

**STATE OF MINNESOTA  
COUNTY OF HENNEPIN**

**DISTRICT COURT  
FOURTH JUDICIAL DISTRICT**

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STATE OF MINNESOTA BY THE  
CITY OF MINNEAPOLIS, et al.

Case No. 05-5474  
(Judge Stephen C. Aldrich)

Plaintiffs

Case Type: Other Civil

METROPOLITAN AIRPORTS  
COMMISSION,

Defendant

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**PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT  
METROPOLITAN AIRPORTS COMMISSION'S MOTION TO DISMISS**

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## **INTRODUCTION AND SUMMARY**

Plaintiffs City of Minneapolis, City of Eagan, City of Richfield and the Minneapolis Public Housing Authority (collectively, the "Communities") respectfully file this Response to Defendant Metropolitan Airports Commission's ("MAC") Motion to Dismiss. The Communities bring this action under the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. §§116B.01, et seq., and the state mandamus statute, Minn. Stat. §§ 586.01, et seq. to obtain declaratory relief and an injunction against MAC requiring it to provide adequate noise insulation for homes in the 60 to 65 decibel noise contours ("DNL 60-65") of the Minneapolis-St. Paul International Airport ("MSP").

### **Background**

Residents of the Communities who live in the DNL 60-65 experience every day the disproportionate effects of noise from MSP, with exposures of to up to 1,000 times more sound energy than would exist in the area without MSP (even with cars, trucks and other urban sources). Complaint at ¶¶ 11-12. Frequent, loud overflights from MSP have destroyed the quietude of otherwise quiet neighborhoods. The Communities seek the implementation of sound insulation measures that MAC is obligated to provide pursuant to state law.

MAC has repeatedly recognized that noise impacts from MSP occur in the DNL 60-65. For example, MAC identified impacts in this area in a 1998 Final Environmental Impact Statement ("1998 FEIS") relating to MAC's expansion of MSP, including a new north-south runway ("Runway 17-35") that MAC plans to open later this year. Moreover, MAC has made enforceable commitments to extend the existing noise insulation program into the DNL 60-65. In the late 1980s and early 1990s, the Legislature directed a planning process for the long-term future of MSP known as the Dual-Track Process. As a result of this process, the Legislature

determined that MSP should remain as the location of the metropolitan area's international airport, but also directed MAC to develop a noise mitigation program to address the heavily impacted areas surrounding the Airport. MAC did so in 1996, and, consistent with its statutory obligations to minimize public exposure to noise around airports, developed and committed to a plan to expand its existing noise insulation program to the DNL 60-65 ("1996 Noise Program"). Subsequently, in the 1998 FEIS, MAC again committed to provide the noise mitigation measures under the 1996 Noise Program to discharge its statutory mandates to minimize the noise impact associated with its activities, including Runway 17-35. In 2002, the Metropolitan Council (which has approval authority over large MAC capital plans) conditioned its approval of MAC's capital spending program on MAC's expenditure of \$150 million for noise insulation in the DNL 60-65.

However, even as MAC is on the brink of opening the new Runway 17-35, it has indicated that it has no intention of discharging its noise insulation obligations. To the contrary, MAC has affirmatively stated that it will not provide much of the noise mitigation it is obligated to provide and that it will only provide a portion of the noise mitigation program that was supposed to have been expanded into the DNL 60-65 contours. Further, it will now require homeowners to pay for up to half of even the incomplete mitigation of MAC's impacts.<sup>1</sup>

### **Summary of Argument**

Throughout, MAC's Memorandum in Support of Defendant Metropolitan Airports Commission's Motion to Dismiss ("Memorandum") mischaracterizes the Communities' Complaint by developing straw-man arguments it then knocks down. This approach is not sufficient to demonstrate that the Complaint should be dismissed, because on its face the

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<sup>1</sup> MAC plans to only provide air conditioning to homes in the DNL 60-65 that do not already have it and not expand the existing program that provides insulated windows, doors, vents, attics and other measures. It also plans to require homeowners to pay for up to half of the costs of mitigating MAC's impacts.

Complaint states claims upon which relief may be granted. These include the Communities' claims that (1) MAC is in violation of MERA due to its material impairment of the resource of quietude without undertaking feasible mitigation (Count 1); (2) MAC is not complying with MERA because it is in violation of environmental quality standards, limitations and other provisions relating to noise insulation (Count 2); and (3) MAC is not discharging its mandatory obligations to provide sound insulation in the DNL 60-65 contours and is therefore subject to mandamus (Count 3).

MAC attempts to recharacterize this case as an administrative appeal of a 2004 funding eligibility proposal (the "Part 150 Plan") it submitted to the Federal Aviation Administration ("FAA") that included a noise mitigation plan in the DNL 60-65. However, FAA's review of the Part 150 Plan is irrelevant to this case. Whether or not the FAA makes MAC eligible for federal funding, the plan itself falls short of affirmative noise obligations required under Minnesota law. The Complaint is clear: the Communities seek a declaration and injunction relating to whether MAC's failure to implement an adequate insulation program is a violation of Minnesota law under MERA and mandamus. The communities complain of MAC's failure to discharge its affirmative obligations under state law, not the review of MAC's federal application. This controversy is live and ripe for adjudication.

Delaying consideration to wait and see if FAA will or will not fund a program that does not even meet the requirements of Minnesota law makes no sense. FAA will not and cannot adjudicate MAC's state law obligations. FAA will not and cannot provide legal or factual findings that would assist Minnesota courts in determining MAC's state-law obligations. Thus, waiting for FAA would not save judicial or party resources. Delaying resolution of the state-law obligations is inappropriate, because residents of the Communities are already suffering from the

impacts of excessive noise. These residents will also experience new impacts associated with the opening of Runway 17-35, which MAC has scheduled for later this year.

MAC would have this Court believe that it can avoid complying with its state-law obligations and mitigation measures for a runway that is about to open merely because it has submitted a request for federal funding eligibility. Accepting MAC's arguments relating to ripeness would allow it to further delay compliance with its state-law obligations. This Court should deny MAC's invitation to abdicate its responsibility to enforce Minnesota law.

MAC's Memorandum also puts aside the actual allegations and claims in the Complaint and characterizes it as a suit for, or based on, a damages and/or inverse condemnation theory. However, this is plainly not what the Communities pled in the Complaint, which seeks only declaratory and injunctive relief under MERA and the mandamus statute.

With regard to the Communities' Second Count, MAC argues that it is not bound by state law — including MERA, the Minnesota Environmental Policy Act ("MEPA") and MAC's own enabling legislation (Minn. Stat. §§ 473.601, et seq.). As discussed in detail below, Minnesota law requires MAC to minimize and mitigate the impacts of its MSP operations to the maximum extent feasible. As part of the process for selecting MSP as the long-term location for the metropolitan area's international airport and for constructing major capital improvements such as the new Runway 17-35, MAC made enforceable mitigation commitments to provide adequate sound insulation, which commitments it now seeks to avoid. Accepting MAC's arguments would allow it to evade its obligation under state law to implement feasible alternatives that reduce the impacts to the environment of the State of Minnesota. MAC must be required to follow through with the mitigation commitments it made to secure approval for, and quicker

construction of, projects like Runway 17-35. Any other approach would undermine MERA and run roughshod over Minnesota's paramount concern with environmental protection.

The Supreme Court of Minnesota made the following statement regarding MAC noise issues in 1974, which is equally applicable today: "MAC was created for the express purpose of promoting and developing airports around the metropolitan area. Having accomplished this task, it would be incongruous for this court to hold that MAC cannot be held responsible for the adverse effects of its activities." Alevizos v. Metropolitan Airports Commission, 216 N.W.2d 651, 663 (Minn. 1974).

