Washington State
Liquor and Cannabis Board

Responses to Common Themes

Concerning November 18, 2020 public hearing on Supplemental CR 102 filed as WSR 20-20-040 concerning cannabis product quality control rules
April 14, 2021

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Introduction

This document is not a concise explanatory statement as described in RCW 34.05.325, or an interpretive or policy statement as described in RCW 34.05.230. The content of this document is for informational, educational, and discussion purposes only.

Background and Purpose of this Document

Background

In early 2018, several stakeholders, including medical marijuana patients, consumers, and licensees, urged WSLCB to require producers and processors to test recreational crops for pesticides and heavy metals. These partners asserted that such a move, already adopted in other states, would inspire confidence among consumers, increase access to medically compliant products, and bolster sales.

In August 2018, the WSLCB began the initial stages of rule development regarding marijuana quality control and product requirements. Among the rule changes being considered and identified in the CR101 was whether all marijuana products be tested for pesticides and heavy metals because neither test is currently required for recreational products in Washington State.

The CR101 was filed in August of 2018, and the agency received over 50 comments, largely in support of requiring pesticide and heavy metal testing for all products.

In late 2018, WSLCB began the process of contracting with an economist through the Governor's office of Regulatory Innovation and Assistance (ORIA) to help with a preliminary small business economic impact statement consistent with the requirements of chapter 19.85 RCW, the Regulatory Fairness Act (RFA). The RFA contemplates and examines the impact of proposed rules on businesses.

In April of 2019 WSLCB hosted its first Listen and Learn session. Licensees were invited to offer language, suggestions and alternative proposals to draft conceptual revisions to WAC 314-55-101, 102, and 1025. Messaging on this session went to all licensees and other interested parties, representing over 10,000 GovDelivery subscribers. During this initial three-hour session, many licensees became acquainted with this method of engagement and participated, although the agency was not able to identify thematic consistency based on the broad range of responses.

WSLCB contracted with Industrial Economics, Inc. to prepare a preliminary SBEIS. That work was in June of 2019. The agency continued to review and analyze scientific research that eventually became cited resources in the significant analysis. The agency continued to collect comments during this time as well.

In August of 2019, WSLCB hosted a second Listen and Learn session inviting licensees to provide ideas around phase in plans and mitigation strategies. Over the course of both Listen and Learn sessions, through emails to the WSLCB, and through other forms of communication, the agency received in excess of 300 comments. These comments were sorted, analyzed to the extent possible, and included as an attachment with original rule proposal introduced on January 22, 2020. That proposal set a public hearing for March 18, 2020.

As a result of the pandemic and the statewide response to it, WSLCB was forced to pause this project, and refile the CR102 in May of 2020 because the agency was unable to host a public hearing on March 18, 2020. A virtual public hearing was scheduled for July 8, 2020. At the public hearing, a wide range of comments were received, most objecting to the proposal as written. Few alternatives were offered other than in concept, and a few commenters offered language proposals. However, one major common theme emerged: a request to increase lot size.

Since this suggestion was a substantive change to the rule proposal, and a revision that the agency could operationalize, the agency prepared a supplemental CR 102, adjusted the phased-in approach to rule implementation, updated the SBEIS to the extent possible, and set a hearing for November 18, 2020.

Between the close of business on November 18, 2020 (date of the supplemental CR 102 hearing) and the close of business on the following day, November 19, 2020, approximately 120 written comments were received regarding a supplemental rule proposal on cannabis product quality control rules. Almost forty were from members of the Washington Sungrowers Industry Association (WSIA). The document is attached as Exhibit A. WSLCB values and appreciates the individual stories and unique experiences offered and shared in all of the comments received.

All comments received as a result of the supplemental CR 102 rule proposal have been reviewed. Themes emerged from those comments, and they are reflected in the table of comments attached hereto as Exhibit B.

Purpose of this Document

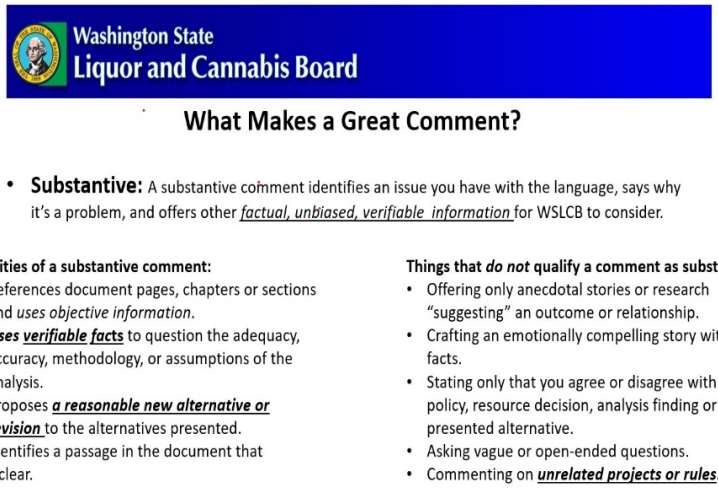
The purpose of this document is to offer substantive responses to the themes that emerged from comments received regarding the supplemental CR 102 filed as WSR 20-20-040 on September 30, 2020 concerning proposed cannabis product quality control proposed rules, and the public hearing held on November 18, 2020. Some of the comments offered alternatives that would require legislative action, presented operational and funding challenges, offered both non-substantive, and substantive feedback.

