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

MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

Plaintiff Association of Freeborn County Landowners ("AFCL") seeks an injunction of unspecified duration that would effectively halt all wind energy development in the State of Minnesota until the Minnesota Public Utilities Commission ("MPUC") adopts rules to AFCL's satisfaction. AFCL's temporary injunction relies on unsupported assertions that the Court must act to avoid unidentified harms. Halting wind development in Minnesota, however, would adversely impact the state's energy and resource planning. For decades, the Minnesota Legislature has undertaken policy initiatives and passed legislation to encourage the transition of Minnesota's energy consumption from traditional coal- and gas-based generation sources to renewable energy sources. The transition is driven, in significant part, by a goal of reducing the adverse environmental impacts of greenhouse gas emissions. Wind energy is one of the generation

resources that the legislature explicitly identified to replace coal-based energy sources and it plays an important role in energy reliability in Minnesota.

The injunction AFCL seeks could also result in more than $ 1 billion dollars in damages to just the Freeborn Wind and the Plum Creek Wind Farms, largely due to the loss of expiring federal production tax credits. In addition, there are yet to be quantified adverse consequences of AFCL's proposed injunction, including lost tax revenue to local communities, payments to participating landowners and income to the construction workers building wind projects in Minnesota.

In bringing its motion, AFCL glosses over the economic consequences of its motion not only to the parties, but also to Defendant-Intervenors' customers and the State of Minnesota. AFCL has ignores the associated bonding requirement for an injunction and gives only cursory mention to long-standing Minnesota precedent favoring the development of renewable energy, including wind energy, to reduce our reliance on fossil-fuel generation.

The Court lacks jurisdiction to issue the relief requested. AFCL seeks to make collateral attacks on current administrative proceedings or appeals therefrom. Neither Minnesota Environmental Rights Act ("MERA"), nor principles of common law, support this Court acting in such a capacity. As detailed in the motions to dismiss filed by Defendant MPUC and Defendant-Intervenors, including Northern States Power Company ("NSP") and Plum Creek Wind Farm, LLC ("Plum Creek"), AFCL cannot show a likelihood of success because its claims fail as matter of law, based upon, among other things, Plaintiff seeks to reargue legal issues it has already raised extensively in administrative and appellate proceedings, and therefore is collaterally estopped. Plaintiff's alleged facts also do not state a viable claim under MERA, Minn. Stat. § 116B.10. Further, the requested injunction also would result in significant and broad harms. As such, the Court should deny Plaintiffs motion for temporary injunction.

BACKGROUND

I. FREEBORN WIND PROJECT

A. Current Project Status

The Freeborn Wind Farm ("Freeborn Wind" or "Freeborn Wind project") is planned to be an up to 200 MW wind farm straddling the Minnesota-Iowa border. Declaration of Darin W. Schottler (Aug. 19, 2020) ("Schottler Decl.") ¶ 2. The Minnesota Public Utilities Commission ("MPUC") granted a site permit to locate up to 84 MW of the wind facility in Freeborn County, Minnesota. *Id.*

The Iowa and Minnesota portions of the Freeborn Wind project are dependent on each other, meaning that infrastructure provided for in the Minnesota site permit is required for the entire project to go into service and be operational. *Id.* The project will include 100 wind turbines. *Id.* ¶ 5. Freeborn Wind is permitted to install up to 42 turbines in Minnesota, but it will install just 24 in the state. *Id.* ¶ 3. A substation that is necessary for the entire project is permitted to be built in Minnesota. *Id.* In addition to the wind farm site permit, Freeborn Wind also sought and received a permit from the MPUC to build a seven-mile 161 kV transmission line to connect the wind farm to the transmission grid. *Id.* ¶ 4.

Freeborn Wind received its permits in May 2019 and began construction. The Operations and Maintenance building for the project is 98% completed, and the substation is 53% built, with all foundations built and the main power transformer set. *Id.* ¶ 5. Forty-two percent of the collection cables are trenched in and 43% of the transmission line structures are set. *Id.* The foundations for 33 out of 100 turbines have been poured, and the turbines themselves are set to arrive on September 21, 2020. *Id.* Installation of the turbines will then begin promptly on September 28, 2020. *Id.*

NSP has incurred $107,730,000 in actual project costs to date. *Id.* ¶ 6. In total, NSP is already committed to costs of $282,460,000, which could not be recovered if the project were not completed. *Id.*

B. Production Tax Credits

Plaintiff mentions in passing that the requested injunction may harm the ability of wind farms to qualify for production tax credits. Indeed, this is a significant factor in wind farm development, and its benefits flow to NSP's customers who receive lower-cost energy as a result. Declaration of Peter Mathieson (Aug. 19, 2020) ("Mathieson Decl.") at ¶ 9.

