

HOUSE BILL NO. 641

INTRODUCED BY K. ZOLNIKOV

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A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING ENVIRONMENTAL REVIEWS OF IMPACTS BEYOND MONTANA'S BORDERS IF THE FEDERAL CLEAN AIR ACT REGULATES CARBON DIOXIDE AS A POLLUTANT; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

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

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

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

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

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

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

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

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

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

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

28 (F) any irreversible and irretrievable commitments of resources that would be involved in the

1 proposed action if it is implemented;

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

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

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

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

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

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

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

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

1 proposal through the existing agency review processes.

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

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

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

11 (i) it is conducted by the department of fish, wildlife, and parks for the management of wildlife and  
12 fish;

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

15 (iii) it is conducted by a state agency and a federal agency to the extent the review is required by  
16 the federal agency; or

17 (iv) the United States congress amends the federal Clean Air Act to include carbon dioxide  
18 emissions as a regulated pollutant.

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

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

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

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

28 (5) (a) (i) A challenge to an agency action under this part may only be brought against a final

1 agency action and may only be brought in district court or in federal court, whichever is appropriate.

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

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

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

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

13 (6) (a) (i) In an action alleging noncompliance or inadequate compliance with a requirement of  
14 parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or  
15 a claim that the environmental review is inadequate, the agency shall compile and submit to the court the  
16 certified record of its decision at issue, and except as provided in subsection (6)(b), the person challenging the  
17 decision has the burden of proving the claim by clear and convincing evidence contained in the record.

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

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

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

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

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

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

28 (II) shall consider the implications of the relief on the local and state economy and make written

1 findings with respect to both.

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

6 (d) The court may issue a temporary restraining order, preliminary injunction, permanent  
7 injunction, or other injunctive relief only if the party seeking the relief provides a written undertaking to the court  
8 in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any  
9 party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial  
10 decision in the case. If the party seeking an injunction or a temporary restraining order objects to the amount of  
11 the written undertaking for any reason, including but not limited to its asserted inability to pay, that party shall  
12 file an affidavit with the court that states the party's income, assets, and liabilities in order to facilitate the court's  
13 consideration of the amount of the written undertaking that is required. The affidavit must be served on the  
14 party enjoined.

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

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

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

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

28 (9) A project sponsor may request a review of the significance determination or recommendation

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

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6 NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval.

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8 NEW SECTION. **Section 3. Applicability.** [This act] applies to environmental impact statements in  
9 process on [the effective date of this act] and statements started after [the effective date of this act].

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