STATE OF MINNESOTA
IN COURT OF APPEALS
A10-812

Minnesota Center for Environmental Advocacy,
Appellant,

vs.

Minnesota Public Utilities Commission,
Respondent,

Minnesota Environmental Quality Board,
Respondent,

and

Enbridge Energy, Limited Partnership, et al., defendant intervenors,
Respondents.

Filed December 14, 2010
Affirmed
Larkin, Judge

Clearwater County District Court
File No. 15-CV-08-865

Alexandra B. Klass, Minneapolis, Minnesota; and

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Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's award of summary judgment in respondents' favor on appellant's claims under the Minnesota Environmental Policy Act and Minnesota Environmental Rights Act. Because respondents are entitled to judgment as a matter of law, we affirm.

FACTS

Respondent Enbridge Energy owns and operates interstate common-carrier pipelines for the transportation of crude petroleum, derivatives, and related products. This case involves Enbridge's LSr pipeline, which is an approximately 313-mile long, 20-inch diameter, crude-oil pipeline that runs between Manitoba, Canada and Clearbrook, Minnesota. Prior to constructing the LSr pipeline, Enbridge filed applications for a pipeline routing permit and a certificate of need with respondent Minnesota Public Utilities Commission (MPUC). Enbridge submitted an Environmental Assessment Supplement (EAS), as required by Minnesota Rule 7852.2700 (2007), with its applications. After receiving comments on the applications, MPUC accepted the applications as substantially complete and referred the matters to the office of administrative hearings for contested-case proceedings.

The general public was provided with notice of the proposed pipeline, and public informational meetings were held in six Minnesota counties. At those hearings, the administrative-law judge (ALJ) received public comments regarding the LSr and portions of two other pipelines, the Alberta Clipper and Southern Lights. In response to preliminary input from landowners and others, Enbridge filed a revised pipeline route request for the LSr. Following additional public hearings, the ALJ issued a report recommending that MPUC issue the certificate of need and routing permit subject to conditions.

The matter came before MPUC for consideration. MPUC granted Enbridge's application for a certificate of need and issued the pipeline routing permit. Appellant Minnesota Center for Environmental Advocacy (MCEA) filed a request for reconsideration, which MPUC denied.

MCEA filed suit against MPUC in district court, claiming violations of the Minnesota Environmental Policy Act (MEPA). Enbridge intervened in the action. Thereafter, MCEA filed an amended complaint alleging additional MEPA claims against MPUC, as well as claims against MPUC and Enbridge under the Minnesota Environmental Rights Act (MERA). The district court granted summary judgment in respondents' favor on all claims. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We

review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

I.

We first review the award of summary judgment on MCEA's MEPA claims. The purposes of MEPA are

> (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment; (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Minn. Stat. § 116D.01 (2008).

MEPA requires that "[w]here there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit [(RGU)]." Minn. Stat. 116D.04, subd. 2a (2008). "Decisions on the need for an environmental assessment worksheet, the need for an environmental impact statement and the adequacy of an environmental impact statement may be reviewed by a declaratory judgment action in the district court of the county wherein the proposed action, or any part thereof, would be undertaken." Minn. Stat. § 116D.04, subd. 10 (2008). MCEA asked the district court to declare that MPUC violated MEPA by failing "to provide the required environmental analysis, instead relying on environmental information prepared solely by the pipeline company."

Because we review the district court's award of summary judgment on the MEPA claims de novo, *see STAR Ctrs., Inc.*, 644 N.W.2d at 77, we ultimately review the agency decision directly. When reviewing an administrative agency decision, we may affirm, reverse, modify the decision, or remand for further proceedings if the "substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2008).