Section 45 of the Internal Revenue Code ("I.R.C.") provides a production tax credit ("PTCs") on the electricity output from wind farms in the United States. Freeborn Wind, like many other such projects, was financed assuming it would qualify for PTCs. *See id.* ¶ 3. PTCs may be claimed only on electricity generated and sold to unrelated persons for the first 10 years after a facility is originally placed in service. I.R.C. §§ 45(a), 45(e)(l)). The PTC on electricity sold in 2020 is 2.5¢ a kilowatt hour and adjusted annually for inflation. Notice 2020-38; I.R.C. § 45(b)(2). However, under current law a facility only qualifies for PTCs if it is under construction by the end of 2020, and only qualifies for the full value of the PTCs if it began construction by the end of 2016. I.R.C. § 45(d)(l). Facilities for which construction began in 2017, 2018, 2019, and 2020 qualify for PTCs at reduced levels—80%, 60%, 40%, and 60% respectively. I.R.C. § 45(b)(5). Under current law, a wind facility that commences "construction" in accordance with IRS regulations on or after January 1, 2021 is not eligible for PTCs. *Id.*

Freeborn Wind began "construction" in accordance with IRS regulations in 2016. Mathieson Decl. ¶ 7. It therefore can receive 100% of the PTC rate if the wind farm is placed in service by the end of 2021. Mathieson Decl. ¶¶ 4–5. As a practical matter, failure to meet that deadline will likely mean the loss of all PTCs. *Id.* ¶ 11. The estimated undiscounted value of the

PTCs for the Freeborn Wind project is approximately $240 million. *Id.* ¶ 10. But NSP's customers benefit at an even higher rate because NSP's rates incorporate the impact of income taxes on the revenue we collect from customers. *Id.* The grossed up estimated undiscounted benefit of a 100 percent PTC is approximately $330 million. *Id.*

This potential harm could theoretically be partially mitigated were NSP able to obtain equipment that qualified for 80% or 60% of the PTC value based on the beginning of construction date. *Id.* ¶ 11. In that case, the undiscounted value of the lost 100% PTCs grossed up for income taxes would be approximately $66 million or $132 million, depending on whether the project could qualify for the 80% or 60% PTC value, respectively. *Id.* However, NSP does not currently have safe-harbored technology that would qualify for the 80% PTC values. *Id.* It is not clear whether requalification would be possible.

C. Renewable Energy Credits

Renewable energy facilities in Minnesota receive a renewable energy credit ("REC") for each megawatt hour ("MWh") of energy generated by Freeborn Wind. RECs are certificates corresponding to the environmental attributes of energy produced from renewable resources like wind and solar. Declaration of Fritz Schulz (Aug. 19, 2020) ¶ 3. RECs are traded in the United through both brokered and bilateral markets. *Id.* ¶ 6. NSP estimates that the value of RECs created by the Freeborn Wind Project will likely be between $1.1 million and $1.5 million annually over the expected 25-year lifespan of the project. *Id.*¶ 8. If the project is not constructed, NSP and its customers will lose the value of the RECS that otherwise would have been generated in connection with the Freeborn Wind project. *Id.* ¶ 8.

D. Impacts of Injunction Staying Construction.

In addition to impacts on NSP and its customers, the construction of Freeborn Wind also has impacts on third parties. Approximately 250 construction personnel are expected to be

required for peak construction periods and 10 permanent personnel will be needed for operation and maintenance of the Project. Schottler Decl. ¶ 8. Local landowners who leased property to the project are expecting to receive lease payments and the local communities will receive property tax benefits when the project is constructed.

If the project construction were stayed more than six months and was not able to requalify, then NSP would not be able to meet the commercial operation deadline of December 31, 2021. Without the PTC, the project would not produce cost-effective energy for NSP's customers, and the wind farm would not be constructed. Mathieson Decl. ¶ 11.

E. Total Quantified Damages to NSP Caused by Injunction

The total quantified damages to NSP if an injunction were granted and the Freeborn Wind Project ceased construction pending the Court's final determination could be as high as:

PTCs:	$330,000,000
Actual costs incurred:	$107,730,000
Committed costs:	$282,460,000
RECs:	$37,500,000
Total:	**$757,690,000**

II. PLUM CREEK WIND PROJECT

A. Current Project Status

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 ("Plum Creek" or the "Plum Creek project"). Plum Creek seeks to install up to 74 wind turbines and related equipment. Declaration of Jordan Burmeister (Aug. 18, 2020) ("Burmeister Decl.") at ¶ 4. The construction will require new gravel access roads and improvements to existing roads; underground and/or aboveground electrical collection and communication lines totally approximately 125 miles; an

operations and maintenance ("O&M") facility; two collector substations; and up to four permanent meteorological towers. *Id.* To connect the Wind Farm to the transmission grid, Plum Creek will also need to construct a 345-kV transmission line ("Gen-Tie") that will be approximately 31 miles long, depending on final route, which is being sought through a separate permit. *Id.* ¶ 5.

The schedule for permitting and construction of the project is currently as follows. The Administrative Law Judge ("ALJ") issued a First Prehearing Order on July 23, 2020. *Id.* ¶ 7. Under the First Prehearing Order, the ALJ's report will issue April 15, 2021. *Id.* The MPUC's decision on whether to grant the permit is expected to issue within approximately 60 days of that date, or by June 14, 2021. *Id.*; *see also* Minn. Stat. § 216E.03, subd. 9 (providing that MPUC order shall issue decision on transmission line route permit within 60 days of ALJ report unless extended by good cause or agreement of applicant).

