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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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

Plaintiff,

v.

Minnesota Public Utilities Commission,

Defendant,

and

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

Defendant-Intervenors.

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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

Plaintiff AFCL does not provide the Court any basis to deny the motions to dismiss filed by Defendants and Defendant-Intervenors. First, Plaintiff repeatedly admits, as it must, that it has already raised the same issues in this case as part of quasi-judicial proceedings before the Minnesota Public Utilities Commission that resulted in a final decision—the First Freeborn Order. Plaintiff attempts to distinguish this case as "systemic," but the MPUC proceedings can and did consider those "systemic" arguments. Res judicata and collateral estoppel bar Plaintiff from re-litigating the same issues with the same party in this forum.

Plaintiff also fails to establish that its claims state a viable claim under MERA. Plaintiff does not dispute that an agency action that is MEPA-compliant fails to state a claim under MERA, and Minnesota's appellate courts have recognized in related contexts that EQB's permit-based environmental review process is a MEPA-compliant process. Likewise, Plaintiff attempts to

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distinguish adverse case law under MERA because it brings its cause of action under section 116B.10 and the cases cited involved actions under section 116B.03. This argument ignores that the injury for which MERA provides a remedy—"pollution, impairment, or destruction" of natural resources—is the same in both sections, and it is that language which applies and results in the failure of Plaintiff's environmental-review based claims.

Plaintiff had available a forum and statutory mechanism to seek a remedy for the harms alleged. That forum is not this Court and the statutory mechanism is not MERA. This Court should dismiss Plaintiff's claims for lack of jurisdiction and because they fail as a matter of law.

ANALYSIS

I. LEGAL STANDARD

Plaintiff argues that the Court cannot consider the administrative records and appellate proceedings it raised in its Complaint. Pl's Response to Motions to Dismiss ("Pl's Resp. Mem.") at 2, 17–24. To the contrary, the Court can and should consider the documents and facts cited in support of the motions to dismiss without converting them to summary judgment.

As Plaintiff acknowledges, the Court may consider documents that are encompassed or referenced in the Complaint. Pls' Resp. Mem. at 18 (citing *Martens v. Minn. Mining Mfg. Co.*, 616 N.W.2d 732, 739 n. 7 (Minn. 2000)). Plaintiff's Complaint refers to the MPUC proceedings, positions it took in those proceedings, and the MPUC's decisions therefrom. *E.g.,* Compl. at ¶¶ 5 (citing LWECS dockets, including Freeborn Wind, WS-17-410, and Plum Creek, WS-18-700), 6 (indicating review of dockets led to identification in complaint), 8–10, 13, 14–16 (discussing specific arguments AFCL raised in Freeborn Wind); 19–21 (discussing various rulemaking petitions and processes), 22–23 (making allegations about scope of Freeborn Wind proceedings as compared to scope of complaint), 25, 34, 36–37 (discussing project details), 48 (discussing AFCL's participation in Freeborn Wind proceedings), 61–63, 67, 69, 70. As such, the Court is

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entitled under Rule 12 to review the public dockets, Plaintiff's filings therein, and the MPUC orders and is not required to rely solely on Plaintiff's characterizations of them.

Second, all the documents attached are public documents, as they are either agency rulemaking documents or from MPUC public dockets. Here, Defendant-Intervenors notably do not ask the Court to review the documents to establish the truth of facts relevant to the merits of Plaintiff's assertions—for example, whether a particular ground factor is appropriate or whether the environmental harms alleged will, in fact, occur. Instead, the documents are provided to establish facts relevant to collateral estoppel, *i.e.*, that Plaintiff did raise specific issues and those issues were addressed in the MPUC's First Freeborn Order. It is well-established that courts may take such documents into consideration on a motion to dismiss, especially where collateral estoppel is an issue. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004); *State ex rel. Friends of Riverfront v. City of Minneapolis,* 751 N.W.2d 586, 592 (Minn. App. 2008).

Finally, the Court may take judicial notice of legal documents, including SONARs, quasi-judicial administrative decisions, and the decisions of the Minnesota Court of Appeals. *Qualley v. Comm'r of Pub. Safety*, 349 N.W.2d 305, 308 (Minn. App. 1984) (declining on motion to dismiss to "entertain . . . speculation" and instead taking judicial notice of court records).

