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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 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS MEPA CLAIMS AND REQUEST FOR ORAL ARGUMENT**

INTRODUCTION

In past motions and now here, Defendants have sought to dismiss or clarify Plaintiffs' sprawling, erroneous allegations and requests for relief that are not legally cognizable. Plaintiffs'

remaining pled claims are based on the previous 2011 version of a Montana Environmental Policy Act ("MEPA") provision, Mont. Code Ann. § 75-1-201(2)(a), which no longer exists. Without amending their Complaint, Plaintiffs now apparently intend to add for trial, the newly amended version of Mont. Code Ann. § 75-1-201(2)(a)(2023) in addition to the previous 2011 version. Because there is no redressability for Plaintiffs' alleged injuries under either version of Mont. Code Ann. § 75-1-201(2)(a), Plaintiffs' claims are not justiciable. This action should be dismissed, in its entirety, with prejudice, and the June 12, 2023 trial vacated.

No redressability exists here.

MEPA is procedural. Mont. Code Ann. § 75-1-102(1). MEPA does not provide regulatory authority for permitting fossil fuels or any other State agency action. Mont. Code Ann. §§ 75-1-102(3)(b). MEPA does not provide any authority to a State agency to withhold, deny or impose conditions on any permit for fossil fuels or any other State action. Mont. Code Ann. § 75-1-201(4)(a).

Because MEPA has no regulatory bearing on the permitting process, invalidating either version of MEPA provision Mont. Code Ann. § 75-1-201(2)(a), will have no effect on Plaintiffs' alleged injuries. There cannot be a constitutional violation because MEPA's role is solely *informational*—it requires an analysis of anticipated *impacts* in an environmental review. Mont. Code Ann. § 75-1-102(1). An apt analogy is to think of MEPA as a briefing memo on anticipated impacts of a State decision—it provides the reader with information, but it has no power to stop or alter the State action.

The MEPA analysis takes place in a track parallel to a State agency's review of a permit application under completely separate, explicit permitting statutes, such as the Montana Strip and Underground Mining Act (MSUMRA) in Title 82, Ch. 4, Part. 2, the statute which governs coal

mine permitting, but the two tracks do not intersect in any regulatory way. For a coal mine application, MSUMRA has sole regulatory authority over the permitting process. Because these specific MEPA statutes—Mont. Code Ann. §§ 75-1-102(1)(a)(b),(3)(a)(b), and 75-1-201(4)(a)—declare that MEPA does not have regulatory authority in any permitting process, or other State action, *redressability under MEPA is impossible* and this action must be dismissed, with prejudice.

ARGUMENT

I. THIS COURT MADE GRIEVOUS ERRORS OF LAW IN ITS MAY 23, 2023 ORDER ON DEFENDANTS' MOTIONS.

The Court's Order on Defendants' Motions to Dismiss for Mootness and Summary Judgment (Doc. 379) is premised on fundamental mistakes of law regarding MEPA's authority. The Court repeatedly erroneously conflates MEPA impacts analyses in environmental reviews with substantive, completely separate, statutory permitting requirements. The Court's grievous mistakes of law include, but are not limited to:

1) error in determining that State agencies "permit[] fossil fuel activities under MEPA,12:21–23 (emphasis added);

2) error in determining that "the State has authority to regulate GHG emissions and climate impacts by regulating fossil fuel activities that occur in Montana," 12:23–24;

3) error in determining that "the State's agents could alleviate the environmental effects of climate change through the lawful exercise of their authority if they were allowed to consider GHG emissions and climate impacts during MEPA review." 13:3–6;

4) error in determining that "Plaintiffs' injuries are fairly traceable to State actions performed pursuant to MEPA and the MEPA Limitation, and whether Plaintiffs' injuries could be alleviated by an order declaring the MEPA Limitation unconstitutional." (Doc. 379) Order on Defendants' Motions to Dismiss for Mootness and for Summary Judgment at 9 (citing Order on Motion to Dismiss at 7–19 (Doc 46.);

5) error in failing to determine that the 2011 version of MEPA is moot—it no longer exists because it has been replaced by the 2023 version.

These errors of law are the bases for the Court's denial of Defendants' motions to dismiss and for summary judgment. This motion presents the Court with the opportunity to correct these errors by recognizing that MEPA has no regulatory bearing on State agency permitting decisions. It follows then that invalidating MEPA provides no redressability for Plaintiffs' alleged injuries, and dismissal of all Plaintiffs' claims, with prejudice, is required.

