

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota by the City of Minneapolis,
Minneapolis Public Housing Authority in and for
the City of Minneapolis, City of Eagan, and City
of Richfield; City of Minneapolis, Minneapolis
Public Housing Authority in and for the City of
Minneapolis, City of Eagan, and City of
Richfield,

Plaintiffs,

v.

Metropolitan Airports Commission

Defendant,

District Court File No.: MC 05-5474

and

Northwest Airlines, Inc.,

Defendant-Intervenor.

The above-entitled matter came duly on for hearing before the Honorable Stephen C. Aldrich, Judge of District Court, on July 15, 2005, on Defendant Metropolitan Airport Commission's May 16, 2005 Motion to Dismiss, and John E. Putnam's and Stephen H. Kaplan's April 20, 2005 Motions for Admission Pro Hac Vice to appear as counsel for Plaintiff City of Minneapolis.

APPEARANCES:

Peter W. Ginder, Esq., Corey M. Conover, Esq., John E. Putnam, Esq., and a host of other attorneys, appeared on behalf of the Plaintiffs.

Thaddeus R. Lightfoot, Esq., and Thomas W. Anderson, Esq., appeared on behalf of Defendant Metropolitan Airport Commission (MAC).

Thomas Tinkham, Esq., appeared on behalf of Defendant-Intervenor Northwest Airlines, Inc. (NWA).

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

THE COURT FINDS:

1. John E. Putnam's and Stephen H. Kaplan's motions for admission pro hac vice should be granted.

2. Plaintiffs object to Defendant MAC's inclusion of an affidavit from Nigel Finney ("Finney Affidavit") and MAC's claim that the Court may review the affidavit without converting the Motion to Dismiss to a motion for summary judgment, as procedurally flawed. This Court agrees.

The Minnesota Supreme Court dealt with this issue in Northern States Power Co. V. Minnesota Metropolitan Council, 684 N.W.2d 485, 491 (Minn. 2004) and found that a district court's consideration of an affidavit attached to the defendants motion to dismiss without converting the motion to one for summary judgment was in error as the affidavit dealt with matters outside the *pleading*. The Court noted, as a threshold matter, that Minn. R. Civ. P. 12.02 provides that a motion to dismiss for failure to state a claim shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the district court for consideration and not excluded, however, the court may consider documents referenced in a *complaint* without converting the motion to dismiss to one for summary judgment. Id.

The Finney Affidavit deals with matters outside the pleadings and should be excluded from consideration.

3. At the hearing, Counsel were instructed to submit additional memoranda to provide further clarification of the issues. Plaintiff's and Defendant-Intervenor NWA's memoranda were received on July 29, 2005. Defendant MAC's memorandum was received on August 1, 2005.

4. Defendant-Intervenor NWA also submitted a reply brief on August 12, 2005. On August 26, 2005, Plaintiffs filed their objection to the submission with a "motion to strike" asserting NWA's reply brief was procedurally inappropriate and contained new issues. NWA responded on September 1, 2005, and argued that by joining the case after MAC's Motion to Dismiss had been filed, it had a right to file an opening and reply brief but found itself in a situation not contemplated by the Minnesota General Rules of Practice 115.03(c). NWA was unable to file its opening or reply brief within the time limits set by the rules. NWA noted that while it had the right to file and schedule a separate hearing for its own motion to dismiss, it chose not to do so in order to save the court and the parties the time and costs involved in a second hearing dealing with the same set of facts and arguments. In the interest of juridical efficiency and economy, relevant subject matter contained in the additional memoranda will be considered by this Court in making a final determination on Defendant's Motion to Dismiss.

5. On September 14, 2005, Defendant-Intervenor NWA filed for bankruptcy under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. On September 19, 2005, NWA filed a Notice of Bankruptcy stating that the instant case was "automatically stayed" pursuant to Section 362 of the Bankruptcy Code. After the court's inquiry, on October 3, 2005 counsel submitted respective memoranda concerning the impact of NWA's Notice of Bankruptcy; all agree that the automatic stay does not apply to this action as the instant case falls within the exception to the automatic stay provisions of 11 U.S.C. Sec. 362, specifically Sec. 362(b)(4), which pertains to actions by a government unit.

6. On October 13, 2005, the Court contacted counsel by email letter seeking information on the effects of Defendant-Intervenor NWA's bankruptcy on the 1999 Airline Lease Agreement with Defendant MAC. The Court had previously granted NWA's motion to intervene based on NWA's obligation through the 1999 Airline Lease Agreement to pay up to \$150 million of the costs of the additional noise mitigation at issue in this case. Plaintiffs maintain, by letter dated October 16, 2005, that the effect of NWA's bankruptcy on the 1999 Airline Lease has no bearing on the ultimate merits of this case as the obligation to comply with the Minnesota Environmental Rights Act ("MERA") falls upon MAC directly, regardless of its leases with NWA. Defendant MAC's letter, dated October 17, 2005, states that if the 1999 Airline Lease is treated as a "true lease" then NWA will have the right to assume or reject the lease. If the lease is rejected, certain terms would be renegotiated, however, that decision could be years away. In the interim, NWA is obligated to remain current on all of its "post-petition" lease obligations and must turn over all passenger facilities charges to MAC. NWA's letter, dated October 17, 2005, confirmed that while they have the right to reject or affirm the 1999 Airline Lease, they have not yet made a decision.

IT IS ORDERED:

1. John E. Putnam and Stephen H. Kaplan are admitted pro hac vice.
2. The Finney Affidavit is excluded from the Courts consideration of Defendant's Motion to Dismiss.
3. The attached memorandum of law is hereby incorporated by reference, and based thereon...
4. Defendant's motion to dismiss is denied.

BY THE COURT:

Dated: November 30, 2005

Stephen C. Aldrich
Judge of District Court

MEMORANDUM OF LAW

The claims presented in the instant case are complex and involve issues of first impression for Minnesota courts. Absent settlement, the matters in dispute are such that the non-prevailing party will most likely appeal when it/they can and seek final determinations from the appellate courts.

BACKGROUND

In 1975 the Minnesota Legislature passed Minn. Stat. §§ 473.601 et seq. (2005) creating the Metropolitan Airport Commission (“MAC”) and endowing it with broad powers to oversee all aspects of running the Minneapolis/St. Paul Airport (“MSP”). MAC has specific authority, *inter alia*, to adopt and enforce rules, regulations, and ordinances, prosecute violators, exercise the right of eminent domain, acquire property, build new runways, enter into contracts, issue bonds to fund airport related interests (including noise abatement and natural resource protection measures regardless of location and ownership), and establish and collect rates, fees, charges and rentals for all airport facilities and determine how those funds will be spent. Minn. Stat. § 473.608.

