



Children, Families, Health, and Human Services Interim Committee

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65th Montana Legislature

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TO: CFHHS Interim Committee Members
FROM: Alexis Sandru, Staff Attorney
RE: Objection to MAR Notice No. 37-820 -- Montana Medical Marijuana Program

At the Committee's March 2018 meeting, the Committee requested that staff draft an objection letter to MAR Notice No. 37-820, pertaining to the Montana Medical Marijuana Program, and research the costs of publication of the objection with the Secretary of State. The draft objection letter is attached. The following points provide information regarding the draft objection letter and the costs of publication.

As Julie Johnson noted in March, because the rules have already been adopted, the remaining action that the Committee may pursue is to formally object pursuant to 2-4-406, MCA.

Requirements for Objecting:

The objection is only available if the rules were not adopted in substantial compliance with the following sections of MAPA:

- 2-4-302, MCA (dealing with proper procedures for notice and filing of rules);
- 2-4-303, MCA (dealing with emergency and temporary rules); and
- 2-4-305, MCA (specifying multiple requirements for proposed and adopted rules, including time requirements for adopting rules, citations required for each rule, and requirements for the statement of reasonable necessity).

The draft objection letter identifies two areas of concern:

1. The canopy allowed under the rules is not within the standards prescribed in statute because the allowance is contrary to the Program's purpose to allow for the limited cultivation of marijuana and is contrary to the guidelines set forth in statute that require DPHHS to establish a canopy that will take into consideration safety and security issues and that will undercut illegal market prices. PLEASE NOTE: In MAR 37-839, published April 13, 2018, DPHHS is proposing to amend the canopy allowance. Public comment is due on May 11, 2018.
2. DPHHS did not include in the adoption notice an adequate statement of reasons for overruling the various considerations that were urged against the adoption of the rules.

The Revenue and Transportation Interim Committee also identified two additional areas of concern: testing standards and a lack of scientific standards for testing laboratories. The draft letter may need to be revised to address these areas. I welcome suggestions the Committee may have. PLEASE NOTE: MAR 37-839 is also proposing to amend ARM 37.107.305, which pertains to testing laboratory licensee requirements. The proposed amendments would:

- require a licensee to provide and maintain analytical testing laboratory professional

- liability insurance with an aggregate limit of \$1 million;
- require a licensee to obtain and maintain a \$25,000 surety bond that names DPHHS as a loss payee in the event the licensee fails to adhere to the security plan approved by DPHHS or operates the facility in a manner that results in the theft, loss, or diversion of marijuana items; and
- adopt a METRC Montana testing lab user guide that implements requirements for testing laboratories, including requirements for packaging and sampling, quality assurance testing, and transfers.

Procedure -- Effect of the Objection:

If the Committee wishes to proceed with this objection, the first step would be to send the objection letter to DPHHS. DPHHS is required to respond in writing to the objection within 14 days. After the Committee receives the response, the Committee may withdraw or modify its objection. If the Committee does not withdraw or modify its objection, it may vote to send the objection to the Secretary of State for publication. The effect of publication of the objection would be, if the rules are challenged in court, to shift the burden to DPHHS in proving that the rules were adopted in substantial compliance with specific portions of the Montana Administrative Procedure Act (2-4-302, 2-4-303, and 2-4-305, MCA). If the court invalidates the rules *and* finds that the rules were adopted in arbitrary and capricious disregard of the authorizing statutes, the court may award costs and reasonable attorney fees against DPHHS. (2-4-406, MCA.)

Costs of Publication:

If the Committee votes to send the objection to the Secretary of State, the Committee has to pay the costs of publication, as well as the costs of publishing DPHHS' response if DPHHS elects to have that published. (2-4-406(3), MCA.) Costs of publication are \$60 per page. (ARM 1.2.423.) The cost of publishing the objection letter as it is currently drafted would be approximately \$180.