SENATE BILL NO. 448

INTRODUCED BY D. WANZENRIED

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO NOTIFY THE OFFICE OF CONSUMER COUNSEL OF PERMIT APPLICATIONS FOR NEW ELECTRICAL GENERATION FACILITIES AND FACILITIES AND UPGRADES PERMITTED UNDER THE MONTANA MAJOR FACILITY SITING ACT; REQUIRING THE OFFICE OF THE CONSUMER COUNSEL TO COMPLETE A CUSTOMER FISCAL IMPACT ANALYSIS FOR NEW ELECTRICAL GENERATION FACILITIES AND FACILITIES AND UPGRADES PERMITTED UNDER THE MONTANA MAJOR FACILITY SITING ACT ~~IF THE PROJECT IMPACTS THE CUSTOMERS OF A UTILITY OR A MUNICIPAL ELECTRIC UTILITY; PROVIDING FOR RULEMAKING AUTHORITY TO ESTABLISH CRITERIA TO BE INCLUDED IN THE ANALYSIS~~; PROVIDING FOR THE USE OF THE ANALYSIS; AMENDING SECTIONS 75-1-201, 75-20-216, AND 75-20-223, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. **Section 1. Customer fiscal impact analysis -- requirements.** (1) ~~The~~ WITHIN 10 DAYS OF RECEIVING AN APPLICATION PURSUANT TO SUBSECTION (1)(A) OR (1)(B), THE department of environmental quality shall ~~determine whether a project potentially impacts the customers of a utility, as defined in 69-8-103, or the customers of a municipal electric utility when~~ NOTIFY THE OFFICE OF THE CONSUMER COUNSEL THAT IT IS in receipt of:

(a) a permit application pursuant to Title 75, chapter 2, 5, or 10, ~~if it is~~ for a new electrical generation facility; or

(b) an application for a certificate under the Montana Major Facility Siting Act for a new facility or upgrade, as defined in 75-20-104.

(2) ~~If the department determines that the proposed electrical generation facility or the proposed facility or upgrade potentially impacts the customers of a utility, as defined in 69-8-103, or the customers of a municipal electric utility, the department~~ THE OFFICE OF CONSUMER COUNSEL shall complete an analysis outlining the fiscal impacts ~~to a utility and a utility's~~ OF THE PROJECT ON ELECTRICITY customers IN MONTANA. The analysis must include an estimation of how customers' rates may be impacted.

(3) (A) EXCEPT AS PROVIDED IN SUBSECTION (3)(B), THE ANALYSIS MUST BE COMPLETED WITHIN 30 DAYS OF RECEIPT OF THE NOTICE FROM THE DEPARTMENT.

(B) THE DEPARTMENT SHALL EXTEND THE 30-DAY DEADLINE IF COMPLIANCE WITH THE DEADLINE IS NOT NECESSARY TO COMPLY WITH THE REQUIREMENTS OF SUBSECTION (4).

~~(3)~~(4) The analysis must be PROVIDED TO THE DEPARTMENT AND incorporated into the department's environmental review, including draft documents released for public comment.

~~(4) The department shall respond to public comments related to the analysis, and the response must be included in final environmental reviews.~~

(5) (A) WITHIN 5 DAYS OF THE CLOSE OF THE PUBLIC COMMENT PERIOD FOR AN APPLICATION REFERRED TO IN SUBSECTION (1)(A) OR (1)(B), THE DEPARTMENT SHALL FORWARD PUBLIC COMMENTS RELATED TO THE ANALYSIS TO THE CONSUMER COUNSEL.

(B) THE CONSUMER COUNSEL SHALL RESPOND TO THE COMMENTS AND RETURN THE RESPONSES TO THE DEPARTMENT WITHIN 30 DAYS, AND THE RESPONSES MUST BE INCLUDED IN THE FINAL ENVIRONMENTAL REVIEWS.

~~NEW SECTION. **Section 2. Adoption of rules and procedures for customer fiscal impact analysis.** (1) The department of environmental quality may adopt rules establishing criteria for determining whether a project impacts the customers of a utility, as defined in 69-8-103, or a municipal electric utility.~~

~~(2) The department may adopt any other rules necessary in implementing [section 1].~~

NEW SECTION. **SECTION 2. EXEMPTIONS.** PROJECTS PROPOSED BY UTILITIES, AS DEFINED IN 69-8-103, ARE EXEMPT FROM THE ANALYSIS REQUIRED BY [SECTION 1].

**Section 3.** 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 subsection (2), 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 that may have an impact on the human environment; 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) through (1)(b)(iv)(C)(III) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(IV);

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, 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 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 a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action. An analysis of any alternative included in the environmental review must comply with the following criteria:

(I) any alternative proposed must be reasonable, in that the alternative must be achievable under current technology and the alternative must be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor;

(II) the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding the proposed alternative;

(III) if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. 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.

(IV) the agency shall complete a meaningful no-action alternative analysis. The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion.