The Legislature also charged MAC with “assur[ing] the residents of the metropolitan area of the minimum environmental impact from air navigation and transportation, and to that end provide for noise abatement...*and minimize the public’s exposure to noise and safety hazards around airports.*” Minn. Stat. § 473.602 [emphasis added]. Following the statute’s directive concerning noise abatement, in 1992, MAC began implementing a noise insulation program for the area around MSP for homes in the day-night level (DNL) 65 decibel (dB) or higher providing air conditioning, insulated windows, doors, vents, attics and other measures at no cost to the homeowner. Rather than interfere with airport operations, the mitigation program seeks to reduce the perceived sound inside people’s homes. The DNL 65 dB program nears completion.

In 1996, after extensive study and review, the Legislature determined that the long-term aviation capacity needs of the metropolitan area would be best served by keeping MSP in its current location as opposed to developing a replacement airport elsewhere. Aware of the disproportional effects of air traffic noise on those living within the contours of MSP, and the fact that the projected expansion of MSP would result in 39 times more people located within the DNL 60-64 dB contours by 2005, the Legislature directed MAC to examine mitigation measures below the DNL 65 dB to the DNL 60 dB level.¹ Minn. Stat. § 473.661(4)(f). MAC was specifically instructed to develop a report and recommendation on mitigation for a 2010 long-term capital plan (“MSP 2010 Plan”) addressing noise mitigation in the DNL 60 dB level in relation to future airport capacity and expansion.² *Id.* Finally, prior to MAC constructing a third parallel runway at MSP, the Legislature directed MAC to enter into a contract with each “affected city” whose approval was required.³ Minn. Stat. § 473.608, subd. 29. The Legislature defined an “affected city” as any city that would fall within the DNL 60 dB noise contour as a result of operations using the third parallel runway. *Id.*

MAC convened a noise mitigation committee⁴ and on October 28, 1996 MAC approved

¹ MSP was built and expanded on a small site adjacent to areas that were fully developed before the advent of commercial jet transportation. The decision to keep MSP at its current location was made in part because it provided close proximity for travelers to both downtown Minneapolis and downtown St. Paul but the Legislature was aware that residents living in the DNL 60 dB would be subjected to noise levels 1,000 times greater than the amount of sound energy experienced absent aircraft noise.

² The MSP 2010 Plan is also referred to in various documents as the “MSP 2010 Development Plan,” the “2010 Long Term Comprehensive Plan,” the “2010 LTCP,” the “2010 Plan,” the “MSP 2010,” the “Long Term Comprehensive Plan,” the “1996 Dual Track Legislation,” the “Dual Track Plan,” and the “Dual-Track Process.” The construction and operation of the North-South runway, Runway 17/35, which opened on October 27, 2005, was included in the MSP 2010 Plan. The total cost for the MSP 2010 Plan was \$2.7 billion. Metropolitan Council Directions Newsletter, [available at](http://www.metrocounsel.org/directions/transit/runway.htm) www.metrocounsel.org/directions/transit/runway.htm (visited on October 25, 2005) (the online newsletter also lists many of the improvements made under the MSP 2010 Plan).

³ Construction of a third parallel runway was not part of the MSP 2010 Plan but the Legislature gave MAC a deadline of January 1, 1997 for entering into contracts with affected cities that had provisions that MAC could not construct a third parallel runway without that city’s approval. The deadline could be extended as long as negotiations were being conducted with the cities in good faith.

⁴ The MSP Noise Mitigation Committee was comprised of representatives from MAC, NWA, Metropolitan Aircraft Sound Abatement Council (“MASAC”), and the cities of Minneapolis, Mendota Heights, Eagan, Bloomington, Richfield, Inver Grove Heights, Burnsville and St. Paul. The committee met 8 times between May and October

the committee's recommendations and committed to a noise mitigation program for MSP ("1996 MSP Noise Mitigation Program").⁵ The 1996 MSP Noise Mitigation Program provided for expanding MAC's DNL 65 dB noise insulation program to affected homes in the DNL 60-64 dB (approximately 7,500 by 2007), at no cost to the homeowners. MAC was to begin implementing the new program following the projected completion of the existing DNL 65 dB program in 2005. The DNL 60 dB contours were found to extend into all, or portions of, Eagan, Mendota Heights, Inver Grove Heights, Minneapolis, Richfield, Bloomington, and Saint Paul. Funding for the new noise insulation program was to come from a combination of Passenger Facility Charge (PFC) revenues, airline fees, internally generated funds, federal aid, and, if necessary, support from the State of Minnesota.⁶

As part of the process for approving the expansion of MSP, both MAC and the Federal Aviation Administration ("FAA") were required to undergo an environmental review of the proposed projects; MAC under the Minnesota Environmental Policy Act ("MEPA") Minn. Stat. § 116D.01, *et. seq.*, and the FAA through the National Environmental Policy Act ("NEPA") 42

1996. A public meeting was held on August 29 1996 and was attended by over 800 citizens.

⁵ Also referred to in various documents as the "1996 Noise Program," the "MSP Noise Program," and the "Noise Mitigation Program." The construction of Runway 17/35 was included in the MSP 2010 Plan and the committee noted that its construction would change the noise contours and accounted for those changes in its recommendation approved by MAC. The future noise impacts associated with Runway 17/35 were estimated on a 2005 baseline and a "worst-case" scenario because the noise contours for 2005 would be larger than that of 2010 or 2020 (the committee was anticipating the number of noisy "hush-kitted" aircraft to decrease from 29% of the carrier fleet in 2005 to less than 1%).

⁶ According to Plaintiffs and Defendants, both the request for federal aid (grants) and the use of PFC revenue for mitigation programs is subject to approval or rejection by the FAA in the Part 150 program. Under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96-193) (hereinafter "the Act") and 14 CFR Part 150, airports are required to submit noise compatibility programs for approval or rejection based on FAA criteria as expressed in Part 150 and the Act.

However, MAC's current submission to the FAA, the 2004 Part 150, discussed *infra*, appears to indicate that the use of PFC revenue is *not* subject to FAA approval. 2004 Part 150, page 5-6 ("FAA policy limits approval of Part 150 remedial mitigation measures (e.g., soundproofing...) to non-compatible land uses that were in place prior to October 1, 1998...This policy does not affect AIP [Airport Improvement Funds] funding for noise mitigation projects that do not require Part 150 approval, that can be funded with Passenger Facility Charges revenue, or that are included in FAA-approved environmental documents for airport development."). The Court requires clarification on this point.

U.S.C. 4321, et. seq.

