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December 10, 2010

VIA HAND DELIVERY

Chris D. Woodward
Assistant General Counsel
New Mexico Department of Health
1190 South St. Francis Drive N 4095
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Regulation 7.34.2 NMAC, "Advisory Board Responsibilities and Duties," Regulation 7.34.3 NMAC, "Registry Identification Cards," Regulation 7.34.4 NMAC, "Licensing Requirements for Producers, Production Facilities and Distribution"

Dear Mr. Woodward:

Enclosed please find the Hearing Officer Report and Recommendations for the above-referenced matter. The official record for this matter is also enclosed.

Very truly yours,

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____
Rachel King
Santa Fe Office

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Enc.
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# REPORT AND RECOMMENDATION OF THE HEARING OFFICER

**Public Hearing:** Department of Health

**Actions in Question:** Repeal and replace 7.34.2 NMAC, "Advisory Board Responsibilities and Duties;" 7.34.3 NMAC, "Registry Identification Cards;" and 7.34.4 NMAC, "Licensing Requirements for Producers, Production Facilities and Distribution."

**Hearing Dates:** September 30, 2010 (comments accepted through October 15, 2010) and December 2, 2010 (record held open until December 7, 2010)

**Report Date:** December 10, 2010

## RECOMMENDATION

That the existing regulations designated as 7.34.2 NMAC, "Advisory Board Responsibilities and Duties," 7.34.3 NMAC "Registry Identification Cards," and 7.34.4 NMAC, "Licensing Requirements for Producers, Production Facilities and Distribution," be repealed and replaced with the proposed regulations of the same names published by the Department of Health on November 2, 2010, except that the plant limit for licensed non-profit producers should be raised from ninety-five (95) plants to one-hundred and fifty (150) plants.

In addition, the Department should attempt to understand the volume of medical cannabis that must be produced in order to meet the needs of qualified patients and to make additional changes as necessary to ensure an adequate supply.

Rachel King

December 10, 2010
Date

# HEARING OFFICER'S REPORT

On August 31, 2010, the Department of Health (the "Department") published proposed revisions of existing regulations 7.34.2 NMAC, "Advisory Board Responsibilities and Duties," 7.34.3 NMAC, "Registry Identification Cards," and 7.34.4 NMAC, "Licensing Requirements for Producers, Production Facilities and Distribution." A hearing on those regulations was held on September 30, 2010. On October 29, 2010, in response to questions submitted to the Department by the Hearing Officer, the Department informed the Hearing Officer that it had further revised the proposed regulations and intended to hold another public hearing on the revised versions. The revised regulations (the "Regulations") were made available to the public on November 2, 2010. A hearing on the Regulations was held on December 2, 2010. On December 8, 2010, the Department informed the Hearing Officer that it proposed to make a further revision to the Regulations to raise the plant limit for licensed non-profit producers from ninety-five (95) to one-hundred and fifty (150).

Both public hearings were held at the Harold Runnels Building Auditorium in Santa Fe, New Mexico. For both hearings, Rachel King, Esq., presided as Hearing Officer. Dominic Zurlo, Program Manager for Harm Reduction and Medical Cannabis, Linda Gorgon, Medical Director, Infectious Disease Bureau, and Chris Woodward, Assistant General Counsel, also attended.

At the beginning of both hearings, the Hearing Officer introduced the public hearing, explaining that the purpose of the hearing was to allow members of the interested public to comment on the proposed revisions to the regulations. At each hearing, Mr. Zurlo described the major changes to each regulation proposed by the Department.

## I. SUMMARY OF EVIDENCE

### Documentary Evidence

The Exhibits submitted with respect to the August 31 Regulations are as follows:

1. 7.34.2 NMAC "Advisory Board Responsibilities and Duties" – current rule
2. 7.34.2 NMAC "Advisory Board Responsibilities and Duties" – proposed rule
3. 7.34.3 NMAC "Registry Identification Cards" – current rule
4. 7.34.3 NMAC "Registry Identification Cards"- proposed rule
5. 7.34.4 NMAC "Licensing Requirements for Producers, Production Facilities and Distribution" – current rule
6. 7.34.4 NMAC "Licensing Requirements for Producers, Production Facilities and Distribution" – proposed rule
7. Notice of Public Hearing, published in New Mexico Register/Volume XXI, Number 16/August 31, 2010

