Washington State
Liquor and Cannabis Board

Board Caucus Meeting

Tuesday, June 29, 2021, 3:00pm
This meeting was held via web conference

Meeting Minutes

CAUCUS ATTENDEES

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

GUESTS

Kathy Hoffman, Policy and Rules Manager

APPROVAL OF MEETING MINUTES

MOTION: Member Garrett moved to approve the June 16, 2021, Special Board Caucus minutes and the June 22 Board Caucus minutes

SECOND: Member Hauge seconded.

ACTION: Chair Postman approved the motion.

BOARD MEMBER AND EXECUTIVE ASSISTANT REPORTS

Chair Postman: Member Hauge, did you want to address the briefing that you had with the Assistant Attorneys General?

Member Hauge: I would, yes. I met with Penny Allen and Bruce Turcott last week at our request. I wouldn't call it a briefing from them to me, they are still in the mode of gathering information about the question that is being asked. And again, the question is what should our response be if we know that Delta-9 is being manufactured from CBD created from hemp outside they system.

One of the most significant things that Penny and Bruce said was that they had just returned from a two-week conference for attorneys that advise regulators on cannabis, where there was a lot of discussion about Delta-8 but there was no discussion about this. It took them a while to get their heads wrapped around the fact that it is a really simple, straightforward question, as Bruce termed it, after we discussed it.

So what we're talking about is somebody taking hemp-derived CBD and not using it as an ingredient, but actually turning it into the more-or-less foundation substance, Delta-9, which then can be used for edibles or vapes or everything else. It took us a while for us to get to that point. They also were very mindful of, and appreciative of, our stance of not wanting to get involved in any particular individual case, and we did

not discuss any individual license holder or – I think I might have mentioned Cleen Tech, but that's about it.

We talked about how I came to my understanding, the people that I had talked to. They promised that they would do a general statutory construction based opinion for our consumption, and that they would do it as soon as is reasonably possible. Before they can issue such an opinion they have steps that they have to go through in their office and I expect for those steps to be taken, but I can say when we're going to have the opinion. They are going to be discussion this matter with others as well, in fact they had discussed the issues with staff prior to talking with me. Again, I was comfortable – at the end of the meeting they understood the nature of the question that we are interested in and are going to get to work on it. They did not give to me, nor did I think it would be appropriate for me to try and forecast what their opinion is going to be.

Member Garrett: I'm sure they get the sense of urgency on this, that can know what we can and cannot do.

Member Hauge: Yes. I told them that we should presume that there is currently a pipeline for CBD based Delta-9 into our regulated 502 market and we are very concerned that we respond to that appropriately and that there is a sense of urgency. We've worked with both of them for a long time, I know they get it and they'll do the best they can.

Chair Postman: I can confirm, Ollie, I don't think there's any question they get the sense of urgency, both among counsel from AAG as well as staff. Someone mentioned this morning that we may see that memo as soon as the end of this week – I would guess next week. I know staff is continuing to meet on this question while that legal analysis is taking place, they aren't waiting for that. There's ongoing conversations about this, so I think when we get that and the three of us all have a chance to look at it as well the staff, I'm hoping that everyone will be ready to have a conversation about what the steps are. I hope it's not much longer. Like I said, I by the end of next week we'll be having those conversations.

Member Hauge: I wanted to carry it a little bit further. I've been at a loss as to what the counter-argument is. My position has been clear. We have pretty clear direction, in my opinion, from the legislature about how we should treat CBD from outside the system, in the system.

I think you've all gotten as well a series of letters from an attorney named Wu in Phoenix. I've reviewed those, and this seems to be his argument, and I'd appreciate it if you think differently. The argument is that we have no jurisdiction – we have to let it go by – because, they are taking CBD from outside the system, made from hemp, and it is below .03 THC Delta-9 so it meets the definition of "not-cannabis". They are bringing it into the system, they add enough cannabis to it to get it above .03 THC, then they are saying "now it's cannabis, and now we are free to work our magic on it, wash it in acid or do whatever the process is, and it is like magic turned into cannabis that is part of the 502 market". I don't find that argument very persuasive, myself, when you take a bottle of CBD and add just enough cannabis oil into it to get it above .03 and you've turned it in to a substance that can be utilized in our 502 system. I don't see how that logic flows. But, again, that is just my opinion right now, I fully expect that Bruce and Penny will take that into account and give us some real legal advice.

