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January 2, 2007

## BY HAND

Mark Thompson  
Court Administrator  
Hennepin County District Court  
Hennepin County Government Center  
1251 Court Tower  
300 South Sixth Street  
Minneapolis, MN 55487

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

Dear Mr. Thompson:

Enclosed for filing please find the following:

- 1) Defendant Metropolitan Airports Commission's Proposed Findings of Fact, Conclusions of Law, and Order; and
- 2) A Certificate of Service.

Thank you for your assistance. Should you have any questions regarding this filing, please call me.

Sincerely,



Thaddeus R. Lightfoot

TRL/mks

cc: Chambers of the Honorable Judge Stephen C. Aldrich (courtesy copy by hand and email)  
Service List (via email and U.S. Mail)

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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

Plaintiffs,

Case No. 05-5474

v.

Case Type: Other Civil

Metropolitan Airports Commission,

Defendant,

and

Northwest Airlines,

Defendant-Intervenor.

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DEFENDANT METROPOLITAN AIRPORTS COMMISSION'S  
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

## FINDINGS OF FACT

### **MAC, its Legislative Authority, and the Dual Track Legislation**

1. The Metropolitan Airports Commission (“MAC”) is a special purpose public entity, created under Minn. Stat. § 407.603, that operates the Minneapolis-St. Paul International Airport (“MSP”). Complaint, ¶ 6.

2. The Minnesota Legislature in 1989 enacted the Metropolitan Airport Planning Act (“MAPA”). *See* 1989 Minn. Laws ch. 279. The MAPA required MAC and the Metropolitan Council to project aviation demand for a prospective thirty-year period and to evaluate two alternative ways to meet aviation demand: (1) continue to develop MSP; or (2) develop a new replacement airport, the so-called “Dual Track Airport Planning Process.” *See* Minn. Stat. § 473.618; Dual Track Final Environmental Impact Statement (“FEIS”), p. I-1; March 8, 1996 Nigel Finney memo to MAC Commissioners re: Dual Track Airport Planning Process Recommendation, pp. 1-2. MAPA also specifically required MAC to develop a Long Term Comprehensive Plan (“the LTCP”) to satisfy air transportation needs to the year 2010. Minn. Stat. § 473.616.

3. In March 1996, MAC and the Metropolitan Council submitted a report to the Minnesota Legislature recommending that MSP be expanded to meet the region’s future aviation needs. The recommended MSP expansion plan was the MSP 2010 LTCP. FEIS, p. I-10 to I-11.

4. Near the conclusion of the Dual Track process, which included numerous public hearings, *see* Minn. Stat. § 473.641 (describing MAC’s statutory obligations relative to Dual Track), the Minnesota Legislature decided that MSP should be expanded as opposed to relocated. By statute, the Legislature directed MAC to implement the 2010 LTCP. Minn. Stat. § 473.606, subd. 25. The Legislature also eliminated the new airport alternative from further

consideration. 1996 Minn. Laws ch. 464, art. 3; Minn. Stat. § 473.155, subd. 5 (repealed 2005); Minn. Stat. § 473.608, subds. 2, 6, 16 and 26. *See also* FEIS, p. III-9.

5. Finally, the Legislature directed MAC to “*examine* mitigation measures [at MSP] to the 60 [(DNL)] level.” Minn. Stat. § 473.661, subd. 4(f) (emphasis added).

### **Noise Mitigation at MSP**

#### **The Early Years of MAC’s Noise Mitigation Program**

6. The Federal Aviation Administration (“FAA”) adopted 14 C.F.R Part 150 in 1985 to provide airports with a framework to analyze and recommend measures to address airport noise. Part 150 provides for “corrective” mitigation measures, such as soundproofing, consistent with a 45 decibel interior noise level goal, and assumes an exterior-to-interior noise level reduction of 20 decibels based upon a home’s existing construction. Hefner Aff., Ex. 4 (Nov. 2004 Part 150 Study Update), App. N, p. 2 of 161. *See also* Chad Leque Dep., pp. 143:24 to 144:3 (stating that achieving the 45 decibel interior target is the “intent of Part 150”). Part 150 then establishes interior noise level reduction goals above existing attenuation levels for the 75, 70 and 65 DNL contour intervals to meet EPA’s interior noise level goal of 45 decibels or less. 14 C.F.R § 150.23; 14 C.F.R. pt. 150, App. A, § A150.101(e)(8) and Table 1, n.1. There are no FAA interior noise level reduction goals in the 60 to 64 DNL contours area. *Id.*

7. In 1992, MAC began implementing a residential noise mitigation component for homes in the projected 1996 65 and greater DNL contours. November 2004 Part 150 Study Update, pp. 8-11 to 8-12. MAC designed the residential noise mitigation program to achieve an interior level not exceeding 45 decibel on an average annual basis, with the actual amount of noise mitigation necessary to achieve a 5, 10, or 15 decibel additional noise level reduction for a given residence depending upon exterior DNL and the residence’s construction. *Id.*

8. Homes surrounding MSP have an average natural noise level reduction of between 27 and 30 decibel (versus the 20 decibel natural noise level reduction that FAA's Part 150 assumes) that results from more robust cold weather construction. Leque Dep., 145:7-12; Diane Miller Dep., 71:10-17, 73:6-22; Merland Otto Dep., pp. 49:2 to 50:10, 54:23 to 55:12, 57:6-8. Therefore, it was unnecessary for MAC to provide mitigation to achieve an additional 10 or 15 decibel noise level reduction to meet the 45 decibel interior noise goal. *Id.*

9. MAC's noise mitigation program that began in 1992 did not specify that MAC would install all possible mitigation options on every home. Rather, MAC installed only the mitigation options necessary for a particular single-family residence to meet the five decibel noise level reduction target. November 2004 MSP Part 150 Update, App. N, p. 1 of 161.

