



**MONTANA
ADMINISTRATIVE
REGISTER**



DEPARTMENT OF REVENUE

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-372.2

Summary

Amending the Quality Assurance Testing Protocol Document (SOP-001) to Increase Test Batch Size In Response to Testing Laboratory Constraints and Updating Web Page URLs

Previous Notice(s) and Hearing Information

On October 10, 2025, the Department of Revenue (department) published MAR Notice No. 2025-372.1 pertaining to the public hearing on the proposed rulemaking in the 2025 Montana Administrative Register, Issue Number 19.

On November 5, 2025, the department held a public hearing to consider the proposals. The following persons appeared and provided verbal testimony: Joanna Barney, Sacred Sun Farms; Christopher Young, attorney, Gravis Law Firm; Charles Hempfling, Quaking Aspen; and Jennifer Hensley, Hensley and Associates on behalf of Fidelity Diagnostics Laboratory (Fidelity).

The department also received written comments from: Michael Lentini, Craig McViney, Steve Marsh, Elizabeth Springman-Pincolini, Josh Zielie, Roy Noland, Stacia Shapan, Willy Richardson, Jeffrey Stahl, Tanner Fleck, Tanya Gallagher, David Bacon, Leah Turner, Erica Siate, Jay McKay, Kyle Holloway, Ryan Stanley, Susan Stanley, James Roth, Frosteez Cannabis Company, Keely Benacquista, Matteus Hartley, Pepper Petersen, Montana Cannabis Guild (Guild), Katie Thurlby, Mike Michals, Charles Hempfling, Blu Hines, Zach Schopp, Bobby Long, David Schafer, Denise Zielie, David Hiller, Adam Evans, Dustin Shaler, Amanda Shaler, Catherine Cornell, Evan Kajander, Kevin Wysocki, Zane Ligas, David Liberman, Logan Carpentier, Kristen Schell, Nick Checota, Drew Stensland, Matt Tucker, Nick Frentsos, Dave Ventura, Joanna Barney, Chuck Holman, Tristan Stovall, Adam Arnold, James McKay, Jamie George, Tauni Werhonig, Bennett Cawthon, Ethan Welder, and Jennifer Hensley, for Fidelity.

Final Rulemaking Action – Effective March 21, 2026

AMEND AS PROPOSED

The agency has amended the following rules as proposed:

42.39.601 DEFINITIONS

42.39.610 QUALITY ASSURANCE SAMPLING PROTOCOL

42.39.614 QUALITY ASSURANCE TESTING REQUIREMENTS

Statement of Reasons

The department has adopted the amendments to ARM 42.39.601, 42.39.610, and 42.39.614 , as proposed, regarding random and representative samples for general compliance, research and development (R&D), and retesting. The department has also updated the website URL in ARM 42.39.614 as proposed.

The department has also adopted Quality Assurance Testing Protocol Document SOP-001 version 4.0 (SOP-001), excepting the department's proposed revisions to implement an increase in test batch size from 5.0 lbs to 15 lbs in Section 7 of SOP-001, for the following summarized reasons:

(1) opposition comments and testimony regarding disproportionately negative economic effects to small to mid-tier sized cannabis licensees; (2) the apparent resolution of previous product testing delays and the current testing laboratory's expansion in response to industry demand; (3) the application of another quality assurance testing laboratory (to meet expected product testing turnaround and to provide industry a testing laboratory option); and (4) the department's need to stabilize quality assurance testing for marijuana product, which outweighs the benefits of increasing test batch sizes.

The department has thoroughly considered the comments and testimony received. The only comments received pertained to the proposed increase of the maximum test batch size to 15 lbs – none to the department's other proposals. Summaries of the comments received and the department's responses are as follows:

Small and Mid-sized Licensee Opposition to Test Batch Increase Comments: The comments have been grouped as Group 1, Group 2, Group 3, Group 4.

Group 1. Comments expressed concerns about Market Consolidation and Anti-Competitive Impact.

- favors the largest four to five vertically-integrated producers
- supports predatory pricing strategies and reduces long-term competition

- forces small and mid-sized growers to reduce strain diversity or exit the market
- smaller businesses face significantly higher cost per-pound, effectively forcing market consolidation

Group 2. Comments of Perceived Compliance Issues & Economic Burden to the Licensees

- Small craft producers operate 20-60 strains per facility; 15-pound batch testing is economically unfeasible
- The state lab projects a potential 40 percent cost increase per test, negating any assumed savings in the small business impact analysis (SBIA)
- Compliance burden will be heavier for small businesses; large operators can comply effortlessly
- The fix (i.e. the rules proposal) is a long-term response to a short-term problem.

