



PROPOSED RULE MAKING

CR-102 (December 2017) (Implements RCW 34.05.320)

Do NOT use for expedited rule making

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STATE OF WASHINGTON
FILED

DATE: March 11, 2020

TIME: 10:19 AM

WSR 20-07-052

Agency: Washington State Liquor and Cannabis Board

Original Notice

Supplemental Notice to WSR _____

Continuance of WSR 20-03-176

Preproposal Statement of Inquiry was filed as WSR 18-17-041 ; or

Expedited Rule Making--Proposed notice was filed as WSR _____; or

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or

Proposal is exempt under RCW _____.

Title of rule and other identifying information: (describe subject) WAC 314-55-101 – Quality assurance sampling protocols; WAC 314-55-102 – Quality assurance testing (effective until August 31, 2020); New Section WAC 314-55-1021 – Quality Assurance and Quality Control (Effective September 1, 2020 until February 28, 2021; New Section WAC 314-55-1022 – Quality Assurance and Quality Control (Effective March 1, 2021); and WAC 314-55-1025 – Proficiency testing. The Washington State Liquor and Cannabis Board (Board) proposes amendments and new sections to current marijuana product testing standards that would require the addition of pesticide and heavy metal testing for all marijuana products produced, processed, and sold in Washington State.

Hearing location(s):

Date: **Time:** **Location:** (be specific) **Comment:**

April 1, 2020	10:00 am	1025 Union Avenue, Olympia, WA 98501	
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Date of intended adoption: April 15, 2020 (Note: This is **NOT** the effective date)

Submit written comments to:

Name: Katherine Hoffman

Address: 1025 Union Avenue, Olympia, WA 98501

Email: rules@lcb.wa.gov

Fax: 360-664-9689

Other:

By (date) April 1, 2020

Assistance for persons with disabilities:

Contact Claris Nhanabu, ADA Coordinator, Human Resources

Phone: 360-664-1642

Fax: 360-664-9689

TTY: 7-1-1 or 1-800-833-6388

Email: Claris.Nhanabu@lcb.wa.gov

Other:

By (date) March 25, 2020

Purpose of the proposal and its anticipated effects, including any changes in existing rules: The proposed rule amendments revise and update current marijuana quality assurance sampling protocols described in WAC 314-55-101, and marijuana proficiency testing described in WAC 314-55-1025.

This proposal also provides that as of March 2021, in addition to the currently required suite of tests, all marijuana products produced, processed, and sold in Washington State be tested for pesticides and heavy metals. This is accomplished by revising and updating existing WAC 314-55-102 by way of a phase-in plan, as follows:

- The first proposed revisions, if adopted, would be effective until August 31, 2020.

- On September 1, 2020, WAC 314-55-102 would be repealed, and WAC 314-55-1021 would become effective until February 28, 2021, adding pesticide testing to the current suite of required product testing for all marijuana products produced and sold in Washington State.
- Finally, on February 28, 2021, WAC 314-55-1021 would be repealed, and effective March 1, 2021, WAC 314-55-1022 would become effective, requiring both pesticides *and* heavy metals to the current suite of required product testing for all marijuana products produced and sold in Washington State.

As a technical matter, this proposal renames and more appropriately refers to marijuana *quality control* sampling protocols and marijuana *quality control* and assurance testing standards. While quality control is a set of activities designed to evaluate a product, quality assurance pertains to activities that are designed to ensure that a *process* is adequate and the system meets its objectives. In contrast, quality control focuses on finding defects or anomalies in a product or deliverable, and checks whether defined requirements are the right requirements. Testing is one example of a quality control activity, but there are many more such activities that make up quality control. For these reasons, this proposal renames these sections.

Other proposed revisions include streamlined, clarified language; section reorganization to increase readability, along with reduction and removal of passive language where appropriate.

Reasons supporting proposal: Current testing requirements for recreational marijuana are intended to ensure that products for sale are safe and have accurate potency levels. However, Washington state recreational marijuana products are not required to be tested for pesticides and heavy metals, and although not precluded from doing so, many producers and processors do not test for either. Based on a number of elements, including consumer concern and national best practices, it has become evident that standardized testing for *all* marijuana products produced, processed, and sold in Washington State is necessary. Washington State is the only state with both recreational and medical programs that does not require such testing for all products.

