STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

State of Minnesota ex. rel. Association of Freeborn County Landowners,

Plaintiff,

v.

Minnesota Public Utilities Commission,

Defendant,

and

Buffalo Ridge Wind, LLC, Three Waters Wind, LLC, Northern States Power Company, and Plum Creek Wind Farm, LLC,

Defendants-Intervenors.

Case Type: Other Civil
Court File No. 62-CV-20-3674
Judge: Hon. Sara R. Grewing

DEFENDANTS-INTERVENORS BUFFALO RIDGE WIND, LLC AND THREE WATERS WIND FARM, LLC'S JOINT REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Defendants-Intervenors Buffalo Ridge Wind, LLC ("Buffalo Ridge") and Three Waters Wind Farm, LLC ("Three Waters") (collectively, "Defendants-Intervenors") demonstrated in their moving memorandum that Plaintiff's Minnesota Environmental Rights Act ("MERA") claims are both procedurally and substantively flawed and must be dismissed. In response, Plaintiff has offered little more than obfuscation and misdirection. Plaintiff now concedes, as it must, that it does not and cannot challenge the Buffalo Ridge and Three Waters permitting proceedings that are currently pending at the Public Utilities Commission ("PUC"). Instead, Plaintiff doubles down on its systemic challenge to the entire PUC wind permitting regulatory framework, insisting that Section 10 of MERA provides a jurisdictional basis for its claims. But none of the arguments

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offered by Plaintiff alters the unavoidable conclusion that the Court lacks jurisdiction to adjudicate Plaintiff's claims or that Plaintiff's claims fail as a matter of law. Accordingly, Plaintiff's Complaint must be dismissed.

ARGUMENT

I. PLAINTIFF HAS CONCEDED ITS CHALLENGE TO DEFENDANTS-INTERVENORS' WIND PROJECTS

AFCL's Response concedes that it is *not* challenging the PUC's review or permitting of the Buffalo Ridge or Three Waters wind projects, which remain pending before the PUC. (Plaintiff's Response Memorandum ("Response") at 2 ("[T]his Complaint is *not about* the individual permitting decisions or actions of the Public Utilities Commission.") (emphasis added)). Accordingly, Plaintiff has waived any argument regarding those pending proceedings. Indeed, by failing to address Defendants-Intervenors' arguments at all (*see* Defendants-Intervenors' Moving Memorandum ("Moving Mem."), at 7–12), Plaintiff has conceded that its challenge to the Buffalo Wind and Three Waters permitting proceedings is not ripe and that this Court lacks jurisdiction to consider such a challenge.[1] *See Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. Ct. App. 2007) ("A party who inadequately briefs an argument waives that argument."); *see also, e.g.*, *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument—as the [plaintiffs opposing the motion to dismiss] have done here—results in waiver."). Accordingly, for the reasons discussed in Defendants-Intervenors' moving memorandum and herein, Plaintiff's

[1] Plaintiff had originally alleged in the Complaint: "[AFCL] . . . challenge[s] the *Permits and draft permits* issued by the Public Utilities Commission, the process, standards and rules, and lack thereof, used to justify approval of wind site permits, the absence of Minnesota Environmental Policy Act compliant environmental review, and the lack of wind specific siting standards and rules." (Compl. ¶ 4) (emphasis added).

MERA claims with respect to the Buffalo Wind and Three Waters wind projects, including its request for injunctive relief with respect to those projects, must be dismissed.

II. MERA SECTION 10 DOES NOT CONFER JURISDICTION OVER PLAINTIFF'S CHALLENGE TO THE VALIDITY OF PUC RULES.

Faced with insurmountable jurisdictional and procedural hurdles to challenge the pending Buffalo Ridge and Three Waters permitting proceedings, Plaintiff has pigeonholed its claims entirely into Minn. Stat. §116B.10 ("MERA § 10"). Plaintiff now argues that its MERA claims are exclusively a "systemic" challenge to PUC's promulgation and application of Minn. R. Ch. 7854 and the process by which the PUC conducts environmental and siting review for all LWECS permits. (*See* Response at 2–3.) Plaintiff insists that MERA § 10 supplies a jurisdictional basis for its systemic challenge.

