STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

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 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Defendants-Intervenors Buffalo Ridge Wind, LLC ("Buffalo Ridge") and Three Waters Wind Farm, LLC ("Three Waters") (collectively, "Intervenors") jointly move the Court to dismiss Plaintiff State of Minnesota *ex rel.* Association of Freeborn County Landowners' ("Plaintiff" or "AFCL") Complaint for lack of subject matter jurisdiction under Rule 12.02(a) and for failure to state a claim under Rule 12.02(e). While Plaintiff characterizes its Complaint as a "systemic" challenge to the entire Minnesota Public Utilities Commission ("PUC") regulatory framework for the siting and permitting of large wind projects, in reality, Plaintiff specifically targets and seeks

to enjoin four wind development projects—including those of Buffalo Ridge and Three Waters[1]—all of which are currently in pending administrative proceedings seeking site permits from the PUC (or, in the case of Freeborn Wind, on appeal from the PUC).

Whether styled as a systemic challenge or a targeted one, however, Plaintiff's claims are legally deficient and should be dismissed. First, Plaintiff's Complaint against the PUC improperly seeks to make an end run around pending administrative proceedings. Because no final agency action has occurred for at least three of those projects, and because Plaintiff has not exhausted administrative remedies in those proceedings, this Court lacks jurisdiction to consider Plaintiff's claims. Second, Plaintiff's claims are not ripe: no redressable injury has occurred or is imminent, and an entire regulatory review process stands between Plaintiff and any possible injury. Third, Plaintiff fails to state a claim under the Minnesota Environmental Rights Act ("MERA") because, as a matter of law, Plaintiff cannot allege "pollution, impairment, or destruction" to the environment resulting from the PUC's environmental review. To the contrary, the PUC's comprehensive environmental review procedures necessarily will address potential environmental effects from Intervenors' wind projects.

For all of these reasons, and as further discussed below, Plaintiff's Complaint must be dismissed.

[1] Northern States Power Company ("NSP") and Plum Creek Wind Farm ("Plum Creek"), the owners of the other two wind projects at issue in this case, have also intervened and have filed separate motions to dismiss in this action. Buffalo Ridge and Three Waters hereby join in and incorporate by reference the arguments advanced by NSP and Plum Creek, as well as by Defendant PUC, in support of their separate motions to dismiss this action.

FACTUAL BACKGROUND[2]

Plaintiff brings this action against the PUC pursuant to the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. § 116B.01 *et seq.*, alleging that PUC rules governing the siting and permitting of Large Wind Energy Conversion Systems, or LWECS—rules that were promulgated decades ago by the Minnesota Environmental Quality Board ("EQB")—violate Minnesota environmental laws, namely, the Minnesota Environmental Procedures Act ("MEPA"). (Plaintiff's Complaint ("Compl.") ¶¶ 1-4.)

More specifically, Plaintiff alleges that in 1995 the Minnesota Legislature mandated the EQB to develop rules governing the siting of LWECS, including criteria for conducting environmental review and assessing the environmental impact of LWECS. (Compl. ¶¶ 17-19.) Plaintiff alleges that the rules promulgated by the EQB did not adequately take into account this statutory requirement because the rules did not specifically mandate environmental review under the separate MEPA statutory framework. (*See* Compl. ¶ 18.) In particular, according to Plaintiff, the PUC rules for LWECS state that "the analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts 7849.111 to 7849.2100, and Minnesota Statutes, chapter 116D. *No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project*." (Compl. ¶ 18) (emphasis in original). According to Plaintiff, the EQB rulemaking process was also "fraught with errors, unsubstantiated assumptions, and unsupported conclusions." (Compl. ¶¶ 18-19.) Plaintiff also alleges that the PUC has failed to provide public participation and excludes the public from the permitting process. (Compl. ¶ 73.)

[2] For purposes of Intervenors' motion to dismiss only, the factual allegations in Plaintiff's Complaint are assumed to be true.

Plaintiff claims that because large wind projects have the "potential for significant environmental effects resulting from any major governmental action," environmental review of all such wind projects in Minnesota must occur under MEPA, rather than under the environmental review procedures that currently apply in PUC regulatory proceedings. (Compl. ¶¶ 24-26.) Accordingly, Plaintiff's Complaint purports to challenge the entire "regulatory framework" that governs the PUC's review, siting, and permitting of large wind projects.

