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 SHIRLEY E. FAUST, CLERK
 By *Shirley 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
 GRANTING IN PART AND
 DENYING IN PART
 DEFENDANTS JIM LYNCH AND
 MONTANA DEPARTMENT OF
 TRANSPORTATION'S MOTION
 TO DISMISS**

Pending before the Court is a motion to dismiss filed by Defendants Montana Department of Transportation and Jim Lynch (MDT). Defendant-Intervenor Imperial Oil Resources Ventures Limited (Imperial Oil) has joined in the 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, 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.

MDT has moved to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6), Mont. R. Civ. P., for failure to state a claim upon which relief can be granted.

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.

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 the public’s right to know and participate under Article II, Sections 8 and 9 of the Montana Constitution and MEPA by failing to provide important information relevant to the KMTP and depriving citizens of meaningful participation. Plaintiffs allege MDT violated additional statutes and regulations by issuing 32-J permits relating to the KMTP.

MDT advances several arguments in support of its motion to dismiss each of which will be addressed separately. Some of MDT’s arguments rely on evidence outside of the Complaint. Such evidence cannot be considered by the Court without converting the motion to dismiss into a motion for summary judgment. *See* Mont R. Civ. P. 12(b). Based on the preliminary stage of the case, e.g.

an answer has yet to be filed, and other pending evidentiary motions the Court will not convert MDT's motion to dismiss into a motion for summary judgment. As such, the Court will only consider matters contained within the Complaint for purposes of ruling on the motion.

Plaintiffs' MEPA Claims.

MDT argues MEPA does not grant the Court authority to set aside environmental review documents and to direct MDT to prepare an EIS as requested by Plaintiffs. According to MDT, the exclusive remedy under MEPA is for the Court to remand to the agency for review. In support of this argument MDT relies on section 75-1-201(3), MCA, and recent amendments to MEPA resulting from Senate Bill 233 (2011).

Section 75-1-201(3)(a), MCA, generally precludes a court from considering any evidence not first presented to the agency for its consideration prior to the agency's decision. If "... new, material, and significant evidence or issues" relating to the adequacy or content of an environmental review document are presented, the court must remand the new evidence or issue back to the agency for its consideration. Mont. Code Ann. § 75-1-201(3)(b) (2009).

Contrary to MDT's arguments, the relief requested by Plaintiffs under MEPA is within the Court's authority to grant. MDT's reliance on amendments to MEPA as the result of Senate Bill 233 is misplaced. Section 9 of the bill states it is effective upon passage and approval. Section 10 of the bill states it applies to environmental assessments and environmental impacts statements begun on or after the effective date of the Act. Senate Bill 233 became law on May 12, 2011. Thus, it clearly applies only to environmental review documents begun on or after May 12, 2011. The MEPA amendments contained in the bill do not apply to the April 8, 2010, KMTP EA and FONSI decision issued on February 7, 2011.

The Court clearly has authority to set aside an agency decision under MEPA when the agency violates the law. Under section 75-1-201(3)(a), MCA, a court may set aside an agency's decision if it finds there is clear and convincing evidence that the decision was arbitrary, capricious, or not in accordance with the law. In *Ravalli County Fish and Game v. Dept of State Lands*, 273 Mont. 371, 903 P.2d 1362 (1995), the Montana Supreme Court held that the agency failed to comply with MEPA. The Court remanded the case to the District Court for an order requiring preparation of an EIS. *Ravalli Fish and Game*, 273 Mont. at 384, 803 P.2d at 1371. This is the type of relief sought by Plaintiffs in the present case. The Court finds Plaintiffs' request that MDT's KMTP decision be set aside and MDT be ordered to prepare an EIS is a claim upon which relief may be granted.

MDT argues the Court may not enjoin MDT from issuing permits based upon alleged violations of MEPA. In support of this argument MDT relies on section 75-1-201(5)(a), MCA, which provides that an "... 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." The statute prohibits an *agency* from withholding, denying, or imposing conditions on a permit. It does not preclude a court from enjoining issuance of permits based upon alleged violations of MEPA.

Section 27-19-201, MCA, specifies when the Court may issue a preliminary injunction. An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual....

