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, Northern States Power Company, Plum Creek Wind Farm, LLC,

Defendant-Intervenors.

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

MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS OF DEFENDANT-INTERVENORS NORTHERN STATES POWER COMPANY AND PLUM CREEK WIND FARM, LLC

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INTRODUCTION

Plaintiff Association of Freeborn County Landowners' (AFCL) Complaint asserts three counts under the Minnesota Environmental Review Act (MERA), Minn. Stat. § 116B.10. Compl. ¶ 1, Counts One–Three. The gravamen of Plaintiff's Complaint is a contention that the environmental review procedures and standards the Minnesota Public Utilities Commission (MPUC) uses in siting wind farms—referred to in statute as Large Wind Energy Conversion Systems (LWECS)—are insufficient.

This is not the first time AFCL has made these claims. As AFCL acknowledges in the Complaint, for years it has vigorously pursued the same arguments about the environmental review procedures and standards in LWECS proceedings as an active party in *In the Matter of Freeborn Wind Energy LLC's Application for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County*, PUC Docket No. IP-6946/WS-17-410 (hereinafter "Docket No. 17-410" or "Freeborn Wind docket").[1] AFCL's choice to intervene and participate in the Freeborn Wind docket, making over 100 filings and having gotten a final judgment on the same claims, means AFCL is barred by collateral estoppel and res judicata from bringing a MERA claim in district court on the same issues.

In addition to being estopped, AFCL's claims fail as matter of law because they do not state a viable claim under MERA. Contrary to AFCL's allegations, the Environmental Quality Board (EQB) lawfully enacted rules pursuant to Minn. Stat. § 216F.05 that establish environmental review procedures and standards for siting wind farms. These standards comply with the Minnesota Environmental Policy Act (MEPA), Minn. Stat. Ch. 116D. Furthermore, MERA is the

[1] The Freeborn Wind docket is available at https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true&userType=public, by searching for Docket No. 17-410.

wrong statutory framework for AFCL's challenges to an environmental review process. Minnesota Courts have held that MEPA, not MERA, is the proper statute under which to challenge environmental review procedures. Therefore, AFCL's MERA claims necessarily fail.

Defendant-Intervenors Northern States Power Company (NSP) and Plum Creek Wind Farm, LLC (Plum Creek) respectfully request the Court dismiss Plaintiffs' Complaint with prejudice in its entirety with prejudice.

BACKGROUND

The following provides a detailed description of the process and MPUC proceedings referenced in AFCL's Complaint. In addition to being encompassed by the Complaint, all facts are a matter of public record.

I. REGULATORY PERMITTING PROCESS FOR WIND FARMS

Site permit applications for LWECS are governed primarily by Minnesota Statutes Chapter 216F and § 216E.03, subd. 7 and Minnesota Rules Chapter 7854. Pursuant to these statutes and rules, the MPUC, acting as a quasi-judicial body, *see* Minn. Stat. § 216A.02, subd. 3, considers whether to approve a LWECS site permit application. The MPUC's process for evaluating LWECS site permit applications tracks the statutory and regulatory requirements and includes an environmental review process in accordance with MEPA, Minn. Stat. Ch. 116D.

A. Permit Application For Wind Farms

A developer seeking to obtain a LWECS site permit must prepare and file a site permit application with MPUC. Minn. R. 7854.0400. Prior to filing the application, a project developer works with the Department of Commerce Energy Environmental Review and Analysis (DOC-EERA), which provides guidelines and "advise[s] on application requirements." *See id.* subp. 3; Minn. Stat. § 216E.03, subd. 11 (DOC-EERA is to "provide technical expertise and other

assistance" in connection with LWECS permit applications). *See also* Declaration of Alethea Huyser, Ex. 1.

By law, the developer must include extensive information in its application to obtain approval. Minn. Stat. § 216F.03; Minn. R. Ch. 7854. This includes comprehensive information on "environmental preservation," Minn. Stat. § 216F.03, "environmental evaluation of sites and routes proposed for future development . . . . and their relationship to land, water, air, and human resources in the state," modeling on potential impacts on public health, welfare, vegetation, animals, materials, and aesthetic values, consideration of whether alternative energy sources might minimize environmental impacts, evaluation of adverse direct and indirect environmental effects that cannot be avoided if the project is built, among others. Minn. Stat. § 216E.03, subd. 7 (applicable to LWECS pursuant to Minn. Stat. § 216F.02(a)).

Pursuant to legislative mandate, administrative rules also govern LWECS site permit proceedings. Minn. Stat. § 216F.05. For environmental review of LWECS, EQB established an alternative review process that embeds environmental review into the permit process.[2] *See* 2001 Statement of Need and Reasonableness for Minn. Rules Ch. 4401 ("2001 SONAR"), Huyser Decl. as Ex. 2; Minn. R. 4410.3300, subp. 3.D.[3] The EQB's rules specifically state that for construction of a LWECS, no EAW is required; rather the "environmental review must be conducted according to chapter 7854." Minn. R. 4410.3300, subp. 3.D. Mirroring the EQB's approved alternative

[2] 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." Minn. Stat. § 116D.04, subd. 4a, *see also* Minn. Stat § 116D.04 subd. 5a. Application-based environmental review process occurs in the context of other utility permitting as well. *See, e.g.,* Minn. R. 7852.1500 (providing a similar environmental review process for routing of pipelines).

[3] When Minn. Stat. Ch. 216F was passed in 1995, the EQB was responsible for permitting LWECS. 1995 Minn. Laws Ch. 203, S.F. No. 1076. It developed the LWECS site permit rules, which were later renumbered to Chapter 7854, under the MPUC's jurisdiction.

review process, the MPUC siting rules state: "The analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts 7849.1000 to 7849.2100, and Minnesota Statutes, chapter 116D." Minn. R. 7854.0500 subp. 7. "No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project." *Id.*

On January 11, 2008, the Commission issued its *Order Establishing General Wind Permitting Standards*, adopting its "General Wind Turbine Permit Setbacks and Standards for LWECS Facilities Permitted by Counties Pursuant to Minnesota Statute 216F.08." Huyser Decl., Ex. 3. The Order establishes general minimum requirements for spacing, setbacks, noise standards, along with other specific requirements. Establishing the minimums by Order allows the Commission to retain the discretion to adjust permit conditions on a case-by-case basis, which it does. *See infra* at IV (discussing rationale for not promulgating the standards as rules).

