

1 HOUSE BILL NO. 270

2 INTRODUCED BY K. ZOLNIKOV, W. GALT

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING REMEDY REQUIREMENTS OF THE MONTANA
5 ENVIRONMENTAL POLICY ACT RELATED TO THE ENVIRONMENTAL REVIEW PROCESS; AMENDING
6 SECTIONS 75-1-102, 75-1-201, AND 75-1-208, MCA; PROVIDING AN IMMEDIATE EFFECTIVE DATE;
7 PROVIDING AN APPLICABILITY DATE."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 **Section 1.** Section 75-1-102, MCA, is amended to read:

12 **"75-1-102. Intent -- purpose.** (1) The legislature, mindful of its constitutional obligations under Article
13 II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. The
14 Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1
15 through 3 of this chapter provide for the adequate review of state actions in order to ensure that:

16 (a) environmental attributes are fully considered by the legislature in enacting laws to fulfill
17 constitutional obligations; and

18 (b) the public is informed of the anticipated impacts in Montana of potential state actions.

19 (2) The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage
20 productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy
21 private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate
22 damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the
23 understanding of the ecological systems and natural resources important to the state, and to establish an
24 environmental quality council.

25 (3) (a) The purpose of requiring an environmental assessment and an environmental impact
26 statement under part 2 of this chapter is to assist the legislature in determining whether laws are adequate to
27 address impacts to Montana's environment and to inform the public and public officials of potential impacts
28 resulting from decisions made by state agencies.

(b) Except to the extent that an applicant agrees to the incorporation of measures in a permit pursuant to ~~75-1-201(4)(b)~~ 75-1-201(3)(b), it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.

Section 2. Section 75-1-201, MCA, is amended to read:

"75-1-201. General directions -- environmental impact statements. (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) under this part, all agencies of the state, except the legislature and except as provided in ~~subsections subsection (2) and (3)~~, shall:

(i) use a systematic, interdisciplinary approach that will ensure:

(A) the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking for a state-sponsored project that may have an impact on the Montana human environment by projects in Montana; and

(B) that in any environmental review that is not subject to subsection (1)(b)(iv), when an agency considers alternatives, the alternative analysis will be in compliance with the provisions of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(II) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(III);

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking for state-sponsored projects, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment in Montana are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana a detailed statement on:

- 1 (A) the environmental impact of the proposed action;
- 2 (B) any adverse effects on Montana's environment that cannot be avoided if the proposal is
3 implemented;
- 4 (C) alternatives to the proposed action. An analysis of any alternative included in the environmental
5 review must comply with the following criteria:
- 6 (I) any alternative proposed must be reasonable, in that the alternative must be achievable under
7 current technology and the alternative must be economically feasible as determined solely by the economic
8 viability for similar projects having similar conditions and physical locations and determined without regard to
9 the economic strength of the specific project sponsor;
- 10 (II) the agency proposing the alternative shall consult with the project sponsor regarding any
11 proposed alternative, and the agency shall give due weight and consideration to the project sponsor's
12 comments regarding the proposed alternative;
- 13 (III) the agency shall complete a meaningful no-action alternative analysis. The no-action
14 alternative analysis must include the projected beneficial and adverse environmental, social, and economic
15 impact of the project's noncompletion.
- 16 (D) any regulatory impacts on private property rights, including whether alternatives that reduce,
17 minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this
18 subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private
19 property.
- 20 (E) the relationship between local short-term uses of the Montana human environment and the
21 maintenance and enhancement of long-term productivity;
- 22 (F) any irreversible and irretrievable commitments of resources that would be involved in the
23 proposed action if it is implemented;
- 24 (G) the customer fiscal impact analysis, if required by 69-2-216; and
- 25 (H) the details of the beneficial aspects of the proposed project, both short-term and long-term, and
26 the economic advantages and disadvantages of the proposal;
- 27 (v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe
28 appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts

1 concerning alternative uses of available resources. If the alternatives analysis is conducted for a project that is
2 not a state-sponsored project and alternatives are recommended, the project sponsor may volunteer to
3 implement the alternative. Neither the alternatives analysis nor the resulting recommendations bind the project
4 sponsor to take a recommended course of action, but the project sponsor may agree pursuant to subsection
5 ~~(4)(b)~~ (3)(b) to a specific course of action.