MAC and the FAA combined efforts to fulfill their environmental review obligations. In May 1998 they issued a Dual Track Airport Planning Process Final Environmental Impact Statement (“1998 DTAPP/EIS”)⁷ in support of the proposed expansion of MSP as delineated in the MSP 2010 Plan. The centerpiece of the joint statement was the 1996 MSP Noise Mitigation Program that the 1998 DTAPP/EIS incorporated and stated would be implemented if the MSP 2010 Plan were approved.⁸ The MSP 2010 Plan for expansion was approved and, as of October 27, 2005, was completed.⁹

As noted above, the Legislature required MAC to enter into a contract with each “affected city” whose approval was required prior to MAC constructing a third parallel runway at MSP. After MAC and the FAA jointly issued their 1998 DTAPP/EIS (which incorporated the 1996 MSP Noise Mitigation Program), MAC negotiated and finalized an agreement with Plaintiff, the City of Minneapolis, in November of 1998. MAC also entered into a “Noise Mitigation Agreement” with Plaintiff, the City of Richfield, in December of 1998. In both cases, the cities agreed to forgo potential legal challenges to the expansion of MSP—specifically the construction of Runway 17/35, which was the cornerstone of the MSP 2010 Plan—in exchange for various assurances. As to Richfield, the bulk of the assurances surrounded noise mitigation within the DNL 60 dB, but both Minneapolis and Richfield referenced the 1998 DTAPP/EIS in

⁷ The 1998 DTAPP/EIS is also referred to in different documents as the “DTAPP/EIS,” the 1998 Final Environment Impact Statement (“1998 FEIS”), the Final Environmental Impact Statement (“FEIS”), and the Environmental Impact Statement (“EIS”).

⁸ However, the 1998 DTAPP/EIS did qualify its endorsement by noting that the 1996 MSP Noise Mitigation Program contained measures that might not be eligible for funding based on FAA policy or criteria.

⁹ On October 27, 2005, Runway 17/35 opened marking the completion of the \$2.7 billion MSP 2010 Plan expansion project which included new gates, new concourses, new terminals, an underground walkway through a new Ground Transportation Center, parking facilities, a Transit Center, tram, air freight and maintenance facilities, and more. See Metropolitan Council Directions Newsletter, available at www.metrocounsel.org/directions/transit/runway.htm (October 25, 2005). Runway 17/35 handles 300 departures and 132 arrivals daily and increases the airports flight capacity by 25%. Airport Opens New Runway, St. Paul Pioneer Press, October 28, 2005, at C1 (quoting MAC).

their agreements.

In early 1999 MAC and the airlines entered into a new operating agreement (“1999 Airline Lease Agreement”), which included a provision that the airlines would fund the DNL 60-64 dB insulation program for MSP at an estimated cost of \$150 million. That amount assumed full insulation of the homes pursuant to the DNL 65 dB program. As MSP’s hub airline, NWA has the largest fleet and commands the greatest number of gates at MSP and, under the 1999 Airline Lease Agreement, agreed (along with all other airlines operating at MSP who entered into the same lease), to provide up to \$150 million to fund the 1996 MSP Noise Mitigation Program through rents, landing fees, and other charges.¹⁰

In March 2002 the Metropolitan Council (“MC”) approved MAC’s “significant effects” capital improvement projects for 2002 (2002 CIP), which included the construction of Runway 17/35 and a terminal parking structure,¹¹ but the approval was conditioned on MAC spending the \$150 million previously earmarked for noise insulation in homes in the DNL 60-64 dB (approximately 7,500 homes). Notwithstanding the condition set by MC, one month later MAC submitted a revised noise program in its 2002 Part 150 Update¹² submission to the FAA that was a scaled down version of the 1996 MSP Noise Mitigation Program and provided for a two-tiered insulation process. Under the new plan, homes within the DNL 63-64 dB would receive insulation mitigation pursuant to the existing DNL 65 dB program while homes within the DNL 60-62 dB would receive air conditioning only. MAC also inserted language that appeared to

¹⁰ The 1999 Airline Lease Agreement was signed by all airlines operating at MSP and provided that the costs of the mitigation plan (which was identified as “Off-Airport Aircraft Noise Costs” on page 7, paragraph 33 of the lease) could be recovered through airline rents, fees, and charges. 1999 Airline Lease Agreement, page 55, 2010 Plan Airfield Programs D.1. MAC estimated the cost of the 1996 MSP Noise Mitigation Program (identified as Home Insulation between 60 and 65 DNL) to be \$150 million dollars. *Id.* at page 6 of Exhibit I.

¹¹ Runway 17/35 was originally slated under the MSP 2010 Plan to commence construction in 1998 with completion scheduled for 2003. The project was delayed for various reasons.

¹² Under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96-193) (hereinafter “the Act”) and 14 CFR Part 150, airports are required to submit noise compatibility programs for approval or rejection based on FAA criteria as expressed in Part 150 and the Act.

back away from its commitment to spend \$150 million on noise insulation. In May of 2002 MAC changed course and recommitted to spending the \$150 million after MC adopted a resolution on May 8, 2002 requiring MAC to remove the offending language from its 2002 Part 150 Update to comply with conditions set in its March approval of the MAC capital improvements program. By letter, dated May 22, 2002, MAC notified MC that it had deleted the disputed language (Amendment 6) from its 2002 Part 150 Update and reaffirmed its \$150 million commitment for noise mitigation in compliance with MC's condition.¹³

Construction on Runway 17/35 and the new parking structure began. Runway 17/35 opened for use while this matter was under advisement.¹⁴

Two years later, in November 2004, MAC submitted another proposal, "2004 Part 150,"¹⁵ to the FAA that scaled back provisions of the 1996 MSP Noise Mitigation Program even further. MAC's new proposal called for providing air conditioning only to homes that do not have it in the DNL 60-64 dB, and requiring those homeowners to pay for up to half of the costs. The 2004 Part 150 proposal is currently under review by the FAA.

On April 20, 2005 the cities of Minneapolis, Eagan, and Richfield, and the Minneapolis Public Housing Authority (collectively "Communities") sued in the name of the State of Minnesota under the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. §§ 116B.01, et seq. (2005), and the state mandamus statute, Minn. Stat. §§ 586.01, et seq. (2005), seeking declaratory relief and an injunction against MAC to require MAC to provide the noise insulation first identified in the 1996 MSP Noise Mitigation Program for homes in the DNL 60 to 64 dB

¹³ See letter, dated May 29, 2002, from Lee Sheehy, Metropolitan Council Regional Administrator, to Nigel D. Finney, MAC Deputy Executive Director Planning and Environment, acknowledging receipt of Mr. Finney's May 22, 2002 letter advising the MC of actions taken by MAC to comply with the MC's condition as stated in its May 8, 2002 resolution.

¹⁴ Runway 17/35, the last of the MSP 2010 Plan projects, cost \$800 million and opened for use on October 27, 2005. Chao Xiong, A New Runway Opens Enhanced-Noise Season, Minneapolis Star Tribune, October 28, 2005, at B3. The new runway handles 300 daily departures and 134 arrivals.

¹⁵ This proposal is referred to in various documents as the "Part 150 Plan," the "2004 Part 150 Study," the "Part 150

noise contours of MSP.

