

November 9, 2023

VIA ELECTRONIC MAIL

Robert Sachs
Division Counsel
Cannabis Control Division
ccd.publiccomment@state.nm.us

RE: PROPOSED CHANGES TO RULES 16.8.2, 16.8.3, AND 16.8.11 NMAC

Dear Mr. Sachs:

Pecos Valley Production (hereinafter, “PVP”), by and through its undersigned legal counsel, hereby submits the comments set forth below regarding proposed changes to Rules 16.8.2, 16.8.3, and 16.8.11. While PVP greatly appreciates the ongoing regulatory efforts by the Cannabis Control Division (hereinafter, “CCD”), the proposed changes to Rules 16.8.2, 16.8.3, and 16.8.11 NMAC are vague, arbitrary, capricious, and not in accordance with law.

As a preliminary matter, CCD has presented no technical evidence to support any of the rule changes. Pursuant to the State Rules Act at NMSA 1978, Section 14-4-5.2(A)(7) (2023), CCD was required to provide “a citation to technical information, if any, that served as the basis for the proposed rule, and information on how the full text of the technical information may be obtained” in its notice of proposed rulemaking. In turn, CCD’s Notice of Proposed Rule Amendments states: “Any technical information used to inform the proposed rules will be accessible by visiting: <https://www.rld.nm.gov/cannavis/>.” When one visits that link, there is no technical information to be found. Accordingly, since CCD has no technical information to support the rule changes, then the any evidence presented by CCD to support its rule changes should be considered non-technical information.

CCD’s reliance on non-technical information to support the rule changes is significant because it impacts the substantial evidence standard. A proposed regulation must be rescinded if, based upon a review of the whole record, the decision of an agency is not supported by substantial evidence. *See* Rule 1-074(R)(2). Substantial evidence consists of “evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder.” *N.M. Mining Assn. v. N.M. Water Quality Control Comm.*, 2007-NMCA-010, ¶ 30, 141 N.M. 41. “When the agency’s decision is supported by substantial evidence the reviewing court does not reweigh the evidence to reach a contrary result; however, when the evidence as a whole does not support the agency’s decision, that decision cannot be upheld.” *Tenneco Oil Co. v. N.M. Water Quality Control Comm’n*, 1987-NMCA-153, ¶ 39, 107 N.M. 469.

For this matter, PVP maintains that its comments (as well as comments of other existing licensees) based on its experience in operating a cannabis business in New Mexico constitute technical information due to specialized knowledge. Therefore, comments by licensees, such as PVP, should be given greater weight than any non-technical information relied upon in developing the proposed rules.

I. PROPOSED CHANGES TO RULE 16.8.2 NMAC

PVP maintains that the proposed changes to Rule 16.8.2 NMAC are vague, arbitrary, capricious, and not in accordance with law. The proposed changes to the Rule 16.8.2 NMAC impose unreasonable barrier that perpetuate the illicit market rather than eliminate it.

A. Rules 16.8.2.22(A)(1)(l), 16.8.2.30(A)(1)(l), and 16.8.2.36(A)(1)(m) NMAC

The proposed changes to Rules 16.8.2.22(A)(1)(l), 16.8.2.30(A)(1)(l), and 16.8.2.36(A)(1)(m) NMAC require applicants for an initial or renewed license to submit to CCD the “applicant’s employee information including, but not limited to names, identification photographs, employment history and demographic information.” PVP maintains that these proposed changes are vague, arbitrary, capricious, and not in accordance with law because:

1. The use of the phrase “but not limited to” provides licensees, such as PVP, with no certainty as to what universe of information must be submitted to CCD, thereby making the rule changes impermissibly vague;
2. PVP reads the proposed rule changes to mean that CCD wants every piece of paper available related to each employee’s employment on an annual basis, which is unreasonable and burdensome and serves no regulatory purpose;
3. If CCD intends on clarifying what employment documents are required on a case-by-case basis with respect to each licensee, then PVP maintains that such an approach is arbitrary because PVP will have no way of determining what documents to submit at the time of obtaining or renewing a license;
4. The proposed changes to the rules related to employment information do not improve a licensee’s ability to produce quality products;
5. PVP is unable to discern what CCD intends on doing with the breadth of employee information requested under the proposed rule changes;
6. The proposed rule changes are impractical, costly, and burdensome because PVP has over 300 employees; and
7. PVP is concerned about the protection of employee information because the proposed rule changes provide no provisions for the security of such confidential and sensitive information.

