

**NEW MEXICO DEPARTMENT OF HEALTH
MEDICAL CANNABIS PROGRAM RULE PROMULGATION HEARING**

Public Hearing: Proposed Amendments to Medical Cannabis Program Rules 7.34.2.7, 7.34.3 NMAC, and NMAC, 7.34.4.28 NMAC

Actions in Question: Rule Promulgation Hearing for Proposed Amendments to 7.34.2.7 NMAC, 7.34.3 NMAC, and 7.34.4.28 NMAC

Hearing Date: November 12, 2021

Report Date: January 18, 2022

REPORT OF HEARING OFFICER

A Public Hearing was held on Friday, November 12, 2021 at 9:00 a.m. via Cisco Webex and telephone. The hearing was held for the purpose of considering the Department of Health’s (“DOH” or “the Department”) proposed amendments to 7.34.2.7 NMAC, 7.34.3 NMAC, and 7.34.4.28 NMAC in the Medical Cannabis Program (“MCP”) rules. Craig T. Erickson presided as Hearing Officer. The DOH was represented by Chris Woodward, Assistant General Counsel.

The proceeding was recorded via Cisco Webex and hosted in that platform by Mr. Woodward and Andrea Sundberg from the Medical Cannabis Program. The original recording is in the possession of the DOH, Office of General Counsel.

Individuals who were present for the Public Hearing on November 12, 2021 included the following individuals:

1. Brenda V. Martinez
2. Kristina Caffrey
3. Jason Barker
4. Duke Rodriguez
5. Marissa Novel
6. Rozana Archuleta
7. Seth Gardenswartz
8. T.J. Trujillo
9. Alexandra (“Alex”) Candelaria
10. Andy Lyman
11. Valerie Hubbard
12. Gary French
13. Elizabeth Bisio

The Hearing Officer opened the proceeding by introducing himself and Mr. Woodward, and Dr. Dominick Zurlo, the Medical Cannabis Program Director. The Hearing Officer then explained that the purpose of this public hearing was to give the public an opportunity to comment on the proposed amendments to 7.34.2.7 NMAC, 7.34.3 NMAC, and 7.34.4.28 NMAC in the Medical Cannabis Program Rules.

The Hearing Officer further stated that, pursuant to Notice, this matter was being heard on the 12th day of November 2021 via Cisco Webex online, and via telephone. He also stated that pursuant to notice, the public had been given the opportunity to comment on the proposed rule via Cisco Webex and telephonically, and through the submission of written comments via email messages. The opportunity was also given to the public to submit written comments via email messages, through the close of business on November 12, 2021.

The Hearing Officer also stated that the proceeding was being recorded, and that we have learned from experience how to get the best recording we can obtain from the Cisco Webex platform. Participants were instructed that they could assist with that effort by being on “mute” at all times, except when speaking. In addition, they were asked to turn off the video on their computers unless speaking. It was explained that this is important for the recording, and also important for the ability of all of us to hear clearly each person who speaks during the course of the hearing. The Hearing Officer explained that if too many people have their video on, or are “unmuted,” the voice of the speaker will become garbled and broken up.

The Hearing Officer also stated that this proceeding was being held in accordance with NMSA 1978, § 9-7-6(E) of the Department of Health Act, and the Default Procedural Rule for Rulemaking found at 1.24.25 NMAC. In addition, the proceeding is governed by the Lynn and Erin Compassionate Use Act (“Compassionate Use Act”) at NMSA 1978, § 26-2B-7(A), (I), and (J).

The Hearing Officer also explained that after his opening remarks, Dr. Zurlo from the Department would provide a brief introduction to the proposed amendments to the rule. Mr. Woodward would then introduce the Department’s Exhibits and move for admission of the Department’s Exhibits into the record.

The public would then be provided the opportunity to make public comment. Participant were reminded to state their full names when they speak, and if they are appearing on behalf of an organization to indicate what that is.

The Hearing Officer also stated that the Department is not bound by the formal rules of evidence during these proceedings, and the Hearing Officer may, in his discretion, exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious. He further noted that the Hearing Officer may take notice of judicially cognizable, technical, or scientific facts within the Department’s specialized knowledge.

The Hearing Officer stated that this hearing is the opportunity to offer public comment. He stated that the hearing is intended to provide the public with an opportunity to voice opinions on the proposed rule. He explained that the hearing is an opportunity for testimony and comments on

the proposed rules, not a question-and-answer session. The Hearing Officer stated that if anyone has questions regarding the proposed rules, they are free to include those questions in their public comments. He also explained that the Department will respond to public comments at the time when the Department issues its concise explanatory statement regarding all comments received. In addition, he stated that the Department will not be responding individually to those making comments on the proposed rules; the Department will publish a concise explanatory statement responding to all comments provided by the public at a later time, in keeping with the requirements of 1.24.25 NMAC.

The Hearing Officer further stated that public comments would be limited to five minutes per participant.

SUMMARY OF PROCEEDINGS

Preliminary Matters

The Department's Exhibits

Mr. Woodward offered the Department's exhibits into the record, and the exhibits were admitted by the Hearing Officer into the record. He noted that the exhibits had been posted on the DOH website, as well as on the Sunshine Portal. The exhibits are as follows:

- DOH Exhibit No. 1: Proposed Amendments to 7.34.2.7 NMAC
- DOH Exhibit No. 2: Proposed Amendments to 7.34.3 NMAC
- DOH Exhibit No. 3: Proposed Amendments to 7.34.4.28 NMAC
- DOH Exhibit No. 4: Notice of Public Hearing
- DOH Exhibit No. 5: Affidavit of Notice to the Public
- DOH Exhibit No. 6: Affidavit of Publication in the Albuquerque Journal
- DOH Exhibit No. 7: Affidavit of Publication in the New Mexico Register
- DOH Exhibit No. 8: Letter Appointing Hearing Officer
- DOH Exhibit No. 9: Final Decision of Acting Secretary David Scrase Re: Adequate Supply Limit
- DOH Exhibit No. 10: Public Comment of Ultra Health dated November 7, 2021

Mr. Woodward also requested that the Hearing Officer leave the record in this rulemaking proceeding open following the hearing for the receipt of the next report from the Medical Cannabis Advisory Board ("MCAB"), which would be meeting on December 7. As part of their meeting,

they would be reviewing the proposed rules and making recommendations concerning them, so the Department requested that the record be left open for the receipt of that report following the December 7 meeting. The request that the record remain open was granted.

Mr. Woodward then stated that the Department moved for the admission of the Department's Exhibits. The motion was granted and the Exhibits were admitted. Additional written comments and other written materials were submitted post-hearing and are discussed below beginning at page 7.

Introductory Remarks of Dominick Zurlo, Ph.D., Medical Cannabis Program Director

Dr. Zurlo began by offering his thanks to everyone who was participating in the hearing. He stated that the Department looked forward to the comments of the public and to their participation.

Dr. Zurlo stated that the proposed rules cover several different sections of the Medical Cannabis Rules. He explained that he would address the primary changes that were being requested in the rules.

He first addressed the amendments to 7.34.2.7 and 7.34.3.7 NMAC. He stated that these are revisions that have resulted from the Cannabis Regulation Act which has been instituted and in is action. This includes doing things such as removing definitions for items such as "courier," changing definitions for "licensed non-profit producer" to "licensee," and moving forward with several other amendments to the definitions for the rules.

Dr. Zurlo stated that the amendment to 7.34.3.9 NMAC is one of the primary changes in the rule. It consists of an increase for the limit for "adequate supply" and the removal of the medical exception that currently exists for the MCP. The amendment for this section also includes new text to explain the significance of the limit in light of the changes in the law resulting from the enactment of the Cannabis Regulation Act. This fits in from the recommendation of the MCAB which requested upon a petition from the public [Ultra Health] a request to increase the adequate supply to 420 units. The Department has changed this to be mathematically closer to 15 ounces, which was also included in the petition. The proposed amendment seeks to change this limit to 425 units, which is closer to 15 ounces, as recommended by the MCAB, when converted into the unit system for the Program.