Member Garrett: In my conversations around this, and in meetings with Jeremy and others, there was a lot of other conversation that came up that I asked Kathy if she would help me understand any miscommunication and to correct some of the communications around some of the things that I see going out in the public. One of the things I wanted to understand was, we put out a statement on this and then came back a few days later with – I might be saying the word wrong, it might not be called a statement –

but an opinion, how that came about and what that was. I think there needs to be some clarification on that if Kathy is on the phone, or David, I'm sorry.

Chair Postman: Kathy, are you with us? We put out a policy statement and then we put out a clarification of that policy statement. I don't know who all got the communication, but there were a lot of people that were saying it was either difficult to understand or being interpreted by different people different ways, and so it was an attempt – if you remember Kathy came and talked at a Board meeting – trying to explain the intention of the LCB. And again, in this context, it was mostly talking about Delta-8. But, you'll notice in both the policy statement and in the clarification it talks about Delta-8 or other – I don't have it in front of me – products that are converted into Delta-9 or others. So, it was written by design to be more far reaching than just Delta-8, but we didn't have specific conversations then about the synthetic Delta-9 we are talking about today. But, when I read those statements it would have allowed for us to continue that, and I know the policy team is looking at what is the right next step.

Member Garrett: Yes, but I wanted some clarity that the policy statement and the clarification statement came from us and what we were trying to accomplish, that we were not instructed to do anything by the Governor's Office or anything like that. That's what I wanted clarity on, Kathy, can you help me with that?

Kathy Hoffman: Good morning and thank you for the question, Board member Garrett. With respect to the policy statement and the follow up clarifying statement, both of those were initiated by the agency. The clarifying statement was a result of questions that some of us got from licensees and others, asking us to, it think, in perhaps more simple terms than the policy statement came out in because we needed to write the policy statement in a specific way. That was based largely on what statute said and in a way that aligned with the agency's position that really had a lot of legal terminology in it. So, we issued the policy statement on April 28, and the clarifying statement came out a few days later on May 3. Again, that was triggered just by questions we got from licensees and others about, can you help us understand in simpler terms what that policy statement meant or said, and then also where were we going to go in terms of rulemaking because the policy statement didn't speak specifically to rulemaking and there were questions about rules. Does that help?

Member Garrett: It does. I remember after my meeting with the group I met with last week, I can't find my notes now, but as everyone knows that if anything is brought to me I'm going to do due diligence and get the facts and hear all sides. So, there were other things that were brought to my attention during that call that I had asked you to help me understand – do you recall some of those things that I said we wanted to clear the miscommunications on?

Ms. Hoffman: I know the one thing you and I talked about was the origin of the policy statement and the clarifying statement. Please excuse me while I grab my notes.

Member Garrett: David and Russ, I had a meeting where things were brought up that I wanted clarity on because those same things, miscommunication or not, whatever that is, was being put out broadly. So I wanted to do due diligence for my sake and for the public to understand what did transpire, how it happened, and to make sure the right communication is what is going on.

Chair Postman: Right. And I think there's been a lot of, what I think is misunderstanding or misinformation about both the initial statement as well as the clarifying statement, and one of the things we've heard quite a bit – I'll reserve my comments for after Kathy…

Ms. Hoffman: Thank you, Chair. Another question that you posed to me, Ollie, was were other agencies aware of the concerns in the last week since we heard at the caucus on June 16 around Delta-9 derived from hemp. The answer to that is yes, we involved – going back to what Chair Postman shared earlier, I

shared with the Board – we created that policy statement in collaboration with the Department of Health (DOH), State Board of Health (SBOH), Washington State Department of Agriculture (AGR) and the Pharmacy Commission. So they were involved with the drafting of that policy statement, and this goes back to March when we had the second version of the policy statement that we were working on.