B. Permit Approval Process – Public Participation

When a LWECS site permit application is filed, MPUC first must determine whether to accept, conditionally accept, or deny the application. Minn. R. 7854.0600 subp. 1. This is the first of multiple opportunities for public participation in the LWECS permitting process.[4] In addition to providing public comments, interested individuals or organizations can petition to intervene in a proceeding as parties. Minn. R. 7829.0800; Minn. R. 7829.0900. DOC-EERA also distributes the application to other state agencies for input, and agencies such as the Minnesota Pollution Control Agency (MPCA) and Minnesota Department of Natural Resources (MDNR) commonly review and submit comments on an application.

[4] As discussed *infra*, in the Freeborn Wind matter, Plaintiff AFCL thoroughly participated in these public participation opportunities—including filing comments, requesting a contested case, intervening as a party, and presenting evidence and argument to the Commission.

If the MPUC accepts or conditionally accepts the application, then it must decide whether the permit should be preliminarily issued and, if so, prepare "a draft site permit." Minn. R. 7854.0800. At this point, the rules require a series of notices to the public and additional opportunities for comment. Minn. R. 7854.0900. Individuals and organizations may seek to become parties to the proceeding, or they may submit comments orally or in writing through the process, which are part of the record. *Id*.

"Any person" may also make a motion for a contested case proceeding. *Id.*, subp. 5. If there are issues of material fact, MPUC will set the matter for a contest case proceeding before an Administrative Law Judge (ALJ) and identify which issues the ALJ should consider. *Id.* The ALJ then oversees discovery, takes evidence, hears witness testimony, and issues findings of fact, conclusions of law, and a recommended disposition. Minn. Stat. §§ 14.57-14.62. Ultimately, based on the record developed, the MPUC makes a final determination of whether to issue a site permit and, if so, what conditions should apply to the permit. Minn. R. 7854.1000, 7829.2700.

The Commission "shall not issue" a site permit for a LWECS unless it determines 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. In addition, the Commission can and does place conditions on a permit including, among other things, restoration or remediation to address or minimize identified environmental impacts. *Id.*, subp. 4.

C. Reconsideration And Appellate Review

When the MPUC issues a final decision on a site permit, there is an opportunity for further review. Any objection to an MPUC decision must first be addressed through a petition for reconsideration to the MPUC. Minn. Stat. § 216B.17; Minn. R. 7829.3000. The petition is a condition precedent to an appeal and must set forth the basis for any contention that the MPUC

decision is factually or legally wrong. Minn. R. 7829.3000 subp. 2. Following reconsideration, MPUC's decisions are subject to certiorari review before the Minnesota Court of Appeals. Minn. Stat. § 216B.52.

II. FREEBORN WIND FARM

Freeborn Wind Farm filed its site permit application on June 15, 2017, in connection with a 200 MW wind farm straddling the Minnesota-Iowa border, seeking approval to site up to 84 MW of the wind facility in Freeborn County, Minnesota.

A. Permit Application

Freeborn Wind's Site Permit Application is a 138-page document. Freeborn Wind Farm Site Permit Application (July 15, 2017), Huyser Decl. ¶ 12.a. It is further supported by eight appendices that were largely prepared by independent environmental consultants and include: correspondence with state and federal agencies regarding the proposed project and any concerns they may have about potential adverse impacts, Appendix A: Agency Correspondence; a nearly 50-page noise study setting forth the specific parameters used and reporting expected outcomes at hundreds of different potential receptors, Appendix B: Noise Analysis; a 26-page shadow flicker study reported expected effects at hundreds of different potential receptors, Appendix C: Shadow Flicker Assessment; over 75 pages analyzing potential impacts to microwave, radio, and other soundwaves used for telecommunications, Appendix : Telecommunication Reports; over 50 pages analyzing effects on home and business markets in the area, Appendix E: Market Impact Analysis; over 70 pages analyzing potential impacts on native prairie grasslands, water resources, and avian populations, Appendix F: Tier 3 Wildlife Studies; an 85-page site characterization study that catalogues and maps the types of ecosystems and wildlife present within the proposed project area, Appendix G: Tier 1 and 2 Studies; and a 64-page avian and bat protection plan, Appendix H: Draft Avian and Bat Protection Plan. *Id.* ¶¶ 12.b-i.

B. AFCL Raised the Same Arguments During Prior MPUC Proceedings

On July 6, 2017, just two weeks after the Freeborn Wind application filing, AFCL first appeared in the Freeborn Wind docket seeking a contested case, and AFCL formally sought intervention on September 1, 2017. AFCL Comments—and Petition for Contested Case and Referral to OAH (Jul. 6, 2017); AFCL Intervention—Notice of Appearance and Petition for Intervention (Sept. 1, 2017), Huyser Decl. ¶¶ 12.j-k. AFCL was granted party status and, to date, has made at least 114 filings in the Freeborn Wind docket. Huyser Decl. ¶ 13. In those filings, AFCL repeatedly raised the same arguments about environmental review of wind farms at issue in case. These include:

Topic	AFCL Complaint	AFCL Filings, Docket No. 17-410[5]
Setback Requirements	Paragraph 53-54	July 6, 2017; [6] July 13, 2017; Oct. 9, 2017; in testimony and exhibits filed on Dec. 22, 2017 and Jan. 22, 2018; Mar. 20, 2018; Apr. 4, 2018; June 8, 2018; Jan. 9, 2019; Mar. 12, 2019; Dec. 12, 2019.
Noise modeling, including ground factor analysis	Paragraphs 6, 13, 26, 38, 40, 66, 72	July 6, 2017; Oct. 9, 2017; in testimony and exhibits filed on Dec. 22, 2017 and Jan. 22, 2018; Mar. 20, 2018; Apr. 4, 2018, June 8, 2018; Jan. 9, 2019; Sept. 18, 2019; Feb. 13, 2019; May 30, 2019; Dec. 12, 2019.
Shadow Flicker levels, including mitigation.	Paragraphs 26, 40	July 6, 2017; July 13, 2017; Oct. 9, 2017; in testimony and exhibits filed on Dec. 22, 2017 and Jan. 22, 2018; Mar. 20, 2018; Apr. 4, 2018; June 8, 2018; Jan. 9, 2019; May 30, 2019; Dec. 12, 2019.
Eagles	Paragraphs 26, 40	July 6, 2017; Oct. 9, 2017; in testimony and exhibits filed on Dec. 22, 2017 and Jan. 22, 2018; Mar. 20, 2018; June 8, 2018; Jan. 9, 2019.
Decommissioning Plan	Paragraph 40	Mar. 20, 2018; Apr. 4, 2018; Jun. 8, 2018; Jan. 9, 2019; May 30, 2019; Dec. 12, 2019.