Construction is slated to start in August 2021. Burmeister Decl. ¶ 7. Construction of Plum Creek and Gen-Tie will take 18 months. *Id.* Approximately 250 construction personnel will be required for construction and 11 to 15 permanent personnel will be needed for operation and maintenance of the Project. *Id.* ¶ 6. The project is scheduled to begin operations by the end of calendar year 2022. *Id.* ¶ 7. If the Wind Farm construction is delayed beyond August 2021, then the December 31, 2022 commercial operation date would not be met. *Id.* ¶ 8

B. Production Tax Credits

The Plum Creek project was also financed with the expectation that PTC revenues would be available to help fund the project. Declaration of Andrew Terwilliger (Aug. 19, 2020 ("Terwilliger Decl.") ¶ 4. Plum Creek began "construction" within the meaning of the I.R.C. in 2017. *Id.* ¶ 7. To qualify for the 80 percent PTC, the project must go into service by the end of 2022. *Id.* The PTC credit, when grossed up for tax purposes, has an estimated value of $293,934,075. *Id.*

Plum Creek may be able to re-qualify the project at a lower PTC rate by making changes which would mean that the date "construction" commenced for purposes of the I.R.C. would move back a year. *Id.* ¶ 8. To the extent such requalification is possible, Plum Creek would have to requalify this year and would cost a couple hundred thousand dollars to undertake. *Id*. In addition, because the amount of the PTC available declines depending on the year "construction" began, Plum Creek would drop from a 80% PTC rate to just 60%. *Id*. Thus, even if Plum Creek requalified, it would lose $73,483,519 in PTC for the project. *Id*.

C. Impacts of Injunction Staying Permit Proceedings.

If the MPUC permitting decisions, site permit, certificate of need and route permit, for the Wind Farm and Gen-Tie are delayed by more than 60 days, the Wind Farm could not be in service by December 31, 2022. Burmeister Decl. ¶ 8.

The quantified financial consequences of such delay would be $73,483,519 to $293,934,075. Terwilliger Decl. ¶¶ 7–8.

ANALYSIS

I. THE COURT LACKS JURISDICTION TO GRANT AFCL'S REQUESTED TEMPORARY INJUNCTION.

A. MERA Does Not Provide the Court Jurisdiction To Enjoin Defendant-Intervenors Wind Farm Projects.

AFCL asks the Court to grant an injunction "halting the construction of the Freeborn Wind, Plum Creek, Buffalo Ridge, and Three Waters wind projects now beginning construction and/or in permitting before the Public Utilities Commission." Compl. ¶ 3. The Court lacks subject matter jurisdiction to grant any such relief.

With respect to Plum Creek, the matter is still pending at the MPUC. By its express terms, Minn. Stat. § 116B.10, subd. 1 allows an "action" against a state agency to "challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit"

only if the "***the applicable statutory appeal period has elapsed***." (emphasis added). MERA provides instead for intervention in such matters. *Dakota Cty. Envtl. Prot. Ass'n v. Minn. Dep't of Nat. Res.*, 322 N.W.2d 757, 758 (Minn. 1982) (citing Minn. Stat. § 116B.09). As Plaintiff admits, the Plum Creek Wind Farm application is currently pending at the MPUC. As such, the statutory appeal period relative to any issues raised in those matters has not elapsed. The Minnesota Supreme Court has explicitly held that courts lack subject matter jurisdiction over a direct action brought in district court under § 116B.10, so long as the agency action is still pending. *Id.* at 758.

With respect to Freeborn Wind, Plaintiff admits that AFCL has participated as a party in the Freeborn Wind matter and has pressed its arguments in that matter. The MPUC issued an order on the same claims as presented here, which order AFCL did not appeal. As discussed below, Plaintiff is collaterally estopped from relitigating the issues which have been finally adjudicated. Any other issues in the case are still pending on appeal, and as such Plaintiff would still be barred from pursuing claims challenging the agency action under § 116B.10. *Id.* (holding that subject matter jurisdiction is lacking to review agency decision, where matter was still on appeal).

As such, the Court lacks jurisdiction and authority to enjoin the permit processes and/or appeals for both the Plum Creek and Freeborn Wind matters.

B. Collateral Estoppel Bars Plaintiff's Claims, Including the Remedy of Injunctive Relief.

As Defendant-Intervenors detailed in their Memorandum in Support of Motion to Dismiss, AFCL's Complaint is barred by the doctrines of res judicata and/or collateral estoppel. Defs.-Intervenors' Mem. in Supp. of Mot. to Dismiss (Aug. 5, 2020) ("Def.-Intervenors' Mem.") at 18–22. Plaintiff does not dispute that as a party to the Freeborn Wind proceedings, it raised these arguments. *See, e.g.,* Pls.' Mem. in Supp. of Temporary Inj. (Aug. 12, 2020) ("Pl.'s Memo.") at

5-9. Plaintiffs' counsel also emphasizes that she has raised these arguments repeatedly in numerous proceedings. *Id.*

Plaintiff attempts to avoid the application of res judicata or collateral estoppel by arguing that "this above-captioned case is focused on the Commission's across the board policy of exempting large wind projects from environmental review. . . . and its failure to promulgate large wind siting standards and criteria as directed by the legislature." *Id.* at 8. But as Defendants-Intervenors' set forth in support of their motion to dismiss, Plaintiff explicitly raised "systemic flaws in [Minnesota's] wind siting process," including the sufficiency of environmental review and alleged failure to promulgate "mandated rules." Def.-Intervenors' Mem. at 8–10. Had AFCL prevailed on these arguments either before the MPUC or brought an appeal to the Court of Appeals, the resulting decisions would have had an impact on future Large Wind Energy Conversion Systems ("LWECS") permit applications.

Indeed, Plaintiff concedes, as it must, that the "issues overlap." *Id.* at 9. But Plaintiff is not entitled to a new forum to litigate the same issue, i.e. the adequacy of the MPUC's wind farm permitting process, with the MPUC that it has already raised in the administrative proceedings. *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, 589 (Minn. App. 2008); *Friends of Tower Hill Park v. Foxfire Props., LLC*, A19-111, 2020 WL 994767, at *2 (Minn. App. Mar. 2, 2020). As such, the Court lacks jurisdiction to grant the relief Plaintiff seeks as to both the Freeborn Wind and Plum Creek projects.

