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*Transmitted Via Email*

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## **I. Introduction.**

The New Mexico Acequia Association (NMAA) provides the following supporting comments on the New Mexico Regulation and Licensing Department (RLD), Cannabis Control Division's (CCD) proposed amendments to the Cannabis Regulation Act's implementing regulations. Of primary importance to NMAA is the RLD/CCD's proposed rescission of its unlawful variance rule and the addition of a new pre-licensure inspection rule.

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 have been, and continue to be, impacted by the legalization of recreational cannabis and are concerned with the negative unintended consequences large-scale and cumulative small-scale cannabis production have on our communities. Negative impacts include, but are not limited to, impacts on scarce water supplies, increased degradation of water

quality, loss of land and water rights ownership, cultural erosion and other deleterious socioeconomic impacts.

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. NMAA continued to advocate for meaningful implementation of the CRA's requirements in the RLD/CCD rulemaking proceedings held in the summer of 2021.<sup>1</sup> We continue to offer our expertise on these issues through our comments submitted herein, and to ensure that these proposed rules meaningfully implement the CRA's requirements.

NMAA's comments are presented as follows: Section II provides our statement of support for the RLD/CCD's proposed rescission of its unlawful variance rule promulgated in 2021. Section III provides our statement of support for a newly proposed pre-licensure requirement rule with our friendly amendment making this new requirement mandatory. Section IV provides our conclusory remarks.

## **II. NMAA Fully Supports the RLD/CCD's Rescission of Its Unlawful Variance Rule.**

The RLD/CCD is proposing to rescind its unlawful variance rule found at 16.8.2.8.Y NMAC. This rule was initially promulgated in August 2021 and allows an applicant or licensee to seek a variance from division rules. In large part due to NMAA's advocacy, several guardrails were ultimately incorporated into this variance rule, such as:

- a) Applicants or licensees may not seek a variance relating to the CRA's water protection requirements found at NMSA 1978 Section 26-2C-7.B(3)-(4)<sup>2</sup>; and

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<sup>1</sup> See NMAA's comments submitted on proposed regulations dated June 16, 2021 and comments submitted on the revised proposed regulations dated August 6, 2021.

<sup>2</sup> 16.8.2.8.Y(3) NMAC.

- b) The division may grant the requested variance, in whole or in part, subject to conditions, if the variance is not contrary to the Cannabis Regulation Act, or public interest, does not have a negative environmental impact, and is not detrimental to public health and safety.<sup>3</sup>

Though NMAA appreciates the guardrails incorporated into the final variance rule currently in effect, NMAA must reiterate its position that this rule is ultimately unlawful and therefore fully supports the RLD/CCD’s newly proposed rescission of its unlawful rule. NMAA provides the following reasons for why the current variance rule is unlawful.<sup>4</sup>

First, neither the RLD nor CCD have the legal authority to promulgate a variance rule. The CRA does not specifically authorize the CCD to promulgate a rule authorizing the CCD to grant variances to any CRA requirement or regulation. NMSA 1978, Sections 26-2C-3.B(1), 26-2C-6, and 26-2C-7; also NMSA 1978, Sections 26-2C-1 through 26-2C-42. 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 New Mexico Uniform Licensing Act. The CCD cannot alter or amend the CRA via regulation. State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191.

Additionally, the CRA does not expressly enumerate power to the RLD Superintendent to promulgate a variance rule or grant a variance petition. *Id*; *See also* NMSA 1978, Section 9-16-6.B, -D. Had the legislature intended the use of a variance mechanism to allow evasion of the

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<sup>3</sup> *Supra* Footnote 2, *Id.* at (5).

<sup>4</sup> *Supra* Footnote 1, pp. 7-12. NMAA provided these reasons during the August 2021 RLD/CCD rulemaking proceeding.

Act's requirements it would have expressly stated so in the Act. The Regulation and Licensing Department Act (RLD 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 RLD 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.

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, which does not authorize variances. NMSA 1978, Section 26-2C-B. The Uniform Licensing Act (ULA) 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. NMSA 1978, Sections 61-1-1 through 61-1-35, as amended through 2023.

