

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

COUNTY OF MISSOULA, NATIONAL)
WILDLIFE FEDERATION, MONTANA)
ENVIRONMENTAL INFORMATION)
CENTER, MONTANA CHAPTER OF THE)
SIERRA CLUB,)

Plaintiffs,)

v.)

MONTANA DEPARTMENT OF)
TRANSPORTATION, an agency of the)
State of Montana, and JIM LYNCH, in his)
capacity as Director of Montana Department)
of Transportation,)

Defendants, and)

IMPERIAL OIL RESOURCES VENTURES)
LIMITED,)

Defendant-Intervenor.)

Cause No.: DV-11-424
Dept. No. 3

FILED JUL 19 2011

SHIRLEY E. FAUST, CLERK

By

Deputy

**MEMORANDUM AND ORDER
REGARDING PENDING
EVIDENTIARY MOTIONS**

Pending before the Court are several motions seeking to exclude and strike certain evidence. Defendants Montana Department of Transportation and Jim Lynch (MDT) have filed a motion in limine and motion to strike reports and affidavits. Defendant-Intervenor Imperial Oil Resources Ventures Limited (Imperial Oil) has filed a motion to strike affidavits and motion in limine to prohibit Plaintiffs from presenting certain evidence. Plaintiffs National Wildlife Federation, Montana Environmental Information Center, and Montana Chapter of the Sierra Club (Non-Profit Plaintiffs) have filed a motion to strike affidavits, portions of MDT's brief, and to limit testimony. Plaintiff Missoula County has joined in the Non-Profit Plaintiffs' motion. Having reviewed the record and considered the parties' arguments the Court now issues its ruling.

BACKGROUND

The subject matter of this case is the Kearn Module Transport Project (KMTP). As part of the project, Imperial Oil proposes to transport approximately 207 oversized loads through Montana from the Montana-Idaho state line at Lolo Pass in Missoula County to the Canadian border at Sweet Grass, Montana. The KMTP modules are being manufactured in South Korea, shipped to the Port of Vancouver, Washington and barged up the Columbia and Snake Rivers to Lewistown, Idaho. The modules' ultimate destination is Alberta, Canada where they would be used in tar sand mining and production.

Some of Imperial Oil's modules exceed legal dimensions, thus requiring 32-J permits from MDT. To date, one (1) 32-J permit has been issued to allow transport of a test validation module from Lolo Pass to Lolo Hot Springs, a distance of approximately seven (7) miles. In order to facilitate the KMTP, construction work must be performed including improvement and construction of various highway turnouts and modification to overhead utility lines and traffic signals. The construction work is subject to MDT encroachment and utility permits. As part of MDT's approval process for the KMTP an environmental assessment (EA) pursuant to the Montana Environmental Policy Act (MEPA) was conducted. The EA was completed on April 8, 2010. A finding of no significant impact (FONSI) decision was issued on February 7, 2011.

Plaintiffs' suit ultimately seeks to permanently enjoin MDT from issuing further permits relating to the KMTP and to void already issued permits. Plaintiffs currently seek issuance of a preliminary injunction under section 27-19-201, MCA.

DISCUSSION

A preliminary injunction hearing was held on the 16th through 18th days of May, 2011. Prior to this hearing, the Court issued a memorandum advising the parties that it was not in a

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position to rule on the pending evidentiary motions until after the hearing. The Court is treating the pending evidentiary motions as motions to give no consideration to certain evidence for the purpose of ruling on the pending preliminary injunction motion. The currently pending evidentiary motions require the Court to determine what exceptions, if any, permit it to consider evidence or issues outside of the administrative record for the purpose of considering Plaintiffs' MEPA claims.

MDT & Imperial Oil's Evidentiary Motions

MDT and Imperial Oil have filed separate motions seeking to exclude extra-record evidence not first presented to MDT during the KMTP public comment and review period, for any matter related to Plaintiffs' MEPA claims. MDT and Imperial Oil further seek to exclude irrelevant evidence that does not address "great or irreparable injury" under section 27-19-201(2), MCA. MDT and Imperial Oil specifically seek to strike the affidavits and accompanying reports of Peter Nielsen, Greg Robertson, Steve Seninger, Greg Howard, Greg Lazerte, and Douglas Burreson.¹

1) Admissibility of extra-record evidence for matters relating to Plaintiffs' MEPA claims.

MDT and Imperial Oil argue extra-record evidence cannot be considered under section 75-1-201(3), MCA, unless the court first remands the extra-record evidence to MDT for its consideration. MDT and Imperial Oil further argue that the Court may not remand extra-record evidence unless it finds such evidence to be new, material, and significant.