Substantive v. Non- Substantive Comment

Public agencies benefit from substantive comment to inform direction. General disagreement or objection to a proposal, unsupported statements, objection to statutorily mandated process, personal opinion, and personal opinion on drafting style are often offered by participants, but

do not constitute substantive comment that helps to inform agency direction. Substantive comment is considered to be objective, contrasted to non-substantive comment which is largely considered to be subjective.

To assist participants in providing comment, WSLCB offers text from a slide deck presented to stakeholders in November, 2020, describing the form and substance of substantive comment:



This slide deck is attached to this document as Exhibit C. While this distinction between substantive and non-substantive comment is not defined in statute or regulation, it is relevant here since public agencies in Washington State create revise and repeal rules based on stakeholder feedback and substantive comment. Special expertise, legal training or both are not prerequisites for offering substantive comment.

The agency looks forward to and appreciates the continued opportunity to offer outreach and educational opportunities that will support and encourage meaningful engagement in future rule and policy development. The WSLCB rules webpage has been substantially updated to offer additional information and resources on the rule development process. A video series describing that process, the agency's' various stakeholder engagement models, and tips on how to share perspectives, ideas and language, and participate effectively is currently being developed.

Substantive Comment Themes

Theme 1: Sampling Protocols

Many commenters requested third party sampling, either through the WSDA, through WSLCB sending enforcement and education staff to farms to perform sample deduction, or creating a new license type for test sample collectors. Another option the agency considered, offered by

labs following the public hearing, but was not offered in public comment, was the concept of labs collecting samples under current rule.

Comments included,

"*Self-selection of samples provides opportunity for dishonest people to game system"*

"If Producers and Processors are allowed to self-sample QA samples, there can be no guarantee of the actual representative nature of the samples."

These concepts were also discussed at the follow up Producer/Processor Deliberative Dialogue session on February 4, 2021.

WSLCB performed a thorough analysis of all suggestions offered at the public hearings, and provides the following response:

With respect to the suggestion that WSDA assume sampling and testing:

Cost Projections

In attempting to project resources needed to run a state sampling program and the costs that would be incurred by licensees the following assumptions were used:

- Sampling program would not be a state subsided program
- Licensee fees would fund the program
- The program would need staffing and infrastructure necessary to scale to ~1500 license locations to encompass all testing required by producers and processors
- At a minimum inspector classifications would be: Agricultural Commodity Field Inspector 2 – Salary Range 36
- A scheduling tool would need to be built or purchased to handle the volume of sample requests
- Chain of custody disclaimers would need to be created
- Fee structure estimates would use existing WSDA hemp program dollar amounts
- Mileage reimbursement rates assume there are agency vehicles provided and per mile would be subject to DES rates which are subject to change
- Total number of samples was calculated using the average amount of samples taken a month ~12,000/per month
- There would be indeterminate opportunity cost loss to licensees in the additional time added to sample collection and test result completion as part of sample scheduling and collection.

Budget Estimates:

Producer only sample collection

Fees would need to support at a minimum 52 FTES and program costs

		Total	Westside	Eastside
TOTAL PROGRAM COSTS	**Monthly**	**52.00**	**16.00**	**34.00**
Salary/Benefits	$ 320,975	**$ 3,851,697**	$ 1,173,887	$ 2,484,038
Ongoing except travel	$ 16,753	**$ 201,040**	$ 62,560	$ 132,940
Travel (per diem, lodging)	$ 12,500	**$ 150,000**	$ 48,000	$ 102,000

Hybrid Premium Vehicle Lease	$ 17,333	$ 208,000	$ 66,560	$ 141,440
Mileage	$ 34,161	$ 409,931	$ 84,102	$ 325,829
Total ongoing	**$ 401,722**	**$ 4,820,668**	**$ 1,435,109**	**$ 3,186,247**
Onetime		$ 120,860	$ 34,450	$ 74,200
Total 1st year		**$ 4,941,528**	**$ 1,469,559**	**$ 3,260,447**