Plaintiffs specifically did not seek an injunction to halt or interfere with flights at MSP, acknowledging that would be preempted by federal law. Plaintiffs also did not seek damages or other relief for past harm. Plaintiffs' MERA claims assert that residents in their communities' experience every day the disproportionate effects of noise from MSP, that the loud flights "destroy the quietude of otherwise quiet neighborhoods," that "quietude" is identified as a "natural resource" deserving of protection under MERA, and that MAC is obligated to provide the previously agreed upon sound insulation measures under Minnesota law. Plaintiffs seek:

1. Count One - Declaration that the MAC has caused and is likely to cause pollution, impairment or destruction of a natural resource in violation of MERA and for associated equitable relief;
2. Count Two - Declaratory judgment that MAC violated environmental quality standards, limitations, rules, orders, licenses, stipulation agreements or permits as defined by Minn. Laws 116B.03(1) and for associated equitable relief; and/or, in the alternative,
3. Count Three - A writ of mandamus to require MAC to exercise its duties required by law.

MAC filed this Motion to Dismiss on May 16, 2005, for lack of subject matter jurisdiction and failure to state claims upon which relief may be granted. Defendant asserts Plaintiff's claim:

1. Is not "ripe" for adjudication and should be dismissed on that basis alone,
2. States a cause of action for damages and economic regulation which is not permitted under MERA,
3. Fails because it doesn't state a claim for enforcement of a state environmental quality standard under MERA, and
4. The request for a writ is improper because the complaint does not establish that MAC has a mandatory duty to implement the relief sought.

NWA was granted Defendant-Intervenor status on June 22, 2005 and joined in MAC's motion to dismiss on July 12, 2005. As previously stated, as MSP's hub airline, NWA has the largest fleet and commands the greatest number of gates at MSP and, under the 1999 Airline

Lease Agreement, is obligated to provide much of the \$150 million, identified by MAC targeted to fund the 1996 MSP Noise Mitigation Program, through its airline rents, landing fees, and other charges.

STANDARD OF PROOF

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). 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), and the complaint must be given a liberal construction in favor of stating a claim. Hutton v. Bosiger, 366 N.W.2d 358, 360 (Minn. Ct. App. 1985).

DOES THE COURT LACK JURISDICTION ON THE BASIS THAT THE ISSUE IS NOT RIPE FOR ADJUDICATION?

A cause of action is subject to dismissal for lack of subject matter jurisdiction under Minn. R. Civ. P. 12.02(a) where the matter is not ripe for adjudication. Izaak Walton League of Am. Endowment, Inc. v. State Dep’t of Natural Res., 252 N.W.2d 852, 854 (Minn. 1977). 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 controversy is about to be affected, in a prejudicial manner.” So. Minn. Constr. Co. Inc. v. Minn. Dep’t of Transp., 637 N.W. 2d 339, 344 (Minn. Ct. App. 2002) (citation omitted).

Defendants argue the Court lacks subject matter jurisdiction as the Plaintiffs claims are not ripe because MAC’s 2004 Part 150 mitigation plan for the DNL 60- 64 dB contours is currently just a proposal made to the FAA and the FAA has yet to approve or reject the proposal.

Plaintiffs counter that the issue is ripe; MSP already generates noise above the DNL 60 dB level and with the opening of Runway 17/35 even more residents are now subjected to, and harmed by, the higher noise levels which have been shown to interfere with speech and sleep.

Plaintiffs correctly state that this is a direct and imminent injury and the harm perceived is not purely hypothetical since MAC has unequivocally stated its intent to renege on its previous commitments pursuant to the 1996 Noise Mitigation Program, the 1998 DTAPP/EIS, and the agreements with the cities. MAC's 2004 Part 150 proposal is reasonably cited, at least at this point, as proof of that intent.

Plaintiffs also claim the proposal to the FAA has no relevance in the instant case since MAC's funding of the 1996 MSP Noise Mitigation Program is not dependent on FAA approval. MAC has the ability and authority to raise funds by a variety of other measures including airport fees and charges (some levied on the airlines, such as landing fees, and others not, such as parking revenue) as well as Passenger Facility Charges. MAC also has the power to levy property taxes on the entire Metropolitan Area tax base.¹⁶ Plaintiffs claim that MAC's ability and right to levy these charges is independent of the 1999 Airline Lease and that the costs of complying with state laws are appropriate costs that can be recovered from MSP users and any other available revenues.

MAC responds that use of its own airport revenue, as the Plaintiffs suggest, to implement noise mitigation measures is not a viable option. Under 14 C.F.R. Part 16, a third party could seek a determination from the FAA that the use of those funds constitutes illegal "revenue diversion." MAC points to the possibility of a third party illegal diversion claim as another reason justifying dismissal on the basis that the issues are not ripe for adjudication.

At the hearing hereon, none of the attorneys for Defendants could identify a single instance in which the FAA had found the use of airport funds for noise mitigation measures such as the ones in the instant case, to be an illegal diversion of revenue.¹⁷ In fact, in 2000, the FAA

¹⁶ Minn. Stat. §§ 473.672-473.673.

¹⁷ See July 15, 2005, Transcript of Proceedings, pgs. 27-31 (for discussion between the undersigned and attorneys regarding the issue of illegal diversion which concluded with the parties agreeing that, to date, there hasn't been a

approved for federal funding¹⁸ all four “Land Use Measures” dealing with noise mitigation in the DNL 60 dB submitted by the Cleveland Hopkins Airport in Cleveland, Ohio. 65 Fed. Reg., 58838, 58838-39 (October 2, 2000). Even earlier, in 1996, the FAA approved for federal grant and PFC funding a California airport noise insulation program at the Burbank-Glendale-Pasadena Airport to the Community Noise Equivalent Level (“CNEL”) of 65 (a different measuring system which is the DNL equivalent of 63 dB). 61 Fed. Reg. 31,994, 32,019-20 (June 21, 1996). Finally, under 14 C.F.R. § A150.101(d) the FAA clearly states that, as part of the Part 150 process, 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.¹⁹

The illegal diversion claim appears most improbable, and in all events, is not a basis for dismissing the instant suit.

No one disputes the fact that MSP generates noise in excess of the DNL 60 dB and that thousands of residents currently live within those noise contours (more so now than before with the opening of Runway 17/35). Plaintiff’s complaint does not seek to interfere with MSP flight operations but rather, Plaintiffs seek relief in the form of requiring Defendants to follow through with previously stated noise mitigation programs in the DNL 60 dB for residents who are dealing with the harm generated by these noise levels now.

The issue is ripe.

noise mitigation expenditure proposed by an airport commission that’s been overturned on the basis of illegal diversion of funds).

