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*Transmitted Via Email*

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## **I. Introduction.**

The New Mexico Acequia Association (NMAA) provides the following suggested friendly amendments, with a statement of reasons, to the New Mexico Regulation and Licensing Department (RLD) Cannabis Control Division's (CCD) revised cannabis producer license rules, guiding the state toward a cannabis industry that protects our precious water resources and fosters an economy that is more inclusive and equitable for small rural producers.<sup>1</sup>

Of primary concern is a new unlawful variance rule that would allow cannabis producer applicants and licensees to evade the Cannabis Regulation Act's (CRA) water protection mandates, as well as any other statutory and regulatory requirement – such as social equity requirements, plant count limits, and environmental regulations that have yet to be promulgated.

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<sup>1</sup> NMAA would like to note that the National Young Farmers Coalition – New Mexico Chapter support these comments.

This unlawful variance rule substantially undermines the CRA and conflicts with the intent and purpose of the Act.

NMAA's mission is to protect water and our acequias, grow healthy food for our families and communities, and to honor our cultural heritage. We represent traditional rural communities throughout New Mexico that will be impacted by the legalization of recreational cannabis and are concerned with negative unintended consequences large-scale and cumulative small-scale cannabis production may have on our communities. Negative impacts include, but are not limited to, impacts on scarce water supplies<sup>2</sup>, increased degradation of water quality, loss of land and water rights ownership, cultural erosion and other deleterious socioeconomic impacts.<sup>3</sup>

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

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<sup>2</sup> Water theft, transfers of surface water rights into supplemental groundwater wells, stress on already scarce water supplies are examples of the cannabis industry's negative impacts to water resources. The Navajo Nation recently testified before the state Rural Economic Opportunities Task Force regarding illegal use of San Juan River water by illegal cannabis producers on its reservation, as well as environmental degradation caused by the illegal cannabis producers. *See* <https://www.nmlegis.gov/handouts/REOTF%20080421%20Item%208%20Cannabis%20Overview%20K.%20Dutcher%208-3-21.pdf>, last accessed August 5, 2021.

<sup>3</sup> These negative impacts have been documented in other states that have legalized commercial cannabis, as discussed below. Moreover, Ultra Health, New Mexico's largest medical cannabis producer and dispensary, has publicly recommended that current and future cannabis producers acquire their own water rights or purchase water rights through a water transfer, instead of relying on municipal water supplies for grow operations. Such advice indicates an impending race to buy up existing water rights once the CRA goes into effect on June 29, 2021. <https://www.cannabisbusinesstimes.com/article/3-quick-tips-securing-water-access-ultra-health-new-mexico/>, last accessed May 28, 2021.

Ultra Health itself has been aggressively buying up land and appurtenant water rights throughout the state, with its most recent purchase of 350 acres of traditional farmland and 1,750 acre feet of appurtenant water rights in Tularosa. <https://www.globenewswire.com/news-release/2021/06/01/2239855/0/en/Ultra-Health-Deploys-Capital-Expansion-Projects-in-Several-Regions-Across-State.html>, last accessed June 11, 2021.

through our comments and proposed friendly amendments submitted herein, and to ensure that these revised rules meaningfully implement the CRA's water protection and equity mandates.

NMAA submitted extensive comments on June 16, 2021 on RLD's initially proposed cannabis producer license regulations, identifying procedural deficiencies with this rulemaking process and providing context for the CRA's critical water protection and social equity mandates NMAA successfully advocated for.<sup>4</sup> NMAA incorporates those substantive comments by reference and requests that RLD/CCD defer adoption of these revised rules until 1) the Cannabis Regulatory Advisory Committee (RAC) is created and has been provided a reasonable opportunity to provide advice regarding these proposed rules, and 2) associated rules, procedures and the legally mandated technical assistance resource guide for New Mexicans are drafted and considered in a single, comprehensive rulemaking proceeding. NMAA further requests that all of its suggested friendly amendments are incorporated into the final rules, and that the CCD withdraw its unlawful variance rule.

## **II. NMAA's Suggested Friendly Amendments to Revised Rules.**

NMAA submits the following suggested friendly amendments with a statement of reasons for RLD/CCD's consideration. For clarity, language proposed to be deleted by NMAA is indicated by ~~**bold strikethrough**~~ (~~red in color copies~~). Proposed new language by NMAA is indicated by **bold underlining** (blue in color copies). NMAA reserves the right to amend its comments and to propose additional changes that are a logical outgrowth of these proposed revised rules, along with additional arguments at the August 6th public hearing.

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<sup>4</sup> See Exhibit A, NMAA comments on initial cannabis producer license regulations, pp. 3-9 for background regarding key water protection and social equity provisions NMAA advocated for in the final CRA, and pp. 9-16 regarding procedural deficiencies of this rulemaking process and NMAA's request for deferral (June 16, 2021).

