

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

State of Minnesota by the
City of Minneapolis, et al.,

Plaintiffs,

v.

Metropolitan Airports Commission,

Defendant, and

Northwest Airlines, Inc.,

Defendant-Intervenor.

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

**DEFENDANT NORTHWEST
AIRLINES, INC.'s MEMORANDUM
OF LAW IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

Plaintiffs are requesting this Court undo the policy determination made by the MAC regarding mitigation in the 60-64 DNL contour. To make their case, they rely on their MERA claims. But MERA provides injunctive relief for a very specific purpose: to preserve the State's natural resources from the defendant's polluting conduct. The Legislature clearly did not intend that MERA should be used by the courts to fashion airport noise mitigation policy. For these reasons, Defendant-Intervenor Northwest Airlines, Inc. ("NWA") requests this Court reject

Plaintiffs' novel MERA and mandamus claims, and grant summary judgment in favor of Defendants, on the following grounds:

First, summary judgment should be granted on Counts I (MERA/Material Adverse Affect) and II (MERA/Violation of Environmental Quality Standard) because the *indoor* quietude of properties located in the 60-64 DNL contour is not a protected natural resource under MERA.

Second, summary judgment should be granted on Counts I and II because Plaintiffs cannot show the *actionable conduct* required for any successful MERA claim – the pollution, impairment or destruction of a natural resource – because the mitigation plan adopted by the MAC on November 20, 2004, does not itself degrade quietude.

Third, summary judgment should be granted on Counts II (MERA/Violation of Environmental Quality Standard) and III (Mandamus) because it has already been adjudicated that the MAC has complied with the 1996 Noise Mitigation Plan, which sits at the center of Plaintiffs' "constellation theory," so there is no longer any grounds for Plaintiffs' claim that MAC has violated an environmental quality standard.

Fourth, summary judgment should be granted on Counts I and II because Plaintiffs cannot show the MAC's mitigation plan will "materially adversely affect the environment" under the five-part Schaller test, especially since the proposed action on its face does not adversely affect the environment and there is no dispute that indoor quietude in the 60-64 DNL contour is significantly degraded, even before the MAC's mitigation program or airport noise is taken into account.

Finally, summary judgment should be granted on Count III (Mandamus) because Plaintiffs can not identify any clear and unambiguous duty to provide insulation to 60-64 DNL homes.

II. DOCUMENTS COMPRISING THE RECORD

To conserve the Court's time and ensure the paper record is as compact as possible for the Court's review, NWA will rely in large part on the paper record filed by the MAC in this matter, which is hereby incorporated by reference. NWA will submit its own documents of record, which include the following:

1. Excerpts from the Deposition of Dr. Paul Schomer (including excerpts from Defendants' Exhibit 48).
2. Excerpts from the Deposition of John Freitag.
3. Excerpts from the Deposition of Merland Otto.

III. STATEMENT OF ISSUES

1. Whether there are genuine issues of material fact in support of Plaintiffs' MERA claims (Counts I and II) given that interior quietude is not a "protected natural resource" under MERA.
2. Whether there are genuine issues of material fact in support of Plaintiffs' MERA claims given that the "conduct" on which they base these claims does not "pollute, impair, or destroy" the environment.
3. Whether there are genuine issues of material fact in support of Plaintiffs' claim that the MAC has violated an "environmental quality standard" (Count II) given that Plaintiffs cannot identify a currently effective "environmental quality standard" that the MAC has violated.

4. Whether there are genuine issues of material fact in support of Plaintiffs' claim that the MAC's conduct has had a "material adverse affect" on the environment (Count I), given that the conduct at issue will not cause any pollution, and the resource in question is already significantly degraded.

5. Whether there are any genuine issues of material fact in support of Plaintiffs' mandamus claim (Count III) where the Plaintiffs cannot point to any state law or regulation that creates a clear and unambiguous duty to provide a 5 DNL mitigation program for homes within the 60-64 DNL contour.

IV. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. FAA Regulates And Controls Local Airports' Noise Mitigation Programs.

Pursuant to its statutory authority, the FAA has created a detailed set of regulations, which allow airport operators to submit airport noise mitigation plans to the FAA for approval. See 14 C.F.R. Part 150. While an airport operator who wishes to create a noise mitigation plan is not obligated to comply with Part 150, compliance has several benefits. First, FAA approval of a Part 150 program is a necessary precondition for FAA grants and the use of Passenger Facility Charges for noise mitigation programs.¹ See 14 C.F.R. Part 150 §§ 150.1, 150.35. Second, an airport can use the Part 150 process to get FAA approval for any changes that might affect airport operations (*e.g.*, flight paths, hours of operation, etc.). See id. at § 150.35. It also provides some protection against lawsuits based upon the levels of noise. See 49 U.S.C. § 47506.

¹ Passenger Facility Charges, or "PFC's" is a type of airport revenue derived from fees that airport passengers pay when they purchase airline tickets. See Affidavit of Nigel Finney in Support of MAC's Motion to Dismiss (at ¶ 10. MAC cannot spend any PFC revenue without specific authority from the FAA. Final Policy on Part 150 Approval of Noise Mitigation Measures: Effect on the Use of Federal Grants for Noise Mitigation Purposes, 63 Fed. Reg. 16409, 16409 (April 3, 1998).

FAA has determined that only exterior noise in excess of 65 DNL² is considered “significant.” See 14 C.F.R. Part 150, App. § 150.101(d) (“For purposes of compliance with this part, all land uses are considered to be compatible with noise levels less than LDN 65dB.”).³ See also Noise Abatement Policy 2000 (65 Fed. Reg. 43802, 43810) (noting that the FAA defines “significant noise exposure” as a yearly DNL of 65 or higher). In addition to the FAA’s 65 DNL exterior noise level standard, the FAA has also determined that an interior noise level of 45 DNL is protective of health and safety. See 14 C.F.R. § 150.23; 14 C.F.R. pt. 150, App. A, § A150.101(e)(8) and Table 1, n.1; Airport Improvement Program Handbook at 141; FAA, Guidelines for the Sound Insulation of Residents to Aircraft Operations at §3.4.1. The FAA’s 45 DNL interior noise level standard matches the EPA, which concluded that 45 DNL interior noise is the level beneath which “no effects on public health and welfare occur.” See Environmental Protection Agency, Information on Levels of Environmental Noise Requisite to Protect Public Health and Safety with an Adequate Margin of Safety, (“Levels Document”) at 3 (1974); see also Leque Dep., pp. 141; 143; 212 (MAC Exhibit Tab C, No. 8) (citing MAC’s long-standing goal under Part 150 mitigation to achieve 45 dB interior noise level).

Because of the FAA’s 65 DNL standard, airport operators almost universally limit their noise insulation programs to homes within the 65+ DNL contour. See also e.g., Freitag Depo. at 191-194 (Holly Affidavit, Exh. B), Def. Ex. 48; Schomer Depo. at 223-224 (Holly Affidavit, Exh. A), Def. Ex. 48; 149 Cong. Rec. S11154 (daily ed. Sept. 5, 2003) (Sen. Coleman observing

² “DNL,” often referred to as dB DNL or LDN, is a noise measurement that measures the average decibels of noise experienced over a 24 hour period.

