

1 SENATE BILL NO. 416

2 INTRODUCED BY C. WILLIAMS

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT RESTORING THE BALANCE AND PROTECTIONS UNDER THE
5 MONTANA ENVIRONMENTAL POLICY ACT FOR ALL MONTANANS; REVISING THE INTENT AND PURPOSE
6 OF THE ACT; CLARIFYING THAT THE ACT SUBSTANTIVELY ENFORCES AND IMPLEMENTS MONTANA'S
7 CONSTITUTIONAL PROVISIONS; DECLARING AND ACKNOWLEDGING THAT THE PROTECTION OF THE
8 CONSTITUTIONAL RIGHTS TO USE AND ENJOY PRIVATE PROPERTY ARE INEXTRICABLY LINKED AND
9 MUTUALLY DEPENDENT UPON THE CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL
10 ENVIRONMENT AND THE PUBLIC'S RIGHT TO PARTICIPATE IN AND OBSERVE GOVERNMENTAL
11 ACTIONS; CLARIFYING AN AGENCY'S SIGNIFICANCE DETERMINATION; INCREASING THE MAXIMUM FEE
12 THAT AN AGENCY MAY CHARGE; ALLOWING AN AGENCY TO EXTEND CERTAIN TIMELINES FOR
13 ENVIRONMENTAL REVIEWS TO ACCOMMODATE PUBLIC COMMENT; CLARIFYING AN AGENCY'S
14 TREATMENT OF INDIVIDUAL PUBLIC COMMENT; AMENDING SECTIONS 75-1-102, 75-1-201, 75-1-203, AND
15 75-1-208, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

16
17 WHEREAS, a clean and healthful human environment is the ultimate form of private property protection;
18 and

19 WHEREAS, the continual erosion over time in Montana of private property protections with respect to
20 air, water, major energy and transmission facility siting, and the Montana Environmental Policy Act has culminated
21 in a public outcry from farmers, ranchers, business people, hunters and anglers, and other citizens; and

22 WHEREAS, laws such as the Montana Major Facility Siting Act and the Montana Environmental Policy
23 Act have been dismantled over time, and these laws implement the public's constitutional right to participate in
24 governmental actions prior to any final decision and to observe governmental deliberations and examine
25 government documents; and

26 WHEREAS, this legislation seeks to restore equal protection under the law for all Montanans and to
27 reinforce the constitutional rights of all Montanans to make decisions of government accountable and to enjoy
28 and use their private property in a clean and healthful environment.

29

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

1

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

3 **"75-1-102. Intent -- purpose.** (1) (a) The legislature, mindful of its constitutional obligations under Article
4 II, ~~section 3~~ sections 3, 8, and 9, and Article IX of the Montana constitution; to provide for the substantive
5 administration and enforcement of these constitutional duties, has enacted the Montana Environmental Policy
6 Act.

7 (b) The Pursuant to subsection (1)(a) and in addition to other laws enacted by the legislature, the
8 Montana Environmental Policy Act is procedural substantively implements Montana's constitutional provisions,
9 and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate
10 review of state actions in order to ensure that:

11 (i) environmental attributes and impacts to the human environment are fully considered;

12 (ii) adverse impacts are mitigated in order that the constitutional duties that the state and each person
13 maintain and improve a clean and healthful environment are implemented; and

14 (iii) the public's right to participate in governmental actions and observe governmental deliberations are
15 fulfilled.

16 (2) The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage
17 productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy
18 private property free of undue government regulation, to promote efforts that will prevent or eliminate damage
19 to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding
20 of the ecological systems and natural resources important to the state, to declare and acknowledge that the
21 protection of the constitutional rights to use and enjoy private property are inextricably linked and mutually
22 dependent upon the constitutional right to a clean and healthful environment and the public's right to participate
23 in and observe governmental actions, and to establish an environmental quality council."

24

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

26 **"75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes
27 and directs that, to the fullest extent possible:

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

30 (b) under this part, all agencies of the state, except the legislature and except as provided in subsection

1 (2), shall:

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

3 (A) the integrated use of the natural and social sciences and the environmental design arts in planning
4 and in decisionmaking that may have an impact on the human environment; and

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

9 (ii) identify and develop methods and procedures that will ensure that presently unquantified
10 environmental amenities and values may be given appropriate consideration in decisionmaking, along with
11 economic and technical considerations;

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

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

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

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

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

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

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

28 (III) if the project sponsor believes that an alternative is not reasonable as provided in subsection
29 (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's
30 determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion,

1 submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project
2 sponsor for any of its activities associated with any review under this section. The period of time between the
3 request for a review and completion of a review under this subsection may not be included for the purposes of
4 determining compliance with the time limits established for environmental review in 75-1-208.

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

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

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

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

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

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

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

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

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

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

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

30 (c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state

1 official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special
2 expertise with respect to any environmental impact involved and with any local government, as defined in
3 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and
4 obtain comments from any state agency with respect to any regulation of private property involved. Copies of the
5 statement and the comments and views of the appropriate state, federal, and local agencies that are authorized
6 to develop and enforce environmental standards must be made available to the governor, the environmental
7 quality council, and the public and must accompany the proposal through the existing agency review processes.

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

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

14 (3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to
15 subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person
16 challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement,
17 a court may not consider any issue relating to the adequacy or content of the agency's environmental review
18 document or evidence that was not first presented to the agency for the agency's consideration prior to the
19 agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and
20 convincing evidence that the decision was arbitrary or capricious or not in compliance with law. A customer fiscal
21 impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal impact analysis is inadequate may
22 not be used as the basis of any action challenging or seeking review of the agency's decision.