Producer/processor sample collection

Fees would need to support a minimum of 59 FTES and program costs

		Total	Westside	Eastside
TOTAL PROGRAM COSTS	**Monthly**	**59.00**	**19.00**	**38.00**
Salary/Benefits	$ 360,718	$ 4,328,621	$ 1,378,283	$ 2,756,566
Ongoing except travel	$ 19,034	$ 228,410	$ 74,290	$ 148,580
Travel (per diem, lodging)	$ 14,250	$ 171,000	$ 57,000	$ 114,000
Hybrid Premium Vehicle Lease	$ 19,760	$ 237,120	$ 79,040	$ 158,080
Mileage	$ 39,228	$ 470,739	$ 107,081	$ 363,658
Total ongoing	**$ 452,991**	**$ 5,435,890**	**$ 1,695,694**	**$ 3,540,884**
Onetime		$ 139,410	$ 42,400	$ 84,800
Total 1st year		**$ 5,575,300**	**$ 1,738,094**	**$ 3,625,684**

The full analysis are attached as Exhibits D and E.

With respect to WSLCB enforcement and education staff deducting samples:

- Presents operational and infrastructure challenges, including costs, insurance, additional vehicle purchase, processing, and other logistical concerns.
- Current staffing levels, which cannot be increased under the Governor's current hiring freeze, would not support additional staffing needs.
- Unclear where enforcement and education staff would take samples once deducted: to accredited/certified labs?
- Unclear whether enforcement and education staff would ultimately become a courier service for accredited/certified labs.

With respect to creating a new license for samplers:

- Creating a new license requires statutory legislative action to create a new license, fee structure, etc.
- Fees would ultimately be borne by licensees in the form of sampling charges.

With respect to labs deducting samples:

- Will likely come with a fee.

- Possible through rule, but increases lab liability risk.

Theme 2: Suggestion that WSLCB Hold Rule Revision until Completion of Cannabis Science Task Force work

This suggestion was offered at both the first and supplemental CR 102 hearings.

Sampling is not part of lab standards that will be established by the Cannabis Science Task Force (CSTF). WSLCB offers the following excerpt from the first report of the CSTF to emphasize two points. First, the CTSF suggests that ***current*** not proposed WSLCB sampling requirements are insufficient. Second, fraudulent activities, inadvertent sampling error, and non-randomized sampling will continue to produce altered or biased samples if additional sampling controls are not put in place:

"The current WSLCB sample requirement of just one 4-gram sample for testing may be insufficient or unsuited for all the required testing that is to be performed on that sample. Specifically, for samples arriving for analysis of pesticides, the entire sample should be homogenized and split to ensure a representative subsample will be tested. However, many mixing and sample splitting techniques that would be most appropriate for pesticide sample preparation may consequently contaminate the sample for microbiological testing. While the labs can request additional samples, some growers and processors are reluctant to part with more of their marketable product. The workgroup felt that due to the analytically driven need for two samples, the requirement should come from rule rather than leaving it up to the individual labs to handle.

Additionally, many Task Force workgroup members felt that fraudulent activities, inadvertent sampling error, and non-randomized sampling will continue to produce altered or biased samples if additional regulatory sampling controls are not put in place. Further, this problem will undermine any good scientific practices the Task Force recommends for testing pesticides in cannabis flower. Using appropriate methods and practices, the laboratories would be producing results showing cannabis products that appear to meet the regulatory requirements, but in actuality, the sample tested may not be representative of the actual product going to market. **A change in the WSLCB rule around who can sample and how sampling is performed were offered as options**. Another option would be to establish a mechanism to investigate fraudulent activities both at sampling and in the labs. The EPA uses their Office of Inspector General to perform investigations of instances of intention misrepresentation, intent to deceive (usually for monetary gain), lying, cheating, and stealing."

The agency encourages licensees to review the report at https://apps.ecology.wa.gov/publications/SummaryPages/2003005.html

Theme 3: Opposition to Number of Subsamples

Suggestions included considering lot or harvest homogenization on a quarterly basis. Several commenters asserted that sublotting is exceptionally – and unnecessarily – complex and "*tantamount to tracking which slices of which apples picked from an orchard on a particular day were used in apple pies delivered and sold*" in specific stores across the state. Stakeholders also asserted that sublotting requires tracking of unnecessary minutiae and results increased cost with no verifiable benefit to public health or safety.