But MERA is not a jurisdictional blank check. Plaintiff's response conflates the scope and substance of review available under MERA with the statutory mechanism for challenging the *validity* of rules and rulemaking under the Minnesota Administrative Procedures Act ("MAPA"). Minn. Stat. §§ 216E.15; 14.44. Plaintiff asserts that Minn. Rule 7854.0500 (1) does not align with its enabling statutory language found in Minn. Stat. § 216F.05, and (2) does not comply with the requirements of the Minnesota Environmental Policy Act ("MEPA"). (*See, e.g.*, Response at 3 ("This is a Complaint brought to address . . . the Commission's failure to comply with statutes"); ("The state refuses to promulgate rules and/or standards as mandated by the legislature."); ("the [PUC]'s systemic failure to comply with . . . [MEPA] to conduct environmental review for a project").)[2]

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[2] Furthermore, Plaintiff consistently and erroneously asserts that MERA allows it to challenge a statute. (Response at 3 ("It is the *statutes*, rules, and standards, and the lack thereof, that are insufficient to protect the air, water, land, or other natural resources from pollution, impairment or destruction.") (emphasis added); *id.* at 8 ("MERA provides for challenge of a *statute*, rule, and

Because Plaintiff's claims concern the *validity* of the PUC rules, rather than the *adequacy* of those rules, MERA is an inappropriate vehicle by which to obtain review. As the plain language of the statute demonstrates, MERA § 10 is concerned *only* with the *adequacy*—not the validity—of rules and standards. *See* Minn. Stat. 116B.10, subd. 2 (in a MERA § 10 action, plaintiff has the burden to prove that a "rule, order, license, stipulation agreement, or permit is *inadequate* to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction"). Minn. Stat. § 116B.10, subd. 2 (emphasis added).

Thus, properly construed, Plaintiff's rulemaking challenge sounds within the MAPA statutory framework. Under well-established Minnesota law, Plaintiff's exclusive remedy for challenging a rule's conformity with statutes is judicial review in the Court of Appeals under Minn. Stat. § 216E.15 and MAPA. *See* Minn. Stat. § 216E.15; Minn. Stat. § 14.44; *Water in Motion, Inc. v. Minn. Dept. of Labor and Industry*, 2016 WL 7041978, at *3–4 (Minn. Ct. App. Dec. 5, 2016) (citing *Coal. Of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. Ct. App. 2009) (holding the Court of Appeals has original jurisdiction to determine the validity of an agency's rules under Minn. Stat. § 14.44)). And, as explained in Defendants-Intervenors moving brief, even under MAPA, Plaintiff's claims would be untimely and procedurally flawed. (Moving Mem. at 18–19.) Therefore, Plaintiff's Complaint related to the Commission's compliance with MERA is not properly before this Court and should be dismissed.

In addition, Plaintiff has offered no substantive arguments in response to Defendants-Intervenors' MAPA arguments. (Response at 6 (stating only that "[t]he plain language of the statute

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permit where the time for appeal has lapsed, either appeal of the original rule or a rulemaking petition.") (emphasis added).) These misstatements further muddy Plaintiff's claims, but clarify the true object of its attack—the sufficiency of the statutes under which EQB promulgated Chapter 7854. Yet that challenge finds no place before the judiciary, either under MERA or MAPA, and mandates dismissal of the Complaint.

says it is the proper forum") (citing Minn. Stat. §116B.10, subd. 1)).) Choosing to rely on its erroneous reading of MERA § 10, Plaintiff also ignores multiple additional jurisdictional arguments raised by Defendants-Intervenors in their moving memorandum. For instance, Plaintiff fails to acknowledge, let alone rebut, that Plaintiff's claims amount to an inappropriate collateral attack on pending administrative proceedings. (Moving Mem. at 9 (citing *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007) (the judiciary must abstain from encroaching on the power of a coequal branch); *Sharood v. Hatfield*, 210 N.W.2d 275, 279 (Minn. 1973)).) Plaintiff also fails to rebut Defendants-Intervenors' argument that Plaintiff's claims are not yet ripe.

Accordingly, this Court should reject Plaintiff's invitation to exercise jurisdiction in excess of the grant provided in MERA § 10.

III. PLAINTIFF'S MERA CLAIMS ARE DEFICIENT ON THEIR FACE.

A. Plaintiff has failed to plead any harm cognizable under MERA.

Even if this Court had jurisdiction to consider Plaintiff's claims under MERA § 10—and it does not—Plaintiff's claims are deficient and must be dismissed. Claims under MERA § 10 concern only whether a "rule, order, license, stipulation agreement, or permit is inadequate to protect the air, water, land, or other natural resources located within the state from *pollution, impairment, or destruction.*" Minn. Stat. § 116B.10, Subd. 2 (emphasis added). Although AFCL invokes the phrase "pollution, impairment, or destruction" repeatedly, it ignores that the term is defined by MERA—any conduct "which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, Subd. 5. Thus, a rule, order, or permit can only be inadequate under MERA if it "materially adversely affects or is likely to materially adversely affect the environment."