23 (b) When new, material, and significant evidence or issues relating to the adequacy or content of the
24 agency's environmental review document are presented to the district court that had not previously been
25 presented to the agency for its consideration, the district court shall remand the new evidence or issue relating
26 to the adequacy or content of the agency's environmental review document back to the agency for the agency's
27 consideration and an opportunity to modify its findings of fact and administrative decision before the district court
28 considers the evidence or issue relating to the adequacy or content of the agency's environmental review
29 document within the administrative record under review. Immaterial or insignificant evidence or issues relating
30 to the adequacy or content of the agency's environmental review document may not be remanded to the agency.

1 The district court shall review the agency's findings and decision to determine whether they are supported by
 2 substantial, credible evidence within the administrative record under review.

3 (4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent
 4 with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an
 5 environmental review that is being prepared by a state agency pursuant to this part and a federal agency
 6 pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state
 7 agency to comply with the requirements of the National Environmental Policy Act.

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

10 ~~(b) Nothing in this subsection (5) prevents a project sponsor and an agency from mutually developing~~
 11 ~~measures that may, at the request of a project sponsor, be incorporated into a permit or other authority to act.~~

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

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

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

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

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

25 (c) Any judicial action or proceeding brought in district court under subsection (6)(a) involving an equine
 26 slaughter or processing facility must comply with 81-9-240 and 81-9-241.

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

30 (b) Any determination of significance made under subsection (1)(b)(iv) must include an evaluation of the

1 degree to which the effects on the quality of the human environment are likely to be highly controversial as an
 2 additional basis for the significance determination.

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

8

9 **Section 3.** Section 75-1-203, MCA, is amended to read:

10 **"75-1-203. Fee schedule -- maximums.** (1) In prescribing fees to be assessed against applicants for
 11 a lease, permit, contract, license, or certificate as specified in 75-1-202, an agency may adopt a fee schedule that
 12 may be adjusted depending upon the size and complexity of the proposed project. A fee may not be assessed
 13 unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring
 14 expenses in excess of \$2,500 to compile an environmental impact statement.

15 (2) The maximum fee that may be imposed by an agency may not exceed ~~2%~~ 2.1% of any estimated
 16 cost up to \$1 million, plus 1% of any estimated cost over \$1 million and up to \$20 million, plus 1/2 of 1% of any
 17 estimated cost over \$20 million and up to \$100 million, plus 1/4 of 1% of any estimated cost over \$100 million and
 18 up to \$300 million, plus 1/8 of 1% of any estimated cost in excess of \$300 million.

19 (3) If an application consists of two or more facilities, the filing fee must be based on the total estimated
 20 cost of the combined facilities. The estimated cost must be determined by the agency and the applicant at the
 21 time the application is filed.

22 (4) Each agency shall review and revise its rules imposing fees as authorized by this part at least every
 23 2 years.

24 (5) In calculating fees under this section, the agency may not include in the estimated project cost the
 25 project sponsor's property or other interests already owned by the project sponsor at the time the application is
 26 submitted. Any fee assessed may be based only on the projected cost of acquiring all of the information and data
 27 needed for the environmental impact statement."

28

29 **Section 4.** Section 75-1-208, MCA, is amended to read:

30 **"75-1-208. Environmental review procedure.** (1) (a) Except as provided in 75-1-205(4) and subsection

1 (1)(b) of this section, an agency shall comply with this section when completing any environmental review
2 required under this part.

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

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

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

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

22 (i) 60 days to complete a public scoping process, if any;

23 (ii) 90 days to complete an environmental review unless a detailed statement pursuant to
24 75-1-201(1)(b)(iv) or 75-1-205(4) is required; and

25 (iii) 180 days to complete a detailed statement pursuant to 75-1-201(1)(b)(iv).

26 (b) The period of time between the request for a review by a board and the completion of a review by
27 a board under 75-1-201(1)(b)(iv)(C)(III) or (8) or subsection (10) of this section may not be included for the
28 purposes of determining compliance with the time limits established for conducting an environmental review under
29 this subsection or the time limits established for permitting in 75-2-211, 75-2-218, 75-20-216, 75-20-231,
30 76-4-125, 82-4-122, 82-4-231, 82-4-337, and 82-4-432.

1 (5) ~~An~~ (a) Except as provided in subsection (5)(b), an agency may extend the time limits in subsection
2 (4) by notifying the project sponsor in writing that an extension is necessary and stating the basis for the
3 extension. The agency may extend the time limit one time, and the extension may not exceed 50% of the original
4 time period as listed in subsection (4). After one extension, the agency may not extend the time limit unless the
5 agency and the project sponsor mutually agree to the extension.

6 (b) An agency may extend the time limits in subsection (4) for up to 90 days to accommodate public
7 comment. An agency shall treat individual public comments received on an environmental review as separate
8 and distinct comments.

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

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

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

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

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

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

28 (11) An agency shall, when appropriate, consider the cumulative impacts of a proposed project. However,
29 related future actions may only be considered when these actions are under concurrent consideration by any
30 agency through preimpact statement studies, separate impact statement evaluations, or permit processing

1 procedures."

2

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

4

5 NEW SECTION. **Section 6. Applicability.** [This act] applies to an environmental assessment and an
6 environmental impact statement begun on or after [the effective date of this act].

7

- END -