*A. 16.8.2.8.G. No guarantees of licensure.*

G. No guarantee of licensure: An applicant may not exercise any of the privileges of licensure until the division approves the license application and issues a license. The submission of an application is in no way a guarantee that the application will be accepted as complete. A license shall be granted or denied within 90 days upon acceptance of a completed application. Information provided by the applicant and used by the division for the licensing process shall be accurate and truthful. The division may initiate action to deny licensure, or other administrative action against an applicant or licensee, pursuant to the Uniform Licensing Act, ~~where there is credible evidence that the applicant omits, misrepresents, or falsifies information in the application or in connection with the applicant's background investigation.~~

Statement of Reasons:

The CRA mandates that the CCD “shall follow the provisions of the Uniform Licensing Act when licensing or permitting” cannabis producer microbusinesses and cannabis producers. CRA, Section 26-2C-6.B.<sup>5</sup> The Uniform Licensing Act (ULA) does not limit action to deny licensure or other administration action against an applicant or licensee “where there is credible evidence that the applicant omits, misrepresents, or falsifies information in the application or in connection with the applicant’s background investigation.” Section 61-1-3, NMSA 1978. This rule, as written, unlawfully limits agency discretion in denying a license, withholding renewal of a license, suspending a license, revoking a license, or any other administrative action against an applicant or licensee permitted under the ULA, and therefore must be stricken. Sections 61-1-1 through 61-1-35, NMSA 1978.

NMAA also recommends CCD develop public education materials regarding when the CCD must deny an application, as required by the CRA’s Section 26-2C-7.D,E, F, G, and H, to ensure that applicants understand when the CCD has zero discretion to deny an application.

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<sup>5</sup> This provision of the CRA also applies to licenses or permitting of cannabis consumption areas, cannabis couriers, cannabis manufacturers, cannabis research laboratories, cannabis retailers, cannabis servers, cannabis testing laboratories, cannabis training and education programs, integrated cannabis microbusinesses, and vertically integrated cannabis establishments. Id.

***B. 16.8.2.8.P, Online application.***

P. Online application: All applications for initial licensure, ~~and~~ renewal, amended licensure, and plant increase requests made pursuant to 16.8.2.15, 16.8.2.16, and 16.8.8.10 must be completed using the online application portal available on the division website. Applicants shall first register for a user account. The division shall provide public notice of applications submitted by posting electronically on the division's website a notice that contains a link to the application with all associated application documents, including proof of a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license.

Statement of Reasons:

As previously explained in NMAA's initial comments, the CRA requires a license applicant to provide proof of a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license.<sup>6</sup> CRA, Section 26-2C-7.B(3). In order to ensure that this requirement is complied with, public notice of applications submitted must be provided. Online publication of cannabis producer license applications will provide public notice to existing water rights owners and other water users of a potential new water use that may result in impairment of existing water rights, detriment to the public welfare, or be contrary to conservation. Providing public notice of applications will help minimize harm to existing water rights owners on the front end, before a cannabis producer license without a legal and sufficient source of water is unlawfully approved by the CCD and engages in unlawful use of water.

NMAA's proposed friendly amendment closely aligns with language provided at NMSA 1978, Section 72-2-20 (as amended in 2019), requiring the Office of the State Engineer to provide notice of water applications online. This amendment to the water code was also the

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<sup>6</sup> See NMAA's initial comments on RLD's proposed draft regulations, pp. 19-20 (June 16, 2021). RLD did not incorporate NMAA's suggested friendly amendment, therefore NMAA reiterates its request that our friendly amendment be incorporated into the final rules.

result of NMAA’s expertise and commitment to public notice and governmental transparency in water matters.

*C. 16.8.2.8.Q, Complete application and fees required.*

Q. Complete application and fees required: Applicants must submit a completed application to the division before it will be accepted by the division as complete and considered for approval or denial. An application must be complete in every material detail and must include all attachments of supplemental information required by the division, including but not limited to required documentation from either the office of the state engineer of a valid water right or a water provider that the use of water for cannabis production is compliant with that water provider’s rules. License and additional premises application and renewal fees must be paid at the time of application submission. Annual plant fees must be paid upon the division’s approval of the initial application or renewal application and approval of the number of cannabis plants that a licensee may produce.

Statement of Reasons:

RLD’s initial 16.8.2.8.Q rule provided that “An application must be complete in every material detail and must include all attachments of supplemental information required by the division.”<sup>7</sup> This initial language complies with and meaningfully implements the CRA. The revised 16.8.2.8.Q rule removes this initial language without any supporting rationale or evidence as to how this revised rule complies with the CRA’s Section 26-2C-7.B(3),(4), which require that an applicant provide documentation from either the office of the state engineer of a valid water right or a water provider that the use of water for cannabis production is compliant with that water provider’s rules, as well as a plan to use, or demonstrate to the division that the applicant cannot feasibly use, energy and water reduction opportunities.

