

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 REPLY IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

To bring a viable MERA claim relating to noise generated by MSP operations, Plaintiffs must seek to restrict aircraft operation (the alleged polluting conduct) in order to preserve outdoor quietude (the alleged protected natural resource). Plaintiffs admit that federal preemption precludes such a claim. Instead, Plaintiffs have manufactured a MERA claim aimed at the mitigation of indoor noise. In the process, they urge this Court to ignore the statutory requirements which demand Plaintiffs show specific conduct by the MAC which adversely impacts a MERA-protected natural resource. This argument fails for three important reasons. First, Plaintiffs cannot circumvent the purpose and spirit of preemption by basing their MERA claim on the noise generated by aircraft operations. Second, MERA protects natural resources and indoor quietude is not a MERA-protected natural resource. Third, MERA provides relief that stops or reduces polluting conduct, but it does not provide for mitigation relief.

II. ARGUMENT

A. Indoor Quietude Is Not A Protected Natural Resource Under MERA.

MERA has one very specific purpose: to protect the State's "natural resources." Minn. Stat. § 116B.01(Purpose); State by Skeie v. Minnkota Power Coop., 281 N.W.2d 372 (Minn. 1979); Freeborn County by Tuveson v. Bryson, 210 N.W.2d 290 (Minn. 1973). MERA was not designed to provide broad protection of human health and the environment, except derivatively through the protection of the State's natural resources. There are numerous other state laws regulating air emissions, water discharges, land disposal and noise, among other potential environmental impacts. MERA's role is to preserve our valuable natural and historic resources from "pollution, impairment or destruction." State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 264 (Minn. 1997). Because Plaintiffs cannot show indoor quietude is among the MERA-protected "natural resources," Plaintiffs' MERA claims must be dismissed.

Plaintiffs cannot point to a single MERA case in which indoor quietude has been identified as a natural resource of the State. To salvage their claim, Plaintiffs return to the gun club cases, but misconstrue the claims and holdings of those cases. Plaintiffs observe that the courts in these cases “looked to a variety of evidence concerning the effects of the noise”, including indoor effects. Pls.’ Mem. at 81. But evidence *for* a cause of action is not the same as a cause of action. Indoor effects are certainly probative, *as evidence*, of degradation of outdoor quietude. But none of the gun club cases state or imply that indoor quietude is itself a protectable natural resource. In the gun club cases, the courts focused on the outdoor environment and controls that would protect that environment, instead of home sound insulation, damages, or other relief that would allow the outdoor degradation to continue.

Notably, Citizens for Safe Grant v. Lone Oak Sportsmen’s Club, 624 N.W.2d 796 (Minn. Ct. App. 2001), illustrates that indoor noise may be relevant to some causes of action, but not MERA. As Plaintiffs concede, the discussion of indoor noise effects in Safe Grant arose in the context of the plaintiffs’ common law nuisance and trespass claims, not the MERA claim. Id. at 804-805. Protection of the use and enjoyment of private property is the central purpose of nuisance and trespass doctrine, Id. at 803, and thus the impacts to indoor quietude were central to the establishment of those claims. In contrast, the discussion under MERA focused on the impacts to “the surrounding area” and the “environment.” Id. at 806. MERA, which is exclusively oriented to the protection of natural resources, serves different policies and obligations than the tort doctrines. The gun club cases do not support Plaintiffs’ theory.

Plaintiffs’ fallback position is that quietude is a protected natural resource, based upon the modifier “all” in the list of protected resources, and the inclusion of “historic resources” as an enumerated, man-made resource. Pls.’ Mem. at 82. The modifier “all” still only applies to that

which it modifies: “natural resources.” Otherwise, if Plaintiffs’ interpretation were adopted, MERA would produce absurd results with “all” read to modify such resources as domestic and farm “animals” and commercial “botanical” resources. Without limiting the resource to “natural” ones, MERA protection would extend to pets, livestock, houseplants, and crops.

