



## Board Caucus Meeting

Wednesday, June 22, 2021, 11:30am

This meeting was held via web conference

## Meeting Minutes

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### CAUCUS ATTENDEES

Chair David Postman  
Member Ollie Garrett  
Member Russ Hauge  
Dustin Dickson, Executive Assistant

### GUESTS

Kathy Hoffman, Policy and Rules Manager  
Audrey Vasek, Policy and Rules Coordinator  
Jeff Kildahl, Policy and Rules Coordinator

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### APPROVAL OF MEETING MINUTES

MOTION: Member Hauge moved to approve the June 8, 2021, Board caucus minutes

SECOND: Member Garrett seconded.

ACTION: Chair Postman approved the motion.

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### RULES PETITION REVIEW AND CONSIDERATION - AUDREY

Ms. Vasek provided an overview of the petition filed by Robert Ho of Feedme Hospitality & Restaurant Group asking to amend WAC 314-07-020(7) to authorize exceptions to the exclusive rights provision (HANDOUTS 1-2). She said the agency staff recommendation was to deny the petition as described.

MOTION: Member Hauge moved to accept the staff recommendation and deny the rules petition.

SECOND: Member Garrett seconded.

ACTION: Chair Postman approved the motion.

Member Hauge: Now that this has been moved and seconded, a bit of discussion if I may?

Chair Postman: Please, go ahead.

Member Hauge: To me the major obstacle here is the statutory prohibition about catering. The policy issues are of course valid and concerning, and I am always wary of anything that requires a case-by-case analysis by anybody's staff. However, in the grand scheme of things this is a kind of accommodation I think that, in a general sense, but for the statutory prohibition for catering that presents a roadblock we can't get around it might be something worth considering. I'd just like to make that point.

Chair Postman: Thank you.

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## **BOARD MEETING PREP AND RULES UPDATES**

Audrey provided an alcohol related rulemaking update, including:

- Implementation of 2021 Legislation – E2SHB 1480 Related to the COVID-19 Alcohol Allowances
  - Initial comment period open until July 2, 2021
  - Internal workgroup meeting regularly
  - Draft conceptual rules should be ready for public review in July
  - Tentatively scheduling “listen and learn” sessions in August
  - Tentatively scheduling the CR 102 for September
- Summary Suspension and Stay Provisions to Enforce Governor’s Proclamations
  - CR 101 filed April 14, 2021
  - Initial comment period closed on June 5, 2021
  - 65 comments received in opposition
  - Internal workgroup is reviewing and considering options for moving forward
- Distillery Reporting and Payment
  - CR 103 adopted on June 8, 2021
  - Rules take effect on July 10, 2021

Audrey asked if there were any questions. There were none.

Jeff provided a cannabis related rulemaking update, including:

- Quality Control
  - Four internal rule drafting sessions have been scheduled
  - One bid received for an economist to help draft the small business economic impact statement
- Criminal History Background Check
  - “Listen and learn” held on June 1, 2021
  - CR 102 tentatively scheduled for July 7, 2021
- Permanent Rules Referencing State Board of Health’s Vitamin E Acetate Prohibition
  - No comments received to date on the CR 102
  - Public Hearing Scheduled for July 7, 2021
  - CR 103 tentatively scheduled for July 21, 2021
  - Current emergency rules may be allowed to expire under this timeline
- Tier I Expansion
  - Public hearing held June 9, 2021
  - Six written comments also received
  - CR 103 tentatively scheduled for July 7, 2021
- THC Isomers Beyond Delta-9
  - Two comments received on the CR 101
  - “Deliberative dialogue” held on June 3, 2021

Chair Postman: When does the public comment period on the “Delta-8 and beyond” rules close?

Jeff Kildahl: Chair Postman, I believe – we have the CR 101 filed, I don’t believe there is a formal comment period open right now. I believe that begins with the proposed rules, the filing of the CR 102.

Chair Postman: You've received two comments so far?