C. As to Ongoing Proceedings, Plaintiff's Request For A Temporary Injunction Are Without Jurisdiction and Not Ripe.

1. Plaintiff's Request For Injunctive Relief as to Plum Creek Is Not Ripe.

The ripeness doctrine is based on the general principle that Minnesota courts will consider only redressable injuries. *Friends of Riverfront,* 751 N.W.2d at 592 (internal citations omitted); *see also State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). The doctrine bars suits brought before a redressable injury exists. *Friends of Riverfront*, 751 N.W.2d at 592. As it relates to agency actions, 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). Here, the Plum Creek project is still in the application process and no permit has issued. As such, Plaintiff is unable to identify any environmental harm actionable under MERA that is currently redressable.

2. Abstention Bars The Court From Enjoining Ongoing Administrative Proceedings.

In addition to the limitation explicitly laid out in MERA, Plaintiffs request to enjoin ongoing administrative proceedings, including any appeals therefrom, is also barred because the Minnesota Administrative Procedures Act ("MAPA") bars this Court from exercising jurisdiction contemporaneously.

Administrative review procedures under MAPA provide the exclusive process for participation in, and review of, *ongoing* MPUC administrative actions. *See, e.g.,* Minn. Stat. §§ 216E.15, 14.63 (both requiring issuance of final orders before judicial review); *Mowry v. Young*, 565 N.W.2d 717, 719–21 (Minn. App. 1997) (holding that certiorari was exclusive mechanism for review a quasi-judicial decision); *Naegele Outdoor Advert., Inc. v. Minneapolis Cmty. Dev. Agency*, 551 N.W.2d 235, 236–37 (Minn. App. 1996) (same). As courts have long recognized, these principles of deference are rooted in the principles of separation of powers. *State*

ex rel. Sviggum v. Hanson, 732 N.W.2d 312, 321 (Minn. App. 2007) (the judiciary must abstain from encroaching on the power of a coequal branch). This is especially true when, as here, there is no threat of imminent environmental harm from projects going through the permitting process.

II. APPLICATION OF *DAHLBERG* FACTORS, MANDATES DENIAL OF PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

A. Legal Standard

A temporary injunction is an "extraordinary equitable remedy[.]" *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. Ct. App. 1994). The determination of whether to grant a temporary injunction, including one brought under MERA, is based on consideration of five factors ("Dahlberg Factors"):

> (1) the nature of the relationship between the parties;
>
> (2) the harm to be suffered by the plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
>
> (3) the likelihood that one party or the other will prevail on the merits;
>
> (4) the aspects of the fact situation, if any, that permit or require consideration of public policy expressed in statutes; and
>
> (5) the administrative burdens involved in judicial supervision and enforcement.

State by Drabik v. Martz, 451 N.W.2d 893, 895 (Minn. App. 1990) (citing *Dahlberg Brothers, Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965)).

The party seeking temporary injunctive relief has the burden of showing that sufficient grounds exist to grant the relief requested. *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 351 (Minn. 1961). "Injunctive relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury." *Id.*

B. The Dahlberg Factors Do Not Support A Temporary Injunction.

1. Nature and relationship of the parties

"A temporary injunction is an extraordinary equitable remedy" and "its purpose is to preserve the status quo until adjudication of the case on the merits." *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). However, Plaintiff fails to show that an injunction is needed to preserve the status quo. As AFCL admits, LWECS in Minnesota have been sited for decades under the current permitting laws and rules; indeed, AFCL's counsel asserts she has been challenging the rules for two decades. *See* Minn. Stat. Ch. 216F; Minn. Stat. § 216E.03, subd. 7; Minnesota Rules Chapter 7854; Pl.'s Memo. at 8. In short, AFCL seeks an injunction to *change* the status quo, not maintain it.

Moreover, AFCL named only the MPUC as a party to this action, which is a neutral adjudicator of the permit decision. Yet, AFCL admits the relief it seeks is not needed to preserve the status quo of its relationship with the MPUC and it does not make the showing required to enjoin an administrative action prior to exhaustion of the appropriate statutory remedy. *See State ex rel. Sheehan v. District Court of State of Minn.*, 93 N.W.2d 1, 4 (Minn. 1958) ("It is a long-settled rule in this state that no one is entitled to injunctive protection against the actual or threatened acts of an administrative agency until the prescribed statutory remedy has been exhausted unless the party seeking injunctive relief can show that the pursuit and exhaustion of such administrative remedy will cause imminent and irreparable harm as distinguished from merely speculative damages"). Instead, AFCL focuses on Defendants-Intervenors, whom it did not name as parties to this case but whose wind farm projects it seeks to enjoin. Enjoining the projects of Defendants-Intervenors does not preserve or affect, in any way, the status quo of AFCL's relationship with MPUC.

Even assuming it did, however, an injunction is not needed to prevent construction from starting on the Plum Creek project. Under the current schedule, MPUC is not scheduled to reach a permit decision until June 2021. *See* Burmeister Decl. ¶ 7. Because no construction can begin until a permit is issued, an injunction does not impact any on-the-ground changes associated with that project. *See* Minn. R. 7854.0300, subp. 1 ("No person may construct an LWECS without a site permit from the commission. No person may commence construction of an LWECS until the commission has issued a site permit for the LWECS.") In the meantime, Plaintiff and other members of the public are able to participate in those proceedings and present any arguments or concerns they have about the environmental review process or environmental impacts. *See* Def.-Intervenors' Mem.