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented; ~~and~~

(G) the customer fiscal impact analysis, if required by [section 1]; and

~~(G)~~(H) the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal;

(v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

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

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

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

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and with any local government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized

to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

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

(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.

(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law. A customer fiscal impact analysis pursuant to [section 1] or an allegation that the customer fiscal impact analysis is inadequate may not be used as the basis of any action challenging or seeking review of the agency's decision.

(b) When new, material, and significant evidence or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review. Immaterial or insignificant evidence or issues relating to the adequacy or content of the agency's environmental review document may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

(4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared 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 is being prepared by a state

agency to comply with the requirements of the National Environmental Policy Act.

(5) (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 (5) 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.

(6) (a) (i) A challenge to an agency action under this part may only be brought against a final agency action and may only be brought in district court or in federal court, whichever is appropriate.

(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.

(b) Any action or proceeding under subsection (6)(a)(ii) must take precedence over other cases or matters in the district court unless otherwise provided by law.

(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.

(8) A project sponsor may request a review of the significance determination or recommendation made under subsection (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 4.** Section 75-20-216, MCA, is amended to read:

**"75-20-216. Study, evaluation, and report on proposed facility -- assistance by other agencies.** (1) After receipt of an application, the department shall within 30 days notify the applicant in writing that:

(a) the application is in compliance and is accepted as complete; or

(b) the application is not in compliance and shall list the deficiencies. Upon correction of these deficiencies and resubmission by the applicant, the department shall within 15 days notify the applicant in writing that the application is in compliance and is accepted as complete.

(2) Upon receipt of an application complying with 75-20-211 through 75-20-213, 75-20-215, and this section, the department shall commence an evaluation of the proposed facility and its effects, considering all applicable criteria listed in 75-20-301, and shall issue a decision, opinion, order, certification, or permit as provided in subsection (3). The department shall use, to the extent that it considers applicable, valid and useful existing studies and reports submitted by the applicant or compiled by a state or federal agency.

(3) Except as provided in 75-1-205(4), 75-1-208(4)(b), and 75-20-231, the department shall issue, within 9 months following the date of acceptance of an application, any decision, opinion, order, certification, or permit required under the laws, other than those contained in this chapter, administered by the department. A decision, opinion, order, certification, or permit, with or without conditions, must be made under those laws. Nevertheless, the department retains authority to make the determination required under 75-20-301(1)(c) or (3). The decision, opinion, order, certification, or permit must be used in the final site selection process. Prior to the issuance of a preliminary decision by the board and pursuant to rules adopted by the department, the department shall provide an opportunity for public review and comment.

(4) Except as provided in 75-1-205(4), 75-1-208(4)(b), and 75-20-231, within 9 months following acceptance of an application for a facility, the department shall issue a report that must contain the department's studies, evaluations, recommendations, customer fiscal impact analysis, if required pursuant to [section 1], and other pertinent documents resulting from its study and evaluation. An environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act may be included in the department findings if compelling evidence indicates that adverse environmental impacts are likely to result due to the construction and operation of a proposed facility. If the application is for a combination of two or more facilities, the department shall issue its report within the greater of the lengths of time provided for in this subsection for either of the facilities.

(5) For projects subject to joint review by the department and a federal land management agency, the department's certification decision may be timed to correspond to the record of decision issued by the participating federal agency.

(6) The departments of transportation; fish, wildlife, and parks; natural resources and conservation; revenue; and public service regulation shall report to the department information relating to the impact of the proposed site on each department's area of expertise. The report may include opinions as to the advisability of

granting, denying, or modifying the certificate.

The department shall allocate funds obtained from filing fees to the departments making reports to reimburse them for the costs of compiling information and issuing the required report."

**Section 5.** Section 75-20-223, MCA, is amended to read:

**"75-20-223. Board review of department decisions.** (1) A person aggrieved by the final decision of the department on an application for a certificate or the issuance of an air or water quality decision, opinion, order, certification, or permit under this chapter may within 30 days appeal the decision to the board under the contested case procedures of Title 2, chapter 4, part 6.

(2) A person aggrieved by the final decision of the department on an application for amendment of a certificate may within 15 days appeal the decision to the board under the contested case procedures of Title 2, chapter 4, part 6.

(3) A person aggrieved by the department's decision not to include an environmental impact statement or analysis in the department's findings pursuant to 75-20-216 may within 30 days appeal the decision to the board under the contested case procedures of Title 2, chapter 4, part 6.

(4) A customer fiscal impact analysis required by [section 1] may not be used as the basis of an appeal of a final decision by the department."

NEW SECTION. **Section 6. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title ~~75~~ 69, CHAPTER 2, and the provisions of Title ~~75~~ 69, CHAPTER 2, apply to [sections 1 and 2].

NEW SECTION. **Section 7. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 8. Applicability.** [This act] applies to applications received by the department of environmental quality on or after [the effective date of this act].

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