[5] All documents are available in Docket No. 17-410. *See* Huyser Decl. ¶ 12.

[6] Although AFCL now complains that MPUC's draft permit template assumes a 1,000-foot minimum setback, Compl. ¶ 54, on July 5, 2017, AFCL took a contrary position in the Freeborn case, arguing that "the Commission has been setting setbacks on a case by case basis" and have "increased over time and ordered at up to 1,5000 feet." *See* AFCL Comments--and Petition for Contested Case and Referral to OAH (Jul. 6, 2017) at 9, Huyser Decl. ¶ 12.j.

Promulgation of Rules	Passim	Mar. 20, 2018; Jun. 8, 2018; Jan. 9, 2019; Mar. 12, 2019; May 30, 2019; Dec. 12, 2019;
Environmental Review, including EAW/EIS	Passim	In addition to the above mentions of rulemaking, Oct. 9, 2017; Dec. 12, 2019; Jan. 28, 2020.
Public Participation: Advisory Task Force	Paragraphs 48, 60, 64	Sept. 1, 2017; Oct. 5, 2017; Oct. 9, 2017; Jan. 9, 2019; and Mar. 12, 2019.
Public participation: Pre-construction meetings, other alleged "ex parte" communications	Paragraphs 66, 68, 69	Jan. 9, 2019; Feb.13, 2019; Mar. 12, 2019; Apr. 23, 2019; May 30, 2019; Dec. 12, 2019.

Early on, AFCL raised arguments about environmental review and sought an advisory task force on the issue. *See* AFCL Motion – For Certification and Petition for Advisory and Scientific Advisor Task Force (Sept. 20, 2017), Huyser Decl. ¶ 12.m. The MPUC granted AFCL's request for a contested case but did not provide for separate environmental review or an Advisory Task Force, explaining that "the contested case process will provide a full and fair opportunity for parties, including AFCL, to develop the issues raised. The contested case process includes a discovery procedure and evidentiary hearings conducted by an Administrative Law Judge during which parties may call and question witnesses and offer exhibits and other evidence." MPUC Order Denying Petition for Advisory Task Force at 3 (Dec. 22, 2017), Huyser Decl. ¶ 12.bb, at 3.

During the contested case, AFCL presented evidence and briefed the merits of the case. AFCL led by arguing that "[t]he State of Minnesota has systemic flaws in its wind siting process and mandated rules have not been promulgated, resulting in projects sited with inadequate and incomplete consideration of criteria . . ." AFCL Initial Brief (March 20, 2018) at 1, Huyser Decl., Ex. 4. AFCL also argued that "[t]he legislature mandated that rules be promulgated addressing siting criteria to include addressing impact on humans and the environment, environmental review, and procedures." *Id.* at 2-4. It further contended that "[t]he wind siting chapter has no provision

for environmental review," and argued that this was "contrary" to "the Minnesota Environmental Policy Act (MEPA). Minn. Stat. Ch. 116D." *Id.* at 6, 7-9; *see also id.* at 61.[7]

In its Findings of Fact, Conclusions of Law, and Recommendations, the ALJ addressed AFCL's arguments. *See* OAH Order - Findings of Fact, Conclusions of Law and Recommendation (May 14, 2018), Huyser Decl. ¶ 12.cc, Findings of Fact ¶ 120 ("No separate environmental document is required for an LWECS project" beyond that set forth in the rules); Findings ¶¶ 218-219 (discussing arguments that additional rulemaking for siting LWECS was required); Findings ¶¶ 280-300 (noise modeling and shadow flicker); Findings ¶¶ 146-15, 248-262 (shadow flicker); Findings ¶¶ 448-451 (eagles)). In Conclusion No. 10, the ALJ concluded that, with the exception of the noise standard, and subject to the special conditions, the Freeborn Site Permit "does not present a potential for significant adverse environmental effects pursuant to the Minnesota Environmental Rights Act and/or the Minnesota Environmental Policy Act." *Id.*, Conclusion ¶10.

In its exceptions to the ALJ decision, AFCL again raised its arguments about the process of environmental review in LWECS siting. *See* AFCL Exceptions to ALJ (June 8, 2018), Huyser Decl. Ex. 5 at 1 (citing "systemic flaws in the wind siting process"), 4 ("It is time for the Commission to site respectfully, using the regulatory tools at hand to prevent foreseeable problems that have cropped up with other projects, such as noise violations, shadow flicker disturbances, avian mortality and need for take permits . . . .")

In its December 19, 2018 Order, MPUC considered AFCL's arguments, noting for example, that "AFCL argued that the Commission's past practices in analyzing and approving site permits for wind farms has been inadequate." MPUC Order Granting Site Permit (December 19, 2018)

[7] The brief also raised the myriad specific issues AFCL mentions in the complaint. *See id* at 11-12 (arguing a 1,000-foot setback lacks a basis); 12-13, 30-37 (discussing noise standards); 13-17 (decommissioning plans); 41-45 (shadow flicker); 55 (eagles)).

(First Freeborn Order), Huyser Decl., Ex. 6, at 11. However, after limited proposed changes to address the noise standard issue, MPUC adopted most of the ALJ's findings and conclusions and granted the permit. *See id.* at 16, 18, 29. In a Petition for Reconsideration of the First Freeborn Order, AFCL again raised its arguments about the environmental review process and standards for LWECS siting, arguing: "Despite Commerce-EERA claims that '[t]he rules to implement the permitting requirements for LWECS are in Minn. Rule 7854,' that is false. There are no statutory siting criteria or rules for siting." AFCL Petition for Reconsideration (Jan. 9, 2019), Huyser Decl., Ex. 7 at 6 (arguing that use of "small wind siting standards" does not provide sufficient review of environmental impacts); *see also id.* (discussing myriad setback, flicker, noise, and other issues addressed above).