II. UNDERSTANDING MEPA'S INHERENT LIMITED PURPOSE IS FUNDAMENTAL TO UNDERSTANDING WHY ANY VERSION OF § 75-1-201(2)(a) IS NOT JUSTICIABLE.

Mindful of its constitutional obligations under Article II, § 3 and Article IX of the Montana Constitution, the Montana Legislature enacted the Montana Environmental Policy Act ("MEPA"). Mont. Code Ann. § 75-1-102(1). The Legislature, not State agencies, creates the MEPA statutes. MEPA directs State agencies to perform environmental reviews and gives directions for environmental impact statements. MEPA is purely procedural and informational, not substantive. Mont. Code Ann. § 75-1-102(1). The purpose of an environmental assessment and an environmental impact statement under Part 2, which includes the MEPA provision at issue, is to assist the Montana Legislature in determining whether existing laws address impacts to Montana's environment and to inform the public and public officials of potential impacts from state action. Mont. Code Ann. § 75-1-102(3)(a) (emphasis added). *Water For Flathead's Future, et al. v. Mont. DEQ*, 2023 MT 86, ¶ 19, 2023 WL 3476980 (May 16, 2023) ("MEPA, like its federal counterpart…is 'essentially procedural.'")

A State agency's MEPA analysis for its permitting decisions, or other state action, runs on a parallel, but separate, track from the explicit statutory process, such as those set forth in Titles 75 and 82, that governs the particular state action. *Pompeys Pillar Historical Assn. v. Mont. Dept. of Envtl. Quality*, 2002 MT 352, ¶ 18, 313 Mont. 401, 61 P.3d 148 (MEPA environmental

assessment, "although conducted contemporaneously with the air quality review for the air quality permit, was not part of the air quality permit process itself.") While the MEPA analysis provides information about potential impacts to the State agency that may be beyond the scope of its permitting criteria, MEPA does not allow the State agency to use the information gained through the MEPA impacts analysis in its decision making. *Bitterrooters for Planning v. Mont. Dept. Envtl. Quality,* 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712 (citing Mont. Code Ann. §§ 75-1-102(3)(b) (MEPA provides no additional regulatory authority to a State agency and does not affect an agency's specific statutory duties to comply with environmental quality standards) and 75-1-201(4)(a) (State "agency may not withhold, deny, or impose conditions on any permit or authority to act based on" MEPA)). "Nowhere in the MEPA is found any regulatory language." *Mont. Wilderness Assn. v. Bd. of Health & Envtl. Sciences*, 171 Mont. 477, 485, 559 P.2d 1157, 1161 (1976).

No exceptions exist. An illustration of how informational MEPA co-exists in a separate track with the explicit statutory permitting process is this: if a potential impact is identified in the MEPA analysis while the Montana Department of Environmental Quality ("DEQ") is concurrently reviewing a permit application under Title 75 or Title 82, the DEQ can ask a permit applicant for a voluntary agreement to mitigate a potential impact identified in the MEPA analysis, but if the applicant declines to voluntarily agree, and otherwise meets all the permitting criteria under the permitting statute, DEQ must follow its permitting statutes and issue the permit. Critically, MEPA does not allow a State agency to add contingencies for impacts identified in the MEPA analysis or to deny a permit application that meets the statutory requirements of the permitting statute which governs the application. Mont. Code Ann. § 75-1-201(4). That's why § 75-1-201(2)(a) is irrelevant to the permitting process. Whether or not there's an analysis of greenhouse gas emissions and

corresponding impacts to the climate in the MEPA environmental review has no effect on any State agency's permitting decision or other State action.

The Court was incorrect in its analysis determining that § 75-1-201(2)(a) "hamstrings" State agencies. (May 23, 2023 Order on Defendants' Motions, 23:14.) It is clear that the Court is proceeding under the mistaken belief that MEPA is integral to a State agency's decision-making process. Under MEPA's own provisions, which are not at issue in this action, it is not. A MEPA review is simply a separate, parallel review that provides information as to potential *impacts*. MEPA requirements are strictly 'procedural' and do not require an agency to reach any particular decision in the exercise of its independent authority. *Bitterrooters*, ¶ 18 (citations omitted). Therefore, a statutory directive to omit a certain analysis in MEPA only affects the analysis and information provided to the public and to the Legislature as to potential impacts of the proposed State action. But—and this is the reason why Plaintiffs have no redressability under MEPA—the omission of analysis in the MEPA environmental review of potential impacts has no effect on the permitting decision or other State action itself. State agencies make permitting decisions under specific permitting statutes. None of these specific permitting statutes, e.g. Titles 75 and 82, direct State agencies to consider potential impacts under MEPA in making permitting decisions. Potential impacts identified in MEPA are not part of the substantive regulatory review.