6 (vi) recognize the potential long-range character of environmental impacts in Montana and, when
7 consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs
8 designed to maximize cooperation in anticipating and preventing a decline in the quality of Montana's
9 environment;

10 (vii) make available to counties, municipalities, institutions, and individuals advice and information
11 useful in restoring, maintaining, and enhancing the quality of Montana's environment;

12 (viii) initiate and use ecological information in the planning and development of resource-oriented
13 projects; and

14 (ix) assist the legislature and the environmental quality council established by 5-16-101;

15 (c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible
16 state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or
17 special expertise with respect to any environmental impact involved in Montana and with any Montana local
18 government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state
19 official shall also consult with and obtain comments from any state agency in Montana with respect to any
20 regulation of private property involved. Copies of the statement and the comments and views of the appropriate
21 state, federal, and local agencies that are authorized to develop and enforce environmental standards must be
22 made available to the governor, the environmental quality council, and the public and must accompany the
23 proposal through the existing agency review processes.

24 (d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for
25 use or permission to act by an agency, either singly or in combination with other state agencies, does not
26 trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the
27 entitlement or unless otherwise provided by law.

28 ~~(2) — (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to~~

subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.

(b) ~~_____~~ An environmental review conducted pursuant to subsection (1) may include an evaluation if:

(i) ~~_____~~ conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or

(ii) ~~_____~~ the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant.

~~(3)~~(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

~~(4)~~(3) (a) The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter.

(b) Nothing in this subsection ~~(4)~~ (3) prevents a project sponsor and an agency from mutually developing measures that may, at the request of a project sponsor, be incorporated into a permit or other authority to act.

(c) Parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action.

~~(5)~~(4) (a) (i) A challenge to an agency's environmental review under this part may only be brought against a final agency action decision and may only be brought in district court or in federal court, whichever is appropriate. A challenge may only be brought by a person who submits formal comments on the agency's environmental review prior to the agency's final decision, and the challenge must be limited to those issues addressed in those comments.

(ii) Any action or proceeding challenging a final agency action alleging failure to comply with or inadequate compliance with a requirement under this part must be brought within 60 days of the action that is the subject of the challenge.

(iii) For an action taken by the board of land commissioners or the department of natural resources and conservation under Title 77, "final agency action" means the date that the board of land commissioners or the department of natural resources and conservation issues a final environmental review document under this part or the date that the board approves the action that is subject to this part, whichever is later.

1 (b) Any action or proceeding under subsection ~~(5)(a)(ii)~~ (4)(a)(ii) must take precedence over other
2 cases or matters in the district court unless otherwise provided by law.

3 (c) Any judicial action or proceeding brought in district court under subsection ~~(5)(a)~~ (4)(a)
4 involving an equine slaughter or processing facility must comply with 81-9-240 and 81-9-241.

5 ~~(6)(5)~~ (a) (i) In an action alleging noncompliance or inadequate compliance with a requirement of
6 parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or
7 a claim that the environmental review is inadequate, the agency shall compile and submit to the court the
8 certified record of its decision at issue. The agency, prior to submitting the certified record to the court, shall
9 assess and collect from the person challenging the decision a fee to pay for actual costs to compile and submit
10 the certified record. Except as provided in subsection ~~(6)(b)~~ (5)(b), the person challenging the decision has the
11 burden of proving the claim by clear and convincing evidence contained in the record.

12 ~~(ii) An action alleging noncompliance or inadequate compliance with a requirement of parts 1~~
13 ~~through 3, including a challenge to an agency's decision that an environmental review is not required or a claim~~
14 ~~that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and~~
15 ~~impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit,~~
16 ~~license, certificate, authorization, or other entitlement or authority unless the review is required by a federal~~
17 ~~agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a~~
18 ~~regulated pollutant.~~

19 ~~(iii)(ii)~~ Except as provided in subsection ~~(6)(b)~~ (5)(b), in a challenge to the agency's decision or the
20 adequacy of an environmental review, a court may not consider any information, including but not limited to an
21 issue, comment, argument, proposed alternative, analysis, or evidence, that was not first presented to the
22 agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to
23 be submitted.

24 ~~(iv)(iii)~~ Except as provided in subsection ~~(6)(b)~~ (5)(b), the court shall confine its review to the record
25 certified by the agency. The court shall affirm the agency's decision or the environmental review unless the
26 court specifically finds that the agency's decision was arbitrary and capricious.

27 ~~(v)(iv)~~ A customer fiscal impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal
28 impact analysis is inadequate may not be used as the basis of an action challenging or seeking review of the

1 agency's decision.

2 (b) (i) When a party challenging the decision or the adequacy of the environmental review or
3 decision presents information not in the record certified by the agency, the challenging party shall certify under
4 oath in an affidavit that the information is new, material, and significant evidence that was not publicly available
5 before the agency's decision and that is relevant to the decision or the adequacy of the agency's environmental
6 review.