Yet while Plaintiff characterizes its Complaint as a challenge to "systemic wind siting issues," Plaintiff's Complaint specifically targets and seeks to enjoin four wind development projects: Buffalo Ridge Wind Project, Three Waters Wind Project, Freeborn Wind Project, and Plum Creek Wind Project. (Compl. ¶ 5.) According to Plaintiff, these four wind projects—two of which (Buffalo Ridge and Three Waters) are owned by Defendant-Intervenors—are "the specific projects before the Commission in which environmental law and the potential for substantial impacts is being disregarded, [and] in which projects are proceeding towards siting without siting rules and standards." (Compl. ¶ 5.) Accordingly, Plaintiff concedes that "[t]his MERA action *challenges the process and substantive issues in the [PUC]'s handling of permit review for the Freeborn, Plum Creek, Buffalo Ridge, and Three Waters wind project proceedings*." (Compl. ¶ 22) (emphasis added). Thus, while Plaintiff purports to challenge the entire regulatory framework for siting and permitting wind projects in Minnesota, the reality is that Plaintiff's Complaint specifically targets and seeks to stop Defendant-Intervenors' pending wind permitting proceedings.

In particular, Plaintiff specifically alleges that the PUC's "vetting and review" for each of these four projects, including Buffalo Ridge and Three Waters, is "inadequate to protect the air, water, land, and other natural resources from pollution, impairment, or destruction." (Compl. ¶ 25.)

Plaintiff thus seeks relief in the form of "a temporary injunction halting the construction of" each of the four wind projects, including Buffalo Ridge and Three Waters wind projects. (Compl. ¶ 3; Prayer for Relief ¶ 7.)

The Buffalo Ridge and Three Waters wind projects are considered LWECS under the PUC's review. (Compl. ¶ 34.) Both projects are currently undergoing the PUC's siting and permit review process. Neither has received a final permitting decision on their applications. (Compl. ¶¶ 9-13, 15.) Instead, siting and permitting decisions for both Buffalo Ridge and Three Waters remain pending at this time. (Compl. ¶¶ 11-12) (citing PUC eDockets WS-19-934 and WS-19-576).[3]

Plaintiff's Complaint asserts three claims against the PUC under MERA: (1) failure to conduct environmental review in violation of MEPA (Compl. ¶¶ 28-44); (2) failure to promulgate siting criteria and rules in violation of MEPA (Compl. ¶¶ 45-57); and (3) failure to provide statutorily required public participation in violation of Minn. Stat. § 216E.08. (Compl. ¶¶ 58-73.) Plaintiff's MERA Complaint seeks two categories of relief. First, Plaintiff seeks a series of declarations regarding the inadequacy of the PUC's rules and permitting decisions related to LWECS, including with respect to the Freeborn Wind Project. (Compl., Prayer for Relief, ¶¶ 1-6.) Second, Plaintiff seeks to enjoin the "permitting siting and construction of the Freeborn, Plum Creek, Buffalo Ridge, and Three Waters wind projects." (Compl., Prayer for Relief, ¶ 7.)

[3] The PUC held a public hearing on the Buffalo Ridge project on June 22, 2020, and accepted public comments on the application until Aug. 3, 2020. *See* PUC eDockets WS-19-394, at *https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={A02CCE72-0000-CF2E-927E-343E466376C0}&documentTitle=20206-164138-02*. For the Three Waters project application, the public hearing scheduled for July 28, 2020 was continued and the date through which the PUC will accept additional public comments on the project has not yet been established. *See* PUC eDockets No. IP-7002/WS-19-576, *https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={108A7D73-0000-CE39-9E0B-83F19B5D7029}&documentTitle=20207-165236-02*.

Because Plaintiff's Complaint seeks an injunction halting the permitting and construction of their wind projects, Buffalo Ridge and Three Waters intervened in this action by stipulation of the parties. This Court granted Buffalo Ridge's intervention in this case on July 1, 2020, and granted Three Waters' intervention on July 20, 2020. Thereafter, Buffalo Ridge and Three Waters each filed separate motions to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim, and now file this joint memorandum in support of their motions to dismiss.

ARGUMENT

I. STANDARD OF REVIEW

Rule 12.02(a) of the Minnesota Rules of Civil Procedure allows a party to defend a claim for relief in a pleading by asserting that the court does not have subject-matter jurisdiction to hear the lawsuit. As a threshold issue, subject matter jurisdiction determines a court's authority to decide a particular class of actions and the particular questions before it. *Witzke v. Mesabi Rehab. Servs., Inc.*, 768 N.W.2d 127, 129 (Minn. Ct. App. 2009). Because subject matter jurisdiction goes to the court's authority to hear the matter at all, it cannot be waived or conferred by the parties' consent. *Id.* "Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court." *See Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007); *see also In re the Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011); Minn. R. Civ. P. 12.02(a).