Group 3. Comments Relating to Consumer Impact & Product Quality

- Reduces strain variety, regional character, and innovation
- Larger harvest lots risk degradation, harming quality
- No measurable benefits for consumers
- lab turnaround times have already improved by 50 percent within the current rules

Group 4. Comments About Inadequacies in the SBIA

- Assumes uniform 15-pound batches, ignoring operational realities
- Ignores lab pricing behavior, operational diversity, and costs for small operators
- Fails to meet statutory requirements under 2-4-111, MCA, for assessing impacts on small businesses.

Response to Comment Groups 1 through 4: The department understands the arguments under Comment Group 1, and while they lack substantiation, the concerns are valid and department agrees that its role in the regulation of the industry is not to favor one segment over another. Similarly, while conclusions in Comment Groups 2 through 4 are speculative, contain certain inaccuracies or misstatements of the law, or are hyperbolic, the department believes its decision to withdraw the test batch size increase proposal described above is an acceptable response to these commenters.

The department also responds that this rulemaking was initiated at the request of industry, as a whole. If there is concern about the volume of marijuana products being tested at a single testing laboratory and delays in processing which affect the availability of sellable product inventory on dispensary shelves, changes to administrative regulations need not be the only answer, but the department is available to provide feedback should compliance questions arise.

Comment Group 3 commenters did not acknowledge that current, and proposed, test batches still require single strains regardless of the test batch size. Samples collected remain constant at 0.5% of the weight of the test batch, which is what the department's flower sampling table is based on, and the metric other states use as well. This metric along with adhering to the protocols in SOP-001 ensures the sample collected is random and representative at any test batch size while maintaining product quality and safety.

Comment Groups 2 and 3 also neglect the fact that the number of strains cultivated, or the amount of product submitted to the testing laboratory for testing, is an independent business decision. Further, the department does not regulate the costs of laboratory tests nor does it benefit financially from any increase in test batch sample sizes. Notwithstanding, the department continued its evaluation through this rulemaking of the impacts of increased test batch sizes: fewer samples, loss of revenue for the existing testing laboratory; and across-the-board price increases in sample test costs that would disproportionately impact smaller providers.

The possibility of adverse economic impact also assumes that the only fully-operational testing lab would remain so (i.e., it is not joined by any new laboratory or that the suspended laboratory is not reinstated). And while industry cannot rely on the status of other applications or promises of additional quality assurance testing laboratories, the department communicated that another testing laboratory is nearing completion of its application and certification(s). And based on the current status of products in the industry and the corresponding test batch protocols, the department believes it is a preferred course of action to allow the new testing laboratory an opportunity to enter the market without the undue influence of new testing requirements.

Opposition commenters in Comment Group 4 also stated the department's SBIA was somehow legally deficient and failed to take external factors beyond the rule proposals into account. Section 2-4-111, MCA, requires the agency to determine if the rule will significantly and directly impact small businesses, publish the determination in the Administrative Register, and prepare an SBIA that identifies by class or group the small businesses probably affected by the proposed rule - including a statement of the probable significant and direct effects of the proposed rule on the small businesses. The statute also requires any alternative methods that may be reasonably implemented to minimize or eliminate any potential adverse effects of adopting the proposed rule while still achieving the purpose of the proposed rule.

While the department complied with all of the requirements and included information that was known, or could have been reasonably known, in the SBIA, the department could not

reasonably foresee that a new testing laboratory would be licensed during this rulemaking, which will undoubtedly change the impact on small businesses.

Ultimately, despite the diligent efforts of the department to prepare an accurate SBIA, 2-4-111(5), MCA, also provides “[t]he final adoption, amendment, or repeal of a rule is not subject to challenge in any court as a result of the inaccuracy or inadequacy of a small business impact analysis required under this section”

Supporting Comments for the Test Batch Increase: Commenters in support of the rulemaking advanced arguments that the increase to the maximum allowable testing batch size is not a requirement, but permits operational flexibility, improves consumer access to all cannabis products statewide, and reduces testing and operational costs for licensed cannabis producers of all sizes – all while maintaining the state’s strict standards for cannabis product safety. Several supporting commenters referred the department to a 2024 technical report commissioned by the Nevada Cannabis Coalition in relation to their state’s market change from 5lb. testing lots to 20lb. The report concluded that “our findings advocate for a regulatory focus on quality and safety that does not rest on the limitation of batch sizes. We recommend that Nevada, and indeed all states considering similar measures place their trusting, robust, proven quality management practices over arbitrary numerical limits.”