There is no guidance available to the WSLCB or any other state agency regulating marijuana from federal agencies who set standards for agriculture, food, and other products because marijuana remains classified as a Schedule I drug, and federally illegal. This presents regulatory challenges to the WSLCB, regulators throughout the country, and the industry since there is limited funding to support research on how marijuana tainted with potential toxins affects humans. However, while the possible health impact of consuming marijuana products with unapproved pesticides is an emerging area of research, the overarching goal of the WSLCB is to protect public health and safety, and to assure that all products sold within the I-502 market are safe for all consumers.

Recently, concern around the composition and safety of marijuana concentrates for inhalation has highlighted the need to assure that all marijuana products are tested for the presence of harmful compounds and other contaminants. The proposed rule amendments and phase-in plan offer a reasonable time frame that provides both licensees and accredited labs the opportunity to adjust business models where necessary, and offers options to prepare for additional fields of testing either immediately or over an extended, but finite period of time.

Statutory authority for adoption: RCW 69.50.345 and RCW 69.50.348.

Statute being implemented: RCW 69.50.345 and RCW 69.50.348

Is rule necessary because of a:

- | | | |
|-------------------------|------------------------------|--|
| Federal Law? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| Federal Court Decision? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| State Court Decision? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |

If yes, CITATION:

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None

Name of proponent: (person or organization) Washington State Liquor and Cannabis Board

<input type="checkbox"/> Private
<input type="checkbox"/> Public
<input checked="" type="checkbox"/> Governmental

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting: Coordinator	Katherine Hoffman, Rules	1025 Union Avenue, Olympia WA, 98501	360-664-1622
Implementation: Examiners Unit Manager	Kendra Hodgson, Marijuana	1025 Union Avenue, Olympia, WA. 98501	360-664-4555
Enforcement: Enforcement	Justin Nordhorn, Chief of	1025 Union Avenue, Olympia, WA, 98501	360-664-1726

Is a school district fiscal impact statement required under RCW 28A.305.135? Yes No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

Other:

Is a cost-benefit analysis required under RCW 34.05.328?

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name: Katherine Hoffman

Address: 1025 Union Avenue, Olympia WA 98502

Phone: 360-664-1622

Fax: 360-664-9689

TTY:

Email: rules@lcb.wa.gov

Other:

No: Please explain:

Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

RCW 34.05.310 (4)(b)
(Internal government operations)

RCW 34.05.310 (4)(e)
(Dictated by statute)

RCW 34.05.310 (4)(c)
(Incorporation by reference)

RCW 34.05.310 (4)(f)
(Set or adjust fees)

RCW 34.05.310 (4)(d)
(Correct or clarify language)

RCW 34.05.310 (4)(g)
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(4)(d): WAC 314-55-101; WAC 314-55-1025.

Explanation of exemptions, if necessary:

COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency's analysis showing how costs were calculated.
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

What is the scope of the rule package?

Compliance with the proposed, specific requirements described WAC 314-55-102, WAC 314-55-1021, and WAC 314-55-1022 will likely result in additional compliance costs. This includes the incremental, phased-in requirement to test all marijuana products for pesticides and heavy metals. The remainder of the rule revisions are exempt.

Which businesses are impacted by the proposed rule package? What was their North American Industry Classification (NAICS) code or codes? What are their minor cost thresholds?

The NAICS code, business description, and minor cost thresholds are described and calculated below:

Type of Business	# of Businesses In Washington	Percentage of Businesses Considered Small ³	Average Annual Revenues ^{4,5}	Minor Cost Threshold (0.3% Average Annual Revenues)
Marijuana Producer, Processor	341 ¹	98%	\$1,418,224	\$4,255
Cannabis Testing Laboratory	14 ²	100%	\$1997000	\$5,990

Notes:

¹ Represents the number of Marijuana producer/processors that reported revenue, lab tests, and employment between 2018-05 and 2019-04

² Represents the number of labs certified to conduct testing on cannabis products in Washington State.

³ Defined as having 50 or fewer employees. Producer/processor employment information provided by the Employment Security Department for the 3rd quarter of 2018. Laboratory businesses employment determined through interviews with labs and LinkedIn business profiles accessed 2019-04 and 2020-01

⁴ Average annual revenues for producer/processors based on total sales divided by the number of business that reported sales, lab tests, and employment.

⁵ For testing laboratories, minor cost threshold based on average annual revenues from the 2010 Economic census of the U.S. for businesses in the "Testing Laboratories" category (NAICS 541380)(WA State Auditor's Office 2019)

Does the rule have a disproportionate impact on small businesses?