Mr. Kildahl: Yes.

Chair Postman: Any other questions on marijuana rulemaking timelines from the Board? Seeing none, anything else from rules?

Kathy Hoffman: If I may... I believe the comment period on the CR 101 is open for 30 days post-filing. Audrey, do you have the statute in front of you?

Chair Postman: That's ok.

Ms. Hoffman: There is a time certain on that, Chair Postman, I don't have the document in front of me that provides that deadline. Thank you Jeff for the update.

Chair Postman: I'll bet we'll have more than two comments by the time we're done.

Ms. Hoffman: Quite often, we do receive comments after the formal period that is described in statute expires. We typically keep those in the file as well – just because they come in after the statutorily described comment period doesn't preclude us from taking a look and keeping them in our rulemaking file.

Chair Postman: Great, thank you. Member Hauge.

Member Hauge: Thank you. Jeff and Kathy, the CR 101 for Delta-8 etcetera, is it your opinion that that is a broad enough filing for us to consider the questions that have been raised – not about Delta-8 but about Delta-9 from synthetic, non-Washington cannabis sources?

Ms. Hoffman: That's a great question Member Hauge. I'm looking into that with our Attorneys General. I think it may be broad enough, but in this particular instance I want to make sure that we've got it absolutely right. I think when we wrote that CR 101 it was based largely on our policy statement, which really was – it did not preclude Delta-9 from hemp-derived sources. It was broader, there were statements in there that spoke to Delta-9 from hemp and other sources. I just want to make sure that our CR 101 was that broad as well. Does that help?

Member Hauge: It does. I think we have to be very precise here. Reading the policy statement and clarifying statement, the only isomer specifically referenced is Delta-8. As I've tried to explain, I consider in terms of our job right now, that is a separate issue from Delta-9 being introduced into our system from non-cannabis sources.

Ms. Hoffman: I want to say that our policy statement, and I'll read from it now, addressed two things:

“The regulation of THC other than Delta-9 and the conversion of CBD, hemp, or both to Delta-8 THC, Delta-9 THC, or any other marijuana compound isn't currently identified in RCW”.

So, our policy statement did approach that. I agree with you that we need to take a second look at our CR 101 and make sure it is expansive enough for the concerns that you brought to the special caucus last week.

Member Hauge: Thank you, I just want to be sure we're on solid ground going forward.

Ms. Hoffman: Thank you for clarifying, I appreciate it.

Chair Postman: Anything else or any other comments on cannabis rulemaking and timelines? None, we'll move on. Thanks again Mr. Kildahl, we appreciate it.

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## **BOARD MEMBER AND EXECUTIVE ASSISTANT REPORTS**

Chair Postman: Dustin, I'm going to put you on the spot really quick, I was going to report this, but can you please give everybody an update on the recording that is going on and how people can find the meetings from here on in?

Dustin Dickson: Of course. As we progress along the learning curve with Teams as our new virtual environment and we get more layers of abilities and things we can use within the system, the next step that we're taking, starting today, is recording the virtual meetings. This will record the camera shots, if and when we have someone presenting a PowerPoint or some sort of presentation, that will be captured as well. The recording of that should be ready within about an hour of the close of the meeting, generally, depending on the length of the meeting. This is something we can post online almost immediately as opposed to waiting for the minutes or having public records requests for the audio because the audio file is too big to link or email. This opportunity creates a link to the meeting so I can put the recordings online. Those will be found on our Board's calendar page, right next to the agendas and handout notes, and will align with everything we already have on the calendar page, it's just one more piece for accessibility and transparency for us.

Chair Postman: I appreciate you doing this. It certainly helps. Obviously, they are always recorded and we have the minutes, but those can take a while and people would have to request the audio. It's great, I appreciate it. Anything else to report today, Dustin?

Mr. Dickson: Not from me, no, Chair.

Chair Postman: Any reports from Member Garrett or Member Hauge?

