

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Contract

Northeastern Minnesotans for Wilderness,

Plaintiff,

v.

Minnesota Department of Natural Resources
and Sarah Strommen, in her capacity as
Commissioner of the Minnesota Department
of Natural Resources,

Defendants,

Twin Metals Minnesota LLC,

Intervenor.

Court File No. 62-CV-20-3838

Judge Laura Nelson

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND ALLOWING STIPULATION

This matter did not come for a hearing before the undersigned and was decided based on party submissions.¹ Based upon all the files, pleadings, records, and proceedings herein, and upon the arguments and submissions of counsel, the Court hereby makes the following:

ORDER

1. Intervenor Twin Metals Minnesota LLC's motion to dismiss is **DENIED**.
2. This matter is **REMANDED** to the DNR pursuant to Minn. Stat. § 116B.10 for the DNR to institute appropriate administrative proceedings to consider and make findings and issue an order regarding the alleged inadequacy of Minn. R. 6132.2000.
3. Judge Nelson's case manager will contact the parties to schedule a telephonic status conference to discuss next steps related to the remand of this matter to the DNR.
4. The attached Memorandum shall be incorporated into this Order.

¹ Pursuant to the Ramsey County Chief Judge's Administrative Order—a copy of which has been filed in this matter—and in light of the current health pandemic, this motion was considered on the parties' written submissions without oral argument.

IT IS SO ORDERED.

BY THE COURT:

Dated: May 12, 2021

LAURA NELSON
JUDGE OF DISTRICT COURT

MEMORANDUM

Factual and Procedural History

Plaintiff Northeastern Minnesotans for Wilderness, (“NMW” or “Plaintiff”), a non-profit organization based in Ely, Minnesota, has filed the instant lawsuit against Defendants Minnesota Department of Natural Resources (“DNR”) and Sarah Strommen, in her capacity as Commissioner of the Minnesota Department of Natural Resources (collectively “Defendants”), under the Minnesota Environmental Rights Act (MERA), Minn. Stat. §§ 116B.01-13 (2018), alleging that the existing rules promulgated by the DNR to regulate non-ferrous mining are insufficiently protective of the Boundary Waters Canoe Wilderness Area (“BWCAW”) because they do not prohibit non-ferrous mining in the Rainy River headwaters, which feed into the waters of the BWCAW. Specifically NMW opposes a non-ferrous mine proposed to be sited in the Rainy River headwaters by Twin Metals Minnesota LLC (“Twin Metals”), which NMW argues will pollute water that will then flow into the BWCAW. NMW in their lawsuit seeks to expand Minn. R. 6132.2000, which bans non-ferrous mining in the BWCAW and the BWCAW Corridor (which includes the 1/4-mile-minimum mining-free buffer around the BWCAW), to include a ban on non-ferrous mining in the Rainy River headwaters. Minn. Stat. § 116B.10 provides for a civil action against a state agency where a person challenges “an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit ... for which the applicable statutory appeal period has elapsed.” Minn. Stat. § 116B.10, subd. 1. A plaintiff must first make out a prima facie case that the environmental quality standard is “inadequate to protect” natural resources. *Id.*, subd. 2. The district

court, while retaining jurisdiction, shall remit the matter to the state agency that promulgated the environmental standard and the state agency shall conduct administrative proceedings to consider, make findings, and issue an order on the adequacy of the environmental standard. *Id.*, subd. 3. After an order has been issued, a party who is dissatisfied with the order can seek review in district court, and the district court is required to determine whether the agency's order is supported by a preponderance of the evidence. *Id.*