### **STANDARD OF REVIEW**

A motion to dismiss must be denied if "it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." Elzie v. Commissioner of Public Safety, 298 N.W.2d 29, 32 (Minn. 1980). Toward that end, when reviewing a motion to dismiss, the Complaint must be given a liberal construction in favor of stating a claim. Hutton v. Bosiger, 366 N.W.2d 358, 360 (Minn. App. 1985). Also, the facts alleged in the complaint must be taken as true. Marquette Nat'l Bank v. Norris, 270 N.W.2d 290, 292 (Minn. 1978).

### **ARGUMENT**

#### **I. THE COMPLAINT PRESENTS A RIPE, JUSTICIABLE CONTROVERSY**

##### **A. The Communities' Claims are Fit for Judicial Decision**

In Minnesota, a controversy is ripe, and therefore justiciable, if the plaintiff demonstrates a direct or imminent injury as opposed to a purely hypothetical theory. State v. Colsch, 284 N.W. 2d 839, 841-42 (Minn. 1979); Lee v. Delmont, 36 N.W. 2d 530, 537 (Minn. 1949). There must be "a bona fide legal interest which has been, or with respect to [which] the ripening seeds

of a controversy is about to be, affected in a prejudicial manner" [sic]. So. Minn. Constr. Co. Inc. v. Minn. Dep't of Transp., 637 N.W. 2d 339, 344 (Minn. App. 2002) (citation omitted). As the Minnesota Court of Appeals has recently noted, this test is met when "the consequences [of an action] have] been reduced to more manageable proportions and where the factual components [are] fleshed out, by some concrete action." Minnesotans for Responsible Recreation v. Dep't of Nat. Res., 651 N.W. 2d 533, 539 (Minn. App. 2002), quoting with favor, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 735 (1998).

1. The Complaint Identifies a Bona Fide Legal Interest

Through MERA, Minnesota has created a right in each person to protect the natural resources in the state from "pollution, impairment or destruction." Minn. Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W. 2d 762, 781 (Minn. 1977); see also Minn. Stat. § 116B.03. To establish a prima facie case, a plaintiff must identify a protectable natural resource and must show either: (1) that the defendant's conduct violates or is likely to violate an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by" a state regulatory agency; or (2) conduct which materially adversely affects or is likely to materially adversely affect the environment. Minn. Stat. §§ 116B.01 & 116B.03 (emphasis added).

The Complaint establishes a prima facie case, because it involves quietude — which is a protectable natural resource — and it demonstrates that the MAC is causing pollution, impairment or destruction of such quietude. More than 10,000 homes in the Communities and in other neighborhoods will experience noise in excess of DNL 60 by 2007, a level that MAC has acknowledged causes adverse impacts. Complaint at ¶ 11. These levels are almost 1,000 times the amount of sound energy than would be experienced absent aircraft noise from MSP.

Complaint at 12. Noise levels in excess of DNL 60 are inconsistent with speech and sleep, and severely impact residents in the cities. Complaint at 17, 20. Further, MAC committed as part of the Dual-Track Process to extend the noise insulation from the DNL 65 and higher to the DNL 60-65, explicitly recognizing the need and feasibility of this insulation to protect quietude.

Complaint at 11 27, 38, 46-50. The Communities, therefore, have demonstrated a bona fide legal interest under MERA.<sup>2</sup> Similarly, Plaintiff MPHA has alleged a direct injury for mandamus purposes arising from MAC's failure to discharge its mandatory noise insulation requirements, insofar as homes it owns would not receive the required sound insulation.

## 2. The Complaint Demonstrates Direct and Imminent Injury

The harm identified in the Complaint is not "purely hypothetical." Delmont, 36 N.W. 2d at 537. MSP is already generating injurious levels of noise in the DNL 60-65 noise contours.

Further, MAC has indicated that it has no intention of implementing the level of noise insulation required under state law and that it has previously recognized to be feasible and necessary.

Complaint at ¶ 63. It has reneged on its mitigation commitments for feasible noise insulation measures in the DNL 60-65 that would have provided real protection to quietude. Complaint at ¶ 64. In addition, it has reneged on its funding commitments by requiring a co-payment for its proposed air conditioning package. Complaint at 66 — 68. Despite MAC's statutory duty to assure residents of the minimum environmental impacts, MAC would provide no noise insulation (such as improved doors and windows, vent baffles and other measures that actually reduce the transmission of sound) for homeowners who already have air conditioning.

Complaint at ¶ 69.

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<sup>2</sup> MAC inappropriately tries to dispute these facts in its Memorandum by asserting that its proposed program would meet certain Environmental Protection Agency guidelines. Memorandum at 5. However, this argument regarding the factual merits of the case is clearly inappropriate in a motion to dismiss.

MAC's infliction of injury to quietude does not exist only in "the realm of future possibility." E.g., Delmont, 36 N.W. 2d at 537. The consequences of MAC's actions have been "reduced to more manageable proportions" and "the factual components [have been] fleshed out, by [the MAC's] concrete action[s]." E.g., Responsible Recreation, 651 N.W. 2d at 539. MAC has already taken steps to create levels of noise that impair quietude. Nonetheless, MAC has made it clear that, although a full sound insulation program in the DNL 60-65 is feasible, and although it has a duty to "assure the residents of the metropolitan area of the minimum environmental impact from air navigation and transportation", it will not implement this program. See Minn. Stat. § 473.655. This action involves a live controversy and has direct legal consequences for the Communities.

3. Withholding Court Consideration Will Cause Hardship

Delaying review will serve no purpose. First, the MAC's actions create legally cognizable harms. Cf. Ohio Forestry, 523 U.S. at 733 (finding no hardship where action under review did not "create adverse effects of a strictly legal kind"). MERA clearly creates rights in all Minnesotans to avoid degradation of natural resources, including quietude. MAC's failure to implement an adequate noise insulation program ensures continued, direct, and immediate harm to the natural resource of quietude. See Minn. Stat. § 116B.03, subd. 1 (providing any political subdivision within Minnesota the authority to bring suit to protect natural resources). Cf. Ohio Forestry, 523 U.S. at 733, (finding no hardship where action under review does not inflict harm on the interests advanced by the plaintiff). The Complaint outlines the many types of harm residents suffer in uninsulated homes. Complaint at 11, 12, 13, 17, 18 & 20. Deferral of

judicial review will further delay the mitigation for which the residents of the Communities have already waited almost 10 years.<sup>3</sup>

**B. Contrary to MAC's Characterization, This Case Arises under MERA and the Mandamus Statute and Is Not an Administrative Review Case**

MAC mischaracterizes the nature of the Complaint by referring to MAC's "proposed mitigation plan" — i.e., the Part 150 Plan submitted to FAA for review — as the subject of the Complaint. Memorandum at 2-10. This is entirely misleading. The Communities seek relief under both MERA and the state mandamus statute, which relief arises out of the MAC's failure to satisfy its state-law obligation to provide adequate noise insulation for homes in the DNL 60-65. Complaint 76-95. Under MERA, the Communities have a cause of action to protect natural resources, including quietude, against "pollution, impairment or destruction." Minn. Stat. § 116B.03, subd. 1; Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W. 2d 796, 805 (Minn. App. 2001). In the event that no remedy is available under MERA, the Communities would have a right under the state mandamus statute to force MAC to comply with its duties to provide for noise abatement and minimize the public's exposure to noise hazards around airports. Complaint at TT 91-95.