Yet, Plaintiff has failed to allege that the PUC's rules in Minn. R. Ch. 7854, or its conduct otherwise, materially adversely affect or are likely to materially adversely affect the environment. Both the Complaint and Response are devoid of any reference to that high standard, much less any allegation that the purported harms with which Plaintiff is concerned rise to that level. As noted in Defendants-Intervenors' moving memorandum—and unrebutted in the Response—a plaintiff must allege "something more than merely an adverse environmental impact to trigger [MERA's] protection." *State ex rel. Friends of the Boundary Waters Wilderness v. AT&T Mobility, LLC*, 2012 WL 2202984, *4 (Minn. Ct. App. June 18, 2012) (citing *Schaller v. County of Blue Earth*, 563 N.W.2d 260, 267 (Minn. 1997)). Because almost every human activity has some kind of adverse impact on a natural resource, MERA should not be construed as prohibiting "virtually all human enterprise." *Id.*[3]

Furthermore, the allegations in Plaintiff's Complaint contradict any argument regarding actual or likely harm to the environment caused by the application of the PUC rules, specifically Minn. R. Chapter 7854. The Complaint—even favorably construed—merely alleges that harm *might* occur by application of the existing regime. It does not allege that the harm is likely, nor could it. Plaintiff alleges merely that "there *may* be costly landowner buyouts"; "there are high levels of shadow flicker *anticipated*"; that "eagles *may* be killed"; and that "[w]ithout environmental review, landowners, residents, businesses, and Minnesota's environmental *can* be adversely affected." (Compl. ¶ 41) (emphasis added). These allegations are pure speculation; they do not rise to the level of harm cognizable under MERA.

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[3] Notably, in *Friends of the Boundary Waters Wilderness*, given the high materiality requirement, the Court of Appeals *reversed* a lower court's determination that placement of a 450-foot cellular tower adjacent to the Boundary Waters Canoe Area Wilderness would materially adversely affect the environment. 2012 WL 2202984, *8.

B. Plaintiff's exemption argument fails as a matter of law.

Plaintiff's case boils down to a legal argument that, while PUC rules require an *applicant* to submit exhaustive environmental review information as part of its large wind energy conversion system ("LWECS") application, the PUC itself can simply ignore that information in its siting and permitting proceedings. Even if MERA were the correct statutory framework for Plaintiff's claims, Plaintiff's claims fail as a matter of law.

Plaintiff contends that the PUC *exempted* LWECS from environmental review rather than providing an alternative to MEPA review. (Response at 17). This is a clear misreading of Minn. Rule 7854.0500 and related provisions in Chapter 7854. Minn. Rule 7854.0500 requires an applicant to provide an exhaustive analysis of environmental impacts, proposed mitigative measures, and any adverse environmental effects, in 18 substantive areas. The PUC, in turn, is required to consider this information in its siting and permitting decision. Under Minn. Rule 7854.1000, entitled "Final Site Permit Decision," the PUC "*shall not issue* a site permit for an LWECS *unless* the commission determines that the project is compatible with environmental preservation, sustainable development, and the efficient use of resources, and the applicant has complied with this chapter." Minn. R. 7854.1000, subp. 3 (emphasis added). This language makes clear that LWECS projects are subject to environmental review and that the PUC *must* evaluate such effects prior to issuing a permit. Indeed, it would be absurd if the PUC rules required an LWECS application to contain the exhaustive siting, design, and environmental information required by Minn. R. 7854.0500, yet, at the same time, authorized the PUC to ignore that information.

Moreover, the PUC is not alone in evaluating the environmental information submitted in the application, a reality Plaintiff conveniently ignores. Minnesota Statutes Section 216E.10, subd. 3, mandates state agency participation in reviewing and ensuring compliance with

environmental standards. The involvement and review by the Minnesota Pollution Control Agency, Department of Natural Resources, and Department of Transportation in the Buffalo Ridge permitting proceeding demonstrates that such review routinely takes place. (*See* Moving Mem. at 16 n. 9.) Although Plaintiff may not agree with the rules governing PUC's environmental review of large wind projects, or may prefer that the PUC rules mandate a specific MEPA review process, it cannot reasonably argue that LWECS have been *exempted* from review.