³ See also Noise Abatement Policy 2000 (65 Fed. Reg. 43802, 43810) (noting that the FAA defines “significant noise exposure” as a yearly DNL of 65 or higher); 14 C.F.R. §150.33(a)(2) (noting that FAA approval must be “reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.”).

that the FAA “has not normally supported noise mitigation projects below a Day-Night Average Sound Level (DNL) of less than 65.”). Indeed, there are no U.S. airports comparable to MSP that provide any significant insulation to homes below the 65 DNL contour. See Schomer Depo. at 223-224, Def. Ex. 48 (Holly Affidavit, Exh. A); Freitag Depo. at 191-194 (Holly Affidavit, Exh. B).

B. The MAC Begins A Program To Insulate Homes Experiencing In Excess Of 65 DNL Noise.

Beginning in 1992, the MAC began a program to insulate homes near MSP experiencing in excess of 65 DNL of noise (the “65+ DNL Homes”). See MAC’s March 1992 Part 150 Update), (MAC Exhibit, Tab A, No. 13); Complaint ¶ 26. This program (the “65+ Program”) involved providing residents affected by these levels of noise with home improvements to lessen the level of interior noise caused by exterior aircraft flights. MAC’s March 1992 Part 150 Update (MAC Exhibit, Tab A, No. 13); Complaint ¶ 27. The improvements included such improvements as new or refurbished doors and windows, wall and ceiling insulation, and vent baffling. Complaint ¶ 27. Air conditioning was also provided to residents to allow them to close their windows during the summer months, which significantly reduces the levels of noise within the home. Id. The goal of this program has been to reduce interior noise levels by 5 DNL. Id.; see also MAC’s March 1992 Part 150 Update), p. 3-37 (noting that the MSP mitigation program is designed “to provide an interior noise environment equal to the [DNL] 45 standard”) (MAC Exhibit, Tab A, No. 13). By all accounts, this program has been successful and well-received by affected homeowners. See Complaint ¶ 29. See also, e.g., Freitag Depo. at 73-75 (Holly Affidavit, Exh. B); Otto Depo. at 62 (Holly Affidavit, Exh. C).

C. **The Minnesota Legislature Delegates To MAC Authority To Determine Whether 60-64 DNL Homes Require Home Insulation.**

While the MAC's 65+ DNL Program was ongoing, it became clear that the then-existing MSP airport was too small to accommodate projected future traffic. See Complaint ¶ 31. A debate ensued regarding whether to build a new airport, or to expand the existing airport. See id. at ¶¶ 31-32. After significant debate, finally, the Legislature decided to expand the airport at its existing location. Id. at ¶ 35. This expansion primarily involved building a new runway. Id. at ¶ 33.

As a part of this legislation for MPS' expansion, the Legislature also required that the MAC engage in certain noise mitigation near the airport. The MAC was obligated to complete insulation for homes experiencing noise in excess of 65 DNL See Minn. Stat § 473.661, subd 4(a), (d). The MAC was also obligated to provide noise mitigation to certain schools and publicly owned buildings in the metro area. Id. at Subd. 4(c). With respect to homes that experience 60-64 DNL of airport noise (the "60-64 DNL Homes"), the Legislature delegated to the MAC the discretion to determine whether any insulation was necessary for these homes, and if so what type:

[T]he [MAC] . . . shall make a recommendation to the state advisory council on metropolitan airport planning regarding proposed mitigation activities and appropriate funding levels of mitigation activities at [MSP]. . . . *The recommendation shall examine mitigation measures to the 60 Ldn level.*

See Minn. Stat. § 473.661, Subd 4(f) (emphasis added). The statute did not require MAC to fund any insulation activities for 60-64 DNL Homes, but instead gave the MAC the discretion to "examine" whether such insulation was appropriate or required. Id. Since this legislation,

various bills have been introduced that would require the MAC to provide a full 5 DNL insulation package to 60-64 DNL homes.⁴ Those bills have all failed to pass.

D. Pursuant To Minn. Stat § 473.661, The MAC Issues A Noise Mitigation Program That Evidences A Plan To Provide Some Insulation To Homes Within The 60-64 DNL Contour.

As required by Minn. Stat. § 473.661(f), the MAC drafted a plan to both codify its existing 65+ DNL Program, and to “examine” a home insulation program for 60-64 DNL Homes. Finney Dep., 56:24 to 57:7 (MAC Exhibit Tab C, No. 3). The resulting document was called the “Noise Mitigation Program, and was completed in November 1996. See Noise Mitigation Program at 36 (MAC Exhibit Tab A, No. 13).

With respect to 60-64 DNL Homes, the MAC indicated in the Noise Mitigation Program that it intended to provide some insulation for these homes, but did not define what insulation that might be or when it would be provided. See Noise Mitigation Program at 36 (MAC Exhibit Tab A, No. 13). The Noise Mitigation Program did not evidence an intent to provide 60-64 DNL homes with any particular level of insulation. Miller Depo. at 34:25 to 35:3 (admitting that the 1996 NMP lacked any description of what noise mitigation in DNL 60 to 64 contours would be) (MAC Exhibit Tab C, Ex. 9); Excerpts from Office of Legislative Auditor, “Metropolitan Airports Commission,” Report # 03-04, January 2003, p. 65 (MAC Exhibit Tab A, No. 15) (confirming that the Noise Mitigation Program did not include any explicit commitment “to provide identical noise mitigation to all homes in the areas with noise levels of 60 DNL or greater.”). As the Honorable Richard S. Scherer, who recently reviewed and interpreted the 1996

⁴ H.F. 3030 at 1.13, 83rd Legis. Sess. (Minn. Mar. 15, 2004) (posted); S.F. 2885 at 1.13, 83rd Legis. Sess. (Minn. Mar. 12, 2004) (posted); S.F. 1569 at 1.20, 83rd Legis. Sess. (Minn. May 19, 2003) (posted); H.F. 1635 at 1.20, 83rd Legis. Sess. (Minn. May 19, 2003) (posted).

Noise Mitigation Program in rejecting Bloomington's environmental claims against the MAC for failure to mitigate 60-64 DNL homes, observed:

[T]he Noise Mitigation Program [did not] specifically define[] the "residential sound insulation program" for the 60-64 DNL contours, identify the components of the program, or specify that the mitigation MAC implemented in the 65 and greater DNL contours would be implemented in the 60-64 DNL contours.

See Order Granting MAC's Motion For Summary Judgment in City of Bloomington v. Metropolitan Airports Commission, at p. 10 (Hennepin County District Court, Aug. 8, 2006) (herein after referred to a "City of Bloomington") (MAC Exhibit Tab D).

E. The MAC Considers Various Insulation Programs For 60-64 DNL Homes.

Following the Noise Mitigation Program, and as the 65+ DNL Program progressed, the MAC considered the specific level of insulation it would provide to homes within the 60-64 DNL contour. From 1999 to 2001, MAC considered various proposals to insulate 60-64 DNL Homes, with cost estimates ranging from \$200 million to \$450 million. See May 30, 2001 Nigel Finney memo to P & E Committee at p. 3-8 (MAC Exhibit No. 19). In August, 2001, the MAC voted to approve a insulation program that provide insulation for 60-64 DNL homes subject to a \$150 million cap. See August 20, 2001 MAC meeting minutes (MAC Exhibit Tab A, No. 20), pp. 7-14; see also Complaint ¶ 62; City of Bloomington, ¶ 36. This was later withdrawn in December 2001, in part because of concerns surrounding the effects of September 11. Minutes of December 17, 2001 MAC Commission Meeting, (MAC Exhibit Tab A, No. 21) pp. 11 to 15; Complaint, ¶ 63. As time went by, other mitigation options were considered, but no final plan was adopted. Minutes of 4/15/02 MAC Commission Meeting, (MAC Exhibit, Tab A, No. 22) pp. 8 to 15. Complaint ¶¶ 64-65.