The MPUC denied AFCL's petition in its May 10, 2019 Order, again discussing the reasons the Freeborn Wind Farm does not raise environmental or human impacts that require denial, in addition to discussing why AFCL's objections about public participation are also misguided. MPUC Order Amending Site Permit (May 10, 2019) (Second Freeborn Order), Huyser Decl. Ex. 8. **AFCL did not appeal this MPUC decision.** *See* Aug. 27, 2019 Order, *In the Matter of Freeborn Wind Energy LLC's Application for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County*, Case No. A19-1195 (Minn. App. 2019), Huyser Decl., Ex. 9, at 2.[8] **As such, there is a final judgment on all issues resolved in the First Freeborn Order.**

[8] In the Second Freeborn Order, the Commission also amended the order granting the site permit on its own motion. The site permit amendments made limited corrections in the permit language, mostly related to the Freeborn-specific noise conditions set in the permit. AFCL filed a second Petition for Reconsideration. Although its objections to the siting rules and environmental review issues were outside the scope of amendment, AFCL once again raised the arguments. AFCL Petition for Reconsideration (January 9, 2019), Huyser Decl. at ¶ 12.s ("There are no statutory

C. AFCL Again Raised Its Environmental Review Arguments During Permit Amendment Proceedings

Around the time the site permit was granted, NSP acquired the Freeborn Wind project and sought to make some amendments. NSP Site Permit Amendment Application (Aug. 20, 2019), Huyser Decl. ¶ 12.gg. NSP filed with the MPUC its proposed amendments to the site permit materials, describing the proposed changes as well as any impacts the proposed changes may have on the environmental impact assessments. *Id*. The MPUC followed its standard procedures. DOC-EERA reviewed the filings, and parties and the public had the opportunity for comment. *See* DOC EERA Comments – and Recommendations (Nov. 12, 2019), Huyser Decl. ¶ 12.ii. AFCL again participated in the review, re-raising its arguments, and arguing that a second contested case should be ordered to "review the supplemental environmental impact analysis." AFCL Comments on Xcel Permit Amendment (Nov. 12, 2019) at 3, *id* at 4-5, Huyser Decl. ¶ 12.hh (listing two pages of environmental impacts it contends present material issues of fact, including whether the environmental review standards used "are appropriate to use for LWECS" and "have a basis in rule or law").

D. AFCL Filed A Petition For EAW

During the amendment proceedings, AFCL filed a Petition for EAW, seeking additional environmental review of the Freeborn Wind project. AFCL Letter – Petition for EAW (Jan. 28,

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siting criteria or rules for siting."); *see also id.* (re-raising same issues discussed above). MPUC denied reconsideration and AFCL appealed. *See* AFCL Writ of Certiorari and Statement of the Case, *In the Matter of Freeborn Wind Energy LLC's Application for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County*, Case No. A19-1195 (Minn. App. 2019). The court of appeals recognized the appeal was limited to the Second Freeborn Order and stayed that appeal pending a final decision on amendment. Oct. 1, 2019 Order, *In the Matter of Freeborn Wind Energy LLC's Application for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County*, Case No. A19-1195 (Minn. App. 2019). It has now been consolidated with AFCL's subsequent appeal.

2020) (petitioning for an EAW to "be completed regarding Freeborn Wind, LLC project"), Huyser Decl. ¶ 12.x. As MPUC explained in denying the petition and amending the site permit,

> The Commission already referred this docket to the Office of Administrative Hearings for a contested case proceeding. With one exception, the Administrative Law Judge found that the project, with appropriate conditions, ***did "not present a potential for significant adverse environmental effects pursuant to the Minnesota Environmental Rights Act and/or the Minnesota Environmental Policy Act.***" The one exception pertained to compliance with noise standards, and the Commission addressed that concern when it approved the initial site permit.

MPUC Order Denying AFCL's Petitions and Amending Site Permit (March 31, 2020) at 9 (emphasis added)(Freeborn EAW Order), Huyser Decl. ¶ 12.jj. Once again, MPUC denied additional environmental review for both legal and factual reasons, pointing to both the EQB-approved environmental review process which had been followed, as well as the conclusion there were not significant environmental impacts expected from the project. *Id.* at 12-15.

On July 10, 2020, AFCL appealed the denial of an EAW and granting the permit amendments. AFCL Writ of Certiorari and Statement of the Case, *In the Matter of Freeborn Wind Energy LLC's Application for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County*, Case No. A20-0947 (Minn. App. 2019). The Second Freeborn Order and EAW appeal is pending.

III. PLUM CREEK WIND FARM

On November 12, 2019, Plum Creek Wind Farm LLC filed a permit for an up to 414-megawatt wind farm in Cottonwood, Murry, and Redwood counties. The application is a 168-pages in length. Docket No. WS-18-700, *In the Matter of the Application of Plum Creek Wind Farm, LLC for a Site Permit to Construct a 414 MW Large Wind Energy Conversion System in*

Cottonwood, Murray and Redwood Counties, Plum Creek Wind Farm Site Application, (Nov. 14, 2019), Huyser Decl. ¶ 14.a.[9]

The appendices to the application substantially prepared by independent environmental consultants include: correspondence with state and federal agencies regarding the proposed project and any concerns they may have about potential adverse impacts, Appendix A: Agency Correspondence; a nearly 115-page noise study setting forth the specific parameters used and reporting expected outcomes at nearly a hundred different potential receptors, Appendix B: Noise Assessment; a 27-page shadow flicker study reported expected effects at over a hundred different potential receptors, Appendix C: Shadow Flicker Assessment; 48-pages analyzing potential impacts to microwave, radio, and other soundwaves used for telecommunications, Appendix D: Telecom Studies; a cultural resources literature review, Appendix E: Public Cultural Resources Literature Review; a 79-page site characterization study that catalogues and maps the types of ecosystems and wildlife present within the proposed project area, a 67-page avian and bat protection plan, and a decommission plan, Appendices F-H. Huyser Decl. ¶ 14.a.i-ix. Plaintiff's counsel, "as an individual," filed comments related to the noise studies submitted in the application on December 16 and 18, 2019 and June 15, 2020. Overland Letter Re: Trade Secret Designation of Public Information (Dec. 16, 2019); Letter, Overland Legalectric – Use of Improper Ground Factor (Dec. 18, 2019); Overland Letter (June 15, 2020), Huyser Decl. ¶¶ 14.b-d.

The Plum Creek project also requires a Certificate of Need, Docket No. IP6997/CN-18-699, and Route Permit for an associated transmission line, IP6997/WS-18-700. Due to the transmission line component, an environmental impact statement is being prepared as part of this

[9] The MPUC docket is available at https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true&userType=public, by searching for Docket No. 18-700.

proceeding pursuant to Minn. Stat. § 216E.03, subd. 5. *See* Notice of Public Information and Environmental Impact Scoping Meeting (March 9, 2020), Huyser Decl. ¶ 14.e. A contested case will also occur.

IV. RULEMAKING PETITIONS

Plaintiff demands that MPUC "develop rules for environmental review of wind projects." *E.g.,* Compl. ¶¶ 1, 45-57, Prayer for Relief ¶¶ 1, 3, 7. Minnesota law provides specific procedures by which a person can petition any state rulemaking-body to request the "adoption, amendment, or repeal of any rule." *See* Minn. Stat. § 14.09, Minn. R. 1400.2040. AFCL and counsel for AFCL have used this process repeatedly to seek new site permit rules.

