MEMORANDUM

TO: **The Economic Affairs Interim Committee**

FROM: **Brendan R. Beatty, Director**
Kristan Barbour, Administrator
Erin Ducharme, Deputy Administrator
Courtney Cosgrove, Counsel

DATE: **December 6, 2021**

SUBJECT: **Concerns regarding certain requested rule revisions**

At the November 17, 2021, Economic Affairs Interim Committee hearing, committee members asked the Department to consider certain revisions to its proposed rules. The Department appreciates EAIC's suggested revisions and its willingness to work with the agency during the rule-making process. However, the Department lacks the legal authority to adopt many of EAIC's requested revisions because they conflict with well-established standards for ascertaining legislative intent.

Whenever a state agency has authority to adopt rules to implement the provisions of a statute, the agency's rule "is not valid or effective unless it is … consistent and not in conflict with the statute; and reasonably necessary to effectuate the purpose of the statute." *Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation*, 2006 MT 72, ¶ 36, citing § 2-4-305(6), MCA. Courts evaluate whether the agency's interpretation adhered to the statutory language when determining whether the agency met this standard. *Mont. Trout Unlimited*, ¶ 36.

Statutory language governs the legislative intent analysis as well. "The legislative intent is to be ascertained in the first instance from the plain meaning of the words used." *Western Energy Co. v. Mont. Dep't of Revenue,* 1999 MT 289, ¶ 11. If the statutory language is clear and unambiguous, no further interpretation is required, and courts will resort to legislative history—including legislators' remarks—only if legislative intent cannot be determined from the plain wording of the statute. *Clarke v. Massey*, 271 Mont. 412 (1995). It is blackletter law that in the construction of a statute, the court should neither omit what has been inserted

nor insert what has been omitted. Section 1-2-101, MCA.

It is with these governing principles in mind that that the Department offers the following:

1. The plain language of HB 701 prohibits the Department from promulgating a rule that imposes a moratorium on new marijuana testing laboratories

The Department has received public comment from marijuana testing laboratories that they would like to see a moratorium on the licensing of new testing labs similar to the moratorium HB 701 imposed on new cultivators, manufacturers, and dispensaries. These labs have raised the specter of out of state businesses coming in and taking over the testing market. At the close of the EAIC meeting, this committee stated its desire to see the Department work with testing labs to come up with a solution—suggesting a moratorium or a "modified moratorium."

Imposing by rule a moratorium on labs violates the applicable statutes' plain language. The moratorium language comes from § 16-12-201, MCA, which provides, in relevant part:

> Section 16-12-201. Licensing of cultivators, manufacturers, and dispensaries.
> (1)(a) Between January 1, 2022 and June 30, 2023, the department may only accept applications from and issue licenses to former medical marijuana licensees that were licensed by or had an application pending with the department of public health and human services on November 3, 2020 and are in good standing with the department and any applicable local regulations or ordinances as of the [January 1, 2022].
>
> (b) The department shall begin accepting applications from and issuing licenses to cultivate, manufacture, or sell marijuana or marijuana products to applicants who are not former medical marijuana licensees under subsection (1)(a) on or after July 1, 2023.

Former medical marijuana licensees are defined to mean "a person that was licensed by or had an application for licensure pending with the department of public health and human services *to provide marijuana to individuals with debilitating medical conditions* on November 3, 2020." Section 16-12-102(14). Testing labs are clearly not included in this definition.

Section 16-12-201 does not impose a moratorium on testing labs. The limitation on only accepting applications from and issuing licenses to former medical marijuana licensees is specific to cultivators, manufacturers and dispensaries, evidenced both by the definition of former medical marijuana

licensee and by the title of the statute. Further, the language in (1)(b) expressly lifts the moratorium on cultivators, manufacturers, and dispensaries on July 1, 2023, meaning it was only applied to these license types in the first instance.

Imposing a moratorium on testing labs in an administrative rule violates the plain language of the implementing statute. The Department is prohibited from grafting additional limitations than are permitted by statute.

2. <u>The plain language of HB 701 prohibits the Department from promulgating a rule that allows a combined use license to be anything other than a tier one canopy license</u>

This committee expressed its understanding that a combined use marijuana licensee—which must be a tribe or a tribally owned business entity—can elect any cultivation tier level when applying and can increase their tier size. The committee stated its belief that this was consistent with what other licensees can do, and combined use licensees should enjoy the same benefit.

At the EIAC hearing the Department failed to correct this committee's misunderstanding of existing law and the proposed rules in this regard and, regrettably, contributed to the confusion. Members of this committee believe that a cultivator applying for licensure after January 1, 2022 can elect their tier size. Because the Department will not be issuing new cultivation licenses after January 1, 2022, there will be no new cultivators and thus no election of tier size. Rather, existing licensees can increase their existing tier pursuant to Sec. 4 of HB 701. For new cultivator licenses issued after July 1, 2023, Sec. 4 of HB 701 expressly provides that "a marijuana business that has not been issued a license before July 1, 2023, must be initially licensed at a tier 2 canopy license or lower." Finally, cultivators that were licensed under the medical program were required to begin at a micro tier or a tier one. Section 50-46-305(15), MCA.

Thus, it is *not* consistent with other cultivation licenses to allow a combined use licensee to elect their tier size upon application.

More importantly, this committee's stated understanding of what was intended under a combined use license conflicts with the plain language of the statute, and thus with legislative intent. Specifically, members of this committee commented that it was never the legislative intent to limit the tribes to a tier one and that the "tier 1" language in the combined use statute was meant as a guarantee of a tier 1 license and not as a limitation.