F. The MAC Approves An Appropriate Noise Insulation Program For 60-64 DNL Homes.

As the 65+ DNL Program neared an end, several facts became clear regarding the 60-64 DNL Program. First, the costs associated with such a program were exponentially higher than had been earlier estimated. After 2000, MAC staffers estimated the costs of a full 5 DNL insulation package as high as \$441,760,000. See May 30, 2001 Nigel Finney memo to P & E Committee at p. 3-8 (MAC Exhibit No. 19). It also became increasingly clear that (likely because of the cold weather climate) the difference between outside noise and inside noise was significantly greater than FAA estimates, between 27-30 DNL. See Finney Affidavit ¶ 5; See also Freitag Depo. at 26, 80 (Holly Affidavit, Exh. B); Schomer Depo. at 214 (Holly Affidavit, Exh. A).⁵ This meant that homes within the 60-64 DNL contour met the EPA's and FAA's 45 DNL interior noise target *by a wide margin*. See Finney Affidavit ¶ 5; See also Schomer Depo. at 214 (Holly Affidavit, Exh. A) (noting that homes within the 65+ DNL contour almost exclusively experienced interior noise in the 30 DNL range). Finally, the increasing difficulties faced by the airline industry after 9/11 and the increasing costs of security caused the MAC to recognize that airport budgets were even tighter than they were in the 1990s. See Minutes of April 15, 2002 MAC Commission Meeting at 8-9 (MAC Exhibit Tab A, No. 22).

In November 2004, the MAC approved a 60-64 DNL insulation program targeted towards homeowners that suffered the highest levels of noise. Under this program, MAC would offer homeowners air conditioning if they did not already have it. See Complaint ¶ 66; Finney

⁵ See also e.g., Miller Dep., p. 71:10-17 (typical Minnesota home provides exterior to interior noise reduction of 27 to 30 decibels with windows closed), pp. 134:19 to 135:5 (conceding that air conditioning alone could allow a home to achieve a 45 dB interior noise level) (MAC Exhibit Tab C, No. 9); Otto Depo. at 55:10-12, 57:6-8 (typical home near MSP provides exterior to interior noise reduction of 27 to 30 decibels with windows closed); (MAC Exhibit Tab C, No. 10).

Affidavit ¶ 6. To participate in the program, homeowners would have to pay a portion of the costs, ranging from 10% to 50%. Complaint ¶ 67; Finney Affidavit ¶ 6. MAC agreed to offer low interest loans to homeowners who participated in the program. Finney Affidavit ¶ 6.

As Judge Scherer recently found, the MAC's final 60-64 DNL Home insulation package was consistent with the 1996 Noise Mitigation Plan and the MAC's earlier statements of intent to provide some level of insulation to 60-64 DNL homes:

The [record] establishes that MAC['s final 60-64 DNL insulation program] did not make "substantial changes" to the mitigation proposed in [the Noise Mitigation Program.] MAC's 1996 Noise Mitigation Program . . . does not specify that the mitigation that MAC implemented in the 65 and greater DNL contours would be implemented in the 60-64 DNL contours.

City of Bloomington at ¶ 74.

G. The Cities Of Minneapolis, Richfield, And Eagan File Suit Against The MAC, Demanding A Full 5 DNL Insulation Package For 60-64 DNL Homes.

The MAC's 60-64 DNL insulation program is beyond any insulation program provided by any comparable airport – no other airport of similar size has any program to insulate homes within the 60-64 DNL contour. See supra p. 5-6. See also May 30, 2001 Nigel Finney memo to P & E Committee at p. 8 (MAC Exhibit No. 19).

Nevertheless, the cities of Eagan, Minneapolis, and Richfield filed suit following the MAC's promulgation of its 60-64 DNL insulation program. Although they alleged that the MAC made "commitments" to provide mitigation to 60-64 DNL Homes, they have not and cannot raise contract or estoppel-type claims. Instead, Plaintiffs have raised claims under the Minnesota Environmental Rights Act (MERA), along with a mandamus claim.

Specifically, the Plaintiffs' Complaint alleges three separate claims:

Count I alleges that the MAC violated MERA because the revised mitigation program adopted by the MAC on November 20, 2004, causes a “material adverse effect” on the indoor quietude in 60-64 DNL homes.

Count II alleges that the MAC violated MERA by adopting the revised mitigation program because that program violated an “environmental quality standard” established collectively by the 1996 Noise Mitigation Plan, the mitigation plan set forth in the 1998 FEIS, the statutory obligations imposed on the MAC to minimize noise at MSP, and the 2010 capital program approved by the Metropolitan Council in 2002.

Count III, the mandamus claim, alleges that the MAC had a “clear and unambiguous” duty under state law to provide 60-64 DNL insulation.

Because the FAA comprehensively regulates MSP air traffic, Plaintiffs acknowledge that they cannot seek the traditional remedy under MERA – an injunction ordering the cessation of the aircraft operations allegedly polluting conduct. See Minnesota Public Lobby v. MAC, 520 N.W.2d 388 (1994). They have, instead, requested that the MAC provide the same insulation package for 60-64 DNL Homes as was provided to 65+ DNL Homes, even though such an insulation package would provide 60-64 DNL residents with lower sound levels than those in the 65+ DNL contours. See Schomer Depo. at 215-216 (Holly Affidavit, Exh. A).

H. This Court Allows Discovery To Proceed.

This Court denied both the MAC’s and NWA’s motions to dismiss the Complaint. This Court initially rejected the MAC’s argument that the matter should be dismissed or stayed pending the FAA’s approval of the MAC’s November 2004 mitigation program. The Court also rejected Defendants’ arguments that MERA did not allow the Court to order economic relief, but rather that any relief under MERA had to be limited to preventing the polluting conduct at issue.

Rather, the Court believed that “MERA grants a wide range of equitable powers to the Court to fashion an appropriate remedy based upon the circumstances of each case.” (Order at 20).

The Court also adopted (for the purposes of the motion) Plaintiffs’ novel theory that a “constellation” of various sources – MERA, the Noise Mitigation Program, the 1998 Environmental Impact Statement (“EIS”) and the MAC’s own enabling statute – set an “environmental quality standard” that could be enforced under MERA. While the Court recognized that the MAC had the authority to modify its previous plans and programs, it concluded that this authority was limited because the Cities had relied upon the MAC’s alleged 1996 “commitment” to provide a full 5 DNL insulation package to 60-64 DNL homes. (Order at 24). As the Court noted “[i]t should not be easy for public bodies to breach commitments on which so many private and public entities have claimed to rely.” (Order at 27).