AFCL admits in its Complaint that "[a]t least two siting rulemaking petitions have been presented to the Commission, and denied by the Commission," citing the most recent as PUC Docket E999/R-18-518. Compl. ¶ 21.[10] The 2018 Petition was submitted by Plaintiffs' counsel on behalf of "Goodhue Wind Truth." MPUC Docket R-18-518, *In the Matter of the Possible Rulemaking to Amend Minnesota Rules Chapter 7854*, Goodhue Wind Truth - Petition for Wind Siting Rulemaking (July 31, 2018), Huyser Decl. ¶ 15.a. According to the petition, this organization is "a group of landowners and citizens in wind project dockets" and "from extensive firsthand experience as an Intervenor in the Goodhue dockets and from participating and observing matters related to Bent Tree, Pleasant Valley, and Freeborn Wind" dockets. *Id.* at 4-5. The petition argued that the environmental review for LWECS siting is insufficient, and that the Commission

[10] The 2011 Petition, which was submitted individually by Ms. Overland, sought procedural changes at the Commission and was not focused on amending LWECS siting rules. *See* PUC Docket No.10-222, Comments – PPSA Annual Hearing Comments of Carol A. Overland (Feb. 01, 2011 (eDocket No. 20112-59140-01). AFCL also identifies a petition presented to the Minnesota Pollution Control Agency (MPCA). MPCA filed a copy of its response in the Freeborn Wind docket, indicating that it had "concluded that the current understanding of wind turbine noise and its potential effects is insufficient to support rulemaking at this time." Docket No. 17-410, Corr. from Commr. Stine to C. Overland (Sept. 12, 2016). AFCL took no further action.

has not developed rules as required by Minn. Stat. § 216F.05. *Id.* at 2-3. The petition also argued that the siting rules and orders that government LWECS are not sufficient. *Id.*

The MPUC opened a docket and allowed comment on the petition. Docket No. 18-518. More than 25 interested parties commented, including landowners from the Freeborn Wind Project, DOC-EERA, and environmental advocacy organizations. *Id.* DOC-EERA commented:

> There are two specific concerns raised in the current petition: 1) the Petitioner's opinion that the siting criteria in the current rule are inadequate; and 2) the Petitioner's interpretation that there is no environmental review requirement in the rule. It is EERA's view that the Petitioner's opinion misrepresents the state's permit review and environmental review of LWECS under the existing rule.

DOC-EERA Comments and Recommendations (Aug. 24, 2018) at 2, Huyser Decl. ¶ 15.c. As to the first issue, DOC-EERA detailed the current siting criteria and explained that the Petitioners' request to include more specific permit conditions was inappropriate because "the Commission continues to need the latitude to evaluate and evolve these permit conditions and standards as further information becomes available and the effectiveness of any given permit condition is tested." *Id.* at 2.

As to the second issue, of environmental review, DOC-EERA explained "[e]nergy facilities [environmental] review has always been unique, given the varied nature of the different facilities and the legislative time restraints on conducting the processes." *Id.* "That is one reason why the [EQB], who had initial responsibility for review of these applications, authorized alternative environmental review for wind energy projects under their Environmental Review rules." *Id.* DOC-EERA describes the environmental review process as follows:

> It is true that it is unusual that the rule does not require a separate environmental document. However, that doesn't mean a complete environmental review is not performed.
>
> EERA works with LWECS applicants well before an application is submitted to make sure all necessary studies and surveys are performed. These include economic

> and environmental issues, as well as modeling for noise and shadow flicker. The applicants also work with the Department of Natural Resources on bird and bat issues and potential impacts to sensitive resources. It is also part of the EERA guidance that applicants work with the US Fish and Wildlife Service and perform Tier I (site characteristics) and Tier II and III studies that are indicated by Tier I review. In the end, though the environmental review is part of the applicants' filings, the potential impacts and mitigations are thoroughly vetted by EERA and the Commission. Finally, environmental review should include an opportunity for the public to participate in the agency decision-making, and the current wind rules do require public participation in the form of meetings and hearings. EERA therefore strongly disagrees with GWT's description of the process as having "no requirement of environmental review."
>
> As envisioned by the EQB, and as executed by the Commission and EERA, LWECS permit review includes robust environmental review.

Id. at 4. As such, DOC-EERA opposed any further rulemaking for LWECS at this time. Minnesota Center for Environmental Advocacy (MCEA), an environmental advocacy organization, agreed with DOC-EERA. MCEA objected to the petition's claims that "'there are no rules regarding criteria for siting LWECS" stating the claims are "simply not true." Minnesota Center for Environmental Advocacy Comments (Aug. 24, 2018) at 2, Huyser Decl. ¶ 15.d.

On September 26, 2018, the MPUC issued its order denying the petition for rulemaking, explaining that, among other things, varied opinions in the docket reflected the lack of "informed consensus on many issues that continue to be developed in individual cases, which provide a better forum for identifying and addressing project-specific issues." MPUC Order Denying Petition (Sept. 26, 2018) at 4, Huyser Decl. ¶ 15.e. The petitioner filed for reconsideration, which was denied. MPUC Order – Denying Reconsideration (Dec. 11, 2018).

V. AFCL'S COMPLAINT

All three Counts in AFCL's Complaint pertain solely to environmental review procedures. Count One explicitly cites MEPA, Compl. ¶¶ 29, 31, 32, 33, 35, 40, 42, 43, and alleges that MPUC's "[f]ailure to conduct environmental review for [LWECS] is a violation of the Minnesota Environmental Policy Act's requirements for environmental review." *Id.* ¶ 44. Count Two makes

similar arguments, but in the context of the siting rules, arguing that Legislature "mandated development of rules regarding siting and environmental review of LWECS." Compl. ¶ 46. EQB indisputably developed LWECS siting rules and built environmental review into the application and review process. 2001 SONAR, Huyser Decl. Ex. 2; Minn. R. Ch. 7854. AFCL's argument, therefore, is to the *form* of the environmental review—namely that it is not in the form of an EAW or EIS. *Id.* ¶¶ 47, 51, 52, 55-57. Count Three alleges the procedures governing the public's role in the environmental review process are insufficient. *Id.* at 16-20.[11]

ANALYSIS[12]

I. LEGAL STANDARD

On a motion to dismiss under Rule 12.02, the Court must consider whether the "complaint sets forth a legally sufficient claim for relief," considering "only those facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences in favor of the non-moving party." *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 826–27 (Minn. 2011). A motion to dismiss based on collateral estoppel is properly brought as a Rule 12 motion. *See, e.g., Saudi Am. Bank v. Azhari*, 460 N.W.2d 90, 91 (Minn. App. 1990); *State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 588 (Minn. App. 2008).

