

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM**

**EXECUTIVE SUMMARY FOR ACTION ON RULE ADOPTION**

**Agenda # III.C.1 Rule Amendment**

**Agenda Item Summary:** The Board is considering adoption of amendments to the air quality incorporation by reference (IBR) rules to adopt updated editions of Montana rules and federal statutes and regulations.

**List of Affected Rules:** This rulemaking would amend Administrative Rules of Montana (ARM) 17.8.102 and 103.

**Affected Parties Summary:** The proposed rule amendments would affect sources of air pollution subject to regulation under the air quality rules in ARM Title 17, Chapter 8, that would be affected by adopting the current editions of federal and state statutes and regulations incorporated by reference in the Administrative Rules of Montana. Specifically, revisions published in the July 1, 2015, edition of the Code of Federal Regulations (CFR), the 2014 edition of the United States Code, as published on the website of the U.S. Government Printing Office, and the Administrative Rules of Montana as they existed on September 30, 2015.

**Scope of Proposed Proceeding:** The Department requests that the Board adopt the amendments to the above-stated rules as proposed in Montana Administrative Register (MAR) Notice No. 17-384, published on July 8, 2016.

**Background:** Annually, the Department requests that the Board update its rules incorporating by reference federal air quality statutes and regulations and state administrative rules. The IBR update is accomplished by amending the dates of the editions and the website addresses of the CFR, U.S. Code, and ARM set forth in ARM 17.8.102(1), and by providing the website address to the online annual versions of the CFR and the U.S. Code sources in ARM 17.8.103. Failure to adopt the most recent edition of the CFR may result in the issuance of a federal implementation plan (FIP) for some of the requirements, with the federal Environmental Protection Agency becoming the regulatory authority in Montana for those requirements. If the failure were to continue, loss of state primacy for administering the air program could result.

**Hearing Information:** No hearing was requested and no hearing was held on the proposed amendments. The Department submitted comments in support of the proposed amendment. No member of the public submitted comments during the comment period.

**Board Options:** The Board may:

1. Adopt the proposed amendments set forth in the attached draft Notice of Amendment, and also adopt the attached HB 521 (stringency) and HB 311 (takings) analyses;
2. Adopt the proposed amendments with revisions that the Board finds are appropriate and that are consistent with the scope of the Notice of Proposed Amendment and the record in this proceeding; or
3. Decide not to adopt the amendments.

**DEQ Recommendation:** The Department recommends that the Board act according to Option 1 described above.

**Enclosures:**

1. Notice of Proposed Amendment, No Public Hearing Contemplated
2. HB 521 and 311 Analyses with Takings Checklist
3. Draft Notice of Amendment



## Memo

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**TO:** Board of Environmental Review

**FROM:** Norman J. Mullen, Staff Attorney

A handwritten signature in black ink, appearing to read "NJM", is written over the name "Norman J. Mullen".

**DATE:** July 27, 2016

**SUBJECT:** House Bill 521 (stringency) and House Bill 311 (takings) review of rulemaking concerning the amendment of ARM 17.8.102 and 103, which establish the date of the version of federal regulations incorporated by reference in air quality rules and provide addresses where those regulations can be obtained, in ARM Notice No. 17-384 (publ. 7/8/16)

### HB 521 REVIEW

(Comparing Stringency of State and Local Rules  
to Any Comparable Federal Regulations or Guidelines)

Sections 75-2-111 and 207, MCA, codify the air quality provisions of House Bill 521, from the 1995 legislative session, by requiring that the Board of Environmental Review, prior to adopting a rule to implement the Clean Air Act of Montana that is more stringent than a comparable federal regulation or guideline that addresses the same circumstances, make certain written findings after a public hearing and receiving public comment.

In this proceeding, the Board is proposing to amend ARM 17.8.102 by adopting more recent versions of the federal regulations, federal statutes, and rules of other Department programs and other Montana state agencies that are incorporated by reference into the state's air quality rules.

None of the proposed amendments would make the state rules more stringent than comparable federal regulations or guidelines. Rather, the proposed amendments to ARM 17.8.102 would update the Board's air quality rules to make them more consistent with federal air quality regulations and statutes. Therefore, no further House Bill 521 analysis is required.