Finally, the Court declined to dismiss the mandamus claim at that time, suggesting that a “writ of mandamus will only be considered if it is determined that MAC has an unequivocal duty” to provide insulation to 60-64 DNL homes. (Order at 28).

V. ARGUMENT

Plaintiffs allege two counts under the Minnesota Environmental Rights Act, Minn. Stat. Chap. 116B (“MERA”), and a claim for mandamus. On Defendants’ motions to dismiss, the Court declined to dismiss Plaintiffs’ novel claims, on the grounds that those claims were at least colorable and the Court of Appeals should have the benefit of a full record. The record is now complete, and an array of undisputed facts and legal issues render the case ripe for summary judgment.

Plaintiffs’ MERA claims are fatally deficient. First, indoor quietude is not a “natural resource” within the meaning of MERA. Second, the MAC’s mitigation plan is not actionable

conduct under MERA, since the mitigation plan does not “pollute, impair or destroy” any natural resource. Third, there has been no violation of any environmental quality standard, permit, or rule, because there is no such rule binding MAC’s noise mitigation decisions. Finally, even if indoor quietude can be considered a natural resource and the mitigation plan is conduct subject to MERA, the MAC’s actions will not materially, adversely affect quietude.

Plaintiffs have profoundly misapplied MERA. MERA is a significant departure from the common practice of delegating the control of environmental quality to regulatory agencies. See 56 Minn. L. Rev. 575, 575-77 (1971-72). Under MERA, ordinary citizens may take the initiative in environmental law enforcement, on behalf of the State. MERA also subjects state agencies to judicial review to determine if their actions fail to protect natural resources from pollution, impairment and destruction.

Given the authority vested in the courts under MERA, the statute must be carefully and faithfully applied. First, the court must ensure that the alleged natural resource is one truly deserving protection under MERA. State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 264 (Minn. 1997). Second, the court must find conduct that causes “pollution, impairment or destruction” of a protected natural resource. Id. If there is no impairing conduct, there is no MERA claim. National Audubon Soc’y v. Minn. Pollution Control Agency, 569 N.W.2d 211, 218 (Minn. Ct. App. 1997).

In applying the statute, it should be remembered that the purpose of MERA is to prevent the *future* degradation of the state’s natural resources. Powderly v. Erickson, 285 N.W.2d 84, 91 (Minn. 1979). MERA is not a remedial statute that can be used to cleanup past pollution, or improve or restore natural resources. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 746-47 (8th Cir. 2004). To establish a MERA claim, a plaintiff must show that defendant’s

current or future conduct will damage a protected natural resource in a manner or to degree beyond past impairment. *Id.* Thus, the critical test under MERA is to evaluate the likely condition of the protected natural resource before and after the defendant's proposed action. Matter of Univ. of Minnesota, 566 N.W.2d 98, 105 (Minn. Ct. App. 1997).

A. Summary Judgment Should Be Granted on Counts I and II Because Indoor Quietude Is Not a Protected Natural Resource Under MERA.

To establish a prima facie case under MERA, Plaintiffs must first identify the "existence of a protectable natural resource." White v. Minnesota Department of Natural Resources, 567 N.W.2d 724, 737 (Minn. App. 1997). In their complaint, Plaintiffs claim the "protected natural resource" at issue is "[t]he quietude of neighborhoods within the Cities and properties owned by MEHA that are located in the DNL 60-65 dB contour." Complaint ¶79. By "within the ... properties," Plaintiffs must mean *only* indoor quietude, since the alleged wrongful conduct is the MAC's failure to install the 5 DNL insulation package for the 60-64 DNL contour, and the only relief they are requesting is limited to the implementation of that package, which will only affect levels of sound indoors. They also must mean only indoor quietude because any attempt to regulate or improve outdoor noise would, by necessity, interfere with aircraft operations and all parties agree that such actions are preempted. Minnesota Public Lobby v. MAC, 520 N.W.2d 388 (1994).

Counts I and II present a distinct issue regarding the scope of MERA: whether indoor quietude is a "natural resource" within the meaning of MERA. Quietude is not defined in MERA.⁶ But before protection is provided under MERA, any particular quiet state must be a "*natural* resource." Minn. Stat. § 116B.01, subd. 4. If the word "natural" is given any meaning,

⁶ Webster's defines "quietude" as "a quiet state". Webster's Ninth New Collegiate Dictionary, 1983.

quietude must be tied to a natural setting. This conclusion is reinforced by Minn. Stat. § 116B.02, subd. 5, which ties regulated conduct to the violation of an *environmental* standard or rule, or which materially adversely affects the *environment*. The “environment” referenced in Minn. Stat. § 116B.02, subd. 5, is plainly the *natural* environment, because MERA’s underlying policy is the “state’s paramount concern for the protection of its *air, water, land and other natural resources from pollution, impairment, or destruction.*” Minn. Stat. § 116B.04 (emphasis supplied). Under the doctrine *nocitur e sociis*, statutory terms are to be interpreted in conformance with their surrounding terms, and the phrase “air, water, land, and other natural resources,” as well as “pollution,” all clearly relate to the natural environment.

The Minnesota Supreme Court has stated that MERA “is intended to preserve the environment in its natural state.” State by Skeie v. Minnkota Power Coop., Inc., 281 N.W.2d 372 (Minn. 1979). The Supreme Court has also cautioned against extending the scope of MERA beyond where it was “clearly intended.” Id. at 374. Such extensions are

something that the legislature, rather than this court, should decide. This consideration is of special significance in dealing with environmental legislation which so much involves the weighing of considerations of public policy a role best performed by the elected representatives of the people...[the new power conferred on citizens by MERA] should not be extended into areas where its use was not clearly intended.

State by Skeie v. Minnkota Power Coop., Inc., 281 N.W.2d 372, 374 (Minn. 1979). The Court should reject Plaintiffs’ request to extend the reach of MERA beyond what the Legislature intended.

If MERA were extended to preserve purely indoor quietude, the results would be nonsensical. An apartment dweller would have a MERA cause of action for any recurring significant noises emanating from neighboring apartments and penetrating the adjoining walls. A homebuilder who did not meet the state building code for insulation could face a MERA claim

for injunctive relief on the ground that the state building code insulation requirements are “environmental rules” designed in part to protect “indoor quietude.” MERA claims could also be asserted against the manufacturers of blenders, hair dryers, and other household appliances that produce noise levels above state noise standards.

This conclusion that “quietude” under MERA does not include interior quiet is confirmed by other related regulations and case law. In the Michigan Environmental Policy Act, the statute on which MERA was modeled, quietude was not recognized as a natural resource, see M.C.L.A. §§ 324.1701, 324.1703, 324.1704, and 324.1705, and quietude has not been identified as a natural resource in any Michigan state court case. See, e.g., Property Owners' Rights Ass'n (PORA) v. Centerline of Calhoun County, 1998 WL 1992998 (Mich. Ct. App. 1998) (gun club case in which lead contamination of soils and groundwater was alleged, but no reference to quietude or noise). Likewise, no Minnesota case has ever found interior quietude to be a “natural resource.” The courts instead have focused on classic natural resources as they exist in the natural environment. In the first MERA case, Freeborn County by Tuveson v. Bryson, the Minnesota Supreme Court emphasized the natural quality of the resources at issue, holding in that case that the proposed highway was subject to MERA review because “(1) the highway would divide a *natural* marsh; (2) the entire marsh is an *ecological unit*; [and] (3) the construction would eliminate some of the area’s *natural physical assets*.” 210 N.W.2d 290, 297 (Minn. 1973) (emphasis supplied).