The next thing that you asked me was do we know about any reported health risks of Delta-8 or Delta-9 derived from hemp or any source. Right now, checking in with the Poison Control Center there haven't been any adverse events reported. We haven't heard anything from the DOH, SBOH, or otherwise. I can share from our conversations with other states in our CANNRA (Cannabis Regulators Association) meetings around this topic that there have been some reported adverse events, largely in states with just medical marijuana markets or no legalization at all where there has been – I know overconsumption is not the right word – but a child has eaten a Delta-8 gummy or something similar and experienced effects from that. So, we've heard about that, I think the latest report was out of West Virginia. There isn't anything related in Washington, or, no events have been reported in Washington of accidental over-ingestion or any kind of side effect connected to these products and any kind of concentrate or anything like that. Of course we're still early in understanding these products, so it may be that that information still hasn't been presented to poison control, but that's what we know at this point.

Member Garrett: Another thing that we talked about – I was asking you about how in the past we've had situations where we've had to do emergency rules. What is the difference now, and why were we able to do them then?

Ms. Hoffman: That's a great question and I do remember that part of the conversation. Going back to these adverse events, let's think about what happened with the E-VALI outbreak where we had multiple reports of "popcorn lung", in laymen's terms, for what was happening across the country. And, again, this seemed to be happening in states with largely unregulated markets, but even in states with regulated markets like Oregon, folks were having these terrible lung injuries connected to their vaporizing different concentrates, and some were coming out of the regulated market in Oregon.

In our state, Governor Inslee took a look at what was happening and decided that he was going to do an Executive Order that required SBOH to do some emergency rulemaking. This didn't require the LCB to do rulemaking at that point, but because we do regulate vapor products that contain THC and also non-THC, we did engage in emergency rulemaking because there was a public health crisis in Washington State related to E-VALI. We did have instances of those lung injuries occurring because of those vapor products.

So, there was a public health emergency, a declared public health emergency by our Governor here – and this is why I shared the information about what we are seeing with poison control which is nothing at this point. There has to be some sort of public health emergency for the agency to be able to use the emergency rulemaking process consistent with the Administrative Procedures Act (APA). That is outlined in RCW 34.05.350. None of those circumstances exist here. I've spoken with our Attorneys General about this, I've spoken with Board member Hauge about that and others as well. Does that help?

Member Garrett: Yes, it does, thank you.

Ms. Hoffman: My pleasure.

Member Hauge: I just wanted to point out, about these clarifying statements that we issued, the policy statement and the clarifying statement, came out long before we had any hint that hemp-derived Delta-9 was being used to supplant 502 products, legal 502 products, in our regulated market. I don't think we

meant to tie our hands, certainly as a Board member I did not look at these statements as something that would tie our hands and render us unable to proceed.

Chair Postman: No, I haven't heard anybody suggest that. In fact, just the opposite. What I just said, and I think Kathy will agree, is that – she and I talked about this a lot at the time – the goal, our intention and our goal was to find a way to address the issue that was in front of us and that was Delta-8, and that was a lot of the conversation. But in every conversation I've had about this it was also, its others as well, the next will be Delta-10 is what people said, we need to find a way to address this through rules in the short term and legislation in the longer term, so we're not chasing after the next new thing that comes along that we don't know what it is today. So I think there is a very conscious acknowledgement of essentially what we didn't know but needed to be able to address. I haven't heard anybody within the agency say that the policy statement in any way was purposely meant to exclude synthetic Delta-9, just the opposite. I think the question we are facing now is to make sure that we are as precise as possible going forward is the CR 101 that we've begun for the rulemaking around our earlier conversation which is the subject of those statements Member Garrett was just talking about, does that suffice now to capture this in the same way now that it is on the front burner, we know we have this, what do we need to say, what should we say. Do I have that right, Kathy? Is that how you would read that?

