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LAND USE - Applicability of environmental impact statement requirements to loan participation decisions by Board of Investments;
MONTANA ENVIRONMENTAL POLICY ACT - Applicability of environmental impact statement requirements to loan participation decisions by Board of Investments;
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CODE OF FEDERAL REGULATIONS - 40 C.F.R. § 1508.18(a);
MONTANA CODE ANNOTATED - Sections 17-6-301 to 17-6-331, 17-6-302 to 17-6-304, 17-6-306, 17-6-308 to 17-6-310, 17-6-312, 75-1-101 to 75-1-324, 75-1-102, 75-1-103, 75-1-105, 75-1-201, 82-4-301 to 82-4-362, 82-4-337;
MONTANA LAWS OF 1983 - Chapter 677;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 62 (1988);
UNITED STATES CODE - 42 U.S.C. §§ 4321-4347, 42 U.S.C. § 4332.

HELD: The Montana Board of Investments must comply with the environmental impact statement requirements of the Montana Environmental Policy Act when the Board considers whether to enter into a loan participation agreement where the underlying project benefiting from the agreement may significantly affect the quality of the human environment.

June 21, 1990

Michael J. Mulroney
P.O. Box 1144
Helena MT 59624

Dear Mr. Mulroney:

On behalf of the Montana Board of Investments, you have requested my opinion concerning the following question:

> Is the Montana Board of Investments obligated to comply with the environmental impact statement requirements of the Montana Environmental Policy Act before entering into loan participation agreements pursuant to section 17-6-312, MCA?

I conclude that decisions to enter into loan participation agreements by the Board of Investments constitute "major actions of state government" within the scope of section 75-1-201(1) (b)(iii), MCA, of the Montana Environmental Policy Act and that environmental impact statements therefore must be prepared to the fullest extent possible in connection with such decisions when the financed project may significantly affect the quality of the human environment.

In 1982 Montana voters approved Initiative No. 95. The initiative directed that, in addition to other income, 25 percent of all revenue deposited after

June 30, 1983 into the permanent coal tax trust fund "be invested in the Montana economy with special emphasis on investments in new or expanding locally-owned enterprises." Mont. Initiative No. 95 § 3(1) (Nov. 1982). The initiative further provided that such revenue could not be used to make "direct loans." *Id.* at § 3(3). A second component of the initiative was creation of the Montana Economic Development Fund, but expenditures from that fund are not at issue here.

In response to Initiative No. 95 the Legislature adopted the Montana In-State Investment Act of 1983 ("Investment Act"). 1983 Mont. Laws, ch. 677 (codified as amended at §§ 17-6-301 to 331, MCA). The Investment Act established the Montana In-State Investment Fund financed substantially by the 25 percent permanent coal tax trust fund revenue allocation under Initiative No. 95 and principal payments made on investments from the fund. § 17-6-306, MCA. The Montana Board of Investments ("Board") is responsible for investing the fund's assets (§ 17-6-308(1), MCA) but, consistent with the provisions of Initiative No. 95, the Investment Act proscribes use of the fund "to make direct loans to individual borrowers" (§ 17-6-310(2), MCA). It does authorize agreements for "loan participation," defined in section 17-6-302(6), MCA, as "loans or portions thereof bought from a financial institution[,]" and limits such participation to 80 percent of the outstanding loan unless the loan is one guaranteed by a federal agency. § 17-6-312(1), MCA; see §§ 8.97.407 to 8.97.409, ARM. The financial institution issuing the underlying loan is responsible for servicing the loan and remitting to the Board its proportionate share of principal and interest payments.

The Montana Environmental Policy Act ("MEPA"), §§ 75-1-101 to 324, MCA, was adopted in 1971, and its purpose is to "encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, [and] to enrich the understanding of the ecological systems and natural resources important to the state." § 75-1-102, MCA. Among its express policies is use of "all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans." § 75-1-103(1), MCA. MEPA's policies and goals supplement those otherwise existing for state agencies. § 75-1-105, MCA.