#### **The Recommendation and Adoption of the 1996 MSP Noise Mitigation Plan**

10. As discussed above, in April 1996 during the Dual Track Airport Planning Process, the Minnesota Legislature directed MAC to "examine mitigation measures [at MSP] to the 60 [DNL] level," but did not require MAC to implement any mitigation measures within the 60 to 64 DNL contours. Minn. Stat. § 473.661, subd. 4(f) (emphasis added). The Legislature also directed that MAC, "with the assistance of its sound abatement advisory committee, shall make a recommendation to the state advisory council on metropolitan airport planning regarding proposed mitigation activities and appropriate funding levels for mitigation activities at [MSP] and in the neighboring communities." Minn. Stat. § 473.661, subd. 4(f).

11. Consistent with this statutory directive, MAC formed a Noise Mitigation Committee in mid-1996 to examine mitigation alternatives. *See* March 22, 1996 Nigel Finney memo to Jeff Hamiel regarding Noise Mitigation Plan.

12. The Noise Mitigation Committee held eight meetings through the summer of 1996, and held a public meeting in August to receive comments and recommendations from concerned citizens. 1996 MSP Noise Mitigation Program, pp. 6, 22. On October 28, 1996, the Noise Mitigation Committee presented a summary of its recommendations to the full MAC Commission. *Id.*, 2-42. As “Assumptions,” the Noise Mitigation Committee recognized that any proposed noise mitigation plan “should be evaluated for effectiveness; revisions should be made as necessary to reflect changes in the noise environment.” *Id.*, 5. With respect to “Insulation,” the Committee recommended that “the residential sound insulation program for the area encompassed by the 1996 DNL 65 contour be completed on the currently approved schedule;” that “the program be expanded after the completion of the current program to incorporate the area encompassed by the 2005 60 DNL;” and that “the 2005 60 DNL contour be based on the most accurate projection of the traffic levels and use of appropriate ANOMS data.” *Id.*, p. 36.

13. The full MAC Commission approved the “Assumptions” and “Insulation” program elements listed above by resolution on October 28, 1996. MAC Resolution of October 28, 1996, pp. 9 – 13. MAC’s resolution to “expand” the Part 150 program to the 60 to 64 DNL contours did not specify the particular noise mitigation measures it would provide. *Id.* The Office of the Legislative Auditor would later note this lack of specificity in a report following its audit of MAC’s operations, concluding that “MAC’s initial commitments to expand its noise insulation program to homes with noise in the DNL 60-64 range were vague and subject to various interpretations” and that “our review of documents and meeting minutes found no conclusive evidence that MAC explicitly committed to provide identical noise mitigation to all homes in the areas with noise levels of 60 DNL or greater.” Office of Legislative Auditor, “Metropolitan Airports Commission,” Report # 03-04, January 2003, p. 65.

## **FEIS Approvals and Implementation of the 2010 LTCP Project**

### **The FEIS Process**

14. MAC and the Federal Aviation Administration (“FAA”) completed the FEIS in May 1998. The MSP Alternative that the FEIS evaluated, which involved implementing the 2010 LTCP, did not include noise mitigation in the project definition. FEIS, pp. III-1 to III-4.

15. The FEIS identified aircraft noise as a significant environmental effect and included extensive consideration of the unmitigated noise effects of the 2010 LTCP project and a no-build alternative. FEIS, pp. V-76 to V-88. The FEIS concluded that the 2010 LTCP project would result in substantially lesser noise effects than the no-build alternative, *id.*, and the noise mitigation measures identified for the 2010 LTCP project were intended to reduce those noise impacts even further. *Id.*, pp. V-80 to V-82. The FEIS concluded that the 2010 LTCP project, by reducing delays and allowing for routing of aircraft over less densely populated areas south of MSP, would decrease the number of persons living in the 60 to 64 DNL contours. *Id.*, pp. V-76 to V-88. *See also* November 2004 MSP Part 150 Update, pp. 6-3, E-1 (updated data from November 2004 Part 150 Study showing 47,238 persons in the 60 to 64 DNL contours under the no-action alternative versus 25,108 persons in the 60 to 64 contours under the 2010 LTCP).

16. With respect to mitigation measures within the 60 to 64 DNL contours, the FEIS acknowledged that MAC adopted the Noise Mitigation Committee’s recommendation on October 28, 1996, to expand the sound insulation program “to incorporate the area within the 2005 DNL 60-65 contour[.]” FEIS, p. V-81.

### **Approval of the FEIS**

17. On November 23, 1998, the Minnesota Environmental Quality Board (“EQB”) issued the Findings of Fact, Conclusions and Order concerning its determination that the Dual Track FEIS was adequate. EQB Findings, p. 13.

### **The Part 150 Study/Noise Mitigation Update Process: 1999 - 2004**

18. In February 1999, after FAA and EQB approved the FEIS, MAC began the Part 150 update process. MAC conducted numerous meetings as part of the update process, including meetings with the Metropolitan Airport Sound Abatement Council (“MASAC”). MASAC included official representatives of the cities of Minneapolis, Richfield and Eagan. November 2001 MSP Part 150 Update, pp. 9-1 to 9-8. MAC published a draft Part 150 study update in October 2000, and held hearings on the draft document. November 2001 MSP Part 150 Update, p. 9-7; Affidavit of Chad Leve in Support of Def. MAC’s Mot. for Summ. J., ¶¶ 26-27.