7 (ii) If upon reviewing the affidavit the court finds that the proffered information is new, material, and
8 significant evidence that was not publicly available before the agency's decision and that is relevant to the
9 decision or to the adequacy of the agency's environmental review, the court shall remand the new evidence to
10 the agency for the agency's consideration and an opportunity to modify its decision or environmental review
11 before the court considers the evidence as a part of the administrative record under review.

12 (iii) If the court finds that the information in the affidavit does not meet the requirements of
13 subsection ~~(6)(b)(i)~~ (5)(b)(i), the court may not remand the matter to the agency or consider the proffered
14 information in making its decision.

15 (c) (i) The remedies provided in this section for successful challenges to a decision of the agency
16 or the adequacy of the statement are exclusive.

17 (ii) If the court finds that noncompliance has occurred with parts 1 through 3 of this chapter, the
18 court may remand the matter to the agency to correct the noncompliance.

19 (iii) Notwithstanding the provisions of 27-19-201 and 27-19-314, a court having considered the
20 pleadings of parties and intervenors opposing a request for a temporary restraining order, preliminary
21 injunction, permanent injunction, vacatur, or other equitable relief may not enjoin, void, nullify, revoke, modify,
22 or suspend the issuance or effectiveness of a license or permit or a part of a license or permit issued pursuant
23 to Title 75 or Title 82 unless the court specifically finds that the party requesting the relief is more likely than not
24 to prevail on the merits of its complaint given the uncontroverted facts in the record and applicable law and, in
25 the absence of a temporary restraining order, a preliminary injunction, a permanent injunction, vacatur, or other
26 equitable relief, that the:

27 (A) party requesting the relief will suffer irreparable harm in the absence of the relief;

28 (B) issuance of the relief is in the public interest. In determining whether the grant of the relief is in

1 the public interest, a court:

2 (I) may not consider the legal nature or character of any party; and

3 (II) shall consider the implications of the relief on the local and state economy and make written
4 findings with respect to both.

5 (C) relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and
6 the irreparable harm the party asking for the relief will suffer. In tailoring the relief, the court shall ensure, to the
7 extent possible, that the project or as much of the project as possible can go forward while also providing the
8 relief to which the applicant has been determined to be entitled.

9 (d) The court may issue a temporary restraining order, preliminary injunction, permanent
10 injunction, or other injunctive relief only if the party seeking the relief provides a written undertaking to the court
11 in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any
12 party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial
13 decision in the case, including but not limited to lost wages of employees and lost project revenues for 1 year. If
14 the party seeking an injunction or a temporary restraining order objects to the amount of the written undertaking
15 for any reason, including but not limited to its asserted inability to pay, that party shall file an affidavit with the
16 court that states the party's income, assets, and liabilities in order to facilitate the court's consideration of the
17 amount of the written undertaking that is required. The affidavit must be served on the party enjoined. ~~If a~~
18 ~~challenge for noncompliance or inadequate compliance with a requirement of parts 1 through 3 seeks to~~
19 ~~vacate, void, or delay a lease, permit, license, certificate, or other entitlement or authority, the party shall, as an~~
20 ~~initial matter, seek an injunction related to a lease, permit, license, certificate, or other entitlement or authority,~~
21 ~~and an~~ An injunction may only be issued if the challenger:

22 (i) proves there is a likelihood of succeeding on the merits;

23 (ii) proves there is a violation of an established law or regulation on which the lease, permit,
24 license, certificate, or other entitlement or authority is based; and

25 (iii) subject to the demonstration of the inability to pay, posts the appropriate written undertaking.

26 (e) An individual or entity seeking a lease, permit, license, certificate, or other entitlement or
27 authority to act may intervene in a lawsuit in court challenging a decision or statement by a department or
28 agency of the state as a matter of right if the individual or entity has not been named as a defendant.

(f) Attorney fees or costs may not be awarded to the prevailing party in an action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3.

~~(7)(6)~~ For the purposes of judicial review, to the extent that the requirements of this section are inconsistent with the provisions of the National Environmental Policy Act, the requirements of this section apply to an environmental review or any severable portion of an environmental review within the state's jurisdiction that is being prepared by a state agency pursuant to this part in conjunction with a federal agency proceeding pursuant to the National Environmental Policy Act.

~~(8)(7)~~ The director of the agency responsible for the determination or recommendation shall endorse in writing any determination of significance made under subsection (1)(b)(iv) or any recommendation that a determination of significance be made.

~~(9)(8)~~ A project sponsor may request a review of the significance determination or recommendation made under subsection ~~(8)~~~~(7)~~ by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208."

"

Section 3. Section 75-1-208, MCA, is amended to read:

"75-1-208. Environmental review procedure. (1) (a) Except as provided in 75-1-205(4) and subsection (1)(b) of this section, an agency shall comply with this section when completing any environmental review required under this part.

