

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PROPOSED
Rules I through III pertaining to the)	ADOPTION
Clean Air Act)	
)	(AIR QUALITY)
)	
)	NO PUBLIC HEARING
)	CONTEMPLATED

TO: All Concerned Persons

1. On October 16, 2015, the Board of Environmental Review proposes to adopt 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 Elois Johnson, Paralegal, no later than 5:00 p.m., August 24, 2015, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

3. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS For purposes of this subchapter, the following terms have the following meanings:

- (1) "Board" means the Board of Environmental Review provided for in 2-15-3502, MCA.
- (2) "Potential conflict of interest" means:
 - (a) any income from a regulated person; or
 - (b) any interest or relationship that would preclude the individual having the interest or relationship from being considered one who represents the public interest.
- (3) "Regulated person" means:
 - (a) a person, other than a department or agency of a state, local, or regional government, who is subject to a permit or an enforcement order that implements the federal Clean Air Act; or
 - (b) any trade or business association of which a person described in (3)(a) is a member.
- (4) "Represent the public interest" means that the person does not:
 - (a) own a controlling interest in or have five percent or more of his or her capital invested in a regulated person;
 - (b) serve as attorney for, act as consultant for, or serve as an officer or director of a regulated person; or
 - (c) hold any other official or contractual relationship with a regulated person.
- (5) "Significant portion of income" means ten percent or more of gross

personal income for a calendar year, including retirement benefits, consultant fees, and stock dividends, except that it shall mean 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement. For purposes of this section, income derived from mutual-fund payments, or from other diversified investments as to which the recipient does not know the identity of the primary sources of income, shall be considered part of the recipient's gross personal income but shall not be treated as income derived from persons subject to permits or enforcement orders under the Clean Air Act.

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

NEW RULE II BOARD ACTION (1) The board may not take action on any contested case matter that arises under the Clean Air Act of Montana unless a majority of members of the board at the time of the action:

- (a) represent the public interest; and
- (b) do not derive a significant portion of income from a regulated person.

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

NEW RULE III REPORTING (1) At the first meeting each calendar year and prior to the first meeting following a change in the board's membership, each board member who represents the public interest and does not derive a significant portion of income from regulated persons shall file with the board secretary a written certification of this status.

(2) If, subsequent to making a certification under (1), a board member no longer represents the public interest or has begun to derive a significant portion of income from regulated persons, the member shall file with the board a written withdrawal of certification.

(3) Whenever the board is prohibited by [New Rule II] from taking action, the chairman shall notify the Governor of this fact in writing and shall in the notice list the members of the board who do not represent the public interest or who derive a significant portion of income from regulated persons.

(4) Each board member who has a potential conflict of interest shall file with the board a written disclosure of the interest that creates the potential conflict.

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

REASON: Section 110 of the federal Clean Air Act (CAA) (42 USC 7410) requires a state seeking primacy for the implementation and enforcement of the CAA to develop a state implementation plan (SIP) that outlines how the state will attain and maintain compliance with the National Ambient Air Quality Standards (NAAQS). Montana's SIP was initially submitted to the Environmental Protection Agency (EPA) in 1972. As a SIP-approved state, Montana must satisfy all of the applicable

requirements of the CAA in order to maintain an EPA-approved air quality program and retain program primacy.

In 2013, the EPA identified a problem with Montana's SIP specific to the requirements of Section 128 of the Clean Air Act (42 USC 7428). In relevant part, Section 128 provides that a SIP must contain the following requirements:

- "(1) any board or body which approves permits or enforcement orders under this Act shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Act; and
- (2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be disclosed."

Because the Board of Environmental Review has such authority, compliance with Section 128 of the CAA is required.

The proposed new rules include definitions, conflict of interest requirements for members of the board, and the process by which the board members will report any possible conflicts of interest. These rules would impose on the board the substantive prohibition contained in section 128(1), the disclosure requirement contained in section 128(2), and definitions that provide for reasonable implementation of these requirements. The definitions are patterned after EPA's "Guidance to States Meeting Conflict of Interest Requirements of Section 128." The EPA has been consulted and has indicated that adoption of these rules into Montana's SIP would be sufficient for Montana to make that SIP compliant with section 128 and allow Montana to retain primacy under the CAA.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than September 10, 2015. 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 Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than September 10, 2015.

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 180 based on the approximately 1800 permit holders.

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 Elois Johnson, Paralegal, 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 Elois Johnson at ejohnson@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, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the board has determined that the proposed new 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, August 3, 2015.