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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No.: CDV-2020-307 Hon. Kathy Seeley **BENCH MEMORANDUM ON THE CONSTITUTIONAL AND PROCEDURAL LIMITS OF THE MONTANA ENVIRONMENTAL POLICY ACT**

The State of Montana submits this Bench Memorandum on the Constitutional and Procedural Limits of the Montana Environmental Policy Act ("MEPA") regarding Plaintiffs' claim being adjudicated in this proceeding.

ISSUE PRESENTED

The issue addressed in this memorandum is whether Plaintiffs' have met the redressability component of the standing requirements in their challenge to the Montana State Legislature's recently enacted statutory provision of MEPA regarding the proper scope of environmental review for greenhouse gases and global climate. *See* Senate Bill 557, at 6 with relevant portions highlighted (enacted by the Governor on May 19, 2023[1]), attached as Exhibit 1. The redressability requirement of standing requires Plaintiffs to demonstrate that "the alleged harm is of a type that *available* legal relief can *effectively* alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (emphasis added).

Here, Plaintiffs have not established redressability because invalidation of Section 75-1-201(2), the challenged provision of the MEPA statute, would not, and cannot, prevent state agencies from continuing to exercise their lawfully authority under their respective governing statutes to issue permits for activities and projects that may emit greenhouse gases.

Plaintiffs cannot otherwise establish redressability because MEPA does not expand — or restrict — the statutory and regulatory authorities of state agencies to issue permits for proposed activities within their jurisdictional purview. Consequently, a court ruling regarding what state

[1] Available at: http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=557&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=

agencies can ***consider*** in undertaking MEPA analysis does not alter the agencies' statutory authority to ***regulate*** or ***approve*** any project.

A. MEPA is Solely a Procedural Statute that Cannot Remedy Plaintiffs' Alleged Injuries

To meet the redressability requirement for standing, Plaintiffs must show that the invalidation of the newly enacted MEPA provision would remedy their alleged injuries. *Larson,* ¶ 46. Plaintiffs have not done so; nor can they.

Under its express terms, MEPA is solely a procedural statute. Mont. Code Ann. § 75-1-102(1) ("The Montana Environmental Policy Act is procedural"). As recently explained last month by the Montana Supreme Court, MEPA

> does not 'demand that an agency make particular substantive decisions,' but rather 'require an agency to review projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment in order to make informed decisions.'

Water for Flathead's Future, Inc. v. Mont. Dep't of Envtl. Quality, 2023 MT 86, ¶ 19, 412 Mont. 258 (quoting *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil & Gas Conservation*, 2012 MT 128, ¶ 32, 365 Mont. 232).

Legal precedent underscores the fundamental tenet that MEPA is procedural. As explained by the Montana Supreme Court, "[b]ecause the Legislature modeled MEPA on the National Environmental Policy Act (NEPA), federal authority construing NEPA is generally persuasive guidance in the construction of similar provisions of MEPA." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453. The U.S. Supreme Court has long established that NEPA is a procedural statute that does not mandate a substantive outcome. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 329 (1989) (explaining that it is "well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary

process."); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551, 558 (1978).

The Montana Supreme Court's ruling in *Park County* does not alter the fundamental principle that MEPA is a procedural statute; nor does it alter the unavoidable conclusion that Plaintiffs' purported injuries, stemming from forecasted future implementation of the current version of the MEPA provision (enacted May 10, 2023), are not redressable in the present case. *See Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 63, 477 P.3d 288. In *Park County*, the court held that a 2011 amendment to MEPA that allowed a project to proceed even if a court found a violation of MEPA for that project violated the constitutional right to a clean and healthful environment because it restricted the court's ability to impose an equitable remedy (staying the project) pending curative additional environmental review upon remand. *Id* at 307. Significantly, however, *Park County* did not import a substantive requirement into MEPA, or otherwise authorize a reviewing court to impose a substantive remedy for MEPA violations. The remedy for a violation of a procedural statute such as MEPA remains procedural – a remand for additional environmental review; no substantive remedy exists under MEPA and no substantive remedy was otherwise created by *Park County*.