There is no conflict between Mont. Code Ann. § 75-1-201(2)(a) and the purpose of MEPA. (*See* May 23, 2018 Order on Defendants' Motions, pp. 14–16.) The Court correctly quotes *Bitterrooters*, ¶ 18, for the proposition that the purpose of MEPA is to "inform[] the agency and the interested public of environmental *impacts* that will likely result" from State actions. (emphasis added). (*Id.* at 23:17–18), but then incorrectly conflates information as to *impacts* gained under the MEPA environmental review with regulatory authority under the separate explicit decision-

making statute. See, e.g. MSUMRA, Title 82, Ch. 4, Part 2. MEPA expressly prohibits this: "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." Mont. Code Ann. § 75-1-201(4)(b). "[I]t is not the purpose of [MEPA] to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency." Mont. Code Ann. § 75-1-102(1). This Court's misunderstanding of MEPA formed the bases for incorrectly denying Defendants' Motions to Dismiss and for Summary Judgment.

Understanding MEPA's purpose and operation is critical to understanding why no version of Mont. Code Ann. § 75-1-201(2)(a) is justiciable. Simply put, there is no redressability because MEPA has no teeth up front.[1] Its purpose is merely to provide information, but it doesn't equip State agencies with any tools to do anything with the information. Invalidating a MEPA provision has absolutely no effect on permitting decisions or other State action of any kind. Paragraph 111 of Plaintiffs' Complaint sets forth the former version of Mont. Code Ann. § 75-1-201(2)(a) and then states: "This has been interpreted to mean that Defendants cannot consider the impacts of climate change in their environmental review." That's exactly right. Because Plaintiffs misunderstand that MEPA is not the bases for State agency permitting decisions or any other State actions,[2] Plaintiffs have erroneously predicated their entire lawsuit under the false premise that invalidating the MEPA provision at issue will have *any* effect on fossil fuel permitting decisions and/or greenhouse gas emissions.

[1] MEPA does have teeth for failure to comply with its requirements for *individual* MEPA analyses. See exclusive remedies. § 75-1-201(6)(c) and (d). Plaintiffs have not challenged any individual MEPA analysis.

[2] Plaintiffs cite numerous excerpts from DEQ hybrid expert witnesses Chris Dorrington, Sonja Nowakowski, and Dave Klemp. None of these individuals stated that DEQ has any permitting authority under MEPA or that MEPA has any bearing on DEQ's issuance of permits. If the statute were invalidated, nothing would change.

That's why there can be no redressability for Plaintiffs' claimed injuries—because invalidating Mont. Code Ann. § 75-1-201(2)(a) won't change anything. There will simply be a void *in MEPA*. But because there is no change to the substantive statutory requirements for permit applications or other State action, there would be no change in the way that State agencies determine permitting decisions or other State action. No redressability exists for Plaintiffs' alleged injuries under Mont. Code Ann. § 75-1-201(2)(a). Dismissal is required.

III. THE AMENDED VERSION OF § 75-1-201(2)(a) IS SIGNIFICANTLY DIFFERENT FROM THE PREVIOUS VERSION PLED IN PLAINTIFFS' COMPLAINT.

The former version of Mont. Code Ann. § 75-1-201(2)(a) (2011) read:

> 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.

HB 971, signed into law on May 10, 2023, amended Mont. Code Ann. § 75-1-201(2)(a) to replace the previous version. It now reads:

> Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) *may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.*

And HB 971 created an entirely new provision which is codified in § 75-1-201(2)(b):

> An environmental review conducted pursuant to subsection (1) may include an evaluation if:
>
> (i) Conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States Congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant.

Providing information about *impacts* to Montana's environment to the Montana Legislature and the public is the purpose and intent of MEPA. Mont. Code Ann. § 75-1-102(3)(a).