The Court may consider the complaint, as well as any documents referred to in the complaint. *See Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n. 7 (Minn. 2000). The Court may also consider public records as part of a Rule 12 review. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007). Indeed, it commonly does so when determining whether collateral

[11] Indeed, the public can and often does participate extensively in MPUC proceedings. *See supra* at I (detailing rules permitting participation).

[12] NSP and Plum Creek hereby join in and incorporate by reference the arguments advanced by Defendants and the other Defendant-Intervenors in support of their separate motions to dismiss this action.

estoppel bars a claim. *See, e.g.*, *Hauschildt v. Beckingham*, 686 N.W.2d 829 (Minn. 2004); *Friends of Riverfront*, 751 N.W.2d at 592. When the facts demonstrate that no viable claim exists, dismissal with prejudice is required. *Martens*, 616 N.W.2d at 748.

II. THE COURT LACKS THE SUBJECT MATTER JURISDICTION OVER AFCL'S CLAIMS

A. AFCL Claims Are Barred Because These Matters Have Already Been Raised and Adjudicated

AFCL fully participated in the Freeborn Wind Farm Docket, including the contested case proceeding. In that proceeding, AFCL did not limit its arguments to project-specific details, but also advocated that the LWECS permitting rules, including its environmental review provisions, were insufficient. The First Freeborn Order denied these claims, and AFCL did not appeal. AFCL does not get a second chance to raise the same issues here. AFCL is barred by res judicata and collateral estoppel from relitigating the same issues and wasting judicial resources.

The doctrines of res judicata and collateral estoppel are related common-law doctrines based on the principle that "a right, question or fact distinctly put in issue and directly determined . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Hauschildt*, 686 N.W.2d at 837 (quotation omitted). Res judicata will absolutely bar a subsequent claim where: "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter." *Id.* at 840 (citation omitted). Res judicata "not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action." *Id.* (citing *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001); *Shober v. Cmmr. of Revenue*, 853 N.W.2d 102, 111 (Minn. 2013). "The commonly used test for determining whether a former judgment bars subsequent action is to inquire whether the same evidence will sustain both actions." *Schober*, 853 N.W.2d at 111.

Collateral estoppel, by contrast, is a narrower doctrine, which requires largely the same elements, but applies when only the issue to be precluded is identical to the issue raised in the prior agency adjudication. *Hauschildt*, 686 N.W.2d at 837. *See also, e.g.*, *Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 321 (Minn. App. 2004); *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996). Here, both doctrines bar Plaintiff's claims.

Minnesota courts have long held that res judicata and estoppel doctrines bar MERA claims for issues that have been raised and addressed in a prior action. *Friends of Riverfront*, 751 N.W.2d at 589; *Friends of Tower Hill Park v. Foxfire Props., LLC*, A19-111, 2020 WL 994767, at *2 (Minn. App. Mar. 2, 2020); *State ex rel. Neighbors for East Bank Livability v. City of Minneapolis*, No. 27-CV-16-17020, 2017 WL 3166826, at *7 (Minn. Dist. Ct. March 24, 2017).

The recent case of *Friends of Tower Hill Park* is on point. A developer obtained a land-use permit from a citing planning commission. 2020 WL 994767, at *1. Challengers participated in the proceedings before the citing planning commission raising claims about environmental impacts, unsuccessfully appealed the decision and filed a petition for an EAW that was denied. *Id.* Much like AFCL here, the Challengers then attempted to bring a MERA action in district court, arguing that their claims were not collaterally estopped because "[t]he broad language of Minn. Stat. § 116B.12" precludes application of the doctrine. *Id.* at *2. The court of appeals disagreed, finding that so long as a quasi-judicial decision on the same issues was reached, collateral estoppel bars a subsequent MERA claim. *Id.* at *3-4.

Here, AFCL itself expressly acknowledges that:

> Over the last three years, AFCL has availed itself of administrative options as an active participant in the Freeborn Wind Project administrative permitting process as an intervenor, a petition[] for contested case and advisory task force, comments, rulemaking petition, and other participatory options.

Compl. ¶ 49. Indeed, AFCL has also fully litigated the facts and claims that the LWECS siting rules are insufficient and lack environmental review as a party to the Freeborn Wind Site Permit docket. Compl. ¶ 5. All factors for applying res judicata and collateral estoppel present here.

1. Same Parties and Same Facts

AFCL raised the issues against the same party, the MPUC, prior to and during the contested case and in its first Petition for Rehearing—all of which are the subject of the First Freeborn Order—are identical to those asserted in this Complaint. For example, AFCL now alleges that this case "challenges the process and substantive issues in the Public Utilities Commission's handling of the permit review for [LWECS]"; "challenges the regulatory framework within which the Commission, and the Environmental Quality Board before it, have been issuing wind site permits over the last 20+ years, a process violating Minnesota environmental law"; and argues "the state has failed to comply with the Minnesota Environmental Policy Act, environmental provisions of the Power Plant Siting Act, and has failed to promulgate siting rules for wind as directed by the Minnesota legislature, issuing permits with no basis in law or rule and rejecting petitions for corrective rulemaking." Compl. ¶¶ 22–23.

As laid out above, AFCL has ***repeatedly*** raised these same arguments, facts, and issues in the Freeborn Wind Site Permit Application matter. Both the ALJ and MPUC specifically considered AFCL's arguments that the environmental review process and standards were insufficient. *See* MPUC Order Denying Petition for Advisory Task Force at 3 (Dec. 22, 2017); OAH Findings of Facts, Conclusions of Law, and Recommendations (May 14, 2018), Docket No. 17-410 at Findings ¶¶ 120, 218–219; Order Granting Site Permit (Dec. 19, 2019). Indeed, when the MPUC issued its First Freeborn Order granting the permit, it expressly found that the project—and the processes used to review it—complied with both MERA and MEPA.