8. Notice of Public Hearing, published in Albuquerque Journal on September 2, 2010 and September 3, 2010
9. Hearing officer Appointment Letter dated August 12, 2010
10. Public Comment from Jim Robbins dated 9/29/10
11. Public Comment from Rev. Bryan A. Krumm CNP dated 9/29/10
12. Public Comment from Timea Eckerdt, not dated
13. Position Paper from the New Mexico Medical Producers Guild

The Exhibits submitted after the August 31 Hearing are as follows:

1. Comments from Cynthia Rose of High Desert Organics received 10/1/2010
2. Comment regarding square footage v. plant count from Healyour Face dated 10/2/2010
3. William Moyer's personal testimonial amendment to statements made at 9/30/2010 public hearing dated 10/6/10
4. Written remarks of Robert Jones dated 10/8/2010
5. Jim Robbins' additional comments to be incorporated into the record dated 10/8/2010
6. Public Comment from Jim Robbins to be incorporated into record dated 9/29/2010
7. Public Comment from Bonnie Bonneau dated 10/6/2010
8. Public Comment from Nicole K. Collins, RN, BSN, MPA dated 10/7/2010
9. Public Comment from Einrich dated 10/13/2010
10. Public Comment from Charles R. Kokesh of BioMed dated 10/14/10 w/ Exhibits A-F
11. Public Comment from Charles R. Kokesh of BioMed dated 10/15/10

The Exhibits submitted with respect to the December 2 Regulations are as follows:

1. 7.34.2 NMAC "Advisory Board Responsibilities and Duties" – current rule
2. 7.34.2 NMAC "Advisory Board Responsibilities and Duties" – revised draft rule
3. 7.34.2 NMAC "Advisory Board Responsibilities and Duties" – strike through version of proposed rule
4. 7.34.3 NMAC "Registry Identification Cards" – current rule

5. 7.34.3 NMAC "Registry Identification Cards" revised draft rule

6. 7.34.3 NMAC "Registry Identification Cards" strike through version of proposed rule

7. 7.34.4 NMAC "Licensing Requirements for Producers, Production Facilities and Distribution" – current rule

8. 7.34.4 NMAC "Licensing Requirements for Producers, Production Facilities and Distribution" – revised draft rule

9. 7.34.4 NMAC "Licensing Requirements for Producers, Production Facilities and Distribution" – strike through version of proposed rule

10. Hearing officer Appointment Letter dated August 12, 2010

11. Notice of Public Hearing -New Mexico Register/Volume XXI, Number 21/November 15, 2010

12. Notice of Public Hearing - Albuquerque Journal – November 2 and 3, 2010 and September 3, 2010

13. DOH Request to Rename NMAC Chapter and Part Name – Existing DOH Rule, October 2010

14. State Records Center and Archives Approval of NMAC Chapter Name Change, Dated November 2, 2010

15. 11/15/10 - Public Comment - Grant Gossett

16. 11/15/10 - Public Comment - Rod Leal

17. 11/16/10 - Public Comment – Kathleen Childs

18. 11/16/10 - Public Comment – Nancy

19. 11/18/10 – Public Comment – Mark Leffingwell

20. 11/28/10 – Public Comment – Cynthia Rose

21. 11/29/10 – Public Comment – Gozarks

22. 11/29/10 – Public Comment - Linda Gambel

23. 11/26/10 – Public Comment – Marlene S. Barber

24. 11/26/10 – Public Comment – New Mexico Patient No. 0271xxx

25. 11/30/10 – Public Comment – Natural Pain Relief New Mexico/James L. Robbins

26. 12/2/10 – Public Comment – BioMed Prescriptions, Charles R. Kokesh

The Exhibits submitted after the December 2 Hearing are as follows:

1. 12/2/10 – Public Comment – Einrich Hibpshman
2. 12/2/10 – Public Comment – Sage Davis
3. 12/2/10 – Public Comment – Mark Leffingwell, Hierba Buena Rx
4. 12/3/10 – Public Comment – Micah and Kimberly Boutillier, Let it Grow
5. 12/5/10 – Public Comment – Charles Gravlee
6. 12/7/10 – Public Comment –Jim Robbins, Natural Pain Relief, NM
7. 12/7/10 – Public Comment –Patricia M. Monaghan
8. 12/7/10 – Public Comment –Len Goodman, New MexiCann Natural Medicine

Additional Correspondence related to the regulations is included in the record as follows:

A. 8/12/10 Hearing Officer Appointment Letter

B. 10/14/10 Letter from Rachel King inviting Department's Comments to rule changes comments

C. 10/29/10 Letter from Chris Woodward, Assistant General Counsel, to Rachel King responding to questions

D. 12/6/10 Letter from Rachel King inviting Department's Comments to rule changes comments

E. 12/08/10 Letter from Chris Woodward, Assistant General Counsel, to Rachel King responding to questions

Taped Record

Both hearings were recorded on cassette tapes, which tapes are part of the hearing record.

