



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

#### [EPA-R08-OAR-2019-0268; FRL-9997-07-Region 8]

### Approval and Promulgation of Air Quality Implementation Plans; Montana; Incorporation by Reference Updates

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of Montana on August 6, 2018. The revisions include an update to incorporate by reference the 2016 version of the Code of Federal Regulations (CFR) and 2015 version of the United States Code (U.S.C.) within the Administrative Rules of Montana (ARM) that are part of the Montana SIP. The revisions also include administrative changes that consolidate the ARM's references to the CFR and U.S.C. and remove two CFR exemptions from incorporation by reference into the ARM. Additional revisions remove incorporation by reference of certain EPA standards for which the State already has delegated authority from the EPA.

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2019-0268. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard

copy form. Publicly available docket materials are available through [www.regulations.gov](http://www.regulations.gov), or please contact the person identified in the “For Further Information Contact” section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Chris Dresser, Air and Radiation Division, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8ARD-QP, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6385, [dresser.chris@epa.gov](mailto:dresser.chris@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In a rulemaking published on June 10, 2019 (84 FR 26806), the EPA proposed approval of SIP revisions submitted by the State of Montana to: 1) Amend ARM 17.8.103, 17.8.302, 17.8.602, 17.8.767, 17.8.802, 17.8.902, 17.8.1002, 17.8.1102, and 17.8.1402 to remove repetitive text describing the location of rule reference material and centralize and consolidate those reference citations into sections 17.8.102(3) and (4); 2) Modify air quality rules by correcting an internal reference in ARM 17.8.904; 3) Amend ARM 17.8.102(2), to remove the exemptions of 40 CFR part 63, subparts JJJJ and KKKKK; 4) Remove references to 40 CFR parts 60, 61, and 63 in ARM 17.8.102(2), 17.8.103(1)(f)-(i), 17.8.302(1)(a)-(c), 17.8.767(1)(c)-(d), 17.8.802(1)(c)-(d), 17.8.902(1)(a)-(b), and 17.8.1002(1)(a)-(b) from the SIP, because Montana has separately been delegated authority for parts 60, 61, and 63; and 5) Update ARM 17.8.102(1) to incorporate by reference the 2016 version of the CFR and the 2015 version of the U.S.C. In this rulemaking the EPA is taking final action to approve proposed revisions 1, 3, 4, and 5. The reasons for our approval are provided in the proposed rule.

The EPA proposed to modify Montana’s SIP by correcting an internal reference in ARM 17.8.904 (revision #2 described earlier). However, since the affected section (17.8.904(7)) has

not yet been approved into Montana's SIP, the correction cannot be finalized in this action. The EPA plans to approve the affected section with the correct internal reference in a future rulemaking.

Additionally, the EPA proposed removal of references to 40 CFR parts 60 and 61 within ARM section 17.8.767. This change was mistakenly described in the proposed rule as removing sections 17.8.767(1)(c)-(d), but the currently approved SIP defines those particular CFR references under sections 17.8.767(1)(d)-(e). Therefore, consistent with the intent of the State's rule change, the EPA will be removing the appropriate sections (17.8.767(1)(d)-(e)) from Montana's currently approved SIP in this final rule.

## **II. Response to Public Comments**

The EPA received one anonymous comment letter on the EPA's proposed approval of SIP revisions submitted by the State of Montana.

*Comment 1:* The commenter remarks that the EPA states it is necessary and appropriate to incorporate NESHAP JJJJ and KKKKK into the SIP, but the EPA does not say why it is necessary. Further, the commenter states that there should be no reason for a state to incorporate federal rules into their SIP as they are already federally enforceable, and the State does not need to get SIP approval for the State to get delegation for state enforcement.

*Response 1:* The EPA agrees that the State is not required to incorporate NESHAPs into its SIP and clarifies that by approving Montana's submitted SIP revisions to ARM 17.8.102(2), which would remove the exemptions for 40 CFR part 63, subparts JJJJ and KKKKK from the SIP, these NESHAPs will not be part of Montana's SIP. The EPA's proposed approval of Montana's revisions to ARM 17.8.102(2) mistakenly stated that approval would "effectively incorporat[e] the most recent federal rules covering emissions from brick and structural clay