The party seeking appellate review of an agency decision has the burden of proving that the decision was the product of one or more of these statutory infirmities. *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). The decisions of administrative agencies are presumed to be correct and to have been based upon the application of the expertise necessary to decide technical matters that are within the scope of the agencies' concerns and authority. *In re Universal Underwriters Life Ins. Co.*, 685 N.W.2d 44, 45-46 (Minn. App. 2004). In reviewing agency decisions, the courts must exercise restraint so as not to substitute their judgment for that which is the product of the technical training, education, and experience found within the agency. *Id.* We will not hold an agency's decision arbitrary and capricious if there is a rational connection

between the facts found and the decision, and if the agency has reasonably articulated the basis for its decision. *Id.* at 45. "We defer to the agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable." *In re an Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 588 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995).

A. Mootness

Respondents assert that because the pipeline has already been built and is fully operational, MCEA's MEPA claims are moot. A moot case is defined as "[a] matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." *Black's Law Dictionary* 1099 (9th ed. 2009). The issue presented here is not abstract; a controversy still exists for which relief could be provided. Moreover, "[w]hen evaluating the issue of mootness in [National Environmental Policy Act (NEPA)] cases, [federal courts] have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities could merely ignore the requirements of NEPA, build [their] structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (quotation omitted). We agree with the federal court's assessment and will consider the merits of MCEA's MEPA claims.

B. Compliance With Environmental Review Responsibilities

MCEA challenges the adequacy of MPUC's environmental review, arguing that MPUC "violated MEPA by failing to conduct its own thorough, independent analysis of

environmental effects." MCEA argues that "once the PUC received the EAS, it had the responsibility for ensuring that the EAS (and any other environmental document it may have independently prepared) complied with applicable MEPA rules, as well as the pipeline routing rules," and that MPUC failed to do so.

Although MEPA requires "a detailed environmental impact statement prepared by the responsible governmental unit," it also provides that the Environmental Quality Board (EQB) "shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement." Minn. Stat. § 116D.04, subds. 2a, 4a (2008). Pursuant to this grant of authority, the EQB has promulgated rules that provide an alternative form of environmental review for proposed pipelines, which is contained in the rules governing the routing permit process. *See generally* Minn. R. 7852 (2007).

The applicable rule states that "[t]he applicant must also submit to the commission along with the application an [EAS containing an] analysis of the potential human and environmental impacts that may be expected from pipeline right-of-way preparation and construction practices and operation and maintenance procedures." Minn. R. 7852.2700. The impacts to be addressed include, but are not limited to, human settlements; the existence and density of populated areas; natural areas, wildlife habitat, water, and recreational lands; and land of historical, archaeological, and cultural significance. Minn. R. 7852.0700. Following public review and contested case hearings, MPUC must "consider" the environmental impacts of the proposed pipeline route "based on the public

hearing record" and provide the reasons for its decision in written findings of fact. Minn. R. 7852.1800, 1900.

The record shows that MPUC followed this process. After numerous public hearings, the ALJ issued his report. In that report, the ALJ made findings of fact regarding the relevant environmental criteria. The ALJ cited to specific record evidence that substantially supports the findings. Based on those findings, the ALJ recommended issuance of a route permit. Next, MPUC independently reviewed the record. MPUC's order granting the pipeline routing permit does not blindly accept Enbridge's application or the ALJ's report. MPUC stated:

> Having examined the record itself and carefully considered the ALJ's Report, the Commission concurs in nearly all his findings of fact and conclusions of law. At a few points, however, the Commission is persuaded that the record better supports the findings and conclusions offered by Enbridge and [Office of Energy Security] for the reasons discussed above.

MPUC complied with the alternative environmental-review process and thereby satisfied its environmental review responsibilities under MEPA.

C. Connected and Phased Actions

MCEA contends that MPUC should have conducted a single environmental review for the LSr project and two other Enbridge pipeline projects: the Alberta Clipper and the Southern Lights. In support of its position, MCEA cites the Minnesota Administrative Rules, which provide that "connected actions or phased actions shall be considered a single project for purposes of the determination of need for an [Environmental Impact Statement (EIS)]." Minn. R. 4410.1700, subp. 9 (2007).