As set forth in its Motion to Dismiss, the Freeborn Wind project has already been granted a permit. AFCL is a party to that proceeding, aspects of which are currently under appeal before the Minnesota Court of Appeals. If AFCL wishes to preserve the status quo, there are specific procedures available in that proceeding to stay or enjoin an order. *See* Minn. R. 7829.3000; Minn. R. App. P. 108; Minn. Stat. § 216B.23. AFCL notably has not moved for a stay, despite having concerns about wind siting rules since it intervened in 2017. *See 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 (docket showing no such motion); *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*, No. A19-1195 (Minn. App. 2019) (same). There is no urgency here. This Court should decline to use the extraordinary remedy of an injunction to alter the status quo of the nature and

relationship of the parties in a matter currently under the jurisdiction of the Minnesota Court of Appeals.

2. The balance of relative harm between the parties

The balance of harms considers "the harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." *Dahlberg Bros.,* 137 N.W.2d at 315. In balancing the harms, the party opposing the injunctive relief need only show substantial harm to bar the requested relief. *Pac. Equip. & Irrigation, Inc. v. Toro Co.,* 519 N.W.2d 911, 915 (Minn. App. 1994). By contrast, for a court to grant an injunction, the moving party must show irreparable harm from the conduct of the opposing party. *Thompson v. Barnes*, 200 N.W.2d 921, 925 (Minn. 1972). To prove irreparable harm, a plaintiff must demonstrate (1) that it has no adequate legal remedy; and (2) that the injunction is necessary to prevent irreparable harm. *Cherne Indus., Inc. v. Grounds & Assocs., Inc*., 278 N.W.2d 81, 92 (Minn. 1979). The failure to establish irreparable harm is a sufficient basis, standing alone, for a court to deny a preliminary injunction. *Morse v. City of Waterville*, 458 N.W.2d 728, 729–30 (Minn. App. 1990).

a. AFCL Has Provided No Evidence of Irreparable Harm.

AFCL fails to provide any evidence of an irreparable harm if an injunction were not granted, instead generally referencing the "potential for substantial impacts" and offering only the conclusory argument of counsel that AFCL and "will suffer substantial harms if the projects are built without environmental review." Pl.'s Memo. at 2, 9. AFCL's failure to substantiate claims of irreparable harm with evidence alone is sufficient to deny its motion. *Id.* MERA protects harm to natural resources, it does not regulate the form of environmental review processes. *See Nat'l Audubon Soc'y v. Minn. Pollution Control Agency*., 569 N.W.2d 211, 218–19 (Minn. App. 1997) ("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). Therefore, Plaintiff would have to come forward with evidence of qualifying, irreparable harms to the environment. It does not and cannot do so.[1]

As discussed above, the Plum Creek project cannot begin construction until a permit is issued, and no MPUC decision will occur on permits until June 2021. Burmeister Decl. at ¶ 7. As such, Plaintiff cannot show any irreparable harm in the form of "pollution, impairment, or destruction of the environment" that will result from the Plum Creek wind farm if an injunction is not granted.

Freeborn Wind, by contrast, has already been issued and construction has begun. Indeed, significant progress has been made on construction of the project. Declaration of Cameron Holland (Aug. 19, 2020) ("Holland Decl.") ¶ 5. Despite its ability to seek a stay of the project pending appeal, AFCL made no effort to enjoin the project before construction began and hundreds of thousands of dollars were expended, nor did it even name NSP as a party to this action. Consequently, AFCL is not entitled to an injunction. *See, e.g.*, *Apple Valley Square v. Apple Valley*, 472 N.W.2d 681, 683 (Minn. App. 1991) (holding that plaintiff was not entitled to equitable relief where it did not move promptly and substantial investment had already occurred). Indeed, to date Freeborn Wind has incurred at least $107,730,000 in actual costs, and is committed to costs of $282,460,000, which would be lost if the project did not move forward. Schottler Decl. ¶ 6.

[1] Plaintiff's counsel argues there could be irreparable harm "where noise violations cause annoyance" or "where expected shadow flicker" occurs. Plaintiff does not state where or how these generalized potential grievances will occur or support the allegations with any record evidence. Pls.' Mem. at 11. But even assuming such a record existed, the harm would not be irreparable, as wind farm operations can be curtailed or decommissioned to redress issues with noise or flicker.

AFCL did not put into the record any evidence of actual harm—let alone irreparable environmental harm—that will result from the project. *See* Minn. R. Civ. P. 65.02 (stating that a temporary injunction may be granted only if "by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor."); *Indep. Sch. Dist. No. 35, Marshall County v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966) ("there being no verified pleadings and no affidavits submitted," plaintiff did not meet requirements for issuance of a temporary injunction). Instead, AFCL's legal brief cites generic concerns advanced solely through the arguments of counsel, focusing heavily details about the modeling done to predict potential environmental impacts as part of the permit process. Pls.' Mem. at 11. At this stage, the MPUC has issued a site permit with approximately 36 general or specific conditions governing the potential impacts. AFCL does not argue that the Freeborn Wind Farm, constructed and operated in accordance with the conditions in the site permit, is likely to lead to irreparable harm, nor provide any evidence that irreparable harm actionable under MERA will occur if the turbines are operated in compliance with those conditions. *See AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348 (Minn. 1961) ("An injunction will not issue to prevent an imagined injury which there is no reasonable ground to fear. The threatened injury must be real and substantial." (citing *J.F. Quest Foundry Co. v. Int'l M. & F. Workers Union*, 13 N.W.2d 32 (Minn. 1944)).