Rule 12.02(e) of the Minnesota Rules of Civil Procedure authorizes a party to bring a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). Under a Rule 12.02(e) motion to dismiss, a pleading will be dismissed when it "appears to a certainty that no facts, which would be introduced consistent with the pleading, exist which would support the relief granted." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn.

2010) (citation omitted) (emphasis added). Although the court must accept as true the facts alleged in the complaint, the court need not accept legal conclusions as true. *Id.* If it is clear from the pleadings that the claim cannot be sustained, dismissal is warranted. *See Jacobson v. Bd. of Trustees of the Teachers Retirement Ass'n*, 627 N.W.2d 106, 109 (Minn. Ct. App. 2001).

II. THE COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE PLAINTIFF'S CLAIMS OR ENJOIN THE WIND PROJECTS

A. Plaintiff Must Seek Relief through the Pending Administrative Processes

Because Plaintiff's Complaint targets and attempts to enjoin four pending permitting proceedings, including proceedings for the Buffalo Ridge and Three Waters wind projects, the Court lacks subject matter jurisdiction to adjudicate such claims under well-established principles of administrative law.

First, under Minnesota law, a party cannot seek judicial review of a pending administrative proceeding until there is final agency action. *See* Minn. Stat. § 216E.15 (requiring the issuance of a site or route permit or a final order of PUC before judicial review can occur); Minn. Stat. § 14.63 (judicial review requires final decision and order of the agency). "[C]ourts generally hold that agency decisions prior to the final order in the case are not reviewable." 21 Minn. Prac. § 13.04 (2d ed. 2019). There is no question that Plaintiff's Complaint seeks judicial review of the four permitting proceedings in question. (Compl. ¶¶ 3, 5, 22, 25.) Because the siting and permitting proceedings remain pending for these wind projects, including for the Buffalo Ridge and Three Waters wind projects, there is no final agency action for purposes of judicial review.

Second, Plaintiff has failed to exhaust its administrative remedies in the permitting proceedings. *See Southern Minn. Construction Co., Inc. v. Minn. Dept. of Transp.*, 637 N.W.2d 339, 344 (Minn. Ct. App. 2002) (holding that the district court correctly determined that it was without jurisdiction to intervene where the party did not exhaust administrative remedies). "It is a

"long-settled rule" that absent imminent and irreparable harm, "no one is entitled to injunctive protection against the actual or threatened acts of an administrative agency" until all administrative remedies have been exhausted. *Essar Global Fund Limited v. Roberts-Davis*, 2020 WL 3172844, at *3 (Minn. Ct. App. June 15, 2020) (citing *Uckun v. Minn. State Bd. Of Med. Practice*, 733 N.W.2d 778, 785 (Minn. Ct. App. 2007)). As discussed below, Plaintiff has not alleged and cannot allege imminent and irreparable harm, and has not sought to intervene in the Buffalo Ridge or Three Waters permitting proceedings or otherwise exhausted its administrative remedies before the PUC.

Even if there was final agency action in the form of a permitting decision, Plaintiff would be required to challenge the PUC permitting decisions in the Court of Appeals pursuant to Minn. Stat. § 216E.15 and Chapter 14 of the Minnesota Administrative Procedures Act ("MAPA"). *See* Minn. Stat. § 216E.15 ("Any applicant, party or person aggrieved by the issuance of a site or route permit or emergency permit from the commission . . . may appeal to the court of appeals in accordance with chapter 14."); Minn. Stat. § 14.63 ("A petition for a writ of certiorari by an aggrieved person for judicial review under sections 14.63 to 14.68 must be filed with the court of appeals and served on all parties to the contested case not more than 30 days after the party receives the final decision and order of the agency."). This statutorily-prescribed judicial review process is the exclusive remedy for aggrieved parties. *See Peterson v. United Parcel Serv., Inc.*, 2014 WL 4672393, at *4 (Minn. Ct. App. 2014) ("Absent express statutory language vesting judicial review of an agency action in the district courts, our jurisdiction in these matters is exclusive.") (citing *Mowry v. Young*, 565 N.W.2d 717, 719 (Minn. Ct. App. 1997)).