Plaintiffs’ argument about the inclusion of “historic resources” within the list of “natural resources” protected by MERA is also misdirected. Historic resources, by virtue of their unique historical significance, have a public resource value akin to the state’s other, more classic resources of the air, water, and land, and completely unlike any interior quietude found in the typical residential structure. The Legislature declared that MERA derives from the “state’s paramount concern for the protection of *its* air, water, land and other natural resources,” Minn. Stat. § 116B.04 (emphasis supplied), and while such resources may be publicly or privately owned, their distinguishing character is their public value. Thus, a historic landmark may be privately owned, but is subject to preservation regulations. See, e.g., State by Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979); State ex rel. Fort Snelling State Park Ass’n v. Minneapolis Park and Recreation Bd., 673 N.W.2d 169 (Minn. Ct. App. 2003). The MERA interest in these landmark buildings is completely different in character from indoor quietude, which is created and preserved solely by the efforts of the individual property owner in sealing off the building’s interior from the external environment. If anything, the inclusion of historic resources in the list of natural resources protected by MERA reinforces the conclusion that interior quietude is not so protected.

Plaintiffs posit a parade of horrors, claiming that if their theory is not viable, then “courts would be foreclosed from ordering home water or air filters for residents near a source of air or water pollution.” Pls.’ Mem. 83. That is precisely what NWA is contending. Mitigation

relief is not available under MERA because it does not preserve natural resources from pollution, impairment or destruction. See Minn. Stat. § 116B.07 (The 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 air, water, land or other natural resources* located within the state) (emphasis supplied). MERA does not provide mitigation of the *effects* of pollution, impairment or destruction of a protected resource. MERA relief is available to stop or reduce the polluting *conduct*. See, e.g., Corwine v. Crow Wing County, 244 N.W.2d 482 (Minn. 1976) (denial of permits to prevent *development* and *operation* of a campground that violated MERA due to lack of sewage treatment facility); Freeborn County by Tuveson v. Bryson, 210 N.W.2d 290 (Minn. 1973), injunction affirmed by 243 N.W.2d 316 (Minn. Ct. App. 1976) (entering injunction preventing the *construction* of a roadway bisecting the natural wildlife marsh protected by MERA); State ex rel Wacouta Tp. v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn. Ct. App. 1993) (injunction entered against landowner preventing any *conduct*, including logging, that would affect the bald eagle roosts); State by Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990) (injunction entered to prevent construction of radio tower); In re Winona County Mun. Solid Waste Incinerator, 442 N.W.2d 344 (Minn. Ct. App. 1989) (denial of permit to *operate* facility).

The gun club cases uphold this basic MERA principle. No court has granted relief in the form of mitigation of the *effects* of the noise disturbance. In every case, the remedy for MERA violations involving disruptions of quietude is to enjoin the offending conduct, not to provide mitigation for the noise effects experienced by residents within private homes. In Minnesota Public Interests Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977), the Supreme Court enjoined the operation of the gun club and did not provide insulation, air

conditioning or any other private remedy under MERA. Likewise, in Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796 (Minn. Ct. App. 2001), the Minnesota Court of Appeals enjoined the operation of the gun club under MERA, but it did not reach outside the scope of MERA to provide individualized home insulation to mitigate the effects of the noise.

MERA was not intended to provide for mitigation for private residences. But Plaintiffs paint far too bleak a picture. There are multiple other devices to protect Minnesota residents personally and their property from the adverse impacts of air or water pollution, such as the Minnesota Environmental Response and Liability Act (MERLA), Minn. Stat. Ch. 115B, or common law claims. MERA has a different purpose, and this Court should interpret MERA according to its expressed limits, as the Minnesota Supreme Court has directed. State by Skeie v. Minnkota Power Coop., Inc., 281 N.W.2d at 374 (cautioning against extending the scope of MERA beyond what the legislature "clearly intended").