The court’s analysis in Kennedy Building Associates v. Viacom, 2006 WL 305279 (D. Minn. 2006), is on point. In this case, U.S. District Court Judge Rosenbaum stated that MERA does not provide a basis for ordering the clean up of the interior of a building. The defendant had contaminated the soil, groundwater and building interior at its site with polychlorinated

biphenyls (“PCBs”). Applying MERA, the court enjoined the future pollution resulting from past contamination but did not order full site clean-up. Discussing the polluted building interior, the court noted that the PCBs were “bonded to the interior surfaces,” thereby contaminating the interior environment of the building. 2006 WL 305279 at *3 (D. Minn. 2006). The court did not discuss the interior contamination, but was strictly concerned with the potential impact on the outdoor natural resources, concluding that the PCBs “did not pose an immediate threat of migration.” *Id.* Because the court found “no evidence showing that the building’s contaminants are migrating into uncontaminated soils and water,” the court found “*no MERA basis under which to remediate the interior of the building.*” *Id.* (emphasis added). The court clearly delineated between the natural resources of soil and groundwater, which are protected by MERA, and the building interior, which is beyond the scope of MERA.

This sense of quiet as a *natural* phenomenon in the *outdoors* is further confirmed by the statute directing the MPCA to establish noise standards:

The Pollution Control Agency shall also adopt standards describing the maximum levels of noise in terms of sound pressure level which may occur *in the outdoor atmosphere*, recognizing that due to variable factors no single standard of sound pressure is applicable to all areas of the state. . . . In adopting standards, the Pollution Control Agency shall give due recognition to the fact that the quantity or characteristics of noise or the duration of its presence *in the outdoor atmosphere*, which may cause noise pollution in one area of the state, may cause less or not cause any noise pollution in another area of the state, and it shall take into consideration in this connection such factors, including others which it may deem proper, as existing physical conditions, zoning classifications, topography, meteorological conditions and the fact that a standard which may be proper in an essentially residential area of the state, may not be proper as to a highly developed industrial area of the state. . . . No local governing unit shall set standards describing the maximum levels of sound pressure which are more stringent than those set by the Pollution Control Agency.

Minn. Stat. § 116.07, subd. 2 (emphasis supplied). This provision was adopted in 1971 during the same legislative session as the enactment of MERA.⁷ Considering the intertwined relationship between MERA and MPCA regulations, Minn. Stat. § 116.03, subd. 1 (prohibiting MERA actions for conduct undertaken pursuant to an MPCA permit or rule), it would be very odd for the Legislature to have expressly limited the MPCA's regulatory authority to the control of noise in the outdoor atmosphere, and *prohibiting* other governments from adopting more stringent standards, while envisioning that private parties could obtain relief under MERA for disruptions of purely indoor quietude. In light of the MPCA's limited authority to control noise, the only sensible interpretation of "quietude" as a "natural resource" under MERA is that it is similarly limited to quietude in the outdoor environment.

There have been ten MERA cases involving explicitly referenced claims of impacts to quietude, and all are consistent with an understanding of quietude as being focused on the outdoors. Minn. Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762 (Minn. 1977) (gun noise); White Bear Rod and Gun Club v. City of Hugo, 377 N.W.2d 49 (Minn. Ct. App. 1985) (same); State ex rel. Neighbors Organized in Support of Env't (NOISE) v. Dotty, 396 N.W.2d 55 (Minn. Ct. App. 1986) (same); McGuire v. County of Scott, 525 N.W.2d 583 (Minn. Ct. App. 1994) (road noise); State by Minn. Public Lobby v. MAC, 520 N.W.2d 388 (1994) (airport noise); Beddor v. City of Chanhassen, 1995 WL 296009 (Minn. Ct. App. 1995) (road noise); Madden v. County of Chisago, 1995 Minn. App. LEXIS 1092 (Minn. Ct. App. 1995) (dog kennel); State by Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997) (road construction); Gleason v. MAC, 2000 WL 821676 (Minn. Ct. App. 2000) (airport noise);

⁷ Compare Minnesota Environmental Rights Act, Laws 1971, ch. 952, eff. June 8, 1971 (codified at Minn. Stat. 116B.01 et seq.) with Minnesota Pollution Control Act, Laws 1971, ch. 727, eff. June 5, 1971 (codified at Minn. Stat. 116.01 et seq.) (adding subd. 2).

Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796 (Minn. Ct. App. Apr. 17, 2001) (gun noise).

Since Plaintiffs do not seek any relief to reduce ambient noise levels, they are not seeking to protect a "natural resource of the State," and their MERA claims must be dismissed.

B. Summary Judgment Should Be Granted on Counts I and II Because the MAC's Mitigation Plan Will Not Impair Quietude.

In addition to showing that quietude within the interiors of residences in the 60-64 contour is a protected natural resource under MERA, Plaintiffs must also show that MAC's conduct will or is likely to cause pollution, impairment or destruction of that quietude. Minn. Stat. § 116B.03, subd. 1; State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 264 (Minn. 1997). MERA defines "pollution, impairment or destruction" as "**conduct**" that either: (1) violates "any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit of the state or any instrumentality, agency or political subdivision thereof", or (2) "materially adversely affects or is likely to materially adversely affect the environment". Minn. Stat. § 116B.02, subd. 5. Minn. Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762, 768 (Minn. 1976) (MERA plaintiffs can "establish pollution, impairment or destruction of the environment through two possible means: (1) by proof that the **conduct in question** violates, or may violate, any environmental quality standard, rule, or regulation of the state or any political subdivision thereof; or (2) by proof that the **conduct complained of** 'materially, adversely affects or is likely to affect' the environment." (emphasis added)).

The "proposed action" or "actionable conduct" that allegedly causes the pollution, impairment or destruction is the trigger point for any MERA action. In this case, there is no actionable conduct. The "proposed action" alleged in the Complaint was the MAC's November

20, 2004 decision to provide AC-only, rather than the 5 DNL package, in the 60-64 DNL contour. See Complaint ¶ 81. But the decision to provide mitigation on its face cannot pollute, impair or destroy the environment. If the MAC’s action consists of installing air conditioning in residences in the 60-64 contour, there is no material adverse affect and Plaintiffs cannot support their MERA claims. National Audubon Soc’y v. Minn. Pollution Control Agency, 569 N.W.2d 211, 218 (Minn. Ct. App. 1997) (“[b]ecause environmental review cannot result in pollution, impairment or destruction of the environment, we conclude [the failure to perform] environmental review does not constitute ‘pollution, impairment or destruction’ of the environment as defined by MERA”).

An analysis of MERA cases shows Plaintiffs have missed the mark. Only seven reported MERA cases, set out in Table 1 below, have resulted in a judgment for plaintiffs, and in each case, the conduct at issue was conduct that polluted the environment (as opposed to an alleged failure to provide mitigation). These cases stand in stark contrast to Plaintiffs’ MERA claims, which are based on the MAC’s mitigation program (rather than polluting conduct), and on an economic windfall for South Metro residents (rather than judicial relief to preserve natural resources).

