STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RICE | THIRD JUDICIAL DISTRICT
Court File No.: C8-05-1032

State of Minnesota, by
Rice County Land Use Accountability, Inc.,

Plaintiff,

v.

Rice County, a political subdivision of the State of Minnesota, and the Rice County Board of Commissioners,

Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Rice County Land Use Accountability, Inc. (hereinafter "RCLUA") has filed a detailed Complaint against Rice County alleging a pattern of behavior of violation of Minnesota's Environmental Rules. Defendants have now brought a Motion for "failure to state a claim upon which relief can be granted. Defendants' contention is that Plaintiff has not brought a legally cognizable claim, that such a and that Plaintiff's Complaint is prohibited and preempted. In their efforts to support this contention, Defendants engage in misrepresentation and diversion, characterizing Plaintiff's action as an appeal or challenge to an environmental review decision. Plaintiff's action is not a matter of "environmental review," and the Minnesota Environmental Policy Act (MEPA) is not applicable. Defendants ignore the inapplicability of MEPA where there is no contested case proceeding or review sought of an agency action, and ignore the procedural arm of the Minnesota Environmental Rights Act (MERA), which provides a distinct cause of action where environmental rules are being violated, and which provides equitable relief. MERA is not limited – it is intended to be a remedy over and above other remedies.

Defendant has no evidence to support its characterization of Plaintiff's Complaint. It is mischaracterizing and then arguing from that mischaracterization. Stating that it is so over and

over, arguing that it is so, does not make it so.

Plaintiff claims with great detail in a twenty-two page Complaint that Rice County repeatedly violated specific environmental rules. Defendant Rice County, in its Answer, and in its Motion Memorandum, is notably silent about the specifics of this Complaint. Nowhere in Defendant's Memorandum accompanying its Motion to Dismiss does Defendant argue that Plaintiff lacks a prima facie case under MERA.

Defendant is incorrect in every respect except for the standard of review – that "the court must inquire whether the Complaint sets forth a legally sufficient claim for relief..." and that "[i]n doing so, a court must consider all assumptions, inferences and allegations set forth in the Complaint to be true, viewing all in the light most favorable to the pleader or the non-moving party. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2002); Minn. R. Civ. P. 12.02(e); see also St. James Capital Corp. v. Pallet Recycling Assoc, of N.A., Inc., 589 N.W. 2d 511 (Minn. App. Ct. 1999)(citation omitted).

Rice County's Motion to Dismiss must be denied in its entirety.

II. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT PROVIDES CAUSE OF ACTION AND RELIEF WHERE A PARTY IS VIOLATING ENVIRONMENTAL RULES

The Minnesota Environmental Rights Act (hereinafter "MERA") is comprised of two distinct causes of action:

- one cause of action for procedural violations of environmental law, where defendant violates environmental rules and standards are violated; and
- another cause of action for substantive damage to the environment, where the conduct of a defendant palpably and measurably damages the environment.

In actions under the procedural arm, a plaintiff must demonstrate that the Defendant violated environmental law. In a procedural claim such as this, a demonstration of substantive damage to

the environment is not necessary – that is needed only under the substantive arm of MERA and is not at issue in this case.

Minnesota Statute §116B.02, Definitions, sets out the two expressly different definitions, procedural and substantive. In the following quote, each is separated out:

> Subd. 5. Pollution, impairment or destruction. "Pollution, impairment or destruction" is any conduct by any person which **(Procedural arm)** violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur or **(Substantive arm)** any conduct which materially adversely affects or is likely to materially adversely affect the environment; provided that "pollution, impairment or destruction" shall not include conduct which violates, or is likely to violate, any such standard, limitation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air.

Minn. Stat. §116B.02 (parenthetical description and emphasis added).

These expressly distinct causes of action based on either procedural violations or substantive harm to the environment are further distinguished in the allocation of the burden of proof for a MERA claim, which sets it out differently for each:

> **116B.04 Burden of proof.**
>
> In any action maintained under section 116B.03, where the subject of the action is **(under procedural arm)** conduct governed by any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the Pollution Control Agency, Department of Natural Resources, Department of Health, or Department of Agriculture, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant violates or is likely to violate said environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit, the defendant may rebut the prima facie showing by the submission of evidence to the contrary; provided, however, that where the environmental quality standards, limitations, rules, orders, licenses, stipulation agreements, or permits of two or more of the aforementioned agencies are inconsistent, the most stringent shall control.
>
> In any other action maintained under section 116B.03, **(under the substantive arm)** whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary.

> The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

Minn. Stat. §116B.04 (parenthetical description and emphasis added).