Statements Presented at Hearing

More than fifty (50) people provided oral testimony at the September 30, 2010 hearing and thirty-six (36) people testified at the December 2, 2010 hearing. Everyone who wished to speak was given an opportunity to do so. Many of the comments provided at the September 30 hearing were addressed in the Final Proposed Regulations, including the definition of "mature plant," the circumstances in which the Advisory Board may remove a condition from the list of debilitating medical conditions, the fee structure, situations in which the Department may deny a

registry identification card application, the limits on board membership of producers, and whether producers can exchange plant material.

At the December 2, 2010 hearing, many of the comments centered in the following areas:

Inadequate supply of medical cannabis – members of the public raised the concern that the limit on producers of 95 plants, coupled with the fact that the Department has licensed relatively few producers, results in qualified patients being unable to obtain an adequate supply. Patients and producers both raised this concern and argued for an increase in the number of plants that a producer may grow, as well as urging the Department to license more producers. Senator McSorley noted that he believed only 40% of the medical cannabis used by qualified patients comes from licensed producers, which means that some qualified patients are forced to acquire their cannabis by illegal means.

Fees – Members of the public raised concerns that the revised fee structure (which includes flat fees for licensees based upon the length of time they are licensed) could harm producers in years when they had little production, and hurt producers who wanted to provide medical cannabis for relatively few qualified patients.

Board membership for producers – Members of the public raised concerns regarding the restrictions on board membership, including the requirement that some board members be medical professionals, and the restriction that individuals may serve on the board of only one non-profit producer. One person testified that board membership should not be restricted to New Mexico residents.

Testing – Members of the public commented that the testing program set forth in the regulations was not adequate to ensure the quality of medical cannabis.

Prices – Members of the public raised concerns about the prices charged by producers for medical cannabis. There were a few suggestions that the Department regulate the price.

Secretary's discretion – Members of the public were concerned that the Secretary retained discretion over whether to license producers and that this discretion could not be appealed.

Members of the public also raised concerns with provisions of the regulations that are required by the Lynn and Erin Compassionate Use Act. As a result, the Department has no discretion over these provisions. They include the definition of an "adequate supply" being a 3-month supply, the requirement that a patient's registration expire annually, and the prohibition of production or distribution within three hundred (300) feet of any school, church or daycare center.

## II. DEPARTMENT'S FURTHER REVISIONS

On December 6, 2010, the Hearing Officer invited the Department to respond to comments made at the hearing. The Hearing Officer's letter is attached hereto as Exhibit D. On December 8, 2010, the Department responded, which response is attached hereto as Exhibit E. The

Department responded to concerns regarding adequate supply by stating that it intended to further revise the Regulations to raise the plant limit for licensed non-profit producers from ninety-five (95) to one-hundred and fifty (150). It noted that it had not changed the standard for judicial appeal and that the standards of due process are met through the hearing procedures in the Regulations. It also explained the purpose of the limits on board membership, the annual renewal of producers' licenses, the fee structure, and the proposed testing regime.

The Department's approach to the Regulations has been deliberate and collaborative. The Department addressed, in some way, all of the major areas of comment from both hearings where it had the discretion to do so, and adjusted the Regulations in response to comments submitted by the public.

The only area of continued concern is that of adequate supply for qualified patients. Likely as a result of the relatively short length of the program, it is not clear that the Department has a detailed understanding of the volume of medical cannabis required to meet the needs of patients. The Department should attempt to ascertain what volume is required to be produced and make additional changes to the regulations if necessary to ensure that there is an adequate supply.

## III. HEARING OFFICER'S RECOMMENDATION

Based on the foregoing, I recommend the existing regulations designated as 7.34.2 NMAC, "Advisory Board Responsibilities and Duties," 7.34.3 NMAC "Registry Identification Cards," and 7.34.4 NMAC, "Licensing Requirements for Producers, Production Facilities and Distribution," be repealed and replaced with the proposed regulations of the same names published by the Department of Health on November 2, 2010, except that the plant limit for licensed non-profit producers should be raised from ninety-five (95) plants to one-hundred and fifty (150) plants.

In addition, I recommend that the Department attempt to understand the volume of medical cannabis that must be produced in order to meet the needs of qualified patients and to make additional changes as necessary to ensure an adequate supply.