19. In February 2001, Nigel Finney provided MAC’s Planning and Environment (“P&E”) Committee with a memorandum regarding proposed mitigation options in the 60 to 64 contours. February 27, 2001 Nigel Finney memo to P & E Committee re: Part 150 Sound Insulation Program – 60–64 DNL Contour, with handwriting, pp. 1-9. MAC then held public hearings regarding the options set forth in the Finney memorandum for the Commission’s consideration. The P&E Committee ultimately agreed to recommend to the full Commission that MAC offer the five decibel mitigation package to residents within the projected 2005 60 to 64 DNL contours, but to restrict funding to \$150 million. Minutes of August 20, 2001 MAC Commission Meeting, p. 7.

20. After receiving extensive input from affected municipalities and residents, November 2001 MSP Part 150 Update, pp. 9-1 to 9-8, the full Commission voted on August 20,

2001 to adopt the P&E Committee's recommendation. August 20, 2001 meeting minutes, p. 14.

21. After circulating the document for public comment and holding public hearings, MAC in November 2001 submitted a final Part 150 Update to FAA. The update proposed the noise mitigation program for homes in the projected 2005 60 to 64 DNL contours that MAC approved in August 2001. November 2001 MSP Part 150 Update, pp. 7-6, 7-14 to 7-15.

22. After MAC submitted the November 2001 Part 150 Update to FAA, however, concerns arose regarding the accuracy of the forecasted 2005 noise contours in light of the impact of the events of September 11, 2001 on air travel. The full Commission addressed this issue at a public meeting on December 17, 2001, with numerous commissioners questioning whether MAC should move forward with the noise mitigation proposal of August 2001. Minutes of December 17, 2001 MAC Commission Meeting, pp. 11-15. Certain elected officials spoke in favor of the August 2001 mitigation proposal. *Id.*, p. 13. By a majority vote, the full Commission voted to rescind the August 2001 action regarding the Part 150 Update, and tabled further discussion of additional program options pending further review. *Id.*, pp. 14-15.

23. The full Commission revisited the Part 150 Update at a public meeting on April 15, 2002. Minutes of April 15, 2002 MAC Commission Meeting, pp. 8-15. Ultimately, the full Commission approved a noise mitigation program that would provide the "current full mitigation package" to homes within the 64 to 63 DNL contours, and a mechanical package to provide air conditioning as mitigation to homes within the 62 to 60 DNL contours, subject to a cap of \$150 million. *Id.*, pp. 13-14. The Commission also directed MAC staff to prepare the 2005 noise contours based upon the most current fleet mix information. *Id.*, p. 14. MAC made provisions for acoustical testing to ensure an interior noise level from outside sources of 45 decibel or less, a standard that is consistent with MAC's land use compatibility guidelines, and

for reimbursement for certain noise mitigation work in lieu of the mechanical package if a home had air-conditioning. November 2004 MSP Part 150 Update, pp. 2-11, 2-12, 8-19 to 8-20.

24. In May 2002, after further consideration of the continued reduction in flights caused by the events of September 11, 2001 and a desire to develop contour maps that reflected the changed circumstances, MAC withdrew the November 2001 Part 150 Update and began modifying MSP noise forecasts and the associated noise contour maps. November 2004 MSP Part 150 Update, p. 8-20; Nigel Finney Dep., 146:18 – 147:10. As it updated noise forecasts and noise contour maps in the Part 150 study, MAC developed a base year 2002 noise exposure map and a forecast year 2007 noise exposure map. November 2004 MSP Part 150 Update, pp. 6-1 to 6-4.

25. In February 2004, Nigel Finney presented the P & E Committee with the draft 2007 forecast noise contours that had been developed over the previous year. February 3, 2004 Nigel Finney memo to P & E Committee re: Part 150 Update. After receiving public comments from interested homeowners, city officials, and other parties, including Northwest Airlines, Minutes, Agenda and Memoranda of March 3, 2004 P & E Committee Meeting, pp. 12-17; Minutes, Agenda and Memos to May 5, 2004 P & E Committee Meeting, pp. 9-13, the P & E Committee met on July 13, 2004, to vote on a proposal to submit to the full Commission. Minutes, Agenda and Memos to July 13, 2004 P & E Committee Meeting, “Reports A,” pp. 1-8. The Committee voted to recommend the approval of the draft 2007 DNL contours and a revised Part 150 Noise Compatibility Plan. *Id.*, p. 7. Under the revised plan, homes in the 2007 60 to 64 DNL contour would be eligible to receive a so-called “mechanical package.” The mechanical package would provide single-family residences within the projected 2007 60 to 64 DNL

contours with central air conditioning as mitigation if the residence did not have air conditioning. *Id.* Residential homeowners would be subject to a fifty-percent co-pay. *Id.*

26. The full Commission considered the P & E Committee's recommendation at its meeting on July 19, 2004. Minutes, Agenda and Memos to July 19, 2004 MAC Commission Meeting, pp. 6-12. The meeting was opened to public comment, and numerous public officials, residents, and commissioners expressed their views regarding the proposal. *Id.*, pp. 9-12. The full Commission voted to approve the draft 2007 DNL contour and to authorize MAC staff to publish a draft document regarding a revised mitigation recommendation that staggered the homeowners' co-pay obligation based upon the location of their homes, and to establish a public hearing date and comment period. *Id.*, pp. 11-12.