Plaintiffs' attempt to dismiss the indoor/outdoor distinction recognized in the Kennedy Building Associates cases is likewise unavailing. Plaintiffs argue that because the courts focused on whether there was *continuing* migration, the cases are irrelevant to whether indoor spaces are "natural resources" under MERA. Pls.' Mem. at 84. To the contrary, these decisions made clear that to fall within the ambit of MERA there must be a "threat of ongoing contamination to separate, uncontaminated *natural resources*." In recrafting the injunction, the district court focused on the absence of evidence of migration "to uncontaminated soils and groundwater." Kennedy Bldg. Assocs. v. Viacom, Inc., 2006 WL 305279 *3 (D. Minn. 2006). Migration was only one part of the MERA equation. To be actionable under MERA, it was necessary that the migrating contamination be impacting or threatening to impact, uncontaminated natural resources (which in KBA consisted of soils and groundwater). By contrast, so long as the

migrating contamination remained within the interior of the building, MERA liability was not triggered.

B. Plaintiffs Cannot Show MERA Actionable Conduct Without Facing Preemption.

Plaintiffs originally alleged that the “conduct” which caused “pollution, impairment or destruction” was the MAC’s November 2004 air conditioning mitigation plan. See Complaint ¶ 84. The mitigation program itself, however, cannot be “conduct” under MERA because it does not result in the pollution, impairment, or destruction of the environment. NWA Initial Mem. at 20-23. Plaintiffs have abandoned this argument, and now point solely to ongoing airport operations as the actionable conduct giving rise to their MERA claims. See Pls.’ Mem. at 38-41. Since Plaintiffs no longer contend a critical claim in their complaint is viable, NWA’s motion for summary judgment should be granted with respect to Counts I and II.

Without amending the complaint, Plaintiffs now stress the MERA actionable “conduct” is MAC’s ongoing operation of MSP. Id. But this shift is not enough to save Plaintiffs’ MERA’s claim. First, it is outside of the pleadings. Second, it runs head-on into preemption. By focusing on airport operations, Plaintiffs are acknowledging the “polluting conduct” for purposes of MERA is aircraft operations, and these operations cannot be regulated by any state authority or under any state law, including MERA. Minnesota Public Lobby v. MAC, 520 N.W.2d 388 (Minn. 1994). Plaintiffs attempt to dodge preemption by claiming their *remedy* does not interfere with the noise-generating aircraft. But this also is not enough. MERA allows this Court to grant relief only as “necessary and appropriate to protect ... natural resources ... from pollution, impairment or destruction.” Minn. Stat. § 116B.07. The relief sought by Plaintiffs is not stopping or even minimizing any polluting, or noise-generating, activity. Kennedy Bldg. Assocs., Inc. v. Viacom, Inc., 375 F.3d 731, 749 (8th Cir. 2004); Kennedy Bldg. Assocs., Inc. v.

Viacom, Inc., 2006 WL 305279 at *9-*10 (D. Minn. 2006); Soo Line R. Co. v. B.J. Carney & Co., 797 F.Supp. 1472, 1486-87 (D. Minn. 1992); Werlein v. U.S., 746 F.Supp. 887, 898 (D. Minn. 1990). In addition, as discussed in Section II.A, the mitigation in issue is not even protecting any natural or MERA-recognized resource. Local and state authorities clearly are empowered to conduct noise abatement activities around MSP, but that power does not mean any state resident has a MERA cause of action based on the noise generated by aircraft operations.

C. The NMP and FEIS Are Not “Environmental Quality Standards.”

In its earlier briefs, NWA has explained why this Court should reject the overbroad reading of “environmental quality standard” offered by Plaintiffs, and their “constellation theory.” NWA has also pointed out that even if the Noise Mitigation Program was an “environmental quality standard,” the MAC had the authority to change that standard. The only new argument made by Plaintiffs is that regulatory bodies relied upon the MAC’s “commitment” to provide mitigation in the 60-64 contour. Pls.’ Mem. at 47-49. But MERA does not authorize actions premised on the violation of unilateral “commitments” by regulated parties, unless such commitments are memorialized in an enforceable term or condition of a governmental approval. Plaintiffs do not contend the MAC has violated the terms or conditions of any government approval required for MSP expansion, especially any state approval. In fact, they do not even base their MERA claim in any way on the violation of a permit or license, where the terms or conditions of the government approval required the 5 DBL mitigation package for residences in the 60-64 contour. Under these circumstances, Plaintiffs cannot show that the alleged reliance of regulatory bodies upon the Noise Mitigation Program or the FEIS is sufficient to give rise to a MERA claim. Moreover, if there was any state “regulatory” breach or violation, Plaintiffs would be required to first exhaust their administrative remedies. See Minn. Stat. § 116B.08, subd. 1