Indeed, AFCL's focus on an alleged harm from an existing wind farm, the Bent Tree Wind Farm, underscores the lack of any evidence supporting its claim of inadequate rules and of the potential for irreparable harm. The Bent Tree Wind Farm was permitted more than ten years ago and placed into service in 2011. Order to Show Cause, Requiring Further Review by The Department of Commerce, and Continuing Curtailment (Mar. 23, 2018), *In the Matter of the Site Permit Issued to the Wisconsin Power and Light Company for the Bent Tree Project in Freeborn*

County, Minnesota, MPUC Docket No. ET-6657/WS-08-573.[2] The wind farm is not at issue in this case and is not operated by Defendant or Defendant-Intervenors. In any event, the crux of the issue that arose with the Bent Tree project was not due to a lack of environmental standards, but a failure in compliance. *Id.* at 2. ("The Commission will require WPL to show cause why the Project site permit should not be suspended or revoked for noncompliance with the MPCA ambient noise standards contained in condition E.3 of the Project site permit.") As such, the Bent Tree example does not support a claim that irreparable harm would occur from either MPUC siting process, generally, or the Freeborn Wind site permit, specifically. To the contrary, the Bent Tree example demonstrates the MPUC's ability to *repair* harm by either curtailing or removing from operation a project that is causing harms.

Furthermore, as party to the Freeborn Wind matter, any consideration of an injunction should be raised as a stay pending appeal before the MPUC and Minnesota Court of Appeals, not in this court. *Adelman v. Onischuk*, 135 N.W.2d 670, 677 (Minn. 1965) ("It is a well-established rule and a basic prerequisite for injunctive relief that a clear showing must be made that any legal remedy that the complainant may have is inadequate.") AFCL has made no effort, however, to attempt to seek a stay in that matter and, therefore, fails to demonstrate a need for *this* Court to consider AFCL's injunction motion.

b. <u>An Injunction of the Freeborn Wind Project Would Cause Significant Harms to Defendant-Intervenors.</u>

Granting an injunction during the pendency of this proceeding would cause significant harms to Defendant-Intervenors, as well as to local communities and the public. In addition,

[2] Available at https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true

Plaintiff seeks to remand this matter for rulemaking—a process which typically takes a year or longer. *See, e.g.,* MINN. LEGISLATIVE AUDITOR, *Admininstrative Rulemaking* (Mar. 1993), *available at* https://www.auditor.leg.state.mn.us/ped/1993/pe9304.htm (estimating an average between 14 and16 months); MINN. DEP'T OF HEALTH, *About Rulemaking* (last visited Aug. 17, 2020), *available at* https://www.health.state.mn.us/communities/environment/risk/rules/water/rulemaking.html (stating that administrative rulemaking can take 9 months to 1 year, but often 18 months or longer).[3] Delays of a year or more would prevent the construction of the Plum Creek and Freeborn Wind farms. Indeed, any delay for the Plum Creek Wind Farm and 6 months for the Freeborn Wind Farm would be enough to cause these wind farms to miss their commercial operations deadlines, resulting in a loss of the PTC revenues and the potential termination of the projects. *Sunny Fresh Foods, Inc. v. MicroFresh Foods Corp.*, 424 N.W.2d 309, 310–11 (Minn. App. 1988) (where granting injunction would cause defendant to "cease operations" and go out of business, injunction was appropriately denied).

The Freeborn Wind project is currently under construction, incurring significant costs, and on schedule to meet a necessary in-service deadline by the end of 2021. *See* Schottler Decl. ¶ 6 (indicating NSP had already spent more than $107 million on Freeborn Wind by Aug. 1, 2020). For the last few decades, wind farm financing has benefited from federal PTCs. *See supra* at Background Sect. I.B. The Freeborn Wind project was developed and approved by the MPUC using cost estimates that assumed a credit of 2.5 cents per kW/hr. Mathieson Decl. ¶ 3. Because NSP is a public utility, these project savings inure to the benefit of the customers. *Id.* ¶ 9. Freeborn

[3] As AFCL notes, rulemaking can take an extended amount of time. The MPUC itself has been in the process updating the rules it uses for other siting permits for more than seven years. *See In re Possible Amendments to Rules Governing Certificates of Need and Site and Route Permits for Large Electric Power Generating Plants and High Voltage Transmission Lines, Chapters 7849 and 7850*, MPUC Docket No. E, ET, IP-999/R-12-1246 (opened in 2012).