27. In September 2004, MAC held a public meeting to take comment regarding the Part 150 Update. October 26, 2004 Nigel Finney memo to P & E Committee re: Part 150 Update, p.1. Approximately 130 individuals submitted written comments, and thirty-three persons spoke at the hearing, including residents of Richfield and Minneapolis, elected officials, and municipal representatives. *Id.* MAC responded to the comments in the November 2004 Part 150 Study Update. Nov. 2004 Part 150 Update, Appendix N.

28. On November 15, 2004, the full MAC Commission voted to authorize staff to revise the Part 150 Program to incorporate the essential elements that had been proposed and discussed over the past several months in public debate, and to submit the approved program to FAA for review and approval. Minutes of November 15, 2004 Meeting of MAC Commission, pp. 4-8. The November 2004 Part 150 Update included the MAC proposed mitigation plan for residents living within the 60 to 64 DNL contours projected for 2007. November 2004 MSP Part 150 Update, pp. 8-20 to 8-21.

29. Existing windows must remain closed for a home to achieve its maximum outside-to-inside noise attenuation. Under the MAC proposed mitigation plan for residents living within the 60 to 64 DNL contours in the November 2004 Part 150 Update, single-family residences within the projected 2007 60 to 64 DNL contours without central air conditioning will receive central air conditioning as mitigation. The proposed mitigation allows all single-family residents in the projected 2007 60 to 64 DNL contours to keep their windows closed in the summer months, thereby enabling the homes to achieve maximum outside-to-inside sound attenuation. As a result, the interior noise environment within the homes receiving the proposed mechanical package will improve. The proposed mitigation will have no negative effects on other homes. Nov. 2004 Part 150 Study Update, App. N, p. 2 of 161; Finney Dep., 121:23 to 122:13; Leqve Dep., 212:16-25; Miller Dep., 71:10-17, 134:19 to 135:5; Otto Dep., 55:10-12, 57:6-8.

## CONCLUSIONS OF LAW

### I. Standard of Review

1. Under Minnesota Rule of Civil Procedure 56, summary judgment “shall be rendered” when the “pleadings, depositions, answers to interrogatories, and admissions *on file*, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and that either party is entitled to a judgment as a matter of law.*” Minn. R. Civ. P. 56.03 (emphasis added). To avoid summary judgment, the non-moving party must present specific facts demonstrating that there is a genuine issue based upon a dispute of material fact that warrants a trial. Minn. R. Civ. P. 56.05; *Borom v. City of St. Paul*, 184 N.W.2d 595, 597 (1971).

## II. The MAC Proposed Mitigation For The Projected 2007 60 To 64 DNL Contours Is Not MERA “Conduct” That Will Materially Adversely Affect The Environment

2. Minn. Stat. § 116B.03, subd. 1 allows a political subdivision, among others, to maintain a civil action in district court for declaratory or equitable relief in the name of the state of Minnesota against any person “for the protection of the air, water, land, or other natural resources located within the state . . . from pollution, impairment, or destruction.”

3. Minn. Stat. § 116B.02, subd. 5 defines “pollution, impairment or destruction” as consisting of two types of “conduct”: 1) “conduct” that violates, or is likely to violate, “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) “conduct” that “materially adversely affects or is likely to materially adversely affect the environment.” (emphasis added). For conduct to constitute “pollution, impairment, or destruction” because of its material adverse effects on the environment, that conduct must weaken or make the environment worse, diminish it, or “otherwise affect [it] in an injurious manner.” *Michigan United Conservation Clubs v. Anthony*, 280 N.W.2d 883, 887 (Mich. Ct. App. 1979) (construing Michigan Environmental Protection Act, on which MERA is modeled).

4. The first count of the complaint alleges that MAC engaged in the second type of “conduct” contemplated under MERA’s definition of “pollution, impairment or destruction.” In particular, the complaint alleges that “noise pollution from MSP materially adversely affects the environment by impairing the natural resource of quietude.” Complaint, ¶ 80. The complaint further alleges that “MAC’s failure and announced intention to continue to fail to implement an adequate noise insulation program in the 60 – 65 DNL will materially adversely affect the environment and fails to minimize the impact of MSP operations on the environment.” *Id.*, ¶ 81.

5. Despite the allegation in paragraph 80 of the complaint that noise from MSP materially adversely affects the environment, the cities maintain that they “do not seek in any manner through this suit to affect the operation of aircraft at MSP.” *Id.*, ¶ 87. This court lacks the jurisdiction to order relief that would affect MSP operations, as federal law preempts all state efforts to affect aircraft operations. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973). 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*). This court cannot and will not address the “conduct” regarding “noise pollution from MSP” as alleged in paragraph 80 of the complaint, and the cities’ efforts to point to “disputed” facts regarding noise levels generated by MSP are irrelevant to their first MERA claim. Accordingly, the only MAC “conduct” that remains relevant is MAC’s proposed mitigation plan in the November 2004 Part 150 Study Update.

6. A court analyzing any allegation of “conduct” that results in a material adverse effect on the environment must begin that analysis by comparing “the environmental situation before the proposed action . . . with the probable condition of the environment after.” *In re University of Minnesota Steam Serv. Facilities*, 566 N.W.2d 98, 105 (Minn. Ct. App. 1997). If the “conduct” at issue does not result in “pollution, impairment, or destruction” under that analysis, it does not meet the standard for MERA conduct. *Id.*