Minnesota law is clear that a MERA action is separate from the administrative review of agency decisionmaking. E.g., White v. Minn. Dep't of Nat. Resources, 567 N.W.2d 724, 737 (Minn. App. 1997) (a MERA action does not seek review of an agency decision). As a result, the pending FAA review is irrelevant. The Communities have not questioned the extent to which MAC's current plan may merit federal funding, which issue may be resolved by FAA. Rather,

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<sup>3</sup> Furthermore, even if one were to assume, arguendo, that delay of review would not cause "hardship," the hardship prong is only prudential, and is irrelevant where the legislature has "declared a preference for immediate review." Eagle-Pitcher Industries v. EPA, 795 F.2d 905, 918 (D.C. Cir. 1985). In this case, the intent of the Minnesota Legislature is manifest: MERA is drafted in "broad and comprehensive language" and is intended to have "broad, all-inclusive application." Freeborn County by Tuveson v. Bryson, 210 N.W.2d 290, 296 (Minn. 1973). Indeed, of critical importance to this issue, the Legislature made the MERA civil remedy available not only when impairment of natural resources is occurring, but also when it is likely. Minn. Stat. § 116B.02, subd. 5.

the Communities assert that the MAC has failed to meet its mandatory obligations under MERA to protect the natural resource of quietude from "pollution, impairment or destruction" and to implement feasible sound insulation around MSP.

The MAC's Part 150 submittal is relevant only as evidence of whether or not MAC is likely to comply with MERA standards. Toward that end, the plan clearly demonstrates that MAC will not implement adequate and feasible sound insulation measures and will therefore continue to cause pollution, impairment and destruction of quietude. The Part 150 Plan is not, however, the subject of this Complaint.

### **C. FAA Action Is Not a Necessary Predicate for Ripeness in this Case**

MAC diverts this Court's attention with an eight-page discussion of various potential uncertainties of the FAA review process for federal funding. This protracted frolic and detour has no bearing on whether or not MAC's failure to implement effective noise insulation in the DNL 60-65 violates state law. The MAC has an independent obligation, arising under state law, to implement adequate sound insulation measures. MAC does not need federal approval to do so. Nor does it need federal funding. As a result, the entire Part 150 argument is a red herring that raises no genuine issue of ripeness.

#### **1. MAC Does Not Require Federal Approval to Comply with State Law**

MAC implies that no local noise mitigation measure is final or effective until a Part 150 review by FAA is complete. Memorandum at 2-10. This is untrue. Since Part 150 is a voluntary program,<sup>4</sup> MAC could implement noise compatibility and mitigation measures without any FAA review whatsoever. Thus, FAA review and approval of federal funding is not a necessary prerequisite to a state judicial determination of whether or not the MAC is complying

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<sup>4</sup> Under Part 150, airports can, but are not required to, seek federal review of plans for nearby land use to be compatible with airport operations. See 14 C.F.R. Part 150.

with Minnesota law. While there may be good policy reasons why MAC may want to use federal funding mechanisms for some or all of the mitigation, those reasons do not affect the question of whether MAC has a legal duty under Minnesota law to provide sound insulation.

In addition, even if an airport does participate in the Part 150 program, as the MAC has done, the FAA review is only relevant in determining whether local noise mitigation efforts are eligible for federal funding. 14 C.F.R. § 150.33(a) (FAA evaluates each noise compatibility program and either approves or disapproves the program funding). FAA would not and could not opine on MAC's obligations under state law. As a result, although the Part 150 process would determine whether the MAC could use certain federal funding mechanisms<sup>5</sup> to implement sound insulation commitments, it will not generate any factual evidence or make any findings that would contribute to the resolution of the legal dispute in this case. See e.g., N.Y. State Ophthalmological Soc. v. Bowen, 854 F.2d 1379, 1386 (D.C. Cir. 1988) ("A controversy is ripe if further administrative process will not aid in the development of facts needed by the court to decide the question it is asked to answer.")

2. FAA Action Will Not Assist this Court

Further, there is no legal need or justification for this Court to defer to any FAA findings in order to determine MAC's compliance with state law. FAA has made clear, as part of the Part 150 process, that it does not preempt states and local authorities from determining that residential areas are incompatible with specific noise levels, so long as the state and local activities do not interfere with flight operations. 14 C.F.R. § A150.101(d). Indeed, in a recent case upholding the City of Naples Airport Authority's ban on certain noisy aircraft due to

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<sup>5</sup> As MAC notes in its Memorandum, under current federal law (based on the so-called "Lott Amendment" cited at page 6 of MAC's Memorandum), FAA cannot approve the use of federal grant funds outside of the DNL 65. However, it may approve the use of Passenger Facility Charges collected from passengers using the Airport for mitigation outside the DNL 65. Memorandum at 7. Regardless, FAA's opinions or policy on the subject of when noise insulation is appropriate do not answer the question of what is required under Minnesota law.

impacts in the DNL 60-65, the U.S. Court of Appeals for the District of Columbia Circuit concluded that FAA's decision to withhold federal funding was unreasonable because the airport had demonstrated that DNL 60 was a "significant noise threshold" for the surrounding community. City of Naples Airport Authority v. FAA, \_\_\_ F.3d \_\_\_ 2005 WL 1313803 (D.C. Cir. June 3, 2005) at 3. As a result, FAA has no right to dictate or define the precise noise mitigation measures that will satisfy MAC's state obligations. Cf. City of Rochester v. People's Coop. Power Ass'n, Inc., 483 N.W.2d 477, 480 (Minn. 1992) (deferral to agency is only applicable where enforcement of a claim requires the resolution of issues which have been placed within the special competence of that administrative body).

3. There is No Risk of Inconsistent Judgments

Contrary to MAC's suggestion (see Memorandum at 9), there is also no meaningful risk of incurring inconsistent obligations under federal and state law. MAC has not demonstrated how a federal determination regarding whether MAC's proposed plan is adequate for federal funding purposes would bear on the independent question of MAC's compliance with state laws (or vice versa). As noted above, federal law provides flexibility for local entities to tailor local noise programs. Indeed, MAC's sudden concern for consistency with federal law is belied by its prior commitments to undertake sound insulation in the DNL 60-65. For example, as outlined in the Complaint, the MAC previously committed to the expansion of the noise insulation program to the DNL 60-65 in the 1996 Noise Program and the 1998 FEIS, and is a party to the 1999 Airline Lease Agreement, which provides for the funding of insulation of homes in the DNL 60-65. Complaint at TT 37-42 (1996 Noise Program), 43-50 (1998 FEIS), 55-56 (Airline Lease Agreement). Moreover, FAA itself has expressly adopted the DNL 60-65 sound insulation

requirements as mitigation measures in the joint MAC/FAA FEIS.<sup>6</sup> Complaint at TT 45-46. Were "inconsistent obligations" a legitimate concern, FAA and the MAC would never have made these commitments.

Finally, MAC's convoluted "revenue diversion" theory simply does not make sense. Even the most cursory review of this argument reveals its inherent flaws. Essentially, MAC claims that this Court should defer judgment in this case because a cascade of hypotheticals might occur. To wit, FAA might "reject" (meaning that FAA might not fund) the MAC's mitigation measures, in which event, the MAC might decide use local airport revenue, following which a third-party might file an administrative enforcement complaint, after which the FAA might determine that the use of airport revenue for noise mitigation constituted illegal revenue diversion, in which case the MAC might lose various federal rights and might be subject to civil penalties. Memorandum at 7-8. As noted above, due to the Naples Airport case and MAC's own commitment to a program in the DNL 60-65, such a scenario is remote and speculative.