¹⁸ Since the passage of the Lott Amendment, the FAA may no longer provide grants under the federal Airport Improvement Program for noise mitigation projects outside of the DNL 65 dB contour until after 2007. Vision 100 – Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 189, 117 Stat. 2490 (2003). PFC revenue may be used but the parties state that its use must be approved by the FAA.

¹⁹ Plaintiffs also point to a recent ruling in Florida where the U.S. Court of Appeals for the District of Columbia Circuit held that the FAA’s decision to withhold federal funding because the City of Naples Airport Authority had banned certain noisy aircraft because of their impact in the DNL 60-65 was unreasonable as the airport had demonstrated that DNL 60 dB was a “significant noise threshold” for the surrounding community. City of Naples

Furthermore, pending FAA approval or rejection of MAC's 2004 Part 150 proposal provides no basis to dismiss Plaintiffs complaint for lack of "ripeness." MAC's enabling statute specifically provides authority for MAC to issue bonds to fund airport related interests including "noise abatement and natural resource protection measures regardless of location and ownership," and establish and collect rates, fees, charges and rentals for all airport facilities and determine how those funds will be spent. Minn. Stat. § 473.608. MAC's own MSP 1996 Noise Mitigation Program, adopted and incorporated in MAC's joint environmental statement with the FAA, the 1998 DTAPP/EIS, provides that funding for the program is to come from a combination of Passenger Facility Charge (PFC) revenues, airline fees, internally generated funds, federal aid, and, if necessary, support from the State of Minnesota. While the 1998 DTAPP/EIS notes that some measures of the program may be rejected for funding by the FAA, that does not mean that MAC cannot implement and fund the measures on its own.

The issues in the instant case are ripe for adjudication. This Court has jurisdiction.

**DOES THE COMPLAINT STATE APPROPRIATE CLAIMS
UNDER MERA FOR INJUNCTIVE RELIEF?**

A cause of action may be dismissed under Minn. R. Civ. P. 12.02(e) when it fails to state a claim upon which relief may be granted. Elzie v. Comm'n of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980).

Through MERA, Minnesota has created a right in each person "to protect the air, water, land and other natural resources" in the state from "pollution, impairment or destruction." Minn. Stat. § 116B.03 (2005); see also Minn. Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762, 781 (Minn. 1977). To establish a prima facie case, a plaintiff must first identify "the existence of a protectable natural resource." White v. Minnesota Dep't of Natural Resources, 567 N.W.2d 724, 737 (Minn. Ct. App. 1997). Second, plaintiff must show

that the defendant's conduct materially adversely affects or is likely to materially adversely affect the environment. Minn. Stat. § 116B.02, subd. 5 (2005); see also Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, 624 N.W.2d 796, 806 (Minn. App. 2001).

Plaintiffs assert that MAC is in violation of MERA due to its material impairment of the natural resource of "quietude"—a general material adverse effect claim that's allowed under MERA. MERA includes "quietude" within its list of "natural resources" worthy of protection. Minn. Stat. 116B.02, subd.4; see also White Bear, 257 N.W.2d at 771, 781 (finding that gunfire in the 65 to 70 decibel range was noise "*far in excess* of that considered permissible to avoid health threats and degradation of the environment" and that quietude is a natural resource protected by MERA) (emphasis added); Lone Oak, 624 N.W.2d at 806 (prima facie showing based on the "degradation of quietude caused by 'impulsive sound'" from gun club); McGuire v. County of Scott, 525 N.W.2d. 583 (Minn. Ct. App. 1994) (holding noise pollution from highways can affect quietude under MERA). Plaintiffs assert that residents within the DNL 60 dB contours of MSP live with sound energy that is 1,000 times greater than that of normal urban living and that the effects of such constant noise have been found to severely impact speech and sleep.

In support of their claim that noise in the DNL 60 dB materially adversely affects the environment, Plaintiffs point to actions taken by the Minnesota State Legislature, MAC, the FAA, the airlines, and MC acknowledging the seriousness of the issue and developing and promoting programs to mitigate the effects of debilitating noise on residents in DNL 60 dB within MSP contours. Specifically Plaintiffs point to MAC's enabling statute, the Legislatures directive to MAC in 1996 to develop a program and submit a recommendation on noise mitigation in the DNL 60 dB; MAC's 1996 MSP Noise Mitigation Program fulfilling that requirement, the 1998 DTAPP/EIS—a joint effort between MAC and the FAA for environmental

review by state and federal agencies which adopted the 1996 MSP Noise Mitigation Program, the 1999 Airline Lease Agreement, and the 2002 Metropolitan Council approval of the MSP 2010 capital program, as proof that noise mitigation in the DNL 60 dB was deemed “significant,” “materially adverse,” and worthy of protective measures.

MAC counters that airports typically only propose noise mitigation for noise levels of DNL 65 dB or greater because the FAA has determined that aircraft noise exposure is “significant” only at those levels. 14 C.F. R. Part 150, App. § 150.101(d). MAC states that its 2004 Part 150 proposal currently under review by the FAA “goes well beyond typical noise mitigation and the cities’ five decibel reduction package request is even further removed from the standard approach to addressing aircraft noise.” MAC also asserts that Plaintiff’s count one contains a fatal flaw and should be dismissed because “MERA does not provide a cause of action for damages and does not extend to economic regulation.” Skeie v. Minnkota Power Cooperative, 281 N.W.2d 372 (Minn. 1979). MERA, according to MAC, only provides for injunctive relief and Plaintiffs claims are really for “impaired use of property and diminution in value” due to aircraft noise which are impermissible under MERA. See Alevizos v. Metro. Airports Comm’n of Minneapolis & St. Paul, 216 N.W.2d 651, 662 (Minn. 1974).²⁰

NWA argues that under MERA, the source of the pollution, the “conduct” itself causing the “materially adverse affect” on the environment, is what Plaintiffs must seek to enjoin. NWA asserts that Plaintiffs failure to attempt to regulate air traffic at MSP—the source of the pollution—is fatal to their complaint. But, NWA charges that Plaintiffs failure to attempt to

²⁰ There was considerable discussion between the parties and the undersigned at the July 15, 2005 hearing concerning the significance of Alevizos to the instant case. The Court believes the correct reading of Alevizos is not as Defendants suggest (“those who live in urban areas cannot expect the same kind of quietude that individuals in rural areas enjoy”) but rather, Alevizos stands for the principal that people living around MSP have the right to the same quietude as those who live in Blaine, or Eden Prairie, or Woodbury, or other parts of the metropolitan urban area, but not the quietude enjoyed by those who live in remote rural areas such as Blackduck. July 15, 2005 Transcript of Proceedings at 42-43.