The revised rule would allow CCD to determine that an application that does not provide CRA mandated documentation is “complete” and therefore eligible to be approved, in violation

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<sup>7</sup> <https://ccd.rld.state.nm.us/wp-content/uploads/2021/05/May-25-2021-Cannabis-Control-Division-Proposed-Rules.pdf>, last accessed July 29, 2021.

of the CRA's Section 26-2C-7.D(1). NMAA's proposed friendly amendment brings the revised rule into CRA compliance.

***D. 16.8.2.8.Z, Application for variance.***

**~~Z. Application for variance:~~**

- ~~1) Any applicant or licensee may seek a variance from division rule(s) and shall do so by filing a written petition with the division. The petitioner may submit with the petition any relevant documents or material, which the petitioner believes would support the petition.~~
- ~~2) Petitions shall:~~
  - ~~a) state the petitioner's name and address;~~
  - ~~b) state the date of the petition;~~
  - ~~c) describe the facility or activity for which the variance is sought;~~
  - ~~d) state the address or description of the premises upon which the cannabis establishment or activity is located;~~
  - ~~e) identify the rule(s) from which the variance is sought;~~
  - ~~f) state in detail the extent to which the petitioner wishes to vary from the rule(s) and how the petitioner will ensure public health and safety is not negatively impacted;~~
  - ~~g) state why the petitioner believes that compliance with the regulation will impose an unreasonable regulatory burden upon the cannabis establishment or activity; and~~
  - ~~h) state the period of time for which the variance is desired, including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.~~
- ~~3) At the discretion of the division, the adjudicatory procedures of the Uniform Licensing Act may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the division.~~
- ~~4) Prior to a final decision, the division will hold a public hearing pursuant to the Open Meetings Act, Section 10-15-1 et. seq., NMSA 1978. The purpose of the hearing is to provide interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed variance. The division, at its sole discretion, may determine whether to hold more than one hearing. The division may act as the hearing officer or designate an individual hearing officer to preside over the hearing. The hearing officer may ask questions and provide comments for clarification purposes. The hearing officer shall identify and mark all written~~

~~comments submitted during the hearing. The public comments should be labeled as exhibits for reference, but do not require formal admission into the hearing record. Individuals wanting to provide public comment or submit information at the hearing must state their name and any relevant affiliation for the record and be recognized before presenting. Public comment shall not be taken under oath. Any individual who provides public comment at the hearing may be questioned by the hearing officer. The hearing shall be conducted in a fair and equitable manner. The hearing officer may determine the format in which the hearing is conducted, but the hearing should be conducted in a simple and organized manner that facilitates public comment. The rules of evidence shall not apply and the hearing officer may, in the interest of efficiency, exclude or limit comment or questions deemed irrelevant, redundant, or unduly repetitious.~~

- ~~5) The division may grant the requested variance, in whole or in part, subject to conditions, if the variance is not contrary to the public interest or detrimental to public health and safety, or the division may deny the variance. If the variance is granted in whole or in part, or subject to conditions, the division shall specify the length of time that the variance shall be in place. A permanent variance may be granted. If a permanent variance is not granted, a petitioner may reapply for a variance once the time period expires.~~
- ~~6) The division shall set forth in the final order the reasons for its actions and shall not be subject to review.~~

#### Statement of Reasons:

As previously stated, NMAA submitted extensive public comments on the initial draft rules on June 16<sup>th</sup>, providing key context for the CRA's water protection provisions that NMAA advocated for and guidance on how to meaningfully and lawfully implement those statutory requirements.<sup>8</sup> RLD/CCD has responded to those comments, and the many other public comments concerning the CRA's water protection mandate, with a newly proposed hostile variance rule that would unlawfully allow cannabis producer license applicants and licensees to circumvent the CRA's water requirements for cannabis producer licenses. The unlawful variance

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<sup>8</sup> Supra footnote 2.



rule would also allow applicants and licensees to evade plant count limits, social equity requirements, environmental regulations specific to the cannabis industry that have yet to be promulgated, and any other statutory and regulatory requirement.

Of note, at the July 29, 2021 CCD hosted webinar for cannabis entrepreneurs, the OSE Water Rights Division Director advised that an applicant could request a variance from the statutory requirement that a license applicant must demonstrate a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license.<sup>9</sup> This statement by New Mexico's chief water administrator to potential applicants - encouraging them to avail themselves of CCD's newly proposed variance rule - is a clear indication that cannabis producer license applicants and licensees will attempt to evade the CRA's water protection mandate through the use of this unlawful rule. One can also conclude from OSE's statement that CCD has foreclosed taking into consideration public comment on its unlawful variance rule and intends to adopt the unlawful rule as is.