Two projects are considered connected actions "if a responsible governmental unit determines they are related in any of the following ways: A. one project would directly induce the other; B. one project is a prerequisite for the other and the prerequisite project is not justified by itself; or C. neither project is justified by itself." Minn. R. 4410.0200, subp. 9c (2007). A phased action "means two or more projects to be undertaken by the same proposer that a RGU determines: A. will have environmental effects on the same geographic area; and B. are substantially certain to be undertaken sequentially over a limited period of time." *Id.*, subp. 60 (2007).

But Minn. R. 4410.2000 expressly contemplates separate environmental review of a pipeline, like the LSr project, that is part of a larger planned network. Although the rule states that "[m]ultiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when determining the need for an EIS and in preparing the EIS," the rule goes on to state:

> For proposed projects such as highways, streets, *pipelines*, utility lines, or systems where the proposed project is related to a large existing or planned network, for which a governmental unit has determined environmental review is needed, the RGU shall treat the present proposal as the total proposal or select only some of the future elements for present consideration in the threshold determination and EIS. These selections must be logical in relation to the design of the total system or network and must not be made merely to divide a large system into exempted segments.

Minn. R. 4410.2000, subp. 4 (emphasis added).

This rule is applicable here. The LSr project is part of Enbridge's planned pipeline network. Enbridge intended to begin operating the LSr pipeline more than one

year before the other two pipelines. Therefore, the treatment of the LSr project as the total proposal was logical in relation to the design of the total network and was not made merely to "divide a large system into exempted segments."

Moreover, the LSr, Alberta Clipper, and Southern Lights pipelines are not connected actions. MCEA asserts that the three pipelines meet the definition of connected and phased actions because "they are dependent on each other for their existence." But the record shows that the three projects serve different purposes: the LSr carries light crude oil, the Alberta Clipper is intended to transport heavy crude oil, and the Southern Lights is intended to carry diluent. MCEA claims that LSr is a prerequisite for Southern Lights because Southern Lights will connect to Line 13, which will have its flow reversed to carry diluents and LSr will replace the crude transport capacity lost through the reversal of Line 13. But this does not render LSr a prerequisite for Southern Lights. Even though capacity replacement will result from construction of LSr, the record shows that the LSr was designed to alleviate existing bottlenecks in the pipeline system. Two actions are connected only if one project is a prerequisite for another and the prerequisite is not justified on its own; LSr is self-justified. And although these pipelines appear to be phased actions as defined by the rule, under Minn. R. 4410.2000, subp. 4, it was unnecessary to consider the three pipelines as a single project.

MCEA also alleges that MPUC "recognized the connected nature of the three pipelines and considered them as one project until just prior to the environmental review stage, at which time it arbitrarily split the LSr pipeline from the other two for permitting purposes." The record refutes this allegation. MPUC established one docket for the LSr

and another for Alberta Clipper and Southern Lights. The public-meeting notices indicated that the LSr was a separate action from the other two pipelines. The fact that the public hearings on the three proposed pipelines were consolidated for public convenience does not mean that the pipelines are connected actions as defined by rule.

Lastly, MCEA argues that MPUC violated MEPA by failing to analyze the environmental impacts associated with the installation of additional pumps to utilize the full capacity of the LSr line and the additional pipelines needed to utilize the full capacity of the Alberta Clipper line. But the record indicates that no additional pumping stations or additional lines are planned. MCEA provides no legal support explaining how the LSr project can be considered a "connected" or "phased" action with unplanned, hypothetical pumping stations or pipelines.

D. Direct, Indirect, and Cumulative Effects

"In selecting a route for designation and issuance of a pipeline routing permit, the commission shall consider the impact [of] the pipeline [on] the following: cumulative potential effects of related or anticipated future pipeline construction[.]" Minn. R. 7852.1900, subp. 3(I). "[A] cumulative potential effects analysis is limited geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources . . . as the proposed project." *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 830 (Minn. 2006). The cumulative-effects analysis focuses on whether a project that may not significantly impact the environment singularly causes a substantial impact when other planned or existing projects are considered.