Further, FAA policy explicitly provides that airport revenue may be used to cover expenses "incurred in order to secure necessary approvals" of airport projects under state law and "acoustical insulation expenses, to the extent that such measures are undertaken as part of a comprehensive and publicly-disclosed" program. FAA, Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994, 32,019-20 (June 21, 1996). This policy contains no limitation regarding whether the noise levels to be mitigated are above or below DNL 65. Thus, contrary to MAC's argument, because the ability to undertake funding is often dependent on state law, it may be necessary for this Court to determine whether mitigation is required as a matter of

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<sup>6</sup> FAA and MAC issued a joint FEIS to jointly satisfy their individual state and federal obligations for environmental review. Complaint at 45.

Minnesota law before FAA could finally resolve MAC's hypothetical revenue diversion question.

Even if MAC's speculative scenario materialized, it would not in any way "reduce [the case] to more manageable proportions" or "flesh out" the "factual components" of the MERA or mandamus claims. See Minnesotans for Responsible Recreation, 651 N.W. 2d at 539. No matter which way FAA may resolve the matter of federal funding eligibility, the legal issues underlying the MERA and mandamus claims would remain the same. See Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 972 (D.C. Cir. 1996) (in challenge to Cable Act provision that permitted, but did not require, franchising authorities to mandate certain programming access, First Amendment claim was ripe, even absent final review by franchising authority, because "any difference in the ways in which franchising authorities might actually implement the requirement does not affect the First Amendment analysis").

Under MAC's revenue diversion theory, almost no state law could be enforced judicially against MAC because of the lurking possibility that some airport user might bring an administrative complaint against the MAC complaining that the use of funds to comply might be inconsistent with FAA policies. This approach is not required by the law and would be exceptionally bad public policy. MAC cannot contract away its state law obligations merely because it has taken money from FAA. Ultimately, therefore, the pending FAA Part 150 review presents no legal or practical reason for delaying the resolution of the outstanding state law issues.

**D. This Court Should Exclude the Affidavit Filed By MAC**

MAC asks the Court to review its attached affidavit of Nigel Finney ("Finney Affidavit") and claims that the Court may review the affidavit without converting the Motion to Dismiss to a

motion to summary judgment. In doing so, MAC solely cites to cases in federal court interpreting the Federal Rules of Civil Procedure. Memorandum at 3-4.

Because MAC's approach is flawed, the Court should exclude the MAC affidavit.

First, MAC's attempt to append the Finney Affidavit is procedurally flawed. Rule 115.03(d) of the General Rules of Practice for the District Courts requires that for summary judgment motions, the memorandum of law must include specific statements and recitals that MAC does not include in its Memorandum, including recitals of uncontested fact. The rule also provides explicitly that "These additional requirements apply also to a motion under Minn. R. Civ.P. 12 if factually based." Rule of General Practice 115.03(d) (emphasis added). MAC's attempt to rely on an affidavit for its ripeness argument clearly indicates that its argument is "factually based." Further, there is no question that its Motion to Dismiss under either a subject matter jurisdiction or failure to state a claim theory arises under Rule 12. Minn.R.Civ.P. 12.02(a) (motion to dismiss on the basis of no subject matter jurisdiction). Because MAC does not comply with Rule 115.03(d), the Court should exclude the Finney Affidavit and deny MAC's ripeness argument based on it.

Second, as discussed above, even assuming the Finney Affidavit stands for the propositions alleged in the Memorandum, MAC has not demonstrated that the Communities' state-law claims are unripe. As a matter of law, the fact that MAC may have submitted the Part 150 request for eligibility for federal funds does not affect the analysis of whether or not the Communities' claims under state law are ripe. See supra at Sections I.A-C. The only facts that might make such claims unripe would be if MAC could somehow show without question that aircraft from MSP are not creating or are unlikely to create noise in the DNL 60-65. However,

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Because the Federal Rules of Civil Procedure do not contain this requirement from the General Rules, MAC's citation to federal cases relating to the use of affidavits in a Rule 12 context is inappropriate and unpersuasive. Memorandum at 3-4.

MAC's Memorandum makes no such claim and MAC cannot deny that aircraft using MSP are creating noise in the DNL 60-65. Thus, the Finney Affidavit is irrelevant to this matter and should be excluded.

## **II. THE COMPLAINT STATES APPROPRIATE CLAIMS UNDER MERA FOR INJUNCTIVE RELIEF**

MAC also completely misconstrues the Complaint by arguing that the Communities' MERA claims represent an action based on damages and not claims for an injunction under MERA. As part of its argument, MAC also asserts that the noise-related injuries at issue in this case are not cognizable under MERA, because they are based on economic-related harms and not environmental ones. MAC's theory is inconsistent with the Complaint. Because the MAC fails to show that Communities would be unable to supply facts sufficient to demonstrate an entitlement to relief, MAC's motion must be denied. E.g., Northern States Power v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).

### **A. The Complaint Seeks Injunctive Relief, Not Damages**

Perhaps the most novel argument from MAC's Memorandum is that the Communities base their action on damages theories and not an injunctive remedy. A cursory review of the Complaint makes abundantly clear that the Communities seek only injunctive relief under MERA. The prayer for relief seeks only declarations regarding MAC's noncompliance with the law and an injunction to have the MAC implement an adequate sound insulation program in the DNL 60-65. See Complaint at pp. 12-13 (prayer "for an order requiring the MAC to implement ...a noise insulation program for residences in the 60 to 65 DNL contours...").

The Complaint in no place seeks damages or other legal relief. The relief sought would prevent or reduce future injury from MAC's activities rather than compensate the plaintiffs for

past injuries or reductions in property value — the hallmark of injunctive relief, as opposed to damages. See Minnesota Mining and Manufacturing Co., v. Travelers Indemnity Co., 457 N.W.2d 175, 181 (Minn. 1990) ("damages" are "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by violation of a legal right.") (quoting Webster's Third New International Dictionary 571 (1961)); City of Thief River Falls v. United Fire and Cas. Co., 336 N.W.2d 274, 276 (Minn. 1983) (suit for injunction under mandamus theory is a not a suit for damages). If successful in their claims, none of the Communities would receive any money from MAC. At most, the MPHA would benefit from the MAC's direct installation of sound insulation at some homes it owns. However, this would not be in the form of any direct payment or damages.

#### **B. The Complaint's MERA Counts Address Environmental and Not Economic Issues**

In an equally curious and unsupportable argument, MAC argues that the Complaint is not really about protection of quietude — as is expressly pled in the Complaint — but instead solely about the use of property. Compare Complaint at 1179 ("The quietude of the neighborhoods within the cities and properties owned by MHPA ... is a protected resource under MERA."); 85 ("MAC's truncated noise insulation program does not adequately protect quietude in the DNL 6-65 dB contour."); ¶ 86 ("MAC can implement a complete mitigation program in the 60-65 DNL to preserve the quietude protected by MERA..."), with Memorandum at 11-12.

##### 1. MERA Expressly Allows a Suit for the Protection of Quietude

MERA expressly identifies "quietude" as one of the "natural resources" protected under the statute. Minn. Stat. § 116B.02, subd. 4. See also, Minnesota Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762, 771 (Minn. 1977) (quietude protected by MERA in case related to gun range); Citizens for a Safe Grant v. Lone Oak Sportsmen's Club,

624 N.W.2d 796, 806 (Minn. App. 2001) (same); McGuire v. County of Scott, 525 N.W.2d 583 (Minn. App. 1994) (noise pollution from highways can affect quietude under MERA).