Under the previous version of Mont. Code Ann. § 75-2-201(2)(a), the provision that restricted the ability to review actual or potential impacts beyond Montana's borders (i.e. regional, national, or global impacts) was removed and replaced with a restriction on Montana's ability to evaluate greenhouse gas emissions and their corresponding impacts to the climate in the state or beyond the state's borders. This new provision appears to change/expand Montana's authority for review under MEPA in a couple of ways. As part of its MEPA review of the potential impacts of a state action, State agencies potentially could now review and consider regional, national, or global impacts of anything other than greenhouse gas emissions and corresponding impacts to the climate—provided that the State agency has the power to regulate the environmental impacts considered. *Bitterrooters,* ¶ 35[3]. (Even if this express prohibition barring review of impacts of greenhouse gas emissions and corresponding impacts to the climate didn't exist, no State agency could consider either in its MEPA review of environmental impacts because no Montana statute provides any State agency with the authority to regulate greenhouse gases or climate change.)

The amendment enacted by HB 971 is also substantially different in that it introduces the new discretionary use of MEPA for a climate impacts analysis, if Congress regulates carbon emissions. Mont. Code Ann. § 75-1-201(2)(b).That language didn't exist in the statute previously. The previous statute also focused on a distinction between impacts within Montana's borders

[3] In *Bitterrooters,* the Montana Supreme Court held that DEQ's environmental review is not required to include environmental impacts that is has no authority to regulate.

versus impacts outside Montana's borders. HB 971 eliminates this distinction and simply states there is no evaluation of greenhouse gases and associated *impacts* in the state or beyond the state's borders. The 2011 version said that an environmental review could only include a review of actual or potential *impacts* beyond Montana's borders under very specific circumstances. HB 971 changed that consideration and how agencies determine impacts. To determine what level of analysis should be conducted, State agencies must now consider whether the possible *impacts* of the proposed action will be significant. HB 971 changed how State agencies review *impacts* to determine significance. Because HB 971 became law less than a month ago, the State agencies have not had time to fully analyze, and determine the full implications of, this major change to MEPA analyses, yet the June 12 trial, now apparently including the new version of Mont. Code Ann. § 75-1-201(2)(a), is scheduled to begin in a few days.

IV. PLAINTIFFS' MEPA CLAIM BASED ON THE PREVIOUS VERSON OF § 75-1-201(2)(a) IS MOOT.

HB 971 is not confined, as Plaintiffs contend, to "clarifying" the previous version. The new law's prefatory language states:

> *An Act generally revising the Environmental Policy Act*; *clarifying and excluding the use of greenhouse gas evaluations*, providing an appropriation; *amending section 75-1-201, MCA*; and providing an immediate effective date.

(Emphasis added). As explained above, the unpled 2023 version is significantly different from the 2011 version. What's more, the 2011 version simply does not exist anymore. Therefore, it's moot and no longer justiciable. Only one version can be the active law at a time. As Plaintiffs aptly pointed out in their Response at page 4, "The central issue in resolving a mootness question is

whether a change in circumstances that prevailed at the beginning of litigation has forestalled the prospect for meaningful relief." *Awareness Grp. V. Bd. of Trustees of Sch. Dist. No. 4,* 243 Mont. 469, 475, 795 P.2d 447, 451 (1990) (internal quotation marks omitted). As explained above, the Legislature significantly amended Mont. Code Ann. § 75-1-201(2)(a) effective May 10, 2023. Because the Legislature invalidated the 2011 version by enacting the 2023 version, it is impossible for this Court to further invalidate the 2011 version and to issue an injunction preventing Defendants from implementing the 2011 version. Therefore, because no effectual relief from the 2011 version is possible, Plaintiffs claims based on the 2011 version are moot and dismissal is required. *Wilkie v. Hartford Underwriters Ins. Co.,* 2021 MT 221, ¶ 8, 405 Mont. 259, 494 P.3d 892.

Defendants response to Section III of Plaintiffs' Response is two-fold. One analysis is substantive based on the inherit limits of MEPA itself; the other is procedural—Plaintiffs cannot proceed on a statute that has been replaced by another statute. Under either analysis, the public interest exception does not apply.

