STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RICE | THIRD JUDICIAL DISTRICT

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.

Court File No. C8-05-1032

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Defendants submit the following Reply Memorandum of Law in Support of their Motion to Dismiss. Plaintiff misconstrues the nature of a MERA claim which is designed to provide a cause of action to prevent conduct that causes pollution, impairment or destruction of the environment. The County's involvement in the three projects outlined in the Complaint was limited to environmental review. This is not "conduct" under MERA; rather, it is the activity of the project proposer that potentially could impact the environment. Although Plaintiff claims the County failed to follow the procedural requirements of MEPA, the alleged deficiencies all relate to environmental review under MEPA. The procedural rules of MEPA, however, are not "environmental quality" rules under MERA. Accordingly, the Court should reject Plaintiff's novel attempt to create a new cause of action under the so-called "procedural arm" of MERA because none exists.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO CONSIDER PLAINTIFF'S MERA CLAIM WHERE IT HAS FAILED TO DEMONSTRATE COMPLIANCE WITH THE MANDATORY PROCEDURAL REQUIREMENTS OF THE STATUTE.

In order to maintain a cause of action under MERA, Plaintiff must adhere to the "mandatory" notice requirements outlined in the statute. *County of Dakota v. City of Lakeville*, 559 N.W.2d 716, 721 (Minn. App. 1997); Minn. Stat. § 116B.03, subd. 2. First, within "seven days after commencing such action, the plaintiff shall cause a copy of the summons and complaint to be served upon the attorney general and the pollution control agency." Minn. Stat. § 116B.03, subd. 2. In addition, "within 21 days after commencing such action, the plaintiff shall cause written notice thereof to be published in a legal newspaper in the county in which suit is commenced, specifying the names of the parties, the designation of the court in which the suit was commenced, the date of filing, the act or acts complained of, and the declaratory or equitable relief requested." *Id.*

Plaintiff has failed to produce evidence or documentation it has complied with these mandatory procedural requirements, despite a request by the undersigned for evidence of compliance and by ignoring the reference to this issue in the County's initial memorandum of law. *See Defs.' Memo., p. 5, n. 1 (August 26, 2005).* The Minnesota Court of Appeals has held if a plaintiff fails to "comply with this requirement, they did not properly commence their action and the district court ha[s] no jurisdiction over the matter." *County of Dakota*, 559 N.W.2d at 721. Therefore, if the Plaintiff failed to provide a copy of the summons and complaint to the attorney general or failed to publish legal notice, its claims must be dismissed for lack of jurisdiction.

II. PLAINTIFF IS CHALLENGING THE DEFENDANTS' PROCESS OF ENVIRONMENTAL REVIEW UNDER MINNESOTA RULES CHAPTER 4410 AND, AS A RESULT, PLAINTIFF'S MERA CLAIM IS NOT ACTIONABLE.

Plaintiff's claim it has a procedural cause of action under the "procedural arm" of MERA has no basis in fact or the law. A review of the specific allegations in Plaintiff's Complaint reveals each of the ten counts alleges a violation of a procedural rule under Minnesota Rules Chapter 4410 entitled "Environmental Quality Board, Environmental Review, Environmental Assessment Worksheet." (emphasis added). Plaintiff alleges specific violations under Minn. R. 4410.1000 (Projects requiring an EAW), Minn. R. 4410.1100 (Petition Process), Minn. R. 4410.3100 (Prohibition on final government decisions) and Minn. R. 4410.4300 (Mandatory EAW categories). These alleged violations fall under the rules of "environmental review" promulgated by the Environmental Quality Board.

An RGU's process of environmental review under Minnesota Rule Chapter 4410 is appropriately challenged by a declaratory judgment action under MEPA, not MERA. *Berne Area Alliance for Quality Living v. Dodge County Bd. of Com'rs*, 694 N.W.2d 577 (Minn. App. 2005), *review denied* (June 28, 2005) ("Declaratory judgment against County for process of feedlot application permits under Minnesota Rules, Chapter 4410 and 7020"); *Minnesotans for Responsible Recreation v. Department of Natural Resources*, 651 N.W.2d 533 (Minn. App. 2002) ("Declaratory judgment action against DNR seeking declaration that DNR complete environmental assessment worksheets under Minnesota Rules, Chapter 4410"). Clearly, the specific allegations in Plaintiff's Complaint relate to the Defendants' process of environmental review under Minnesota Rules, Chapter 4410. As in *Berne* and *Minnesotans for Responsible Recreation*, a challenge to an RGU's process of environmental review must be brought under MEPA. Minn. Stat. § 116D.04, subd. 10.