Dr. Zurlo then turned to Section 10 of 7.34.3 NMAC, which includes an amendment to remove the caregiver background check. This is to adjust for the new criteria within the Cannabis Regulation Act, specifically with regard to expungement in criminal records for caregivers and for individuals in possession of cannabis.

Dr. Zurlo stated that the next couple of sections include items that are either replacement of references with regard to producers, or changes to some of the items that the Cannabis Regulation Act now transfers the authority within the Cannabis Control Division of the Regulation and Licensing Department, for example, laboratories and again changing the definition of "producer" to "licensee."

Dr. Zurlo then turned to 7.34.3.19 NMAC, which includes references to “reciprocal participant.” In order to be able to have revisions that are consistent with the transfer of the licensing authority to the Cannabis Control Division, the addition of 7.34.3.22 NMAC essentially duplicates that current reciprocity provisions that are included in 7.34.4.28 NMAC. It is revised to reflect the increase the reciprocal limit, which is consistent with the “adequate supply” limit for patients at 425 units or 15 ounces.

Dr. Zurlo stated that the final major change is the removal of the existing rule of 7.34.4.28 NMAC, which was the old version for the reciprocity provisions and which will now be included in 7.34.3.22 NMAC.

Dr. Zurlo closed his remarks by stating that the majority of these changes are in response to the new Cannabis Regulation Act and the changes in duties and responsibilities from the NM DOH to the Cannabis Control Division at the Regulation and Licensing Department, especially with regard to cultivation, production, and sale of cannabis. The other change with regard to the unit and adequate supply limit has been done upon review of this by the Medical Cannabis Advisory Board after petition by a member of the public.

Public Comments

The following is a summary of the public comments offered into the record at the November 12, 2021 Public Hearing.

The Public Comments of Kristina Caffrey

Ms. Caffrey, who is the chief legal counsel for Ultra Health, began by reading several sections of the statute, the Cannabis Regulation Act, which she argued show why any attempt by DOH to promulgate a patient purchase limitation is “greatly illegal.” She argued that the DOH has no authority to do what it is trying to do in this rule promulgation process.

First, Ms. Caffrey she read as follows.

Section 26-2C-25:

Except for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the division on the effective date of the Cannabis Regulation Act.

She stated that the reference to the “division” is the Cannabis Control Division in the Regulation and Licensing Department.

Second, she referred to “Section 70”¹ of the Cannabis Regulation Act, which she read as follows:

¹ “Section 70” is found in the “temporary provisions” in the annotations to NMSA 1978, §26-2C-1.

To the extent any administrative rules are inconsistent with the provisions of this Act, such rules are null and void.

Third, Ms. Caffrey then referred to Section 26-2C-25(A)(1) of the Act and read as follows:

A. The following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person . .

(1) possessing, using, being under the influence of, displaying, purchasing, obtaining or transporting not more cannabis than authorized by the Cannabis Regulation Act

Fourth, Ms. Caffrey addressed Section 26-2C-3(B)(4)(a), which directs the Cannabis Control Division to promulgate rules stating that

(a) a person who is twenty-one years old or older shall not purchase more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time.

Finally, Ms. Caffrey stated that Section 26-2C-6(K) states, as to activity under the Medical Cannabis Program, the licensee shall continue to operate under rules promulgated for the Medical Cannabis Program until the division [the Cannabis Control Division] promulgates rules for medical cannabis activity, “except that a qualified patient, a primary caregiver and a reciprocal participant shall not be prohibited from purchasing and obtaining cannabis products pursuant to the medical cannabis program.”

Ms. Caffrey argued that all of the foregoing sections demonstrate that the DOH has no statutory authority to promulgate any regulations that limit the amount of cannabis that a medical cannabis patient can purchase. She argued that the purchase limits are now enshrined by statute in the Cannabis Regulation Act.

The Public Comments of Duke Rodriguez

Mr. Rodriguez from Ultra Health stated that it is “embarrassing that we are participating in this rulemaking instead of waiting for the courts to properly adjudicate this issue.” He argued that the Cannabis Regulation Act specifically says that any person may purchase two ounces of cannabis, 16 grams of cannabis extract, and 800 milligrams of edible cannabis at any one time as of June 29, 2021. Mr. Rodriguez stated that this matter has been fully briefed and sits before Judge Ben Chavez awaiting his ruling. On June 29, he argued, the DOH was fully stripped of any regulatory power besides the patient registry. He stated that it is inappropriate for an agency that has been stripped of its powers to propose a rule to limit patient purchases below their statutory rights acting as if they are above the law and the legislature. He argued that the level of misinformation is frightening. He argued that the intentional misrepresentations about the price and the availability of cannabis communications to both the general public and the New Mexico Legislature are “shameful beyond comprehension.” He asked, why would DOH as the illegal

gatekeeper come between patients and their medicine. He said these rules are punitive of patients and not in accordance with law and this rulemaking should be closed indefinitely.

The Public Comments of Alexandra (“Al”) Candelaria

Ms. Candelaria stated that she has had a ten-year career in the medical cannabis industry and wanted to offer some on-the-ground perspective. She stated that she thinks all of these rule changes are very important and will impact the lives of our community. For brevity’s sake, with respect to the amount of cannabis that our patients have safe and legal access to, a lot of the patients who are in special populations need access to larger amounts of flower in order to make it possible to have enough medicine for themselves. She said it’s not just these people, “you know, puff and tough,” a lot of patients cannot tolerate smoking. She argued that right now the access that they have is not working. She said she really wanted to offer that perspective of patients who have been asking for this access to more quantity of their medicine really need it.

The Public Comments of T.J. Trujillo

Mr. Trujillo is the attorney for Pecos Valley Production. To keep his comments brief, he stated that they concur with the comments of Ms. Caffrey and Mr. Rodriguez regarding the fact that this rulemaking is contrary to law and should be terminated.

Ms. Sundberg then indicated that no other participant wanted to offer public comment and she reminded the public that written comment could still be submitted to the Department until the end of this hearing.

The Hearing Officer then explained that his job going forward was to submit a report making recommendations to the Acting Secretary, indicating that would be done in January 2022, after receipt of the additional submission of the MCAB meeting minutes by the DOH.

The Hearing Officer thanked all the participants for their presence in the hearing.

The Hearing Officer then closed the proceeding and went off the record.

Written Comments and Other Materials Submitted for Hearing

DOH Exhibit Nos. 9 and 10 contain written comments from the public and other written materials submitted to the Hearing Officer during the course of the rule promulgation process. DOH Exhibit No. 9 is the November 7, 2021 Final Decision of Acting Cabinet Secretary Scrase Regarding Medical Cannabis Advisory Board Reports and Recommendations. The original DOH Exhibit No. 10 contained only the November 9, 2021 Comments on Proposed Rule 7.34.3 NMAC, submitted by Ultra Health. Those exhibits were admitted into evidence at hearing.

Subsequent to hearing, the following written comments and materials were submitted to the Hearing Officer, and have been included in DOH Exhibit No. 10 - 21, as follows:

DOH Exhibit No. 11: March 25, 2019 Petition of Ultra Health to DOH Secretary Kathyleen Kunkel

DOH Exhibit No. 12: March 27, 2019 Letter from DOH Secretary Kunkel to Ultra Health

DOH Exhibit No. 13: March 29, 2020 Petition by Ultra Health to the Medical Cannabis Advisory Board Recommending Quantities of Cannabis That are Necessary to Constitute an Adequate Supply for Qualified Patients and Primary Caregivers

DOH Exhibit No. 14: November 12, 2021 Comments of Kylie Safa

DOH Exhibit No. 15: November 12, 2021 Comments of Duke Rodriguez

DOH Exhibit No. 16: November 12, 2021 Comments of Kristina Caffrey

DOH Exhibit No. 17: December 3, 2021 Letter of DOH OGC Attorney Chris Woodward in Response to Public Comments

DOH Exhibit No. 18: December 7, 2021 Draft Medical Cannabis Advisory Board Meeting Minutes

DOH Exhibit No. 19: Judge Benjamin Chavez's December 16, 2021 Order Quashing Alternative Writ of Mandamus

The foregoing written comments and materials have been admitted into evidence by the Hearing Officer, and are summarized herein as follows:

March 25, 2019 Letter of Ultra Health to DOH Secretary Kathyleen Kunkel

On March 25, 2019, Ultra Health, through its Project Manager Kylie Safa, wrote to then DOH Cabinet Secretary Kunkel regarding patient purchase limits and a petition to initiate a rulemaking process. Ultra Health states therein that, pursuant to 1.24.25.10 NMAC, it petitions the Department to initiate a rulemaking process regarding patient purchasing limits, for the specific purpose of raising the patient purchase limitation to the common industry limit of 15 ounces in any three-month period, and to eliminate the use of units as a system of measurement altogether, in exchange for the industry standard measurement of dry weight in ounces for flower and dry eight in ounces of THC for extracts and infused products. *See* DOH Exhibit No. 11 at 1.