Substantive response: In Section III, Plaintiffs' reliance on the Court's findings (pp. 12–13) of the Order on Defendants' Motions for Dismissal and for Summary Judgment, is misplaced because the Court's finding that the State permits fossil fuels under MEPA is a clear error of law. (Or. at 12:21–23.) As explained above, MEPA has no regulatory authority. *Bitterrooters*, ¶ 18, Mont. Code Ann. §§ 75-1-102(3)(b) and 75-1-201(4)(a). So too is the Court's finding that the State has authority to regulate greenhouse gas emissions and climate impacts by regulating fossil fuel activities in Montana. (*Id.* at 12:22–24.) No statute or other law provides State agencies with authority to regulate greenhouse gas emissions and climate impacts in Montana. (*Id.* at 12:23–24.) And indeed, the Court cites none.

In Section III, Plaintiffs continue to erroneously contend that invalidating a MEPA statute is somehow a constitutional issue. Because MEPA has no regulatory authority and cannot be the basis for denying, withholding, or adding a contingency to a permit, there is no constitutional issue. MEPA is not a permitting statute. *Bitterrooters*, ¶ 18; Mont. Code Ann. §§ 75-1-102(3)(b) and 75-1-201(4)(a). Applying these laws to this case, two things follow: First, there is no justiciable case or controversy because there simply is no constitutional issue regarding this procedural, informational statute with no regulatory authority. MEPA's required impacts analysis has nothing to do with evaluating permitting criteria. MEPA's own statutes forbid consideration of MEPA *impacts* in the permitting process. *Id.* Second, because MEPA has no regulatory authority in State agency permitting decisions for fossil fuels or other State action, it is impossible to grant *any* relief to Plaintiffs. Invalidating Mont. Code Ann. § 75-1-201(2)(a) and issuing an injunction prohibiting State agencies from following any version of this MEPA provision will not result in any change in permitting fossil fuels, or to any other State agency activity. The public interest exception to mootness does not apply here because Plaintiffs have simply failed to sue under a statute whose invalidation could provide Plaintiffs any redress in fossil fuel permitting or any other State action.

Procedural analysis: Plaintiffs refuse to accept that the 2011 version of Mont. Code Ann. § 75-1-201(2)(a) is no longer law and cannot be adjudicated. The 2011 version must be dismissed as moot because it is no longer a live case or controversy. *Larson,* ¶ 18.

In Section III, Plaintiffs contend that even if the 2023 amendment to Mont. Code Ann. § 75-1-201(2)(a) is determined to be a substantive amendment to this procedural statute, the public interest exception to the mootness doctrine allows both versions to be declared unconstitutional. But Plaintiffs cite no case which says that a previous version of an amended statute can be

adjudicated *along with the amended statute.* If Plaintiffs' position is that the 2023 version clarified the previous version, then the previous version is unnecessary to adjudicate.

Unfortunately for Plaintiffs, because they have not pled the 2023 version, any claims based on it are simply not justiciable. This Court does not have subject matter jurisdiction to decide matters which are not properly before it. The 2011 version of Mont. Code Ann. § 75-1-201(2)(a) is moot because the 2023 version replaced it. All claims based on the 2011 version must be dismissed from this action, with prejudice. No authority would allow this Court to adjudicate a previous statute that has been replaced with a current version. In enacting the 2023 amendment, the Montana Legislature invalidated the 2011 version and therefore, prohibited State agencies from following the 2011 version. There is simply no need for this Court to further invalidate and enjoin the 2011 version. The Legislature has already done that. Plaintiffs' claims based on Mont. Code Ann. § 75-1-201(2)(a) are moot and require dismissal. The public interest doctrine has no application here.

V. THERE IS NO REDRESSIBILITY FROM STATE AGENCY DEFENDANTS.

Plaintiffs contend: "[T]he former and current language of § 75-1-201(2)(a), MCA were understood and implemented by Defendants as prohibiting Montana's regulatory agencies from considering greenhouse gas (GHG) emissions or climate change when conducting environmental reviews." (Response at 2.) Yes. The Legislature enacted both versions of Mont. Code Ann. § 75-1-201(2)(a). In the previous version, the Legislature directed State agencies not to consider impacts beyond Montana's borders. In the current version, the Legislature prohibits an evaluation of greenhouse gas emissions and impacts on climate change within and outside of Montana's borders. State agencies merely implement Legislative direction. The Legislature said, "Don't analyze these things *for impacts analysis* under MEPA." The State agencies complied.