Further, the Complaint has pled that this quietude has been materially impaired and destroyed by MAC in the DNL 60-65. Complaint at ¶¶ 11-20, 79-85. The Complaint alleges that the areas in the DNL 60-65, which are the focus of this action, are subject to far more noise than average urban residents — up to 1000 times more than they would experience without MSP noise, even with other urban noise sources like cars and trucks.<sup>8</sup> Id. at ¶ 12. Further, the noise levels in these zones would normally be 30-40 decibels (even with other urban sources), a level of "quietude" that courts have found deserving of protection under MERA.<sup>9</sup> Id. Compare White Bear, 257 N.W.2d at 771 (finding of protectable quietude upheld where background noise readings were between 30 and 40 decibels). Indeed, the MAC has acknowledged the detrimental effects of noise in the DNL 60-65 in the 1998 FEIS and elsewhere. Complaint at ¶ 46. Thus, the allegations of the Complaint suffice to support the ability of Communities to make a prima facie showing of impairment of the protected resource of quietude. Id. at 12.

## 2. MERA Case Law Allows Consideration of Impacts of Noise to Property Uses

The fact that the Complaint also notes the concrete and detrimental effects to residents and to their enjoyment of their properties arising out of MAC's disruption of quietude in no way

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<sup>8</sup> This fact alone distinguishes this case from the language cited by MAC (Memorandum at 12) out of Alevizos v. Metropolitan Airports Commission, 216 N.W.2d 651, 662 (Minn. 1974), that "[e]very landowner must continue to endure that level of inconvenience, discomfort, and loss of peace and quiet which can be reasonably anticipated by any average member of a vibrant and progressive society." The fact is that residents in the DNL 60-65 experience far more noise than the average member of society, including urban residents. And, the remedy sought by the Communities would provide some relief from noise, but would fall far short of "securing a level of quietude equivalent to that experienced in less developed areas." Memorandum at 12. In any case, resolution of these factual issues would be premature at the motion to dismiss stage.

<sup>9</sup> The Communities recognize that it is not feasible to reduce outside noise back to 30-40 decibels and do not seek such relief. The noise insulation the Communities seek would provide five decibels of noise reduction, which is meaningful relief, but hardly a total solution to the impacts of noise. Nonetheless, it represents what MAC itself has determined to be necessary and feasible.

undermines the MERA case. MERA cases addressing the issue of quietude have explicitly considered evidence relating to the effects of noise on the lives of nearby residents and their uses of property as part of the determination of whether quietude had been impaired. See White Bear, 257 N.W.2d at 772-73 (considering evidence of the effects of noise on neighbors' use of property and lives to conclude adequate evidence of disruption of quietude existed); Lone Oak, 624 N.W.2d at 806 (evidence of effects of loud, unpredictable noise on neighbor's lives supported finding of unreasonable disruption of quietude under MERA). And, contrary to the suggestions in MAC's argument, effects on property value are only some of the environmental effects described in the Complaint. See e.g., Complaint at vij 12, 13, 17 & 20 (pleading impacts to overall noise levels, health, welfare, quality of life, annoyance, ability to conduct conversations and listen to television or telephones, and sleep).

MAC's only cited case support for its arguments is Skeie v. Minnkota Power Cooperative, 281 N.W.2d 372 (Minn. 1979), and Stansell v. City of Northfield, 618 N.W.2d 814 (Minn. App. 2000). In these cases, courts found that plaintiffs had not demonstrated effects on a MERA-protected natural resource. However, these cases are distinguishable, because they related to pure questions of property impairment, economic impacts and land use that were not based on a MERA-protected resource. Skeie, 281 N.W.2d at 374 (fact that use of cultivated fields would be more difficult due to power line did not demonstrate effect on MERA-protected natural resource); Stansell, 618 N.W.2d at 820 (economic activity of city center was not a MERA-protected natural resource). Here, by contrast, the Complaint focuses on the expressly identified resource of quietude. See Complaint at 79, 85-86; Minn. Stat. § 116B.02, subd. 4. See also, White Bear 257 N.W.2d at 780-81.

3. The Availability of Other Possible Causes of Action Does Not Undermine MERA Claims

MAC also claims that the appropriate relief for aircraft noise must be found in an inverse condemnation action. Memorandum at 12. Nonetheless, despite citing authority for the potential for airport inverse condemnation liability from noisy operations, MAC utterly fails to demonstrate that inverse condemnation is the exclusive cause of action.<sup>10</sup> The potential existence of an inverse condemnation claim does not in any way preclude a MERA claim. MERA case law indicates that other causes of action do not affect the ability to bring a MERA claim. For example, in Lone Oak, the court simultaneously upheld findings that noise from a gun club constituted violations of MERA, nuisance and trespass. Lone Oak, 624 N.W.2d at 804-05. See also, People for Env'tl. Enlightenment and Responsibility v. Minnesota Env'tl. Quality Council, 266 N.W.2d 858, 866 (Minn. 1978) (MERA may be used in conjunction with other environmental statutes). Thus, MAC's theories do not provide any basis for dismissal under Rule 12.

Finally, MAC postulates that the Complaint raises "contract, estoppel or quasi-contract" claims and then goes on to argue that such claims are not cognizable under MERA. Memorandum at 12. However, once again, the MERA claims actually pled in the Complaint do not rely on any contractual or estoppel arguments. See Complaint at pp. 12-13. Thus, this straw-man argument provides no basis for dismissal.

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<sup>10</sup> MAC's Memorandum cites Alevizos v. Metropolitan Airports Commission, 216 N.W.2d 651 (Minn. 1974), for the proposition that impacts to the use and diminution of value of property support a cause of action under an inverse condemnation theory. However, Alevizos never holds that inverse condemnation is the exclusive cause of action related to aircraft noise.

### **III. THE SECOND COUNT OF THE COMPLAINT STATES A CAUSE OF ACTION FOR THE ENFORCEMENT OF AN ENVIRONMENTAL QUALITY STANDARD, LIMITATION, RULE OR ORDER UNDER MERA**

MAC misleadingly argues that the Complaint's second MERA count — based on MAC's violation of "any environmental quality standard, limitation, rule, order license, stipulation agreement or permit" — does not state a cause of action. This argument is based on an assertion that the sound insulation commitments identified in the Complaint are not required as a matter of law and are, thus, unenforceable."

As discussed below, MAC's argument misreads both MERA and other statutes binding on MAC that, singly and cumulatively, create an affirmative obligation to provide adequate noise insulation. Accepting MAC's strained argument would erode the broad reach and protection of MERA and the other statutes designed to protect residents near MSP.

#### **A. MERA Provides for an Expansive Approach to Enforceable Environmental Standards and Limitations**

The Legislature enacted MERA as a broad remedial statute to protect the environment and natural resources of Minnesota. See White Bear, 257 N.W.2d at 781-82 (MERA is a "far reaching" and "substantive" statute); County of Freeborn by Tuveson v. Bryson, 243 N.W.2d 316, 322 (Minn. 1976) (MERA has a "broad remedial purpose" and has given the "land ethic the force of law"); County of Freeborn by Tuveson v. Bryson, 210 N.W.2d 290, 296 (Minn. 1973) ("Where a statute such as this is drafted in broad and comprehensive language, we are not justified in engrafting exceptions upon it."). MERA creates substantive rights to a clean environment in addition to a cause of action: "each person is entitled by right to the protection, preservation and enhancement of air, water, land and other natural resources..." Minn. Stat.

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MAC's argument is addressed only to Count Two of the Complaint. MAC does not and cannot make a similar argument related to Count One, which alleges that MAC is causing a material adverse impact to the natural resource of quietude under MERA.

§116B.01 (emphasis added). The statute establishes that the protection of natural resources is the state's "paramount concern" and that economic considerations do not constitute a defense.