7. A comparison of the noise environment in the projected 2007 60 to 64 DNL contours around MSP before and after the MAC proposed mitigation establishes that the proposed mitigation cannot constitute a material adverse effect under MERA. As a threshold matter, the MAC proposed mitigation cannot and does not affect exterior aircraft noise. Findings

of Fact, ¶ 29; *City of Burbank*, 411 U.S. at 633-34; *Minnesota Pub. Lobby*, 520 N.W.2d at 391-92. Exterior noise, therefore, will not become worse as a result of the MAC proposed mitigation. Homeowners within the 60 to 64 DNL contours that already have central air conditioning will not see a change in the existing interior noise environment, as these homeowners are already able to keep their windows closed throughout the year and receive the benefit of exterior-to-interior noise attenuation from existing home construction. Findings of Fact, ¶ 29. For homeowners within the 60 to 64 DNL contours who will receive the proposed MAC mitigation, the existing interior noise environment will improve because those homeowners will be able to keep their windows closed during the summer months, thereby reducing exterior noise. *Id.*

8. The MAC proposed mitigation will ameliorate existing exterior aircraft noise by providing a quieter indoor noise environment. Therefore, rather than injuring the environment, MAC's proposed actions will improve or not affect the environment. Conduct that improves or does not affect the environment is not conduct that has a material adverse effect under MERA. *University of Minnesota*, 566 N.W.2d at 105.

### **III. The 1996 Noise Mitigation Program And The 1998 FEIS Are Not MERA Environmental Quality Standards**

9. The second count of the complaint alleges that MAC is guilty of the other type of "conduct" contemplated under MERA. The complaint alleges that MAC's "failure" to provide a "five decibel noise reduction package" to homes within the 60 – 64 DNL contours violates or will violate an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit. Complaint, ¶¶ 88 – 90. In particular, the complaint alleges that MAC violated state "environmental quality standards" embodied in: (1) the 1996 Noise Mitigation Program; (2) the mitigation discussed in the FEIS; (3) MAC's statutory obligations to minimize

noise from MSP; and (4) the Metropolitan Council's 2002 approval of the MSP 2010 capital improvement program ("CIP"). Complaint, ¶ 90. In their pleadings in support of their motion for summary judgment and in oral argument, however, the cities narrowed their allegation to assert that it was only the 1996 Noise Mitigation Program and the FEIS that established either an "environmental quality standard" or a "limitation" enforceable through MERA. *See, e.g.,* Pls.' Summ. J. Br. at pp. 30 – 32.

10. MERA does not define the terms "standard" or "limitation." Other sources, however, provide useful insights into what those terms mean in the context of environmental law. A "standard" is a "model accepted as correct by custom, consent, or authority." Black's Law Dictionary (8<sup>th</sup> ed. 2004). In discussing the development of an environmental quality "standard," the Minnesota Pollution Control Agency's ("MPCA's") enabling statute states that the agency has the authority to "adopt, amend and rescind rules and standards having the force of law relating to any purpose" pertaining to the protection of the environment. Minn. Stat. § 116.07, subd. 4. MPCA must adopt "standards" in accordance with the rulemaking procedures of the Minnesota Administrative Procedure Act ("Minnesota APA"). *Id.* The Minnesota APA, which governs promulgation of MPCA environmental quality "standards," distinguishes "policies" from "rules and regulatory programs," and provides detailed rulemaking procedures to which state agencies must adhere. Minn. Stat. §§ 14.02, 14.05-14.69.

11. Similarly, a "limitation" is a "restriction." Black's Law Dictionary (8<sup>th</sup> ed. 2004). Limitations typically fall within the definition of and authority to adopt "rules or standards." For example, under the Minnesota Water Pollution Control Act, "standards" include "effluent limitations," and MPCA's enabling act requires the agency to promulgate such standards under the Minnesota APA's rulemaking procedures. Minn. Stat. §§ 115.01, subd. 19, 116.07, subd. 4.

MPCA's rules also define an "effluent limitation" as "a restriction established by rule or permit condition." Minn. R. 7001.1020, subp. 13.

12. Statutes, rules, orders, licenses, stipulation agreements, or permits do not constitute environmental quality standards under MERA unless they are duly promulgated under the authority that the Legislature provides and include substantive and enforceable environmental limitations. *Cf. Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995); *Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 743-44 (8<sup>th</sup> Cir. 2004); *Williams Pipeline Co. v. Soo Line R.R. Co.*, 597 N.W.2d 340, 345-46 (Minn. App. 1999). *See also* Minn. Stat. § 116B.10 (MERA provision authorizing civil actions against state agencies to challenge "an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued" by the state or any instrumentality thereof).

13. Although a public corporation and not a state agency, MAC is an instrumentality of the state and derives its existence and authority from its enabling statute. Minn. Stat. § 473.603, subd. 1a. As with other entities that the legislature creates, MAC has the power to promulgate or issue substantive environmental quality standards "only if, and to the extent, the legislature has authorized it to do so." *Hirsch*, 537 N.W.2d at 485. MAC's enabling statute is the only source of MAC's ability to promulgate and enforce binding "rules, regulations, and ordinances" necessary to discharge its duties "as [MAC] deems necessary." Minn. Stat. § 473.608, subd. 17. In particular, MAC's enabling statute establishes express administrative procedures with which MAC must comply before promulgating any rule, regulation, or ordinance, including specific public notice and public hearing requirements. *Id.*, subds. 17 & 18.

### **1996 Noise Mitigation Program**

14. MAC did not promulgate the 1996 Noise Mitigation Program as a binding ordinance, rule, or regulation under Minn. Stat. § 473.608, subd. 17. Rather, the full MAC Commission simply adopted the policy recommendations of the Noise Mitigation Committee through a resolution passed on October 28, 1996. MAC Resolution of October 28, 1996, pp. 9 – 13; Findings of Fact, ¶ 13. Accordingly, this resolution was neither a “standard” nor a “limitation” because it does not satisfy the definitions of those terms of art and MAC did not adopt the resolution as a binding ordinance, rule, or regulation under its enabling statute.

