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January 2, 2007

BY HAND

The Honorable Stephen C. Aldrich
Hennepin County District Court
C-1321 Government Center
300 South Sixth Street
Minneapolis, MN 55487

Re: City of Minneapolis, et al. v. Metropolitan Airports Commission &
Northwest Airlines
Case No. 05-5474

Dear Judge Aldrich:

MAC writes in response to the Court's request for additional information on the federal preemption issue identified in the parties' summary judgment briefs and discussed at oral argument on the parties' summary judgment motions.

As the Court is aware, the Minnesota Environmental Rights Act ("MERA") provides a cause of action to address "conduct" that "materially adversely affects" the environment. Minn. Stat. §§ 116B.02, subd. 5; 116B.03, subd. 1. In their briefs and at oral argument, the cities suggested that MAC's continued operation of Minneapolis-St. Paul International Airport ("MSP") constitutes "conduct" that "materially adversely affects" the environment under MERA. As detailed in the briefs of MAC and Northwest Airlines and explained at oral argument, to the extent that the cities are relying upon "the operation of MSP" as "MERA conduct," federal law preempts the cities' MERA claims.

The preemption issue arises because federal law preempts all state laws affecting aircraft operations. Even state laws that do not expressly require any direct control of aircraft operations are preempted if compliance with such state laws is impossible without affecting aircraft operations. *Minnesota Pub. Lobby v. Metro. Airports Comm'n*, 520 N.W.2d 388, 391-92 (Minn. 1994) (construing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973)). See also *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1313-14 (9th Cir. 1981) (Congress has preempted local regulation of the source of aircraft noise). If "the operation of MSP" constitutes conduct

which “materially adversely affects the environment,” MSP cannot conceivably come into full “compliance” under MERA.

The cities’ attempt to focus only on the remedies they are asking this Court to impose is the same argument that the Supreme Court considered and rejected in *Minnesota Public Lobby*. That case involved a MERA action seeking enforcement of certain MPCA noise pollution standards. 520 N.W.2d at 388-89 & n.1. Among the actions that the *Minnesota Public Lobby* plaintiffs alleged MAC could take to reduce aircraft noise and comply with the MPCA noise pollution standards was noise mitigation. *Id.* at 392, n.6 (plaintiffs claimed that MAC could “apply for further funding or authority from the state legislature to abate noise,” and could “acquire aviation easements” or use “eminent domain” for noise mitigation purposes). Just as the cities assert in this action, the *Minnesota Public Lobby* plaintiffs claimed that such mitigation did not “impinge on aircraft operations.” *Id.* at 392. The Minnesota Supreme Court rejected this argument and found that federal law preempted application of MPCA’s noise standards to MSP.

Minnesota Public Lobby unequivocally states that the Noise Control Act of 1972 leaves “no room for local curfews or other local controls” that impinge upon aircraft operations. 520 N.W.2d at 390-91, quoting *City of Burbank*, 411 U.S. at 638. Congress intended to preempt state law in the aircraft noise area because state regulation “would severely limit the flexibility of FAA in controlling air traffic flow.” *Id.* By declaring that aircraft operations at MSP constitute MERA “conduct,” the cities seek to use MERA to regulate aircraft noise in contravention of *Minnesota Public Lobby*. The cities cannot by attaching the label of MERA “conduct” abrogate the express preemption established in *Minnesota Public Lobby*, subvert the purposes of the Noise Control Act of 1972, and undermine the division between federal and state authority that the Noise Control Act created. *Cf. ENSCO, Inc. v. Dumas*, 807 F.2d 743, 744-45 (8th Cir. 1986) (the federal Resource Conservation and Recovery Act (“RCRA”) preempted a county ordinance providing that hazardous wastes regulated under RCRA could not be disposed of in the county and the county could not, “by attaching the label ‘more stringent requirements’ or ‘site selection’ . . . arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies.”); *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112 (3d Cir. 1985) (the Atomic Energy Act of 1954 preempted a township ordinance prohibiting importation of spent nuclear fuel or other radioactive waste for the purpose of storage, because the local ordinance attempted to “regulate the operation of the Oyster Creek nuclear plant” and thereby ignored “the division between federal and state authority created by the AEA [Atomic Energy Act].”).

As MAC and Northwest Airlines explained in their respective briefs, because federal law preempts all state laws affecting aircraft operations, the only possible MERA “conduct” in the cities’ action is the difference between the noise benefits of the five-decibel noise reduction package that the cities seek and the noise benefits of the proposed

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MAC mitigation plan. Such a difference cannot constitute MERA conduct. The parties agree that the MAC proposed mitigation plan will have no effect on exterior "quietude" because the mitigation will not affect exterior aircraft noise. Moreover, even assuming that "interior quietude" is a MERA-protected natural resource, the MAC proposed mitigation plan will either improve or have no effect on interior quietude and as a result cannot constitute "pollution, impairment or destruction." See MAC's Summ. J. Br. at 35-36, 46-47; MAC's Reply Br. at 6-8.

MAC is providing a copy of this letter to counsel of record by email and U.S. Mail.

Sincerely,


Thaddeus R. Lightfoot

TRL/mks

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