NMW filed their initial complaint in this matter on June 24, 2020. On September 30, 2020, Twin Metals filed a notice of intervention pursuant to Minn. Stat. § 116B.10, subd. 4. On November 13, 2020, NMW and Defendants filed a stipulation (the "Stipulation") in which NMW and Defendants agreed to skip the first step of analysis under Minn. Stat. § 116B.10 and move straight to administrative remand to the DNR for consideration of Minn. R. 6132.2000, with DNR not taking a position on whether the evidence NMW has presented warrants a change to the rules. DNR stated that if this matter were administratively remanded it would conduct a fair and impartial process to determine the adequacy of Minn. R. 6132.2000, would allow a public comment period, and would continue its independent environmental review of Twin Metals' proposed non-ferrous mine in the Rainy River headwaters. Twin Metals has since filed the instant rule 12.02 motion to dismiss and an objection to NMW and the Defendants' stipulation. Twin Metals' argues this case should be dismissed because NMW (1) lacks standing to bring a complaint in this matter; (2) fails to state a proper claim because any material adverse effects to the environment by the proposed Twin Metals' mine are too premature and speculative; (3) fails to identify an applicable statutory appeal period which has elapsed, which Twin Metals alleges is a prerequisite to bringing a claim under Minn. Stat. § 116B.10; and (4) NMW's requested relief under Minn. Stat. § 116B.10 constitutes a violation of the separation of powers doctrine and an unconstitutional taking. Twin Metals also argues that NMW and Defendants cannot stipulate to remand this matter to the DNR without Twin Metals' input because to do so would deprive Twin Metals of their rights as a party in this action.

Legal Standard for Motion to Dismiss

A civil claim may be dismissed for "failure to state a claim upon which relief can be

granted.” Minn. R. Civ. P. 12.02(e). “The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (internal citations omitted). A district court may only dismiss a complaint for failure to state a claim on which relief may be granted, if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded. *Finn v. Alliance Bank*, 860 N.W.2d 638 (Minn. 2015).

NMW has Standing to bring this Action

Twin Metals’ first argument is that NMW lacks standing to bring this MERA action as the injuries NMW allege in this case are merely hypothetical. Standing is conferred on persons who bring a suit on a matter of public interest if they can demonstrate either “(1) damages distinct from the public injury, or (2) express statutory authority.” *Stansell v. City of Northfield*, 618 N.W.2d 814, 818 (Minn. App. 2000). In this case NMW alleges damages expressly allowed by statute. Minn. Stat. § 116B.10 allows “any natural person residing within the state” or any “organization” with “members, partners or employees residing within the state” to bring an action in the district court for declaratory or equitable relief against the state, where “the nature of the action is a challenge to an environmental quality standard [or] rule.” Even when a party seeks damages expressly allowed by statute, however, that party must still meet the standing requirements under Article III of the U.S. Constitution. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000). “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational

values of the area will be lessened by the challenged activity.” *Id.* at 183. “[I]t is the plaintiff’s burden to establish standing by demonstrating that ... the defendant’s allegedly wrongful behavior will likely occur or continue.” *Id.* at 190.

NMW argues its members have or will suffer concrete and particularized damages directly traceable to Twin Metals’ proposed mine. NMW claims damages on behalf of its members, including: Rebecca Rom, who has visited the BWCAW annually over the course of her life and is concerned that toxic water from Twin Metals’ proposed mine in the Rainy River headwaters will make its way into the waters she uses in the BWCAW for drinking, cooking, bathing, swimming, fishing, and other recreational activities; NMW members who own land near the BWCAW and fear the mine will pollute their water and reduce their enjoyment of surrounding lakes in and near the BWCAW; Steve and Jan Koschak, who own a resort near the BWCAW and fear that that the mine’s location will pollute the air and water near their property and reduce its value. Twin Metals argues that these feared harms are too tenuous to constitute standing, as that NMW is concerned about possible effects of potential pollution from a proposed mine. Standing, however, can arise from both past harms and potential future harms, as long as those threatened harms are imminent. An injury in fact can be an “actual or threatened injury.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982). *See also Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211–12, 45 L. Ed. 2d 343 (1975) (Plaintiff must have suffered “immediate or threatened injury as a result of the challenged action”). In this case NMW alleges that the BWCAW is “uniquely vulnerable” to water pollution and could suffer irreversible damage quickly after the proposed Twin Metals mine opens. NMW has pled that the location of the mine and its tailings pile is fixed, that the Rainy River headwaters and the waters of the BWCAW are connected, and that Twin Metals has obtained mine leases and filed a mine plan for the proposed Rainy River mine. NMW has detailed the concerns NMW members have are with this specific proposed mine. “For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Forslund v. State*, 924 N.W.2d 25, 32

(Minn. Ct. App. 2019) (quotations omitted).