Ultra Health states in its March 25, 2019 letter that the Department has explicit statutory authority to create and adopt the rule it proposes regarding patient purchase and possession limitations, citing NMSA 1978, §§ 26-2B-4(A), 26-2B-3(A), 26-2B-4(a), AND 26-2b7(A)(2). *Id.* at 2. It also outlines the basis for its proposed rule in pages 3-6 of its letter. *Id.*

March 27, 2019 Letter from DOH Secretary Kunkel to Ultra Health

Secretary Kunkel responded to Ultra Health's March 25, 2019 letter and petition by stating that the petition was denied. *See* DOH Exhibit No. 12. Secretary Kunkel declined the request for a rulemaking proceeding because the Department was at that time surveying patients and producers to gather more information relevant to supply and demand of medical cannabis within the Medical Cannabis Program. *Id.* It also noted the then recent increase in the plant limit through an emergency rule amendment. She further noted that the survey effort was not complete, and that it would be premature to engage in rulemaking at that time. *Id.*

March 29, 2020 Petition by Ultra Health to the Medical Cannabis Advisory Board Recommending Quantities of Cannabis That are Necessary to Constitute an Adequate Supply for Qualified Patients and Primary Caregivers

A year later, on March 29, 2020, Ultra Health filed a Petition to address quantities of medical cannabis necessary to constitute an adequate supply for patients and primary caregivers with the Medical Cannabis Advisory Board. *See* DOH Exhibit No. 13. The Petition asked the MCAB recommend quantities of cannabis that are necessary to constitute an adequate supply of medical cannabis for qualified patients and primary caregiver, pursuant to NMSA 1978, § 26-2B-6(E). In particular, Ultra Health sought a recommendation by the MCAB for a minimum of 15 ounces (420 units) of usable cannabis for a period of three months. *Id.* The Petition thereafter sets forth the asserted basis for the requested recommendation. *Id.* at 5-11.

DOH Acting Cabinet Secretary David Scrase's November 7, 2021 Final Decision Regarding Medical Cannabis Advisory Board Reports and Recommendations

DOH Exhibit No. 9 is the November 7, 2021 Final Decision Regarding Medical Cannabis Advisory Board Reports and Recommendations. The Final Decision addresses three different sets of reports and recommendations from the MCAB. *Id.* at 1. In relevant part, it addresses the MCAB's recommendation regarding an increase in the purchase limits of medical patients for qualified patients. *Id.* at Section I.C. on page 4. The MCAB's recommendation was made in response to Ultra Health's Petition. The MCAB recommended that the DOH increase the "adequate supply" three-month possession limit to 420 units. *Id.* Acting Secretary Scrase adopted the MCAB's recommendation to increase the "adequate supply" purchase limit. *Id.*

Acting Secretary Scrase also noted that the Department has proposed to amend 7.34.3.9 NMCA to increase the adequate supply limit to 425 units (approximately 15 ounces) of dried cannabis material for a three-month period. *Id.* He further noted that the Department has proposed to remove the "medical exception" found in 7.34.3.9(C) NMCA. *Id.* In addition, he described the basis for the proposed increase, and noted that the proposed amount is six times greater than sales records from LNPPs showed. *Id.*

Finally, Acting Secretary Scrase stated that with the passage of the Cannabis Regulation Act and the imminent arrival of commercial cannabis sales, the "adequate supply" limit will have less significance, because qualified patients will be able to exceed that limit by making purchases of commercial cannabis. *Id.* At that time, the Acting Secretary noted, the adequate supply limit

will have two main functions: (1) to identify which cannabis purchases are tax-free under the CRA, and (2) to identify the maximum quantity of cannabis that qualified patients and primary caregivers can collectively possess outside of residence. *Id.* He also notes that under the CRA, there is no limit on the quantity of cannabis that can be possessed by an individual who is 21 years old or older inside of their residence. *Id.*

Ultra Health's November 9, 2021 Comments on Proposed Rule 7.34.3

DOH Exhibit No. 10 contains the November 9, 2021 Comments on Proposed Rule 7.34.3 NMAC by Ultra Health, written by Kristina Caffrey, Chief Legal Counsel for Ultra Health.

Ultra Health begins by stating that the proposed 7.34.3.9 NMAC, which sets an amount no greater than 425 units total unit of usable cannabis that may be purchased within a three-month period, is “illegal” and violates the Cannabis Regulation Act in “multiple ways.” *See* DOH Exhibit No. 10 at 1.

First, Ultra Health argues that the DOH has no legal authority to limit purchases for medical patients in any way, citing NMSA 1978, § 26-2C-5, which provides that “[e]xcept for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the division of the effective date of the Cannabis Regulation Act.” Thus, Ultra Health argues, the Department has no authority to limit purchases for medical patients in any way, and no authority to promulgate rules related to cannabis, except if those rules concern the medical cannabis registry. *Id.*

Ultra Health argues that the term “medical cannabis registry” is defined in the CRA as the “system by which the department approves or denies applications and issues and renews registry identification cards for qualified patients” in NMSA 1978, § 26-2C-3(MM). Ultra Health argues that limiting the purchases of medical cannabis patients, which 7.34.3.9 NMAC purports to do, has nothing to do with processing registry identification cards. *See* DOH Exhibit No. 10 at 2.

Ultra Health states that the effective date of the CRA was June 29, 2021, and the DOH lost any authority that would allow it to define “adequate supply,” create purchase limitations, or enforce purchase limitations on that date. *Id.*

Ultra Health’s second argument is that the “adequate supply” provisions—both statutory and regulatory—in the Lynn and Erin Compassionate Use Act have been nullified by the CRA. Ultra Health asserts that NMSA 1978, § 26-2C-25(A)(1) provides that the “following conduct is lawful for a person who is twenty-one years of age or older . . . possessing, using, being under the influence of, displaying, purchasing, obtaining or transporting not more cannabis than authorize by the Cannabis regulation Act or the medical cannabis program.” Ultra Health argues that this provision was effective as of June 29, 2021. *Id.* at 2-3.

Ultra Health argues that other provisions of the CRA clarify the extent of the rights granted by Section 26-2C-25(A)(1), stating that subsection 25(A)(2) provides that the “following conduct is lawful for a person who is twenty-one years of age or older . . . possessing in excess of two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible

cannabis if the excess is stored in the person's private residence and not visible from a public place." Ultra Health states that Section 26-2C-3(B)(4)(a) directs the Cannabis Control Division of the RLD to promulgate rules stating that "a person who is twenty-one years old or older shall not purchase more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time." *Id.*

Ultra Health argues that the forgoing statutory provisions broadly refer to a "person" and not a "recreational purchaser" or a "non-medical purchaser." Thus, it argues that the term "person" plainly includes medical cannabis patients. Ultra Health argues that Section 26-2C-25(A)(1), which uses the terms "possessing," "purchasing," and "obtaining," is both a possession limitation and a purchase limitation. *Id.*

Ultra Health further argues that Section 26-2C-25(A)(1) specifically allows "persons" to purchase "not more cannabis than authorized by the Cannabis Regulation Act or the medical cannabis program" without reference to whether the higher or lower amount controls. Consequently, it argues that if the person purchased the higher amount it would still be lawful. *Id.*

Ultra Health argues that the proposed 7.34.3.9 NMAC, which would allow a qualified patient to purchase less than the amount authorized by the CRA, "blatantly" contradicts the statutory provision. *Id.*

Ultra Health argues under the Compassionate Use Act, possessing and purchasing cannabis was lawful only for qualified medical patients, subject to certain volume requirements set by regulation. It also argues that under the Cannabis Regulation Act possessing and purchasing cannabis became lawful for all adults beginning on June 29, 2021, up to volumes defined by the statute rather than by regulation. *Id.* at 3.

