

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE AMENDMENT

Agenda # III.C.1.

Agenda Item Summary: The department requests that the board act on Montana Administrative Register Notice (MAR) No. 17-382, published on April 8, 2016, to amend air quality rules in ARM Title 17, chapter 8, subchapters 6, 7, and 12, pertaining to appeals of permits for construction, installation, alteration, use, and operation of facilities under the Clean Air Act of Montana.

List of Affected Rules: This rulemaking would amend ARM 17.8.610, 612, 613, 614, 615, 749, and 1210.

Affected Parties Summary: This rulemaking will not affect any regulated sources. The amendments simply update the administrative rules to remove conflicts between the existing rules and statute.

Scope of Proposed Proceeding: The board is considering final action on the amendment of the above-referenced rules. The amendment of these rules was proposed in MAR notice No. 17-382. The board did not receive any comments on the proposed rulemaking and is considering amending the rules as proposed. See Draft Notice of Amendment.

Background: Sections 75-2-211, 75-2-213, and 75-2-218, MCA, contain the procedures for appeals of permits for construction, installation, alteration, use, and operation of facilities under the Clean Air Act of Montana. As currently written, those statutes provide:

- (1) that a person who is directly and adversely affected by the issuance or denial of a permit may request a hearing;
- (2) that a request for hearing does not stay the department's decision on an application unless the board orders a stay;
- (3) that depending on the applicable statute, an appellant must file an affidavit supporting the request for hearing either with the request or within 30 days after the issuance or denial of the permit; and
- (4) that a separate process is available for challenges to energy development projects in 75-2-213, MCA.

As proposed, the amendments would modify the rules to incorporate these provisions and remove provisions implementing previous statutory procedures.

In addition, the amendments would strike paragraphs of rule text that were lifted verbatim from 75-2-211, MCA. The Montana Administrative Procedure Act at 2-4-

305(2), MCA, states that rules should not unnecessarily repeat statutory language. Doing so creates situations where rules must be amended whenever even the smallest changes are made to statute. The amendments instead refer to the appeal process provided in 75-2-211, MCA.

In summary, the amendments would address conflicts between the ARM and MCA that have resulted from legislative changes to the Clean Air Act of Montana.

Hearing Information: The board did not set a public hearing and did not receive a request for a public hearing on the proposed action, so no hearing was held.

Board Options: The board may:

1. Adopt the proposed amendments as set forth in the attached Notice of Amendment;

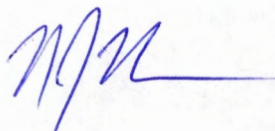
DEQ Recommendation: The department recommends that the board amend the rules as proposed in the Draft Notice of Amendment.

Enclosures:

1. Montana Administrative Register (MAR) No. 17-382 Notice of Notice of Amendment, Issue 7, page 563, published April 18, 2016.

TO: Board of Environmental Review

FROM: Norman J. Mullen, DEQ Staff Attorney



DATE: May 27, 2016

SUBJECT: House Bill 521 (stringency) and House Bill 311 (takings) review of rulemaking concerning the amendment of ARM 17.8.610, 17.8.612, 17.8.613, 17.8.614, 17.8.615, 17.8.749, and 17.8.1210 pertaining to major open burning source restrictions, conditional air quality open burning permits, Christmas tree waste open burning permits, commercial film production open burning permits, firefighter training, conditions for issuance or denial of permit, and general requirements for air quality operating permit content in ARM Notice No. 17-382 (publ. 4/8/16)

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 seven rules in ARM Title 17, chapter 8, by correcting language concerning air quality appeals to make them consistent with appeals language in Sections 75-2-211, 75-2-213, and 75-2-218, MCA.

None of the proposed amendments would make the state rules more stringent than comparable federal regulations or guidelines. Rather, the proposed amendments would amend seven of the Board's air quality rules to make them consistent with the relevant Montana statutes concerning air quality permit appeals. Therefore, no further House Bill 521 analysis is required.