Most importantly, the application of MERA is broad with few limitations:

> **116B.12 Rights and remedies nonexclusive.**
>
> No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by sections 116B.01 to 116B.13. The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.

Minn. Stat. §116B.12.

Defendant's inappropriate claim -- that MERA is inapplicable and that Plaintiff's only recourse is an action under MEPA -- is contrary to the statute and case law. Minn. Stat. §116B.12; State of Minnesota by Fort Snelling State Park Association v. Mpls. Park & Rec. Bd., et al., ___ N.W.2d ___, C4-03-36 (Minn. App. 2003).

The Court recognizes that pollution, impairment or destruction of natural resources occurs in a variety of ways, thus the two distinct causes of action under MERA:

> (1) "any conduct by any person which *violates*, or is *likely to violate*," any environmental quality standard, permit, or similar rule; and (2) "any conduct which *materially adversely affects* or is *likely to* materially adversely affect *the environment*.

State by Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997).

In Schaller, the court noted that Schaller brought two distinct claims, one under the procedural arm regarding potential future violation of noise standards, that "projected traffic volumes on CSAH 90 for the year 2010 would generate noise in excess of state standards, and a second count under the substantive arm regarding "destruction of natural resources in the Schaller ravine." Id. The court confirmed the validity of a procedural claim but rejected Schaller's procedural

count on a fact basis, stating that it was speculative, that the violation had not occurred and that Schaller could not establish "that a future noise violation is 'likely' under MERA." Id. The rejection by the court of Schaller's procedural claim was due to the speculative nature of the claim, a factor not present in the case before this court. Rice County has repeatedly violated environmental law, and a number of specific violations that have occurred are identified in the Complaint.

The procedural arm of MERA has since been upheld, reinforcing the binary nature of the procedural MERA claim – a question of whether the environmental rule was violated or not -- by citing a violation of a state statutory standard, and provision of relief under MREA. Gillette v. Peterson, A03-997, WL 1191764, (Minn. App. 2004). "By violating Minn. Stat. § 103G.245, subd. 1(2), appellants violated an environmental quality standard. The district court, therefore, properly concluded that appellants violated Minn. Stat. §116B.02, subd. 5." Id.

Plaintiff RCLUA's claim is not speculative. Plaintiff set out in detail the specific violations of environmental law that have occurred. Each count pertains to an identified violation of environmental law that is easily demonstrated by public records – either the County violated environmental or it did not! Plaintiff has made its prima facie case as required by statute, based on documentation of these specific violations that is in the public domain, and has specifically and very narrowly requested documentation regarding these violations from Defendants in Discovery, which they refuse to answer.

III. DEFENDANTS ARE BARKING UP THE WRONG TREE, IN HOPES THAT WITH THE DIVERSION, THE COUNTY CAN ESCAPE RESPONSIBILITY FOR ITS REPEATED VIOLATIONS OF ENVIRONMENTAL RULES.

Defendants Motion is a diversionary tactic that does not address the Plaintiff's claim. From the Motion's very first line on the first page, where Defendant puts quotes around "procedural cause of action" as if that arm of MERA does not exist, to reliance on MEPA and disregarding the validity of claims under MERA, to mischaracterizing Plaintiff's Complaint as a matter of debate

regarding substantive "environmental review," the Defendant's claim that MERA in inapplicable and that Plaintiff's only recourse is an action under MEPA is wholly without merit and contrary to the statute. Minn. Stat. §116B.12.

What environmental review decision is it that Plaintiff's are challenging? What environmental decisions are Plaintiff seeking to reverse? Plaintiff has served Defendant with a detailed twenty-two (22) page complaint, in which there are many specific instances to choose from, yet Defendants have yet to cite one instance, one decision, one count, that Plaintiff seeks to review. There have been opportunities, in its Answer, and in its Motion Memorandum. Yet Defendant does not cite any evidence to support its characterization. Stating that it is so does not make it so.

A. THIS ACTION IS NOT A CHALLENGE OF ENVIRONMENTAL REVIEW

What environmental review decision is it that Defendants allege that Plaintiff's are challenging? Starting with the first page of its Memorandum, Defendants work to misconstrue Plaintiff's Complaint as a matter of "environmental review" and therefore prohibited as a MERA action. Defendants' claim that "[t]he underlying basis of Plaintiff's cause of action is the County's involvement in environmental review for the three projects," and that "Plaintiff alleges the County's environmental review is sufficient to state a claim under MERA." Defendant's Memo, p. 1. Defendant relies on Audubon to falsely frame Plaintiff's claim as a matter of "environmental review." Then, Defendant states that such a complaint is disallowed, and such claims are only available under MEPA. Id., p. 1-2; National Augubon Soc'y v. Minnesota Pollution Control Agency, 569 N.W. 2d 211, 219 (Minn. App. 1997) (hereinafter "Audubon"). In Audubon, an Environmental Assessment WorksheetThe Plaintiff's claim is not a claim that challenges the completeness of environmental review, or whether an environmental review decision is arbitrary and capricious -- in the Audubon case an EIS need determination was at issue -- this is a claim that specific cited environmental rules were violated by the county, and in many cases, the rules violated are rules