B. The Legislature's Recent MEPA Amendment Falls Squarely within the Parameters of the Constitution and Governing Legal Precedent

On May 19, 2023, the Governor enacted Senate Bill (SB) 557, promulgated and passed by the Legislature to amend and clarify the contours of the MEPA statute. The Legislature explained in the preamble to SB 557 that it undertook this amendment in the exercise of its "constitutionally delegated authority to implement the right to a clean and healthful environment." Ex. 1, at 1. The Legislature underscored in the preamble that "there is no indication that one enumerated

inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means." *Id.*

In the preamble, the Legislature also explained that this MEPA amendment is aligned with the recent U.S. Supreme Court ruling in *West Virginia v. EPA*, which held that the major questions doctrine limits the ability of a federal agency to promulgate and apply regulations that implicate significant economic and political issues, such as major climate change regulation, where Congress did not grant such authority or discretion to the federal agency using explicit language. 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'") (brackets in original).

Consistent with the Montana Constitution, U.S. Supreme Court precedent, and the solely procedural nature of MEPA, the Legislature's MEPA Amendment provided that an agency permit or decision cannot be vacated or voided based on a finding of inadequate review of greenhouse gas emissions or climate impacts "unless the review is required by a federal agency or the United States congress amends the federal Clean Air act to include carbon dioxide as a regulated pollutant." Ex. 1, at 6 with relevant portions highlighted.

The Legislature's MEPA Amendment is entirely constitutional. Montana's Legislature has not authorized or empowered the Department of Environmental Quality, or any other state agency, to regulate greenhouse gas emissions or establish climate policies. While Plaintiffs wish to see the state of Montana take steps to limit the production of oil, gas, and coal as part of an overall strategy to curtail the use of fossil fuels, the Legislature has not chosen to do so, and no state agency has the authority to do so under their governing statutes. State agencies are obligated to follow their statutory mandates that provide for the development of oil, natural gas, coal, and other natural

resources. As discussed below, MEPA's procedural requirements do not change this fundamental legal principle or otherwise provide a basis to expand a state agency's jurisdiction beyond what the Legislature has provided to them.

C. The Scope of MEPA Review is Limited by Scope of the Agency's Jurisdiction and the Rule of Reason

The jurisdictional limits of a state agency and the "rule of reason" also limit the scope of environmental review and analysis required by MEPA. As the Montana Supreme Court has explained, "MEPA and NEPA must be construed in harmony with the substantive limitations of an agency's applicable regulatory authority." *Bitterrooters*, ¶ 30. That is, the required scope of the MEPA analysis is limited by the type of information the agency will find useful in evaluating and potentially approving the project. *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (explaining that the "rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decision-maker).

A permitting agency's statutory authority also guides the scope of environmental review for a proposed project. *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (explaining that under NEPA, an agency need not evaluate an environmental effect where it "***has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions***") (emphasis added).

In other words, the contours of MEPA analysis must necessarily be guided by both the scope of the proposed action and the contours of an agency's jurisdictional limits. MEPA does not require an agency to analyze the environmental impacts of actions that are outside the agency's statutory authority. *Public Citizen*, 541 U.S. at 767. This precedent is directly applicable here.

As reflected in the recent MEPA Amendment (SB 557), the Montana Legislature acknowledged that the U.S. Environmental Protection Agency (EPA) has not made carbon dioxide

or other greenhouse gases a regulated pollutant under the Clean Air Act or otherwise required the state to promulgate such regulations. § 75-1-201(6)(a)(ii), MCA. Nor has Montana enacted any laws to empower any state agency to do so. Because Montana state agencies do not have the statutory authority to regulate greenhouse gases or climate change, they are not required under MEPA to evaluate the potential environmental effects from greenhouse gases upon local, state, regional, national, or global climate. *Public Citizen,* 541 U.S. at 770 (holding an agency does not need to evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions.").