Supporters for the test batch increase also asked the department to consider the unfortunate coincidence of circumstances that arose with the timing of new pesticide testing and limited lab capacity which impacted the entire supply chain. A temporary fix could not be implemented quickly enough nor do they believe it is an isolated instance; a more permanent solution is necessary. The commenters argue this rulemaking is consistent with the department prior rulemaking which revised the definition of process lot by removing a numeric lot size cap.

Supporting commenters also provided tier-level data that indicates market consolidation is already occurring irrespective of the rulemaking proposal and the opposition commenters. Supporting commenters’ data indicates while micro and Tier 1 cultivators declined sharply, mid-tier producers (Tiers 3-6) grew steadily, and higher-tier producers (Tiers 7-12) accounted for over 54% of statewide production. Top gains came from Tier 7 and above, reflecting that production is increasingly concentrated in the upper tiers.

Responses to Supporting Comments for the Test Batch Increase: The department understands the position of the supporters and the data-driven arguments presented. However, as the department stated (above) and in its response to the opposition commenters, a primary role for the department is to administer a stable, legal market consistent with the legislature’s directives in 16-12-101, MCA. Inherent in the department’s administration and regulation of the cannabis industry is not to advance regulation that favors one segment of industry over another. The department believes stabilizing the industry by having additional testing laboratories available to meet testing timelines and providing more choices for the industry outweighs the benefits of increasing test batch sizes at this time and addresses the monopoly concerns expressed by the opposition commenters.

Other Comments Regarding Test Batch Increase: In addition to the opposing and supporting comments summarized above, the department received comments from industry stakeholders who also recommended the department propose a smaller increase in test batch size to 10 lbs., and one comment from the Guild that suggests the department immediately adopt a maximum 20 lb. test batch size.

Response to Other Comments Regarding Test Batch Increase: During the department's discussions with industry in the Spring of 2025, a 10lb. test batch was discussed but the department determined that incremental increase would not provide sufficient industry relief nor provide a long-term solution. And contrary to Mr. Petersen and the Guild's assertions, the department is not persuaded that an increase to 20 lbs. is advisable without additional data, safeguards, or discussion to support it. The request also exceeds the scope of this rulemaking under the administrative procedure act.

Fidelity Diagnostics Comments: Fidelity is in a unique position in the industry as the primary testing laboratory currently operating at full capacity; and it is attempting to provide balanced commentary that is considered by the department and Fidelity's customers, who are Montana's cannabis licensees. Fidelity commented that from a purely scientific perspective, there is no reason to oppose the proposal to increase test batch size, but there are economic realities for testing laboratories with adopting an increase. Fidelity noted that it has supported legislative and rule changes around cannabis testing that had a negative impact on its bottom line because consumer safety is priority. Fidelity has made more than \$1.5 million in investments to respond to the needs of industry. And at the public hearing, Fidelity reported that average turnaround times for testing had dropped to an average of 12 business days trending towards ten – with no drop in the quality of testing. However, after many conversations with its clients and other laboratory representatives in Montana, Fidelity encourages the department to very seriously consider the business impact of changing the batch size as other laboratory businesses are reviewing their business models and profitability of Montana's testing industry. While Fidelity is confident that it will be able to respond to changing legal landscapes, this rule change could affect future lab development in the state.

Response to Fidelity's Comments: The department appreciates Ms. Hensley's appearance and Fidelity's involvement in the rulemaking process. The department also understands Fidelity's unique position in the industry and its cooperative approach in its role in Montana's regulated cannabis industry. Fidelity's contention about the business impact is well taken; and as the department noted in its responses to the opposition commenters, regulation of the industry should not favor one segment of industry over another. While there is industry support for increasing test batch sizes, there are still a number of possible outcomes for the industry – including the addition of another testing laboratory in the near future. For these reasons and for the reasons expressed in the department's responses, the department believes withdrawal of the proposal to increase the test batch size and maintaining the current five pound limit is the most prudent resolution.

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Approval

Brendan Beatty, Director of Revenue