TABLE 1

MERA Conduct	MERA Remedy	Citation
Operation of a gun club	Injunction preventing operation of the gun club	<u>Minnesota Public Interest Research Group v. White Bear Rod & Gun Club</u> , 257 N.W.2d 762 (Minn. 1977)
Development and operation of a campground without a sewage treatment facility	Denial of special use permit and planned unit development permit	<u>Corwine v. Crow Wing County</u> , 244 N.W.2d 482 (Minn. 1976)
Construction of a roadway bisecting a natural wildlife	Injunction preventing	<u>Freeborn County by Tuveson v. Bryson</u> , 210 N.W.2d 290

marsh	construction	(Minn. 1973), <i>injunction affirmed by Freeborn County by Tuveson v. Bryson</i> , 243 N.W.2d 316 (Minn. Ct. App. 1976)
Operation of a gun club	Permanent injunction against the operation of the gun club	<i>Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.</i> , 624 N.W.2d 796 (Minn. Ct. App. 2001)
Logging of wooded area that is home to bald eagle roosts	Landowner enjoined from destroying, disturbing or impairing bald eagles or their roosts on landowners' property	<i>State ex rel Wacouta Tp. v. Brunkow Hardwood Corp.</i> , 510 N.W.2d 27 (Minn. Ct. App. 1993)
Construction of highly visible radio tower near Boundary Waters Canoe Area	Injunction preventing construction of the tower	<i>State by Drabik v. Martz</i> , 451 N.W.2d 893 (Minn. Ct. App. 1990)
Operation of a solid waste incineration facility	Denial of permit to operate	<i>In re Winona County Mun. Solid Waste Incinerator</i> , 442 N.W.2d 344 (Minn. Ct. App. 1989)

The obvious potential actionable MERA conduct – the conduct that may impair quietude in the 60-64 DNL contour – is aircraft operations. But as the Cities recognize in their Complaint, *Minnesota Public Lobby v. MAC*, 520 N.W.2d 388, 292 (Minn. 1994), holds that federal law preempts any attempt to hold that airport operations themselves violate MERA.⁸ However, even if the preemption issue were pushed aside, Plaintiffs cannot show that airport operations themselves are actionable conduct because the 60-64 contour is already impaired. MERA provides relief to prevent the future degradation of natural resources. *State by Powderly v.*

⁸ In their Complaint, Plaintiffs allege that the MAC's November 2004 mitigation plan is the "conduct" that will impair quietude. See Complaint ¶ 81. But in response to NWA's motion to dismiss, Plaintiffs altered their position and argued that the noise generated from MSP operations constitute the relevant MERA conduct. See Plaintiffs' Supplemental Memorandum of Law in

Erickson, 285 N.W.2d 84, 90 (Minn. 1979) (MERA cannot require improvement of natural resources but can only prevent future destruction). MERA is intended to prevent new pollution. MERA is not a remedial statute, like MERLA, which provides means to improve or restore the environment. MERA cannot be used to order the clean-up of past pollution. Kennedy Building Associates v. Viacom, Inc., 375 F.3d 731, 749 (8th Cir. 2004); Soo Line R. Co. v. B.J. Carney & Co., 797 F.Supp. 1472, 1486 (D. Minn. 1992). MERA is forward-looking. MERA can be used to abate impacts caused by past actions, but only when those past actions pose a threat of “new pollution of separate natural resources.” Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d at 746-47 (MERA authorizes injunctive relief to “clean up hazardous substances when such substances create *ongoing* pollution of underground water and lakes, which constitute ‘separate natural resources.’”) (emphasis added); Kennedy Bldg. Assocs. v. Viacom, Inc., 2006 WL 305279, *9-*10 (D. Minn. 2006) (finding no basis in MERA to enjoin pollution that does not have a future impact on separate natural resources); Soo Line R. Co. v. B.J. Carney & Co., 797 F.Supp. at 1486-87; Werlein v. U.S., 746 F.Supp. 887, 898 (D. Minn. 1990).

In this case, there is no new pollution of separate natural resources. The residences in the 60-64 DNL contour, according to the Plaintiffs, are already impaired. See Complaint ¶¶ 10-11. There are no new or separate resources at risk that warrant MERA protection. Summary judgment must be granted on the MERA claims because Plaintiffs cannot demonstrate the MAC’s conduct is causing “pollution, impairment, or destruction.”

C. **Summary Judgment Should Be Granted on Count II Because the MAC's Mitigation Plan Does Not Violate Any Environmental Quality Standard.**

Count II alleges that the MAC violated an “environmental quality standard” when it decided to provide the air-conditioning insulation package to homeowners within the 60-64 DNL Contour, and thereby violated MERA Section 116B.03, subd. 1. See Complaint ¶¶ 88-90. Specifically, Plaintiffs allege that the MAC’s 1996 Noise Mitigation Program, and a “constellation” of sources that later referenced this program (but do not create independent duties to fund 60-64 DNL insulation on their own), created an “environmental quality standard” under MERA.⁹ Id. at ¶ 90. This “standard,” Plaintiffs contend, was violated when the MAC decided to provide the 60-64 DNL homes with the air-conditioning program in November 2004. Id. This claim fails for several reasons.

First, even if the court assumes the Noise Mitigation Plan created an environmental quality standard for purposes of MERA, the MAC has not acted contrary to that plan. Specifically, the MAC’s air-conditioning program satisfied the Noise Mitigation Program’s statement of intent to provide some unidentified amount of mitigation to 60-64 DNL Homes. As the Honorable Richard S. Scherer recently found, and as the evidence in this matter has confirmed, the noise mitigation program did not “specifically define” the 60-64 DNL insulation program, or indicate that any particular level of insulation would be provided within this contour. See supra at 9. When the MAC finalized its 60-64 DNL insulation plans in 2004, it did not constitute a “substantial change” to what was stated in the Noise Mitigation Program. Id. at 11. As Judge Scherer found, the MAC’s 60-64 DNL air conditioning program was consistent with

⁹ Plaintiffs have never argued that the State noise standards constitute an “environmental quality standard” under MERA. See Complaint ¶ 90. No doubt, this is because such a claim was already raised by South Metro residents in the Minnesota Public Lobby case, and rejected as preempted. See Minnesota Public Lobby v. MAC, 520 N.W.2d 388, 388-89 (Minn. 1994).

the Noise Mitigation Program.¹⁰ See also Miller Depo. at 34:25 to 35:3 (admitting that the 1996 NMP lacked any description of what noise mitigation in DNL 60 to 64 contours would be) (MAC Exhibit Tab C, No. 9); Excerpts from Office of Legislative Auditor, “Metropolitan Airports Commission,” Report # 03-04, January 2003, p. 65 (MAC Exhibit Tab A, No. 15) (confirming that the Noise Mitigation Program did not include any explicit commitment “to provide identical noise mitigation to all homes in the areas with noise levels of 60 DNL or greater.”).