B. Rules 16.8.2.22(A)(3), 16.8.2.30(A)(3), and 16.8.2.36(A)(3) NMAC

The proposed changes to Rules 16.8.2.22(A)(1)(l), 16.8.2.30(A)(1)(l), and 16.8.2.36(A)(1)(m) NMAC require applicants for an initial or renewed license to submit to CCD “proof the applicant has acquired all applicable documentation from the local jurisdiction in which the licensed premise will be located including proof of registration, proof of zoning approval, and proof of completion of a fire inspection.” PVP maintains that these proposed changes are vague, arbitrary, capricious, and not in accordance with law because:

1. PVP is unable to discern what is required by the general use of the phrase “all applicable documentation”;
2. PVP operates in multiple local jurisdictions, and based upon this specialized knowledge, PVP maintains that businesses must obtain a variety of approvals from local jurisdictions which may or may not include proof of registration, zoning, or completion of a fire inspection, so requiring these specific proofs may be impracticable;
3. PVP maintains that proposed rules cannot be so vague as to what documents are required from local governments when there are hundreds of local jurisdictions with different regulatory frameworks;
4. PVP further maintains that if a cannabis establishment has not obtained necessary approvals from a local jurisdiction, then it should be up to that local jurisdiction in the first instance—not CCD—to take action against a cannabis business for failure to obtain necessary local approvals; and
5. PVP believes that obtaining a local business license is no way to measure compliance due to the regulatory variations in each local jurisdiction.

C. Rules 16.8.2.22(C), 16.8.2.30(C), 16.8.2.36(C), and 16.8.2.44(E) NMAC

The proposed changes to Rules 16.8.2.22(C), 16.8.2.30(C), 16.8.2.36(C), and 16.8.2.44(E) NMAC provide: “When the division determines that an application for licensure is incomplete, an applicant will have 48 hours to rectify any deficiencies before the division will reject the application.” Based on experience, PVP maintains that 48 hours is too short of a time frame to rectify deficiencies. Rather, PVP proposes five days as a reasonable time frame to cure deficiencies, as it is consistent with the five-day time frame for Corrective Action Plans.

D. Rules 16.8.2.22(A)(10), 16.8.2.30(A)(9), 16.8.2.36(A)(8), and 16.8.2.44(A)(6) NMAC

The proposed changes to Rules 16.8.2.22(A)(10), 16.8.2.30(A)(9), 16.8.2.36(A)(8), and 16.8.2.44(A)(6) NMAC require “a detailed description of any denial, suspension, revocation, surrender, or any other form of discipline or disciplinary action by a cannabis licensing agency in another state, jurisdiction or territory against the applicant or any controlling person associated with the applicant.” PVP maintains that the phrase “controlling person associated with the

applicant” is vague, overbroad, and arbitrary because it could mean persons who previously controlled an interest but no longer do.

E. Rule 16.8.2.44(A)(5) NMACC

The proposed changes to Rule 16.8.2.44(A)(5) NMACC require applicants for an initial or a renewed cannabis testing laboratory license to provide CCD with a “list of all natural persons who hold any financial or voting interests, including but not limited to natural persons associated with any business having a financial or voting interest in the cannabis testing laboratory to ensure compliance with NMSA 1978, [Section] 26-2C-6(G). PVP maintains that the proposed rule changes are vague, arbitrary, capricious, and not in accordance with law because: (1) PVP is unable to discern the meaning of “associated with any business”; (2) the underlying statute does not authorize an expansive inquiry into business structures and compositions; and (3) CCD has presented no evidence of the need for such rule changes.

II. PROPOSED CHANGES TO RULE 16.8.3 NMAC

The proposed changes to Rule 16.8.3.9(K)(4) and 16.8.3.12(A)(9)(c) NMCA state: “No sticker or other obstruction shall be used to cover the cannabis logo.” PVP asserts that these proposed rule changes need to be revised to make them clear. CCD should clarify that the use of a sticker with the New Mexico “THC” logo in red is an acceptable practice and that it is not acceptable to obstruct the “THC” logo in red.

III. PROPOSED CHANGES TO RULE 16.8.11 NMAC

The proposed changes to Rule 16.8.11.10(B) would charge a license \$75 for the licensee’s designation of a non-controlling person as an agent. PVP maintains that such an assessment is an illegal tax disguised as a fee because such an assessment is not related any increase in regulatory activity caused by the licensee designating a non-controlling person as an agent. PVP further maintains that it is unreasonable for CCD to create a disincentive for licensees to engage in the common business practice of designation a non-controlling person as an agent.

IV. CONCLUSION

PVP greatly appreciates CCD’s continuing efforts advance the regulatory framework for the cannabis industry. Unfortunately, PVP believes that the current set of proposed rules misses the mark for improving the regulatory framework. Vague regulations are useless, as they do nothing to benefit cannabis licensees or CCD. Therefore, PVP respectfully requests that the CDC rescind this set of proposed rules and work with stakeholders, such as PVP, to develop a clear set of rules that improve regulatory efficiency.

Respectfully submitted,

TRUJILLO LAW GROUP

By: 

Anthony (T.J.) J. Trujillo