Section 6(2) of HB 701 provides, however, that a combined use license "*consists of one tier 1 canopy license* and one dispensary license allowing for the operation of a dispensary." By its plain language, HB 701 defines a combined use license as a tier one canopy. It imposes the further limitation that a cultivation site

and a dispensary site be located at the same premises—a restriction not included under cultivation and dispensary provisions. A combined use licensee is further restricted to operating within 150 air miles of the exterior boundary of the tribe. The plain language of the statute clearly demonstrates that the legislature intended restrictions on a tier one licensee that do not exist for other license types. Further, tier levels are not guaranteed for any licensee. Licensees must comply with the relevant statutes and administrative rules to maintain any level of licensure.

The plain language of HB 701 makes clear that a combined use licensee must both enter the market at tier one and remain at a tier one. This is consistent with the legislature's plain language definition of a combined use license and with the same limitation on new licensees under the existing medical program until July of 2023. The Department does not believe that it is statutorily not permitted to amend its rule to allow otherwise.

As with the lab moratorium, the Department understands that the Legislative Services Division's Legal Services Office has been asked to offer its analysis on the scope of a combined use license. The Department looks forward to that analysis and will consider its conclusion.

3. <u>The plain language of HB 701 does not allow the Department to charge an excessive fee for the inspection of potential dispensary locations to discourage new storefronts</u>

Members of this committee expressed surprise at the EAIC meeting that licensees could maintain more than one dispensary location. There were suggestions that the Department should find a way for the Department, through fees, to discourage multiple locations. One suggestion was for the Department to put in rule a graduated fee structure, where each subsequent dispensary license would cost more than the last. However, Section 5(6) of HB 701 sets the dispensary fee at "$5,000 for each location that a licensee operates." The other suggestion was for the Department to charge a large fee for the inspection of proposed dispensaries.

Under the existing medical marijuana program that HB 701 moved to the Department, licensees can maintain more than one dispensary. Section 50-46-342, MCA, provides that "the dispensary license fee is based on the total number of registered premises used as dispensaries." For instance, "four or five registered premises used as dispensaries" carries an annual fee of $25,000. Section 50-46-342(5), MCA. HB 701 amended this provision to change the citation to the revenue account fees are deposited in, but in no other respect. Sec. 84 of HB 701.

House Bill 701 carries forward the ability for licensees to maintain multiple dispensary locations. As noted above, Sec. 5(6) provides that "the dispensary

license fee is $5,000 *for each location that a licensee operates as an adult use dispensary or a medical marijuana dispensary*." The moratorium speaks in terms of licensees, not licenses, and allows the Department to continue to accept applications from and issue licenses to former medical marijuana licensees. Section 16-12-201, MCA. Indeed, the Department is currently accepting new applications under the medical program and will allow existing licensees to apply for additional locations after January 1, 2022.

The statute's language prohibits the Department from imposing a fee with any purpose other than covering administrative expenses. Section 16-12-112, MCA, while allowing the department to make rules setting fees, also provides that such fees "must be sufficient to offset the expenses of administering this chapter but may not exceed the amount necessary to cover the costs to the department of implementing and enforcing this chapter." The cost of inspecting a licensed premise is already captured in the licensing fees. HB 701 does not authorize the Department to assess the fees requested.

The Department understands that members of this committee have requested a legal opinion from Legislative Services Division's Legal Services Office. If the Legal Services Office reaches a different conclusion, the Department will revisit its analysis.

4. <u>The Department will strike its Point of Sale System Rule to develop additional criteria</u>

This committee indicated that the Department should work on its New Rule I from MAR Notice 42-1040 – requiring dispensaries to utilize a point of sale system. The Department will strike the proposed rule to allow time to determine what other criteria should be established in rule. The Department intends to re-notice this rule in the near future.

5. <u>HB 701 does not authorize the Department to regulate the sale or advertising of hemp or hemp products</u>

With respect to the hemp ban, the Department believes that the amendment from the most recent draft of New Rule IV(13) from MAR Notice No 42-1033, which provides that "the prohibition in 16-12-208, MCA, on marijuana dispensaries selling hemp is limited to hemp plants and hemp flower" addresses both industry's and the legislature's concerns. Under the medical marijuana program, ARM 42.39.111(20) prohibited dispensaries from selling hemp flower, so under the above language, this prohibition remains but is not exceeded in scope. This narrow prohibition will not prevent medical marijuana cardholders from

receiving medicine, will not burden industry, and will not contradict the legislative intent.

However, the Department was asked to revisit its rules in two respects concerning the hemp ban. The first relates to advertising. This committee indicated that the advertising of hemp was a concern for the legislature, and that hemp should fall into the same category as marijuana with respect to advertising restrictions. The second relates to licensing dispensaries with a separate CBD license with a nominal fee. EAIC suggested that a dispensary could receive one of these licenses, put up a wall in their existing location, and sell CBD from there.

The primary concern with these suggestions is that the Department has no statutory authority to regulate hemp—neither in advertising nor in licensing its sales. If advertising of hemp was a concern of the legislature, those concerns did not make their way into HB 701. Additionally, the Department's rules with respect to the advertising of marijuana and marijuana products went into effect in October of 2021 and it received no legislative feedback that the rules should also apply to hemp.

Because HB 701 does not provide the Department with the necessary regulatory authority over hemp, promulgating rules to regulate its advertising or its sale is impermissible.