Indeed, under MERA, the proper procedural mechanism to raise such claims is through intervention in the administrative proceeding rather than a collateral action in the district court.

See Minn. Stat. § 116B.09. Here, Plaintiff has demonstrated its ability to comply with applicable law, raising these same issues in the pending PUC proceedings for Freeborn Wind. (*See* Compl. ¶ 48.) Minnesota courts have dismissed challenges similar to Plaintiff's for lack of jurisdiction, where the party could have instead intervened in the agency proceeding pursuant to Minn. Stat. § 116B.09. *See Dakota Cty. Envtl. Prot. Ass'n v. Minnesota Dep't of Nat. Res.*, 322 N.W.2d 757, 758 (Minn. 1982) (noting that district court dismissed complaint for lack of subject matter jurisdiction because "the proper method to challenge the commissioner's order was through intervention under Minn. Stat. § 116B.09 in the pending matter"); *cf. White Bear Lake Restoration Ass'n v. Minn. Dep't of Nat. Resources*, -- N.W.2d --, 2020 WL 3980718, at *6 (Minn. 2020) (allowing MERA action because plaintiffs were *not* challenging agency decisions or "the issuance of any single permit" but rather were challenging the agency's failure to review permits on a cumulative basis over many years in violation of its own statutes).

Third, Plaintiff's claims amount to a collateral attack on pending administrative proceedings, asking the Court to review and address the same environmental review issues that are currently pending before the PUC. This Court should refrain from addressing issues that are simultaneously pending in an administrative matter. *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) (citing *Sharood v. Hatfield*, 210 N.W.2d 275, 279 (Minn. 1973)); *see also* Minn. Const. art. III, § 1. 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. App. 2019) (citing *In re Max Schwartsman & Sons, Inc.*, 670 N.W.2d 746, 754 (Minn. App. 2003)). Deference to an administrative agency is similarly rooted in the separation of powers doctrine, and takes into

account the agency's expertise in the subject matter. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977); *In re Application of Minnesota Power for Authority to Increase Rates for Elec. Service in Minn.*, 838 N.W.2d 747, 761 (Minn. 2013) (affording deference to the "analytical approach" chosen by the PUC due to the agency's expertise).

In short, Plaintiff's claims seek to make an end run around currently pending siting and permitting applications at the PUC, and to collaterally attack those proceedings rather than engaging directly in them. This Court lacks subject matter jurisdiction to consider Plaintiff's claims.

B. Plaintiff's Claims Are Not Ripe Because There Are Ongoing Administrative Proceedings Regarding Wind Project Applications for Site Permits.

Plaintiff's claims also fail as a threshold matter because they are not ripe for judicial review. In Minnesota, "[t]he ripeness doctrine is based on the general principle that Minnesota courts will consider only redressable injuries" and, thus, "bars suits brought before a redressable injury exists." *State ex rel. Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 592 (Minn. Ct. App. 2008) (internal citations omitted). When a plaintiff alleges injury resulting from the action of an agency, Minnesota courts hold—and have long held—that no redressable injury arises until the agency issues a final action. *Schober v. Comm'r of Revenue*, 853 N.W.2d 102, 108 (Minn. 2013) (holding "an order is ripe for review when the final determination of an inferior tribunal which, if unreversed, would constitute a final adjudication of some legal rights of the taxpayer" and "finality occurs when nothing is still pending before the agency . . ., and the result of the agency process directly affects a party") (internal quotations and citations omitted); *Thomas v.*

Ramberg, 60 N.W.2d 18, 21 (Minn. 1953) (describing the "general rule" that "only final administrative orders and decisions are subject to review").[4]

As discussed above, each of the four wind projects Plaintiff seeks to enjoin, including the Buffalo Ridge and Three Waters wind projects, "are in the midst of the [PUC]'s siting process." (Compl. ¶¶ 13, 6 ("[T]hese four [projects] are in permitting or construction on the project has not yet begun.")).[5] Accordingly, Plaintiff's Complaint seeks to enjoin the permitting and construction of the Buffalo Ridge and Three Waters wind projects before the PUC has issued any siting or permitting determination as to those projects. Because no redressable injury to Plaintiff could possibly occur until a permit decision is final, Plaintiff's MERA claims are not ripe. *See Schober*, 853 N.W.2d at 108.