Ms. Hoffman: Yes, that's exactly right. I want to reiterate, I brought the CR 101 to the three of you on May 12. At that time we were going off the premise that really what we were worried about – I think that's a fair way to say it – is we knew that Delta-8 was in the market on May 12. To that end, we wrote the CR 101 just to contemplate that, to keep the rule work really concentrated on Delta-8. I want to remind everyone, in the policy statement we say, and this is the second bullet:

> *We want to address the conversion of CBD, hemp, or both, into Delta-8 THC, Delta-9 THC or any other marijuana compound that is not currently identified or defined in the Revised Codes of Washington or the Washington Administrative Code.*

That's what Chair Postman was speaking to when we were thinking about how this could be bigger than just Delta-8. We were contemplating that when we put forth the policy statement. Since the Board caucus on June 16, it appears we need to broaden the scope of that CR 101 to contemplate that second bullet. That was not something we were thinking we would need to act upon – I think that's a fair way to say it – in the original CR 101, so we will be revising it.

Member Garrett: So, the bullet point that you just read that was in the policy statement, I want to clear up miscommunication and perception. That bullet point, when we did the clarifying statement, was that left out?

Ms. Hoffman: I would have to look at the clarifying statement, but I don't think it was excluded and I don't think the clarifying statement suggested that it was excluded.

Member Garrett: Okay, thank you.

Ms. Hoffman: You are welcome.

Chair Postman: I just pulled up the minutes from the 12th, Kathy was there and told us:

> *As you know, our agency has been aware of products entering the regulated market with labeling noting the presence of cannabinoids other than Delta-9 tetrahydrocannabinol (THC) and other CBD (cannabidiol) additives. We've also learned that CBD isolate from hemp and other sources is being genetically or chemically altered to result in potentially result in potentially intoxicating*

psychoactive compounds not derived from marijuana as defined in statute, or synthetic equivalents of substances contained in the cannabis plant.

I think that there is that sense, and I wasn't sure that we needed to refile that CR 101, but I know less about the rulemaking than any of us on this meeting right now. I just kept reading what was there in the statement, but some of the language that's in the statement and that was discussed at the Board meeting when we approved this isn't in the CR 101 and it just behooves us to put it there. I think we can all see that.

Then to the question whether we were told to put out a clarifying statement, or lobbied to, or whatever, there's been a lot of talk at a couple of our meetings that the clarifying statement to appease one segment of the industry. I think it's clear that is a reference to WACA (Washington Cannabusiness Association) because they had been, their director at least, had been vocal about criticizing the initial statement. I've said this before and I'll say it again, she opposed and objected to the clarifying statement. The clarifying statement was put out at the direction of the agency itself for the expressed purpose of trying to shine a brighter light on the issue before we went into what we said a thousand times was going to be a long and iterative process, that would start with learning science about what we were talking about, and we are going to continue that process. But when that statement came out, the director of WACA opposed it, called it confusing and frankly inaccurate, and said that the clarification was still confusing so wouldn't it be better to work with industry partners before issuing a statement. So, at least from WACA's perspective, the clarifying statement was not done in consultation with them much less at their behest or lobbying, and in the end they objected to it quite strenuously.

Member Garrett: Thank you. This clears up a lot of things that were communicated to me.

Chair Postman: Great.

Ms. Hoffman: Thank you very much.

Chair Postman: I think, and since Kathy is still on and you were in some of these meetings, I know staff is head-down working on this issue, are you able to give any sort of time frame, or Rick if you want to jump in, on when we might see something, whether that is a CR 101, letter, statement or whatever that may be?

Ms. Hoffman: I do have an updated draft CR 101 I hope to bring to the Board and actually I think it's on the next agenda, actually, on July 7, for your consideration. This adds the additional language and broadens the rulemaking project, the inquiry, a lot further than it does right now, but still keeps the rule development in its lane, as it were. I want to reiterate that our rulemaking authority around these topics right now, until we have some sort of legislative clarity, is going to be very limited. It is very limited. We can of course under 69.53.42(1)(m) – apologies that I have that memorized – which speaks to the Board's authority to prohibit additives, solvents, those types of things, including vapor products. That's really what we can do at this point in terms of rulemaking, but I think more importantly is working with legislature in the coming year to talk about the ways we can broaden the scope of our authority there.