Wind must be in service by the end of 2021 to qualify for the 100 percent PTC. *Id.* ¶ 7. Freeborn may be able to minimize the loss somewhat by requalifying the project, but it is uncertain at this time if such an effort is feasible. *Id.* ¶ 11. If requalification is not possible, the project could be abandoned, or customers will lose benefits of approximately $337 million in PTCs. *Id.* ¶ 10. Freeborn Wind is currently under construction and on schedule to qualify for the tax credit. Schottler Decl. ¶ 7. Even an injunction of a relatively short duration would prevent Freeborn Wind from being able to complete construction in time. *Id.*

The immediate impacts of this would be to halt the construction of the wind farm, which is currently to employ approximately 250 temporary construction and engineering jobs at the peak of construction this fall. *Id.* ¶ 8. Additional unquantified expenses would likely be incurred because of distribution and delay in the construction schedule. Turbines have already been purchased and NSP would have to pay to store and maintain them during any injunction. NSP also has contracts for major equipment rental, which typically has to be reserved at least a year in advance, as well as construction contracts, the distribution and delay of which would also involve additional expense to NSP. *Id.* ¶ 10

Significantly, although only a portion of overall Freeborn Wind farm will be located in Minnesota, the site permit includes a substation that provides necessary logistics for the entire Project. *Id.* ¶ 2. So, while NSP obtained different permits for a transmission line and for the Iowa portion of the project, an injunction of the Minnesota site permit and the loss of the PTC associated could be significant enough to shut down the entire Freeborn Wind project in both states. *Id*. At this point, NSP has actual costs of at $107,7300,000, as well at least $282,460,000 in additional costs that would be incurred if the project were abandoned at this stage. *Id.* ¶ 6.

NSP would also risk losing $37,500,000 in the value of RECs. All total, NSP could incur damages up to $757,690,000 as the result of an injunction.

In addition to the quantified losses to NSP, Freeborn Wind provides material benefits to the community and landowners. Freeborn Wind is expected to provide 10 permanent operations jobs, payments to Minnesota landowners who elected to lease property for use in the project, and local tax revenue per year to hosting communities. *Id.* ¶ 8.

c. An Injunction Would Also Substantially Harm Plum Creek.

Like Freeborn Wind, the financing for Plum Creek Wind Farm also assumes that it will receive the benefits of the PTCs. Plum Creek qualified for the tax credit later than Freeborn Wind, and therefore is relying on 80% of a 2.5 center per kW/hr tax credit worth $295 million assuming the project goes into service by 2022. Terwilliger Decl. ¶¶ 5–7. Under the current permit and construction schedules, any delay would prevent the project from meeting that deadline. Burmeister Decl. ¶ 8. A loss of the PTC eligibility could result in a loss of the whole project, as the project could become uneconomical and uncompetitive. Terwilliger Decl. ¶ 7.

Like Freeborn, Plum Creek may have the ability to "requalify" its PTC eligibility to extend a year. *Id.* ¶ 8. This process would involve a cost of several hundred thousand dollars, reduce the amount of tax credits Plum Creek could obtain, and still may not provide a sufficient time extension to allow for both a full rulemaking and permitting process to be completed. *Id.* If requalified, Plum Creek would have to be in service by 2023 and would lose approximately $73.5 million in tax credits. *Id.* The delay in permitting and construction would also involve costs in extending landowner leases, holding costs for real estate and major equipment, additional legal fees, etc.

As such, an injunction would cost Plum Creek at least $73.5 million and up to $295 million in losses.

3. The likelihood of success on the merits

The probability of success on the merits is a "primary factor" in determining whether to issue a temporary injunction. *Minneapolis Fed'n of Teachers v. Minneapolis Pub. Schs.*, 512 N.W.2d 107, 110 (Minn. App. 1994). As Defendant-Intervenors have laid out in their motion to dismiss, AFCL's claims do not succeed on the merits even based on the face of the complaint. Nothing in Plaintiff's motion supports a different outcome here.

First, the environmental review process MPUC used in permitting LWECS is a MEPA-complaint, EQB-created, alternative review process. Minnesota law establishes that where an agency action satisfies MEPA, the MERA claim necessarily fails. *Holte v. State*, 467 N.W.2d 346, 348 (Minn. App. 1991); *State by Smart Growth Minneapolis v. City of Minneapolis*, 941 N.W.2d 741 (Minn. App. 2020); *See Minn. Ctr. for Envtl. Advoc. v. Minn. Pub. Utils. Comm'n,* No. A-10-812, 2010 WL 5071389, at *10 (Dec. 14, 2010). Plaintiff's argument does not dispute this. Instead, Plaintiff argues that the EQB-created process does not comply with MEPA. Plaintiffs cannot be reconciled with the plain text of Minnesota statute and regulations. Despite both MERA and MEPA having already been passed, the Minnesota Legislature in 1995 directed EQB to adopt specific rules to govern the environmental review of LWECS. *See* Minn. Stat. § 116C.691-697. It did not order EQB to conduct an EIS or EAW under MEPA. In response, EQB finalized rules that specifically used an application-based process for environmental review. See 2001 Statement of Need and Reasonableness for Minn. Rules Ch. 4401 ("2001 SONAR"), attached to Def.-Intervenors' Memo. as Ex. 2. Minnesota rules 4410.4300, subp. 3, and 7854.0500, subp. 7 (both of which were passed by EQB) make it explicit that the application-based process is the governing process for environmental review, and that "[n]o environmental assessment worksheet or environmental impact statement shall be required." EQB has explicitly created a process that is MEPA-complaint, and Plaintiff's preference for different procedures does not render it unlawful.

Second, and in any event, Plaintiff's claims also fail because its challenge is limited the environmental review process, rules, and participation. As a matter of law, "environmental review cannot result in pollution, impairment, or destruction of the environment," but is instead "a process of information gathering and analysis." *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency.,* 569 N.W.2d 211, 218–19 (Minn. App. 1997). Thus, Plaintiff fails to state any viable claim under MERA, for this reason as well.

