



Notice of Permanent Rules to Define "Trade Area"

This explanatory statement concerns the **Washington State Liquor Control Board's adoption of WAC 314-02-1071 What is "trade area"?**.

The Administrative Procedure Act (RCW 34.05.325(6)) requires agencies to complete a concise explanatory statement before filing adopted rules with the Office of the Code Reviser. This statement must be provided to anyone who gave comment about the proposed rule making.

Once persons who gave comment during this rule making have had a chance to receive this document, the Liquor Control Board will file the amended rules with the Office of the Code Reviser. These rule changes will become effective 31 days after filing (approximately November 2, 2013).

The Liquor Control Board appreciates your involvement in this rule making process. If you have any questions, please contact Karen McCall, Rules Coordinator, at (360) 664-1631 or e-mail at rules@liq.wa.gov.

What are the agency's reasons for adopting this rule?

Permanent rules are needed to define "trade area" in RCW 66.24.630 which was created with the passing of Initiative 1183. RCW 66.24.630 requires that a spirits retail licensee selling spirits for off-premise consumption have at least 10,000 square feet of retail space, unless the location is a former contract store or former state store, or there is no other spirits retail licensee within the "trade area" the applicant proposes to serve. The law does not define trade area, but left it to the Board to create a definition and criteria for such licenses.

Summary of all public comments received on this rule proposal.

Comments received on CR 102 filed March 13, 2013, published at WSR 13-07-031 :

Five written comments were received in support of the proposed rules as written.

Twenty-two written comments were received opposing the 20 mile radius:

Suggestions were made to change the 20 mile radius to anywhere from 2 blocks to 15 miles.

LCB response: The Board chose to use a 20 mile radius based on the process for determining where the Board might create a contract liquor store when the Board was the only legal spirits retailer. With the passage of I-1183 spirits package stores increased from 328 to 1,316. Therefore, spirits are available for purchase from many more locations than prior to June 1, 2012. The Board believes that requiring a person to travel 20 miles to purchase spirits is reasonable, as there are many more locations now than in the past.

One comment was received requesting an exception for Indian tribes.

Requested an exception for "an area located on a federally recognized Indian tribe's reservation or tribal trust lands within the State of Washington".

LCB response: After considering this comment, the board agreed to make an exception to the 20 mile radius requirement for an application by a tribal entity on tribal land. The Board's intent was that the exemption would only be for a business operated by the tribe itself.

Once comment was received requesting an exception for stores subject to the regulatory jurisdiction of a federally recognized Indian tribe.

The comment asserted that any state attempt to regulate square footage of spirits retail stores on Washington Indian lands is (1) an illegal exercise of state authority in Indian Country because it is not alcohol regulation, and (2) an illegal imposition of a state land-use regulation in Indian Country.

LCB response: The Board does not agree that the comment is well-founded, or that the statute imposing the minimum square footage is regulating land use. Under federal law, states and tribes have concurrent regulatory authority over the sale of liquor in Indian country. Before I-1183 was enacted, former WAC 314-37-010 specified the conditions for the operation of tribal liquor stores and was upheld by the federal courts. It is not in the public interest to have a proliferation of smaller stores.

One comment was received requesting a revision to the proposed rule WAC 314-02-1071 (2)(a) to read "There is no spirits retail license holder or auction title holder within twenty travel miles at the time of license application".

The reason for the request is "many small towns usually have one landlord. There is no competition for real estate and our members could be forced out of business by the landlord. Without this revision our member's rights are worthless."

LCB response: Spirits retail licensees include businesses that purchased the right to apply for a spirits retail license based on the location of the former state store, but this is a reasonable clarification. The board agreed to make the revision to the proposed rule.

Two written comments were received requesting an exception to the 20 mile radius requirement for locations where the primary mode of travel is by boat.

LCB response: The board will make an exception to the 20 mile radius requirement for a location where the primary mode of travel is other than by automobile.

Comments received at the Public Hearing on April 24, 2013:

One comment was received for an exception to the 20 mile radius requirement for locations where the primary mode of travel is by boat.

LCB response: The board will make an exception to the 20 mile radius requirement for a location where the primary mode of travel is other than by automobile.

Two comments were received opposing the 20 mile radius requirement.

There was a request to not just consider the 20 mile radius but to consider local jurisdiction. Another request was to change the 20 mile radius to a 15 mile radius.

LCB response: The decision for the 20 mile radius was based on the former contract liquor store model. With the passage of I-1183 spirits package stores increased from 328 to 1,316. The availability of spirits is not deterred by the 20 mile radius requirement for stores less than 10,000 square feet.

Comments received on first Supplemental CR 102 filed May 8, 2013, filed at WSR 13-11-026:

Eleven written comments were received opposing the 20 mile radius:

Suggestions were made to change the 20 mile radius to a 10 mile radius, and to make decisions on a case-by-case basis rather than how far a proposed store would be from an existing spirits retail licensed location. This would include taking into consideration public transportation availability and persons with disabilities. One comment suggested the board should allow one license under 10,000 square feet per city or town.

LCB response: The decision for the 20 mile radius was based on the former contract liquor store model. With the passage of I-1183 spirits package stores increased from 328 to 1,316, thus spirits are more available for purchase than in the past. The availability of spirits is not deterred by the 20 mile radius requirement for stores less than 10,000 square feet.