Member Garrett: Thank you all for delaying the start time so I could participate today. Back to the caucus we had on Delta-9, I wanted to – in reading all of the emails coming through and the expression of the seriousness of this and not knowing the health impacts, where are we now? Russ, have you done anything different, or where do we think we should be on that subject at this point?

Member Hauge: Where we are is, as of this moment, status quo. We have staff saying that they are unable or unwilling to proceed with any enforcement kind of action. I have a meeting scheduled this Thursday with legal counsel to discuss the legalities of this and particularly by position that CBD from outside the regulated system may be used to enhance CBD content and that's all. We're going to discuss that. I note that our legal counsel has been unavailable for the last couple weeks, I do not know what the next step would be after that meeting. Certainly I'm going to continue trying to either get staff to look at this as a serious issue and take action, or bring back before the Board in a public meeting because our counsel's opinion right now is that to discuss the different legalities cannot be done in a closed session. I of course follow their advice on that.

So, nothing has changed as of right now. We will have the lawyers weigh in on Thursday, to me, and I will share that with you as soon as is reasonably possible after that. Given our schedule, unless we call another special meeting, it will be the following Tuesday when we have our caucus.

Chair Postman: Member Garrett, go ahead.

Member Garrett: I was going to ask your opinion and what you are feeling about this right now.

Chair Postman: I have a different sense than Member Hauge just expressed. I've been talking to staff pretty much constantly about this since that meeting last week. I don't believe staff is either unable or unwilling to proceed with enforcement action. I think they are – and we heard the Policy Director talk to us about this, that he believes there is a grey area in that statute that is less than crystal clear, and I thought there was a consensus that an important next step would be to get interpretation from legal counsel. I know our counsel, the agency counsel, was unavailable last week because he was at a legal conference along with other staff from LCB, but up until then I don't think it had been several weeks.

I talked to counsel this morning, they are preparing for your meeting. Like you, I agree with them that there is no reason for this to be a closed briefing. There is no litigation before us on this and it does not qualify for an executive session under the Open Public Meetings Act. I was hoping we would be able to do that briefing – given that, we should just do it in public and talk about the statute. Because, even in a one-on-one briefing, I don't believe a Board member should be talking about any specifics or potential litigation given that we have to sit at the end of the process as the final adjudicators.

I think staff is taking this very seriously. We just heard Kathy Hoffman talk a little bit about conversations about what we do with the CR 101, if anything, to make it more clear. Although, I think the part she just read makes it, to me, that we are looking at things including the modification of this into Delta-9, whether you want to call that synthetic or whatever process.

There's a lot of work going on. Staff is doing what it can to try and figure this out. I think that it is problematic that – we can't really do this from a "Board-down" kind of way, that's not the way it works and we're going to have to have patience as staff works to both get that interpretation of the statute that we all agreed was important, and then see how we can build this into the ongoing process we have already to make sure we have the science and data and the input from the public and experts, and we will do that.

If you review what we've said about the current rulemaking and the CR 101, and I've reviewed some of it, over and over again both Ms. Hoffman, Director Garza and myself have always said we need to move beyond just the discussion about Delta-8, because there is going to be something else tomorrow. Whether it's a Delta-10 or Delta-9, this is a living, breathing thing we have going on.

I think the Board and the staff have been clear that our inquiry here is broad-based and that we are looking for a way to capture all of this in a discussion and a rulemaking so we're not surprised by the next thing that some very smart chemists or botanists in the industry come up with that we're not able to anticipate. We can't do rulemaking, in my mind, to a specific compound because that will change too fast. I think we've always had that intention.

I think bringing the issue of what we can shorthand call "synthetic Delta-9" is very important and is a priority for us to try and address that and find out what is happening. I can assure you that staff is working on that and has not said anything, to me at least, either publically or to me that they are either unable or unwilling.