The fact that Plaintiff's Complaint purports to challenge the entire PUC regulatory framework regarding LWECS does not alter this analysis. The Minnesota Court of Appeals rejected a nearly identical challenge to agency rules in *Nielsen v. State*, No. C4-90-1525, 1991 WL 10223, at *1 (Minn. Ct. App. Feb. 5, 1991). In *Nielsen*, the plaintiff argued that final agency action was not a prerequisite to challenging the Minnesota Department of Natural Resources' allegedly flawed determination process. *Id.* The court rejected this argument: "the requirement of exhausting

[4] *See also Thompson v. City of Red Wing*, 455 N.W.2d 512, 515-16 (Minn. Ct. App. 1990) ("Where a land owner has not yet obtained a final decision regarding application of a land regulation to the particular property in question, the claim is not ripe for review."); *Nielsen v. State*, No. C4-90-1525, 1991 WL 10223, *1 (Minn. Ct. App. Feb. 5, 1991) ("In this case, no final decision has been reached by the Commissioner. Therefore, this action is not yet ripe for judicial review.").

[5] *See* PUC eDocket for Buffalo Ridge Wind Project: IP-7006/CN-19-309, IP-70061/WS-19-394; Three Waters Wind Project: PUC eDocket No. IP-7002/WS-19-576. When reviewing a Rule 12 motion, "[a] court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). The Court may also consider documents in the public record without converting a motion to one for summary judgment. *Central Lakes Educ. Ass'n v. Indep. Sch. Dist. No. 743*, 411 N.W.2d 875. 881 (Minn. Ct. App. 1987).

one's remedies is not applicable merely because there is an apprehension that the agency decision will be unfavorable." *Id.*

Moreover, because an entire regulatory regime stands between Plaintiff's allegations and any actual harm, Plaintiff's allegations of harm are necessarily remote and purely speculative. *See Thomas*, 60 N.W.2d. at 20. Plaintiff's own allegations confirm this point: Plaintiff alleges 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 reveal that Plaintiff merely has an "*apprehension* that the final outcome of the administrative proceedings will be prejudicial." *Thomas*, 60 N.W.2d at 20. That is not enough to establish a ripe claim.

III. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UNDER MERA

Even if Plaintiff's claims were ripe, and even this Court had subject matter jurisdiction to consider them, Plaintiff's allegations still fail to state a MERA claim for relief under Rule 12.02(e). First, Plaintiff's allegations do not constitute "pollution, impairment, or destruction" of the environment under MERA as a matter of law. Second, Plaintiff's allegations with respect to the adequacy of PUC rules on environmental review are procedurally deficient and contrary to Minnesota law.

A. Plaintiff Cannot Allege "Pollution, Impairment, or Destruction" of the Environment under MERA.

Plaintiff's Complaint fails to state a claim because Plaintiff cannot allege "pollution, impairment, or destruction" of the environment within the meaning of MERA. *See* Minn. Stat. § 116B.03, subd. 1 (plaintiff may maintain cause of action for protection from "pollution, impairment, or destruction" of the environment); Minn. Stat. § 116B.10, subd. 2 (noting plaintiff

has the initial burden to show "pollution, impairment, or destruction" of the environment as part of a claim under § 116B.10); (*see also* Compl. ¶ 1) (alleging MERA claims to prevent the PUC from "further impairing, polluting, or destroying" the environment).[6] "Pollution, impairment, or destruction" is defined under MERA as "any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state," or "which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5. The Minnesota Supreme Court has recognized that a plaintiff must allege "something more than merely an adverse environmental impact to trigger its 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.*

As discussed above, the wind projects, including those of Buffalo Ridge and Three Waters, are not yet permitted or constructed, but instead remain in a regulatory review process at the PUC. In that regulatory posture, Plaintiff simply cannot allege "pollution, impairment, or destruction" of the environment under MERA, either as a violation of an environmental quality standard or as having a materially adverse effect on the environment. *See* Minn. Stat. § 116B.02, subd. 5. Indeed, Plaintiff's complaint is devoid of any facts regarding pollution, impairment, or destruction of the

[6] While Plaintiff purports to bring its action under Minn. Stat. § 116B.10, subd. 1, which governs MERA actions against the state or its political subdivisions, to the extent Plaintiff's claims specifically seek to enjoin four private wind development projects, the appropriate standard for evaluating the availability of such relief is Minn. Stat. § 116B.03, which governs civil actions generally under MERA. Under either provision, however, Plaintiff must allege "pollution, impairment, or destruction" of the environment.