that require that environmental review be completed yet it was not! There has been no environmental review to criticize in most of these instances of violation! There has been no contested case. There has been no administrative proceeding to review under MEPA.

Audubon does not apply because this is not a challenge of environmental review. As the Audubon court states, and Plaintiff fully agrees, "Environmental review is a process of information gathering and analysis." Id. (quoting Coon Creek Watershed Dist. V. State Envil. Quality Bd., 315 N.W.2d 604, 605 (Minn. 1982). The claim of the Audubon Society was that the EIS decision was arbitrary and capricious, relief for which is provided under MEPA. Id. However, Plaintiff is not complaining that an EIS determination should have been other than what it was, and is not complaining that the decision is arbitrary and capricious, and is not complaining about the substance of county environmental review – again, Plaintiff's complaint is that the county is violating specific environmental rules. The basis for the court's Audubon decision is that "unlike the MEPA action, the MERA action does not seek review of an agency decision." Id. And Plaintiff in this case does not seek review of an environmental decision.

Defendant's Answer relies heavily on its contrived theory that Plaintiff is surreptitiously seeking review, therefore Plaintiff has asked in its Interrogatories:

> 12. Defendant's Answer in the above-captioned proceeding repeatedly refers to "appeal" or other terms referring to an action regarding a challenge County decisions. What decisions is Plaintiff appealing or attempting to modify? Provide citation to Plaintiff's Complaint.

Defendant refuses to Answer Plaintiff's Interrogatories and is seeking court-ordered protection, and has yet to identify any environmental decision of which Plaintiff seeks review. Again for the record, what Plaintiff seeks is that the County be held accountable for its multiple violations of environmental law, that its power of environmental review be temporarily revoked, and that staff, the Planning Commission and County Commissioners receive training regarding environmental rules.

B. THIS ACTION IS NOT REVIEW OF AN ENVIRONMENTAL DECISION, AND MEPA

IS INAPPLICABLE.

What environmental review decision is it that Plaintiff's are challenging and which should be challenged only under MEPA? A review of the Complaint verifies that Plaintiff is not asking for review of an environmental decision, yet Defendant tries to characterize it as such. Over and over, Defendant's arguments are based on a premise of challenge to environmental review, and that premise is invalid. Again, Defendant's claim that MERA in inapplicable and that Plaintiff's only recourse is an action under MEPA is wholly without merit and contrary to the statute. Minn. Stat. §116B.12.

Most importantly, the Minnesota Environmental Policy Act is inapplicable in this case, and under MERA, Plaintiffs are not limited to review under MEPA, as there has been no "administrative procedure" to review, and MERA specifically is not limited, as MEPA is:

> No contested case hearings preceded this MERA action, and the parties do not seek review of an agency action pursuant to these administrative processes. Therefore, the Minnesota Administrative Procedure Act is in applicable and the district court properly exercised de novo jurisdiction...
>
> The legislature expressly stated that the "rights and remedies provided [in MERA] shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available." Minn. Stat. §116B.12 (2002). Furthermore, there is no basis for estoppel of claims or issues because the administrative proceedings did not involved hearings or agencies acting in judicial or quasi-judicial capacities. *See Surf & Sand Inc. v. Gardebring, 457 N.W.2d 782, 787 (Minn. App. 1990) (res judicata applies to administrative proceedings when agency acts in judicial capacity and resolves disputed issues that the parties have had adequate opportunity to litigate), review denied (Minn. Sept. 20, 1990).* Thus, this civil action under MERA was authorized regardless of administrative processes.

State of Minnesota by Fort Snelling State Park Association v. Mpls. Park & Rec. Bd., et al., 673 N.W.2d 169, 177 (Minn. App. 2003).

III. RICE COUNTY'S MOTION TO DISMISS MUST BE DENIED.

Rice County has built an argument around a mischaracterization of the Plaintiff's Complaint. This is a MERA action, an action designed to hold the County accountable for its violations of

environmental law. Defendant Rice County's Motion to Dismiss must be denied in its entirety.

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Dated: 1/6/15

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