Plaintiffs' Response is replete with cites to *Legislative action* amending Mont. Code Ann. § 75-1-201(2)(a). (*See e.g.,* Response at 10 ("It is important in constitutional cases that courts do not condone legislative shenanigans…"), 11 ("Defendants' willingness to repeal and amend laws to avoid litigation, (apparently referring to the Montana Legislature which is not a Defendant in this action) without altering their unconstitutional conduct [makes it important to adjudicate] the assortment of laws Defendants (again apparently referring to the Montana Legislature) have enacted to direct the State's conduct with respect to fossil fuels….")) Defendants are State agencies—none of which had any role in the legislative amendment of Mont. Code Ann. § 75-1-201(2)(a). Plaintiffs cite no legislative history for HB 971 referencing any State agency. The Montana Legislature enacted all the MEPA statutes, including Mont. Code Ann. § 75-1-201(2)(a). Plainly, Plaintiffs have sued the wrong defendants for a facial constitutional challenge to MEPA. Plaintiffs' MEPA claims do not lie against State agency Defendants and should be dismissed, with prejudice.

VI. PLAINTIFFS' MEPA CLAIMS BASED ON THE 2011 VERSTION OF § 75-1-201(2)(a) ARE NOT JUSTICIABLE. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE A STATUTE THAT NO LONGER EXISTS.

A. BECAUSE HB 971 SIGNIFICANTLY ALTERED THE 2011 VERSION OF § 75-1-201(2)(A), PLAINTIFFS' CLAIMS BASED ON THAT VERSION MUST BE DISMISSED.

Plaintiffs rely heavily on legislative history and one word, clarification, plucked from the prefatory language of HB 971, to insist that HB 971 isn't all that different. Plaintiffs cite no legal authority, other than the 2023 Order on Defendants' Motions, in support of their position that the Court retains subject matter jurisdiction to decide a statute that no longer exists. That's because no statute or Montana Supreme Court decision provides for subject matter jurisdiction in this situation.

B. THE CLAIMS IN PLAINTIFFS' COMPLAINT BASED ON THE 2011 LAW DO NOT APPLY TO THE 2023 LAW.

Without citing any legal authority on point, Plaintiffs blithely contend that their Complaint and proposed Pre-Trial Order set forth the "necessary allegations of fact and constitutional claims against § 75-1-201(2)(a), MCA (2011) *and* as amended by HB 971." (Response at 7.) Even though HB 971 became law less than a month ago, Plaintiffs deny that supplementation or amendment of their pleadings is required. (*Id.*) They contend that they have satisfied notice pleading under Mont. R. Civ. P. 8. (*Id.*)

Trial is scheduled to start on June 12, 2023—in a few days. Defendants conducted extensive discovery throughout November and December, 2022 and filed motions in February and March, 2023. HB 971 became law on May 10, 2023. On June 1, 2023, in Plaintiffs' Response brief, **Defendants learned for the first time that Plaintiffs intend to go to trial on versions of the same statute**—one of which no longer exists—and the other of which is unpled. For the newly amended 2023 version of Mont. Code Ann. § 75-1-201(2)(a), Defendants have had no opportunity to analyze it, no opportunity to conduct discovery, no opportunity to file appropriate motions, and no opportunity to prepare an adequate defense. In short, Defendants are severely prejudiced.

The single point of notice pleading is to provide a defendant with notice so that the defendant can prepare an appropriate defense. Amending the pleadings *after the trial* stands notice pleading on its head. *Slattery v. Labbitt,* 120 Mont. 183, 185, 181 P.2d 601, 602 (1947) is an obscure case more than 70 years old. It has never been followed. In that case, Plaintiff amended his Complaint twice, once before trial and once after. In the amendment before trial, Plaintiff increased the amount alleged to be due and owing from $ 1,135.72 to $ 1,220.23. This was not a surprise to the defendant because he had been provided with a bill of particulars for the larger amount. In the second amendment after trial, Plaintiff changed the Complaint so that the allegation

was that the indebtedness upon which the action was brought was incurred between the 2nd day of *May*, 1944, and the 4th day of August, 1944, instead of between the 2nd day of *June*, 1944, and the 4th day of August, 1944, as originally alleged. The amount requested on the account was unchanged and the various items enumerated in the bill of particulars remained the same. *Id.*

In *Slattery,* unlike here, Plaintiff amended his Complaint and provided a bill of particulars itemizing the amount owed well before the amendment. *Id. Slattery* is not on point because Plaintiffs have not amended their Complaint. They are simply proceeding to trial on the 2023 version of Mont. Code Ann. § 75-1-201(2)(a) *and* the former 2011 version without amending their pleadings. Furthermore, both amendments in *Slattery* were minimal and unlike here, caused no prejudice to Defendants. *Slattery* is clear that prejudice to defendants is a reason to find error in allowing amendment. *Id.*