Accepting the allegations NMW has made as true, NMW has alleged concrete and particularized threatened harm to its members based on their personal connection to the natural resource at issue and the imminent future harm to those natural resources if the proposed Twin Metals mine opens. NMW has alleged that the aesthetic and recreational values of the BWCAW would be immediately degraded by the opening of the Twin Metals proposed mine and the water pollution that would flow from the Rainy River headwaters into the BWCAW. Accordingly NMW has shown an imminent harm and has standing to seek declaratory and or equitable relief under Minn. Stat. § 116B.10.

NMW has Presented Facts Sufficient to Support a Prima Facie Showing

On review of a Rule 12.02(e) dismissal of a MERA action, the question is not whether the plaintiff has established a prima facie showing under MERA, but rather whether the plaintiff has alleged sufficient facts, such that the facts alleged and the inferences drawn from those facts can support each element of the required prima facie showing.

State by Smart Growth Minneapolis v. City of Minneapolis, 954 N.W.2d 584, 595 (Minn. 2021). The required showing is minimal. *Id.* NMW alleges in its complaint that the proposed Twin Metals mine will adversely affect BWCAW in a number of ways, including acid, sulfate, and heavy metals leaking from the mine into Birch Lake, and traveling from there into the waters of the BWCAW, which are “uniquely vulnerable” to contamination and pollution. NMW alleges this contamination would adversely affect fish populations, water quality and quantity, and aquatic ecosystems of the BWCAW’s waters. The question before the Court is whether these claims are sufficient to allege causation at the Rule 12.02(e) stage. NMW alleges that Twin Metals has sited a non-ferrous mine in the Rainy River headwaters, that the location of the mine and mine tailings will not change, and that because the Rainy River headwaters are connected to the BWCAW waters, pollution from the mine will reach the BWCAW, necessitating a rule change to Minn. R. 6132.2000. The Court concludes that, accepting all of NMW’s allegations as true and construing all reasonable inferences in its favor,

the allegations are sufficient. The allegations contained in the complaint, if true, and any evidence that NMW could introduce consistent with those allegations, are sufficient to state a claim upon which relief can be granted. A Rule 12.02(e) dismissal for failure to state a claim precludes only those cases where it appears “to a certainty” that the plaintiff can introduce no facts consistent with the complaint to support the claim for relief. *State v. Smart Growth Minneapolis* at 596-97. Because it is not certain that NMW could not introduce any evidence in support of its claim, a dismissal under Rule 12.02(e) is not appropriate.

The “Applicable Statutory Appeal Period” Prerequisite Does not Apply

Minn. Stat. § 116B.10 subd. 1 allows a civil action challenging “an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit ... for which the applicable statutory appeal period has elapsed.” Twin Metals’ final argument is that NMW cannot challenge Minn. R. 6132.2000 because the applicable statutory appeal period has not elapsed. NMW counters that the “applicable statutory appeal period” language of Minn. Stat. § 116B.10 applies only to permits, and that DNR environmental rules do not have statutory appeal periods and therefore the appeal period language in § 116B.10 does not apply here. The Court agrees with NMW’s interpretation of Minn. Stat. § 116B.10 subd. 1’s appeal period language—the requirement that the relevant statutory appeal periods has run applies only when the rule or permit in question is subject to a statutory appeal period. This interpretation is supported by dicta in the dissent of *White Bear Lake Restoration Ass’n ex rel. State v. Minnesota Dep’t of Nat. Res.*, 928 N.W.2d 351, 372 (Minn. Ct. App. 2019), review granted (July 16, 2019), aff’d in part, rev’d in part, 946 N.W.2d 373 (Minn. 2020), in which Judge Bratvold interprets Minn. Stat. § 116B.10 subd. 1’s appeal period language as meaning that Minn. Stat. § 116B.10 is “available in addition to a certiorari appeal from an agency decision to issue a permit” (emphasis added). In this case, because no statutory appeal period exists for the DNR rule at issue, the appeal period language of Minn. Stat. § 116B.10 does preclude NMW from bringing this suit.