(MERA provision providing, in part, “[i]f administrative, licensing or other similar proceedings are required to determine the legality of the defendant’s conduct, the court shall remit the parties to such proceedings.”)

D. Plaintiffs Are Too Quick to Dismiss the Schaller Factors.

Plaintiffs are quick to excuse themselves from assessment under the five factors set out by the Minnesota Supreme Court in State v. Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997), claiming that the Schaller framework is ill-suited to analyze claims premised on impacts to quietude. But it is not quietude itself that poses the analytical difficulties; it is the Plaintiffs’ formulation of a claim that will do nothing to protect or restore quietude except indoors. The Schaller factors provide the best guidance about how this Court should assess whether the MAC’s conduct is causing a “a material adverse effect” on a protected natural resource and in what form. Since Plaintiffs cannot explain why these factors should not be applied, this Court should rely upon them until given good reason to do otherwise. As discussed in NWA’s initial brief, application of the Schaller factors are especially relevant to what constitutes actionable conduct under MERA, as well as what natural resources deserve MERA protection, and highlight the huge disconnect between the resources Plaintiffs claim they are trying to protect and the relief they actually seek. NWA’s Initial Mem. at 28-32.

E. Plaintiffs Cannot Show a Clear and Unambiguous Duty to Provide Mitigation.

Plaintiffs still cannot point to a single document, statute, or regulation that requires a 5 DNL insulation program for 60-64 DNL homes. Neither state law nor any of the MAC documents in question make any unambiguous reference to a 5 DBL insulation program for 60-64 DNL Homes. The Noise Mitigation Program does not state that 60-64 DBL homes would receive a 5 DNL insulation package, and Plaintiffs are left to rely upon inferences and

implications drawn from other areas of the Noise Mitigation Program and from the related extrinsic evidence to argue that the program really meant 5 DNL, even if it did not use the phrase. See Pls.’ Initial Mem. at 32-38. The Legislature specifically asked the MAC to “examine” what mitigation, if any, would be appropriate in the 60-64 DNL contour. A statute providing this discretion is the exact opposite of a mandate that is so “clear and complete as to not admit any reasonable controversy.” See Johnson v. Minn. Dep’t Human Servs., 565 N.W.2d 435, 460 (Minn. Ct. App. 1997).

III. CONCLUSION

For these reasons, as well as those set out in its memorandum of law, NWA requests this Court grant its motion for summary judgment on the following grounds:

First, summary judgment should be granted on Count I (MERA/Material Adverse Affect) and Count 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 – conduct causing the pollution, impairment or destruction of a MERA-protected natural resource – because the mitigation plan adopted by the MAC on November 20, 2004, does not itself degrade quietude.

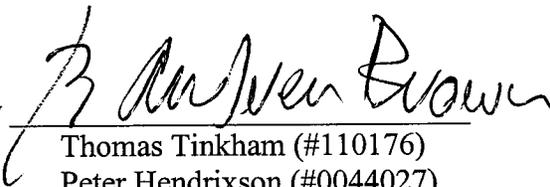
Third, summary judgment should be granted on Counts II and Count III (Mandamus) because it has already been adjudicated that the MAC has complied with the 1996 Noise Mitigation Plan, so there is not longer any grounds for Plaintiffs’ claim that MAC has violated an environmental quality standard. See City of Bloomington v. MAC, at p. 10 (Hennepin County District Court, Aug. 8, 2006) (MAC Exhibit Tab D).

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 cannot identify any clear and unambiguous duty to provide insulation to 60-64 DNL contour.

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