Plaintiffs cite general dicta allowing amendment of pleadings but fail to cite any case which allows Plaintiffs to proceed to trial on a new version of a statute that no longer exists without amending their pleadings, thereby depriving Defendants of the opportunity for discovery and motions, and preventing Defendants from formulating an adequate defense to the new, unpled statute. As Defendants have pointed out, the statutory changes to Mont. Code Ann. § 75-1-201(2)(a) are significant, not merely a minor clarification as Plaintiffs attempt to contend.

C. THERE ARE SIGNIFICANT REDRESSIBILITY AND PRUDENTIAL STANDING CONCERNS PREVENTING THIS COURT FROM ADJUDICATING THE 2023 AMENDED VERSION OF § 75-1-201(2)(A).

As explained earlier, because of mistakes of law in the Court's determination of the role of MEPA, the Court's earlier rulings that "Plaintiffs' injuries are fairly traceable to State actions performed pursuant to MEPA and the MEPA Limitation, and whether Plaintiffs' injuries could be alleviated by an order declaring the MEPA Limitation unconstitutional" (Response at 9) are

incorrect. MEPA provides no regulatory authority. *Bitterrooters*, ¶ 18; Mont. Code Ann. §§ 75-1-102(3)(b) and 75-1-201(4)(a). Therefore, invalidating MEPA provision § 75-1-201(2)(a) won't have any effect on permitting decisions which Plaintiffs claim are the bases for their injuries. The redressability requirements of justiciability and standing are not met. Judgment cannot "effectively operate" and provide meaningful relief. *Larson v. State,* 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241.

The Court's ruling that "declaratory relief [as to MEPA] would redress Plaintiffs' injuries," (Response at 9) is simply incorrect. MEPA has no regulatory authority. *Bitterrooters,* ¶ 18; Mont. Code Ann. §§ 75-1-102(3)(b) and 75-1-201(4)(a). The recent decision by the Oregon federal district case in *Juliana v. United States,* 2023 U.S. Dist. LEXIS 95411 has no bearing on this case. Plaintiffs in that case have not sued under the National Environmental Policy Act. Plaintiffs in that case sought to file a Second Amended Complaint requesting the Oregon federal district court to: (1) declare that the United States' national energy system violates and continues to violated the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law; (2) enter a judgment declaring the United States' national energy system has violated and continues to violate the public trust doctrine; and (3) enter a judgment declaring that § 201 of the Energy Policy Act has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law. *Id.* at 13. None of those issues are present in this case. Furthermore, the holding of the June 1, 2023 *Juliana* decision is simply that Plaintiffs are granted permission to file a Second Amended Complaint.

HB 971's amendment to MEPA has no bearing on Plaintiffs' injuries. It clarifies that *impacts analysis* information shall not include "greenhouse gas emissions and corresponding

impacts to the climate in the state or beyond the state's borders." Mont. Code Ann. § 75-1-201(2)(a)(2023). Plaintiffs' Response conveniently ignores that HB 971 added a new provision not in the previous statute—that such an evaluation may be included *if* Congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant. Mont. Code Ann. § 75-1-201(2)(b).

CONCLUSION

Because of mistakes of law in the Court's Order on Defendants' Motions for Dismissal for Mootness and for Summary Judgment, jurisprudential concerns of standing and redressability are not met. MEPA has no regulatory authority. It only provides information as to anticipated impacts, but it is not part of the regulatory decision-making process governed by the explicit regulatory statute for a State action. Therefore, invalidating Mont. Code Ann. § 75-1-201(2)(a) will have no effect on any permitting decisions. Plaintiffs have failed to show that invalidating Mont. Code Ann. § 75-1-201(2)(a) will provide them with any relief from State agency permitting decisions. Because redressability for Plaintiffs' alleged injuries is impossible under Mont. Code Ann. § 75-1-201(2)(a), dismissal of this action, with prejudice, is required. If outright dismissal with prejudice is not granted, the jurisprudential concerns of fairness and avoiding prejudice to Defendants require the Scheduling Order, including the trial scheduled to begin on June 12, 2023, to be vacated. Defendants request oral argument on this Motion.

DATED this 9th day of June, 2023.

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Dated: 06-09-2023