Plaintiffs argue that the Court may consider extra-record evidence under three limited circumstances. In *Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, the Montana Supreme Court indicated extra-record evidence may be considered, "... for background information; for ascertaining whether the agency considered all the relevant factors; or for ascertaining whether the agency fully explicated its course of conduct or grounds of decision."

¹ The affidavits of Greg Howard, Greg Lazerte, and Douglas Burreson were filed after Imperial Oil's motion to strike. Imperial Oil requested that these affidavits be stricken in its *Reply Brief in Support of Motion to Strike Testimony and Motion in Limine*.

Heffernan ¶ 66 (citing *Skyline v. Sportsmen Association v. Board of Land Commissioners*, 286 Mont, 108, 951 P.2d 29 (1997); *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)).

Heffernan is a subdivision review case, which did not implicate MEPA.

The Court finds that section 75-1-201(3), MCA, controls when it may admit extra-record evidence in reviewing an agency decision under MEPA. In reviewing an agency's decision under MEPA, "... a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision." Mont. Code Ann. § 75-1-201(3)(a) (2009).

The statute contains one exception.

When new, material, and significant evidence or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review....

Mont. Code Ann. § 75-1-201(3)(b).

"It is well-established that when the language of a statute is clear and unambiguous, the statute speaks for itself. [The court] will not 'insert what has been omitted . . . or omit what has been inserted' nor will [the court] resort to other means of interpretation." *Kulstad v. Maniaci*, 2009 MT 403, ¶ 10, 353 Mont. 467, 221 P.3d 127 (quoting *Hilands Golf Club v. Ashmore*, 2002 MT 8, ¶ 20, 308 Mont. 111, 39 P.3d 697; Mont. Code Ann. § 1-2-101).

Section 75-1-201(3), MCA, makes clear that the Court may not consider any evidence or issues not first presented to MDT for its consideration during the KMTP decision making process unless such evidence or issues are new, material, and significant. If new, material, and significant

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evidence is presented to the Court such evidence must be remanded to MDT for its consideration. Therefore, the Court must determine whether the evidence and issues MDT and Imperial Oil seek to exclude is new, material, and significant.

Peter Nielsen has submitted three affidavits for Plaintiffs. Nielsen's testimony during the preliminary injunction hearing was based on these affidavits and reports.

Nielsen's March 24, 2011, affidavit addresses why he believes, as an environmental professional, the KMTP EA is deficient. The affidavit raises issues relating to the need for an EIS, impacts to aquatic resources, analysis of alternatives, and climate change impacts. The issues raised in Nielsen's affidavit have been commented on by Plaintiffs and other members of the general public and responded to by MDT. *See e.g.* FONSI D-373 to D-376, D-386 to D-388, D-327. Therefore, the issues raised by Nielsen are not new and his affidavit may be considered by the Court.

Nielsen's April 15, 2011, affidavit contains a report relating to a field investigation he conducted on April 12, 2011, along part of the proposed KMTP route. Nielsen's field investigation was conducted after MDT issued the EA and FONSI. Therefore, the report and affidavit are new evidence. Nielsen's report addresses turnout construction, wetland impacts, and road sanding. The Court will consider each of these separately.

First, the report suggests that turnouts are not as large as stated in the EA and therefore more construction than characterized by the EA will be required. Nielsen is not an engineer and does not have experience in road construction or the transport of high-wide loads. Nielsen's contention that turnouts are not as large as stated in the EA is largely speculative. Nielsen used pacing to measure turnout distances and his report identifies turnouts which don't "appear" to be large enough to

accommodate the KMTP modules. The Court does not find this evidence to be material or significant.

Second, Nielsen's report suggests that some proposed turnouts will be within 100 feet of wetlands. The EA states that new turnouts will be located a minimum of approximately 100 feet from wetlands. In addition, all sites will undergo a field review to determine if wetlands are present and the location of turnouts or utility work will be adjusted or mitigation measures applied as necessary. Nielsen's evidence of wetlands being within 100 feet of some proposed turnout locations is not significant or material given that a field review of wetlands will be undertaken prior to construction of the turnouts.

The last issue raised by Nielsen's report is road sanding impacts to Lolo Creek. Plaintiffs have presented no evidence that additional road sanding will take place to facilitate transport of the KMTP modules. Therefore, evidence relating to impacts from road sanding cannot be considered material or significant. The Court concludes that Nielsen's April 15, 2011, affidavit does not contain material or significant evidence and will not remand it to MDT.