The variance rule proposed at 16.8.2.8.Z NMAC is unlawful for the following reasons. First, the CRA does not authorize variances from the CRA's requirements regarding water, social equity, or any other CRA requirements. Sections 26-2C-1 through 26-2C-42, NMSA 1978. The CRA also does not specifically authorize the CCD to promulgate a rule that would allow the

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<sup>9</sup> Though the CCD Deputy Director of Policy stated this webinar was being recorded and would be made available, CCD has not posted the recording online at this time. The CCD Deputy Director of Policy has not responded to NMAA's inquiry regarding link to this recorded webinar, as well as the link to the record June 29<sup>th</sup> public hearing.

OSE's statement was in response to a question from an entrepreneur. The OSE Water Rights Division Director also advised that a cannabis producer needing to get water quickly could lease water under the New Mexico Water Use Leasing Act and request a preliminary approval from the OSE to immediately use water without public notice, hearing and final decision requirements being satisfied, as required by the WULA. Sections 72-6-1 through 72-6-7 NMSA 1978. OSE's preliminary approval practice has been found to be unlawful. Carlsbad Irrigation District v. State Engineer, D-503-CV-2019-1871, pp. 12-17 (April 1, 2020). OSE appealed the Romero decision and the appeal is currently pending, A-1-CA-39378.

CCD to grant variances to any CRA requirement or regulation, let alone the water requirement for licenses. Sections 26-2C-3.B(1)<sup>10</sup>, 26-2C-6, and 26-2C-7. Additionally, the CRA does not expressly enumerate the power to promulgate a variance rule or grant a variance petition to the RLD Superintendent. *Id*; *See also* Section 9-16-6.B, -D, NMSA 1978.<sup>11</sup> Had the legislature intended the use of a variance mechanism to allow evasion of the Act’s foundational water protection and social equity mandates it would have expressly stated so in the Act.

An administrative agency’s discretion may not justify altering, modifying, or extending the reach of a law created by the Legislature. State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191. The CCD’s newly proposed variance rule unlawfully alters and modifies the CRA’s express condition of licensing provided at Section 26-2C-7.B(3) by allowing cannabis producer license applicants to evade the statutory requirement of demonstrating a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs related to the license.<sup>12</sup> Moreover, CCD’s newly proposed variance rule conflicts with the intent, purpose and express language of the CRA. Sections 26-2C-3.B(1), 26-2C-3.D, and 26-2C-7.B(3). When there is a conflict or inconsistency between statutes and regulations promulgated

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<sup>10</sup> The CRA mandates only that the CCD promulgate rules for “qualifications and procedures for licensure”. Section 26-2C-3.B(1). “Procedures” only encompass the form, manner and order of applying for a license. The variance rule is not a procedural rule; it is a substantive rule creating a new legal right for applicants/licensees and a new legal authority for the CCD not based in the CRA or the ULA. The CCD cannot alter or amend the CRA via regulation. State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191.

<sup>11</sup> The Regulation and Licensing Department Act provides that “the superintendent has every power expressly enumerated in the laws, whether granted to the superintendent or the department or any division of the department, except where authority conferred upon any division is explicitly exempted from the superintendent’s authority by statute.” Section 9-16-6.B. The Act also provides that “the superintendent may make and adopt such reasonable and procedural rules as may be necessary to carry out the duties of the department and its divisions...”. Section 9-16-6.D. This Act does not provide authority for the RLD Superintendent to promulgate a new substantive law that creates a new legal right for an applicant and licensee and a new legal authority for RLD/CCD via a regulation.

<sup>12</sup> The unlawful variance rule would also permit applicants and licensees to evade compliance with all other statutory requirements and future regulatory requirements, such as environmental regulations specific to the cannabis industry. CCD has yet to promulgate regulations addressing environmental impacts, natural resources, quality control, inspection, testing of cannabis products, health and safety, and food and product safety.

by an agency, the language of the statute prevails. Jones v. Empl. Serv. Div. of Human Serv. Dep't, 1980-NMSC-120, ¶3, 95 N.M. 97, 98.

Second, the CRA mandates that the CCD “shall follow the provisions of the Uniform Licensing Act when licensing or permitting” cannabis producers, cannabis producer microbusinesses, integrated cannabis microbusinesses, and vertically integrated cannabis establishments. Section 26-2C-B. The Uniform Licensing Act (ULA) also does not provide a variance mechanism by which license applicants and licensees can evade compliance with the CRA’s water protection, social equity and other requirements. Sections 61-1-1 through 61-1-35 NMSA 1978. In fact, the ULA expressly provides what administrative actions the CCD can take regarding a license applicant or licensee other than approving a license application. Section 61-1-3 NMSA 1978. The New Mexico Supreme Court has made clear that, “Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded.” Robinson v. Bd. of Comm’rs, 2015-NMSC-035, 360 P.3d 1186, 1191; Fancher v. Bd. of Comm’rs, 1921-NMSC-039, ¶11, 28 N.M. 179, 188.