(over, please)

House Bill 521 and House Bill 311 Memo for Amendments
to Air Quality Permit Appeals Rules
ARM Notice No. 17-382
May 27, 2016
Page 2

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 reviewed whether the adoptions of the rule amendments being proposed 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 17.8.610, 17.8.612, 17.8.613, 17.8.614, 17.8.615, 17.8.749, and 17.8.1210 pertaining to major open burning source restrictions, conditional air quality open burning permits, Christmas tree waste open burning permits, commercial film production open burning permits, firefighter training, conditions for issuance or denial of permit, and general requirements for air quality operating permit content in ARM Notice No. 17-382 (publ. 4/8/16)

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

YES NO

- | | | |
|--------------------------|-------------------------------------|---|
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 2. Does the action result in either a permanent or indefinite physical occupation of private property? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 3. Does the action deprive the owner of all economically beneficial use of the property? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 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.] |
| <input type="checkbox"/> | <input type="checkbox"/> | 4a. Is there a reasonable, specific connection between the government requirement and legitimate state interests? |
| <input type="checkbox"/> | <input type="checkbox"/> | 4b. Is the government requirement roughly proportional to the impact of the proposed use of the property? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 5. Does the action deny a fundamental attribute of ownership? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 6. Does the action have a severe impact on the value of the property? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 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 NO, do not answer questions 7a-7c.] |
| <input type="checkbox"/> | <input type="checkbox"/> | 7a. Is the impact of government action direct, peculiar, and significant? |
| <input type="checkbox"/> | <input type="checkbox"/> | 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded? |
| <input type="checkbox"/> | <input type="checkbox"/> | 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)
17.8.610, 17.8.612, 17.8.613, 17.8.614,)
17.8.615, 17.8.749, and 17.8.1210)
pertaining to major open burning source)
restrictions, conditional air quality open)
burning permits, Christmas tree waste)
open burning permits, commercial film)
production open burning permits,)
firefighter training, conditions for)
issuance or denial of permit, and general)
requirements for air quality operating)
permit content)

NOTICE OF AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On April 8, 2016, the Board of Environmental Review published MAR Notice No. 17-382 regarding a notice of proposed amendment of the above-stated rules at page 563, 2016 Montana Administrative Register, Issue Number 7.
2. The board has amended the rules exactly as proposed.
3. No public comments or testimony were received.

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, May 23, 2016.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.8.610, 17.8.612, 17.8.613, 17.8.614,)
17.8.615, 17.8.749, and 17.8.1210)
pertaining to major open burning source)
restrictions, conditional air quality open)
burning permits, Christmas tree waste)
open burning permits, commercial film)
production open burning permits,)
firefighter training, conditions for)
issuance or denial of permit, and general)
requirements for air quality operating)
permit content)

NOTICE OF PROPOSED
AMENDMENT

(AIR QUALITY)

NO PUBLIC HEARING
CONTEMPLATED

TO: All Concerned Persons

1. On June 3, 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 rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Denise Hartman, no later than 5:00 p.m., April 18, 2016, to advise us of the nature of the accommodation that you need. Denise may be contacted at the 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:

17.8.610 MAJOR OPEN BURNING SOURCE RESTRICTIONS (1) through (2) remain the same.

(3) When the department approves or denies the application for a permit under this rule, a person who is ~~jointly or severally~~ directly and adversely affected by the department's decision may request a hearing before the board in the manner provided in 75-2-211, MCA. ~~The request for hearing must be filed within 15 days after the department renders its decision and must include an affidavit setting forth the grounds for the request. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final unless 15 days have elapsed from the date of the decision and there is no request for a hearing under this section. The filing of a request for a hearing postpones the effective date of the department's decision until the conclusion of the hearing and issuance of a final decision by the board.~~

(4) through (5) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-211, MCA

17.8.612 CONDITIONAL AIR QUALITY OPEN BURNING PERMITS

(1) through (9) remain the same.

(10) When the department approves or denies the application for a permit under this rule, a person who is ~~jointly or severally~~ directly and adversely affected by the department's decision may request a hearing before the board in the manner provided in 75-2-211, MCA. ~~The request for hearing must be filed within 15 days after the department renders its decision. An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final until 15 days have elapsed from the date of the decision. The filing of a request for a hearing does not stay the effective date of the department's decision. However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:~~

~~(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or~~

~~(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.~~

~~(11) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4), MCA, for undertakings on injunctions.~~

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-211, MCA

17.8.613 CHRISTMAS TREE WASTE OPEN BURNING PERMITS

(1) through (7)(b)(iii) remain the same.