15. Because the 1996 Noise Mitigation Program does not constitute a “standard” or “limitation” enforceable under MERA as a matter of law, this Court need not reach the issue of whether MAC’s October 28, 1996 resolution establishes an “unambiguous” requirement that MAC provide the exact same noise mitigation to residents in the 60 to 64 DNL contours that it provided to residents in the 65 and greater DNL contours.

16. Nevertheless, if the Court were to consider the issue, it appears that the language of MAC’s October 28, 1996 resolution does not establish an “unambiguous” requirement that MAC provide the exact same noise mitigation to residents in the 60 to 64 DNL contours that it provided to residents in the 65 and greater DNL contours. The express language of Item 1 under the resolution addressed completion of the “current” program being implemented at the time in the 65 and greater DNL contours. Item 2 articulated MAC’s intention regarding noise mitigation in the 60 to 64 DNL contours, stating that “[t]he program be expanded after completion of *the current program* to incorporate the area encompassed by the 2005 60 DNL.” *Id.*, p. 9 (emphasis added). MAC, therefore, distinguished “the current program” offered in the 65 and greater DNL contours from “the program” intended for the 60 to 64 DNL contours. Under the doctrine of

*expressio unius est exclusio alterus* (“expression of one thing is the exclusion of another”), a legislative body using a term in place and not in another intends to differentiate between the two terms. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006)).

17. Other portions of the 1996 Noise Mitigation Program underscore the difference between “the current program” in the 65 and greater DNL contours and MAC’s intention for “the program” in the 60 to 64 DNL contours. For instance, Section 3.A of the 1996 Noise Mitigation Program described the FAA-approved “Current Sound Insulation Program” that MAC had been implementing in the 65 and greater DNL contours since 1992, whose stated goal was to “reduce exterior noise levels by 5 db” for single-family residences by implementing one or more of the mitigation measures listed in that section. 1996 NMP at 26-30. The “program [to] be expanded” in the 60 to 64 DNL contours, discussed in Section 3.B and entitled “*Proposed* Sound Insulation Program,” said nothing about reducing noise levels by “5 db” and did not list any specific mitigation measures. *Id.* at 30-34 (emphasis added).

18. The cities’ other efforts to claim that MAC made an “unambiguous” commitment in the 1996 Noise Mitigation Program are unpersuasive. The cities first point to the portion of the 1996 Noise Mitigation Program that summarizes the various recommendations made to the full MAC Commission by the Noise Mitigation Committee, noting the Committee recommended that MAC investigate providing noise mitigation that resulted in a three-to-five decibel interior noise level reduction in the 54 to 60 DNL contours. Pls.’ Summ. J. Br., pp. 34-35. They argue that MAC must have intended a full five decibel package within the 60 to 64 DNL contours because it did not specify otherwise. *Id.* As even the cities acknowledge, however, the full MAC Commission *rejected* the Committee’s recommendation regarding the 54 to 60 DNL contours when it passed the 1996 Noise Mitigation Program resolution. *Id.* In essence, the cities

assert that because MAC did not conform language it approved to advisory committee recommendations that it rejected, MAC intended to implement an identical noise mitigation package in the 60 to 64 DNL contours and the 65 and greater DNL contours. This argument lacks legal support and is inconsistent with the language of the 1996 Noise Mitigation Program and the resolution adopting that program.

### **1998 FEIS**

19. The MAC also did not promulgate the 1998 FEIS as a binding ordinance, rule, or regulation. Rather, FAA and MAC prepared the FEIS under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370f, and the Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. §§ 116D.01-.11. The 1998 FEIS merely incorporated and discussed the 1996 Noise Mitigation Program. FEIS, p. V-81; Findings of Fact, ¶ 16.

20. Environmental impact statements such as the 1998 FEIS are not decision-making documents that establish enforceable environmental standards. *Coon Creek Watershed Dist. v. Minn. Env'tl. Quality Bd.*, 315 N.W.2d 604, 605 (Minn. Ct. App. 1982). Rather, the 1998 FEIS, like all environmental review under MEPA, was simply part of “a process of information gathering and analysis.” *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 218 (Minn. Ct. App. 1997).

### **MAC's Ability To Change Its Resolution**

21. Even if the “sequence of events” upon which the cities rely is sufficient to create an environmental quality “standard” or “limitation,” MAC changed that “standard” or “limitation” in 2001, 2002, and again in 2004.

22. Minnesota courts expressly recognize the right of an administrative agency such as MAC to reconsider its decisions. *Turnblad v. Dist. Court*, 107 N.W.2d 307, 312 (Minn.

1960). *See also In re North Metro Harness, Inc.*, 711 N.W.2d 129, 135-36 (Minn. Ct. App. 2006) (upholding Minnesota Racing Commission's decision to grant racetrack license after previously denying license); *Dun & Bradstreet Corp. Found. v. United States Postal Serv.*, 946 F.2d 189, 194 (2d Cir. 1991) (agency may reconsider interim or even final decisions) (citations omitted); *Stowe v. Bologna*, 592 N.E.2d 764, 767 (Mass. Ct. App. 1992) (agency has "inherent power" to reconsider decisions). When discharging legislative or rulemaking functions, such as whether and how to adopt a noise mitigation plan, MAC's decisions "command the same regard and are subject to the same tests as enactments of the legislature." *Minneapolis St. Ry. Co. v. City of Minneapolis*, 86 N.W.2d 657, 676 (Minn. 1957) (citation omitted). Such legislative enactments are subject to revision. *See, e.g., Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 770-71 (Minn. 2006) (agency may reverse past legislative rules or policies); *Nat'l Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230-31 (D.C. Cir. 1992) (same).