With the Noise Mitigation Program fully implemented by the 60-64 DNL air conditioning program, all of the other stars in Plaintiffs’ “constellation” fall to earth. The Final Environmental Impact Statement (“FEIS”) merely incorporates the Noise Mitigation Program’s statement of intent to provide mitigation for the 60-64 DNL contour. See Final Environmental Impact Statement, at V. 80-81 (MAC Exhibit Tab A, No. 1). The Plaintiffs’ “constellation” theory consists of nothing more than a series of public statements by MAC staffers indicating an intent to provide some insulation in the 60-64 DNL contour (perhaps spending \$150 million on such a program), which are so vague and lacking in formality that even Plaintiffs do not believe that they constitute an environmental quality standard. See Otto Depo. at 219 (Holly Affidavit, Exh. C) (indicating that the FEIS and Public Statement by MAC staffers indicating an intent to provide insulation do not constitute an environmental quality standard). Plaintiffs cannot point to any document or “program” in which it “committed” to providing 60-64 DNL Homes with a 5

¹⁰ Judge Scherer’s ruling is the most reasonable interpretation of the 1996 Noise Mitigation Program and should be adopted by this Court. Indeed, because Plaintiffs and Bloomington are advancing the same litigation goals, his finding should be controlling under principles of collateral estoppel. See Reil v. Benjamin, 584 N.W.2d 442, 444 (Minn. Ct. App. 1998) (collateral estoppel precludes “relitigation” of a “legal question or fact issue that has been determined by court of competent jurisdiction”); Bublitz v. Comm’r of Revenue, 545 N.W.2d 382, 385 (Minn. 1996) (same).

DNL noise reduction package. Rather, the MAC only indicated that it would create a program providing some noise relief. The MAC's 60-64 DNL air conditioning program fully and completely fulfills these earlier public statements.

Second, none of the documents in Plaintiffs' "constellation" (nor all of them together) constitute an "environmental quality standard" under MERA. Under MERA, an "environmental quality standard" means more than a line-item in a budget, or a public statement by a governmental agency staff member of a then-recognized intent to provide a economic benefit to certain state residents.¹¹ An environmental quality standard must be a statute, rule, or regulation whose clear purpose is to prevent pollution. See Nemeth v. Abonmarche Dev., Inc., 576 N.W.2d 641, 650 (Mich. 1998) (noting that an environmental quality standard rule or rule is a rule whose "purpose is to prevent pollution and environmental derogation"). See also Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc., 709 N.W.2d 174, 214-16 (Mich. Ct. App. 2005); Preserve The Dunes, Inc. v. Dep't of Env'tl. Quality and Technisand, Inc., 690 N.W.2d 487, 492-93 (Mich. Ct. App. 2004). None of the documents relied upon by Plaintiffs purport to create any type of formal, environmental standard of general applicability that seeks to prevent pollution. At best, they are merely policy statements of intent to provide some unidentified amount of mitigation for certain 60-64 DNL homes, which cannot constitute an environmental "standard" under MERA.¹²

¹¹ See Complaint at ¶ 80 (indicating that the Met Council's budget are a part of the Plaintiffs' "constellation").

¹² Likewise, as the Plaintiffs' experts have testified, the EIS does not create an "environmental quality standard" under MERA. Courts have routinely concluded (as the Plaintiffs here recognize) that an EIS is merely an informational document that cannot be enforced. Otto Depo. at 219 (Holly Affidavit, Exh. C). See National Audubon Soc'y v. Minn. Pollution Control Agency, 569 N.W.2d 211, 218 (Minn. 1997) (FEIS cannot be enforced; it is merely an informational document); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (same). The remaining statements that constitute the Plaintiffs' constellation – a budget

However, even if it is assumed MAC enacted an “environmental quality standard” in the 1996 Noise Mitigation Program, the MAC still retained the inherent authority to modify this “standard.” A governmental agency retains the authority to modify or change its earlier decisions and rules. E.g., Johnson v. City of Minneapolis, 667 N.W.2d 109, 116-117 (Minn. 2003); Turnbladh v. Ramsey County District Court, 107 N.W.2d 307, 312 (Minn. 1960) (noting that a governmental agency has a “well-established right” to “reopen and redetermine” a matter); Dun & Bradstreet Corp. v. United States Postal Serv., 946 F. 2d 189, 193 (2nd Cir. 1991) (“It is well established that an agency may, on its own initiative, reconsider its interim or even its final decisions . . .”). An agency that promulgates an “environmental quality standard” must also retain the authority to modify or change that standard to meet updated needs and concerns. Plaintiffs certainly could not raise a MERA claim based upon pollution standards promulgated by MPCA in 1975, but later revoked.

Apart from the shortcomings of their MERA claims, Plaintiffs are also asking this court to second-guess the judgment of the Minnesota Legislature. The Legislature directed the MAC to provide the 5 DNL package to residences in the 65+ DNL contour. The MAC has complied with this law. The Legislature also directed that the MAC “examine” whether mitigation should be provided for residences in the 60-64 DNL contour. The MAC has complied with this law. The Legislature, for obvious and good reasons, concluded the MAC should, in the exercise of its informed discretion, determine what mitigation, if any, should be installed in the 60-64 contour. If the MAC had failed to “examine” mitigation for the 60-64 contour, then perhaps a MERA

line from the Met Council’s budget and public statements by MAC staffers of an intent to provide noise insulation within the 60-64 DNL contour in the amount of \$150 million – clearly do not constitute actionable “standards” on their own, as Plaintiffs have already admitted. See Otto Depo. at 219 (Holly Affidavit, Exh. C).

claim under plaintiff's theory would be justified. But that is not this case. The MAC's November 20, 2004 determination was subject to judicial review in a declaratory judgment action under the arbitrary and capricious standard. See Enterprise Leasing Co. v. MAC, 250 F.3d 1215, 1223 (8th Cir. 2001) ("[C]ases are legion that MAC's interpretation of [its own] statute cannot be set aside unless it is arbitrary, capricious, an abuse of discretion, or otherwise not supported by law."). But it should not be considered an environmental quality standard under MERA.

D. Summary Judgment Should Be Granted on Count I Because the MAC's Mitigation Plan Will Not "Materially Adversely Affect" Quietude.

Under MERA, if there is not an environmental quality standard limiting defendant's polluting conduct, then Plaintiffs can still show "pollution, impairment or destruction" by demonstrating that defendant's conduct "materially adversely affects the environment." Minn. Stat. § 116B.03, subd. 1; Schaller, 563 N.W.2d at 264. The "material adverse affect" analysis applies only when there is not an applicable environmental quality standard reflecting the State's existing policy regarding protection of the resource. Id. Under this standard, the court must determine if judicial intervention is justified. Id. at 265. These can be hard cases. The Supreme Court has pointed out that "almost every human activity has some kind of adverse impact on a natural resource" and concluded that "we cannot construe MERA as prohibiting virtually all human enterprise." Id. at 265-66. Consequently, the Supreme Court has adopted five factors that courts should consider in determining whether Plaintiffs' conduct "materially affects the environment." Those factors are:

- (a) The quality and severity of any adverse effects *of the proposed action* on the natural resource affected;
- (b) Whether the natural resources affected are rare, unique, endangered, or have historical significance

- (c) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
- (d) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); and
- (e) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

Id. at 267.

When the Schaller factors are applied in this case, the deficiencies in Plaintiffs' MERA claims become plainly evident. The first factor – “[t]he quality and severity of any adverse effects of the proposed action on the natural resources affected” – confirms that Plaintiffs cannot show a “material adverse affect” until they first identify conduct by the defendant that actually affects the protected natural resource.¹³ Once again, Plaintiffs' MERA claim fails because of the lack of actionable conduct, because the proposed action – adjustment of the MAC's insulation package – does not adversely affect quietude at all, but actually improves it.