environment stemming from any of the four wind projects (much less any other project), including the Buffalo Ridge and Three Waters permit applications, as construction on the projects has not yet commenced.[7]

Moreover, Minnesota courts have squarely held that an agency's environmental review process *cannot result* in "pollution, impairment, or destruction" of the environment under MERA. *National Audubon Soc. v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 218 (Minn. Ct. App. 1997). In *National Audubon Society*, plaintiff brought a MERA claim to challenge the adequacy of the MPCA's environmental review process. *Id.* The Court of Appeals rejected the claim, holding there was no such cause of action under MERA:

> Because environmental review cannot result in pollution, impairment, or destruction of the environment, *we conclude environmental review does not constitute "pollution, impairment, or destruction" of the environment as defined by MERA*. Appellants therefore have no cause of action against the MPCA under MERA.

Id. (emphasis added). Thus, the administrative process, and not MERA, is the "more appropriate vehicle" to challenge the PUC's environmental review where the agency's role is conducting environmental review. *Id.* Similarly, in *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, 2010 WL 5071389, *4 (Minn. Ct. App. Dec. 14, 2010), the Court of Appeals addressed and rejected the plaintiff's claim that the PUC's environmental review was "causing" pollution under MERA. *Id.* at *10. The Court held that where the agency's environmental review is adequate under its own administrative rules, the MERA claim fails as a matter of law. *Id.* (citing *Lubbers v. Anderson,* 539 N.W.2d 398, 401 (Minn. 1995)).

[7] For this same reason, Plaintiff has not alleged and cannot allege a sufficient injury within the meaning of MERA to have standing to pursue its claims, depriving this Court of jurisdiction to hear Plaintiff's claims. *See supra* Part II.B (discussing failure to allege a ripe claim).

Here, the PUC's siting and permitting proceedings already include rigorous environmental review provisions that are intended to evaluate and that ultimately will mitigate and prevent any such "pollution, impairment, or destruction" of the environment. Under these rules, the PUC shall not issue a site permit for a LWECS "unless the commission determines that the project is compatible with environmental preservation, sustainable development, and the efficient use of resources," and the applicant is in compliance with the chapter. Minn. R. 7854.1000, subp. 3. Applicants must include an analysis of potential environmental impacts of the project, proposed mitigative measures, and any adverse environmental effects that cannot be avoided for several areas, including noise, visual impacts, public health and safety, hazardous materials, soils, geologic and groundwater resources, surface water and floodplain resources, wetlands, vegetation, wildlife, rare and unique natural resources, and more. Minn. R. 7854.0500, subp. 7 (listing areas for which environmental impacts must be evaluated). Additionally, the PUC must consider numerous factors including "environmental evaluation of sites and routes proposed for future development and expansion to their relationship to the land, water, air, and human resources of the state." Minn. Stat. § 216E.03, subd.7(2); *see also* Minn. Stat. § 216F.02(a) (stating that Minn. Stat. § 216E.03 applies). Because PUC rules already address the impacts of LWECS on the environment, Plaintiff cannot allege an actual or imminent injury under MERA. Further, the comprehensive nature of the PUC's environmental review framework demonstrates why an analysis of environmental impacts under those rules "satisfies the environmental review requirements of . . . [MEPA]." Minn. R. 7854.0500, subd. 7.

Plaintiff cannot allege "pollution, impairment, or destruction" of the environment because the subject wind projects are still undergoing the permitting process, which includes the comprehensive environmental review procedures discussed above. Indeed, the projects have

conducted numerous environmental studies for submission alongside the project application to the PUC. For example, Buffalo Ridge employed the use of micrositing, which is the process in which wind resources, potential environmentally sensitive areas, soil conditions, and other site factors are evaluated to locate wind turbines and associated facilities. PUC eDocket No. IP-70061/WS-19-394, Document No. 20197-154454-01 (Page 7).[8] The environmental impacts analysis of the Buffalo Ridge project application spans nearly 100 pages, and includes analysis on potential impacts, mitigation measures, land use, sound, visual impacts, shadow flicker, traffic, telecommunications, radio, television, cultural and archaeological resources, recreational resources, waterfowl, nearby parks, public health and safety, soils, groundwater, wildlife, and wetlands, among others. *Id.* at 20-116. In addition, as required under Minn. Stat. § 216E.10, subd. 3, the PUC solicited and received input from other permitting agencies as part of its review of the Buffalo Ridge wind project, including the Minnesota Pollution Control Agency, the Minnesota Department of Natural Resources, and the Minnesota Department of Transportation.[9]

Similarly, Three Waters conducted two baseline aviation studies, two bat activity studies, a northern long-eared bat summer presence/absence study, two eagle and raptor nest surveys, habitat mapping, site characterization study, bird and bat conservation strategy, cultural resources

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[8] *See https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup& documentId={C0AD016C-0000-CB15-8CD4-C93AC6456836}&documentTitle= 20197-154454-01*.