Drabik v. Martz, 451 N.W.2d 893, 896 (Minn. App. 1990). "[I]t is the duty of the courts to support the legislative goal of protecting our environmental resources." Tuveson, 243 N.W.2d at 321.

MERA includes a deliberately broad list of environmental quality provisions the violation of which constitutes a basis for an action: "any environmental quality standard, limitation, rule, order license, stipulation agreement or permit." Minn. Stat. § 116B.02, subd. 5 (emphasis added). The all-encompassing term "any," as well as the long and inclusive list of the types of environmental quality provisions included, reflect a clear legislative intent for an inclusive reading of this list of enforceable measures. See Tuveson, 210 N.W.2d at 296 (the use of the word "any" in a statute is "all comprehensive," "sweeping in its reach," and "includes all persons and things referred to indiscriminately"). This far-reaching intent is reinforced by MERA's provisions regarding burden of proof, which provide that, "where the environmental quality standards, limitations, rules, orders, licenses, stipulation agreements, or permits [] are inconsistent, the most stringent shall control." Id. at § 116B.04 (emphasis added).

"It is elementary that remedial statutes must be liberally construed for the purposes of accomplishing their objects." State v. Industrial Tool & Die Works, Inc., 21 N.W.2d 31, 38 (Minn. 1945); Miklas v. Parrott, 684 N.W.2d 458, 461 (Minn. 2004) (same). In particular, Minnesota courts have recognized that the state's "strong environmental policy" should be "liberally construed." In re Greater Morrison Sanitary Landfill, 435 N.W.2d 92, 99 (Minn. App. 1989). As a result, this Court may not embrace the narrow and cramped approach advocated by MAC to limit the types of environmental provisions that trigger MERA.

MAC's primary argument rests on its attempt to misapply two cases that interpret an affirmative defense under MERA that allows a defendant to show that it is taking action "pursuant to an environmental quality standard, limitation, rule, order license, stipulation agreement or permit." Memorandum at 14-16; citing Kennedy Building Assoc. v. Viacom, Inc., 375 F.3d 731 (8<sup>th</sup> Cir. 2004), and Williams Pipeline Co. v. Soo Line Railroad Co., 597 N.W.2d 340 (Minn. App. 1999). See also, Minn. Stat. § 116B.03, subd. 1 (affirmative defense). In both cases, however, defendants sought to use this defense by arguing that their environmentally destructive acts were conducted pursuant to state environmental permits or other limitations. In both cases, the courts determined that the defendants' behavior at issue was not undertaken "pursuant to" the environmental permits or provisions, because the provisions did not expressly direct the defendants to take the particular action that was the subject of the complaints. Kennedy, 375 F.3d at 744; Williams, 597 N.W.2d at 346. In both cases, the courts expressly based their decisions on an interpretation of the "pursuant to" phrase of the MERA affirmative defense. *Id.* They did not consider the scope of the "environmental quality standard, limitation, rule, order license, stipulation agreement or permit" phrase, which is the relevant issue when considering the affirmative scope of MERA.

Further, the Kennedy and Williams courts were interpreting an affirmative defense to a remedial statute, and thus, would have been reading the defense strictly and narrowly, as opposed to the broad reading properly afforded to the primary purposes of such a statute. See e.g., United States v. Shell, 841 F.Supp. 962, 970 (C.D. Cal. 1993) ("With CERCLA's basic remedial purposes in mind, the Court narrowly construes the defenses provided under section 107(b)."). See also, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir.

1985) ("We will not interpret [a statute] in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise.").

As a result, MAC's reliance on these cases is unavailing. Kennedy and Williams have no bearing on the question of whether the environmental standards identified in the Complaint are enforceable under MERA. Instead, this Court must read MERA broadly in order to effectuate its remedial purpose.

**B. The 1996 Noise Program and 1998 FEIS Are Enforceable under MERA**

MAC's Memorandum unconvincingly attempts to characterize the 1996 Noise Program and the mitigation requirements in the 1998 FEIS as purely gratuitous and unenforceable policy statements. The core of its argument revolves around citations to case law standing for the proposition that an Environmental Impact Statement prepared under MEPA is an informational document. Memorandum at 16-18.

However, as discussed below, while the requirement to prepare an EIS may, by itself and in isolation, not require a public entity to include mitigation, a constellation of other statutory requirements inside and outside of MEPA requires MAC and other public entities to provide such mitigation in order to minimize the effects of operations and projects. These include MERA, MEPA and the MAC's own enabling statute.

These substantive statutes require MAC to mitigate the impacts of its actions, inter alia, to retain the existing location of MSP as the long-term site for the metropolitan area's international airport and to expand its capacity through the new Runway 17-35 and other construction. The 1996 Noise Program and the 1998 FEIS both represent enforceable standards for the mitigation required to meet MAC's substantive statutory obligations applicable to such

decisions. A review of these statutory provisions and history places the MAC's 1996 Noise Program and 1998 FEIS into proper perspective.

1. MAC's Enabling Laws Require MAC to Minimize Noise Impacts and Provide Mitigation

As discussed in the Complaint, the Legislature explicitly directs MAC to minimize the effects of its operations on nearby residents and to provide sound insulation to affected residents.

Minn. Stat. §§ 473.602, 473.655

It is the purpose of sections 473.601 to 473.679 to: (2) assure the residents of the metropolitan area of the minimum environmental impact from air navigation and transportation, and to that end provide for noise abatement, control of airport area land use, and other protective measures; and (3) promote the overall goals of the state's environmental policies and minimize the public's exposure to noise and safety hazards around airports.

Minn. Stat. § 473.602.

It is hereby determined and declared that the purposes of sections 473.601 to 473.679 are public and governmental; that the development of the metropolitan airports system by the corporation be consistent with the airport chapter of the Metropolitan Council's development guide and promote the public safety and welfare of the state; and that the development, extension, maintenance, and operation of the system in such a manner as to assure the residents of the metropolitan area of the minimum environmental impact from air navigation and transportation, with provision for noise abatement, control of airport area land use, and other protective measures, is essential to the development of air navigation and transportation in and through this state, and is necessary in order to assure the inclusion of this state in national and international systems of air transportation, benefits the people of the state as a whole, renders a general public service, and provides employment, and is of great public economic benefit.

Minn. Stat. § 473.655 (emphasis added). Further, in 1996, the Legislature directed MAC specifically to consider whether to provide insulation to homes in the DNL 60-65 as part of the decision to commit to MSP as the long-term site for the metropolitan area's primary commercial

airport and to undertake the 2010 capital plan.<sup>12</sup> Id. at § 473.661, subd. 4(f). The Legislature then directed MAC to undertake the 2010 capital plan, which was subject to MAC's obligation to minimize and mitigate noise impacts. Id. at § 473.608, subd. 25.

## 2. MERA and MEPA Create Substantive Standards Binding on MAC

MAC's compliance with the specific provisions of its enabling statute must also be viewed in the context of the requirements of MERA and MEPA. MERA creates an affirmative and substantive obligation on MAC and other public entities to avoid causing significant effects on the environment by implementing feasible and prudent alternatives. E.g., PEER, 266 N.W.2d at 867-68 (Minn. 1978). This includes taking potential steps to mitigate the effects of an action. See e.g., White Bear, 257 N.W.2d at 783.

Similarly, as an arm of the State, MAC has an obligation under MEPA to avoid any action "significantly affecting the quality of the environment ... so long as there is a feasible and prudent alternative..." Minn Stat. § 116D.04(6).<sup>13</sup> See also Tuveson, 243 N.W.2d at 321 ("[A]s a political subdivision of the state, the county has a greater duty than does a private individual to see that legislative policy is carried out"); Erickson v. King, 15 N.W.2d 201, 204 (Minn. 1944) (MAC is a governmental instrumentality exercising a sovereign function).