The ULA limits CCD’s administrative actions to denial of a license, withholding renewal of a license, suspension of a license, revocation of a license, restrictions or limitations on the scope of a license, monitoring of a license, censure or reprimand of a licensee or applicant, payment of fines, corrective action, or refunds to consumers of fees that were bill to and collected from the consumer by the licensee. Section 61-1-3. There is no provision in the ULA allowing the CCD to permit a license applicant or licensee to evade compliance with either a statutory or regulatory requirement. Sections 61-1-1 through 61-1-35. The CCD cannot alter or modify the ULA via regulation, as CCD is attempting to do with its unlawful variance rule. State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191.

Alternatively, if a court determines that the CRA and/or the ULA do in fact authorize variances from statutory and regulatory requirements, then the ULA’s hearing procedures and not the CCD’s proposed rules would be applicable to a variance petition proceeding. Section 26-2C-6.B; Section 61-1-7 through 61-1-16, NMSA 1978. Again, the CCD cannot alter or modify the ULA hearing procedures via regulation. State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191.

Finally, the ULA – which the CRA mandates CCD follow for licensing and permitting of cannabis producers and microproducers – authorizes judicial review of administrative actions. Section 26-2C-6.B; Section 61-1-17. If a court determines that the CRA and/or the ULA authorize variances, then the CCD’s denial or approval of a variance petition would constitute an administrative action under the ULA and be subject to judicial review. Section 61-1-17. The CCD cannot amend the ULA’s judicial review mandate via regulation, as it is attempting to do with its unlawful variance rule, providing that the division’s final decision “shall not be subject to judicial review”. State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191.

For these reasons, the CCD must withdraw its unlawful variance rule. NMAA is strongly opposed to this draft rule and will vigorously defend the CRA's water protection mandates.

***E. 16.8.2.15.A(13), Application Requirements for Cannabis Producer License.***

(13) the initial number of **mature** cannabis plants the applicant proposes for production and the amount of water and energy the applicant plans to use on a monthly basis for a twelve month period;

**Statement of Reasons:**

The CRA defines a cannabis producer as a person that “(1) cultivates cannabis plants; (2) has unprocessed cannabis products tested by a cannabis testing laboratory; (3) transports

unprocessed cannabis products only to other cannabis establishments” or (4) sells cannabis products wholesale.” Section 26-2C-2.I. The CRA defines cannabis as follows:

- (1) means all parts of the plant genus *Cannabis* containing a delta-9-tetrahydrocannabinol concentration of more than three-tenths percent on a dry weight basis, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or its resin; and
- (2) does not include:
  - a) the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil or cake; or the sterilized seed of the plant that is incapable of germination; or
  - b) the weight of any other ingredient combined with cannabis products to prepare topical or oral administrations, food, drink or another product;

Section 26-2C-2.B. The CRA does not state that “immature cannabis plants” are not “cannabis” subject to the CRA and its licensing and regulation requirements. *Id.* See also Sections 26-2C-2.EE, and 26-2C-7. Therefore, the word “mature” must be struck from the revised rule, as a cannabis production license is required for production of *all* cannabis plants – both immature and mature

NMAA’s proposed friendly amendment to this revised rule ensures that cannabis producers provide the number of both immature and mature cannabis plants for its proposed operation and associated water and energy use requirements for all cannabis plants. By not including immature cannabis plants, the CCD is allowing cannabis producer applicants and licensees to underreport estimated and actual water and energy needs, which also implicates CCD’s required analysis regarding whether an applicant has demonstrated a legal right to a commercial water supply, water rights or another source of water sufficient to meet the needs of the proposed production operation. Section 26-2C-7.B(3). This revised rule also implies that immature cannabis plants are not subject to the CRA’s licensing and regulatory requirements, which is an incorrect interpretation of the law.

Finally, the NMAA provided initial extensive substantive comments on why the measuring of water and energy<sup>13</sup> use in cannabis production is critical at this point in time.<sup>14</sup> Due to illegal use of water unique to the cannabis industry<sup>15</sup>, the insatiable market demand for recreational cannabis, along with the current and future climatic conditions and our scarce water resources, RLD/CCD must start collecting data on water and energy use and monitor the cannabis industry's impact to our state's most precious resource and to our climate.

NMAA's proposed friendly amendments to this revised rule ensures meaningful implementation of the CRA's water protection and energy efficiency mandates. Section 26-2C-7.B(3),(4).

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<sup>13</sup> A recent study out of Colorado State University concluded that the cannabis production industry has an energy problem, consuming substantial amounts of electricity and causing high greenhouse gas emissions in Western states still reliant on coal and natural gas for their energy grids. [https://www.hcn.org/issues/53.6/infographic-marijuana-cannabis-has-a-carbon-problem/print\\_view](https://www.hcn.org/issues/53.6/infographic-marijuana-cannabis-has-a-carbon-problem/print_view), last accessed July 29, 2021.

<sup>14</sup> See NMAA's comments and proposed friendly amendments on RLD's initial proposed rules, pp. 3-7, 23-25 (June 16, 2021).