Separation of Powers Doctrine

Twin Metals claims that MERA, as a challenge to the inadequacy of an agency rule, violates

the separation of powers doctrine by allowing the judicial branch to “command the executive branch how to perform its function.” This argument is unsupported. Under the plain language of the statute, in MERA actions, the court sits as a court of first impression with original jurisdiction. *White Bear Lake Restoration Ass’n*, 946 N.W.2d at 383 (citing *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977).) Under both Minn. Stat. §§ 116B.03 and 116B.10, the court balances on a case-by-case basis whether there is “pollution, impairment, and destruction” of natural resources. This balancing has previously been found not to violate the separation of powers doctrine. See *White Bear Lake Restoration Ass’n*, 946 N.W.2d at 383 (detailing prior cases and finding that court duties under MERA are “fully consistent with our judicial role”). Twin Metals also makes a takings argument. The Court finds that the motion to dismiss stage is not the appropriate stage to address any possible takings arguments. Accordingly, the Court finds that Twin Metals’s motion to dismiss fails.

The DNR and NMW’s Stipulation to Remand the Issue

Having denied Twin Metal’s motion to dismiss, the Court turns to the issue of the stipulation. The MERA provides a three step process to address cases brought pursuant to Minn. Stat. § 116B.10. First, the court makes a determination if the plaintiff has made a prima facie showing that the environmental rule at issue is inadequate to protect the natural resources from likely pollution, impairment and destruction. If the plaintiff meets that bar, the matter is remitted to the agency that promulgated the environmental rules at issue to institute the appropriate proceedings to consider, make findings, and an order on the inadequacy and likely harm to the natural resources. Third, the court retains jurisdiction for purposes of judicial review to determine whether the agency’s order is supported by the preponderance of the evidence.

In this case, the DNR and NMW stipulated to move to step two, remitting the matter, and further agreed on certain issues related to that process. In stipulating, the DNR conceded that NMW’s burden to obtain a remand was relatively low and that they would likely meet it and therefore “the interests of the agency and the public would be served by advancing the case to a consideration of the merits of plaintiff’s argument.” See DNR’s Consolidated Response at 3-4. Twin

Metals was approached to participate in the stipulation, but declined indicating its intent to file the instant motion to dismiss. Twin Cities objects to the stipulation on the basis that its motion to dismiss needed to be addressed first, that the stipulation was not agreed to by all parties, and that it believes the stipulation changes the legal standards in both the agency and any subsequent judicial review. The Court agrees with Twin Metals that it was appropriate to address the motion to dismiss as a threshold matter. Having done so, we now turn to the remaining issues.

It is undisputed that Twin Metals was not a party to the stipulation to remit the matter. The question then becomes what if any rights of Twin Metals are implicated by that stipulation. Minn. Stat. § 116B.10 sets a low bar for establishing a prima facie case and obtaining a remand to the applicable agency. NMW need only make a prima facie showing of “the existence of material evidence” that an environmental quality standard, rule, or limitation is inadequate to protect natural resources of this State from pollution, impairment, or destruction. Minn. Stat. § 116B.10, subd. 2. Although Twin Metals contests NMW’s ability to meet that burden, for the reasons discussed above, those arguments—given the relatively low burden—are not particularly persuasive. The more salient issue is whether the stipulation alters the burdens or scope of review authorized under Minn. Stat. § 116B.10. Twin Metals points to certain language found in the stipulation, such as “adequate” versus “inadequate” and “inadequacy,” and the absence of other language, such as “pollution, impairment, or destruction” as evidence that the stipulation is an attempt to alter the agency review in a way that prejudices them. The DNR in its response, argues that was not its intent and that it did not interpret the stipulation language to modify any burdens under Minn. Stat. § 116B.10 and indicated a willingness to discuss the remittance order language to provide clarity between the parties on that point. This Court finds that the stipulation to the extent it remits the matter is appropriate, but finds that for clarity a telephone conference is appropriate to discuss the specific language of the remittance such that it unambiguously comports with Minn. Stat. § 116B.10.

CONCLUSION

For the reasons set forth above, Defendant Twin Metal's motion to dismiss is DENIED, and this matter shall be REMANDED to the DNR for appropriate administrative proceedings.

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