Member Garrett: Thank you for that. I hear and I understand the big picture of long terms and going through the CR 101, 102 and 103 process, but my question becomes more on – because we've had situations where while things were going through the policy process, we've had to come up with emergency rules. My question, and where I'm at is, in reading what the industry is saying to us about what is happening out there, and not understanding the health impact on people that are consuming this

product, how is everyone feeling about that? I get what you are saying, David, as far as making sure of the big picture and getting ready for the future, but just for this – now, today – that's my concern in everything that I'm reading and hearing, what can we do, what are we willing to do, and what is that looking like?

I agree with the big picture and the future, and what we are trying to do. But, on this, today, I don't know what we can do.

Chair Postman: Let's let Member Hauge respond, then I have some thoughts as well.

Member Hauge: First of all, I need some clarification. David, you said you've been talking with staff. Is staff still waffling on whether, in fact, Delta-9 from a synthetic source is being introduced into the system?

Chair Postman: Again, I have not heard any waffle. I haven't had that conversation. The conversation we're having is, given what the conversation was on Wednesday, and that we have rulemaking underway, and what we're hearing from different people – really quick, Member Garrett, I would be careful when we say what we're hearing from the industry, because we're hearing different things from different parts – but I haven't asked that question, do you believe this or not. What I'm hearing is that we need to look at this and we need to address it. I think that work is starting to happen.

Member Hauge: What I hear from staff is that we need to do nothing. What I want to know is...

Chair Postman: That's not what they are saying, though.

Member Hauge: That's what they said to me. What I want to know, and you said you had some concerns about going forward with Board members talking with counsel, are you saying I should not meet with legal counsel? And in the meantime we should accept the legal opinion of our Policy Director, who is not a lawyer?

Chair Postman: No, of course not. I didn't say you should not go ahead. What I said was that I'd hope we could do it in public, because I think there's a great public interest in this issue. My understanding is, that given that it is not an exception covered in the Open Public Meetings Act, because there is no litigation, that we should be able to have that conversation in public.

Now, what that means, of course, is that you aren't talking about a specific licensee, which I don't think should happen either in a one-on-one or a public meeting. That's all I said, Member Hauge. I said nothing of the sort. At our caucus on Wednesday, the Director also tried to clarify that they never said we don't think anything should happen. I followed up on that question repeatedly, and Kathy Hoffman's comments just now I think reflect some of the conversations I've had with her. That's just not what I hear from staff. It is certainly within your right to talk to counsel. I think that we need a clear analysis of that statute by the AAGs for all of the staff at the LCB as well as the three of us.

Member Hauge: Okay. I'll proceed, and I will share. I guess I'm concerned that at the end of the day we're going to have an argument between our lawyers, the people that passed the bar and work for the Attorney General's office and our staff, who are not lawyers. That's what the discussion is now. Staff is saying "I talked to a license holder's lawyer and the license holder's lawyer told me it was ok" so I can't do anything. I want to get past that.

Chair Postman: I just don't think that reflects the thinking of staff at the LCB. It never has, and in this case I know it does not. I'm not going to worry today that we might have a fight down the line. I've never, in all my months here, found a case where staff pushed back against legal advice of that sort. I don't know why

you would anticipate that. I don't think this is a fight. I think this is an effort on the part of staff to be more methodical, perhaps, than you would like, and to make sure they are doing these steps correctly. I don't get the sense that they are, as you put it last week, sitting on their hands or giving up. That's my opinion from talking to them over the last, almost, week.

Member Hauge: One more point. The people that we are hearing from are the people that are being damaged economically by allowing synthetic Delta-9 into the system. The damage that's being done is real and its immediate. The people who are not concerned about it are the people that are making money. I just would like us to keep that in mind.

Chair Postman: I think that is understood and expected and not unusual that people that you hear from are the ones that are having damage done to them. I don't think – back to the issue that Member Garrett raised about emergency rules, and you both would know this better because you went through the emergency rules around vaping and some of the other things – there's a high bar on emergency rules and without knowing the health effects that Member Garrett raised, I think it would be difficult to do it that way.