Two written comments were received requesting revisions to the tribal exception. Define "tribal entity" to include a federally-recognized tribe having its reservation geographically within Washington state, a member of such a tribe, or any kind of business entity owned by such a tribe or a member of such a tribe. "Tribal Land" should also be defined as land held in trust by the United States for the benefit of a tribe or a member of a tribe.

LCB response: The board intended that the proposed exception for an application from a tribal entity be for a federally-recognized tribe only, not for locations operated by members of such a tribe. Liquor transactions within Indian country must conform to tribal law as well as state law. Some tribes allow retail sales of spirits within their reservations only through a tribal government enterprise. If the board were to issue licenses to tribal members for locations within such reservations, it would run afoul of tribal law. If this exception were written as broadly as this comment suggests, the board would not have adequate criteria to determine whether to grant or deny a license, or how many locations under 10,000 square feet were licensed, if the only criteria was the location be on tribal land and owned or operated by a member of the tribe.

One comment was received opposing the exceptions. Exceptions should not be granted based on whether the location is located on tribal land or on an island accessed by boat.

LCB response: The board considered this comment and determined some exceptions are appropriate.

One comment was received requesting a revision. "Trade area" should be defined by "trade zone". Geographic space without any significant population should not qualify as a "trade area".

LCB response: The board does not have the resources to examine each potential type of "trade zone" as that would be determined by the particular business model the applicant chooses to use. The board needs to be able to use objective criteria in its licensing decisions.

Two comments were received in support of the exception to the 20 mile radius requirement for locations where the primary mode of travel is by boat.

Comments received on second Supplemental CR 102 filed August 21, 2013, which removed the exception for locations on tribal lands, filed at WSR 13-17-111:

Two written comments were received in support of the revised proposed rules as written.

Five written comments were received opposing the 20 mile radius.

Suggestions were made to change the 20 mile radius to a much lower amount.

LCB response: The decision for the 20 mile radius was based on the former contract liquor store model. With the passage of I-1183 spirits package stores increased from

328 to 1,316. The availability of spirits is not deterred by the 20 mile radius requirement for stores less than 10,000 square feet.

Once comment was received requesting an exception for stores subject to the regulatory jurisdiction of a federally recognized Indian tribe. Stated any state attempt to regulate square footage of spirits retail stores on Washington Indian lands is (1) an illegal exercise of state authority in Indian Country because it is not alcohol regulation, and (2) an illegal imposition of a state land-use regulation in Indian Country.

LCB response: The Board does not agree that the comment is well-founded, or that the statute imposing the minimum square footage is regulating land use. Under federal law, states and tribes have concurrent regulatory authority over the sale of liquor on tribal lands. Before I-1183 was enacted, former WAC 314-37-010 specified the conditions for the operation of tribal liquor stores and was upheld by the federal courts. A court has found the application of the 10,000 square foot minimum requirement for spirits retail licensees is properly applied to a location on an Indian reservation. It is not in the public interest to have a proliferation of smaller stores.

One comment was received opposing the removal of the exception for Indian tribes. Requested the exception for “an area located on a federally recognized Indian tribe’s reservation or tribal trust lands within the State of Washington” be added back into the proposed rule.

LCB response: Prior to I-1183, the board contracted with tribes which chose to operate a store to sell spirits, and allowed those tribes to convert those locations, and any new proposed locations, to spirits retail licensees. If a tribe does not currently have a location, and wishes to sell packaged spirits, the board will discuss the proposed location with the tribe in accordance with the government-to-government process in RCW 43.376.

Comments received at the Public Hearing on September 25, 2013:

One comment was received opposing the 20 mile radius requirement. There was a request to change the 20 mile radius to a 15 mile radius.

LCB response: The decision for the 20 mile radius was based on the former contract liquor store model. With the passage of I-1183 spirits package stores increased from 328 to 1,316. The availability of spirits is not deterred by the 20 mile radius requirement for stores less than 10,000 square feet.

One written comment was received opposing the removal of the exception for Indian tribes. Requested the exception for “an area located on a federally recognized Indian tribe’s reservation or tribal trust lands within the State of Washington” be added back into the proposed rule.

LCB response: Prior to I-1183, the board contracted with tribes which chose to operate a store to sell spirits, and allowed those tribes to convert those locations, and any new proposed locations, to spirits retail licensees. If a tribe does not currently have a location, and wishes to sell packaged spirits, the board will discuss the proposed location with the tribe in accordance with the government-to-government process in RCW 43.376.

WAC Changes

NEW SECTION

WAC 314-02-1071 What is "trade area"? (1) "Trade area" as used in RCW 66.24.630 means an area where there is no spirits retail license within a twenty mile travel distance at the time of license application.

(2) The board will use the following criteria when determining to accept a spirits retail license application where the proposed premises location is less than ten thousand square feet of fully enclosed retail space:

(a) There is no spirits retail license holder or auction title holder within twenty travel miles at the time of license application; and

(b) The board will determine travel distance by a publicly available mapping tool which may be accessed on the board's web site. The web address of this site at the time of rule adoption is <http://wslcb.maps.arcgis.com/home/>.

(3) Former contract liquor stores and title holders by those who purchased a state store at auction are exempt from the ten thousand square foot minimum required by law. Should either choose to locate within an established trade area and they are in compliance with board relocation criteria, they may be issued a license.

(4) The board may make an exception to the twenty mile travel distance for the following: A spirits retail license application is for a location where the significant mode of travel is other than by automobile.