II. PLAINTIFF CANNOT OVERCOME THE LACK OF JURISDICTION

As Defendant-Intervenors set forth in their motion to dismiss, Plaintiff's claims are all barred by the doctrines of res judicata and collateral estoppel because Plaintiff raised the same issues in the Freeborn Wind matter as it raises here. Defendant-Intervenors NSP and Plum Creek Mem. in Supp. of Mot. to Dismiss ("Def-Intervenors Mem.") at 18–22. Plaintiff does not dispute that these doctrines to prevent litigants from using MERA to re-litigate issues lost in an administrative proceeding to which it was a party. Nor can it. *Friends of Riverfront*, 751 N.W.2d at 589; *Friends of Tower Hill Park v. Foxfire Props., LLC*, No. A19-111, 2020 WL 994767, at *2

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(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 *4–*11 (Minn. Dist. Ct. Mar. 24, 2017).

Plaintiff also admits that "these claims have been raised repeatedly in individual permitting dockets," Pl's Resp. Mem. at 4, and have "overlapping issues," Pl's Mem. in Supp. of T.I. at 8-9. Plaintiff argues that the doctrines should not apply because this case alleges "systemic problems" and Freeborn Wind involved only a single permit. This argument fails for several reasons.

First, it ignores that the gravamen of both a collateral estoppel and res judicata analysis is whether, in a prior case involving the same parties (here AFCL and the MPUC), Plaintiff could have or did raise the same issues. Here, Plaintiff raised the same "systemic" arguments in the Freeborn Wind matter. Def.-Intervenors' Mem. at 7–12, 20–21. Notably, Plaintiff does not dispute the accuracy of Defendant-Intervenors' recitation of AFCL's arguments. If there are differences in the factual circumstances—and Defendant-Intervenors dispute there are—it would merely mean that Plaintiff's case is barred by collateral estoppel, rather than res judicata. *Hauschildt*, 686 N.W.2d at 837 (explaining that while collateral estoppel is narrower doctrine, it applies where the issue to be precluded is identical to the issue raised in the prior agency adjudication.)

Second, although Plaintiff argues that "[a]ppeal via certiorari of the many individual permits after invention . . . cannot and will not" be sufficient to address its concerns, the propriety of environmental review mechanisms can be and *is typically* reviewed in precisely that manner. *E.g., Minn. Ctr. for Envtl. Advocacy v. Minn. Pub. Utils. Comm'n (MCEA v. MPUC)*, No. A10-812, 2010 WL 5071389 (Minn. App. Dec. 14, 2010) (reviewing under MEPA whether similar permit-based alternative review process used for pipelines was a MEPA-complaint process and holding that it was); *In re North Dakota Pipeline Co.,* 869 N.W.2d 693 (Minn. App. 2015)

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(reviewing environmental process used by agency and recognizing that application-based process as an acceptable EIS alternative, if followed). *See also, e.g.*, *In re Applications of Enbridge Energy, LP for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minn.,* 930 N.W.2d 12 (Minn. 2019) (challenging 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) (challenging environmental review of mining leases).

Indeed, it is clear from the structure of MERA that the legislature intended such a result because, where an ongoing administrative proceeding exists, § 116B.09 directs the party to intervene in the administrative proceedings, rather than to sue under § 116B.10.[1]

Finally, Plaintiff's suggestion that it is not trying to assert district court jurisdiction "over specific permitting decisions or actions" is belied by its request for injunctive relief—which explicitly seeks to stop all proceedings and construction for the four individual wind farms at issue in those specific dockets. *See* Pl's Mem. in Supp. of T.I. at 2. Indeed, Plaintiff even seeks to enjoin Freeborn Wind—a permit proceeding *to which it is a party and in which it lost the same arguments it raises here.* That AFCL chose not to appeal the First Freeborn Order was its own tactical decision. It is now bound by that decision and barred from re-raising the issues in this

[1] Plaintiff also misunderstands the lesson *White Bear Lake Restoration Ass'n ex rel. Minnesota v. Minn. Dep't of Nat. Res.,* A18-0750, 946 N.W.2d 373, 379–80(Minn. Jul. 15, 2020) teaches as it relates to this case. The issue in the *White Bear* case was whether the plaintiffs could proceed under § 116B.03, where they alleged DNR was not following its legal obligations to consider the cumulative harms of permits issued over decades. DNR argued that the plaintiff should have to follow the process set forth in § 116B.10. Here, Plaintiff does not allege "cumulative harms" and does not seek to proceed under § 116B.03. The appellate courts have not yet reached the merits of any other issues raised in the case.