<sup>15</sup> [https://www.hcn.org/articles/water-illegal-marijuana-grows-are-stealing-from-californias-scarce-water?fbclid=IwAR0VkyxtOa9U0YTR8B6vzNPWrJ1rvs2QWNmP11hGmR9Xj\\_fZYv7dydSJAGU](https://www.hcn.org/articles/water-illegal-marijuana-grows-are-stealing-from-californias-scarce-water?fbclid=IwAR0VkyxtOa9U0YTR8B6vzNPWrJ1rvs2QWNmP11hGmR9Xj_fZYv7dydSJAGU), last accessed July 29, 2021. Contrary to assertions by the cannabis industry, illegal water theft by cannabis producers in California is not limited to just northern California, it is across the state and has increased since legalization of recreational cannabis, and it impacts both surface and groundwater resources. Id. Officials in California "say water thefts are increasing at about the same rate as the decline in California's water supplies." Id. Illegal cannabis production operations are stealing water from rivers and streams, from hydrants, from rural water stations, from water storage tanks, and from underground domestic water lines. Id.

The amount of water stolen is significant. Curt Fallin, a federal Drug Enforcement Agency agent, said during a recent news conference, "By our calculation, the illegal grows in Los Angeles, Riverside and San Bernardino counties require an astounding 5.4 million gallons of water a day, every day." Id. That is enough water for 72,000 people. Id. The illegal use of water by cannabis producers is negatively impacting farmers. Gailen Kyle, an alfalfa farmer, stated that his farm is surrounded by illicit pot operations and that "intimidating characters come to his door pressuring him to sell out" and that the illegal over-pumping of groundwater is lowering production in his groundwater wells. Id.

It is also critical to prevent licensed cannabis producers from engaging in illegal water theft. The adage "you can't manage what you don't measure" is apt.

***F. 16.8.2.15.B, Verification of Information.***

B. Verification of information: The division ~~shall~~ **may** verify information contained in each application and accompanying documentation by:

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

**Statement of Reasons:**

As previously stated in NMAA's June 16, 2021 comments, it is unclear what type of training and familiarity CCD staff will have in reviewing and evaluating water documents provided by the office of the state engineer or a water provider. Therefore, requiring CCD staff to consult with these entities is both necessary and critical to ensure lawful and meaningful implementation of the CRA's water protection mandate. Section 26-2C-7.B(3).<sup>16</sup>

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

- A. Application: A licensed producer shall submit to the division an application form for an amended license, pay the required fee, and must obtain approval from the division, prior to implementing any of the following:
- 1) Material or substantial change of the size or location of the premises;
  - 2) Change of licensee's legal or business name;
  - 3) ~~Material or substantial~~ change in water source;
  - 4) Increase in plant count beyond which licensee is currently licensed to produce;
  - 5) Addition of a controlling person;
  - 6) Material or substantial change to a licensee's security system;
  - 7) Material or substantial modification of the premises; or
  - 8) Engaging in an activity which requires an addition or change of a license type.

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<sup>16</sup> See NMAA's comments on RLD's initial rules, p. 21 (June 21, 2021). RLD did not incorporate NMAA's suggested friendly amendments in this revised rule and is therefore reiterating its request that its suggested friendly amendments be incorporated into the final rules.

Statement of Reasons:

As previously explained in NMAA’s June 16, 2021 comments on RLD’s initial proposed rules, the CRA requires that ALL water used in a cannabis operation be verified as a legal source of water sufficient to meet the needs related to the license.<sup>17</sup> Section 26-2C-7.B(3). Therefore, “material or substantial” must be deleted from 16.8.2.16.A(3). If a licensee makes *any* change to its water source, the licensee is required under the CRA to submit proof that it has a legal right to a new water source, and the mechanism to do so is through an application for an amended license, which is subject to the same public notice and information requirements as an initial license application.

Again, NMAA will vigorously defend the CRA’s water protection provisions it advocated for. CCD must ensure that licensees who make *any* change to their water source comply with the CRA’s documentation requirement demonstrating a legal right to a commercial water supply, water rights or another source of water sufficient to meet the needs related to the license. Section 26-2C-7.B(3).

***H. 16.8.2.16.D(2), Material or Substantial Change.***

(2) a **modification** change in the licensee’s ~~access to the~~ water source submitted with an application for initial or renewal licensure ~~or a 10 percent, or more, increase in the licensee’s water usage;~~

Statement of Reasons:

As previously stated above, if a licensee changes its water source or increases the amount of water to be used from the identified water source, the licensee must still comply with the CRA’s mandate and provide documentation demonstrating a legal right to a new water source proposed to be used in its licensed operation sufficient to meet the needs related to the license.

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<sup>17</sup> See NMAA’s comments on the initial rules, pp. 25-26 (June 21, 2021). RLD failed to incorporate NMAA’s suggested friendly amendment to ensure compliance with the Section 26-2C-7.B(3), therefore NMAA is reiterating its request that its suggested friendly amendments be incorporated into the final rules.