Ultra Health asserts that the intent to displace the authority of the DOH over patient purchase limitations is obvious in the text of the CRA. Ultra Health again cites Section 26-2C-5 of the CRA, which provides that except for administration of the medical cannabis registry, the power, duty, and authority of the DOH related to medical cannabis shall be transferred to the Cannabis Control Division on the effective date of the statute. Ultra Health argues that "[b]y severely limiting DOH's authority, the CRA indicates its intent to supplant and supersede DOH's arbitrary and capricious limitations on medical cannabis patient purchases." *Id.*

Ultra Health next argues that Laws 2021 (1st S.S.), ch. 4 § 70 (under "Temporary Provisions" in the Annotations to NMSA 1978, § 26-2C-1), provides that "[t]o the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void." Ultra Health argues that the CRA unmistakably authorizes purchases of not more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time, and that provision was effective as of June 29, 2021. Ultra Health argues that nothing in the CRA limits its effectuation to certain dates. *Id.*

Ultra Health argues that when there are two conflicting statutes, the later, more comprehensive statute governs. Ultra Health cites NMSA 1978, § 12-2A-10(A), which states: "If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict

is irreconcilable, the later-enacted statute governs.” It also cites, NMSA 1978, § 12-2A-10(C), which states: “If a statute is a comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably.” Ultra Health asserts that the CRA is a comprehensive revision of the law regarding cannabis, and therefore it prevails over the Compassionate Use Act where the two statutes conflict. Consequently, Ultra Health argues, the proposed rule is “illegal.”

In its written comment, Ultra Health next turns to an argument related to “Additional Amounts of ‘Commercial’ Cannabis.” See DOH Exhibit No. 10 at 4. It refers to the statement in 7.34.3.9 NMAC which states: “Once commercial cannabis sales are authorized by the Cannabis Control Division to begin in accordance with NMSA 1978, § 26-2C-6(K), qualified patients and primary caregivers will be able to make commercial purchases above the adequate supply limit, in accordance with the Cannabis Regulation Act.” *Id.* Ultra Health argues that this provision is “illegal.” It argues that although the DOH’s proposed rule fails to define “commercial purchases” and fails to even define “commercial,” “it is obvious what DOH attempts to do here.” *Id.*

Ultra Health states that in September 2021, the DOH wrote in a pleading filed in a district court case—D-202-CV-2021-04058:

As commercial sales are not currently permitted, the [Compassionate Use Act] limits qualified patients to purchases of eight ounces within a three-month period. See 7.34.3.9(A), 7.34.4.8(L) NMAC. Hypothetically, if a qualified patient were able to purchase on the commercial, non-medical market above those limits currently permitted by regulation, by statute the cannabis excise tax would apply.

Ultra Health argues that the meaning of the forgoing statement is clear—medical cannabis patients may purchase 450 units over 90 days without paying applicable tax, but any volume over that amount would be taxed. Ultra Health argues that there is no statutory justification for this position, and the proposed regulation violates the statute. NMSA 1978, § 7-42-3(C) states: “The cannabis excise tax shall not apply to retail sales of medical cannabis products sold to a qualified patient of primary caregiver who presents a registry identification card issued pursuant to [the Compassionate Use Act] or a reciprocal participant who presents similar proof from another state, the District of Columbia or a territory or commonwealth of the United States at the time of the sale.” Ultra Health argues that the forgoing provision contains no volume limitation whatsoever and simply provides that sales of medical cannabis to a qualified patient or primary caregiver who has a registry identification card are not subject to the excise tax. Ultra Health argues that the DOH is attempting to add words to the statute and has no authority to do so. *Id.* at 4.

Ultra Health cites *Wilcox v. New Mexico Bd. of Acupuncture and Oriental Medicine*, 2012-NMCA-106, ¶ 7, quoting *Rivas v. Bd. of Cosmetologists*, 101 N.M. 592, 593, which states: “An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.” It also cites *State ex rel. Taylor v. Johnson*, 1998-NMSC015, ¶ 22, 961 P.2d 768, for the proposition that “[t]he administrative agency’s discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.” *Id.*

In addition, Ultra Health argues that there is no volume limitation in NMSA 1978, § 7-9-73.2, which provides that receipts of from the sale of prescription drugs, oxygen, and oxygen services provided by a licensed durable medical equipment provider and cannabis products should in accordance with the Compassionate Use Act may be deducted from gross receipts and governmental gross receipts. Ultra Health argues that the DOH is reading words into a statute that are not there. *Id.* at 4-5.

Finally, on the foregoing topic, Ultra Health argues that the DOH has no authority to determine what is and what is not taxable. *Id.* at 5. It argues that nowhere in the Compassionate Use Act or the DOH's enabling statute does the Legislature delegate authority to the DOH to make decisions on taxation, which is exclusively in legislative control. It argues that the DOH's attempt to control taxation is "recklessly unlawful," and the DOH is "simply crowning itself king." *Id.* It argues that the DOH is created by statute and limited to the power and authority defined by statute. *Id.*

Ultra Health next turns to the reciprocal limitations in 7.34.3.22(B) NMAC, which places the same purchase limitations on reciprocal patients as 7.34.3.9 NMAC places on medical cannabis patients. It argues that these purchase limitations are unlawful for the same reasons that 7.34.3.9 NMAC is unlawful.

Ultra Health's final argument in its November 9, 2021 written comment is that even if the DOH had lawful authority to promulgate purchase limitations for patients, the rule would still fail because it is unsupported by substantial evidence and because the DOH failed to consult the Medical Cannabis Advisory Board. *Id.* at 5-6. It argues that the DOH has provided no evidence at all in support of its adequate supply figure of 425 units over 90 days. It argues that NMSA 1978, § 26-2B-7 requires that after consultation with the MCAB, the department shall promulgate rules in accordance with the State Rules Act, and it argues there is no indication that occurred. *Id.*

November 12, 2021 Comments of Kylie Safa

Ms. Safa submitted written comments after the hearing on November 12, 2021. *See* DOH Exhibit No. 14. She states that her written comments are submitted regarding proposed rule 7.34.3 NMAC.

Ms. Safa stated that she was the original petitioner who submitted the "publicly submitted petition" supporting the purchase limit increase and referenced by the DOH at hearing. She states that she feels it is important to "set the record straight" with respect to the petition. *See* DOH Exhibit No. 14.

She notes that the petition to recommend an increase in patient purchase limits has a long history; it was originally submitted in March 2019 to then Secretary Kunkel, as a petition to initiate a rulemaking process. Ms. Safa states that Secretary Kunkel responded by indicating the matter may be considered in an upcoming 2019 rulemaking process to address plant count. She then asserts that "[p]urchase limits were never considered during that 2019 rulemaking process as previously represented by then-Secretary Kunkel." *Id.*

Ms. Safa then states that the petition was submitted again to the MCAB in March 2020. It was not heard or voted on until November 2020, when the MCAB agreed with the petitioner's recommendation to increase patient purchase limits. She then asserts that the petition sat idle with no action for nearly two years. *Id.*

Ms. Safa the asserts that as of the enactment of the CRA, the petition to increase patient purchase limits is no longer relevant because patient purchase limits were increased by the statute and the DOH no longer has authority on anything cannabis-related except the patient registry. *Id.*

Ms. Safa concludes by asserting that if the proposed amendment to 7.34.3 NMAC had occurred over two years ago it would have been a victory for MCP patients. However, she claims, in today's world "it is nothing short of a slap in the face to New Mexico's medical cannabis patients." *Id.* She claims it is an illegal attempt to impede on the rights to all person over the age of 21 under the CRA, including those of patients. She also claims it is illegal to attempt to create a taxing scheme in which the Department has not authority. *Id.*

November 12, 2021 Comments of Duke Rodriquez

Mr. Rodriguez submitted written comments after the hearing on November 12, 2021. *See* DOH Exhibit No. 15. The written comments are identical to the public comments Mr. Rodriguez offered at hearing.