The core substantive provision in MEPA is section 75-1-201, MCA, and subsection 1(b)(iii) of that provision mandates the preparation of environmental impact statements under certain conditions:

> (1) The legislature authorizes and directs that, to the fullest extent possible:
>
> ....

> (b) all agencies of the state, except as provided in subsection (2), shall:
> ....
> (iii) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on:
>
> (A) the environmental impact of the proposed action;
>
> (B) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (C) alternatives to the proposed action;
>
> (D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
>
> (E) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented[.]

The only state agency expressly excluded from the requirements of section 75-1-201, MCA, is the Department of Public Service Regulation in the exercise of its regulatory authority over rates and charges of railroads, motor carriers and public utilities. § 75-1-201(2), MCA.

The Board has adopted no regulations to implement any responsibilities it may have under MEPA and does not prepare environmental impact statements prior to determining whether to enter into a loan participation agreement--even where the private-borrower activity giving rise to the agreement may significantly affect the quality of the human environment.

As a preliminary matter, I am constrained to reject any claim that the Board has a blanket dispensation from the obligations imposed under MEPA. First, as stated, the only agency excluded from the statute's requirements is the Department of Public Service Regulation with respect to one aspect of its responsibilities. Second, unlike the Department of State Lands which, when processing permit applications under a prior version of section 82-4-337, MCA, in the Hard Rock Mining Act, §§ 82-4-301 to 362, MCA, was permitted to proceed without an environmental impact statement, the Board has no legislatively prescribed time limits in its decisionmaking under the Investment Act which "preclude[] the statutory duty of preparing an EIS." Kadillak v. Anaconda Company, 184 Mont. 127, 136, 602 P.2d 147, 153 (1979). Third, such a blanket exception would be inconsistent with provisions governing use of the investment fund. That fund is substantially financed by monies from

the permanent coal tax trust fund whose statutory purposes include under section 17-6-303(2), MCA, developing "a stable, strong, and diversified economy which meets the needs of Montana residents both now and in the future while maintaining and improving a clean and healthful environment as required by Article IX, section 1, of the Montana constitution." Accord § 17-6-304, MCA. Section 17-6-309(4), MCA, further provides that, "[i]n deciding which of several investments of equal or comparable security and return are to be made when sufficient funds are not available to fund all possible investments, the board shall give preference to the business investments" which, *inter alia*, "maintain and improve a clean and healthful environment, with emphasis on energy efficiency." The Board's independent obligation under the Investment Act to consider the environmental effects of the use of monies from the investment fund, therefore, is not only entirely complementary with application of MEPA, but is also directly facilitated by compliance with it.

Nonetheless, the mere applicability of MEPA generally to the Board does not determine whether decisions to enter into loan participation agreements constitute "major actions of state government" and are consequently subject to the environmental impact statement requirements in section 75-1-201(1)(b)(iii), MCA. In answering that question, the Montana Supreme Court has made it clear that I must be guided by decisions applying the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347. See Kadillak, 184 Mont. at 135-37, 602 P.2d at 152-53 (relying upon federal interpretations of NEPA in construing MEPA); 42 Op. Att'y Gen. No. 62 (1988), slip op. at 3. The term "major Federal action," as used in section 102 of NEPA, 42 U.S.C. § 4332, has been interpreted to include most forms of direct or indirect assistance to otherwise private activity. E.g., 40 C.F.R. § 1508.18(a) (1989) (federal actions include "projects and programs entirely or partly financed" by government); Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) (loan to finance private company's construction costs); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (grant to community redevelopment agency); Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974) (mortgage guaranty insurance to secure loan made by financial institution to private developer); see generally D. Mandelker, NEPA Law and Litigation § 8.17 (1984) ("In most cases in which a federal agency makes a direct categorical grant for a nonfederal project, the use of federal funds for the project is sufficient to bring it under NEPA. The courts reach the same result when the federal agency makes a loan to a nonfederal entity or makes federal mortgage insurance available"). Such financial assistance will be deemed major federal action for environmental impact statement purposes when "it enable[s] a private party to act so as to significantly affect the environment." South Dakota v. Andrus, 614 F.2d 1190, 1194 (8th Cir. 1980). Thus, "[m]ost courts agree that significant federal funding turns what would otherwise be a local project into a major federal action." Alaska v. Andrus, 591 F.2d 537, 540 (9th Cir. 1979); accord National Association for Advancement of Colored People v. Medical Center, Inc., 584 F.2d 619, 634 (3d Cir. 1978).