Section 26-2C-7.B(3). The revised rule, as currently written, would allow licensees to circumvent the CRA's mandate. NMAA's suggested friendly amendments clean up the revised rule language and ensures CRA compliance.

***I. 16.8.2.28.E, Report to law enforcement and the Office of the State Engineer***

E. Report to law enforcement and the office of the state engineer: The division shall refer suspected criminal activity or complaints alleging criminal activity, including the unlawful taking of water, that are made against a licensee to appropriate federal, state, or local law enforcement authorities, and, in the case of the unlawful taking of water, to the office of the state engineer.

**Statement of Reasons:**

In order to meaningful implement the CRA's water protection mandates, CCD and OSE must enforce the laws against unlawful taking of water by licensees. The CCD must therefore be required to refer suspected water theft activity or complaints alleging the unlawful taking of water by a licensee to the OSE.

***J. 16.8.2.28.H, Producer Reports.***

H. Producer reports: A cannabis producer licensee shall submit reports on ~~an~~ **annual** quarterly basis, or as otherwise reasonably requested, and in the format specified by the division. The annual report shall include:

(16) actual water use and energy use in the preceding ~~3~~**12** months;

(19) amount of gross receipts tax paid to the New Mexico Taxation & Revenue Department.

**Statement of Reasons:**

Because New Mexico has not required medical cannabis producers to provide data regarding water and energy use, the state has failed to properly analyze cannabis production impacts to scarce water resources and impacts of cannabis production's significant energy use on the environment, public health and welfare. NMSA 1978, Sections 26-2B-1 through 26-2B-10

(as amended through 2021). As previously stated, this data is critical now more than ever due to megadrought conditions gripping the state and increasing severity of climate change impacts.

Moreover, the initial rule required quarterly producer reports, “or as otherwise requested.”<sup>18</sup> RLD/CCD has provided no rationale as to why producer reports should only be submitted annually, as opposed to quarterly. Under the revised rule, the public will not know the cannabis production industry’s actual water and energy use for over a year – an unwarranted delay given New Mexico’s current megadrought status. RLD/CCD must gather the information it needs to respond to conditions on the ground in a timely manner, modifying regulations pertaining to industry’s water and energy use accordingly.

***K. 16.8.8.10.A, Plant Increase Request.***

A. A licensee may request an increase of the number of mature plants licensed ~~at the time of renewal~~ in the licensee’s renewal application and at one other time per year, in a plant increase request application provided by the division. To be considered for approval by the division, the licensee shall provide, in addition to required fees set forth in 16.8.11 NMAC, the following information to demonstrate the licensee’s capacity for a mature cannabis plant count increase, licensee’s compliance with the Cannabis Regulation Act, the Lynn and Erin Compassionate Use Act, and division rules:

Statement of Reasons:

Licensees wanting to request a plant increase outside of a license renewal application should be required to submit a plant increase request application with all of the information required by the revised rule’s subsections A(1)-(7) NMAC. This will ensure that the division administers plant increase requests in a uniform manner.

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<sup>18</sup> <https://ccd.rld.state.nm.us/wp-content/uploads/2021/05/May-25-2021-Cannabis-Control-Division-Proposed-Rules.pdf>, last accessed July 29, 2021.

### **III. Public Notice for the Revised Rules Violates the State Rules Act and Attorney General's Default Rules for Rulemaking.**

Section 1.24.25.11 NMAC provides the following, in pertinent part:

The agency shall provide to the public, as defined in Section 14-4-2 NMSA 1978, notice of the proposed rulemaking a minimum of 30 calendar days prior to the public rule hearing and in accordance with requirements of Section 14-4-5.2 NMSA 1978 [the State Rules Act].

The State Rules Act requires CCD to provide in its public notice “information on where and when a public rule hearing will be held and how a person may participate in the hearing” a minimum of 30 days prior to the public rule hearing. Section 14-4-5.2 NMSA 1978. RLD/CCD’s public notice issued July 7, 2021 fails to provide correct or sufficient notice on how the public could participate in the August 6, 2021 hearing remotely online. The July 7, 2021 public notice provides the following link for the public to participate in the August 6, 2021 hearing:

<https://ccd.rld.state.nm.us/>.<sup>19</sup> This link directs the public to the CCD general website, which provides no notice of the August 6<sup>th</sup> hearing, and not to the actual webex platform used by CCD for remote online public participation. From the CCD general website, one would have to scroll down the webpage and know to click on the “Public hearings, comment and notices” link, and then from that webpage, would have to know to click on another link, scroll down another webpage, and then find the webex link to then register for the webex August 6<sup>th</sup> hearing.