The agency understands these concerns, and appreciates the analogy offered. However, WSLCB notes while the analogy is helpful conceptually, cannabis is tested for potency while apples are not. The concern that the agency is attempting to address is an accurate representative sample of a lot, or potentially, a harvest. To assist, WSLCB turned to other states for examples of sampling size and subsamples. WSLCB offers the following tables as a way to compare and contrast sampling and subsampling sizes in other states:

State	Market Type	Sample Increments	Rules
AK	Rec	Depends on size >> See table	3 AAC 306.455
CA	Rec	Representative sample must be 0.35% total harvest batch weight >> See tables	16 CCR 5707
CO	Rec	Dependent on product type >> See tables	1 CCR 212
NV	Rec	"Sampling protocols" means the procedures specified by the Department which are required to be used to obtain samples of marijuana for quality assurance testing." (Appears nothing is complete yet, waiting for Nev Dept of Ag)	NAC 453D.130
OR	Rec	Sample increments taken must in total represent a minimum of 0.5 percent of the batch (No absolute is required, although minimum 10 is required. Lab must show that sampling procedure ensures a 95% confidence interval)	OAR 333-007-0360
WA	Rec	4 grams per 5lb lots	WAC 314-55-101

Sample Size Examples (from existing rule) for Alaska, California, and Colorado

AK lbs	1g Sub Samples		CA lbs (flower)	# of Increments		CO lbs (flower)	# 0.5g samples
1	4		< 10	8		<10	8
2	4		10.1-20	16		10.1-20	12
3	5		20.1-30	23		20.1-30	15
4	6		30.1-40	29		30.1-40	18
5	8		40.1-50	34		40.1-100	23
6	10					>100	29
7	11		**CA Product Sizes**	**# of Increments**			
8	13		<50	2		**CO lbs (concentrates)**	**# 0.25g samples**
9	14		51-150	3		<1	8
10	16		151-500	5		1.1-2	12
			501-1200	8		2.1-3	15
			1201-3200	13		3.1-4	18
			3201-10,000	20		4.1-10	23
			10,001-35,000	32		>10	29
			35,001-150,000	50			
						CO units (edibles)	**# Units**
						<100	2
						101-500	4
						501-1000	6
						1001-5000	8
						5001-10,000	10
						>10,000	12

Theme 4: Testing Protocols

The WSIA form letter and previous comments suggests that the agency implement "…testing for illegal or disallowed pesticides…completed at the farm level using third parties" " although there has not been an offering in concept or language regarding the meaning of the phrase and among other things, how it might be operationalized.

In a follow up conversation with a representative of WSIA on January 12, 2021, the agency learned that "farm-basted testing with a third party" means third party testing occurring at the farm for outdoor farmers, or by the room for indoor farmers. The concept is offered as way to remove a lot or batch system, and contemplates testing an entire "harvest" meaning one room or one closed loop light dep system or similar.

WSLCB appreciates the clarification, and based on that, the notion of testing at a cannabis farm, whether indoor or outdoor, is clearer. While the agency considers the idea of farm based testing, the agency encourages stakeholders to review the cost analysis of WSDA and other third party sampling as analyzed above, and in attachments to this document. An infographic including this proposal is attached as Exhibit F.

Theme 5: Harvest Level Testing vs. Lot Level Testing

"Harvest level testing" has often been suggested by WSIA during rule development, although a definition of the phrase has not been offered. When asked by an attendee to define the concept at the Producer/Processor Deliberative Dialogue session on February 4, 2021, panelists generally struggled to offer a definition or indicated that they didn't know what either phrase meant. One panelist offered his interpretation: testing would occur on the farm, and a harvest level test would occur at the time of harvest. This contemplates a third party entity coming to a farm, sampling and testing, rather than the licensee sampling and transferring the product to an accredited/certified lab. Please refer to Theme 1 for a discussion and analysis of WSDA/third party sampling costs.

With respect to harvest level testing, licensees have expressed concern in both oral and written comment around the lack of alignment with Department of Health (DOH) rules regarding medically compliant product and adult use product. It has also been asserted that if harvest level testing is allowed under current DOH rules (see chapter 246-70 WAC), why couldn't that be extended to recreational product regulated under chapter 314-55 WAC?

To meaningfully respond to these concerns and questions, WSLCB reached out to Kristi Weeks, author of the original DOH medically compliant product rules. DOH rules were promulgated in 2016 when a different traceability system was in place, and Ms. Weeks indicated that heavy metal and pesticide screening at the time of harvest could be contemplated by that system. These rules have not been updated since 2016, however, and Ms. Weeks noted that the allowance of testing at the time of harvest referenced DOH rules was offered as a compromise to outdoor growers who heavily objected to lot level testing.

Further, WAC 246-70-030(8) provides that "harvest" means the marijuana plant material derived from plants of the same strain that were brought into cultivation at the same time, grown in the same manner and physical space, and gathered at the same time. However, there is no reference to or definition of "harvest level testing." Rather, WAC 246-70-050(1)(b)(ii) provides that pesticide screening and heavy metal screening are required for all marijuana flowers, trim, leaves, or other plant matter, intended for retail sale without extraction at the time of harvest or when placed into lots.