23. The cities suggest that MAC, through a sequence of events, created an "environmental quality standard" requiring a five decibel noise reduction package for every home in the projected 2005 (and later 2007) 60 to 64 DNL contours. The sequence allegedly began in 1996 when the Minnesota Legislature directed MAC to examine mitigation in the 60 to 64 DNL contours and ended in 2002 with the Metropolitan Council's CIP approval on the condition that MAC spend \$150 million on mitigation in the 60 to 64 DNL contours. This argument ignores actions between 2001 and November 2004, when MAC ultimately recommended the proposed mitigation to which the cities now object.

24. In August 2001, after receiving extensive public input, MAC passed a mitigation recommendation for homes in the projected 2005 60 to 64 DNL contours subject to a budget of

\$150 million. Minutes of August 20, 2001 MAC Commission Meeting, p. 14; Findings of Fact, ¶ 20. MAC passed a different mitigation program again in April 2002, when it recommended a five decibel mitigation package for homes in the projected 2005 64 and 63 DNL contours, as well as testing to determine if a mechanical package was necessary to meet the 45 DNL interior noise level for homes in the projected 2005 60 to 62 DNL contours. Minutes of April 15, 2002 MAC Commission Meeting, pp. 13 – 14; Findings of Fact, ¶ 23. Finally, MAC passed yet another mitigation program in July 2004 when it recommended the mechanical mitigation package for homes in the projected 2007 60 to 64 DNL contours. Minutes of November 15, 2004 Meeting of MAC Commission, pp. 4-8; Findings of Fact, ¶ 28.

25. In short, even if a sequence of events could constitute an environmental quality “standard” or “limitation” in 1996, MAC changed that “standard” or “limitation” three times between 2001 and the end of 2004. Each time, MAC held public Committee and full Commission meetings at which it discussed the technical and financial merits of a variety of mitigation options in the 60 to 64 DNL contours. Findings of Fact, ¶¶ 18 - 28. After carefully considering the mitigation options set forth, MAC determined in November 2004 that the proposed mechanical mitigation package would allow homeowners within the 60 to 64 DNL contours to meet the interior noise target of 45 DNL. The public process between 2001 and 2004 was similar to the public process involved in the development of the 1996 Noise Mitigation Program and the consideration of the 1998 FEIS. *Compare* Findings of Fact, ¶¶ 10 - 17 *with* Findings of Fact, ¶¶ 18 - 28. There is no principled reason, and no support in MERA, MAC’s enabling statute, or any other authority to suggest that MAC created an environmental quality standard or limitation through a “sequence of events” between 1996 and 2002, but then could not

alter or amend that standard or limitation through a different “sequence of events” between 2001 and 2004.

**MEPA And MERA Do Not Create “Enforceable Standards”**

26. The cities argue, incorrectly, that both MERA and MEPA contain “independent substantive standards” that are enforceable against MAC here. Pls.’ Summ. J. Br. at 25-26, 40-43. The cities assert first that “MERA creates an affirmative and substantive obligation on MAC and other public entities to avoid causing significant effects on the environment by implementing feasible and prudent alternatives.” Pls.’ Summ. J. Br. at 40. The cities do not cite any language within MERA itself that supports their claim, and no such language exists in the statute. MERA’s statutory provision under which any person may maintain a civil action for the protection of the air, water, land or other natural resources from pollution, impairment, or destruction does not include the term “feasible and prudent alternative.” Minn. Stat. § 116B.03, subd. 1. The only MERA reference to “feasible and prudent alternatives” is found in Minn. Stat. § 116B.04, which addresses the burdens of proof in MERA actions and provides a “feasible and prudent alternative” affirmative defense. The defense, however, does not apply to MERA claims alleging violation of an environmental quality standard, such as count II of the complaint. *Archabal v. County of Hennepin*, 495 N.W.2d 416, 421-22 (Minn. Ct. App. 1993). MERA’s “no feasible and prudent alternative” affirmative defense does not impose any affirmative obligation to undertake alternatives or to implement mitigation. *Id.*, 495 N.W.2d at 422-23.

27. Nothing in the Minnesota Supreme Court decisions upon which the cities rely creates an affirmative obligation under MERA to “tak[e] all available steps to mitigate the effects of an action.” Pls. Summ. J. Br. at 41. The cities cite *People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d 858

(Minn. 1978), in support of their assertion that MERA creates an “affirmative and substantive obligation” to implement “feasible and prudent alternatives,” but that case merely discusses the burden of proof established under MERA, Minn. Stat. § 116B.04, and does not hold that MERA creates an “affirmative and substantive obligation” to implement “feasible and prudent alternatives.”

28. The cities also inappropriately rely on *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977), to suggest that an “independent MERA standard” exists. In *White Bear Rod & Gun*, the Minnesota Supreme Court applied the same “burden of proof” analysis under Minn. Stat. § 116B.04 that it had in *PEER*, found that the plaintiff met its *prima facie* showing of impairment. The Court then concluded that the defendant failed to rebut the impairment showing or offer evidence establishing the no feasible and prudent alternative affirmative defense. *White Bear Rod & Gun*, 257 N.W.2d at 781.