(over, please)

House Bill 521 and House Bill 311 Memo for Update  
to Air Quality Incorporation-by-Reference Rule  
ARM Notice No. 17-384  
July 27, 2016  
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HB 311 REVIEW  
(Assessing Impact on Private Property)

Sections 2-10-101 through 105, MCA, codify House Bill 311, the Private Property Assessment Act, from the 1995 legislative session, by requiring that, prior to taking an action that has taking or damaging implications for private real property, a state agency must prepare a taking or damaging impact assessment. Under Section 2-10-103(1), MCA, "action with taking or damaging implications" means:

a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications.

I reviewed the guidelines and researched whether the adoptions of the federal regulations being proposed to be incorporated by reference would constitute a deprivation of real property in violation of the federal or state constitution. I determined that they would not, and have completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. No further House Bill 311 assessment is required.

**PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST**  
**(using form prepared by Montana Department of Justice, Jan. 2011)**

In the matter of the amendment of ARM 17.8.102 and 17.8.103 (pertaining to air quality incorporation by reference--publication dates and incorporation by reference and availability of referenced documents) in ARM Notice No. 17-384 (publ. 7/8/16)

**DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?**

**YES      NO**

- |       |       |   |
|-------|-------|---|
| _____ | ✓     | 1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?   |
| _____ | ✓     | 2. Does the action result in either a permanent or indefinite physical occupation of private property?  |
| _____ | ✓     | 3. Does the action deprive the owner of all economically beneficial use of the property?  |
| _____ | ✓     | 4. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 4a and 4b and continue with question 5.]  |
| _____ | _____ | 4a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?   |
| _____ | _____ | 4b. Is the government requirement roughly proportional to the impact of the proposed use of the property?   |
| _____ | ✓     | 5. Does the action deny a fundamental attribute of ownership?   |
| _____ | ✓     | 6. Does the action have a severe impact on the value of the property?   |
| _____ | ✓     | 7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is <b>NO</b> , do not answer questions 7a-7c.] |
| _____ | _____ | 7a. Is the impact of government action direct, peculiar, and significant?   |
| _____ | _____ | 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?  |
| _____ | _____ | 7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?                              |

Taking or damaging implications exist if **YES** is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 5, 6, 7a, 7b, 7c; or if **NO** is checked in response to questions 4a or 4b.

If taking or damaging implications exist, the agency must comply with Mont. Code Ann. § 2-10-105, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )  
17.8.102 and 17.8.103 pertaining to )  
incorporation by reference--publication )  
dates and incorporation by reference )  
and availability of referenced documents )  
)  
)

NOTICE OF AMENDMENT  
  
(AIR QUALITY)

TO: All Concerned Persons

1. On July 8, 2016, the Board of Environmental Review published MAR Notice No. 17-384 regarding a notice of proposed amendment of the above-stated rules at page 1109, 2016 Montana Administrative Register, Issue Number 13.
2. The board has amended the rules exactly as proposed.
3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JOHN F. NORTH  
Rule Reviewer

By: \_\_\_\_\_  
JOAN MILES  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2016.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )  
17.8.102 and 17.8.103 pertaining to )  
incorporation by reference--publication )  
dates and incorporation by reference )  
and availability of referenced documents )  
)  
)

NOTICE OF PROPOSED  
AMENDMENT

(AIR QUALITY)

NO PUBLIC HEARING  
CONTEMPLATED

TO: All Concerned Persons

1. On September 30, 2016, the Board of Environmental Review proposes to amend the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Denise Hartman, Administrative Rules Coordinator, no later than 5:00 p.m., July 29, 2016, to advise us of the nature of the accommodation that you need. Please contact Denise Hartman at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail dhartman2@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.8.102 INCORPORATION BY REFERENCE--PUBLICATION DATES

(1) In this chapter where the board has:

(a) adopted a federal regulation by reference, the reference is to the July 1, 2014 ~~2015~~, edition of the Code of Federal Regulations (CFR), as it is published on the web site of the U.S. Government Printing Office at ~~http://www.gpo.gov/fdsys/browse/collectionCfr.action?selectedYearFrom=2014&go=Go~~  
https://www.gpo.gov/fdsys/browse/collectionCfr.action?selectedYearFrom=2015&go=Go;

(b) adopted a section of the United States Code (USC) by reference, the reference is to the ~~2013~~ 2014 edition of the USC as it is published on the web site of the U.S. Government Printing Office at ~~http://www.gpo.gov/fdsys/browse/collectionUScode.action?selectedYearFrom=2013&go=Go~~  
https://www.gpo.gov/fdsys/browse/collectionUScode.action?selectedYearFrom=2014&go=Go;

(c) adopted a rule of the state of Montana from another chapter of the Administrative Rules of Montana (ARM), the reference is to the rule in effect on September 30, ~~2014~~ 2015.