In particular, in order to calculate annual costs, we require information on a per entity basis describing the number of samples being tested per year. While we have some limited anecdotal information on the numbers of samples tested per year by individual producer/processors, we lack information on the myriad business models that could lead to a wide range in the number of samples tested per year, and thus a wide range of per entity compliance costs per year. Developing reliable estimates would require a comprehensive survey with a *reasonable* response rate, and even then, given the wide variability of business models and documented inconsistency in responses from licensees, per entity costs is difficult to determine.

Did the agency make an effort to reduce the impact of the rule?

The proposed rule changes include provisions that are intended to reduce the compliance costs for small businesses. These include:

- An incremental phase-in period that contemplates full compliance by March, 2021; and
- Allowing labs to subcontract pesticide and heavy metals testing for a period of time.

It is difficult to accurately assess if small businesses will be disproportionately impacted by this rule proposal when there is both significant overlap and variance between the groups evaluated. As noted above, and throughout this SBEIS, most of the businesses impacted are small as defined by RCW 19.85.030.

Did the agency involve small businesses in the rule development process?

Throughout the rule development process, the WSLCB has engaged with businesses likely to be affected by the rule, and who volunteered to participate in the process. To support development of the SBEIS, a subset of six producer/processors spanning a range of both tiers and types of producers was contacted; interviews were conducted with two producers, one processor, and one producer/processor. In addition, interviews were conducted with three testing laboratories. Additional opportunity for public comment will be available when the proposed rule is published. Indoor and outdoor farmers, including sun growers, were included in the interviews.

During the rule development process, the WSLCB hosted two “Listen and Learn” sessions, one in April 2019 and the second in August 2019, inviting industry discussion and feedback on the proposed rules, and discuss potential mitigation strategies. The WSLCB’s stakeholder process encouraged interested parties and industry partners to:

- Identify burdensome areas of existing and proposed rules;
- Proposed initial or draft rule changes; and
- Refine those changes.

Although the WSLCB broadly messaged these sessions (messaging went directly to *all* licensees, as well as over 10,000 GovDelivery subscribers), few processors and producers attended the sessions. This rule project was the first employing the “Listen and Learn” model, and attendees were initially unfamiliar with not only the model, but the process, although detailed agendas were provided well in advance of each meeting.

These heavily facilitated sessions followed two thought streams: the first asked attendees to review draft conceptual rules offered well in advance of the meeting and provide feedback or specific rule language, specifically indicating what they liked, didn’t like, and what they proposed in the way of a solution. No rule language revisions were offered by attendees at either session. Solutions ranged from suggesting that figures and language be more concise in general without offering example, to unsupported assertions that adding pesticides and heavy metals to the suite of required tests would put certain producers out of business.

All comments received during these sessions were curated to the extent possible, although developing themes from sessions was difficult based on the broad range of comments. The proposed rules went through several stages of edits, review, discussion, and then further refinement before arriving at the initial proposal. The end result of this process are proposed rules that are offered as a framework and guidance for testing marijuana products that supports the overarching WSLCB goal of public health and safety.


A summary of the description of issues related to the proposed rule set and how the agency collaborated with stakeholders and industry partners to mitigate potential burden associated with rule compliance is more fully described in the Significant Analysis prepared consistent with RCW 34.05.328, including a phase-in plan, and offered as part of this initial rule proposal.

Will businesses have to hire or fire employees because of the requirements in the rule?

While the impacts to individual producer processors may depend on their ability to pass on increased testing costs (in the form of higher prices to retailers), the proposed rule is not expected to affect the amount of marijuana produced. Thus, the proposed rule is unlikely to affect the overall number of employees of producer/processors or retailers. For example, if increased testing costs lead some smaller entities to cease production, other entities may produce larger volumes. While it would be an indirect effect, the proposed rule may result in some limited additional employment in the labs conducting testing. In order to conduct the testing, a lab adding this testing capability may need to hire one or two additional scientists or technicians to operate equipment and conduct tests. The extent of potential employment gains are uncertain, but given the small number of labs in the industry (currently 15 certified labs) any employment gains would likely be limited.

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name: Katherine Hoffman
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Email: rules@lcb.wa.gov
Other:

Date: March 10, 2020	Signature: 
Name: Jane Rushford	
Title: Chair	