WSLCB offers that licensees still are required to have a sample that scales in relation to the size of their harvest. To assist in understanding this request in relation to other suggestions and current testing protocols, please see Exhibit F.

Theme 6: Reduce Number of Mandatory Tests to Accommodate Pesticide Testing

Several comments were received regarding the necessity for current suite of tests. Some commenters queried if it was possible to remove one or more tests to accommodate mandatory pesticide testing, and whether heavy metal testing was necessary absent verifiable data indicating adverse events connected to the consumption of cannabis. For example, one commenter offered:

"I would also like to point out that even at the 10 lb mark to help ease the cost of adding two additional tests it still will increase the costs by 26% per lb to the P/P when it comes to testing. The lab we currently work with charges $80 for pesticide testing, $50 for heavy metal testing, and $85 for potency I502 panel. Currently I am paying $85/5lb = $17 per lb, the new proposed rules would increase my cost 10lbs/($80+$50+$85 = $215), 10lbs/$215 = $21.50 per lb. I suggest keeping the lot size to 10 lbs and doing a I502 panel and pesticide testing but only require per harvest heavy metal testing be submitted so as to not have such a dramatic increase in cost per lb for testing."

In consideration of these comments, the WSLCB is exploring whether test modification is appropriate. The agency is most focused on improving consumer confidence when purchasing cannabis products. To assist, agency staff prepared the attached Cannabis Testing Failure Rate Data document, attached as Exhibit G. It is important to note that only a few analytes have decreased in the number of failures per month – none of which has had meaningful or sustained improvement in their fail rates. Additionally, the agency encourages readers to review the sampling collection costs comparing the current and proposed rules that is included as part of Exhibit F.

Theme 7: Consider WSDA Testing Protocols

WSIA offered the hemp program protocols as an alternative to current marijuana testing protocols. WSLCB refers readers to Theme 1, including the third party sampling discussion and associated Exhibits D and E.

The WSDA hemp program has offered some guidance that has been provided at both the federal and state level, both focused only on testing at the plant level. There are currently no product testing requirements under the WSDA hemp program. See Exhibit H.

Theme 8: Lot Level Testing Does Not Protect Employees from Exposure to Dangerous Chemicals

This assertion was offered in some of the form letters, although examples of how lot level testing exposed cannabis employees to dangerous chemicals were not offered, and no reports of adverse events based on dangerous chemical exposure offered. It is unclear how testing might occur at the lot level in a way that exposed cannabis employees when testing generally occurs in accredited/certified cannabis testing labs. For purposes of this response, the agency assumed that the comment possibly referred to lot level sampling, since this may be a way that cannabis business employees could potentially be exposed to chemicals.

WSLCB notes that pesticide handler employer duties are regulated by the Washington State Department of Labor and Industries (LNI), generally, under chapter 296-307 WAC. These regulations mirror federal law under 40. C.F.R. Sec. 170. Chapter 296-307 applies to all agricultural operations with one or more

employees covered by the Washington Industrial Safety Act (WISHA) under chapter 41.17 RCW. The agency encourages licensees to contact LNI with concerns regarding employee exposure to dangerous chemicals.

Theme 9: Disproportionate Impact on small business, minority owned business, or both

Several comments offered that WSLCB consider the impact of increased testing on small and minority owned businesses. Comments were received, such as the following:

"We are 100% minority owned OH being Native American and Woman owned and BC being Native American, Women and Latino owned, I feel that for some individuals speaking from a point of being 100% minority owned in the industry is of value to hear from. I believe it's so important to continue to protect the industry in a way that craft cannabis companies can exist, it is important that all sizes of operations thrive in cannabis and not just larger companies."

The agency greatly appreciates this comment and suggestion of expanded analysis. One of the challenges the agency faces is defining "small business." As discussed in Listen and Learn sessions, and in both the first and amended SBEIS, RCW 19.85.020(3) defines "small business" as any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees." Under this definition, approximately 98% of licensed cannabis businesses meet the definition of "small business.

From the perspective of the economic analysis required under chapter 19.85 RCW, WSLCB also faces challenges in stratifying levels of "small" or "smallness" within that 98% unless it turns to the tier system to create such a delineation. Licensees do not agree, nor does the agency, that this is an accurate representation because there is variation between tiers regarding number of employees, revenue, and other factors, and the delineation creates an artificial separation that is only defined by the amount of canopy licensed, rather than the actual business operations of each licensee.

