

1 SENATE BILL NO. 557

2 INTRODUCED BY M. NOLAND, B. MITCHELL, T. MANZELLA, J. FULLER, K. REGIER, S. HINEBAUCH, T.  
3 MCGILLVRAY, B. USHER, D. LENZ, D. BARTEL, C. GLIMM, J. ELLSWORTH, K. BOGNER, D. ZOLNIKOV, D.

4 EMRICH

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6 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE ENVIRONMENTAL POLICY ACT RELATING TO  
7 LEGAL CHALLENGES; REQUIRING A FEE TO COMPILE RECORDS; ~~REQUIRING THE CHALLENGER TO~~  
8 ~~DISCLOSE FUNDING SOURCES ; CLARIFYING THAT CHALLENGING A DECISION IS NOT A~~  
9 ~~CHARITABLE PURPOSE; AWARDDING ATTORNEY FEES; PROVIDING THAT CERTAIN CHALLENGES~~  
10 ~~RELATED TO GREENHOUSE GASSES CANNOT VOID ACTIONS UNLESS REQUIRED BY FEDERAL~~  
11 ~~AGENCY OR ACT OF CONGRESS; AND AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN~~  
12 ~~IMMEDIATE EFFECTIVE DATE."~~

13  
14 WHEREAS, IN ACCORDANCE WITH ARTICLE IX, SECTION 1(2), OF THE MONTANA CONSTITUTION, THE  
15 LEGISLATURE IS CONSTITUTIONALLY DELEGATED THE AUTHORITY TO IMPLEMENT THE RIGHT TO A CLEAN AND HEALTHFUL  
16 ENVIRONMENT; AND

17 WHEREAS, THE LEGISLATURE, MINDFUL OF ITS CONSTITUTIONAL OBLIGATION TO PROVIDE FOR THE  
18 ADMINISTRATION AND ENFORCEMENT OF THE CONSTITUTION, HAS ENACTED A COMPREHENSIVE SET OF LAWS TO  
19 ACCOMPLISH THE GOALS OF THE CONSTITUTION; AND

20 WHEREAS, THE LEGISLATURE HAS REVIEWED THE INTENT OF THE FRAMERS OF THE 1972 CONSTITUTION AS  
21 EVIDENCED IN THE VERBATIM TRANSCRIPTS OF THE CONSTITUTIONAL CONVENTION; AND

22 WHEREAS, THERE IS NO INDICATION THAT ONE ENUMERATED INALIENABLE RIGHT IS INTENDED TO SUPERSEDE  
23 OTHER INALIENABLE RIGHTS, INCLUDING THE RIGHT TO USE PROPERTY IN ALL LAWFUL MEANS; AND

24 WHEREAS, THE UNITED STATES SUPREME COURT'S DECISION IN WEST VIRGINIA V. EPA REALIGNS THE  
25 SEPARATION OF POWERS TO RESTRICT THE ADMINISTRATIVE STATE; AND

26 WHEREAS, CONGRESS HAS NEITHER EXPLICITLY PASSED LEGISLATION THAT REGULATES GREENHOUSE  
27 GASES AS POLLUTANTS UNDER THE FEDERAL CLEAN AIR ACT NOR EXPLICITLY DIRECTED THE ENVIRONMENTAL  
28 PROTECTION AGENCY TO REGULATE CARBON DIOXIDE.

1

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

3

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

5 **"75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes  
6 and directs that, to the fullest extent possible:

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

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

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

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

15 (B) that in any environmental review that is not subject to subsection (1)(b)(iv), when an agency  
16 considers alternatives, the alternative analysis will be in compliance with the provisions of subsections  
17 (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  
18 necessary, subsection (1)(b)(iv)(C)(III);

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

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

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

28 (A) the environmental impact of the proposed action;

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

1 not a state-sponsored project and alternatives are recommended, the project sponsor may volunteer to  
2 implement the alternative. Neither the alternatives analysis nor the resulting recommendations bind the project  
3 sponsor to take a recommended course of action, but the project sponsor may agree pursuant to subsection  
4 (4)(b) to a specific course of action.

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

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

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

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

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

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

27 (2) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to  
28 subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not

1 include actual or potential impacts that are regional, national, or global in nature.