November 12, 2021 Comments of Kristina Caffrey

Ms. Caffrey submitted written comments after the hearing on November 12, 2021. *See* DOH Exhibit No. 16. This comment was written in response to the Final Decision Regarding Medical Cannabis Advisory Board Reports and Recommendations, signed by Acting Secretary Scrase on November 7, 2021. *See* DOH Exhibit No. 9. Ms. Caffrey comments on page 3 of the Final Decision, which addresses the MCAB's recommendation to increase the "adequate supply" amount.

Ms. Caffrey argues that the Final Decision in no way changes the illegality of the DOH's proposal to adopt any adequate supply limitation. She notes that the MCAB recommended in 2020 that the DOH should raise the patient purchase limit; this was prior to the passage of the Cannabis Regulation Act. She argues that any cannabis-related events prior to June 29, 2021 are largely irrelevant because the world of cannabis in New Mexico fundamentally changed on that date. She further argues that if the DOH had consulted the MCAB after June 29, 2021, the Board could have considered the issues in light of the CRA. However, she asserts, the DOH failed to update the Board on its loss of statutory authority to set any "adequate supply" limits. *See* DOH Exhibit No. 16 at 1.

She argues that it no longer matters what the MCAB thinks about adequate supply because purchase limitations for all "persons" (including medical cannabis patients) are now set by statute. *Id.*

She also argues that Acting Secretary Scrase made a “blatantly false statement” when he stated: “Once commercial sales begin, qualified patients in the Medical Cannabis Program will be able to exceed the ‘adequate supply’ 90-day limit by making ‘commercial’ purchases of cannabis. In this way, the adequate supply limit will cease to function as a true acquisition limit. Instead, the adequate supply limit will have two main functions: (1) to identify which cannabis purchases are tax-free, in accordance with the CRA; and (2) to identify the maximum quantity of cannabis that qualified patients and primary caregivers can collectively possess outside of a place of residence (given that the adequate supply limit exceeds the two-ounce limit that would otherwise apply outside of one’s residence under the CRA).” *Id.* at 1-2.

Ms. Caffrey concludes by stating that the Acting Secretary should confine his opinions to matters of medicine because he is mistaken on the law. She repeated her prior assertions that the tax exemption portions of the CRA contain no volume limitations, and there is no basis in the statute to assert that only the “adequate supply” is tax free. She stated that it is entirely outside the purview of the DOH to make decisions regarding taxation, and her organization would be informing legislators of this matter regarding taxation. *Id.* at 2.

December 3, 2021 Letter of DOH OGC Attorney Chris Woodward in Response to Public Comments

On December 3, 2021, DOH Assistant General Counsel Chris Woodward submitted a written response to the Public Comments received by the Department in this rulemaking process. *See* DOH Exhibit No. 17. Mr. Woodward structured his comments by referring to the combined comments of Kristina Caffrey, Duke Rodriguez, and Kylie Safa (all made on behalf of Ultra Health) and the comment of attorney T.J. Trujillo (on behalf of Pecos Valley Production) who summarily endorsed the comments of Ultra Health, as the “Ultra Health comments.” *Id.* at 1.

Mr. Woodward began in his response by addressing Ultra Health’s comments related to the ongoing lawsuit of *Jason Barker v. New Mexico Dept. of Health et al.*, case number D-202-CV-2021-04058. He noted that, at the time of his response, a hearing had been held in that matter on November 2, 2021, and that parties expected a decision in the case soon.² Mr. Woodward noted that, as of December 3, 2021, the Department had not been enjoined from pursuing any rule amendments concerning the MCP in that litigation. That assertion continues to be accurate following the issuance of the Court’s decision in the *Barker* case.

Mr. Woodward challenges Ultra Health’s assertion that the DOH lacks authority to set regulatory standards concerning the “adequate supply” limit. He argues that Ultra Health’s argument that the DOH lacks such authority ignores the fact that the “adequate supply” limit remains in the statute. *See* DOH Exhibit No. 17 at 1-2. He argues that this is an “extraordinary omission.” *Id.* He notes that despite the fact that the CRA made various amendments to the Compassionate Use Act, including numerous amendments to definitions, the definition of “adequate supply” remained in the law. In fact, he states, the expression “adequate supply” appears several times in the Compassionate Use Act, including in Sections 26-2B-3, 26-2B-4, 26-2B-6, and 26-2B-7. He argues that this fact cannot be interpreted as a mistake; and the Department is

² Judge Benjamin Chavez issued a decision on December 16, 2021, and his decision has been made a part of the record in this proceeding. *See* DOH Exhibit No. 19. The decision of Judge Chavez is summarized below.

obligated to apply it. He argues that laws are not interpreted to be meaningless, yet that is what Ultra Health is asking the Hearing Officer to do. *Id.* at 2.

Mr. Woodward argued that the bill that enacted the Cannabis Regulation Act made several amendments to the Compassionate Use Act but did not modify or delete the definition of “adequate supply” or the requirements related to that term elsewhere in the statute. *Id.* He argues that the inclusion of “adequate supply” in House Bill 2 demonstrates that it was included deliberately, and that the references in the Compassionate Use Act were intended to be read in conjunction with the CRA text. *Id.*

Mr. Woodward further noted that the reference to “adequate supply” in the Compassionate Use Act in Section 26-2B-6 establishes the MBAC’s duty to recommend quantities of medical cannabis that are necessary to constitute an “adequate supply” for medical cannabis patients and primary caregivers. He argues that there would be no reason for the Legislature to require the Board to make recommendations about adequate supply if the DOH had no authority to set the adequate supply limit, and to interpret the Compassionate Use Act in this manner would effectuate an absurd result, contrary to case law regarding statutory construction. *Id.*

Mr. Woodward argues that Section 26-2B-7(A)(2) requires that the Department “define the amount of cannabis that is necessary to constitute an adequate supply.” *Id.* He quotes Section 26-2B-3(A) for the definition of “adequate supply,” as follows:

An 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[.]

Id. at 3.

Mr. Woodward states that due to the enactment of the CRA and the coming of commercial cannabis sales, the legal significance of adequate supply is changing. *Id.* The definition of “adequate supply” describes a possession limit and it is also described in the Compassionate Use Act as a usage limit. *See* Section 26-2B-4(A). Given that the CRA authorizes any person 21 years of age and older to possess unlimited quantities of cannabis within the person’s resident, and the CRA broadly authorized the use of cannabis by persons 21 years of age or older without a usage limit, Mr. Woodward argues that adequate supply now will function primarily as a purchase limit for what are deemed “medical” purchases. *Id.* at 3. He argues that purchases beyond the adequate supply limit will be taxed as commercial sales. *Id.*

Mr. Woodward asserts that adequate supply may also function as a possession limit for patients, and as a collective possession limit for qualified patients and primary caregivers, for amounts of cannabis possessed outside the person’s residence. *Id.* He notes that this is due to the fact that the adequate supply limit is greater than the ordinary two-ounce possession limit of the CRA and the Compassionate Use Act continues to immunize patients and primary caregivers for the possession of cannabis up to the adequate supply limit. He further notes that Section 26-2C-

25(A)(1) acknowledges that the possession limits for qualified patients may differ from those that apply to the general public. *Id.* at 3, fn 1.

