



CR 101 Memorandum

Re: Implementation of House Bill (HB) 2826 (Chapter 133, Laws of 2020), regarding marijuana vapor products.

Date: July 8, 2020
Presented by: Casey Schaufler, Policy and Rules Coordinator
Prepared by: Kathy Hoffman, Policy and Rule Manager

Background

On September 27, 2019, Governor Inslee issued Executive Order 19-03 to address an outbreak of lung injuries emerging in previously healthy individuals who had vaped THC or nicotine vapor products.

Under direction of Executive Order 19-03, on October 10, 2019, the Washington State Board of Health (SBOH) issued emergency rules prohibiting the sale of flavored vapor products by persons licensed under chapter 69.50 RCW or chapter 70.345 RCW.

On November 20, 2019, the SBOH found that the outbreak of lung disease continued to grow, and that the adoption of an emergency rule prohibiting the sale of vapor products containing vitamin E acetate was necessary for the preservation of the public health, safety, and general welfare. The SBOH relied on the following to support its finding:

- In July 2019, the United States Centers for Disease Control and Prevention (CDC), United States Food and Drug Administration (FDA), state and local health departments, and other clinical and public health partners began investigating outbreaks of lung injury associated with e-cigarette product use, or vaping.
- In September 2019, the CDC activated its Emergency Operations Center to aid in the investigation of the multistate outbreak.
- As of November 13, 2019, there have been two thousand one hundred seventy-two confirmed cases reported across forty-nine states, the District of Columbia, Puerto Rico and the United States Virgin Islands, including forty-two deaths confirmed in twenty-four

states. Fourteen cases of lung injury have been reported in Washington State.

- As part of the investigation into the multistate outbreak of lung disease associated with the use of vapor products, the CDC conducted laboratory tests of twenty-nine samples of fluid collected from the lungs of patients with vaping-associated lung disease from ten states. An article released on November 8, 2019, showed that all of the samples contained vitamin E acetate, providing direct evidence of vitamin E acetate at the primary site of injury in the lungs. Vitamin E acetate is a chemical that is used as an additive or thickening ingredient in vapor products. The CDC has not determined that vitamin E acetate is present in only THC vapor products or only non-THC vapor products. THC was identified in eighty-two percent of the samples, and nicotine was identified in sixty-two percent of the samples. None of a range of other potential chemicals of concern was detected in the samples, but evidence is not yet sufficient to rule out the contribution of other chemicals, substances, or product sources to the disease. The CDC has identified vitamin E acetate as a chemical of concern and stated that, until the relationship of vitamin E acetate and lung health is better characterized, it is important that vitamin E acetate not be added to vapor products.

The SBOH emergency flavor ban expired on or about February 7, 2020.

On March 20, 2020, the SBOH continued its emergency rule concerning the prohibition of the sale of vapor products containing vitamin E acetate. The SBOH is currently moving to permanent adoption of this rule.

On March 25, 2020, House Bill (HB) 2826 passed the legislature in response to concerns related to marijuana vapor product and vapor related lung illnesses. The bill contained an emergency clause, and in its intent section, found that “recent reports of lung illnesses associated with vapor products” demanded “serious attention by the state in the interest of protecting public health and preventing youth access. While state law grants the liquor and cannabis board broad authority to regulate vapor products containing marijuana, the legislature finds that risks to public health and youth access can be mitigated by clarifying that the board is granted specific authority to prohibit the use of any additive, solvent, ingredient, or compound in marijuana vapor product production and processing and to prohibit any device used in conjunction with a marijuana vapor product.”

Consistent with the statutory authority provided to the Board by HB 2826, and upon the determination of the SBOH that vitamin E acetate is a drug of concern

and should be banned, the Board adopted an emergency rule on May 27, 2020 as WAC 314-55-1065 prohibiting the use of vitamin E acetate.

Reasons Why Rules Are Needed

HB 2826 provides that the Board may adopt rules prohibiting any type of marijuana vapor product device, or prohibit the use of any type of additive, solvent, ingredient, or compound in the production and processing of marijuana products, including marijuana vapor products.

However, before adopting either of these types of rules, the Board must have determined, following a consultation with the Department of Health (DOH), or any other authority the Board deems appropriate, the device, additive, solvent, ingredient, or compound may pose a risk to public health or youth access.

HB 2826 authorizes the Board to require marijuana processors to submit, under oath, to the Department of Health, a complete list of all constituent substances and the amount and sources of all constituent substances in each marijuana vapor product.

HB 2826 also provides that Board may adopt rules prohibiting the use of a characterizing flavor in marijuana vapor products.

Rules are needed to implement the provisions of HB 2826, and to establish definitions for terms including, but not limited to “characterizing flavor,” botanical terpenes,” and others.

Process

The rule making process begins by announcing LCB’s intent to consider changes to existing rules, adding new rule sections, or both by filing a CR-101 form with the Office of the Code Reviser. This allows staff, stakeholders, industry partners, and all members of the authorizing environment to begin discussing proposed rule changes. At the CR-101 stage of the rulemaking process, no proposed language is offered. Any interested party may comment on the subject of this possible rulemaking during the designated comment period. Notice will be sent to all who have indicated that they want to receive notice of rule activity pertaining to this preproposal inquiry. The notice will identify the public comment period and where comments can be sent.