2 (b) An environmental review conducted pursuant to subsection (1) may include a review of actual  
3 or potential impacts beyond Montana's borders if it is conducted by:

4 (i) the department of fish, wildlife, and parks for the management of wildlife and fish;

5 (ii) an agency reviewing an application for a project that is not a state-sponsored project to the  
6 extent that the review is required by law, rule, or regulation; or

7 (iii) a state agency and a federal agency to the extent the review is required by the federal agency.

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

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

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

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

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

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

25 (iii) For an action taken by the board of land commissioners or the department of natural resources  
26 and conservation under Title 77, "final agency action" means the date that the board of land commissioners or  
27 the department of natural resources and conservation issues a final environmental review document under this  
28 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) must take precedence over other cases or  
2 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) involving an  
4 equine slaughter or processing facility must comply with 81-9-240 and 81-9-241.

5 (6) (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, ~~and except~~. The agency, prior to submitting the certified record to the  
9 court, shall assess and collect from the person challenging the decision a fee to pay for actual costs to compile  
10 and submit the certified record. Except as provided in subsection (6)(b), the person challenging the decision  
11 has the burden of proving the claim by clear and convincing evidence contained in the record. ~~The person~~  
12 ~~challenging the decision shall identify the source of funding used for the challenge. A challenge under this~~  
13 ~~section is not considered a charitable purpose for a nonprofit corporation as provided in Title 35, chapter 2, and~~  
14 ~~is not exempt from taxation under section 501(c)(3) or 501(c)(6) of the Internal Revenue Code.~~

15 (ii) AN ACTION ALLEGING NONCOMPLIANCE OR INADEQUATE COMPLIANCE WITH A REQUIREMENT OF PARTS  
16 1 THROUGH 3, INCLUDING A CHALLENGE TO AN AGENCY'S DECISION THAT AN ENVIRONMENTAL REVIEW IS NOT REQUIRED  
17 OR A CLAIM THAT THE ENVIRONMENTAL REVIEW IS INADEQUATE BASED IN WHOLE OR IN PART UPON GREENHOUSE GAS  
18 EMISSIONS AND IMPACTS TO THE CLIMATE IN MONTANA OR BEYOND MONTANA'S BORDERS, CANNOT VACATE, VOID, OR  
19 DELAY A LEASE, PERMIT, LICENSE, CERTIFICATE, AUTHORIZATION, OR OTHER ENTITLEMENT OR AUTHORITY UNLESS THE  
20 REVIEW IS REQUIRED BY A FEDERAL AGENCY OR THE UNITED STATES CONGRESS AMENDS THE FEDERAL CLEAN AIR ACT  
21 TO INCLUDE CARBON DIOXIDE AS A REGULATED POLLUTANT.

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

27 (iii)(iv) Except as provided in subsection (6)(b), the court shall confine its review to the record certified  
28 by the agency. The court shall affirm the agency's decision or the environmental review unless the court

1 specifically finds that the agency's decision was arbitrary and capricious ~~or was otherwise not in accordance~~  
2 ~~with law.~~

3 ~~(iv)~~(v) A customer fiscal impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal  
4 impact analysis is inadequate may not be used as the basis of an action challenging or seeking review of the  
5 agency's decision.

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

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

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

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

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

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

1 (B) issuance of the relief is in the public interest. In determining whether the grant of the relief is in  
2 the public interest, a court:

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

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

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

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

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

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

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

27 (e) An individual or entity seeking a lease, permit, license, certificate, or other entitlement or  
28 authority to act may intervene in a lawsuit in court challenging a decision or statement by a department or

1 agency of the state as a matter of right if the individual or entity has not been named as a defendant.

2 (f) Attorney fees or costs may not be awarded to the prevailing party in an action alleging  
3 noncompliance or inadequate compliance with a requirement of parts 1 through 3. ~~Attorney fees must be  
4 awarded to a party seeking the lease, permit, license, certificate, or other entitlement or authority and against  
5 the party bringing the challenge if there is a judicial determination that the agency's decision was adequate, in  
6 compliance with the requirements of parts 1 through 3, or on remand to the agency for additional review if the  
7 agency reaches substantially the same decision.~~

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

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

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

21  
22 NEW SECTION. SECTION 2. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID PARTS THAT ARE  
23 SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT] IS INVALID IN ONE OR MORE OF ITS  
24 APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID  
25 APPLICATIONS.

26  
27 NEW SECTION. SECTION 3. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND APPROVAL.

28 - END -