Because the interpretation of statutes and administrative rules is a matter of law, Plaintiff's exemption argument can be addressed and disposed of in this Rule 12 motion. *Instant Testing Co. v. Cmty. Sec. Bank*, 715 N.W.2d 124, 126 (Minn. Ct. App. 2006) (affirming district court's dismissal based on interpretation of statute); *Bolar v. Hennepin Home Health Care, Inc.*, No. C9-97-1477, 1998 WL 88228, at *4 (Minn. Ct. App. Mar. 3, 1998) ("[W]e review the commissioner's [application of a rule] as a matter of law.") Moreover, courts extend judicial deference to agency decisions involving the interpretation of statutes that the agency is charged with administering. *Matter of Minnesota Power for Authority to Increase Rates for Electric Service in State*, 929 N.W.2d 1, 10 (Minn. Ct. App. 2019) (citing *In re Max Schwartsman & Sons, Inc.*, 670 N.W.2d 746, 754 (Minn. Ct. App. 2003)). Accordingly, the Court should give deference to the PUC's promulgation of environmental review rules under the enabling statutory language of Minn. Stat. 216F.05. Again, as discussed in Defendants-Intervenors' moving memorandum, Section 216F.05 plainly does not mandate that the PUC conduct a MEPA-specific environmental review process, but, instead, affords the PUC flexibility to promulgate its own environmental review rules. That is precisely what PUC has done. Plaintiff's MERA claims fail on their merits.

C. *White Bear Lake* undercuts Plaintiff's claims.

Finally, while Plaintiff relies heavily on the *White Bear Lake* case, that case demonstrates why Plaintiff's claims are deficient. *See White Bear Lake Restoration Ass'n ex rel. State v.*

Minnesota Dep't of Nat. Res., 946 N.W.2d 373 (Minn. 2020). In *White Bear Lake*, the plaintiffs asserted that the DNR *failed* to act in accordance with its governing rules or statutes regarding surface and ground water use, including Minn. Stat. §§ 103G.211, .285, and .287, and Minn. R. 6115.0670.[4] *Id.* at 381. Here, by contrast, Plaintiff contends that the rules and processes the PUC *does follow* are *invalid* under their enabling statute and MEPA. Thus, although AFCL disagrees with the siting and environmental review that PUC undertakes, it does not allege agency inaction or disregard for existing rules, as the *White Bear Lake* plaintiffs did.

For this same reason, Plaintiff's attempt to distinguish *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, 2010 WL 5071389, *4 (Minn. Ct. App. Dec. 14, 2010), is unavailing. (Response at 14–16.) Given that environmental review *does* exist under PUC rules—notwithstanding Plaintiff's disagreement with the statutory sufficiency and form of that review—that review by itself cannot constitute pollution, impairment, or destruction, and MERA is an inappropriate avenue to challenge the PUC. *See National Audubon Soc. v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 218 (Minn. Ct. App. 1997).

Moreover, as Defendants-Intervenors discussed in their moving memorandum and their opposition to Plaintiff's motion for temporary injunction, the plaintiffs in *White Bear Lake* alleged concrete existing harm resulting from decades of final agency decisions, rather than vague and speculative future harm from ongoing permitting proceedings. The *White Bear Lake* plaintiffs alleged that the DNR's conduct "*materially adversely affected* White Bear Lake and the aquifer" by drawing down lake levels due to many years of improper DNR permitting decisions. *White*

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[4] DNR "issued outsized permits on a case-by-case basis; failed to review permits on a cumulative basis . . . ; failed to reopen, amend, or right-size permits; failed to require alternative source planning; failed to impose mandatory irrigation bans; and imposed only one permit reduction" in contravention of those authorities. *White Bear Lake Restoration Ass'n ex rel. State v. Minnesota Dep't of Nat. Res.*, 946 N.W.2d 373, 381 (Minn. 2020).

Bear Lake Restoration Ass'n, 946 N.W.2d at 381. Again, Plaintiff's allegations here fail to cross that basic threshold for a viable MERA challenge.

CONCLUSION

Plaintiff has conceded that it is not challenging the Buffalo Ridge or Three Waters pending permitting proceedings. What remains is a deficient MERA claim under Section 10. The only available recourse for Plaintiff's challenge to PUC's rulemaking is a separate action under MAPA, not the MERA action Plaintiff has brought before this Court. Accordingly, Defendants-Intervenors respectfully request that this Court dismiss Plaintiff's Complaint with prejudice.

Dated: August 26, 2020

/s/ Andrew W. Davis

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ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subd. 2, to the party against whom the arguments in this pleading are asserted.

Dated: August 26, 2020

/s/ *Andrew W. Davis*
Andrew W. Davis