D. MEPA Does Not Expand, or Limit, the Regulatory Authority of State Agency's Administration of their Statutory Permit Programs

Under the plain language of MEPA, and well-established legal precedent, MEPA does not expand a state agency's substantive authority or statutory jurisdiction, nor confer powers beyond those granted to the agency by the Legislature. MEPA cannot dictate substantive outcomes to state agency decision-making for their respective permit programs. MEPA includes a specific and express disclaimer that the Legislature did not intend, through MEPA, to expand regulatory authority to any agency beyond that authority explicitly granted to the agency by statute. § 75-1-102(3)(b), MCA ("it is not the purpose [of MEPA] to provide for regulatory authority beyond authority explicitly provided for in existing statute [sic] to a state agency."); *Bitterrooters*, ¶ 30 (explaining that "MEPA provides no additional regulatory authority to an agency and does not affect an agency's specific statutory duties to comply with environmental quality standards").

Most significantly as to the redressability issue here, MEPA expressly states that an "agency may not withhold, deny, or impose conditions on any permit or other authority to act based on [MEPA]" and that MEPA "does not confer authority to an agency that is a project sponsor to modify a proposed project or action." § 75-1-201(4)(a) & (c), MCA. Thus, even if an agency

undertakes an analysis of greenhouse gases, under MEPA it can neither "withhold, deny, or impose conditions on any permit," nor can it "modify a proposed project or action" based on that analysis. *Id.*

Just because MEPA is devoid of statutory authority to regulate, does not mean that the Legislature has not enacted other statutory provisions compliant with the Montana Constitution's right to a clean and healthful environment. With respect to Article II, section 3 regarding the right to a clean and healthful environment, because "the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations," the Legislature is responsible for the administration and enforcement of this duty. *Preamble* to 2003 Constitution Amendments, attached to Ch. 361, L. 2003.

To meet its obligations to provide for a clean and healthful environment, the preamble to the 2003 Constitutional Amendments explained further that the Legislature enacted a "comprehensive set of laws to accomplish" these constitutional goals, including the:

- Montana Clean Indoor Air Act of 1979, Title 50, Chapter 40, part 1, MCA;
- Montana Environmental Policy Act, Title 75, Chapter 1, parts 1-3;
- Clean Air Act of Montana, Title 75, chapter 2, parts 1-4;
- Water quality laws, Title 75, chapter 5;
- Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, Part 1;
- Montana Solid Waste Management Act, Title 75, chapter 10, part 2;
- Montana Hazardous Waste Act, Title 75, chapter 10, part 4;
- Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7;
- Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945;
- Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, Chapter 11, part 5;
- Montana Major Facility Siting Act, Title 75, chapter 20;

- Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6;
- Environmental Control Easement Act, Title 76, chapter 7;
- The Strip and Underground Mine Siting Act, Title 82, chapter 5, part 1;
- Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2;
- The Opencut Mining Act, Title 82, chapter 4, part 4;
- Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1.

MEPA cannot be viewed in a vacuum as it relates to the constitutional right to a clean and healthful environment. MEPA is but one of many laws promulgated by the Legislature to meet its constitutional responsibilities. Unlike many of the other environmental laws listed above, MEPA is merely procedural and does not require any substantive outcome or modification of the proposed project or permit to reduce or eliminate potential environmental impacts. Indeed, MEPA does not, and cannot, require a substantive outcome, or otherwise require a state agency to deny or modify a permit, or even impose mitigation measures to reduce potential impacts.

E. MEPA Does Not Prohibit Adverse Environmental Impacts

Moreover, even if the Legislature expanded the authorities of state agencies to regulate greenhouse gases, nothing in MEPA would require a state agency to mitigate potential impacts from those emissions. The legislative intent of MEPA is to "provide for the adequate review of state actions" and MEPA declares a "state policy that will encourage productive and enjoyable harmony between humans and their environment" and will "protect the right to use and enjoy private property free of undue government regulation . . . .." § 75-1-102(2), MCA.