I think one of the most important questions, which hasn't really been raised, is that health effect question. Kathy Hoffman and I have talked about that. I talked with somebody from the industry about it yesterday. That's part of what we need to do. Particularly if there's a move to try to do something on an emergency basis, you know we need to have strong evidence of a health impact. I don't think you could use emergency rulemaking for market disruption, but, you would know better.

Member Garrett, anything more?

Member Garrett: I just would hate to have something happen. I know we can't control everything. You know how sometimes you read – something happens two weeks from now where something major occurs, some person does something out of character, and they bring it back and fault it to something that – I'd like for us to be proactive and not reactive. That's my main concern on this, that we aren't going to be reactive and wait for something to occur and react to that. We can control that.

Chair Postman: I agree with that. Correct me if I'm wrong, but it was only yesterday that I spoke with someone from the Cannabis Alliance, that this health issue was raised by somebody in the industry, and if there's evidence of that we should see it. And if there is we should act on it, like we would with any other health risk.

I want to make it clear, that while I have questions about this process, I am not on one side trying to stop action against the synthetic Delta-9, or whatever you want to call it. I'm asking questions, which I believe we all should ask, but I do not want to be painted as an opponent of what's happening here. There's nothing on the table before us. When there is it will get serious consideration. And, again, as Chair I've spend the last week, minus a day, talking to staff about how important this is and how we do need to have quick, thorough thought on this to see how we go forward. I've not heard a single word of objection to that.

Member Garrett: Have we considered, or is it our place to even consider – someone made a suggestion of taking that product and having it tested?

Member Hauge: To do that we'd have to admit that there is synthetic Delta-9 into our system and apparently staff is not prepared to admit that.

Chair Postman: Russ, I think that you're really doing a disservice to both the staff of the LCB and the three of us as well. These comments about that really play into the suspicion and the cynicism around this. That's not the staff that I know. That's not how the work is done at the LCB. I really think that's a disservice. They may not have agreed with you 100%, and that's why we have a process that we're working on. That's why no Board member – and when I talk to staff I'm always very clear to say "I'm just one Board member, I'm not telling you what to do, there is not a decision here". It would never have entered my mind to order an investigation of a licensee.

What we face, now, is because of those sorts of comments the inbox is just filling up with people echoing those comments, about essentially how corrupt we are. I object to that. I really do. And, I think it makes it harder for us to address these kinds of issues that are splitting the industry. This is not just, you've got WACA (Washington Cannabusiness Association) over here and Sungrowers over there, either. There's other operators out here. Again, there's Cannabis Alliance, there's other groups. Within those organizations I hear different voices.

And so it behooves us, I think, to be on our toes about this and to really understand where people stand on it and what is going on out there. That's all I'm hearing from staff. I think to say that staff doesn't care or doesn't want to do something, undermines the authority of this Board and plays into the hands of people that are filling our inboxes and calling me names and talking about "regulatory capture" which is just a fancy Harvard Business Review way of saying corruption. I don't like it. It does a disservice to us.

As you know, when someone from WACA came before the Board and listed off a parade of horrors that exaggerated false and, if nothing else, mean spirited, called us malicious, said that our Enforcement people treated them like criminals. We, I, worked very hard with staff to push back on every single thing that was said that was out of line. That's what we do. People are not playing favorites in this agency. I just don't see it, and when it comes from a long-standing Board member with a legal career like yours, I think that it is undermining our authority and our ability to do difficult rulemaking, I have to tell you.

Member Garrett: I am trying to get us to focus on not the negatives, but to focus on what we can be doing in the meantime.

Chair Postman: That's what I'm trying to get us to, Ollie. Exactly. And that's why – I spoke with counsel this morning, Kathy and I have spoken a couple times since last week, I talked with the management team this morning about it, and stressed to the management team that this is a priority and that it behooves us to move and be thorough and open to whatever the case is. And, I said to them the same thing I've said to us here, which is "don't tell me that it's one side against the other. We don't know where everybody stands and this is not one or the other."