regulate air traffic is not surprising considering that in the gun club cases, White Bear and Lone Oak, while the Courts had authority to enjoin the conduct—the operating of the gun club—that remedy is not available here as federal law preempts any state law seeking to regulate or restrict air traffic to and from MSP. Minnesota Public Lobby v. MAC, 520 N.W.2d 388, 393 (Minn. 1994) (finding that while there is no doubt “aircraft noise generated by MSP is a serious and unpleasant problem which interferes with the enjoyment of life and property for” those living in affected areas, the state is preempted by Congress from “enacting noise regulations which impinge on aircraft operations”).²¹ NWA claims that the only available remedy to the Court under MERA is to restrict the “source” of the pollution—the airplanes—which Minnesota Public Lobby prohibits. Finally, NWA argues that the Court is only allowed under MERA to issue “declaratory or equitable” relief that prevents the polluting conduct at issue and is prohibited from providing the relief sought by Plaintiffs. NWA cites Minn. Stat. § 116B.03, subd. 1 in support of its claim that remedies under MERA are “particularly narrow.”²²

Plaintiffs counter that MAC’s reliance on the FAA’s determination that aircraft noise exposure is “significant” only at the DNL 65 dB and higher is without merit because state law trumps federal standards in the instant case. Furthermore, Plaintiffs point out that the FAA clearly states that, as part of the Part 150 process, 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.²³ 14 C.F.R. § A150.101(d).

²¹ However, Minnesota Public Lobby, also states that “MAC’s enabling legislation creates statutory responsibilities which include minimizing the environmental impact of aircraft operation and abating noise. The MAC must act on these responsibilities in balancing the needs of air carriers, travelers, and residents of areas surrounding the airport.” 520 N.W.2d. at 393.

²² The Court notes that NWA bases its argument on the wrong MERA statute. Minn. Stat. § 116B.07 outlines the relief a court may grant. In addition to declaratory and equitable relief, the statute provides that the court “may impose such conditions upon a party as are necessary or appropriate to protect the...natural resources located within the state from pollution, impairment, or destruction.” Id.

²³ Plaintiffs also note that a recent ruling by the U.S. Court of Appeals for the District of Columbia Circuit held that the FAA’s decision to withhold federal funding because the City of Naples Airport Authority in Florida had banned

Plaintiffs clearly do not seek to interfere with flight operations and their complaint clearly states their sole goal; appropriate mitigation of the noise pollution generated by MSP flights based on the plan drafted and endorsed by MAC itself in its 1996 MSP Noise Mitigation Program on residents living within the DNL 60 dB contours.

Plaintiffs disagree with Defendants interpretation of MERA. Plaintiffs note that while MAC does not fly the actual planes causing the noise, MAC has total control over the facility in which the conduct takes place; MAC picked the location of the airport, built the airport, designed the runways and selected the direction in which the runways would point and therefore, MAC should be held responsible for the adverse effects of its activities. Plaintiffs argued at the hearing that to accept NWA's argument that since MAC does not actually "fly" the planes it can't be held accountable for them is "tantamount to saying that in the gun club cases that because the gun club owner didn't have his finger on the trigger for every shot, there was no conduct, or because MNDOT didn't drive every one of the cars that goes down one of the highways and creates noise, there's no conduct there." July 15, 2005, Transcript of Proceedings at 78.

Plaintiffs state the relief they seek is appropriate and allowed under MERA as it would prevent or reduce future injury from Defendants' activities rather than compensate the Plaintiffs for past injuries or reductions in property value—the cornerstone of injunctive relief, as opposed to damages. See Minnesota Mining and Manufacturing Co. v. Travelers Indemnity Co., N.W.2d 175, 181 (Minn. 1990) (finding that "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,

certain noisy aircraft because of their impact in the DNL 60-65 was *unreasonable* as the airport had demonstrated that DNL 60 dB 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 (emphasis added).

571 (1961)).

Finally, Plaintiffs charge that Defendant NWA's claim that relief available under MERA as limited to granting injunctions only to "stop" materially adverse conduct—i.e. the flying of planes—is incorrect and without merit. Plaintiffs point to MERA's "Relief" provision which plainly provides that if a violation is found to have occurred, a Court "may grant declaratory relief, temporary and permanent equitable relief, *or may impose such conditions upon a party as are necessary or appropriate* to protect the...natural resources located within the state from pollution, impairment, or destruction." Minn. Stat. § 116B.07 (emphasis added). The relief they seek, Plaintiffs assert, is not outside the courts discretion. In fact, federal courts interpreting MERA, have fashioned injunctive relief requiring affirmative action on the part of defendants to remediate past chemical releases if past conduct poses a current threat of continuing contamination. See e.g. Kennedy Building Assoc. v. Viacom, Inc., 375 F.3d 731, 746-747 (8th Cir. 2004); Werlein v. U.S., 746 F. Supp. 887, 898 (D. Minn. 1990), vacated on other grounds, 793 F. Supp. 898 (1992).

In 1974, the Minnesota Supreme Court found that "MAC was created for the express purpose of promoting and developing airports around the metropolitan area" and that "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, 216 N.W.2d at 663 (holding MAC was properly named as defendant in mandamus action by property owners seeking inverse condemnation for noise and pollution).

Minnesota law is clear; an airport proprietor is responsible for the effects of aircraft noise even if it does not operate the plane.

The complaint alleges that those who live within the shadow of MSP deal with constant noise levels far beyond those experienced by others within the Twin Cities. A fact made clear by

the Minnesota Supreme Court in Alevizos and Minnesota Public Lobby. When the Legislature made the determination in 1996 that the long-term aviation capacity needs of the metropolitan area would be best served by keeping MSP in its current location as opposed to developing a replacement airport elsewhere, it recognized residents would be significantly impacted by the noise generated by airport operations and specifically directed MAC to examine and make recommendations to mitigate noise in the DNL 60 dB. MAC did, and as a result, a 1996 MSP Noise Mitigation Program was established based on a finding that sound insulation in the DNL 60 dB was necessary to ensure that residents experienced minimal impact from airport operations.

Plaintiffs complaint does not seek to interfere with flight operations at MSP, a claim which would be preempted by federal law, but rather, Plaintiffs seek to hold MAC responsible under MERA for the “material impairment” and “adverse effects of” MSP activities on a protected natural resource—“quietude”—and secure an injunction ordering MAC to mitigate the noise pollution generated by MSP flights based on the plan drafted and endorsed by MAC itself in its 1996 MSP Noise Mitigation Program for residents living within the DNL 60 dB contours.

Plaintiffs have stated a cause of action under MERA.

Furthermore, if Plaintiffs ultimately prevail in their MERA claim, the Court is confident that MERA grants a wide range of equitable powers to the Court to fashion an appropriate remedy based on the circumstances of each case. If a determination is made that relief in the instant case is *necessary or appropriate* to protect a natural resource, MERA provides the Court with wide discretion and authority to fashion *such conditions upon a party* as the situation merits including the remedy sought by Plaintiffs. Minn. Stat. § 116B.07 (emphasis added).