The Court has the authority to issue a preliminary injunction enjoining MDT from issuing KMTP permits if it finds any one of the circumstances in section 27-19-201, MCA, are met. Plaintiffs' request that the Court preliminarily enjoin MDT from issuing KMTP permits based upon alleged violations of MEPA is a claim upon which relief may be granted.

Plaintiffs' Article II, Sections 8 and 9 Right to Know and Right to Participate Claims.

MDT argues Plaintiffs' right to know and right to participate claims must be dismissed as time barred by the thirty (30) day statute of limitations under sections 2-2-213 and 2-3-114, MCA. Plaintiffs argue their right to know and right to participate claims are being brought under MEPA and therefore the sixty (60) day statute of limitations under section 75-1-201(6)(a)(ii), MCA, applies.

The right of participation is found in Article II, Section 8 of the Montana Constitution, which provides that "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision *as may be provided by law.*" (Emphasis added). The Montana Legislature has codified guidelines at section 2-3-101, et seq., MCA, to implement the Article II, Section 8 right of participation. *See* Mont. Code Ann. § 2-3-101. Agencies are required to "... develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public." Mont. Code Ann. § 2-3-103(1)(a).

The statutes implementing the right to participate have an enforcement mechanism which provides that, "[t]he district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant

to this section must be filed within 30 days of the date on which the petitioner learns, or reasonably should have learned, of the agency's decision.” Mont. Code Ann. § 2-3-114. In *Kadillac v. Anaconda Company*, 184 Mont. 127, 602 P.2d 147 (1979), Plaintiffs alleged they were denied their right to notice and participation. The Montana Supreme Court noted that section 2-3-114, MCA, requires that action under such a claim must be taken in District Court within 30 days of the date of the decision. *Kadillac*, 184 Mont. at 140, 620 P.2d at 155.

The right to know is found in Article II, Section 9 of the Montana Constitution, which provides that, “[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.” In *Irving v. School District No. 1-1A*, 248 Mont. 460, 813 P.2d 417 (1991), the Montana Supreme Court stated that, “[t]he Legislature has provided one remedy that can be utilized when Article II, Section 9 is violated. Section 2-3-213, MCA, provides that any decision made during an illegally closed meeting can be declared void by a District Court. A suit to void any such decision must be commenced within 30 days of the decision.”

In the instant case, Plaintiffs have alleged violations of the public’s right to know and participate under the Montana Constitution. The Montana Legislature has specifically provided the procedure for enforcing these rights under sections 2-3-213, and 2-3-114, MCA. The Court concludes Plaintiffs’ constitutional claims are subject to the thirty (30) day statute of limitations contained under section 2-3-213 and 2-3-114, MCA, rather than the sixty (60) day statute of limitations under MEPA.

Plaintiffs failed to file within thirty (30) days of when they knew, or should have known, of MDT’s decision regarding the KMTP. The FONSI decision was issued on February 7, 2011.

Plaintiffs knew, or should have known, of MDT's decision on February 7, 2011, or very shortly thereafter. Plaintiffs filed their complaint on April 1, 2011, more than thirty (30) days after they knew, or should have known, of MDT's KMTP decision. Plaintiffs' right to participate and right to know claims are time barred by sections 2-3-114 and 2-3-213, MCA, and the Court lacks jurisdiction to consider the claims. *Kadillac*, 184 Mont. at 140, 620 P.2d at 155. Therefore, Plaintiffs' constitutional claims arising from the right to know and right to participation are dismissed.

Plaintiffs' Prayer for Attorney Fees and Costs.

MDT argues Plaintiffs are not entitled to attorney fees and costs because they have failed to present evidence that MDT's defense was pursued frivolously or in bad faith. For the purposes of a motion to dismiss, MDT's argument is premature. The Court cannot conclude at this time that Plaintiffs' request for attorney fees and costs is a claim upon which relief cannot be granted.

ORDER

For the foregoing reasons, MDT's Motion to Dismiss is granted in part and denied in part. It is hereby ordered that Plaintiffs' right to know and right to participation claims under the Montana Constitution are dismissed.

DATED this 29th day of June, 2011.



Ray J. Dayton
District Court Judge