

SENATE BILL NO. 557

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EMRICH

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE ENVIRONMENTAL POLICY ACT RELATING TO LEGAL CHALLENGES; REQUIRING A FEE TO COMPILE RECORDS; REQUIRING THE CHALLENGER TO DISCLOSE FUNDING SOURCES; CLARIFYING THAT CHALLENGING A DECISION IS NOT A CHARITABLE PURPOSE; AWARDING ATTORNEY FEES; AND AMENDING SECTION 75-1-201, MCA."

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

Section 1. 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 (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

1 environmental amenities and values may be given appropriate consideration in decisionmaking for state-
2 sponsored projects, along with economic and technical considerations;

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

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

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

10 (B) any adverse effects on Montana's environment that cannot be avoided if the proposal is
11 implemented;

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

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

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

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

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

28 (E) the relationship between local short-term uses of the Montana human environment and the

1 maintenance and enhancement of long-term productivity;

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

4 (G) the customer fiscal impact analysis, if required by 69-2-216; and

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

7 (v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe
8 appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts
9 concerning alternative uses of available resources. If the alternatives analysis is conducted for a project that is
10 not a state-sponsored project and alternatives are recommended, the project sponsor may volunteer to
11 implement the alternative. Neither the alternatives analysis nor the resulting recommendations bind the project
12 sponsor to take a recommended course of action, but the project sponsor may agree pursuant to subsection
13 (4)(b) to a specific course of action.

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

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

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

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

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

1 state, federal, and local agencies that are authorized to develop and enforce environmental standards must be
2 made available to the governor, the environmental quality council, and the public and must accompany the
3 proposal through the existing agency review processes.

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

8 (2) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to
9 subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not
10 include actual or potential impacts that are regional, national, or global in nature.

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

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

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

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

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

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

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

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

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

1 agency's environmental review prior to the agency's final decision, and the challenge must be limited to those
2 issues addressed in those comments.

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

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

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

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

14 (6) (a) (i) In an action alleging noncompliance or inadequate compliance with a requirement of
15 parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or
16 a claim that the environmental review is inadequate, the agency shall compile and submit to the court the
17 certified record of its decision at issue, ~~and except.~~ The agency, prior to submitting the certified record to the
18 court, shall assess and collect from the person challenging the decision a fee to pay for actual costs to compile
19 and submit the certified record. Except as provided in subsection (6)(b), the person challenging the decision
20 has the burden of proving the claim by clear and convincing evidence contained in the record. The person
21 challenging the decision shall identify the source of funding used for the challenge. A challenge under this
22 section is not considered a charitable purpose for a nonprofit corporation as provided in Title 35, chapter 2, and
23 is not exempt from taxation under section 501(c)(3) or 501(c)(6) of the Internal Revenue Code.

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

1 (iii) Except as provided in subsection (6)(b), the court shall confine its review to the record certified
2 by the agency. The court shall affirm the agency's decision or the environmental review unless the court
3 specifically finds that the agency's decision was arbitrary and capricious ~~or was otherwise not in accordance~~
4 ~~with law.~~

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

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

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

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

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

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

1 restraining order, a preliminary injunction, a permanent injunction, or other equitable relief, that the:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 - END -