The agency anticipates contracting with an economist to complete an updated SBEIS in the coming months based on an updated rule proposal. As part of that contracted work, WSLCB is contemplating a broader licensee survey than it was able to complete previously, designed to track demographics such as location, tier size, inclusion in protected groups, and other details. The agency is also considering a robust cost/benefit analysis in the Significant Analysis consistent with RCW 34.05.328 since some of the concerns expressed by licensees are not contemplated for analysis, nor are they required under chapter 19.85 RCW. The Significant Analysis offers more flexibility to unpack and explore impacts than may be considered indirect under the RFA.

Theme 10: Test only end products

Multiple comments were received requesting that the agency consider end-only product testing.

WSLCB offers that approximately 75% of all marijuana products sold within the Washington State I-502 market required one round of testing[1]. The remaining 25% require sampling and testing more than once - including the additional potency test required for items meeting the definition of "end product." The

[1] These estimates were created using information regarding overall sales by product types and the testing requirements associated.

agency offers the discussion and analysis of end and intermediate product testing, describing the actual number of products that have undergone one round of testing. That discussion is attached hereto as Exhibit I.

Non-Substantive Comment Themes

Theme 1: WSLCB Education and Outreach Opportunities

Sub-theme: Application of Chapter 19.85 RCW and Chapter 34.05 RCW

Comments suggested a fundamental misunderstanding of the application and limited scope of the Regulatory Fairness Act (RFA), rule development process and procedure under the Administrative Procedures Act (APA), and the limited scope of Small Business Economic Impact Statements (SBEIS) requirements. Links were provided to the Governor's Office of Regulatory Innovation and Assistance (ORIA) in the Significant Analysis (SA) as a way to offer education and resources on the RFA, SBEIS and SA, and the agency has been transparent about its work with ORIA and the contracted economist who assisted the agency in drafting the initial SBEIS for this project.

Comments were offered that the agency should provide analysis beyond what chapter 19.95 RCW requires, such as:

> *"The proposal is not equitable and will have a significant disproportionate impact on small craft producers, many of which are owned by women, minorities, and economically disadvantaged individuals. Neither the phased in approach nor the increased lot size effectively mitigate the impact these rules will have on small businesses such as mine."*

Non-substantive comment reflecting opinion on drafting style were offered, such as:

> "*Furthermore, the WSLCB's SBEIS and Significant Rule Analysis is a complete and utter joke that reads as though it was written by the lobbyist for well capitalized indoor producers."*

Comment also suggested a general misunderstanding of both chapter 34.05 RCW and chapter 19.85 RCW, such as:

> *"The WSLCB should appoint a committee in accordance with RCW 34.05.310(2) to assess the costs of the proposed rules and more effective means of reducing the costs for small businesses in accordance with RCW 19.85.030."*

Additionally, in oral comment at the public hearing, suggestions were offered indicating that WSLCB should rely on self-reported licensee data rather than the North American Industry Classification System (NAICS), Department of Revenue, Employment Security, and other verifiable data, as well as tools developed by ORIA economists necessary for agencies to complete RFA analysis. It was asserted that cannabis businesses are different from other businesses, therefor RFA should apply to cannabis licensees differently than all other businesses in Washington State. Of note is that recently, the NAICS classification system added the following definitions for marijuana [cannabis] industries, recognizing businesses offering specialized lines of merchandise, crops grown under cover, and crops grown in an open field:

- 111419 **Marijuana**, grown under cover
- 111998 **Marijuana**, grown in an open field
- 424590 **Marijuana** merchant wholesalers
- 453998 **Marijuana** stores, medical or recreational

These classifications are updated every five years, and it is anticipated that a new update will be available in early 2022. See North American Industry Classification System (NAICS) U.S. Census Bureau.

Two comments asserted that WSLCB include social equity as an additional analysis under chapter 19.85 RCW, although there is no statutory requirement to do so, and thus no uniform metric for all state agencies to rely upon to complete such an analysis. The Regulatory Fairness Act (chapter 19.85 RCW) is limited to analysis of a small business economic impact statement if a proposed rule will impose more than minor costs on businesses in an industry.

WSLCB acknowledges these comments, notes opportunities to provide education, and reaffirms its demonstrated commitment to assuring that its regulations lead to socially equitable conditions. The agency is working with ORIA to develop a methodology contemplating social equity analysis that could be included in future significant analysis described in RCW 34.05.328.

Until chapter 19.85 RCW is amended to require a social equity metric and analysis as part of an economic analysis of compliance cost, the WSLCB will continue to complete economic analysis consistent with statutory requirements for all proposed rules that meet the qualifications for such an analysis. Licensees and other interested parties who wish to propose amendments to chapter 19.85 RCW, such as requiring social equity analysis and providing exemption from RFA required analysis on the basis of business type from may contact their local legislative representatives.

