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 SHIRLEY E. FAUST, CLERK
 By *Shirley E. Faust*
 Deputy

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

**ORDER AND MEMORANDUM
 DENYING IMPERIAL OIL'S
 MOTION TO DISMISS**

Pending before the Court is a motion to dismiss filed by Defendant-Intervenor Imperial Oil Resources Ventures Limited (Imperial Oil). Defendants Montana Department of Transportation and Jim Lynch (MDT) have joined in Imperial Oil's arguments. The Court has reviewed the record including affidavits submitted on the issue of standing together with the written arguments of the parties. The Court rules as follows.

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, which have already been issued. 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 ultimately seek to permanently enjoin MDT from issuing further permits relating to the KMTP and to void already issued permits until such time as MDT complies with MEPA, the Constitution and statutes and regulations governing issuance of the permits. Plaintiffs currently seek issuance of a preliminary injunction to prevent activity on the project during the pendency of the action.

Defendant-Intervenor Imperial Oil has moved to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6), Mont. R. Civ. P., on the ground that Plaintiffs lack standing and therefore cannot

state a claim upon which relief can be granted.¹ Imperial Oil argues each Plaintiff lacks standing for differing reasons.

STANDARD OF REVIEW

In considering a motion to dismiss, the complaint is to be considered in the light most favorable to the Plaintiff and allegations of fact contained therein are to be taken as true. *Willson v. Taylor*, 194 Mont. 123, 126, 634 P.2d 1180, 1182 (1981). A Rule 12(b)(6) motion to dismiss should only be granted when “. . . the plaintiff could not prevail ‘[u]nder any set of facts which could be proved in support of the claim.’” *Kunz v. Butte-Silver Bow*, 244 Mont. 271, 273, 797 P.2d 225 (1990) (quoting *Mogan v. City of Harlem*, 227 Mont. 435, 437, 739 P.2d 491, 492-493 (1987)).

In considering a motion to dismiss, courts are generally limited to reviewing the complaint only. Mont. R. Civ. P. 12(b). “Where a district court considers any outside information not included in the plaintiff’s pleadings the court must convert a motion to dismiss to a motion for summary judgment and provide proper notice.” *Farmers Coop. Assn. v. Amsden, LLC.*, 2007 MT 287, ¶ 18, 39 Mont. 452, 171 P.3d 684. “The policy behind converting a motion to dismiss into a motion for summary judgment when a court considers outside information, is to notify the parties of the additional evidence considered, allow ample opportunity for the parties to prepare information countering the additional evidence, and avoid surprise.” *Farmers Coop.*, ¶ 23. In *Farmers Coop.*, the Montana Supreme Court concluded the district court did not err in considering some matters outside of the pleadings when ruling on a motion to dismiss because the parties were not surprised by the information and there was no need for further time to consider the issues presented. *Farmers Coop.*, ¶ 23-24.

¹ Imperial Oil also argues Plaintiffs’ constitutional claims are time barred. This argument is addressed by the Court in the June 28, 2011, order and memorandum regarding Defendants’ motion to dismiss.

Here, Plaintiffs have submitted affidavits in support of their standing. Defendant-Intervenor Imperial Oil states in its brief that the Court may consider these affidavits in ruling on the motion to dismiss. Imperial Oil's brief in support of the motion to dismiss cites and addresses Plaintiffs' standing affidavits. Thus, the parties are all aware of the affidavits and have had the time and opportunity to address them in their briefs relating to the motion to dismiss. Therefore, the Court will consider the complaint as well as Plaintiffs' standing affidavits in ruling on the motion to dismiss.

DOCTRINE OF STANDING

Standing is one of several justiciability doctrines which limit courts to deciding only "cases" and "controversies" and is a threshold, jurisdictional requirement in every case. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207. "The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Heffernan*, ¶ 30. "Standing requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation...." *Id.* There are two strands to standing: the constitutionally imposed case or controversy requirement and the judicially self-imposed "prudential" limitations. *Heffernan*, ¶ 31.