Nielsen's May 12, 2011, affidavit and report allege that best management practices (BMPs) are not being properly installed and maintained. Nielsen's report and affidavit were completed after MDT issued the EA and FONSI and therefore are new evidence. Whether BMPs are being properly installed or maintained raises an issue of compliance with the Montana Department of Environmental Quality's 2007 general storm water permit and the KMTP's storm water pollution prevention plans. The issue before the Court is not whether the KMTP is meeting substantive environmental permitting requirements, but rather whether MDT complied with the procedural requirements of MEPA. Evidence relating to whether BMPs have been properly maintained or

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installed is not material or significant to determining whether MDT adequately considered environmental impacts under MEPA.

Gregory H. Robertson submitted two affidavits for Plaintiffs. Robertson offered testimony based on these affidavits as well as testimony regarding floodplain issues.

Robertson's April 7, 2011, affidavit addresses why he believes the KMTP EA is inadequate. Robertson raises issues relating to alternative route analysis, safety issues, and adherence to the ten (10) minute rule. These issues have been commented on by other members of the general public and responded to by MDT. *See e.g.* FONSI D-403, D-399, D-148, D-373 to D-376, D-386 to D-388. Therefore, the issues raised by Robertson are not new and his affidavit may be considered by the Court.

Robertson's May 13, 2011, affidavit and report offer evidence of why he believes the KMTP will fail to meet the ten (10) minute rule under Admin. R. Mont. 18.8.1101(6). Robertson's affidavit and report were completed after MDT issued the EA and FONSI. Therefore, the report and affidavit are new evidence. MDT has the authority to revoke 32-J permits if Imperial Oil or its contractors violate the 10 minute rule. *See* Admin. R. Mont. 18.8.901. Thus, evidence offered to show that the KMTP may not meet the 10 minute rule is not material or significant to determining whether MDT violated MEPA. The Court will not remand Robertson's affidavit or report to MDT.

During the preliminary injunction hearing Robertson testified that, contrary to the EA and FONSI, the proposed turnout at milepost 20.3 is located within a floodplain. Plaintiffs also submitted a map in support of their contention that the proposed turnout at milepost 20.3 is within a floodplain. Exhibit 15; *See* Aff. Douglas Burreson (May 13, 2011). Robertson testified that this issue had not been previously raised with MDT and that he had formed his floodplain opinion within the past week. The EA anticipates no impact to aquatic resources. However, if impacts to

aquatic resources are unavoidable the appropriate permits must be obtained. The encroachment permits also require compliance with floodplain regulations. The Court finds that the floodplain issue and evidence relating to it are not material or significant to determining whether MDT violated MEPA.

Steve Seninger (Seninger) is an economist who submitted an affidavit discussing why he believes the economic analysis in the KMTP EA is inadequate. Seninger also provided testimony which was based on the contents of his affidavit. Seninger submitted comments during the environmental review process, which were responded to by MDT. *See* FONSI D-695 and 696. Seninger's affidavit and testimony are substantially the same as the comments which he previously submitted to MDT. Therefore, his affidavit and testimony do not present new issues or evidence and may properly be considered by the Court.

Greg Howard (Howard) is a wetland specialist who testified and submitted a report and affidavit for Plaintiffs. Howard delineated wetlands and reviewed BMPs along part of the proposed KMTP route. Howard's field survey was conducted after MDT issued the EA and FONSI and therefore is new evidence. Howard's report and testimony are not material or significant. The EA states that new turnouts will be located a minimum of approximately 100 feet from wetlands and a field survey of wetlands will be conducted prior to construction of turnouts. As previously discussed, evidence relating to the maintenance and installation of BMPs is not relevant to determining whether MDT violated MEPA. Howard's affidavit, report, and testimony will not be remanded to MDT.

Greg Lazerte (Lazerte) is a land surveyor for Missoula County who testified and submitted an affidavit for Plaintiffs. Lazerte conducted a topographical survey of proposed turnout locations along part of the proposed KMTP route. Lazerte also prepared narrative and survey

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drawings. The survey drawings included the wetlands delineated by Howard. Lazerte's topographical survey and drawings were prepared well after issuance of the EA and FONSI and therefore are new evidence. Lazerte is not a civil engineer and does not have the authority to stamp drawings for construction. Lazerte testified that he deviated from MDT's engineering plans by using a different fill slope. The EA states new turnouts will be located a minimum of approximately 100 feet from wetlands and a field survey of wetlands will be conducted prior to construction of turnouts. The Court finds Lazerte's field investigation, survey drawings, and related testimony are not material and significant evidence.