MAC cites cases that indicate that the purpose of preparing an EIS is to develop information, but the cases do not suggest that measures which implement substantive obligations

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<sup>12</sup> The Legislature also tied its definition of "affected city" (in the context of possible additional runway construction at MSP) to whether a city would experience an increase in the size of the DNL 60 noise contour in that city. This is a clear Legislative determination of impact associated with living in the DNL 60-65. MAC's argument in its Memorandum that this determination has nothing to do with impacts to persons living within that contour would render the provision of the statute an absurd nullity. See Memorandum at 20-21. The Legislature would not designate cities with increased noise contours as "affected" if there were not effects associated with the increased noise. Similarly, if the test of an "affected" city was related to something other than the effect of noise, the legislature would not have used noise contours as a trigger.

<sup>13</sup> 114D.04, subd. 6 applies to any "state actions" significantly affecting the environment. This provision applies to MAC as an arm of the State. MERA Section 116B.10, entitled "Reviewal [sic] of State Actions," applies to acts taken by the State and its subdivisions, indicating an intent for "state actions" to include actions by political subdivisions like MAC.

are not enforceable. Indeed, one of the very cases that MAC cites, Coon Creek Watershed Dist. v. Minn. Env'tl. Quality Bd., clarifies that the EIS plays an important role in determining mitigation when agencies are under substantive obligations: "The requirement of an EIS does not preclude the repair [to a ditch at issue] but merely ensures that the environmental effects will be considered and that the repair will be done in the least harmful way." 315 N.W.2d 604, 605 (Minn. 1982) (emphasis added). See also id. at 606 ("In addition, [MEPA] requires that, where possible, other state laws be interpreted and administered in accordance with its provisions.").

3. The 1996 Noise Program and 1998 FEIS Create Enforceable Standards Pursuant to these Statutes

In the 1996 Noise Program, MAC determined that extension of the already-existing noise insulation program to the DNL 60-65 was necessary, appropriate, and feasible to ensure the compatibility of a major international airport located in close proximity to residential areas. Critically, the Noise Program's requirements for homes in the DNL 60-65 are enumerated in mandatory language (and not hortatory language or policy statements) and contain very explicit provisions for excuse of non-compliance (e.g., if MAC's bond rating slips below an "A" level). See Complaint at TT 37-42; Memorandum at Exhibit A. Had MAC not been under a statutory obligation to provide this insulation, its implementation of the 1996 Noise Program would have been in excess of its authority, because MAC's implementing statute does not provide it with general authority to insulate residences apart from its obligations to provide noise mitigation. Minn. Stat. § 473.601, et seq.

MAC subsequently made the determination in the 1998 FEIS that residents in the DNL 60-65 were adversely affected by noise from MSP and will be increasingly affected by the airport with the new Runway 17-35 in operation. As a result, MAC again provided a mitigation program that was set out in mandatory terms with explicit provisions for an escape from the

requirement (e.g., if MAC's bond rating fell below "A"). Complaint at 1137-42; Memorandum Exhibit A.

The 1996 Noise Program and the 1998 FEIS reflect the existence of and MAC's commitment to the feasible and prudent alternative of providing noise insulation to affected homes in the DNL 60-65. The statutes examined above identify the general, yet binding and substantive, standards for the minimization of harm that bind the MAC. The 1996 Noise Program and 1998 FEIS provide specific standards and limitations to implement these provisions and are, thus, enforceable under MERA. Otherwise, MAC would be allowed to avoid its substantive obligations by simply making promises and commitments when trying to secure approval for a project and then renege years later — which is exactly what MAC is seeking to do now. MERA was designed to avoid just this type of situation and it must be interpreted to effectuate the legislature's clear intent.

#### 4. MAC Has Failed to Show that the Standards Are Not Enforceable

MAC's defense in the Memorandum is that its requirements to mitigate and minimize the impacts of its noise are nonbinding. Again, it relies on the Kennedy Building and Williams Pipeline cases as its primary authority for the argument that general standards (e.g., minimization of impacts) cannot be enforced under MERA.<sup>14</sup> Memorandum at 18. Again, however, neither of these cases considered the level of specificity for an enforceable environmental provision that would be needed to support an affirmative cause of action under MERA. Instead, they found that particular actions taken by defendants were not taken "pursuant to" an environmental

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<sup>14</sup> MAC also cites *In re NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 405 (Minn. App. 1988). However, Red Wing dealt with the considerably different situation of whether the general substantive provisions of MEPA regarding overall environmental goals (the "right to the protection, preservation, and enhancement of air, water, land and other natural resources located within the state") provide a specific procedural right to a contested hearing in a particular case to the plaintiff. *Id.* at 405. This differs completely from MERA, which provides a substantive obligation on the part of state subdivisions to choose less harmful alternatives if feasible and prudent.

standard or other provision and, thus, do not qualify for MERA's affirmative defense. Kennedy Building, 375 F.3d at 744; Williams Pipeline, 597 N.W.2d at 346. The cases did not opine on what an "environmental standard" or other provision must be to obtain relief under MERA. Further, it is critical to note that the courts themselves have found that the general, but substantive, standards of MERA and MEPA themselves (i.e., to avoid any action significantly affecting the environment if there is a feasible and prudent alternative) suffice to state a claim under MERA. PEER, 266 N.W.2d at 868.

Finally, while MAC advances the unremarkable proposition that its organic statute calls for it to promote other non-environmental ends, including the promotion of aviation, it makes no demonstration that these other provisions negate the environmental standards or that the environmental and non-environmental requirements cannot be simultaneously met. Indeed, the Legislature itself determined that adequate mitigation was essential to MAC meeting its aviation-related mission. Minn. Stat. § 473.655. Further, the 1996 Noise Program and 1998 FEIS provide content to the general standards applicable to MAC by indicating what noise insulation should be provided, when and under what circumstances they would become infeasible. Because MAC cannot demonstrate that the mitigation is infeasible in a motion to dismiss (and, indeed, has not tried), the court must deny its motion to dismiss the second count of the Complaint.

States Power, 122 N.W.2d at 29

### **C. The MAC's Failure to Comply with Conditions in the Metropolitan Council's 2002 Approval of Its Capital Program Is a Violation of MERA**

MAC is also violating the terms of a condition imposed by the Metropolitan Council in the context of approving MAC's capital program in 2002. This condition is also an environmental standard or limitation and is enforceable under MERA.

I. The Metropolitan Council's 2002 Authorization Is an Environmental Quality Standard, Limitation or Order

The Metropolitan Council's condition on its approval of MAC's 2010 Capital Improvement Program is, by its very nature, an "environmental quality standard, limitation, rule, order, license, stipulation agreement or permit of the state or any instrumentality, agency, or political subdivision thereof," the violation of which constitutes "pollution, impairment or destruction" of the environment. See Minn. Stat. § 116B.02(5). The Metropolitan Council is obligated to review the MAC's capital projects and the development of the metropolitan airports system. Minn. Stat §§ 473.181(5) and 473.621(6). In this case, the Metropolitan Council approved MAC's 2002 "significant effect" projects, including the construction of Runway 17-35 and a terminal parking structure, contingent on the MAC's reaffirming its \$150 million funding commitment for a full sound insulation program. Complaint at 58-59. As a result, the Metropolitan Council's authorization imposes standards to ensure minimal environmental impacts from the MAC's actions. It also imposes limitations on the MAC's authority to implement its capital plan based on the environmental impacts on noise. Finally, it orders the MAC to install sound insulation as a condition for approval of the 2010 Capital Improvement Plan.