[9] *See https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup& documentId={30698B6C-0000-C51D-987D-A97234823FC2}&documentTitle= 20198-155152-01* (MPCA)*; https://www.edockets.state.mn.us/EFiling/edockets/search Documents.do? method= showPoup& documentId={905C436F-0000-CF1D-A6EF-40CC7D90329A}& documentTitle=201912-158605-01*; *https://www.edockets.state.mn.us/EFiling/edockets/search Documents. do? method=show Poup&documentId={905C436F-0000-CD3E-A305-F2BA3FBE 6AE5}&documentTitle=201912 -158605-02* (DNR); *https://www.edockets.state.mn.us/EFiling/ edockets/searchDocuments.do?method= showPoup&documentId={8021256F-0000-CD13-B98F-627B73EFFB2D}& documentTitle=201912-158512-01* (MnDOT).

studies, a historical/architectural survey, a wetland/waterbody delineation/field study, a radio report, a land mobile and emergency services report, an off-air TV analysis, a microwave study, an obstruction analysis and airspace analysis, sound monitoring and modeling study, shadow flicker analysis, and a jobs and economic development impact model. PUC eDocket No. IP-7002/WS-19-576, Document No. 20199-156208-01 (Pages 5-6 and 5-7).[10]

Plaintiff would have this Court conduct its own evaluations of the adequacy of such studies before the PUC has even addressed these issues. Even with the results and analysis of these studies, however, Plaintiff would not be able to allege "pollution, impairment, or destruction" of the environment to support their MERA action. Further, Plaintiff fails to show that the agency's review is the cause of any actual injury. As in *Minnesota Center for Environmental Advocacy*, the PUC's adherence to its administrative process is adequate and Plaintiff's MERA claims must fail as a matter of law.

B. Plaintiff's Complaint Improperly Challenges Promulgated Rules under MAPA.

While Plaintiff's Complaint is primarily concerned with enjoining the four identified wind projects (*see* Compl. ¶ 5), Plaintiff also purports to mount a systemic challenge to "the regulatory framework within which the [PUC], and the [EQB] before it, have been issuing wind site permits over the last 20+ years, a process violating Minnesota environmental law." (Compl. ¶ 23.) In 1995, the Minnesota Legislature directed the PUC (then the EQB) to adopt rules governing the review of applications for site permits for LWECS sites, and specifically directed the agency to promulgate requirements for environmental review. *See* Minn. Stat. § 216F.05. During the promulgation process, the agency was required to provide 60 days for public notice and comment

[10] *See https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup & documentId={607A876D-0000-C615-A8C9-7BFD50A81D91}&documentTitle=20199-156208-01.*

on the proposed rules before they are adopted, amended, or repealed. Minn. Stat. § 14.101. The result of this rulemaking was Minn. R. 7854.0500, subp. 7. Plaintiff's Complaint seeks to dismantle this regulatory regime for wind permitting by challenging a PUC rulemaking process that has been in place for decades. Hundreds of wind projects have been analyzed, sited, rejected, or modified under these rules. (*See* Compl. ¶ 3) ("[O]ver 2,500 megawatts of wind has been sited in Minnesota" since 1995).

Even if Plaintiff's rulemaking challenge had been timely lodged within the 60-day comment period, *see* Minn. Stat. § 14.101, this Court is not the proper forum for Plaintiff's attack on Minn. R. 7854.0500. It is well-established that judicial review of agency rulemaking, including the PUC rules at issue here, must be brought in the Court of Appeals under the Minnesota Administrative Procedures Act ("MAPA"). 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 that the Court of Appeals has original jurisdiction to determine the validity of an agency's rules under Minn. Stat. § 14.44)). Plaintiff has failed to do so.[11]

Even if Plaintiff's rulemaking challenge were procedurally proper before this Court, however, it would fail as a matter of law. MAPA sets forth a limited number of grounds on which a rule can be invalidated: (1) constitutional violations; (2) exceedance of statutory authority; or (3) non-compliance with procedure in promulgating the rule. Minn. Stat. § 14.45. Here, Plaintiff's Complaint alleges that the PUC's rule exceeds statutory authority because it fails to require