(8) When the department approves or denies the application for a permit under this rule, a person who is ~~jointly or severally~~ directly and adversely affected by the department's decision may request a hearing before the board in the manner provided in 75-2-211, MCA. ~~The request for hearing must be filed within 15 days after the department renders its decision. An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final until 15 days have elapsed from the date of the decision. The filing of a request for a hearing does not stay the effective date of the department's decision. However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:~~

~~(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or~~

~~(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.~~

~~(9) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4), MCA, for undertakings on injunctions.~~

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, 75-2-211, MCA

17.8.614 COMMERCIAL FILM PRODUCTION OPEN BURNING PERMITS

(1) through (7) remain the same.

~~(8) When the department approves or denies the application for a permit under this rule, a person who is jointly or severally directly and adversely affected by the department's decision may request a hearing before the board in the manner provided in 75-2-211, MCA. The request for hearing must be filed within 15 days after the department renders its decision. An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final until 15 days have elapsed from the date of the decision. The filing of a request for a hearing does not stay the effective date of the department's decision. However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:~~

~~(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or~~

~~(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.~~

~~(9) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4), MCA, for undertakings on injunctions.~~

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, 75-2-211, MCA

17.8.615 FIREFIGHTER TRAINING (1) through (5) remain the same.

~~(6) When the department approves or denies the application for a permit under this rule, a person who is jointly or severally directly and adversely affected by the department's decision may request a hearing before the board in the manner provided in 75-2-211, MCA. The request for hearing must be filed within 15 days after the department renders its decision. An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision.~~

~~The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final until 15 days have elapsed from the date of the decision. The filing of a request for a hearing does not stay the effective date of the department's decision. However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:~~

~~(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or~~

~~(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.~~

~~(7) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4), MCA, for undertakings on injunctions.~~

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, 75-2-211, MCA

17.8.749 CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT

(1) through (6) remain the same.

(7) If the department denies an application for a Montana air quality permit it shall notify the applicant in writing of the reasons for the permit denial and advise the applicant of the right to appeal the department's decision to the board as provided in 75-2-211 or 75-2-213, MCA, as applicable.

(8) remains the same.

AUTH: 75-2-111, 75-2-204, MCA

IMP: 75-2-211, 75-2-213, MCA

17.8.1210 GENERAL REQUIREMENTS FOR AIR QUALITY OPERATING PERMIT CONTENT (1) through (1)(e) remain the same.

(2) The following standard terms and conditions are applicable to each air quality operating permit issued pursuant to this subchapter:

(a) through (i) remain the same.

(j) The department's final decision regarding issuance, renewal, revision, denial, revocation, reissuance, or termination of a permit is not effective until 30 days have elapsed from the date of the decision. The decision may be appealed to the board by filing a request for hearing within 30 days after the date of the decision. A copy of the request shall be served on the department. The filing of a ~~timely~~ request for a hearing ~~postpones~~ does not stay the effective date of the department's decision ~~until the board issues a final decision.~~ However, the board may order a stay as provided in 75-2-218, MCA. If effective, the permit shield, or application shield, as appropriate, shall remain in effect until such time as the board has rendered a final decision.

(k) through (5)(c) remain the same.

AUTH: 75-2-217, 75-2-218, MCA
IMP: 75-2-217, 75-2-218, MCA

REASON: Sections 75-2-211, 75-2-213, and 75-2-218, MCA, contain the procedures for appeals of permits for construction, installation, alteration, use, and operation of facilities under the Clean Air Act of Montana. As currently written, those statutes provide:

(1) that a person who is directly and adversely affected by the issuance or denial of a permit may request a hearing;

(2) that a request for hearing does not stay the department's decision on an application unless the board orders a stay;

(3) that depending on the applicable statute, an appellant must file an affidavit supporting the request for hearing either with the request or within 30 days after the issuance or denial of the permit; and

(4) that a separate process is available for challenges to energy development projects in 75-2-213, MCA.

The proposed amendments would modify the rules to incorporate these provisions and remove provisions implementing previous statutory procedures.

In addition, the proposed amendments would strike paragraphs of rule text that were lifted verbatim from 75-2-211, MCA. The Montana Administrative Procedure Act at 2-4-305(2), MCA, states that rules should not unnecessarily repeat statutory language. Doing so creates situations where rules must be amended whenever even the smallest changes are made to statute. The proposed amendments instead refer to the appeal process provided in 75-2-211, MCA.

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, no later than May 6, 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, no later than May 6, 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, email, 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 dhartman2@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled by sending a letter by U.S. Mail to the bill sponsor on January 8, 2016.

9. With regard to the requirements of 2-4-111, MCA, the board has determined that the proposed amendment of the above-stated 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, March 28, 2016.