products manufacturing and clay ceramics manufacturing into Montana's SIP.” However, the EPA clarifies that approval of Montana’s revisions to ARM 17.8.102(2) will not result in 40 CFR part 63, subparts JJJJ and KKKKK being included in Montana’s SIP. This is because the EPA is approving other parts of Montana’s SIP submission that request to remove the underlying incorporation by reference of all NESHAPs in its SIP, including but not limited to subparts JJJJ and KKKKK. Specifically, Montana requested to remove from its SIP ARM 17.8.103(1)(i) and ARM 17.8.302(1)(c), which incorporate by reference all of 40 CFR part 63. Therefore, because the EPA is approving Montana’s request to remove from its SIP the underlying incorporation by reference of all NESHAPs, the removal of the *exemption* of the NESHAPs in subparts JJJJ and KKKKK from the SIP will not result in those two NESHAPs being included in the SIP. Lastly, it is important to note that although 40 CFR part 63, subparts JJJJ and KKKKK are not included in Montana’s SIP, they are nevertheless included in Montana’s state administrative rules, and the EPA has delegated to Montana the authority to implement those NESHAPs. As a result, even though those NESHAPs are not part of Montana’s SIP, they are part of a separate EPA delegation of authority to Montana, which allows Montana to implement and enforce those NESHAPs.

*Comment 2:* The commenter states that the EPA says it is necessary and appropriate to incorporate the 2016 CFR and the 2015 U.S.C. but does not address the fact that doing so would make all changes in the CFR since 2016 not applicable in the State and all changes in the statute since 2015 not applicable in the State. The commenter further suggests that the EPA must disapprove because incorporating old versions of the CFR or U.S.C. could be construed to mean that the 2019 CFR and U.S.C. do not apply until the State incorporates these sections by reference. By approving old versions of the CFR or U.S.C. into the SIP EPA is allowing the

State to be more lenient than the federal government in terms of enforcing air pollution requirements.

*Response 2:* The EPA disagrees with the commenter's characterization of which versions of the CFR and U.S.C. should be adopted through this action, and of the consequences of not approving the most recent versions. Under CAA section 110(k), the EPA is required to act on a state's SIP revision package, which contains requested changes to their SIP, and to approve the revision to the extent it meets the requirements of the CAA. In this case, the State of Montana requested updates to its SIP's incorporation by reference references, which currently incorporate the 2013 version of the CFR and 2012 version of the U.S.C., so that these references would reflect the 2016 version of the CFR and 2015 version of the U.S.C. Such a gap is a normal part of the cooperative federalism inherent in the SIP process – states must adopt SIP measures through state-level processes with specific procedural requirements and submit those revisions to the EPA (*see generally* 40 CFR 51.100 *et seq.*, including Appendix V), and then the EPA has up to 18 months in which to act on those submissions under CAA section 110(k). In this case, at the time Montana started its State rulemaking process, the 2016 and 2015 versions of the CFR and U.S.C. were the most recent versions available. If the State wishes to adopt more recent versions, it will be required to submit a SIP package requesting that the EPA update its SIP accordingly. Future State rulemaking and SIP update packages will continue to update the incorporation by reference dates as appropriate. Additionally, the commenter is incorrect in its assertion that the more recent versions of the CFR and U.S.C. will not apply. All current federal regulations and laws promulgated and published in the CFR and U.S.C. apply throughout the nation, including in Montana. So, approving these specific SIP revisions do not make the State's enforcement "more lenient" than under the current federal regulations and laws, even if those submissions

incorporate since-revised versions of federal laws and regulations. Additionally, the commenter does not raise any specific differences between the 2016 and 2015 versions of the CFR and U.S.C. and the current versions of the CFR and U.S.C. that it believes would cause the State's SIP to be "more lenient" than current federal law and thus not approvable.

### **III. Final Action**

For the reasons expressed in the proposed rule, and the reasons explained in the response to public comments, the EPA is approving the SIP submittal, containing recent amendments to the ARM, submitted by the State of Montana on August 6, 2018, as follows: 1) Amend ARM 17.8.103, 17.8.302, 17.8.602, 17.8.767, 17.8.802, 17.8.902, 17.8.1002, 17.8.1102, and 17.8.1402 to remove repetitive text describing the location of rule reference material and centralize and consolidate those reference citations into sections 17.8.102(3) and (4); 2) Amend ARM 17.8.102(2), to remove the exemptions of 40 CFR part 63, subparts JJJJ and KKKKK; 3) Remove references to 40 CFR parts 60, 61, and 63 in ARM 17.8.102(2), 17.8.103(1)(f)-(i), 17.8.302(1)(a)-(c), 17.8.767(1)(d)-(e), 17.8.802(1)(c)-(d), 17.8.902(1)(a)-(b), and 17.8.1002(1)(a)-(b) from the SIP, because Montana has separately been delegated authority for parts 60, 61, and 63; and 4) Update ARM 17.8.102(1) to incorporate by reference the 2016 version of the CFR and the 2015 version of the U.S.C.