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. NMSA 1978, Section 61-1-3, as amended through 2023. 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. Also of note is that during the recent 2023 legislative session our legislature did not include express authority to grant variances in House Bill 384, which amended the ULA.<sup>5</sup>

The ULA limits CCD’s administrative actions to the following: 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 RLD/CCD to permit an applicant or licensee to evade compliance with either a statutory or regulatory requirement. Sections 61-1-1 through 61-1-35. Again, the RLD/CCD cannot alter or modify the ULA via regulation, as RLD/CCD has done 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 promulgation of a variance rule and granting variances from statutory and regulatory requirements, then the ULA’s hearing procedures and not the RLD/CCD’s variance rule hearing procedures would be applicable to a variance petition proceeding. NMSA 1978, Section 26-2C-6.B; Sections 61-1-7 through 61-1-16, as amended through 2023.<sup>6</sup> 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.

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<sup>5</sup> Sections 61-1-1 through 61-1-25, as amended through 2023; *see* <https://www.nmlegis.gov/Sessions/23%20Regular/final/HB0384.pdf> (last accessed August 29, 2023).

<sup>6</sup> The RLD/CCD’s current variance rule provides, “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.” 16.8.2.8.Y(3) NMAC.

Finally, the ULA – which the CRA mandates CCD follow for licensing and permitting of cannabis producers and micro producers – authorizes judicial review of administrative actions. Section 26-2C-6.B; Section 61-1-17, as amended through 2023. If a court determines that the CRA and/or the ULA authorize variances, then the RLD/CCD’s denial or approval of a variance petition would constitute an administrative action under the ULA and be subject to judicial review. *Id.* The RLD/CCD cannot amend the ULA’s judicial review mandate via regulation, as it has done with its unlawful variance rule, providing that the division’s final decision “shall not be subject to judicial review.”<sup>7</sup> State ex. rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P.3d 1191.

For the above stated reasons, NMAA fully supports the RLD/CCD’s proposed rescission of its unlawful variance rule.

### **III. NMAA Fully Supports Amending the RLD/CCD’s Newly Proposed Pre-Licensure Inspection Rule to Require Mandatory Rather than Discretionary Inspections.**

NMAA joins with Ultra Health in requesting the RLD/CCD to amend its newly proposed pre-licensure inspection rule to require mandatory rather than discretionary inspections.<sup>8</sup> NMAA therefore submits the following suggested friendly amendment with a statement of reasons. 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)**<sup>9</sup> as follows:

**Z. Inspections prior to licensure:** Prior to the issuance of a license under the Cannabis Regulation Act, the division ~~may~~ **shall** conduct an on-site inspection of

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<sup>7</sup> 16.8.2.8.Y(6) NMAC.

<sup>8</sup> Ultra Health Comments on Proposed Revisions to Regulation 16.8.2.8 NMAC (August 22, 2023), <https://www.rld.nm.gov/wp-content/uploads/2023/07/2023.8.22-Ultra-Health-Comments-on-CCD-Proposed-Rules-for-August-31-2023-Public-Hearing.pdf> (last accessed August 29, 2023).

<sup>9</sup> 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 31<sup>st</sup> public hearing.

the proposed premises for any one or more license type to ensure that the premise complies with all applicable provisions of the Cannabis Regulation Act as well as all applicable provisions of rules promulgated thereto. Prior to implementing required inspections, the division shall provide public notice on the division website detailing which license type(s) will require inspections.

NMAA supports a new mandatory pre-licensure inspection rule for the following reasons. First, we know that pre-licensure inspection requirements work to mitigate violations and costly enforcement actions. When the Cannabis Regulation Act was passed in 2021, NMAA advocated for a pre-licensure inspection/verification of a legally valid water right or water source as a condition of approval for obtaining a cannabis producer/micro producer license. NMSA 1978, Section 26-2C-7.B(3)-(4). The primary intent of this pre-licensure requirement, and proactive protection of our state's most precious resource, is to ensure that the producer/micro producer licensee is not unlawfully taking surface or groundwater and impairing existing water right owners or unlawfully taking water from a water provider, thereby minimizing potential violations of the CRA's water requirements and any enforcement actions the RLD/CCD might need to take.<sup>10</sup>

Nearly a year after this pre-licensure water inspection requirement went into effect, the New Mexico Office of the State Engineer ("OSE") Director of Water Resources Allocation Program explained that the CRA's water validation requirement is working to prevent water theft by licensed cannabis producers and results in less agency resources being expended in the long term. For example, in February 2022, nearly 85-90% of applicants "have presented invalid water rights, need to reconfigure the water rights or plan to use a domestic well, which is not allowed for agriculture," Director Romero advised. He further stated that removal of the existing water protection requirement is "going to make it that much more difficult on the agency when we're