29. The cities also wrongly assert that the Minnesota Environmental Policy Act (“MEPA”) creates its own independent “feasible and prudent alternative” requirement that applies to MAC. MEPA provides that “[n]o state action” shall be allowed or “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 . . . .” Minn. Stat. § 116D.04, subd. 6. The MEPA provision is designed to ensure that state actions, such as MPCA permitting decisions or environmental review, fully consider alternatives to a proposed project that may have fewer adverse environmental effects than the proposed project. *In re University of Minnesota*, 566 N.W.2d 98, 104 (Minn. Ct. App. 1997). MEPA does not

convert mitigation measures outlined in environmental review documents, such as those discussed in the 1998 FEIS, into independently enforceable substantive obligations. *See Nat'l Audubon Soc'y v. MPCA*, 569 N.W.2d 211, 217 (Minn. Ct. App. 1997) (mitigation measures need not be substantive standards, but must be more than “mere vague statements of good intentions”). Mitigation in an EIS need not be fully developed, and does not constitute an enforceable standard. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989); *Laguna Greenbelt v. Dep't of Transp.*, 42 F.3d 517, 527-28 (9<sup>th</sup> Cir. 1994).

30. MEPA also mandates that a governmental agency taking a “state action” subject to MEPA must consider “feasible and prudent” alternatives *to that action*. Minn. § 116D.04, subd. 6. MAC satisfied that requirement when it considered the effects of a “no build” alternative under the 1998 FEIS and when it determined that building the proposed runway was preferable, from an environmental standpoint, to building no runway at all. 1998 FEIS, at V-76 to V-88. Moreover, the noise mitigation measures that the FEIS identified addressed not just the environmental effects of the proposed runway project, but also noise generated from *existing* MSP runways. *Id.*, at V-74 to V-88, B-1 to B-2. The project that MAC selected represented the alternative to the proposed new runway project with the lesser adverse noise effects. FEIS, pp. V-76 to V-88; Findings of Fact, ¶ 15.

31. The mitigation that the cities seek is not a “feasible and prudent alternative” to the 2010 LTCP project that the FEIS evaluated. Mitigation is distinct from a proposed action or alternatives to a proposed action, and explores the types of measures that could be “helpful in mitigating any adverse environmental impact caused by the action.” *Coon Creek Watershed Dist. v. Minn. Env'tl Quality Bd.*, 315 N.W.2d 604, 605-06 (Minn. Ct. App. 1982). *See also City of Bloomington v. Metro. Airports Comm'n*, Civ. No. 27-CV-05-16811 (Hennepin County Dist.

Ct. Aug. 8, 2006) at 17-18 (noting that in describing the contents of an EIS, MEPA distinguishes the “proposed action” from possible “mitigation” measures that *may be* undertaken to reduce the proposed action’s adverse effects (citing Minn. Stat. § 116D.04, subd. 2a)).

32. MEPA is an information-gathering statute that provides for an EIS to ensure agencies *consider* important environmental issues rather than *dictating* substantive results, and does not mandate that mitigation discussed in an EIS be fully developed “standards” or “commitments.” *Minnesota Center for Environmental Advocacy (MCEA) v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 466-69 (Minn. 2002). Moreover, a governmental unit may change subsequent mitigation measures that an EIS identifies without violating MEPA. *Cf. Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 603 (E.D. Va. 1999) (citing *Robertson v. Methow Valley*, 490 U.S. 332, 353 (1989)) (“because it is only procedural and not substantive in nature, NEPA does not require agencies to implement any of the mitigation measures discussed in the FEIS”). Thus, MEPA, like MERA, neither creates substantive standards nor prohibits an agency from changing mitigation associated with a project.

#### **IV. MAC Does Not Have An Unequivocal Legal Duty To Implement A Five Decibel Noise Reduction Package**

33. A court may issue a writ of mandamus “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” Minn. Stat. § 586.01. A writ of mandamus may issue only if a statute or regulation imposes 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).

34. The cities have failed to specify the source of MAC’s alleged “mandatory duty” to provide the five decibel noise reduction package within the 60 – 64 DNL contours. *See*

Complaint, ¶¶ 91-95. MAC's enabling statute only grants MAC the discretion to examine mitigation to the 60 DNL contour and to balance noise mitigation with other competing interests, such as expanding the metropolitan area's full aviation potential in an economical manner. Minn. Stat. § 473.602(1). This is not the "unequivocal" or "specific duty" necessary for mandamus.

35. Moreover, given the scope of possible injunctive relief under MERA, the cities' mandamus claim is at best duplicative of the MERA claims and should be dismissed. *Cf. Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 379 (Minn. Ct. App. 2005) (upholding dismissal of duplicative claim for equitable relief).

### **ORDER**

As outlined in these Findings of Fact and Conclusions of Law, Plaintiffs City of Minneapolis, City of Richfield, City of Eagan, and Minneapolis Housing Authority have not demonstrated that Defendant Metropolitan Airports Commission engaged in conduct that pollutes, impairs, or destroys the natural resources of the state of Minnesota.

Accordingly, it is hereby

ORDERED that Defendant Metropolitan Airports Commission's Motion for Summary Judgment is hereby GRANTED; and Plaintiffs' Motion for Partial Summary Judgment is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Stephen C. Aldrich

Dated: January 2, 2007

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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

Plaintiffs,

Case No. 05-5474

v.

Case Type: Other Civil

Metropolitan Airports Commission,

**CERTIFICATE OF  
SERVICE**

Defendant,

and

Northwest Airlines,

Defendant-Intervenor.

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I hereby certify that a copy of Metropolitan Airports Commission's Proposed Findings of Fact, Conclusions of Law, and Order was served by placing the document in the United States mail, postage prepaid, this 2<sup>nd</sup> of January, 2007, addressed to:

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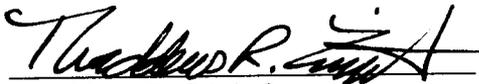
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