Finally, even if Plaintiff were able to survive the motions to dismiss, it is still unlikely to succeed on the merits of its claim. As set forth in the Defendants' Motion to Dismiss, MPUC's decision to determine the appropriate siting conditions on a per-project basis does not violate MERA or MEPA, and it does not require additional rulemaking. Because Plaintiff's claims not only are unlikely to succeed, but rather because they fail as a matter of law, this factor alone requires denial of its motion for temporary injunction.

4. Public policy considerations

Minnesota public policy also weighs against enjoining the MPUC from permitting LWECS projects, including the four projects undergoing permits identified in this case and the yet to be identified future wind farm projects.

Minnesota passed legislation to both protect environmental harms and encourage the development of renewable energy. Wind farms do not involve competing policy interests, but rather are part of a coherent policy to meet both objectives. For example, in 1994, the Minnesota legislature passed a specific "wind power mandate" requiring that certain public utilities acquire and install a certain amount of wind energy conversion systems.

In 2001, the legislature passed the Next Generation Energy Act, which it has since amended on multiple occasions. The act set specific targets for electric utilities serving Minnesota to "generate or procure sufficient electricity generated by an eligible energy technology" such that

by 2025 at least 25 percent of retail customer usage would be met by those technologies, and certain public utilities are required to meet even higher goals. Minn. Stat. § 216B.1691, subds. 2 & 2a. "Wind" is defined as one of the renewable energy sources that qualifies as an "eligible energy technology." *Id.*, subd. 1. Indeed, for certain utilities, the legislature again mandates that at least 30 percent of their energy generation come from either solar or wind technologies. *Id.,* subd. 2a. The law demands the MPUC take a number of actions to ensure that these goals are made and provides some enforcement mechanisms if an electric utility is not making good faith efforts to do so. *Id.*, subds. 2c, 2d, 2e, 3, 7.

In 2007, the legislature also passed greenhouse gas emission reduction goals, seeking to reduce Minnesota's emissions across all sectors "to a level at least 80 percent below 2005 levels by 2050." Minn. Stat. § 216H.02, subd. 1. In a 2019 biennial report on the state's progress, the Minnesota Pollution Control Agency and Minnesota Department of Commerce specifically identified wind energy as a significant factor in reducing emissions associated energy generation for Minnesota. MINN. POLLUTION CONTROL AGENCY, *Greenhouse Gas Emissions in Minnesota: 1990-2016* (Jan. 2019) at https://www.pca.state.mn.us/sites/default/files/lraq-2sy19.pdf.

Federal policy initiatives also encourage and incentivize the development of wind energy conversion systems. Most significantly, as discussed above, the I.R.C. provides for a production tax credit that permits a 1–3 cent per kilowatt-hour tax credit over the first ten years of a qualifying project, which includes wind energy conversion systems. These have been recognized as an important factor in encouraging the development of wind energy. *See, e.g.*, *id.* An injunction to allow a rulemaking process would likely disqualify all Minnesota projects from qualifying for this valuable federal incentive, resulting in the loss of these generation resources for meeting Minnesota energy needs.

5. Any administrative burden involving judicial supervision and enforcement

Although not a significant factor, the administrative burden also weighs against granting an injunction. Because of the existence of overlapping administrative processes, federal PTC deadlines, and the ongoing appeals, a temporary injunction would likely involve additional judicial supervision and oversight.

* * * * *

A review of the factors dictates that Plaintiff's request for a temporary injunction be denied. Plaintiff has not shown any likelihood of success on the merits. To the contrary, Plaintiff's claims fail as a matter of law. Furthermore, the consequences of the injunction Plaintiff requests are significant. They not only come at significant financial cost to the specific named projects, but likely would end Minnesota's ability to take advantage of retiring federal production tax credits to develop low-cost renewable wind energy to meet state energy needs.

III. ALTERNATIVELY, IF INJUNCTION WERE GRANTED, PLAINTIFF MUST POST A SUBSTANTIAL BOND.

While MERA specifically contemplates the option of a temporary injunction to protect natural resources, a bond is required. Minn. Stat. §§ 116B.04, 116B.10; *State by Drabik*, 451 N.W.2d at 897 (citing Minn. R. Civ. P. 65.03(a)). As the Court of Appeals explained:, "[w]hile MERA terms a bond as optional, a temporary injunction shall not be granted except upon the giving of security in an amount as the court deems proper for payment of costs and damages as may be incurred or suffered by a party who is wrongfully enjoined." *Id.* Additionally, "[t]he amount of security required is within the trial court's discretion." *Id.* (citing *In re Petition of Giblin*, 232 N.W.2d 214 (Minn. 1975)).

Here, as set forth above, Plaintiff seeks an injunction that would inflict draconian financial consequences to the named wind projects. While the scope of the adverse financial consequences

varies depending on the length of the stay, quantified damages for just two projects could quickly add up to more than $1 billion in lost PTC credits and costs. Defendant-Intervenors have invested in the development of the wind farm projects, which serve the public need for energy demand as part of a heavily regulated market, including undertaking the expenses associated with conducting the environmental reviews required under Minnesota law. Furthermore, as a public utility, financial impacts to NSP ultimately affect the rates and expenses paid by Minnesota energy consumers. While Defendant-Intervenors could look into requalification to offset these expenses, it is not certain at this time whether such an effort would be successful.

As such, should any injunction be issued, a bond of at least $ 1 billion should be required to protect the financial viability of these two wind projects and ensure that Plum Creek and NSP, along with their customers, are not left to absorb the material, adverse financial if Plaintiff's case ultimately does not succeed.

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/s/ Lisa M. Agrimonti

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