Sub-theme: WSDA Contract Scope, Limitations, Potential for Expansion

Since the inception of this rule project, comments have been received regarding the scope and nature of the Washington State Department of Agriculture (WSDA) contract with the WSLCB. Since the rule proposal did not contemplate reliance on the WSDA as a testing or sampling resource, the agency views this as a non-substantive comment in relation to the proposal itself. However, the following is offered to address those recurrent comments:

The WSDA contract does not influence this rule project. It is unlikely that the state will subsidize this work, unless the WSDA is authorized by legislation to sample and charge licensees for their work.

For background on the WSDA contract, an original Interagency Agreement was signed in August of 2016 to cover heavy metals and potency testing and renewed in July of 2019. Knowing WSLCB already had a contract with WSDA, the agency began conversations regarding pesticides.

WSLCB began developing this contract based on complaints from employees of licensed cannabis businesses who reported getting sick, as well as consumer complaints indicating they could taste pesticides in products they purchased. The Board set standards on pesticides in WAC 314-55-108, but

the agency quickly learned that it did not have a way to establish and prove whether or not pesticides were truly present in cannabis products. Prior to the WSDA contract, the agency used WSLCB accredited or certified labs to conduct such tests. This posed a problem for evidentiary purposes because the agency was unable to testify to the validity of the equipment or testing procedures. Chain of custody integrity also came into question if a violation was alleged.

WSLCB reached out to WSDA for assistance with pesticide testing. Scope of the agreement was limited to financing to secure the necessary personnel, equipment and other services, and included analyzing an average of 75 samples per month. The cost included a onetime fee of $1,115,000 for equipment and an annual cost up to $370,000 for personnel and maintenance. The agreement was specific to "the analytical results reliable and useful for enforcement purposes" only.

The 2019 Operating Budget (Engrossed Substitute House Bill 1109) provided WSDA with funding of $635,000 for fiscal year 2020 and $635,000 for fiscal year 2021 only for compliance-based laboratory analysis of pesticides in marijuana. It is difficult to identify how much the cost per sample it would be when including pesticide analysis with heavy metals and potency level analysis. However, based on the 2016 contract costs, WSLCB estimates that the cost would be approximately $411 per test. WSLCB recently received documents from one of the certified pesticide lab indicating that they charge a $125 for pesticide testing.

As a result of recent complaints WSLCB concerning mold in marijuana, the agency began and continues to work on a second contract with WSDA for mold and yeast testing that results in a $10,000 initial cost with $45,000 annual payments for testing. WSLCB has agreed to pay $1,800 per set of tests with a maximum set at 40 samples.

To conduct pesticide testing, WSDA requires 10g of flower per test, contrasted to accredited or certified labs that only require 3g of flower. WSDA tests for over 200 pesticides compounds and WSLCB accredited or certified labs test for an estimate of 110 compounds. Therefore, even when the accredited or certified labs test for pesticides, a sample could still fail according to WSLCB standards if the samples are taken to the WSDA lab.

In addition to random sampling, WSLCB conducts complaint driven testing.

- Throughout fiscal year (FY) 2019, WSLCB received 41 pesticide complaints taking multiple samples of marijuana product as each location.
    - As a result, 18 cases were unsubstantiated and 23 cases were substantiated.
    - In FY 2020, WSLCB received 17 complaints with 4 unsubstantiated, 12 substantiated and 1 case for which results are pending.
- The WSLCB random sampling program has recently changed. The agency is collecting samples of dried or finished product from a generated list. This list will help WSLCB identify a broader, more accurate list of locations in order to get a confidence level of compliance among the industry.
- A simple randomized testing program will be initialized. The program will run for 12 months, beginning January 1st, 2021 through December 31, 2021.

- The program will utilize 66% of available testing capacity. The other 33% will be utilized for complaint investigations and tests driven by officer observations.
- The program will utilize investments that have already been made over time in equipment and FTES for WSDA to assist with testing for the purposes of assisting the state investigation.
- There will be 298 tests conducted. This sample size will return a 95% confidence rate at + or - 5%. A much small group of 90 locations can be run returning a 95% confidence rate at =+ or – 10%.

Based on the request to consider pesticide testing performed at the state level for all marijuana industry members, the agency reached out to Mike Firman of WSDA to determine whether or not WSDA could take on additional pesticide testing. It was determined that request for additional pesticide testing to be performed by WSDA would result in a significant fiscal note. Since WSDA is not prepared to accommodate such a request, it would need to build new lab space or renovate existing space, obtain required new equipment, and hire additional personnel. This could take several years to put into place, would need to include determination of initial and ongoing funding sources, establish staffing and sustainability standards, and develop numerous other operational details.