(b) To the extent that the requirements of this section are inconsistent with federal requirements, the requirements of this section do not apply to an environmental review that is being prepared jointly by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that must comply with the requirements of the National Environmental Policy Act.

(2) (a) Except as provided in subsection (2)(b), a project sponsor may, after providing a 30-day notice, appear before the environmental quality council at any regularly scheduled meeting to discuss issues regarding the agency's environmental review of the project. The environmental quality council shall ensure that the appropriate agency personnel are available to answer questions.

(b) If the primary concern of the agency's environmental review of a project is the quality or quantity of water, a project sponsor may, after providing a 30-day notice, appear before the water policy committee established in 5-5-231 at any regularly scheduled meeting to discuss issues regarding the agency's environmental review of the project. The water policy committee shall ensure that the appropriate agency personnel are available to answer questions.

(3) If a project sponsor experiences problems in dealing with the agency or any consultant hired by the agency regarding an environmental review, the project sponsor may submit a written request to the agency director requesting a meeting to discuss the issues. The written request must sufficiently state the issues to allow the agency to prepare for the meeting. If the issues remain unresolved after the meeting with the agency director, the project sponsor may submit a written request to appear before the appropriate board, if any, to discuss the remaining issues. A written request to the appropriate board must sufficiently state the issues to allow the agency and the board to prepare for the meeting.

(4) (a) Subject to the requirements of subsection (5), to ensure a timely completion of the environmental review process, an agency is subject to the time limits listed in this subsection (4) unless other time limits are provided by law. All time limits are measured from the date the agency receives a complete application. An agency has:

- (i) 60 days to complete a public scoping process, if any;
- (ii) 90 days to complete an environmental review unless a detailed statement pursuant to 75-1-201(1)(b)(iv) or 75-1-205(4) is required; and
- (iii) 180 days to complete a detailed statement pursuant to 75-1-201(1)(b)(iv).

(b) The period of time between the request for a review by a board and the completion of a review by a board under ~~75-1-201(9)~~ 75-1-201(8) or subsection (10) of this section may not be included for the purposes of determining compliance with the time limits established for conducting an environmental review under this subsection or the time limits established for permitting in 75-2-211, 75-2-218, 75-20-216, 75-20-231, 76-4-114, 82-4-122, 82-4-231, 82-4-337, and 82-4-432.

(5) An agency may extend the time limits in subsection (4) by notifying the project sponsor in writing that an extension is necessary and stating the basis for the extension. The agency may extend the time limit one time, and the extension may not exceed 50% of the original time period as listed in subsection (4).

1 After one extension, the agency may not extend the time limit unless the agency and the project sponsor
2 mutually agree to the extension.

3 (6) If the project sponsor disagrees with the need for the extension, the project sponsor may
4 request that the appropriate board, if any, conduct a review of the agency's decision to extend the time period.
5 The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the
6 issue.

7 (7) (a) Except as provided in subsection (7)(b), if an agency has not completed the environmental
8 review by the expiration of the original or extended time period, the agency may not withhold a permit or other
9 authority to act unless the agency makes a written finding that there is a likelihood that permit issuance or other
10 approval to act would result in the violation of a statutory or regulatory requirement.

11 (b) Subsection (7)(a) does not apply to a permit granted under Title 75, chapter 2, or under Title
12 82, chapter 4, parts 1 and 2.

13 (8) Under this part, an agency may only request information from the project sponsor that is
14 relevant to the environmental review required under this part.

15 (9) An agency shall ensure that the notification for any public scoping process associated with an
16 environmental review conducted by the agency is presented in an objective and neutral manner and that the
17 notification does not speculate on the potential impacts of the project.

18 (10) An agency may not require the project sponsor to provide engineering designs in greater detail
19 than that necessary to fairly evaluate the proposed project. The project sponsor may request that the
20 appropriate board, if any, review an agency's request regarding the level of design detail information that the
21 agency believes is necessary to conduct the environmental review. The appropriate board may, at its
22 discretion, submit an advisory recommendation to the agency regarding the issue.

23 (11) An agency shall, when appropriate, evaluate the cumulative impacts of a proposed project.
24 However, related future actions may only be considered when these actions are under concurrent consideration
25 by any agency through preimpact statement studies, separate impact statement evaluations, or permit
26 processing procedures."
27

28 NEW SECTION. **Section 4. Severability.** If a part of [this act] is invalid, all valid parts that are

1 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
2 the part remains in effect in all valid applications that are severable from the invalid applications.

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4 NEW SECTION. **Section 5. Effective date.** [This act] is effective on passage and approval.

5

6 NEW SECTION. **Section 6. Applicability.** [This act] applies to all decisions pending but not decided
7 by a court and cases filed on or after [the effective date of this act].

8

- END -