Then, other things in terms of rulemaking, is getting – let's define synthetic. I know it might be challenging, but we have some other states that have tried that and have that in rule, New York is one of them. New York has done a really good job describing cannabinoids and those kinds of things, so we've got some folks that have done this ahead of us, just a few months ahead of us, but they are great examples to follow in terms of getting our rules together moving forward.

Member Hauge: I am certainly all in favor of us following the path that Kathy has led us on, for many rulemaking exercises now, making sure we are doing things according to what the science says and the law says. However, I do not want to create the impression that, certainly that I am in favor of us doing nothing until we have the legislature tell us that we can pass more stringent rules.

Member Garrett: Right.

Member Hauge: The damage will be done if we wait. Certainly passing rules is not the only tool in our bag. I guess, if I could simplify what I've been saying, is if we don't have the rulemaking authority to deal with this existential threat, then let's find out what else we can do and let's do it as soon as is reasonably possible. It is not – we will not be serving the public if we punt until the next legislative session.

Member Garrett: Thank you, Russ. When you said that, Kathy, that the first thing I thought was that this is what it was sounding like, and that is not our intent. Thanks Russ for helping clear that up.

Ms. Hoffman: Absolutely not our intent. We're going to what we can in terms of rulemaking within our statutory authority, that's absolutely going to happen. All that to say, I don't know that rules are going to be able to – fix it.

Member Garrett: Correct me, Russ, if I'm wrong. Kathy, you're referring to handling this through rules. What Russ is implying is that there are other ways for us to handle this. I just want us to be clear, once again, on what we are trying to communicate because it gets confusing. So, you're referring to rules, and Russ, you are referring to ways other than rules. Am I correct?

Member Hauge: Yes. We have, I guess like any regulatory agency, the authority to regulate and I won't speculate as to what form that may take because I don't know the scope of the problem. But, I do not think that the agency is impotent in the face of substances not coming from the 502 market being introduced into the 502 market. I think that we can find some things to do, if we just find the will to do it.

Chair Postman: Correct me if I'm wrong, Kathy, I don't think anyone is suggesting, there's nobody in the agency that has suggested that we're impotent in our ability to deal with this. Staff is working hard on this. I would expect in the next week or so we'll have some sense of what other tools we could use, but I'll underline what you just said Member Hauge, we don't know the scope of the problem yet, that's an important thing to know before we try to take action, so we need to figure out what that is. We need to have the legal question answered which is in the process now. Then we have a number of tools available to us and we'll discuss those and decide what is appropriate and when. I may be a little bit of a broken record on this, but I do not believe in any way that this is a question of the will of the LCB staff or any Board member or a capability question, we are just going through all the steps that I hear us all talking about – what is the best clarification we can get on the legal question? What is the scope of the problem? What tools do we have at hand to address it in the short term? What needs to be done, if anything, in the long term? And, we're already down this path under the existing conversation around Delta-8 and other compounds including synthetic Delta-9 which is addressed, again, in the policy statement.

I think there is a recognition, clearly around the Delta-8 question, that it is a problem of such scope and running up against some limits on our current regulatory reach that we would need legislation. We've said it over and over again. I don't think that in and of itself means that we feel we are impotent to address Delta-8. We're moving ahead with rulemaking, but we're going to go further, we're going to do more, and I think it's a responsible approach to always find the strongest authority we can. Again, I don't hear

anybody in the agency suggesting that they don't have the wherewithal in any sense to address it, we just have to go through these steps, which we are doing, and they met today. I know a lot of work is happening in that front. I am confident that they will let us know as soon as they have some or any of those questions answered, they will come to us and we can reconvene to discuss further.

With that, thank you Kathy for stepping up, sorry to put you on the spot but that was helpful to clarify some things.

Meeting adjourned at 3:39pm.

Minutes approved this 13th day of July, 2021.

David Postman
Board Chair

Not Present for Approval

Ollie Garrett
Board Member

Russ Hauge
Board Member

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