To meet the constitutional case-or-controversy requirement, the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right, which can be alleviated by successfully maintaining the action. *Heffernan*, ¶ 33 (citing *Olson v. Dept. of Revenue*, 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986); *Bd. of Trustees v. Cut Bank Pioneer Press*, 2007 MT 115, ¶15, 337 Mont. 229, 160 P.3d 482; *Jones v. Montana University System*, 2007 MT 82, ¶ 48, 337 Mont. 1, 155 P.3d 1247). Prudential requirements include the rule that the alleged injury must be distinguishable from injury to the public generally, but need not be exclusive to the plaintiff.

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Heffernan, ¶ 33; (citing *Bd. of Trustees* at ¶ 15). Prudential limitations must be balanced against the importance of the question to the public and whether denying standing would effectively immunize the issue from review. *Missoula City-County Air Pollution Control Board v. Board of Env'tl Rev.*, 282 Mont. 255, 260, 937 P.2d 463, 466 (1997); *Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997).

It is well established that an association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when (a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit.

Heffernan, ¶ 43 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Hunt v. Washington State Apple Advertising Commn.*, 432 U.S. 333, 343 (1977)).

DISCUSSION

Plaintiffs' complaint alleges MDT's permitting and approval process of the KMTP violated MEPA, the Constitution, and various statutes and regulations. Plaintiffs allege MDT violated MEPA by: failing to consider and disclose impacts of the KMTP in the EA; failing to consider a full range of reasonable alternatives for the KMTP; and failing to prepare an environmental impact statement (EIS). Plaintiffs allege MDT violated additional statutes and regulations by issuing 32-J permits relating to the KMTP. Plaintiffs allege the KMTP project and activities relating to it may have adverse impacts on the environment, economy, emergency response services, the highway system, waterways, and wildlife. Each Plaintiff submitted comments on the KMTP Draft EA, as did individual members and citizens of each organization.

Plaintiffs' allegations in support of their standing are located in paragraphs nine through thirteen of the complaint. These allegations are to be taken true for the purposes of considering the motion to dismiss. Plaintiffs have also submitted four affidavits to bolster the standing allegations

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contained within the complaint. *See* Aff. Sara E. Boyett (Mar. 9, 2011); Second Aff. Sara E. Boyett (May 11, 2011); Standing Aff. of John Wolverton (Mar. 15, 2011). Standing Aff. of James D. Jensen (Mar 28, 2011). The Court will address each Plaintiff's standing separately.

Standing of Missoula County

Missoula County has alleged threatened injuries which can be successfully alleviated by maintaining the action. Missoula County alleges the KMTP will traverse the entire length of the county and that the project is of concern because of potential impacts to the people and environment of Missoula County. These alleged threatened injuries to the environment and people of Missoula County can be alleviated if the county prevails in enjoining the KMTP.

The alleged threatened injuries to Missoula County are distinguishable from injuries to the public generally. Specifically, Missoula County has a direct interest in protecting its tax base, economy, environment, and providing adequate emergency response services. The Court finds Missoula County has met the requirements of standing.

Standing of the National Wildlife Federation

The National Wildlife Federation (NWF) has alleged threatened injuries which can be successfully alleviated by maintaining the action. The NWF has a regional office in Missoula. NWF alleges its members visit and use areas the KMTP impacts and that its members will be adversely affected by the KMTP project. The NWF further alleges it is concerned about the impacts of the KMTP to Montana as well as exploitation of the Alberta tar sands.

Some, if not all, of these threatened injuries can be alleviated if the NWF successfully maintains its action. If the KMTP is permanently enjoined NWF members will no longer be threatened by the alleged impacts of the KMTP to areas used and visited by its members. The

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threatened injuries to NWF's members are distinguishable from those of the general public in that its members use and visit areas alleged to be impacted by the KMTP.

