proposed Rule Changes – November 22, 2019

The Department states that this proposed new subsection of the rule identifies standards for reciprocity for individuals who hold proof of authorization to participate in the medical cannabis program of another state, territory, or commonwealth of the United State, or a New Mexico Indian nation, tribe, or pueblo. This provision was added to the statute via SB406 (2019), at NMSA 1978, §26-2B-7(I). *See Exhibit 9.*

The Department states that the proposed reciprocity standards would permit reciprocal participants to purchase cannabis products from licensed non-profit producers using the medical cannabis I.D. card or other proof of authorization obtained from their home state or territory. The rule proposes a reciprocal limit for possession of cannabis and cannabis products, which is identical to the 230-unit “adequate supply” limit that applies to enrolled qualified patients. Reciprocal participants must be registered by an LNPP, and sales and transfer to reciprocal participants must be tracked in the electronic tracking system specified by the Department. LNPPs are required to provide information materials to reciprocal participants at the time of the sale or transfer, which identify the possession limit, as well as a notice concerning prohibitions against interstate transfer of cannabis under state and federal law.

Written Comments of Ultra Health – November 22, 2019

In its written comments for the November 22, 2019 public hearing, Ultra Health argued that there are ambiguities in this proposed rule. It argued that clarification is needed with respect to the requirement that participants “register with a licensed non-profit producer.” *See* Exhibit 14. Ultra Health stated that it assumes that this means that out-of-state visitors can register with multiple producers and not be restricted to one.

Ultra Health also stated that it assumes that this “registration” will be visible to all producers because all producers must be able to see a person’s purchase history in order to ensure that the person does not purchase greater than 230 units within a 90-day period.

Written Comments from Natural Rx – November 22, 2019

Brooke Duverger from Natural Rx submitted a written comment for the November 22, 2019 public hearing and stated that Natural Rx is supportive of allowing reciprocity among other state medical cannabis programs. *See* Exhibit 14. However, they recommended greater clarity on how the program will allow these patients to purchase medical cannabis from multiple producers, as they are not required to obtain a New Mexico MCP card. *See* Exhibit 14. She also stated that it is unclear how this will work under the current BioTrack processes.

There were no oral public comments on specifically addressing 7.34.4.28 NMAC – Reciprocity at the January 16, 2020 public hearing. However, Duke Rodriguez may have been alluding to that rule as follows:

The Comments of Duke Rodriguez at the January 16, 2020 Public Hearing

Mr. Rodriguez said he was going to keep his comments narrower and stay away from all the rules. He said that they appreciate all the work the Department has done. He said Ultra Health had not had time to “reconcile” all the changes for the January 16 hearing. Ultra Health also submitted written comments on the reciprocity rule at the January 16, 2020 hearing, which are summarized below.

At the January 16, 2020 public hearing, Mr. Rodriguez did discuss the issue of residency. He said that the issue of residency has been well-addressed. He is a card holder in New Mexico, California, and Arizona. He said the courts have ruled that residency is allowed for any person. The regulation change does not reflect that. He said that the Governor said that she might call for a change in the statute, but until that change is made, the law is the law. He said that the regulations should reflect the current law, without further explanation.

Summary of Written Comments from Ultra Health in its January 16, 2020 Written Comments

Ultra Health submitted written comments on reciprocity again in its January 16, 2020 written comment. It asserted again that there are ambiguities in the proposed rule regarding reciprocal participation and asks that the DOH clarify these points so that the reciprocal program may be implemented smoothly. *See Exhibit 29.* The items that Ultra Health specifically are as follows:

- Ultra Health stated that the rule requires participants to “register with a licensed non-profit producer,” and states that it assumes this means out-of-state visitors can register with multiple producers and is not restricted to one producer.
- Ultra Health furthers states that it also assumes that the “registration” will be visible to all producers, because all producers must be able to see a person’s purchase history in order to ensure that the person does not purchase greater than 230 units within a 90-day period.

Written Comments Submitted at the January 16, 2020 Public Hearing

An individual submitted a written comment on January 16, 2020 at 10:27 AM with the heading “Medical Cannabis Hearing Commentary” and which commented on the proposed rule concerning reciprocity. *See Exhibit 29.* The individual asked that the DOH make the rule regarding reciprocity as “open and accepting and as easy” for patients to get medicine or travel on their way through a different state as possible. *Id.* The individual commented that it has been stressful in his/her experience to travel in states where medical cannabis is not legal. The individual asked that all the medical cannabis states “be legit here too.” *Id.*

Summary of Medical Cannabis Program Rule Amendments for Public Hearing January 16, 2020

The Department submitted a new summary for the reciprocity rule for the January 16, 2020 public hearing and added language which specified that the reciprocity provision will become effective on July 1, 2020. *See Exhibit 29.* The Department also noted that one concern raised in public comments was that it is not yet clear how the registration of reciprocal participants will work in the context of the BioTrack tracking system. The Department stated that it is working with BioTrack to incorporate reciprocal participant registration and sales into the BioTrack system but anticipates that it will take until July for the system to be updated and any bugs to be worked out. *Id.*

The Department also responded to public comment from LNPPs requesting clarification on how the registration process for reciprocal patients will work in practice. *Id.* It notes first the effective date of July 1, 2020 discussed above. This start date for reciprocity and implementation will address implementation concerns related to the inventory and sales tracking system known as “Biotrack.” The Department states that Biotrack, once updated, will include functions to enable registration of and sale to reciprocal participants, and reciprocal participants will be able to register with any given LNPP. The Department further states that registration will require that an LNPP input the reciprocal patient’s contact information and out-of-state medical cannabis registration information in Biotrack. That information will also keep track of the units for cannabis and cannabis products that are sold to the reciprocal participants. *Id.*

Recommendation: The rule as proposed is within the Department’s authority as established in NMSA 1978, § 26-2B-7(I). The Department has addressed the limited concerns raised by public comment. The Hearing Officer recommends that the Secretary adopt “7.34.4.28 NMAC – Reciprocity.”



Craig T. Erickson



Date