MCEA asserts that the "cumulative, direct, and indirect impacts from the three pipelines must be examined, particularly as concerns the cumulative effects of these projects on global warming." According to MCEA, the environmental effects that must be examined are the "effect on global warming from the increase in greenhouse gas emissions associated with refining the tar sands [in Alberta, Canada] and using the resulting petroleum, the destruction of carbon-sequestering boreal forests and bogs in northern Alberta, and the subsequent release of carbon from those boreal forests and bogs." But rule 7852.1900, subp. 3(I), concerns the designation of a route for a proposed pipeline, whereas the effects with which MCEA is concerned relate to the tar-sand refining process in Alberta and the existence of the pipeline generally—not to the LSr pipeline route itself.

Moreover, MPUC considered the cumulative potential effects as specified by the rule. The ALJ noted that the revised route and alignment submitted by Enbridge "describes a 500 foot route width that will accommodate either, or both, of the LSr and Alberta Clipper pipelines, if approved by the Commission." These pipelines were planned to run adjacent and parallel. The ALJ further noted that, beyond the LSr and the Alberta Clipper Projects (i.e., the Alberta Clipper and Southern Lights pipelines), Enbridge did not have plans for further pipeline construction. In its report, MPUC noted that "[b]ased on the best available evidence, the Commission finds that Enbridge's preferred route . . . will have no greater cumulative potential effect on future pipeline construction than any feasible alternative." This decision is presumed to be correct and to have been based upon the application of the expertise necessary to decide technical

matters that are within the scope of the agencies' concerns and authority. *See Universal Underwriters Life Ins. Co.*, 685 N.W.2d at 45-46.

E. Failure to Respond to Comments

MCEA also asserts that MPUC violated MEPA by failing to respond to the Minnesota Department of Natural Resource's (DNR) and MCEA's written comments expressing concerns about the LSr pipeline route and "by stating in response to comments by the DNR and MCEA that Enbridge could address any environmental concerns as they arose during the construction and operation of the pipeline."

MPUC evaluated the evidence in the record and considered the comments made by the DNR. In an attempt to respond to the DNR's concerns, MPUC adopted seven supplemental findings, which were suggested by the Minnesota Department of Commerce's Office of Energy Security (OES), in its order granting the pipeline routing permit. Furthermore, the dictate that MPUC must consider evidence in the record does not necessarily mean that MPUC must specifically respond to each comment or concern. *See* Minn. R. 7852.1800 ("The commission's route selection decision shall be based on the public hearing record and made in accordance with part 7852.1900."). And we must keep in mind the deference that is afforded when reviewing matters within an agency's expertise. *See Universal Underwriters*, 685 N.W.2d at 45-46 ("When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience."). Although MPUC did not respond to each of the DNR's

comments with a great deal of specificity, it did address each of them in some respect. Based on our deferential standard of review, we conclude that MPUC adequately considered and addressed the DNR's concerns.

MCEA also argues that MPUC failed to consider or respond to its written comments. MCEA takes issue with the lack of "analysis of any sort of the cumulative effects of all three pipelines on the development of the Alberta tar sands oil and the impact of that development on air quality in Minnesota or climate change." Specifically, MCEA argues that the mining process generates enormous carbon emissions in Canada and the resulting import of crude oil from the mines causes increased refinery activity and fuel consumption in Minnesota, which also increases carbon emissions. MCEA is correct—MPUC did not address these concerns. But these concerns deal with mining, refining, and fuel consumption in general, whereas MPUC was concerned with the environmental impact resulting from a specific, proposed pipeline route. *See* Minn. R. 7852.1900. MCEA's general environmental concerns were beyond the scope of the necessary environmental review, and MPUC's review is not inadequate as a result of its failure to address them.