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forum. Plaintiff plainly asks this Court to do something it cannot do—to override a final, prior quasi-judicial decision to which AFCL was a party.

III. PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW

A. Plaintiff Fails to Show That Environmental Review is Not MEPA-Compliant.

Plaintiff does not dispute that its MERA claim fails as a matter of law, provided the environmental review of a LWECS is MEPA-complaint. Under existing law, the environmental review of a LWECS is MEPA-complaint. Indeed, Plaintiff cites the EQB rule that expressly states that "the analysis of environmental impacts" required by LWECS Rule 7854.0500 "satisfies the environmental review requirements of chapter 4410. . . . and Minn. Statutes, chapter 11D," *i.e.,* MEPA. Pl's Resp. Mem. at 11. *See also* 4410.4300, subp. 3.D (for LWECS, "environmental review must be conducted according to chapter 7854.")

Plaintiff characterizes the environmental review process as limited to just "application content." Pl's Resp. Mem. at 12, 17. This is not accurate. EQB embedded the environmental review in the overall permit process—a process that includes gathering factual information, Minn. R. 7854.0500, public review and participation, *id.* at 7854.0900, and both preliminary and final agency determination on the completeness and content of the application materials, *id.* at 7854.0600, .1000. *See also, e.g.,* Huyser Decl. Exs. 6, 8 (MPUC orders analyzing environmental impacts and setting conditions based thereon). Environmental review of proposed pipeline routes in Minnesota is conducted in the same manner. *See, e.g.,* Minn. R. Ch. 7852.2700 (environmental studies required as part of application), 7852.1700 (public hearings required), 7852.1400, .1800, .1900 (preliminary and final reviews to consider the completeness, substance). In that context, the EQB's embedded environmental review process has been found to be MEPA-complaint.[2] *MCEA*

[2] Like the LWECS review, the permit rules governing other utility siting decisions do not contain specific numerical environmental benchmarks, but rather set categories of information to be

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v. MPUC, 2010 WL 5071389, at *4. Plaintiff identifies no reason the same process, in the context of a LWECS, would violate MEPA.

B. Environmental Review Is Not A Viable MERA Claim.

Plaintiff also does not dispute that Minnesota courts have repeatedly held that challenges to environmental review procedures are not actionable under MERA. Instead, Plaintiff argues that the cases cited involve claims under § 116B.03, whereas Plaintiff seeks to assert claims under § 116B.10. Pl's Resp. Mem. at 7. It is a distinction without a difference.

Under either section, the gravamen of a MERA claim is whether the Plaintiff can show court intervention is necessary to "protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction" caused by conduct of the defendants. Minn. Stat. §§ 116B.10, subd. 2; 116B.03, subd. 1; 116B.04(a). "[E]nvironmental review cannot result in pollution, impairment, or destruction of the environment"—the standard common to both sections of MERA—because it is "a process of information gathering and analysis" not conduct which causes harm. *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency*., 569 N.W.2d 211, 218–19 (Minn. App. 1997); *MCEA v. MPUC*, 2010 WL 5071389, at *10.[3]

Plaintiff does not allege any specific harm to a protected natural resource, and the environmental review procedures it challenges are not an action that can cause pollution,

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provided and considered. *See, e.g.*, Minn. R. Ch. 7852 (routing of pipelines); Ch. 7850 (site or route permit for power plant or line). The benchmarks are often developed and applied on a case-by-case base, to allow scientific development and to ensure the criteria used are appropriate to the circumstances of the particular project at issue. *See* Def-Intervenors' Mem. at n. 16.

[3] Section 116B.03 provides for claims that the alleged rule or permit was *violated* and caused pollution, impairment, or destruction of natural resources; it may be brought against private or governmental entities. Minn. Stat. §§ 116B.03–.04. By contrast, § 116B.10 involves allegations that a rule or permit is *inadequate* to protect natural resources from pollution, impairment or destruction and can be brought only against a government entity. *See, e.g.*, *White Bear Lake Restoration Ass'n*, 946 N.W. at 379.

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impairment, or damages to natural resources. As such, Plaintiff's claims challenging environmental review procedures are not actionable under MERA.

CONCLUSION

For the reasons stated herein, in their prior memorandum and in the memoranda filed by Defendant and other Defendant-Intervenors, Defendant-Intervenors Northern States Power Company and Plum Creek Wind Farm, LLC respectfully request the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Dated: August 26, 2020

/s/ Lisa M. Agrimonti

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