While the MAC would read MERA narrowly, such an approach is clearly contrary to the intent of the statute. As discussed above, the statute is written in sweeping terms, and is "intended to preserve the environment In [sic] its natural state from pollution, impairment or destruction." Skeie v. Minnkota Power Coop., Inc., 281 N.W.2d 372, 373 (Minn. 1979). To exclude protection where a provision is not formally labeled on its face as a "standard, limitation, rule, order, license, stipulation agreement or permit" would fundamentally undermine the broad goals of the statute. g., Minn. Stat. § 116.01 (defining the purpose of the statute); Tuveson,

210 N.W.2d at 296. The Metropolitan Council's action constitutes the implementation of a legislatively-mandated duty to protect the environment. The action is a direct response to environmental impacts from noise. Furthermore, it is imposed by an entity with jurisdiction to consider environmental issues. As a result, the Metropolitan Council's order, imposing noise standards and limitations on the MAC, is an environmental quality standard, limitation, rule or order, the violation of which constitutes "pollution, impairment or destruction" of the natural resource of quietude.

## 2. The Metropolitan Council Did Not Overturn its 2002 Noise Mitigation Standard

MAC's argument that the Metropolitan Council has somehow reversed its 2002 requirement is not only unfounded, but also clearly not a basis upon which to dismiss this action. See Memorandum at 20-21. First, as a matter of course, this court should summarily dismiss this theory because the MAC has not produced any evidence sufficient to support judicial notice on this matter. E.g., *State Dep't of Highways v. Halvorson*, 181 N.W. 2d 473, 476 (Minn. 1970) (where a court is asked to take judicial notice of an agency regulation, the identity and contexts of which are not disclosed in formal pleadings, counsel should be prepared to include as an exhibit to the court the relevant contents of the regulation).<sup>15</sup>

Second, it is not at all apparent, based on the MAC's own argument, that the Metropolitan Council's 2005 action "overturns" its prior conditional approval. Compare Memorandum at 20. The two approvals govern wholly separate matters. Compare, e.g., Memorandum at 20 (describing the Metropolitan Council's initial approval of the "2002 MSP

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<sup>15</sup> The Minnesota Rules of Evidence stipulate that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resource to sources whose accuracy cannot reasonably be questioned. Minn. Rules of Evidence, Rule 201(b). Given the dispute over the merits of the Metropolitan Council's 2005 action, the idea that the 2005 action "reversed" the Metropolitan Council's 2002 conditional approval is clearly not a "fact" that is appropriate for judicial notice.

capital improvement program") with id. at 21 (describing the Metropolitan Council's 2005 approval of "MAC's 2005 capital improvement plan"). The MAC's entire argument rests on the fact that the Metropolitan Council's most recent action "made no mention of a MAC commitment to spend \$150 million on noise mitigation." See Memorandum at 21. However, especially on a motion to dismiss, this falls far short of a demonstration that the Metropolitan Council retroactively undid its prior conditions on the approval of the 2002 program, even assuming it could do so. It is wholly unjustified, therefore, to impute an entire policy change based solely on the Metropolitan Council's silence.

**D. The MAC's Failure to Abide by the Noise Mitigation Terms of Various Other Agreements Is Further Evidence that it Violated MERA**

The MAC incorrectly asserts that the Communities characterize the 1999 Airline Lease Agreement, the Third Parallel Runway Agreement, and the Noise Mitigation Agreement with the City of Richfield as environmental quality standards, limitations, rules, or orders. This is incorrect. The Communities cite to these agreements as supplemental evidence for their MERA claims. For example, the 1999 Airline Lease Agreement includes an agreement to fund the insulation of the homes in the DNL 60-65. Complaint at TT 55-56. MAC's participation in such an agreement demonstrates its recognition that those noise insulation commitments are feasible. Since demonstration that protection measures are not feasible would be an affirmative defense under MERA, these agreements are useful evidence to the Communities' case, even if they do not form part of the prima facie case.

#### IV. THE COMPLAINT STATES A PROPER CLAIM FOR MANDAMUS

##### A. The Complaint Seeks to Enforce the Mandatory, Ministerial Duty of the MAC to Provide Adequate Sound Insulation

MAC's allegation that the Communities "cannot establish a legal duty" mandating that MAC implement a five decibel noise reduction package in the DNL 60-65 is unfounded. See Memorandum at 22. As discussed above, MAC has a clearly-defined statutory duty to minimize the environmental impact of its operations, to minimize the public's exposure to noise hazards, and to provide for noise abatement. Complaint at 21, citing Minn. Stat. § 473.602. Lest there be any question, its enabling act provides that:

the development, extension, maintenance, and operation of the system in such a manner as to assure the residents of the metropolitan area of the minimum environmental impact from air navigation and transportation, with provision for noise abatement ... and other protective measures, is essential to the development of air navigation and transportation in and through this state ...

Complaint at 25, citing Minn. Stat. § 473.655 (emphasis added). Similarly, as discussed above, MERA and MEPA require the selection of the least impacting feasible alternative.

Recognizing that duty, the MAC promulgated two primary standards in which it determined and identified the scope of these statutory duties. First, in the 1996 Noise Program, the MAC committed to expand the then-existing noise insulation program to include residences within the projected 2005 DNL 60-65. Complaint at ¶ 38. It also stipulated that "no case should unreimbursed financial impacts fall on affected residents or their local governments." Complaint at 1139. Second, in the FEIS, the MAC evaluated the environmental impacts of the MSP expansion project and the construction of a new runway. In that context, the MAC admitted that noise associated with airport operations would impact residents outside of the DNL 65 contour and therefore considered impacts out to the DNL 60. Complaint at ¶ 46. As a result,

the MAC committed to full sound insulation in the DNL 60-65 as a mitigation measure.

Complaint at ¶ 48.

Not only does the statute enumerate a clear duty to mitigate noise impacts, these two documents are also evidence of MAC's own conclusion that full sound insulation in the DNL 60-65 at no cost to residents or local governments is both feasible and necessary to satisfy its statutory obligation to assure residents of minimal impacts. These are not mere promises or moral obligations; rather they are documented, concrete actions pursuant to the dictates of the Legislature.<sup>16</sup>

MAC's duty is quintessentially ministerial: it is "absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated fact." Kari v. City of Maplewood, 582 N.W.2d 921, 923 (Minn. 1998). These commitments are not mere policy statements; instead, they are couched in mandatory language. *Id.* Further, the MAC's obligation is clearly defined, with detailed requirements and exceptions. These specific details evidence the type of clear, present duty that is enforceable under the mandamus statute.

#### **B. The Mandamus Claim Does Not Depend on What Mechanism MAC Uses To Pay for the Program**

As a final matter, MAC once again mischaracterizes the Complaint by asserting that the Communities "seek to overturn MAC's discretionary recommendation to FAA." Compare Memorandum at 23. This is not the case. As outlined in Section I above, the Communities seek to enforce the MAC's mandatory duty to provide an adequate noise insulation program in the DNL 60-65. E.g., Complaint at ¶ 92. Toward that end, the Communities have no significant interest in the ultimate funding mechanism. The sole issue before this Court is whether, regardless of the scope of federal funding ultimately authorized for expansion projects, MAC has

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<sup>16</sup> Even though MAC is apparently hesitant to admit to its prior commitments, this Court must take the facts alleged in the Complaint as true. Marquette Nat'l Bank v. Norris, 270 N.W.2d 290, 292 (Minn. 1978).

an independent state obligation to mitigate noise impacts. As a result, granting the motion to dismiss would be inappropriate.

**CONCLUSION**

For the foregoing reasons, the MAC's motion to dismiss should be DENIED.