There is no dispute MERA specifically authorizes a cause of action for "conduct" which "violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation, agreement or permit ... or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subp. 5. However, the Defendants' actions do not violate an environmental quality rule nor does its process of environmental review constitute "conduct" under the statute.[1]

As a threshold matter, the Plaintiff is unable to demonstrate the alleged violations of Minnesota Rule, Chapter 4410 constitute "conduct" for the purposes of MERA. Minnesota courts have consistently determined "environmental review is simply a process of information gathering and analysis." *Coon Creek Watershed District v. State Environmental Quality Board*, 315 N.W.2d 614, 605 (Minn. 1982). This process of information gathering "cannot result in pollution, impairment, or destruction of the environment." *National Audubon Soc'y v. Minnesota Pollution Control Agency*, 569 N.W.2d 211, 219 (Minn. App. 1997). Because the Defendants' actions under Minnesota Rule, Chapter 4410 do not constitute "conduct" under MERA, Plaintiff's claims must fail. *See Id.*

Absent from Plaintiff's Complaint is any allegation or reference to an environmental quality rule. To the contrary, Plaintiff alleges deficiencies in the Defendants' administrative procedure. Minnesota Rule Chapter 4410 describes the process and procedures an RGU must use in conducting environmental review and does not reference environmental quality.

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[1] Plaintiff contends MERA is "comprised of two distinct causes of action" for "procedural violations" and "substantive damage." *Pl's Memo.* pg. 4-5. Plaintiff fails to cite a single case or statute which supports its position. There are not two different causes action under MERA; rather, there are two ways to demonstrate how conduct can cause environmental harm. As the Minnesota Supreme Court explained, "There are two types of pollution, impairment or destruction of natural resources subject to 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, 264 (Minn. 1997) (emphasis in original) (citing Minn. Stat. § 116B.02, subd. 5). There is no support for Plaintiff's erroneous contention MERA contemplates a "procedural" cause of action.

An example of a typical MERA claim involving an environmental "quality" rule is attached. In *Beach, et al. v. MPCA and County of Koochiching*, Dist. Ct. File No. C4-03-469 (Dec. 27, 2004), the county proposed to construct a sewer extension project to the Jackfish Bay area. The plaintiffs attempted to demonstrate a MERA claim two ways. First, the plaintiffs alleged the project would violate environmental quality standards, permits and rules (i.e., water quality rules and standards, noise rules and standards, and NPDES permit violations). Second, the plaintiffs claimed the project was likely to materially adversely affect the environment. The court rejected both of these assertions. The decision provides a good example of the environmental quality standard, permit or rule within the meaning of the statute. Moreover, the decision provides an example of where an RGU's role extends beyond mere environmental review and into the realm of "conduct." Because Koochiching County was constructing the project, the plaintiffs could allege a MERA claim against the county.

Here, Rice County is not constructing any of the projects and therefore its administrative actions under MEPA are insufficient to create a MERA claim. Plaintiff's reliance on *Gillette v. Peterson*, 2004 WL 1191764 (Minn. App. June 1, 2004) is misplaced. In *Gillette*, the Court determined a MERA claim was appropriate for violations of Minnesota Statute § 103G.245, subd. 1(2) which requires a "public works permit to . . . change or diminish the . . . course [or] current . . . of public waters." Unlike *Gillette*, the instant action does not involve permitting or other conduct, it involves information gathering in the form of administrative procedure under Minnesota Rule, Chapter 4410. There is simply no precedence for permitting a challenge to an RGU's process of environmental review under MERA.

Finally, a review of the prayer for relief in the Complaint demonstrates further why this action is without merit. The first 12 claims for relief request a declaration the County violated

various environmental review provisions of MEPA. If Plaintiff believed the County's environmental review was deficient, it had a remedy under the provisions of MEPA. Moreover, MEPA is not an environmental quality rule; rather, it simply provides an administrative framework for the gathering and analysis of information related to a specific project.

The next claim for relief seeks to enjoin the County from being designated as an RGU by the EQB. The EQB is not a party to this action and it is the EQB, not the County, that determines the appropriate RGU for a specific project.

Plaintiff then has the audacity to request the Court "Order remedial training for Rice County Staff, Commissioners, and Planning Commissioners regarding Environmental Review." *Pl.'s Compl., p. 21 (June 10, 2005).* This request has no legal basis and is just plain silly and offensive to the hard-working public servants in Rice County. The County, its elected officials and its appointed commissioners take their role in environmental review seriously, as they do with respect to all of their duties and responsibilities. In short, there is no basis in fact or law to support Plaintiff's outlandish claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court grant their Motion to Dismiss, and dismiss Plaintiff's claims in their entirety.

IVERSON REUVERS

Dated: September 20, 2005

By 

Paul D. Reuvers, #217700
Jeffrey A. Egge, #338771
Attorneys for Defendants
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200