He further asserts that the adequate supply limit will continue to operate fully as a use and possession limit for qualified patients and primary caregivers who are under the age of 21, given the immunities of the CRA at Section 26-2C-25 apply only to persons age 21 or older. *Id.* He notes that any person, including a minor, can be enrolled in the MCP and any person 18 or older can be enrolled as a primary caregiver. *Id.*

Mr. Woodward argues that the fact that the CRA establishes a two-ounce transactional limit to sales to “persons” and immunizes “persons” for the purchase and possession of cannabis is irrelevant to the issues raised in this proceeding. He states that the Department does not dispute that qualified patients and primary caregivers are bound to the two-ounce per-transaction purchase limit, nor does it dispute that person 21 years of age and older are generally immunized of possession of two ounces of cannabis outside their residence. *Id.*

Mr. Woodward next argues that the Compassionate Use Act and the CRA, when read together, make it evident that the Legislature created a two-tiered framework for “medical” and “commercial” or “recreational” purchases, with the primary distinction being whether revenue from a sale of cannabis is subject to taxes under New Mexico tax law. *Id.* He states that the NMSA 1978, § 7-9-73.2 exempts from gross receipts tax the sale of cannabis products sold in accordance with the Compassionate Use Act and NMSA 1978, § 7-42-3 imposes cannabis excise taxes on cannabis retailers in New Mexico. *Id.* at 3-4. He notes this system is closely analogous to other drug sales in New Mexico. *Id.* at 4. He argues that once commercial cannabis sales begin, the adequate supply limit will operate to limit the amount of cannabis that is deemed exempt from taxes, just as a prescription effectively limits the quantity of Ibuprofen that is deemed exempt from gross receipts tax. *Id.*

Mr. Woodward also notes that Ultra Health claims that, because there is no volume limit on medical cannabis sales specified in the gross receipts tax exemption in NMSA 1978, § 7-9-73.2, all cannabis sales to qualified patients and primary caregivers are tax-free, regardless of whether the volume purchased is within the three-month adequate supply limit. *Id.* at 4, fn 2. He argues that by this argument, all receipts from the sale of Ibuprofen would likewise be deemed tax-free, because no volume limit is specified in that section of the tax law. Mr. Woodward argues that Ultra Health’s persistent refusal to acknowledge the existence of the adequate supply limit in statute defy reason. *Id.*

Mr. Woodward then turns to Ultra Health’s argument regarding Section 26-2C-5 of the CRA, which provides as follows:

Except for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the [cannabis control] division on the effective date of the Cannabis Regulation Act.

Id. at 4. Mr. Woodward notes that Ultra Health relies primarily on this provision to argue that this section of the CRA transferred DOH's authority regarding the adequate supply limit to the CCD. He argues that implicit in this argument is the notion that this provision in the statute "nullified" all of the many references to "adequate supply" that remain in the Compassionate Use Act. He argues that Section 26-2C-5 itself refutes Ultra Health's argument. The title of Section 26-2C-5 is "Department of health; duties; **transfer of licensing duties.**" *Id.* at 4. [Emphasis added.] He also notes that the caption on the first page of House Bill 2 from the 2021 Legislative session describes the bill in similar terms, as "TRANSFERRING LICENSING AUTHORITY UNDER THE LYNN AND ERIN COMPASSIONATE USE ACT TO THE CANNABIS CONTROL DIVISION." *Id.* at 4, fn 3. Mr. Woodward argues that this proves that the Legislature did not intend that the powers to be transferred to the CCD would include the setting of the adequate supply limit. In support of his argument on statutory construction, Mr. Woodward cites *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 18, which states: "For the purpose of determining the legislative intent we may look to the title, and ordinarily it may be considered as a part of the act if necessary to its construction." *Id.* at 4.

Mr. Woodward argues that setting of the adequate supply limit is not a licensing duty, because it does not pertain to the licensing that was done previously under the Compassionate Use Act. The only medical cannabis "licensing" that was ever done under that Act was the licensing of commercial cannabis establishments and the insurance of personal production licenses to qualified patients (which are now extinct). Thus, he argues that only commercial licensing duties have been transferred to the CCD. *Id.* at 5. In support of his argument, he also notes that Section 26-2C-3 of the CRA creates the CCD to administer the CRA and the licensing provisions of the Compassionate Use Act, and Section 26-2C-6(B) identifies all of the person and entities to be licensed by the CCD, all of which are commercial license designation. *Id.* He further argues that at no time has the Compassionate Use Act or DOH rules ever described qualified patients and primary caregivers as having been "licensed" for those designations; instead, they are deemed "enrolled" and listed in the Medical Cannabis Registry and issued Registry identification cards by name. *Id.*

Thus, Mr. Woodward argues that because the Legislature transferred only licensing duties to the CCD, which do not include responsibility for setting the adequate supply limit; because the Legislature reserved to the DOH the administration of the medical cannabis registry; and because the Compassionate Use Act contains numerous references to the adequate supply limit and the Department's role in setting it, it is apparent that the Legislature considered the setting of the adequate supply limit to be a responsibility associated with the Medical Cannabis Registry. *Id.* at 5. Mr. Woodward provides case law authority for the propositions that a fundamental purpose of statutory construction is to ascertain and effectuate legislative intent using the plain language of the statute as the primary indicator of that intent, and, further, that a court does not give effect or embrace legislative intent if it reads a statute in a way that would render it meaningless. Mr. Woodward argues that, unlike Ultra Health's argument, the DOH's interpretation of the Compassionate Use Act and the CRA relies on the plain text of the statutes and gives effect to both statutes. *Id.*

Mr. Woodward argues that Ultra Health's argument concerning the reciprocal patient limit is unavailing for similar reasons. He cites sections of the Compassionate Use Act which provide

that reciprocal participants are exempt from arrest or other penalties only if the quantity of cannabis they possess does not exceed the limit identified by Department of Health rule. Further, as in the case of “adequate supply,” the MCAB is tasked in the Compassionate Use Act with making recommendations to the DOH concerning the reciprocal participation limit. Mr. Woodward argues that there would be no purpose for this requirement unless the Department, as plainly stated in the text of the statute, was responsible for setting the reciprocal participation limit by rule. *Id.* at 5-6. Further, he argues, for the same reasons as described above, the setting of the reciprocal participation limit is not a licensing duty and was not transferred to the CCD under the CRA. *Id.* at 6.

Mr. Woodward’s final argument in his December 3, 2021 letter responds to Ultra Health’s argument that the proposed 425-unit adequate supply limit is unsupported by substantial evidence. *Id.* 6-7. He summarizes Ultra Health’s argument, stating the Ultra Health makes the following arguments:

- The DOH has provided no evidence at all, let alone substantial evidence, to support the 425 units over 90 days adequate supply limit;
- The DOH has provided no studies, no surveys, no supporting documents, not comparisons to other states.
- In short, the DOH has provided no evidence whatsoever.

Mr. Woodward responds to the forgoing statements by stating that the statements are “outrageously hypocritical and demonstrate bad faith on the part of Ultra Health and its representatives.” *Id.* at 6. He further states: “**The 15-ounce adequate supply limit that the Department of Health is now proposing is a direct result of Ultra Health’s petition to the Medical Cannabis Advisory Board in which Ultra Health requested adoption of a 15-ounce limit.**” [Emphasis in original.] *Id.* This is the amount requested by Ultra Health in its March 29, 2020 petition to the MCAB. This is the petition that was referenced by Acting Secretary Scrase in his Final Decision on MCAB’s recommendations. *See* DOH Exhibit No. 17 at 5, and Exhibit No. 8 at 4.

Mr. Woodward further argues that Kylie Safa, on behalf of Ultra Health, requested that the adequate supply limit be increased to a minimum of 15 ounces (420 units) of usable cannabis for a period of three months. *See* DOH Exhibit No. 17 at 6, and Exhibit No. 13 at 4. Mr. Woodward also notes that Ultra Health’s petition described this amount as a “common industry standard” and stated that it has previously petitioned for the same adequate supply limit on March 25, 2019. *See* DOH Exhibit No. 17 at 6, Exhibit No. 11 at 2. He further stated that Ultra Health’s petition detailed how New Mexico’s adequate supply limit compared with those of other states, stating that Arizona, Arkansas, Illinois, Maine, and Nevada all had 15-ounce limits for a three-month period. *See* DOH Exhibit No. 17 at 6 and Exhibit No. 11 at 5-6. Mr. Woodward also notes that Ultra Health’s petition states that its recommended 15-ounce adequate supply limit is “in keeping with industry practice.” *See* DOH Exhibit No. 17 at 6 and Exhibit No. 11 at 7.