[11] While Plaintiff could petition the PUC to request amendment or repeal of any rule, Minn. Stat. § 14.09, Plaintiff has not done so here.

environmental review under MEPA.[12] (Compl. ¶ 18.) Plaintiff is simply wrong. Rule 7854.0500 is squarely within the statutory authority provided by Minn. Stat. § 216F.05. That statute provides that "[t]he commission shall adopt rules governing the consideration of an application for a site permit for an LWECS that address: (1) criteria that the commission shall use to designate LWECS sites, which must include the impact of LWECS on humans and the environment;…[and] (4) requirements for environmental review of the LWECS." Minn. Stat. § 216F.05. Section 216F.05 plainly does *not* mandate that the PUC conduct environmental review *under MEPA*. *See id.* Indeed, the express statutory language makes clear that the Legislature intended the PUC (or its predecessor, the EQB) to promulgate *its own* environmental review rules. *Id.*

Thus, the PUC (via the EQB) followed this statutory command when it issued Rule 7854. As discussed above, *see supra* Part III.A, the PUC's siting and permitting procedures include comprehensive environmental review requirements, which preclude the PUC from issuing a site permit for a LWECS "unless the commission determines that the project is compatible with environmental preservation, sustainable development, and the efficient use of resources," and the applicant is in compliance with the chapter. Minn. R. 7854.1000, subp. 3. Applications must provide a comprehensive analysis of potential environmental impacts, proposed mitigation, and any environmental effects that cannot be avoided, and the PUC must take numerous environmental factors in considering in proposed sites. Minn. R. 7854.0500, subp. 7; Minn. Stat. § 216E.03, subd. 7(b)(2). These promulgated review procedures adhere closely to the statutory requirements of Minn. Stat. § 216F.05. Further, Minnesota courts afford deference to an agency's interpretation and administration of its statutes. *See Matter of Minnesota Power for Authority to Increase Rates*

[12] While Plaintiff also alleges that the rulemaking process was "fraught with errors, unsubstantiated assumptions, and unsupported conclusions," this allegation is conclusory. (Compl. ¶ 19).

for Electric Service in State, 929 N.W.2d 1, 10 (Minn. App. 2019) (citing *In re Max Schwartsman & Sons, Inc.*, 670 N.W.2d 746, 754 (Minn. App. 2003)).

Moreover, MEPA itself specifically recognizes that the legislature may authorize alternative forms of environmental review within statutes. *See* Minn. Stat. § 116D.04, subds. 2a, 4a. Critically, the Minnesota Court of Appeals addressed a nearly identical issue to the one raised by Plaintiff in *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, 2010 WL 5071389, *4 (Minn. Ct. App. Dec. 14, 2010). There, plaintiff MCEA challenged the adequacy of the PUC's environmental review procedures regarding pipeline routing decisions, asserting that the PUC "violated MEPA by failing to conduct its own thorough, independent analysis of environmental effect." *Id.* at *3. The plaintiff argued that the PUC's environmental review rules for pipelines[13] were inadequate because they did not mirror MEPA's environmental review requirements. *See id.* The trial court rejected this argument, and the Court of Appeals affirmed. *Id.* The court held that while MEPA requires a detailed environmental impact statement, "it also provides that the [EQB] 'shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement.'" *Id.* (quoting Minn. Stat. § 116D.04, subds. 2a, 4a). The court went on to find that the PUC's review was consistent with its own rules, rejecting the MCEA's challenge.

The Court of Appeals' holding in *MCEA* squarely addresses—and forecloses—Plaintiff's claims in this action. Minnesota statutes, *including MEPA itself*, allow the PUC to promulgate and

[13] The PUC rules related to the environmental assessment of proposed pipelines are contained in Minn. Rule 7852.0700 and 7852.1900.

apply its own "alternative forms of environmental review." *See id.* The PUC has done just that. Even if this Court were the proper forum for Plaintiff's allegations, Plaintiff's "systemic" challenge to the PUC's entire wind permitting framework fails to state a claim and should be dismissed.

CONCLUSION

For all of these reasons, Intervenors Buffalo Ridge and Three Waters respectfully request that the Court grant its motion to dismiss Plaintiff's Complaint.

Dated: August 5, 2020

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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 5, 2020

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