### **IV. Incorporation by Reference**

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of Administrative Rules of Montana described in the amendments set forth to 40 CFR part 52, below. The EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and at the EPA Region 8 office (please contact the

person identified in the “For Further Information Contact” section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA’s approval, and will be incorporated by reference in the next update to the SIP compilation.<sup>1</sup>

## **V. Statutory and Executive Orders Review**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

---

<sup>1</sup> 62 FR 27968 (May 22, 1997).

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take



effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [**Insert date 60 days after date of publication in the Federal Register**]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: July 26, 2019.

\_\_\_\_\_  
Gregory Sopkin,  
Regional Administrator,  
Region 8.

40 CFR part 52 is amended as follows:

**PART 52 -- APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

**Subpart BB – Montana**

2. In §52.1370, the table in paragraph (c) is amended by revising the table entries for “17.8.102,” “17.8.103,” “17.8.302,” “17.8.602,” “17.8.767,” “17.8.802,” “17.8.902,” “17.8.1002,” “17.8.1102” and “17.8.1402”.

The revisions read as follows:

**§ 52.1370 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

State citation	Rule title	State effective date	EPA final rule date	Final rule citation	Comments
* * * * *					
<b>(i) Administrative Rules of Montana, Subchapter 01, General Provisions</b>					
* * * * *					
17.8.102	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register</b> ].	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the	Excluding (2).

				<b>Federal Register].</b>	
17.8.103	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register].</b>	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register].</b>	Excluding (1)(f)-(i).

\* \* \* \* \*

**(ii) Administrative Rules of Montana, Subchapter 03, Emission Standards**

\* \* \* \* \*

17.8.302	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register].</b>	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register].</b>	Excluding (1)(a)-(c).
----------	----------------------------	-----------	---	--	-----------------------

\* \* \* \* \*

**(iv) Administrative Rules of Montana, Subchapter 06, Open Burning**

\* \* \* \* \*

17.8.602	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register].</b>	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register].</b>	
----------	----------------------------	-----------	---	--	--

\* \* \* \* \*

**(v) Administrative Rules of Montana, Subchapter 07, Permit Construction and**

<b>Operation of Air Contaminant Sources</b>					
* * * * *					
17.8.767	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register</b> ].	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register</b> ].	Excluding (1)(c)-(d).
<b>(vi) Administrative Rules of Montana, Subchapter 08, Prevention of Significant Deterioration of Air Quality</b>					
* * * * *					
17.8.802	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register</b> ].	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register</b> ].	Excluding (1)(c)-(d).
* * * * *					
<b>(vii) Administrative Rules of Montana, Subchapter 09, Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Nonattainment Areas</b>					
* * * * *					
17.8.902	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register</b> ].	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register</b> ].	Excluding (1)(a)-(b).

				<b>Register].</b>	
* * * * *					
<b>(viii) Administrative Rules of Montana, Subchapter 10, Preconstruction Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Attainment or Unclassified Areas</b>					
* * * * *					
17.8.1002	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register].</b>	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register].</b>	Excluding (1)(a)-(b).
* * * * *					
<b>(ix) Administrative Rules of Montana, Subchapter 11, Visibility Impact Assessment</b>					
* * * * *					
17.8.1102	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register].</b>	[Insert <b>Federal Register</b> citation]. [Insert date of publication in the <b>Federal Register].</b>	
* * * * *					
<b>(xi) Administrative Rules of Montana, Subchapter 14, Conformity of General Federal Actions</b>					
* * * * *					
17.8.1402	Incorporation by Reference	2/23/2018	[Insert date 30 days after date of publication in the <b>Federal Register].</b>	[Insert <b>Federal Register</b> citation]. [Insert date of publication	

				in the <b>Federal Register</b> ].			
*	*	*	*	*	*	*	*

\* \* \* \* \*

[FR Doc. 2019-16382 Filed: 8/1/2019 8:45 am; Publication Date: 8/2/2019]