Mr. Woodward includes the following quotes from Ultra Health:

- Again, the most commonly accepted, conservative industry standard for patient purchase limits equate to 15 ounces in a 90-day period. The advisory board should recommend to the Department an increase in patient purchase limit to no less than 15 ounces over 90 days to ensure patients can purchase back-stock medicine allowing them to meet the CDD's recommendation to have a 30 -day supply of medicine on hand.
- We [Ultra Health] respectfully request the Medical Cannabis Advisory Board increase adequate supply to a minimum of the conservative industry standard of 15 ounces (or 420 units) for a three-month period.

See DOH Exhibit No. 17 at 6 and Exhibit No. 11 at 9 and 11.

Mr. Woodward also notes that on March 25, 2019, Ms. Safa wrote to then Secretary Kunkel requesting that the Department initiate a rulemaking process to amend 7.34.3.9 NMAC in order to increase the adequate supply limit to 15 ounces. *See* DOH Exhibit No. 17 at 6 and Exhibit No. 11 at 9 and 11. He noted that Ms. Safa stated at that time that the requested adequate supply was in line with other medical markets. *Id.*

Mr. Woodward argues that for years, Ultra Health has pushed for the adoption of a 15-ounce supply limit, which was also unanimously endorsed by the MCAB, and is the industry standard in several states. *See* DOH Exhibit No. 17 at 7. He also states that “Ultra Health’s representatives attempt a cynical bait-&-switch, insisting there’s no evidence to support it.” *Id.* He argues that Ultra Health’s arguments are disingenuous and without merit. *Id.*

Mr. Woodward concludes by stating that the proposed 15-ounce adequate supply limit nearly doubles the current 8-ounce limit. *Id.* He argues that the 15-ounce limit is supported by the following:

- It was unanimously endorsed by the MCAB.
- It is, as Ultra Health has repeatedly stated, an industry standard that is applied in several states.
- Only about 7/10s of 1 percent of all enrolled qualified patients have sought a medical exception to access an additional 115 units/grams up to a total of 2345 units/grams or approximately 12 ounces of dried usable cannabis.
- Further, as Mr. Woodward has previously argued, the adequate supply limit will soon no longer function as an acquisition limit for patients 21 years of age or older.
- Since June 29, 2021, qualified patients and all other persons 21 years of age or older have been allowed to lawfully grow and cultivate up to six mature cannabis plants and six immature plants, and they are able to gift the cannabis to one another. The

6-mature plant limit represents a 50% increase that qualified patients may grow.
Id.

Thus, Mr. Woodward argue that there is no legitimate argument to say that the adequate supply limit prevents qualified patients from obtaining needed medicine.

December 7, 2021 Draft Medical Cannabis Advisory Board Meeting Minutes

On December 7, 2021 the Medical Cannabis Advisory Board issued draft meeting minutes for meeting of that date. *See* DOH Exhibit No. 18.

The minutes reflect the fact that Kristina Caffrey made comments at the meeting regarding her interpretation of adequate supply and who it is affected by the CRA. *Id.* at 3. The minutes also note that Duke Rodriquez commented that he did not believe the DOH has the ability to set the adequate supply limit and viewed any attempt to limit adequate supply as a tax increase. *Id.* The notes further reflect that Kylie Safa shared her interpretation of the CRA and her opinion that the DOH had no authority to set an adequate supply limit, because “in her eyes, any purchase a medical cannabis patient makes is inherently medicinal and should therefore never be subjected to a tax.” *Id.* at 3-4.

The minutes reflect the decision by a 5-0 vote of the members of the MCAB, a “a lengthy deliberation,” to adopt all of the proposed rule revisions without modification *Id.* at 2.

Judge Benjamin Chavez’s December 16, 2021 Order Quashing Alternative Writ of Mandamus

The decision of Judge Chavez in *Jason Barker v. New Mexico Dept. of Health et al.*, case number D-202-CV-2021-04058, was submitted to the Hearing Officer as an exhibit after it was issued. The decision was designated by Judge Chavez as an “Order Quashing Alternative Writ of Mandamus” (hereinafter referred to as “Judge Chavez’s Order” or “the Order.”) *See* DOH Exhibit No. 19.

In the Order, Judge Chavez quashed an Alternative Writ of Mandamus that had been issued on August 20, 2021 in the *Barker* case, and made the following findings that are relevant to this rulemaking proceeding:

- The Alternative Writ had asserted one count against the Respondents in the case, which included the Department of Health and the Regulation and Licensing Department. *See* DOH Exhibit No. 19 at ¶ 8. That count sought a writ of mandamus “to compel Respondents to comply with their non-discretionary duty to permit Petitioner, as well as all qualified patients, qualified caregivers, and reciprocal patients, to purchase two ounces of cannabis, tax free, at any one time effective on June 29, 2021.” *Id.*
- The Petitioner failed to establish that he, as well as other qualified patients, qualified caregivers, and reciprocal patients, have a clear legal right to purchase an

additional two ounces of medical cannabis, tax free, at this time, under the Cannabis Regulation Act. *Id.* at ¶ 12.

- Under the MCP, a qualified patient and a qualified primary caregiver may possess no more than 230 total units in any three-month period, and for purposes of rule 7.34.3.9(A) NMAC, that amount is deemed an “adequate supply.” *Id.* at ¶ 16.
- The Court noted that on several occasions at hearing, Petitioner argued that the Respondents did not have the authority to promulgate the foregoing rule and the Court noted that the rule was promulgated before the passage of the CRA. *Id.* at ¶ 16, fn 1.
- The Court found that earlier in 2021, the New Mexico Legislature had passed the Cannabis Regulation Act and that the Act created the Cannabis Control Division within the Regulation and Licensing Department to administer the CRA and the licensing provisions of the Compassionate Use Act and the rules associated with those Acts, as set forth in NMSA 1978, §26-2C-3(A). Judge Chavez found that with the exception of the medical cannabis registry, the CRA transferred authority over the MCP to the CCD in NMSA 1978, § 26-2C-5. *Id.* at ¶ 19.
- Judge Chavez also found that, reading the Compassionate Use Act and its regulations together with the CRA, it is clear that the Legislature intended that there be a transition period from legal medical cannabis only to both legal medical and commercial cannabis. He stated that NMSA 1978, § 26-2C-6(K) makes it clear that retail sales of cannabis cannot occur until the CCD authorizes such sale, and that such sales must be authorized by April 1, 2022. Further, he found that the forgoing statute makes clear that licensees of the MCP remain subject to the rules promulgated that govern that program. *Id.* at ¶ 21.
- Judge Chavez further disagreed with the argument of Petitioner that the temporary provisions of the CRA nullify 7.34.3.9(A) NMAC and 7.34.4.8(L) NMAC. He found that 2021 N.M. Laws (1st S.S.), ch. 4, Section 70 states:

Except to the extent any administrative rules are inconsistent with the provisions of this act, *any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred.* To the extent such any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

Id. at ¶ 22. The Court found that the temporary provisions only nullify the rules if those rules are consistent with the CRA, and the Court reiterated that it had found that they are not inconsistent with the CRA, and consequently remain in force both under the temporary provisions and under Section 26-2C-6(K).

ANALYSIS AND RECOMMENDATIONS

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.

In addition:

"The court will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function."

Id., quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583 (1995).

The Hearing Officer has fully considered the arguments of the Department and the participants in this rule promulgation proceeding and addresses each of the current group of proposed amendments to the Medical Use of Cannabis Rules as follows:

7.34.2.7 NMAC

7.34.2.7 NMAC is the "Definitions" section of Part 2 of the Medical Cannabis Rules. The proposed amendments, according to Dr. Zurlo are revisions arising out of the passage of the Cannabis Regulation Act, which include, for example, removing the definition for "courier," and changing the definitions for "licensed non-profit producer" to "licensee," as well as other amendments to the definitions for the rules.

No public comments specific to these proposed revisions were offered at hearing or in written submissions, although Alexandra Candelaria offered the comment that she believed all of the rule changes are very important and will impact lives in the community.

Ultra Health appeared to oppose any rulemaking activity by the Department of Health, but offered no specific comments as to the proposed amendments to 7.34.2.7 NMAC. Ultra Health argued that all authority for the DOH to promulgate rules has shifted to the Cannabis Control Division of the Regulation and Licensing Department. As addressed more fully below in the discussion of the proposed amendments to 7.34.3 NMAC, the Hearing Officer recommends that the Acting Secretary find that that argument is not well-founded and find that the DOH has the authority to promulgate the proposed rules in this rulemaking proceeding.