The prohibition of loans to individual borrowers in section 3(3) of Initiative No. 95 and section 17-6-310, MCA, is presumably intended to remove the Board from the process of directly soliciting or administering those loans and to ensure active involvement of financial institutions in any extension of credit. The loan participation provisions of the Investment Act accordingly are aimed at fostering development of a credit market, financed from both private and governmental sources, to encourage in-state business growth; i.e., the Investment Act envisions a tripartite functional relationship between the Board, the lending institution and the borrower, where the Board acts to facilitate private financing of selected projects by the infusion of state monies at commercially favorable interest rates. Singularly reflective of this tripartite relationship is the application form used in the Board's loan participation decisionmaking. The form consists of two parts, the first of which must be completed by the private borrower and the second by the financial institution originating the loan. The borrower is required to "[i]nclude both a physical description of the project and a description of the uses of the project" and, under a section designated "Preferences," to describe "any potential environmental impacts occurring as a result of the proposed project[] and [to] specify any environmental permits that will be necessary." The form thereby mirrors the Investment Act's directive that the Board not only consider the environmental impact of projects which are proposed to be financed through loan participation agreements but also give preference under certain conditions to those projects which are environmentally beneficial. Consequently, while proceeds from a loan participation agreement do not constitute a direct loan from the Board to the private borrower, they are nonetheless used to facilitate financing of particular projects, or to "enable" the initiation of those projects, the purposes of which the Board wishes to advance.

It is therefore clear that loan participation agreements constitute a mechanism whereby the State, through the Board, seeks to encourage development of carefully selected private projects. The device used to achieve this result is purchase of a portion of a loan between a lending institution and its private borrower. The Board's financial commitment under these circumstances directly enables, and thereby substantially benefits, the borrower's activity. In light of the indisputable applicability of MEPA generally to the Board and the decisional or other authority discussed above construing the term "major Federal action" in NEPA, a determination to enter into a loan participation agreement must be deemed a "major action[] of state government" under section 75-1-201(1)(b)(iii), MCA.

My conclusion that decisions to enter into loan participation agreements constitute "major actions of state government" should not be viewed as mandating preparation of environmental impact statements before entry into all such agreements, since the requirements of section 75-1-201(1)(b)(iii), MCA, apply only where the involved project may "significantly affect the quality of the human environment." The Board's attention is directed to the pattern rules adopted by other state agencies to discharge their responsibilities

under MEPA. E.g., §§ 8.2.301 to 8.2.326, ARM (Department of Commerce). These regulations contain substantial procedural flexibility when conducting environmental assessments or, if appropriate, preparing environmental impact statements. The Board may wish to consider adoption of comparable regulations to assist in efficiently discharging its statutory obligations under the Investment Act and MEPA.

Finally, my holding should also not be construed as limiting in any way the Board's substantive decisionmaking power with respect to the propriety of a particular loan participation agreement. The requirements of MEPA, including those in section 75-1-201(1)(b)(iii), MCA, are procedural in nature and designed only to ensure that an agency, to the fullest extent possible, takes otherwise authorized action with reasonably complete understanding of its environmental consequences. See Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989) ("[A]lthough [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. ... If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs").

THEREFORE, IT IS MY OPINION:

> The Montana Board of Investments must comply with the environmental impact statement requirements of the Montana Environmental Policy Act when the Board considers whether to enter into a loan participation agreement where the underlying project benefiting from the agreement may significantly affect the quality of the human environment.

Sincerely,

MARC RACICOT
Attorney General