In accord with this legislative intent, like NEPA, MEPA does not prohibit adverse environmental impacts from the agency action under review. MEPA does not require an agency to

withhold authorization for a project simply because adverse environmental impacts are predicted to occur.

Indeed, underscoring its purely procedural nature, MEPA expressly states that an "agency may not withhold, deny, or impose conditions on any permit or other authority to act based on [MEPA] and that MEPA "does not confer authority to an agency that is a project sponsor to modify a proposed project or action." § 75-1-201(4)(a) & (c), MCA. Therefore, even if MEPA required consideration of greenhouse gases and global climate change, nothing in MEPA obligates the state agency to take any affirmative or substantive action to address those issues (e.g., to mitigate greenhouse gas emissions, to modify or deny the permit application, or to promulgate or select an alternative with the least amount of greenhouse gas emissions).

Similarly, MEPA, like NEPA, does not prohibit adverse environmental impacts. As explained by the U.S. Supreme Court, an agency is not constrained by NEPA from deciding that other values outweigh the environmental costs, even if that environmental loss may be 100% of the resource at issue. *Robertson,* 490 U.S. at 351 (explaining that the agency would not have violated NEPA if, after clearing the statute's procedural hurdles, it concluded that the benefits of a ski resort "justified the issuance of a special use permit [to develop that resort], notwithstanding the loss of 15, percent, 50 percent, or even 100 percent of the mule deer herd").

MEPA contains an express declaration of policy that MEPA must be used to balance environmental considerations with other competing interests (e.g., economic interest and private property rights) and the existence of greenhouse gases, regardless of volume, that may emit from a proposed project do not need to be considered by the reviewing agency or otherwise require the agency to deny or modify the permit application. At bottom, MEPA cannot be used as a tool to unilaterally expand the statutory and regulatory authorities conveyed to state agencies by the

Legislature. Nor can MEPA be used to curtail or restrict these statutory and regulatory authorities, particularly those that authorize the development of Montana's energy resources.

F. MEPA Must Balance Private Property Rights with Other Constitutional Rights, Including the Right to a Clean and Healthful Environment

Under the Montana Constitution, MEPA cannot be utilized to preclude the lawful use of private property rights, including natural resources such as oil and natural gas. The MEPA statute expressly states that nothing in MEPA's declaration of policy and legislative intent "expands or diminishes private property protection afforded in the U.S. or Montana constitutions" and that nothing in those provisions "may be construed to preclude ongoing programs of state government pending the completion of any statements that may be required by [MEPA's declared purpose, intent, and policy]." § 75-1-106, MCA.

Thus, when reviewing Plaintiff's' claims, it is important to place the constitutional provisions in context with other inalienable rights, including private property rights, as well as place MEPA into context as but one of many environmental laws promulgated by the Legislature to meet its constitutional responsibilities to provide for a clean and healthful environment. The constitutional right to a clean and healthful environment is not elevated over any other constitutional right, including the right to private property. The Constitution tasks the Legislature to balance these competing rights. As explained in the preamble to the 2003 Amendments to the Montana Constitution, with regarding the right to a clean and healthful environment, "there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, ***including the right to use property in all lawful means***." *Preamble* to 2003 Constitution Amendments, attached to Ch. 361, L. 2003 (emphasis added).

CONCLUSION

The invalidation of the new MEPA provision challenged herein cannot remedy Plaintiffs' alleged injuries. Under the basic and foundational constitutional principle of separation of powers, the judicial branch cannot unilaterally amend MEPA or otherwise use MEPA to unilaterally amend other state statutes that authorize the development of Montana's natural resources, including oil, natural gas, coal, and other mineral resources. Only Montana's Legislature can do so.