Recommendation: Based upon the foregoing, the Hearing Officer recommends that the Acting Secretary find that the proposed amendments to 7.34.2.7 NMAC are in harmony with the agency's express statutory authority or spring from those powers that may be fairly implied therefrom, and that the proposed amendments are reasonably consistent with the statutory purposes of the agency. *See Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

7.34.3.7 NMAC

7.34.3.7 NMAC is the "Definitions" section of Part 3 of the Medical Cannabis Rules. The proposed amendments therein are identical to the proposed amendments to 7.34.2.7 NMAC.

Recommendation: Based upon the analysis provided above on 7.34.2.7 NMAC, the Hearing Officer recommends that the Acting Secretary find that the proposed amendments to 7.34.3.7 NMAC are in harmony with the agency's express statutory authority or spring from those powers that may be fairly implied therefrom, and that the proposed amendments are reasonably consistent with the statutory purposes of the agency. *See Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

7.34.3.8 NMAC

7.34.3.8 NMAC is the MCP rule that addresses "Qualified Debilitating Medical Conditions." The Department proposes to amend Subsection D of that rule to revise the annual submittal requirements for qualified patients and establish revised written certification requirements for eligibility in the MCP. The language of the amendment requires that qualified patients, in order to remain eligible for participation in the MCP, submit an annual certification on a DOH form with an attestation by a certifying practitioner regarding eligibility for the program, including having a debilitating condition and a statement that the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the qualified patient.

There were no public comments on this proposed amendment to the rule.

The proposed amendments to the rule are consistent with the express language of Compassionate Use Act, as set forth in NMSA 1978, § 26-2B-7.1.

Recommendation:

The Hearing Officer recommends that the Acting Secretary find that proposed amendments to 7.34.3.8 NMAC are in harmony with the agency's express statutory authority or spring from those powers that may be fairly implied therefrom, and that the proposed amendments are reasonably consistent with the statutory purposes of the agency. *See Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

7.34.3 and 7.34.4 NMAC

7.34.3.9(A) NMAC is the MCP rule that sets forth requirements for the maximum quantity of usable cannabis a qualified patient or qualified primary caregiver may purchase within a three-month period. The proposed amendments to the rule allow the purchase within any three-month period of a quantity of usable cannabis no greater than 425 total units or 15 ounces, and that that amount will be deemed an “adequate supply.” The Department proposes to amend this rule to establish that a qualified patient and primary caregiver may possess the amount of cannabis permitted in the CRA and once commercial sales are authorized by the CCD, qualified patients and primary caregivers may make commercial purchases above the adequate supply limit in accordance with the CRA.

These amendments were the focus of vigorous opposition by Ultra Health and its representatives, as summarized in detail above in the summaries of public comments at hearing and in written comments. In short, Ultra Health argues that the Department is completely without authority to promulgate rules, because, it argues, the DOH lost its authority to do so on June 29, 2021 with the passage of the Cannabis Regulation and the transfer of authority to the Cannabis Control Division in that department. It further argues that even if DOH did not lose authority to promulgate amendments to 7.34.3 NMAC, it lacks substantial evidence to promulgate rules regarding the adequate supply limit.

The Department responded, also in detail to the arguments of Ultra Health in its December 3, 2022 written response to the comments of Ultra Health. The Hearing Officer has summarized in detail the arguments of the Department in its December 3, 2021 written response. *See* DOH Exhibit No. 17. The Hearing Officer recommends that the Acting Secretary find that the arguments set forth by the Department therein are well-taken and should be adopted by the Acting Secretary. In fact, the arguments of the Department are persuasive and comprehensive in addressing the law that establishes its authority to amend the adequate supply rule, and the facts that support these amendments to the adequate supply rule. The Hearing Officer will not summarize every component of that argument in this Analysis, because the arguments of the Department are summarized in detail above in the Summary of Proceedings. However, there is no question that the Compassionate Use Act gives the authority to the Department of Health to promulgate rules related to the “adequate supply” limit, and the passage of the Cannabis Control Act does not change that fact. The Department also provides a persuasive argument that that transfer of licensing duties from the MCP to the CCD does not impact the Department’s duties with respect to the requirements of establishing an adequate supply limit.

Further, the Hearing Officer recommends that, as set forth in its December 3, 2021 written response, the Department has established by substantial evidence the basis for the proposed amendments to 7.34.3 NMAC. As addressed in detail therein, the basis for the 15-ounce adequate supply limit was articulated in written submissions from Ultra Health for the last two years, beginning in 2019. The 15-ounce limit is an industry standard that has been applied in several states and was unanimously approved by the Medical Cannabis Advisory Board. It is also supported by the fact that only about 7/10s of 1% of qualified patients has sought to access additional medical cannabis under the medical exception, and soon will have additional access to cannabis when commercial sales begin in April 2022.

Contrary to the assertions of Ultra Health, the Department is not engaging in writing rules related to tax law. It cites tax law to express its understanding of the effect of a qualified patient purchasing an adequate supply of medical cannabis and then, lawfully, purchasing commercial cannabis beyond that limit. The proposed amendments to the rules say nothing about the tax implications in this arena.

Finally, with respect to 7.34.3.9 NMAC, the decision of Judge Chavez in the *Barker* case does not limit the authority of the Department to promulgate rules regarding adequate supply, and the temporary provisions of the CRA in Section 70 do not nullify 7.34.3.9(A) NMAC, and the rule is not inconsistent with the CRA, and remain in force pursuant to NMSA 1978, § 26-2C-6(K).

The proposed amendments also include removing 7.34.3.9(C) NMAC from the regulation. That subsection is the medical exception which allowed the purchase of greater quantities of usable cannabis by patients who could establish great use was medically necessary. Given the facts represented above, it appears that there is no longer a need for this exception.

7.34.3.10 NMAC includes an amendment to remove the primary caregiver background check, in order to adjust for new criteria within the Cannabis Regulation Act, related to expungement in criminal records for caregivers and individuals in possession of cannabis. There was no opposition to this proposed amendment at hearing or in written comments.

Proposed changes to 7.34.3.11 and 13 NMAC relate to replacement of references regarding producers and changes to some of the items that the CRA now transfers authority to the CCD, for example, laboratories and changing the definition of “producer” to “licensee.” There was no opposition to these proposed changes either.

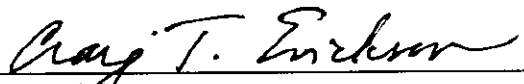
7.34.3.19 NMAC, includes references to “reciprocal participant.” The DOH proposes to amend this subsection to be consistent with the transfer of the licensing authority to the Cannabis Control Division, the addition of 7.34.3.22 NMAC essentially duplicates that current reciprocity provisions that are included in 7.34.4.28 NMAC. It is revised to reflect the increase the reciprocal limit, which is consistent with the “adequate supply” limit for patients at 425 units or 15 ounces.

The final major change is the removal of the existing rule of 7.34.4.28 NMAC, which was the old version for the reciprocity provision, and which is now addressed in 7.34.3.22 NMAC. These proposed amendments are made in response to the Cannabis Regulation Act and the changes in duties and responsibilities from the NM DOH to the Cannabis Control Division, especially with regard to cultivation, production, and sale of cannabis.

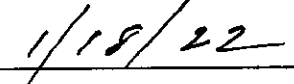
Recommendation:

The Hearing Officer recommends that the Acting Secretary find that proposed amendments to 7.34.3 and 7.34.4 NMAC are in harmony with the agency’s express statutory authority or spring from those powers that may be fairly implied therefrom, and that the proposed amendments are reasonably consistent with the statutory purposes of the agency. *See Rio Grande Chapter of Sierra Club v. New Mexico Mining Com’n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

The Hearing Officer further recommends that the Acting Secretary adopt the proposed amendments to 7.34.2.7, 7.34.3, and 7.34.4.28 NMAC, as set forth in DOH Exhibit Nos. 1, 2, and 3.



Craig T. Erickson



Date