Consistent with Minnesota law which provides that a motion to dismiss must be denied if taking the facts alleged in the complaint as true, giving the complaint a liberal construction in

favor of stating a claim, “it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded,” the undersigned finds that Plaintiffs claim on Count One sufficiently states a claim upon which relief can be granted and the relief sought by Plaintiffs is not outside the authority of this Court to provide.

Defendant’s motion to dismiss on Count One is denied.

**DOES COUNT TWO OF THE COMPLAINT STATE A CAUSE OF ACTION
FOR THE ENFORCEMENT OF AN ENVIRONMENTAL QUALITY STANDARD,
LIMITATION, RULE OR ORDER UNDER MERA?**

MERA provides that a violation can be found when plaintiff shows 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. Minn. Stat. Stat. § 116B.02, subd. 5.

Plaintiffs rest their claim in Count Two on a novel theory under MERA and assert that public policy interests demand that their theory prevail. Plaintiffs claim that a “constellation” of statutes— MERA, the Minnesota Environmental Protection Act (“MEPA”), and MAC’s own enabling statute—*require* MAC to mitigate the impacts of its actions 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 completed under the MSP 2010 Plan. Plaintiffs point to the 1996 MSP Noise Mitigation Program and the 1998 DTAPP/EIS—developed and submitted to environmental agencies for review and approval in support of the MSP 2010 Plan for expansion pursuant to statutory requirements—as creating the “environmental quality standard” they assert is being violated.²⁴ MAC submitted the 1998

²⁴ The sequence of events surrounding the Legislatures decision in 1996 and the actions taken by MAC, the FAA and MC, as a result of that decision, are described in detail in the “Background” section of this memorandum of law.

DTAPP/EIS, which incorporated its 1996 MSP Noise Mitigation Program, to MEPA.

In addition to protections provided under MERA, and in support of their claim that the “constellation” of these three statutes create an affirmative and substantive state agency environmental standard that MAC is obligated to follow, Plaintiffs note that:

MEPA directs that...

“No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.”

Minn. Stat. 116D.04, subd. 6.

Plaintiffs state this statute covers all state agencies, including MAC, and requires state agencies to create “feasible and prudent alternative[s]” to actions that have an adverse effect on the environment. Plaintiffs claim that this statute clearly obligates MAC to undertake the noise mitigation measures, which MAC committed to in its 1998 DTAPP/EIS statement to MEPA in 1998 in order to gain approval from MEPA, for its expansion plans as delineated in the MSP 2010 Plan.

Finally, Plaintiffs point out that the third statute in their “constellation,” MAC’s enabling statute, provides, in its very first words under the declaration of purposes, for MAC to...

“promote the public welfare and national security” and “serve public interest...”

Minn. Stat. 473.602(1).

Plaintiffs state that the second and third sections of MAC’s enabling statute are equally illustrative of the Legislatures intent that MAC—first and foremost—protect the public. These provisions direct MAC 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.

Id.

Plaintiffs assert that Minnesota case law, in particular the Minnesota Supreme Court in Minnesota Public Lobby, supports their argument by identifying the mandatory nature of MAC's statutory obligation to minimize the impacts of its noise finding that, "The MAC's enabling legislation creates statutory responsibilities which include minimizing the environmental impact of aircraft operation and abating noise. The MAC must act on these responsibilities in balancing the needs of air carriers, travelers, and residents of areas surrounding the airport." 520 N.W.2d at 393.

Defendants assert that Plaintiffs "constellation" theory is without merit. They assert that Plaintiffs have failed to point to any *specific* statute, standard, limitation, rule, or order requiring MAC to provide a 5 DNL insulation program for 60-64 DNL homes and therefore the Count Two claim must fail.

MAC argues that it does not have a "mandatory" or "unequivocal legal duty" to implement the 1996 MSP Noise Mitigation Program nor is there any existing "environmental quality standard" that binds Defendants to providing insulation for homes in the DNL 60-64 dB. MAC asserts that the Legislature only required MAC to "*examine* mitigation measures to the 60 Ldn level"²⁵ and MAC did that. Contrary to Plaintiffs claims, MAC says there was no requirement to *implement* the mitigation measure and furthermore, MAC reserved the right to alter their mitigation plans if necessary. Finally, MAC points out that government agencies are entitled to change a plan or program depending on its judgment with regard to events. MAC

²⁵ See Minn. Stat. § 473.661, subd.4(f).

claims that a variety of events, not the least of which was 9/11, caused them to reevaluate the 1996 MSP Noise Mitigation Program and adjust it based on current realities.

NWA also argues that MAC is not a state agency with any duty to protect or monitor the environment, and thus does not have the power to issue an environmental quality standard and therefore, Plaintiffs claim fails to state a cause of action upon which relief can be granted.

Plaintiffs agree that while state agencies generally have discretion to change course so long as the decision is within the realm of their discretion, they claim, in the instant case, MAC did not have that discretion because of their enabling statute and because of the following sequence of events: Minnesota's legislature directing MAC to examine and make recommendations concerning the noise mitigation standards to include the DNL 60-65 dB which MAC did with its 1996 MSP Noise Mitigation Program; MAC and the FAA appearing to solidify their commitment to the 1996 MSP Noise Mitigation Program by adopting it in their joint 1998 DTAPP/EIS statement which MAC submitted to MEPA for approval prior to the Cities entering into any agreements with MAC; MAC's 1999 Airline Lease Agreements with the airlines which gave the appearance of funding the mitigation program; and MC's approval of the final phase of the MSP 2010 Plan on the condition that MAC commit the previously designated funds to implementing the mitigation program.

At the hearing, Plaintiffs claimed that MAC asserted to them that the program would be implemented if the MSP 2010 Plan expansion projects (including Runway 17/35) were approved and Plaintiffs believed them. Plaintiffs say they relied on MAC's assertions to their detriment and entered into contracts with MAC forgoing their right to legal measures concerning construction of Runway 17/35. Plaintiffs stated at the hearing that one of the reasons "the City of Minneapolis did not include the 60 to 65 decibel mitigation in its contract [was] in large part because that had already been agreed to and provided by the standards enforceable under MERA through the 1998 FEIS and 1996 noise program...[and that] they relied on state law" believing

they had “an enforceable provision...and no reason to believe that MAC would renege...” July 15, 2005 Transcript of Proceedings at 45.

Finally, Plaintiffs point out that from 1996 to 2002 steps were taken, environmental reviews were submitted, agreements were entered into, votes were taken, conditions were set, and 2.7 billion dollars was spent implementing every single expansion project contained in the MSP 2010 Plan with the exception of the 1996 MSP Noise Mitigation Program. The approval for, and construction of, Runway 17/35 and the new terminal parking structure occurred *after* the events of 9/11. Plaintiffs argue that MAC’s prior actions established noise mitigation as being necessary and feasible and, as a matter of public policy, it is now too late for them to renege on their commitment to the community.