There are different opinions out there and we will not act on anybody's opinion, that's not what we do. It's not a popularity contest for whoever sends the most emails. What we need to do is hear from all these people, just like we did in the "deliberative dialogue" around Delta-8, which everybody including you, Member Hauge, spoke highly of. That was valuable. That's the approach we need to take. Let's get on it, let's do that.

Member Hauge: I want to clarify, at no time did I make any representations to any staff other than in the style that you've pointed out, David. I am one Board member. It was in that mode that I talked with the Director, many times, and was told not to order an investigative action, but to bring forward the information that I had gathered as the Board member working on this issue, and to share that with the Enforcement Director. Again, it was at his direction.



I sense an alternative narrative here that somehow this is something that I'm disappointed that people aren't doing what I tell them to do. That is not the case, that is not the case at all. This agency has a very grave responsibility to regulate what is still a federally illegal activity. I want to make sure we follow our own rules. That is my concern.

That, I think, informs my one-way "we have to get this fixed right now" approach because it's really hard for me to see a way around the language of the statutes. If I'm pushing too hard, I apologize. But, I'm going to continue to push because, quite frankly, I think what we are doing now is not enough. I will continue to apply pressure to do more.

Chair Postman: To be clear, I'm not suggesting you are pushing too hard. It's our job. We lead this agency. Their power comes from us and we have the responsibility for the overall agency, policy and everything else, other than what we choose to delegate. All I'm asking is to do that in a way that doesn't get to what I've complained about publically that industry lobbyists do – don't attach character. Don't question motive. Don't say things like "well we could just do what one lobbyist says", or "we could just sit on our hands", this isn't an either-or. People questioning, people saying they need more information, is not people saying "I don't care".

I think our job is to lead and sometimes you have to push hard to do that. This is not about asking you or anybody else to go easy, either on your fellow Board members or on staff, I would never suggest such a thing. All I'm saying is that some of the language, I think, does a disservice to the Board and the agency. And, it's up to you of course whether to use that or not, but when I say that I'm not asking you to stop pushing, or to stop raising important issues, or to stop criticizing. Those are all legitimate jobs of a Board member; I have no doubt. But there's a way to do it. And if members of the public come before us and say those things, I respond to that too. I think we have an obligation to do that, that's my feeling.

Member Garrett: Thank you.

Chair Postman: Thanks for raising it, Ollie. I think Member Hauge has his legal briefing and we'll figure out what the other steps are after that. I know that staff is also looking at this. I think Director Garza's suggestion of a work session is something we should still look at. We need to have this conversation. We need to have it publically and we need to be able to debate the pieces that are debatable. What we shouldn't need to do is debate whether there's an investigation or not. That's going to happen depending on what this process is. It happens every day within the LCB, and I sit as a judge in the final adjudication of that, so I'm trying to preserve that a little bit.

The other thing, since we're on the subject, we've got a lot of people who were very angry when I said on Wednesday that we couldn't take action. That's the law. That's the Open Public Meetings Act, which we respect and most members of the public benefit from. It's clear, unless we said that we were going to take some action, we can't just take action. There's one part of the industry that wanted us to, there's another part that would have sued us, there's others who wouldn't have known what we were doing. That's not regulatory capture, when we say – with 24 hours' notice, with no counsel briefing on the statute – there was an expectation that we would take action? There's just no way, and it's insulting when people suggest that is a sign of corruption. That's just a sign of following the law, a law that they should care as much about as we do.

Any closing thoughts from either Board member? Hearing none, we will see everybody at the Board meeting tomorrow. Thank you.

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Meeting adjourned at 12:25pm.

Minutes approved this 29<sup>th</sup> day of June, 2021.



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David Postman  
Board Chair



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Ollie Garrett  
Board Member



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Russ Hauge  
Board Member

Minutes Prepared by: Dustin Dickson, Executive Assistant to the Board