Lastly, MCEA misplaces reliance on *Trout Unlimited v. Minn. Dep't of Agric.* to support its argument that MPUC erred by allowing Enbridge to address environmental problems as they arose. 528 N.W.2d 903 (Minn. App. 1995) *review denied* (Apr. 27, 1995). In *Trout Unlimited*, the agency recognized the potential for significant environmental impacts, but determined that, because the situation could be monitored and permits would need to be obtained, an EIS was unnecessary. *Id*. at 909. This court held

that future mitigation measures were not a substitute for an EIS. *Id.* But *Trout Unlimited* is factually distinguishable because, in this case, an environmental impact review was conducted under the applicable rules. And although MPUC's order included mitigation plans, MPUC did not use mitigation measures as a substitute for environmental review.

In sum, none of MCEA's arguments establishes a basis to reverse, modify, or remand the MPUC's decision to issue the routing permit and certificate of need for the LSr pipeline. *See* Minn. Stat. § 14.69. Accordingly, summary judgment in MPUC's favor on MCEA's MEPA claims is affirmed.

II.

We next address MCEA's MERA claims. "MERA provides a civil remedy for those that seek to protect . . . the air, water, land, and other natural resources within the state" from pollution, impairment, or destruction. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs*, 711 N.W.2d 522, 525 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). MCEA alleged one MERA count against MPUC and two MERA counts against Enbridge, generally asserting that respondents polluted, impaired, or destroyed a calcareous fen[1] in violation of MERA. MCEA also asserts that Enbridge violated an environmental-quality standard by acting without an approved management plan. *See* Minn. R. 8420.0935, subp. 4 (2007) ("Calcareous fens

[1] "A calcareous fen is a peat-accumulating wetland dominated by distinct groundwater inflows having specific chemical characteristics. The water is characterized as circumneutral to alkaline, with high concentrations of calcium and low dissolved oxygen content. The chemistry provides an environment for specific and often rare hydrophytic plants." Minn. R. 8420.0935, subp. 2 (2007).

must not be impacted or otherwise altered or degraded except as provided for in a management plan approved by the commissioner."). MCEA sought declaratory and equitable relief on its MERA claims.

On appeal, MCEA argues that summary judgment was improperly granted because there are genuine issues of material fact regarding its MERA claims. Respondents counter that MCEA's MERA claims are barred under Minn. Stat. § 216B.27, subd. 2 (2008). Chapter 216B governs Minnesota public utilities. *See* Minn. Stat. §§ 216B.01-.82 (2008). Minn. Stat. § 216B.27 describes the process for reconsideration of MPUC decisions, including the issuance of pipeline routing permits, and states:

> The application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. No cause of action arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made. No person or corporation shall in any court urge or rely on any ground not so set forth in the application for rehearing.

Minn. Stat. § 216B.27, subd. 2.

MCEA argues that Minn. Stat. § 216B.27 does not apply to its MERA claims because "[t]hat statute limits the issues that a party may raise in an appeal of a PUC decision made as part of an administrative proceeding." But MCEA cites no authority to support its assertion that the statute applies only to appeals, and the assertion is

inconsistent with the plain language of the statute. If the legislature's intent is clearly discernible from a statute's unambiguous language, courts interpret the language according to its plain meaning, without resorting to other principles of statutory construction. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004). Section 216B.27, subd. 2, unambiguously references "[n]o cause of action arising out of any decision" or "any proceeding for the judicial review" of the decision. The plain language of the statute therefore applies both to judicial proceedings to review a decision and to causes of action arising out of the decision. Because this case involves a cause of action arising out of a decision of MPUC, section 216B.27, subd. 2, applies.