(2) through (2)(b) remain the same.



AUTH: 75-2-111, MCA  
IMP: Title 75, chapter 2, MCA

REASON: See reason statement below.

17.8.103 INCORPORATION BY REFERENCE AND AVAILABILITY OF REFERENCED DOCUMENTS (1) through (3) remain the same.

(4) Copies of the CFR may be obtained from the U.S. Government Printing Office at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?selectedYearFrom=2014&go=Go> as set forth in ARM 17.8.102. When printed versions are available, they may be obtained as described in (3)(c).

(5) Copies of the U.S. Code may be obtained from the U.S. Government Printing Office at <http://www.gpo.gov/fdsys/browse/collectionUScode.action?selectedYearFrom=2013&go=Go> as set forth in ARM 17.8.102. When printed versions are available, they may be obtained as described in (3)(c).

AUTH: 75-2-111, MCA  
IMP: Title 75, chapter 2, MCA

REASON: The board adopts and incorporates by reference, federal regulations to ensure that Montana's air quality rules are at least as stringent as air quality regulations adopted by the Environmental Protection Agency to maintain primacy and federal delegation of Montana's air quality program, and to implement federal emission standards according to a federal program of emissions control.

The board is proposing to amend the air quality rules to update editions of federal and state statutes, rules, and regulations, available online, that are incorporated by reference. The board is proposing to amend ARM 17.8.102(1) and 17.8.103(4) and (5) to adopt revisions to federal regulations published in the July 1, 2015, edition of the Code of Federal Regulations (CFR) as it is published on the web site of the U.S. Government Printing Office (U.S. GPO); the 2014 edition of the U.S. Code, as it is published on the web site of the U.S. GPO; and the September 30, 2015, edition of the ARM. The reason for the reference to a specific web page of the CFR is that the CFR is published in a new codified version every year. For Title 40, which contains most of the federal regulations adopted by reference by the board for air quality regulation, the official version is dated July 1 of each year. However, the online version is not available by that date, and the printed version is not available for more than four months after that date. The board adopts the July 1 edition after the online version has been made available. The reason for the reference to a specific web page for the U.S. Code is that the U.S. Code is published in a new codified, printed version every six years. The most recent printed version is 2012. It is updated online by the U.S. Law Revision Counsel, which is associated with the U.S. House of Representatives, as new laws are enacted. It then takes approximately eight months before all titles of the U.S. Code are updated on the web site of the U.S. GPO with the changes enacted into law by the previous session of Congress. It takes about another ten months for a printed annual supplement to be distributed. The U.S. GPO publishes the printed versions, and its web site is the most authoritative site for the official online version of the U.S. Code. It is this web

site that the board is proposing to use as the version of the updated U.S. Code referred to in its rules in ARM Title 17, chapter 8 every year.

The only Montana administrative rules not contained in the air quality rules in ARM Title 17, chapter 8, that are incorporated by reference in those rules are Title 17, chapter 53, subchapters 5 and 10, which pertain to hazardous waste. These are referenced in ARM 17.8.103, 17.8.302, and 17.8.602. Neither of those hazardous waste subchapters has been modified since April 1, 2005. Even though they have not been modified, the board is proposing to update the reference to them to the September 30, 2015, version of the ARM because that more recent version is more readily available for the use of the regulated community, public, and the Department of Environmental Quality in researching and determining the applicable requirements of the rules.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Denise Hartman at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail [dhartman2@mt.gov](mailto:dhartman2@mt.gov), no later than August 5, 2016. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Denise Hartman at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail [dhartman2@mt.gov](mailto:dhartman2@mt.gov), no later than August 5, 2016.

6. If the board receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25, based on the more than 250 persons who potentially could wish to appeal air quality permits and therefore could be affected by this rulemaking.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water

quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Denise Hartman, Administrative Rules Coordinator, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Denise Hartman at dhartman2@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the board has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North

JOHN F. NORTH

Rule Reviewer

BY: /s/ Joan Miles

JOAN MILES, CHAIRMAN

Certified to the Secretary of State, June 27, 2016.