NWF's members would have standing to individually bring suit under the reasoning set forth above. At a minimum, alleged impacts to wildlife and the environment as the result of the KMTP are germane to the NWF's purpose as a conservation, advocacy, and educational organization. The individual participation of its members in the suit is unnecessary. The Court finds the NWF has standing to proceed in the case on behalf of its members.

Standing of the Montana Environmental Information Center

The Montana Environmental Information Center (MEIC) has alleged threatened injuries which can be successfully alleviated by maintaining the action. MEIC is an environmental organization headquartered in Montana. The MEIC alleges its members use and visit areas that the KMTP impacts and that its members will be adversely impacted by the KMTP's potential economic, environmental, and community impacts along the proposed route. Sara E. Boyett (Boyett) is a member of the MEIC. Aff. Sara E. Boyett ¶ 3 (May 11, 2011). Boyett lives approximately 300 yards from the proposed KMTP route and is concerned about the project's impact on her quality of life including the potential for increased noise, light, and traffic delays. Aff. Sara E. Boyett ¶ 4 (Mar. 9, 2011). Boyett is also concerned about the KMTP's potential impacts to the visual aesthetics and scenic nature of the Blackfoot Valley. Aff. Sara E. Boyett at ¶ 5.

As someone who lives along the KMTP route, Boyett's threatened injuries are distinguishable from those of the general public. Boyett would have standing to bring suit individually. The threatened environmental impacts from the KMTP described in Boyett's affidavit are germane to MEIC's purpose as an environmental organization. Boyett's individual participation

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in the lawsuit is unnecessary. The Court finds the MEIC has standing to proceed in the case on behalf of its members.

Standing of the Sierra Club

The Sierra Club has alleged threatened injuries which can be successfully alleviated by maintaining the action. The Sierra Club is non-profit environmental organization that maintains a Montana Chapter. The Sierra Club is concerned about the KMTP because its members visit and use areas that the project will allegedly impact. The Sierra Club is also concerned about the KMTP's effects in expanding development of tar sands in Alberta, Canada.

John Wolverton (Wolverton) is a member of the Montana Chapter of the Sierra Club who recreates in areas near the KMTP route. *Aff. John Wolverton* ¶¶ 1 and 10 (Mar. 15, 2011). Wolverton alleges that enjoyment of these areas will be adversely impacted if the KMTP project proceeds. *Aff. John Wolverton* at ¶ 10. Wolverton is concerned about the KMTP's impact on his ability, and the ability of other Sierra Club members, to use existing turnouts to access outdoor recreation areas. *Id.*

As someone who recreates in areas near the proposed KMTP route and relies on existing turnouts along the route for recreational access, Wolverton's threatened injuries are distinguishable from those of the general public. Wolverton would have standing to bring suit individually. The threatened environmental injuries and access issues described in Wolverton's affidavit are germane to the Sierra Club. Wolverton's individual participation in the lawsuit is unnecessary. Therefore, the Sierra Club has standing to bring suit on behalf of its members.

CONCLUSION

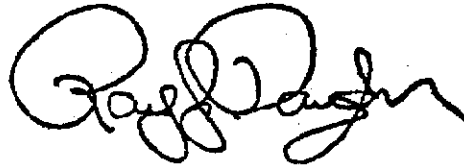
Each Plaintiff has alleged a threatened injury, distinguishable from the public generally, which can be alleviated by successfully maintaining the lawsuit. Missoula County has alleged

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threatened injuries to it as a result of the KMTP. NWF, the Sierra Club, and MEIC have met the requirements of associational standing. They have alleged threatened injuries to their members who would have standing to individually bring suit. The interests sought to be protected are germane to the NWF, Sierra Club, and MEIC. Individual participation of their members is unnecessary.

Therefore, Imperial Oil's Motion to Dismiss is **DENIED**.

DATED this 18th day of June, 2011.



Ray J. Dayton
District Court Judge