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<sup>10</sup> For an in-depth discussion of why the CRA's water protection requirements are vital to protecting existing water rights, please see NMAA's June 16, 2021 comments submitted on the RLD/CCD's Proposed Rules, pp. 3-7.

already resource-strapped. By requiring cannabis producers to first verify water rights, [the] office will have a clear picture of who is tapping into water resources for cannabis cultivation, instead of spending resources on investigating reported violations or waiting on his staff to stumble onto something.”<sup>11</sup>

Second, we know that a failure to engage in pre-licensure inspection is resulting in increased violations and expenditure of limited resources for engaging in costly and time-consuming enforcement actions. The RLD Superintendent recently presented to the New Mexico Court, Corrections and Justice Interim Legislative Committee on August 23, 2023 that it has issued 2,627 cannabis licenses and that there are an additional 258 pending license applications.<sup>12</sup> From January 1, 2023 through July 31, 2023 alone, the RLD/CCD has issued seven enforcement actions, has performed only 256 inspections, and has found 1,356 violations.<sup>13</sup> For August 1, 2023 through August 8, 2023, five enforcement actions have been issued.<sup>14</sup>

Moving forward, requiring the RLD/CCD to perform mandatory pre-licensure inspections on the front end will substantially reduce the number of license violations found and

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<sup>11</sup> Source: <https://nmpoliticalreport.com/2022/02/15/senate-passes-cannabis-law-changes-adds-new-water-rights-language/> (last accessed August 29, 2023).

<sup>12</sup> RLD presentation to the Court, Corrections and Justice Interim Committee, slides 5-7 (August 23, 2023), <https://www.nmlegis.gov/handouts/CCJ%20082223%20Item%208%20RLD%20Cannabis%20Update.pdf> (last accessed on August 29, 2023). RLD provides that it has issued a total of 1,484 “Cannabis Parent Licenses” and 2,637 “Cannabis Licensed Premises.” Of the 2,637 licenses issued, 398 licenses are for large-scale producers, 453 licenses are for micro producers, and over 1,000 licenses have been issued to retailers. For the 258 pending cannabis license applications, 53 are for large-scale producers, 70 are for micro producers, and 40 are for retailers.

<sup>13</sup> Supra Footnote 8, slide 15. Also of note is that the RLD/CCD have not yet posted online violations found, correct actions issued, and inspections performed. <https://www.rld.nm.gov/cannabis/compliance/inspections-performed/> (last accessed August 29, 2023); <https://www.rld.nm.gov/cannabis/compliance/enforcement-actions/> (last accessed August 29, 2023).

<sup>14</sup> <https://www.rld.nm.gov/cannabis/compliance/enforcement-actions/> (last accessed August 29, 2023).



enforcement actions taken, saving substantial resources RLD/CCD would otherwise have to expend pursuing more time consuming and costly preliminary injunctions against cannabis licensees in the New Mexico courts.<sup>15</sup>

#### **IV. Conclusory Remarks.**

For the above stated reasons, NMAA extends its appreciation to the RLD/CCD for its proposed rescission of its unlawful variance rule and for its effort to meaningfully regulate applicants and licensees in a more thoughtful, resource-efficient manner through the implementation of a front-end pre-licensure inspection rule. Such measures will ensure that the many deleterious impacts of the commercial recreational cannabis industry are minimized to the greatest extent possible. NMAA therefore requests that the RLD/CCD follow through with its rescission of the unlawful variance rule and incorporate NMAA’s friendly amendment to the division’s newly proposed pre-licensure inspection rule.

Submitted on August 30, 2023 by:



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<sup>15</sup> With the passage of HB 384, amending the state Uniform Licensing Act, the RLD now has authority to pursue preliminary injunctions. NMSA 1978, Section 61-1-25.1. This bill became law in June 2023. <https://www.nmlegis.gov/Sessions/23%20Regular/final/HB0384.pdf> (last accessed August 29, 2023). *See also* the Santa Fe Reporter interview with RLD Superintendent regarding this new enforcement authority: <https://www.sfreporter.com/news/2023/07/19/regulators-mount-up/> (last accessed August 29, 2023).