2) *Admissibility of extra-record evidence to show "great or irreparable injury" under section 27-19-201(2), MCA.*

Section 75-1-201(3), MCA, does not preclude the Court from considering extra-record evidence to determine whether Plaintiffs have demonstrated "great or irreparable injury" for the purpose of obtaining a preliminary injunction under section 27-19-201(2), MCA. The Court may consider any evidence it deems relevant to determining whether Plaintiffs have demonstrated "great or irreparable injury." Notwithstanding MDT and Imperial Oil's arguments, the Court finds evidence relating to BMPs and the 10 minute rule are relevant to establishing great or irreparable injury under section 27-19-201(2), MCA. The Court will consider such evidence and afford it the weight it deems appropriate.

Plaintiffs' Evidentiary Motion

Plaintiffs seek to exclude extra-record evidence offered by MDT for the purposes of defending against Plaintiffs' MEPA claims. Plaintiffs' argue that MDT cannot submit extra-record evidence to justify or rationalize the KMTP decision. Plaintiffs specifically ask the Court to strike the affidavits of Shane Stack, Danielle Bolan, Dan Kiely, William Craig, Tom Martin, Dwane

Kailey, and Harold Fossum. Plaintiffs also ask the Court to strike portions of MDT's brief which refer to these affidavits.

Courts review MEPA decisions to determine "whether *the record* establishes that the agency acted arbitrarily, capriciously, or unlawfully." *Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995) (emphasis added) (quoting *North Fork Preservation Assoc. v. Dept. of State Lands*, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989)).

Evidence not based on the administrative record is irrelevant to the Court's role in determining whether the administrative record establishes that MDT acted arbitrarily, capriciously, or unlawfully in approving the KMTP. In considering Plaintiffs' MEPA claims, including whether to grant a preliminary injunction under section 27-19-201(1), MCA, the Court will give no consideration to evidence offered by MDT, which tends to justify or rationalize its approval of the KMTP and is not based upon the administrative record.

Having reviewed the affidavits and related testimony which Plaintiffs seek to exclude, the Court finds that most of the evidence is based on the administrative record and may properly be considered. With one exception, the evidence which Plaintiffs seek to exclude merely highlights or summarizes portions of the administrative record and generally explains the MEPA review process.

The affidavit of MDT economist Harold Fossum (Fossum) is not based upon the administrative record. Fossum's affidavit was offered to counter the comments, affidavit, and testimony of Seninger regarding the economic analysis in the KMTP EA. Seninger submitted comments to MDT during the KMTP public comment period addressing this issue and MDT responded to those comments. MDT cannot now supplement its response to those comments

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through the extra-record affidavit of Fossum. Therefore, the Court will not consider Fossum's affidavit.

CONCLUSION

Section 75-1-201(3), MCA, controls the admissibility of extra-record evidence for the purpose of considering Plaintiffs' MEPA claims. Extra-record evidence offered by Plaintiffs cannot be considered unless the Court concludes such evidence is material and significant and remands to MDT for its consideration. The Court has found the following to be extra-record evidence which is not material or significant:

- 1) April 15, 2011, affidavit, report, and related testimony of Peter Nielsen;
- 2) May 12, 2011, affidavit, report, and related testimony of Peter Nielsen;
- 3) May 13, 2011 affidavit, report, and related testimony of Gregory H. Robertson;
- 4) Gregory H. Robertson's floodplain testimony;
- 5) affidavit of Douglas Burreson;
- 6) affidavit, report, and related testimony of Greg Howard;
- 7) affidavit, report, and related testimony of Greg Lazerte.

The Court will give no consideration to the above evidence for matters related to Plaintiffs' MEPA claims, including whether to grant a preliminary injunction under section 27-19-201(1), MCA.

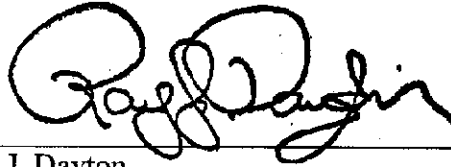
The Court will give no consideration to any evidence offered by MDT which tends to rationalize MDT's approval of the KMTP and is not based upon the administrative record.

Therefore, the Court will not consider the affidavit of Harold Fossum.

The Court will consider evidence, including extra-record evidence, which it deems relevant to determining whether Plaintiffs have demonstrated "great or irreparable injury" in order to obtain a preliminary injunction under section 27-19-201(2), MCA.

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DATED this 19th day of July, 2011.

A handwritten signature in black ink, appearing to read "Ray J. Dayton", written over a horizontal line.

Ray J. Dayton
District Court Judge

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