As noted earlier, in 1974 the Minnesota Supreme Court found that “MAC was created for the express purpose of promoting and developing airports around the metropolitan area” and that “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, 216 N.W.2d at 663 (holding MAC was properly named as defendant in mandamus action by property owners seeking inverse condemnation for noise and pollution). The Court has to admit that the easy, simple answer would be to reject Plaintiffs claim on Count Two as there is no case law to provide direction to the Court on Plaintiffs novel “constellation” theory of statutes creating a set of events in which MAC, as a state agency, on its own can establish an agency environmental standard worthy of protection under MERA. But, this Court is loath to do that for the following reasons:

Plaintiffs make a persuasive argument that *as a matter of public policy* liberal construction should be given to the idea that an environmental standard was established deserving of state protection under the conditions of this case. Especially when: (1) a state

agency is instructed by the state legislature to determine whether environmental impairment exists from its actions, at what level, and what the mitigation of that impairment should be, and (2) the state agency gathers representatives from all the affected areas to ponder the question and provide input, and (3) the state agency then issues a recommendation for a program based on that input that it purports to identify and mitigate environmental impairment found, and (4) the state agency's program is then adopted by the governing federal agency and submitted jointly to environmental review agencies for review and ultimate approval, and (5) the state agency then, on the basis of state and federal environmental approval, the existence of its own program and its joint statement with the federal agency, seeks and enters into contracts with others to forgo legitimate legal challenges to its proposed expansion projects, and (6) the state agency provides public support to those programs for more than 6 years which, it can be safely argued, induces the affected public to forgo legitimate legal challenges, and (7) the state agency, during those critical 6 years, gets approval for, and spends, \$2.7 billion to complete desired expansion projects, while assuring the governing body approving the money for the projects that it will continue to commit previously identified and targeted funds to the mitigation measures that were to be part of the expansion project, and (8) the state agency, having secured funding and free of legal challenges from all sources, proceeds with the expansion projects, but (9) as the final project nears completion, the state agency seeks to disavow its previously stated mitigation program and funding commitments for the program. A case could be made that the "sequence" of events orchestrated by a state agency, and the "constellation" of documents and approvals secured by the state agency, *themselves* create an environmental quality standard, limitation, rule or order, worthy of protection under MERA.

The Court is persuaded that Plaintiffs' claim, as outlined, is serious and deserving of a chance to be developed on a full record in the event of appellate review. It should not be easy

for public bodies to break commitments on which so many private and public entities have claimed to rely.

In addition, and perhaps more precisely, MAC asserts that none of the other agencies in the state that are concerned with environmental issues has authority over noise at the airport. That is likely true. By the same token, the legislature by MERA has declared quietude to be a protectable resource, and charged MAC with the duty of ensuring that it is a good neighbor as to noise. If no one else can set a standard for noise around the airport, but MAC has done so by its official actions surrounding the DNL 60 dB standard, then it is reasonable to see if MAC, as operator, has met the demand of MAC, as regulator, of airport noise.

Defendant's motion to dismiss on Count Two is denied.

**DOES THE COMPLAINT STATE APPROPRIATE CLAIMS
FOR A WRIT OF MANDAMUS?**

Minnesota's mandamus statute, Minn. Stat. §§ 586.01-.02 (2005), requires the plaintiff to prove that the defendant (1) failed to perform an official duty clearly imposed by law; (2) that as a result of this failure, the plaintiff has suffered a public wrong that specifically injured the plaintiff; and (3) that there is no other adequate legal remedy. N. States Power Co. v. Minn. Metro. Counsel, 684 N.W.2d 485, 491 (Minn. 2004). If the plaintiff is unable to meet all three of the requirements, the Court lacks jurisdiction to issue a writ of mandamus. Friends of Animals & Their Env't v. Nichols, 350 N.W.2d 489, 491 (Minn. Ct. App. 1984).

To obtain a writ of mandamus directing a government official to implement a statute or regulation, the statute or regulation must impose a clear and unequivocal duty to act in the precise manner the party seeking the writ requests. State v. Wilson, 632 N.W.2d 225, 227 (Minn. 2001). A writ of mandamus will issue only where the duty to be performed is ministerial and the obligation to act is plainly defined. Id. If there is "any degree of discretion with respect to the

act in question,” a writ of mandamus may not issue. Electronics Unlimited, Inc. v. Village of Burnsville, 182 N.W.2d 679, 682-83 (Minn. 1971).

Defendants assert that Plaintiffs have failed to point to any specific statute, rule, or regulation requiring the MAC to provide a 5 DNL insulation program for 60-64 DNL homes that even Plaintiffs admit that they have discretion as to what type of mitigation program is provided, if any, and therefore the mandamus claim must be dismissed.

In this case, the petition or a writ of mandamus will only be considered if it is determined that MAC has an unequivocal duty. Additionally, it would appear that injunctive relief is similar to a writ of mandamus, and the request for a writ should not be dismissed because, if MERA violations are found, such a writ may be (part of) an appropriate remedy.

Defendant’s motion to dismiss on Count Three is denied.

**DOES MINNESOTA LAW PERMIT THE SIMULTANEOUS FILING
OF MERA AND MANDAMUS CLAIMS?**

Minnesota’s mandamus statute states, “no pleading or written allegation, other than the writ, answer, and demurrer, shall be allowed.” Minn. Stat. § 586.08. NWA argues that the statute requires a mandamus petition must be raised in a stand-alone pleading and therefore, since the Plaintiffs did not comply with this procedural requirement, their claim should be dismissed.

However, the Minnesota Court of Appeals in Nolan and Nolan v. City of Eagan, 673 N.W. 2d 487, 495 (Minn. Ct. App. 2004) dealt with an issue similar to this and noted that the mandamus statute also provides that further proceedings should be conducted “in the same manner as in a civil action” and that Minn. R. Civ. P. 8.05 states that “a party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or both.” The Court in Nolan found that “while no case directly addressed this issue, we conclude that case law indicates that a petitioner can properly pursue mandamus and tort claims

simultaneously.” Id. The Court also cited judicial efficiency and economy in support of its ruling that a mandamus claim could be pursued simultaneously, and alternatively, with other court claims. Id.

This Court agrees. While the claims in the instant case are different than those in Nolan—plaintiffs are pursuing MERA claims and, in the alternative, a writ of mandamus—the issues are sufficiently complex that to require the plaintiffs to argue their claims in two separate proceedings would be a waste of judicial efficiency, economy and unnecessarily increase the cost of litigation for all parties.

CONCLUSION

The issues in the instant case are complex. Many of the arguments have never been addressed by Minnesota case law. A full record is required to insure any appellate courts have a full record for consideration.

Defendant’s Motion to Dismiss is properly denied.

SCA