The second Schaller factor also raises a critical consideration in this case. This factor considers the quality of the natural resource before that resource is impacted by defendant's conduct. If the resource is rare, unique or endangered, then judicial intervention is more likely to be justified. Plaintiffs are not making any claims that indoor quietude is rare, unique or endangered resource. In fact, Plaintiffs have gone to great lengths to describe how much quietude is already degraded in the 60-64 DNL contour, and will remain so independently of the scope of the insulation package. See Complaint ¶¶ 11-12.

¹³ This focus on examining the “proposed action” is repeated in four of the five factors.

The role of pre-existing degradation in analysis of MERA claims was discussed in a pair of cases involving a strip mall development near Duluth, Minnesota. See Krmpotich v. City of Duluth, 474 N.W.2d 392 (Minn. Ct. App. 1991) (Krmpotich I), rev. in part, aff'd in part Krmpotich v. City of Duluth, 483 N.W.2d 55 (Minn. 1992) (Krmpotich II). In that case, a developer proposed to fill a 1.85 acre wetland for the development. Krmpotich II, 483 N.W.2d. at 56. This wetland had suffered substantial degradation over the years from runoff, channeling, and other impacts. Id. The trial court concluded that as a result of these impacts, the wetland was no longer a natural resource worthy of protection under MERA. Id. The Court of Appeals reversed, reasoning that if “given relief from the regular input of pollutants, the area could purge itself and recover,” whereas if the development was allowed to go forward, it could never recover. Krmpotich I, 474 N.W.2d at 400. The Minnesota Supreme Court reversed again, and its grounds for reversal are instructive. First, the Court held that the trial court’s findings of pre-existing degradation were relevant as a matter of law to the MERA inquiry and not clearly erroneous as a matter of fact. Krmpotich II, 483 N.W.2d at 57. Second, the Court agreed with the Court of Appeals that despite such degradation, the wetland remained a natural resource within the meaning of MERA, and did not disturb the Court of Appeals’ conclusion that it was the ability to recover from its current degradation that rendered the wetland worthy of protection. Id. Third, the Court then affirmed the trial court’s conclusion that considering all factors, including the degradation of the wetland and the availability of alternatives, the project could go forward. Id.

Unlike the degraded wetland in Krmpotich, which the courts theorized would recover if left intact, Plaintiffs offer no scenario in which the sound environment in the airport flight paths will be anything but noisy for the foreseeable future. See Schomer Depo. at 102-103 (Holly

Affidavit, Exh. A); Complaint ¶ 84. In its order on the Motion to Dismiss, the Court left open the possibility that development of the record might show that the measures requested by the Plaintiffs might bring the interior soundscapes of the affected homes in line with the reasonable “expectations” of urban dwellers. But this begs the question of whether such reasonable expectations constitute “quietude” within the meaning of MERA. None of the cases in which quietude was substantively analyzed involved urban areas with elevated ambient noise levels. Given that there is no pre-existing quietude to be protected, Plaintiffs’ MERA claim cannot result in the protection of a presently uncontaminated natural resource. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 747-48 (8th Cir. 2004).

The remaining Schaller factors, which focus on the long term and consequential effects on natural resources of the proposed action, are equally inapplicable. The underlying conduct – airport operations – is permanent and outside the scope of MERA. The “proposed action” that Plaintiffs have challenged – reduction in scope of the MAC insulation program – operates and is effective solely on a building-by-building, house-by-house basis. The “effects on natural resources” can therefore only be understood as the accumulation of effects on thousands of micro-environments, each of which owes more to landowner decisions and the evolving Minneapolis housing and commercial real estate markets than to anything occurring in the natural world. Collectively, the Schaller factors simply do not fit and are not satisfied in any manner that could justify judicial intervention.

The Schaller factors are not exclusive, and they should be applied with some flexibility, adjusted on a case-by-case basis. Schaller, 563 N.W.2d at 267. But the fact that Plaintiffs cannot satisfy *any of the factors* only underscores that their claims are not consistent with the elemental requirements and purposes of MERA. Plaintiffs have brought claims that do not

protect a natural resource of the state, because the identified resource is neither “natural” nor damaged by the MAC’s mitigation plan. Under these circumstances, summary judgment must be granted.

E. Summary Judgment Should Be Granted on Count III because Plaintiffs Admit There Is Not a Clear Legal Duty to Provide the Full Insulation Package in the 60-64 Contour.

Finally, summary judgment should be granted against Count III of the Complaint because the Plaintiffs cannot demonstrate any clear and unambiguous duty in law by the MAC to provide noise mitigation to 60-64 DNL Homes.

To successfully raise a mandamus claim, a party must demonstrate that the act sought to be compelled is one the law “clearly and positively requires.” See Day v. Wright County, 391 N.W.2d 32, 34 (Minn. Ct. App. 1997); Johnson v. Minn. Dep’t Human Servs., 565 N.W.2d 453, 460 (Minn. Ct. App. 1997) (holding that the petitioner’s mandamus claim required a showing that the act demanded be so “clear and complete as not to admit any reasonable controversy.”). The duty cannot be discretionary, or involve the exercise of judgment. E.g., Friends of Animals & Their Environment (FATE) v. Nichols, 350 N.W.2d 489, 491 (Minn. Ct. App. 1984). See also, e.g., Waters v. Putnam, 183 N.W.2d 545, 550 (Minn. 1971).

The only clear duty imposed by Minn Stat. § 473.661, subd. 4(f), is a duty to examine mitigation options, which the MAC has clearly discharged. How the MAC performed that examination, what conclusions the MAC drew in balancing cost and effectiveness, and how the MAC adjusted the program to meet changing circumstances all plainly required the exercise of judgment. Indeed, the statute does not command any mitigation outcome at all, let alone the specific package desired by Plaintiffs. Such open-ended, analytical directives are the antithesis of a mandamus scenario.

Alternatively, Plaintiffs may claim that whatever discretion the MAC may have initially enjoyed under Minn Stat. § 473.661, subd. 4(f), that discretion was progressively narrowed and eliminated as the MAC made commitments to federal, state, and local interests to implement noise mitigation in a particular way. A threshold problem of such a theory is that none of these interests expressly conditioned any approval, permit, or other action on implementation of any noise mitigation commitment in the 60-64 DNL contour. Despite months of discovery and intensive document production, Plaintiffs are as unable today to identify any express duty as they were when the case was commenced. They are free to argue that such a duty should be equitably *implied* from the overall facts and circumstances of the airport expansion project, but mandamus cannot lie absent an express mandate free of any ambiguity. Johnson, 565 N.W.2d at 460.

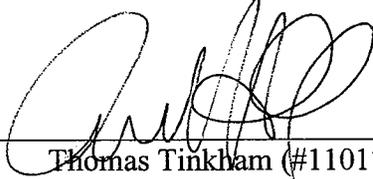
For these reasons, the Plaintiffs cannot raise a genuine issue of material fact to support their mandamus claim, and this claim must be dismissed.

VI. CONCLUSION

For the forgoing reasons, summary judgment should be granted in favor of defendants on Counts I, II and III.

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