We therefore consider whether MCEA'S MERA claims against Enbridge are barred under section 216B.27, subd. 2. This section precludes a party from bringing a cause of action arising out of an MPUC decision unless that party first raises the ground for the claim in a petition for rehearing on the decision. The grounds for MCEA's MERA claims against Enbridge are that Enbridge constructed and operates the LSr pipeline through a calcareous fen, thereby causing pollution, impairment and destruction of a natural resource, in the absence of a management plan approved by the DNR. These claims arise from MPUC's decision to authorize the construction of the pipeline in a particular location. Although MCEA petitioned for reconsideration of MPUC's pipeline-routing decision, its petition was based solely on grounds that MPUC issued the routing permit and certificate of need "prior to completion of adequate environmental review for the project" under MEPA. It is undisputed that MCEA did not raise the grounds for its MERA claims against Enbridge in its petition for rehearing. Accordingly, the claims

against Enbridge are procedurally barred. S*ee* Minn. Stat. § 216B.27, subd. 2. Enbridge is therefore entitled to summary judgment on these claims as a matter of law.

Moreover, contrary to MCEA's assertion, Enbridge is not operating the LSr pipeline without an approved management plan. Under Minnesota law, no action may be brought under MERA on the basis of "conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture." Minn. Stat. § 116B.03, subd. 1 (2008); *see also* Minn. R. 4410.0200 (2007) ("'Permit' means a permit, lease, license, certificate, or other entitlement for use or permission to act that may be granted or issued by a governmental unit . . . ."). The DNR has approved a fen management plan for the affected fen. MCEA's argument that this management plan does not apply to the LSr pipeline is unpersuasive. The plan states: "The following discussion refers to calcareous fen components within the Gully 30 area that have been or will be impacted directly or indirectly by the 2008 installation of the LSr pipeline and the proposed installation of the Alberta Clipper pipeline . . . ." Thus, even if MCEA's MERA claim against Enbridge were not procedurally barred, the claim based on Enbridge's operation of the LSr in the absence of an approved management plan would fail as a matter of law. *See* Minn. Stat. § 116B.03, subd. 1.

We next consider whether MCEA's MERA claim against MPUC is barred under section 216B.27, subd. 2. MCEA asserts that MPUC failed to conduct an adequate environmental review as required by MEPA and as a direct result, granted a routing

permit for the construction of the LSr pipeline through a calcareous fen, thereby causing pollution, impairment, and destruction of a natural resource in violation of MERA. This claim arises out of MPUC's permitting decision. Because MCEA raised the adequacy of MPUC's environmental review in its petition for reconsideration of the permitting decision, the MERA claim is not procedurally barred. *See* § 216B.27, subd. 2.

But the reason that the MERA claim against MPUC is not procedurally barred is because the claim and MCEA's petition for reconsideration are based on identical grounds: MPUC's alleged failure to conduct adequate environmental review under MEPA. And because MCEA alleges inadequate environmental review as the basis for its MERA claim, the claim entails assessment of MPUC's environmental review. But MEPA, rather than MERA, is the "appropriate vehicle" with which to challenge the adequacy of MPUC's environmental review "where the agency's role is limited only to conducting environmental review of the project at issue." *See Nat'l Audubon Soc. v. Minnesota Pollution Control Agency*, 569 N.W.2d 211, 213, 219 (Minn. App. 1997) (concluding that where plaintiffs were challenging an agency's environmental-review decision and the agency's role was limited to conducting the required environmental review of the project, plaintiffs' challenge must be brought under MEPA and not MERA), *review denied* (Minn. Dec. 16, 1997). Accordingly, MCEA may not maintain its claim against MPUC under MERA. *See id*. at 219.

Perhaps MCEA is attempting to avoid the conclusion, compelled by *National Audubon*, that MPUC's alleged inadequate review is not actionable under MERA by asserting that MPUC's inadequate review is "causing" pollution. *See id.* at 218

(explaining that "[b]ecause environmental review cannot result in pollution, impairment, or destruction of the environment . . . environmental review does not constitute 'pollution, impairment, or destruction' of the environment as defined by MERA"). But because we have determined that MPUC's environmental review is adequate under MEPA, there is no genuine issue of material fact, and the MERA claim fails as a matter of law. *See Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) ("A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim."). For these reasons, MPUC is entitled to summary judgment on MCEA's MERA claim.

In conclusion, summary judgment on all of MCEA's MERA claims is appropriate.

Affirmed.

Dated:

Judge Michelle A. Larkin