Plaintiffs arguments were not limited to their effect on Freeborn Wind alone, either. Had the MPUC agreed with AFCL on this argument, other LWECS permit applications would have been subject to the same standards. Likewise, AFCL could have obtained appellate review of the First Freeborn Order, including its rejection of AFCL's arguments about environmental review, and any appellate decision would have bound the MPUC in its other permit proceedings. AFCL, however, elected not to file a petition for certiorari review and, therefore, the MPUC decision is a final judgment.[13] *See State v. Lemmer*, 736 N.W.2d 650, 659 (Minn. 2007) (finding final judgment on the merits requirement met for purposes of collateral estoppel where party had a right of appeal, but did not exercise it). Thus, MPUC's final decision denying AFCL's arguments bar AFCL's claims as against all parties and projects, including both the Freeborn Wind and Plum Creek projects. *See Friends of Tower Hill Park*, 2020 WL 994767, at *5 (holding that even when a quasi-judicial decision did not expressly mention MERA there was a preclusive effect so long as it "expressly addressed the very factual issue that is the basis for appellant's MERA claim").

2. Fair Opportunity to Be Heard

AFCL has had a full and fair opportunity to be heard on these issues. *Joseph*, 636 N.W.2d at 328.[14] It presented evidence, was able to conduct cross-examination and provide argument over

[13] Plaintiff not only did raise the arguments; it was also obligated to do so to obtain any judicial review. *See Minn. Ctr. for Evtl. Advoc. v. Minn. Pub. Utils. Comm'n*, No. A-10-812, 2010 WL 5071389, at * 9 (Dec. 14, 2010) (finding environmental advocacy group barred from raising new environmental claims in MERA action, where the claims were not presented to MPUC for reconsideration under Minn. Stat. § § 216B.27 and stating that "***[n]o cause of action*** arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petition in the action or proceeding" sought timely reconsideration. (quoting Minn. Stat. § 216B.28, subd. 2))) [hereinafter *MCEA v. MPCA*].

[14] Courts also consider whether the agency was impermissibly biased, *see Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 119 (Minn. 1991), but Plaintiff makes no allegations of impermissible bias in its Complaint.

the course of three years. *Friends of Riverfront*, 751 N.W.2d at 590 (finding procedural safeguards sufficient where party had opportunity to "present evidence and legal arguments.").

3. Final Judgment

The MPUC's First Freeborn Order is a quasi-judicial decision subject to judicial review. *See, e.g.*, Minn. Stat. §§ 216A.02, subd. 3 (defining MPUC's quasi-judicial authority); 216A.05, subds. 1, 5; 216B.52, subd. 1 (providing for appeal of MPUC decisions under the Minnesota Administrative Procedures Act). As noted, AFCL did not seek judicial review of the First Freeborn Order and it is a final judgment for purposes of res judicata and collateral estoppel. *Lemmer*, 736 N.W.2d at 659.

Accordingly, AFCL is barred by res judicata and collateral estoppel from seeking to re-litigate the same factual circumstances and cause of action, and is also collaterally estopped from re-asserting these issues under MERA in this action.

III. WERE AFCL'S CLAIMS NOT BARRED BY COLLATERAL ESTOPPEL OR RES JUDICATA, AFCL FAILS TO STATE A CLAIM UNDER MERA.

A. Plaintiffs' MERA Claims Fail As A Matter of Law Because the Environmental Review of LWECS is MEPA-compliant.

AFCL's MERA claims also fail as a matter of law because the environmental review process for siting LWECS complies with MEPA.

To bring a successful cause of action under Minn. Stat. § 116B.10, AFCL has "the burden of proving that the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit [being challenged] is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction." *Id.*, subd. 2. MEPA, passed two years later, incorporates the same definitions as MERA and establishes the procedures by which the requisite environmental review must occur in the agency permitting process. Minn. Stat. § 116D.03, subd. 2 (incorporating definitions from MERA); subd. 6

(prohibiting any permit that is "likely to cause pollution, impairment, and or destruction" of the environment, so long as there is a feasible and product alternative). Indeed, it has long been recognized that MEPA and MERA are part of "a coherent legislative policy." *People for Envtl. Enlightenment & Resp. (PEER) v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978); *White Bear Lake Restoration Ass'n ex rel. Minnesota v. Minn. Dep't of Nat. Res.*, A18-0750, -- N.W.2d --, 2020 WL 3980718, at *4 (Minn. Jul. 15, 2020) (explaining same and noting that MEPA incorporates MERA's definition of "pollution, impairment, or destruction." (citations omitted)).

As a result, when MEPA is satisfied, a MERA claim necessarily fails as a matter of law. *MCEA v. MPUC*, 2010 WL 5071389, at *10 ("[B]ecause we have determined that MPUC's environmental review is adequate under MEPA, there is no genuine issue of material fact, and the MERA claim fails as a matter of law."). Likewise, where MEPA allows an exception to environmental review requirements, no MERA action may be brought for failure to conduct environmental review. *See, e.g.*, *Holte v. State*, 467 N.W.2d 346, 348 (Minn. App. 1991) (MERA challenge to the later-enacted Minnesota Grasshopper Control Act (MGCA) failed because "had the legislature wished to subject the [MGCA] to MERA it could have done so explicitly.")

In *State by Smart Growth Minneapolis v. City of Minneapolis*, the Minnesota Court of Appeals considered a MERA action brought to challenge a metropolitan-area comprehensive plan. 941 N.W.2d 741 (Minn. App. 2020). Relying on an EQB rule that had entirely exempted the process from MEPA's EAW and EIS requirements, the comprehensive plan at issue had been developed without conducting environmental review. *Id.* at 743. Plaintiffs nonetheless argued they had a viable MERA claim because the comprehensive plan included elements that would have

a materially adverse effect on the environment. *Id.* The Court disagreed because the review process was MEPA-compliant, explaining:

> [T]he city is in compliance with the requirements of MEPA because it is exempted from environmental review. Allowing MERA to be used to force such a review is contrary to the express legislative intent manifest in such an exemption. Such a result would also be contrary to the plain language of MEPA, and would create a conflict between MERA and MEPA, which were intended to complement one another.

Id. at 745. In short, even in a case where no environmental review occurred, the MERA claim failed because an "express exemption in the later-enacted MEPA prevails over the previously enacted MERA," the court affirmed dismissal. *Id.* at 745.

Likewise here, in a statute enacted after MERA, the legislature directed EQB to adopt rules governing the siting of LWECS, including any "requirements for environmental review." *See* Minn. Stat. § 116C.691-697 (1995), later renumbered to § 216F.01-.07. EQB is also responsible for determining environmental review processes under MEPA, including whether alternative review procedures are appropriate for a particular class of project. *See* Minn. Stat. § 116D.04, subds. 4a; 5a.