Absent this new MEPA provision, indeed even in the absence of MEPA in its entirety, state agencies can and will continue to permit and authorize activities that may result in greenhouse gas emissions under their governing statutes and powers granted to them by the Legislature. MEPA does not authorize state agencies to elevate environmental concerns over other competing interests, including the state's need for energy resources, and the private property rights associated with ownership of oil, natural gas, and other mineral resources.

Under the confines of the Montana constitution, the plain language of the MEPA statute, and long-established legal precedent, the Court cannot fashion a remedy that will address Plaintiffs' alleged harms. Accordingly, Plaintiffs cannot meet the redressability requirement for standing to utilize the jurisdiction of this court and Plaintiffs' remaining claims for relief must be dismissed.

Dated this 19th day of June, 2023.

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ATTORNEYS FOR DEFENDANTS

EXHIBIT 1

AN ACT REVISING THE ENVIRONMENTAL POLICY ACT RELATING TO LEGAL CHALLENGES; REQUIRING A FEE TO COMPILE RECORDS; PROVIDING THAT CERTAIN CHALLENGES RELATED TO GREENHOUSE GASSES CANNOT VOID ACTIONS UNLESS REQUIRED BY FEDERAL AGENCY OR ACT OF CONGRESS; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, in accordance with Article IX, section 1(2), of the Montana constitution, the Legislature is constitutionally delegated the authority to implement the right to a clean and healthful environment; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the United States Supreme Court's decision in West Virginia v. EPA realigns the separation of powers to restrict the administrative state; and

WHEREAS, Congress has neither explicitly passed legislation that regulates greenhouse gases as pollutants under the federal Clean Air Act nor explicitly directed the Environmental Protection Agency to regulate carbon dioxide.

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;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment in Montana 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 in Montana a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse effects on Montana's environment 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) 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 Montana 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;

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

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

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

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

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

(ix) assist the legislature and 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 in Montana and with any Montana 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 in Montana 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) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.

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

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

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

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

(3) 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.

(4) (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 (4) 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.

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

(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 (5)(a)(ii) must take precedence over other cases or matters in the district court unless otherwise provided by law.

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

(6) (a) (i) In an action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate, the agency shall compile and submit to the court the certified record of its decision at issue~~, and except~~. The agency, prior to submitting the certified record to the court, shall assess and collect from the person challenging the decision a fee to pay for actual costs to compile and submit the certified record. Except as provided in subsection (6)(b), the person challenging the decision has the burden of proving the claim by clear and convincing evidence contained in the record.

(ii) An action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

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

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

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

(b) (i) When a party challenging the decision or the adequacy of the environmental review or decision presents information not in the record certified by the agency, the challenging party shall certify under

oath in an affidavit that the information is new, material, and significant evidence that was not publicly available before the agency's decision and that is relevant to the decision or the adequacy of the agency's environmental review.

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

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

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

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

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

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

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

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

(C) relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and the irreparable harm the party asking for the relief will suffer. In tailoring the relief, the court shall ensure, to the

extent possible, that the project or as much of the project as possible can go forward while also providing the relief to which the applicant has been determined to be entitled.

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

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

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

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

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

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

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

pursuant to the National Environmental Policy Act.

(8) 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.

(9) A project sponsor may request a review of the significance determination or recommendation made under subsection (8) 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 2. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 3. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,

SB 557, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____day

of_____, 2023.

_____

Speaker of the House

Signed this _____day

of_____, 2023.

SENATE BILL NO. 557

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

AN ACT REVISING THE ENVIRONMENTAL POLICY ACT RELATING TO LEGAL CHALLENGES; REQUIRING A FEE TO COMPILE RECORDS; PROVIDING THAT CERTAIN CHALLENGES RELATED TO GREENHOUSE GASSES CANNOT VOID ACTIONS UNLESS REQUIRED BY FEDERAL AGENCY OR ACT OF CONGRESS; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 06-19-2023:

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Dated: 06-19-2023