



CR 103E Memorandum

Emergency Rules Regarding Enforcement of WAC 246-80-021 – Adding New Sections to WAC 314-55-077 – Marijuana processor license – Privileges, requirements, and fees and WAC 314-55-079 – Marijuana retailer license – Privileges, requirements and fees.

Date: April 28, 2021

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Background:

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 e-cigarette or vaping associated lung injury (EVALI). In September 2019, the CDC activated its Emergency Operations Center to aid in the investigation of the multi-state outbreak. As of its final update on February 18, 2020, the CDC has identified two thousand eight hundred seven confirmed cases reported across fifty states, the District of Columbia, Puerto Rico and the US Virgin Islands, including sixty-eight deaths confirmed in twenty-nine states and the District of Columbia. Twenty-seven cases of EVALI, including two deaths, have been reported in Washington State.

As part of the investigation into the multistate outbreak of EVALI, the CDC conducted laboratory tests of forty-eight 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. A further study found ninety-four percent of EVALI patients tested had vitamin E acetate in the bronchoalveolar lavage but no samples from a health comparison group indicated evidence of vitamin E. Two samples showed presence of other toxicants (one each) in the EVALI group but did not provide sufficient evidence to identify another toxicant as the source of disease. The CDC has identified vitamin E acetate as a chemical strongly linked to EVALI and recommends that vitamin E acetate not be added to vapor products.

Based on these findings, the Washington State Board of Health adopted a permanent prohibition of vitamin E acetate, effective November 15, 2020 as WSR 20-23-006, codified as WAC 246-80-021.

WAC 246-80-021 provides that:

No person including, but not limited to, a person licensed under chapter 69.50 or 70.345 RCW, may sell, offer for sale, or possess with intent to sell, or offer for sale vapor products containing vitamin E acetate. The foregoing prohibition applies to the sale, offer for sale, or possession with intent to sell, or offer for sale vapor products containing vitamin E acetate at any location or by any means in this state including, but not limited to, by means of a telephonic or other method of voice transmission, the mail or any other delivery service, or the internet or other online service.

These emergency rules replace emergency rules filed on January 6, 2021 as WSR 21-02-093 and WSR 21-02-094 that allowed the Board to take disciplinary action, without interruption, against any licensed marijuana processor or retailer failing to comply with the provisions of WAC 314-55-1065 prohibiting the use of vitamin E acetate consistent with its regulatory authority.

However, since the SBOH has permanently adopted WAC 246-80-021 to prohibit the use of vitamin E acetate, and the Board can rely on this authority to enforce compliance, the Board's emergency prohibition under WAC 314-55-1065 is no longer necessary. These emergency rules provide enforcement continuity while the permanent the rule development process takes place, consistent with the CR 101 filed on March 31, 2021 as WSR 21-08-035.

Reasons why rules are needed:

These emergency rules allow the Board to take disciplinary action, without interruption, against any licensed marijuana processor or retailer that fails to comply with the provisions of WAC 246-80-021, prohibiting the use of vitamin E acetate consistent with the authority of chapter 69.50 RCW.

The Board has the authority and responsibility to adopt rules for the preservation of public health. The immediate filing these emergency rules provides for the enforcement of WAC 246-80-021, and preserves public health, safety and general welfare. Therefore, the immediate adoption of these emergency rules concerning enforcement provisions for WAC 246-80-021 prohibiting the sale of vitamin E acetate is necessary.

Process:

Consistent with RCW 34.05.350, any agency may find that the immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time

requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest. This rule change is exempt from the filing of a CR101, analytical, and public hearing requirements.

An emergency rule adopted under RCW 34.05.350 takes effect upon filing with the code reviser, unless a later date is specified in the order of adoption, and may not remain in effect for longer than one hundred twenty days after filing.

Notice will be sent to all who have indicated that they want to receive notice of rule activity, and posted to the Board's website.