Sub-theme: Suggestions that Require Statutory Revision

Many comments were received that require statutory, as opposed to regulatory revision, such as:

- Cannabis farming should be treated the same as WSDA organic farming;
- The assertion that WSLCB and Department of Agriculture are required by statute to test at the retail level (*this statute does not exist);*
- Raise the costs of licenses relating to market share or yearly sales to pay for testing (this would require a statutory revision);
- Third party sampling – WSDA performs both sampling and testing (*this comment is non-substantive because it would require statutory revision, but is also discussed in depth in the substantive comment section of this document to provide a complete analysis of the actual cost or operationalization of this assertion*).
- "*The Tax is too high and it's the producers that are having to eat it*." (*Tax rates are established by the legislature, not the WSLCB*).

To assist, WSLCB offers the following text from a slide deck presented to stakeholders in November, 2020, regarding the differences between statute and regulation:

What is a statute?

- A statute is a law passed by a legislative body, like the Washington State Legislature. *Boards and Commissions are not legislative bodies that create or develop statute.*

Example: **RCW 69.50.357**
Retail outlets—Rules.

- (5) The state liquor and cannabis board must fine a licensee one thousand dollars for each violation of any subsection of this section. Fines collected under this section must be deposited into the dedicated marijuana account created under RCW 69.50.530.

What is a rule (or regulation)?

- A directive made and maintained by an authority that interprets or implements a statute, establishes a program, standards or criteria.

Example: **WAC 314-55-086**
Mandatory signage.
(1) All licensed marijuana processors, producers, and retailers, with the exception of licensed retailers with a medical marijuana endorsement, must conspicuously post a notice provided by the board about persons under twenty-one years of age at each entry to all licensed premises. The notice must contain all of the following language: "Persons under twenty-one years of age not permitted on these premises."

Sub-theme: Remove Tier System

Although this comment was common, and the agency appreciates the suggestion, it does not pertain to the proposed rules. The subject of this rule project is WAC 314-55-101, -102, or 1025, concerning cannabis quality control. The tier system is described and regulated under WAC 314-55-075.

Theme 2: General Dislike or Disagreement with Proposal

There were over twenty written comments and more than thirty oral comments expressing general dislike of the proposal, and requesting that the rule project be withdrawn entirely. Few alternatives to the actual rule proposal were offered. One comment asserted that licensees should not be testing cannabis for pesticides and heavy metals at all. Another asserted that they opposed representative samples, and opposed testing for excipients that may be prohibited by the Board, but did not offer any alternatives. Other comments offered included,

"*It is an unreasonable expectation that having the products tested will keep everyone honest."*

"The fact that a company with three tier 3 licenses pays the same as me for my little Tier 2 license is ridiculous. Same for large processors and retailers. Selling 6 million a month and only paying just over 1 thousand dollars a year for the license is a steal of a deal for them and they know it! This is a small example of how the current system is geared to help large producers which in turn hurts small producers.

Just like the BOTEC findings reported. This CR 102 is overkill, ridiculous and will add to the turnover problem with your small tier licensees!"

Theme 3: Perceptions of Accredited/Certified Cannabis Testing Labs

Several comments asserted that the rule proposal would "enrich labs." Data and verifiable evidence was not offered to support this statement.

One commenter indicated that they did not trust labs, and another licensee asserted, "*Labs have been loudly vocal."*

As of close of business, November 19, 2021, three comments were received from labs on this supplemental CR 102 proposal.

A Deliberative Dialogue session was held on February 11, 2021 featuring accredited/certified cannabis lab owners and employees. Panelists responded to some of these assertions during that session. A follow up meeting was held with panelists on March 1, 2021, and panelists offered additional reflections. The transcript from that dialogue is provided as Exhibit J.

Theme 4: Reference to Product as "craft cannabis" and Producers as "craft cannabis producer"

Many comments offered that the agency consider accommodation or exemption for "craft cannabis" producers from cannabis testing requirements. Unfortunately, there is currently no definition for "craft cannabis" or "craft cannabis producer" in state or federal statute or regulation.

WSLCB understands and appreciates the care and effort demonstrated by a number of licensees in the cultivation and production of high quality cannabis products. The agency also recognizes that this designation is important to licensees, represents pride and attention to production method, and recognizes the significance of the "craft" designation. However, without a statutory definition, or a specific license type established in statute, the agency is unable to contemplate exemptions or carve-out provisions for this industry-designated category of production. This is also true of the term "organic" in cannabis production.

Although it appears that legislation that could potentially to create such a "craft cannabis" license and designation did not advance during the current legislative session, the agency looks forward to working with licensees and other interested parties in the future to consider such a designation.