Consistent with those authorities, in 2001 EQB finalized the first rules governing the siting of LWECS in Chapter 4401. 2001 Sonar, Huyser Decl., Ex. 2. In deciding to use an application-based environmental review process, EQB stated that it was "not requiring in these rules that an Environmental Assessment Worksheet or an Environmental Impact Statement be prepared on a proposed LWECS. It is sufficient that the environmental impacts and mitigative measures be discussed in the application itself. If an issue of concern were to be raised specific to a particular wind project, the EQB could ask for additional examination of those impacts and could address

the concern through permit conditions or by moving some of the turbines." 2001 SONAR, Huyser Decl., Ex. 2.[15]

Minnesota law continues to provide for an alternative review process through the application and adjudication at the MPUC. Minnesota Rule 4410.4300, subp. 3 expressly states:

> For construction of a wind energy conversion system, as defined in Minnesota Statutes section 216F.01, designed for and capable of operating at a capacity of 25 megawatts or more, the PUC is the RGU and environmental review must be conducted according to chapter 7854.

In addition to setting forth the topics of environmental review that are required, chapter 7854 also states that "[t]he analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts 7849.1000 to 7849.2100, and Minnesota Statutes, chapter 116D. No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project." Minn. R. 7854.0500, subp. 7.

In short, the environmental review process for LWECS is a MEPA-authorized environmental review process, and therefore cannot as a matter of law violate MERA. The later-enacted LWECS statutes and later-enacted MEPA rules both establish the application and MPUC processes as the statutorily required environmental review.[16] AFCL's MERA claims necessarily fail as a matter of law.

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[15] Indeed, site permits typically involve pages of conditions to reduce, minimize, or avoid impacts to humans and the environment. For example, the Freeborn Wind Site Permit is 26 pages long with more than 45 conditions just on environmental impacts that must be met, in addition to numerous other compliance requirements. Huyser Decl., Ex. 6.

[16] AFCL also seems to argue that the siting rules should be more specific, and that it is improper for MPUC not to develop rules with site-specific criteria, such as specific setbacks or flicker guidelines. Neither MERA nor MEPA require this. In any event, as DOC-EERA explained in response to the Petition for Rulemaking, establishing such specific criteria in rules limits an agency's ability to respond to developing science or site-specific considerations. *See* supra at IV; *In re Lawful Gambling License of Eagles Aerie 2341 v. State Lawful Gambling Control Bd.*, 533 N.W.2d 874, 876 (Minn. App. 1995) (stating once the board adopted a rule, it had no authority to

B. AFCL's Claim Also Fails Because Environmental Review Does Not Result In The "Pollution, Impairment, Or Destruction" Of The Environment.

AFCL, as a party to the Freeborn Wind proceeding, sought review of the MPUC's decisions and environmental review processes under MEPA. AFCL also seeks an order finding that the environmental review procedures used by MPUC in reviewing permits for LWECS violates MERA. As a matter of law, however, "environmental review cannot result in pollution, impairment, or destruction of the environment" and therefore challenges to environmental review processes cannot state a viable MERA claim. *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency.*, 569 N.W.2d 211, 218–19 (Minn. App. 1997).

A MERA action is viable only when a plaintiff proves that an action 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). "Pollution, impairment, or destruction" is defined by MERA "as either (1) 'any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit' or (2) 'any conduct which materially adversely affects or is likely to materially adversely affect the environment.'" *White Bear Lake Restoration Ass'n*, 2020 WL 3980718, at *4 (quoting Minn. Stat. § 116B.02, subd. 5). "Environmental review," however, "is a process of information gathering and analysis." *Nat'l Audubon Soc'y*, 569 N.W.2d at 218 (citing

formulate conflicting or limiting policy on a case-by-case basis). For the time being, MPUC continues to develop its more specific guidance on an adjudicatory basis rather than through rulemaking, and it is squarely within its authority to do so. Minn. Stat. § 14.06(b) (exempting MPUC from rulemaking mandate); *In re Nw. Bell Tel. Co.*, 371 N.W.2d 563, 567–68 (Minn. App. 1985) (finding that public utilities commission had not erred in issuing order rather than promulgating rule; public utilities commission had right to exercise its discretion to decide which method, rulemaking or case-by-case determination, was most appropriate in formulating administrative policy).

Coon Creek Watershed Dist. v. State Envtl. Quality Bd., 315 N.W.2d 604, 605 (Minn. 1982)). As such, claims under MERA that challenge only environmental review necessarily fail.

Instead, review of an agency's actions in conducting environmental review occurs under MEPA, not MERA. *MCEA v. MPUC*, 2010 WL 5071389, at *10; *see also White Bear Lake Restoration Ass'n*, 2020 WL 3980718, at *4. Indeed, MEPA provides multiple enforcement mechanisms for parties seeking to challenge environmental review. *See* Minn. Stat.§ 116D.04, subds. 2a(e) (petition for review); 10 (right to seek review by writ of certiorari), 11 (bring district court action for failure to timely act); 13 (district court action available to bring injunction, compel performance, or other appropriate action). *See also, e.g.*, *In re Applications of Enbridge Energy, Ltd Partnership for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota*, 930 N.W.2d 12 (Minn. 2019) (considering MEPA challenges to environmental review of proposed pipeline); *In the Matter of the Petition for Environmental Assessment Worksheet for the 33rd Sale of State Metallic Leases in Aitkin, Lake, and Saint Louis Counties*, 838 N.W.2d 212 (Minn. App. 2013) (considering MEPA challenges to environmental review of mining leases).

The Minnesota Court of Appeals has already squarely rejected the use of MERA to challenge whether MPUC's environmental review complies with MEPA in similar circumstances. In *MCEA v. MPUC*, MCEA brought a MERA claim, challenging the environmental review MPUC conducted for purposes of routing a pipeline, which is also done through a similar application-based alternative review process. 2010 WL 5071389, at *10. *See* Minn. R. 7852.1500; *In re North Dakota Pipeline Co. LLC*, 869 N.W.2d 693 (Minn. App. 2015) (recognizing that application-based process as an acceptable EIS alternative). In denying MCEA's MERA claim, the court of appeals explained that "MEPA, rather than MERA, is the 'appropriate vehicle' with which to challenge

the adequacy of MPUC's environmental review. . . ." *Id.* at *10; *Nat'l Audubon Soc'y*, 569 N.W.2d at 218–19 ("MERA may not be used to seek review of an agency's decision not to prepare an EIS, because MEPA is the appropriate avenue for such decisions.")

As such, the claims necessarily fail as a matter of law.

CONCLUSION

For the reasons stated herein, Defendant-Intervenors Northern States Power Company and Plum Creek Wind Farm, LLC respectfully request the Court dismiss Plaintiffs' Complaint in its entirety with prejudice.

Dated: August 5, 2020

s/ Lisa M. Agrimonti

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