CCD is required to provide sufficient notice to the public, 30 days prior to the hearing, of all of these steps to find the webex link in order to provide public comment remotely. The CCD

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<sup>19</sup> <https://ccd.rld.state.nm.us/wp-content/uploads/2021/07/Notice-of-Proposed-Rulemaking.pdf>, last accessed August 5, 2021.

sent out an email at 3:25 p.m. only to those individuals who signed up to receive notices from the CCD, providing the following link to participate in the August 6, 2021 hearing:

[https://nmrld.webex.com/mw3300/mywebex/default.do?nomenu=true&siteurl=nmrld&service=6&rnd=0.9744636117154881&main\\_url=https%3A%2F%2Fnmrld.webex.com%2Fec3300%2Feventcenter%2Fevent%2FeventAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b00000005dcde4163daf189d6925ebc58c240807cd94a20019fcd2ae5c39f25f9709570c9%26siteurl%3Dnmrld%26confViewID%3D201835189817589504%26encryptTicket%3DSDJTSwAAAAWCc4c6AbeALcOkd2-AIIRKKLYnRAvwXYqxoxJPBhIOoQ2%26](https://nmrld.webex.com/mw3300/mywebex/default.do?nomenu=true&siteurl=nmrld&service=6&rnd=0.9744636117154881&main_url=https%3A%2F%2Fnmrld.webex.com%2Fec3300%2Feventcenter%2Fevent%2FeventAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b00000005dcde4163daf189d6925ebc58c240807cd94a20019fcd2ae5c39f25f9709570c9%26siteurl%3Dnmrld%26confViewID%3D201835189817589504%26encryptTicket%3DSDJTSwAAAAWCc4c6AbeALcOkd2-AIIRKKLYnRAvwXYqxoxJPBhIOoQ2%26).

The CCD also posted this new link - not provided in the July 7<sup>th</sup> notice - on the bottom of the webpage that takes an individual significant navigation to reach from the main website, as explained above - on August 5<sup>th</sup>, less than 24 hours before the public hearing. The late posting of the actual link the public has to use to participate in the August 6<sup>th</sup> hearing clearly violates Section 14-4-5.2.A(6). Such a violation renders any final rules adopted invalid.

#### **IV. Conclusion.**

New Mexico has an opportunity to build a cannabis economy that yields equitable benefits for producers and entrepreneurs, both rural and urban. NMAA supports the legislature's and Governor Lujan Grisham's endeavor to create a vibrant, inclusive cannabis economy for all New Mexicans that protects our limited water resources and provides economic opportunities with an emphasis on social equity.

RLD Superintendent Linda Trujillo recently advised the Economic Development and Policy interim legislative committee that, "The biggest challenge [micro/New Mexican] producers are going to face is that startup cost. The access to capital is almost not available."<sup>20</sup>

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<sup>20</sup> <https://www.abqjournal.com/2413389/lawmakers-weigh-challenges-facing-nm-pot-entrepreneurs.html>, last accessed August 4, 2021; See [https://www.nmlegis.gov/handouts/EDPC%20072621%20Item%201%20a\\_Cannabis101.pdf](https://www.nmlegis.gov/handouts/EDPC%20072621%20Item%201%20a_Cannabis101.pdf) to view Superintendent Trujillo's powerpoint presentation, last accessed August 5, 2021.

Governor Lujan Grisham’s 2019 Marijuana Legalization Work Group Recommendations expressly identified the startup capital access issues for New Mexicans, recommending that new revenue from recreational cannabis legalization be dedicated “to a fund helping communities and small businesses access capital needed to start and grow NM-based businesses,” with an initial dedication of \$1.2 million in the first year of legalization.<sup>21</sup>

NMAA, and many other organizations and individuals, worked tirelessly for the Governor’s recommendation to be included in the final CRA, yet for unknown reasons the necessary social equity fund was not included. Without this fund, New Mexicans are not only priced out of participating in the new cannabis economy, but will be pressured to sell their land and water rights to out-of-state corporate cannabis entities who do have access to startup and expansion capital.

Sen. Cliff Pirtle, a Roswell Republican and farmer, asked RLD Superintendent Trujillo about reports that out-of-state companies are already buying up New Mexico farmland. The Superintendent responded that, “she didn’t have hard data, but that she’s heard anecdotally about a ‘tremendous’ amount of people looking for warehouses, land and water rights.”

In light of the alarming social equity and water resource impacts this emerging industry will have on New Mexicans, the NMAA has carefully reviewed these revised proposed regulations. NMAA reiterates its request that adoption of these rules be deferred until 1) the Cannabis Regulatory Advisory Committee is created and is given a reasonable opportunity to review and advise the RLD/CCD on these proposed rules, and 2) associated rules, procedures and the legally mandated technical assistance resource guide are drafted and considered in a single, comprehensive rulemaking proceeding. NMAA also requests that its suggested friendly

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<sup>21</sup> Work Group Recommendations, p. 8 (October 2019).

amendments be incorporated in any final rules adopted, and that the CCD withdraw its unlawful variance rule.

A handwritten signature in black ink, reading "Paula Garcia". The signature is written in a cursive style with a large initial "P" and "G".

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Paula Garcia,  
Executive Director of New Mexico Acequia Association