



U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

Office of the Chief Counsel

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Washington, DC 20591

NOV 30 2007

Tom Anderson  
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Dear Mr. Anderson:

This legal opinion is provided in response to the Consent Decree in State of Minnesota et al. v. Metropolitan Airports Commission (MAC) and Northwest Airlines (Cities Litigation) Case No. 277-CV-05-5474, District Court, County of Hennepin. The decree was entered into by the parties to the case and Hennepin County District Court (Aldrich, J.) October 19, 2007. We received a copy of the decree on October 23, 2007. This case concerns a noise mitigation program for residents of the area surrounding Minneapolis St. Paul International Airport (MSP) and alleged violations of the Minnesota Environmental Rights Act (MERA).

Section 8.8 of the Consent Decree provides that it "...shall become effective only if the Office of the Chief Counsel of the [FAA] advises the MAC in writing by November 15, 2007, that the elements of this Consent Decree are: (1) an appropriate use of airport revenue; (2) consistent with MAC's obligations to operate a self-sustaining airport system; and (3) consistent with MAC's obligations pursuant to grant agreements with the federal government. If the FAA does not provide such advice by November 30, 2007, this Consent Decree shall be null and void."

By letter dated June 7, 2007, the MAC asked the FAA to review and approve an earlier settlement proposal in a class action case, Wiencke, et al. v. MAC, that concerns the same matter and is pending before the same judge. We understand that settlement in the *Wiencke* case consistent with the Consent Decree in the above-referenced case is the other condition precedent to finalizing that decree. The provisions of the Consent Decree supersede the prior settlement proposal and letter request.

At the outset we emphasize that as a matter of federal law the FAA necessarily plays a very limited role in such circumstances. At the request of an airport sponsor, FAA reviews proposed settlements for consistency with federal law and to insure that they comply with federal grant obligations. However, the agency does not approve or disapprove proposed settlement agreements in litigation to which it is not a party. In this instance the FAA is providing legal advice in furtherance of the Consent Decree.

The consent decree specifically seeks advice regarding use of airport revenue; however we understand that in the future MAC may be seeking further advice regarding approval to use Passenger Facility Charges (PFCs). This response deals primarily with airport revenue. The possible future use of PFCs and significant constraints under the Airport Improvement Program

(AIP) are discussed briefly. This opinion does not reach the issue of whether there are local land use compatibility guidelines, which potentially affects PFC and AIP funding.

## I. Noise Mitigation

### A. Use of Airport Revenue

FAA recognizes that defending litigation can be a significant expense of its own, and that there will always be a benefit to settling litigation at its “nuisance value” to avoid unnecessary litigation expenses. This is an acceptable use of airport revenue. On the other hand, noise litigation may not be settled at any amount with airport revenue simply because the airport has been sued on the basis that a settlement is the cost of doing business as an airport. If the lawsuit asks for payment for expenses not related to the operation of the airport, then the airport has an obligation to contest the claim on its revenues for these expenses. Additionally, the airport must demonstrate to the satisfaction of the FAA that it has shown diligence in its defense of the litigation, which in this instance it has.

In the Cities litigation, the District Court has issued an Order for Partial Summary Judgment establishing the airport operator’s noise mitigation obligations under state law. That decision essentially found that MAC established a substantive and enforceable environmental quality standard for mitigation that it was required to fulfill as part of its project to build a new runway at MSP. The costs of the noise mitigation under the Consent Decree are less than what the District Court would apparently order MAC to provide if the case were to proceed to a final judgment.

While it is probable that some of the homes that would benefit from the settlement are currently below an interior level of DNL 45 dB and technically do not require any mitigation, the mitigation package is airport-related. It is airport-related because it arises from MAC’s construction of a new runway at MSP and MAC’s earlier representations and commitments that led other governmental entities and the public to rely on the mitigation measures in the 1996 Noise Mitigation Program and the 1998 Final Environmental Impact Statement to permit the new runway to be constructed.

The District Court reasoned that MAC had a legal obligation under the MERA to provide the 5 decibel noise mitigation package to homes that were in the 60-64 DNL contour under MERA even if some technically no longer require mitigation, because MAC repeatedly committed to this mitigation from 1996 through 2001 but “[o]n December 17, 2001, the MAC ‘rescinded its commitment...’ MAC, Official Statement re: the Series 14 Bonds at 68-69 (October 10, 2001).” Findings of Fact, Conclusions of Law, and Order for Partial Summary Judgment, State of Minnesota v Metropolitan Airports Commission, dated January 25, 2007, Finding of Fact 60, page 10.

In the face of a state court decision and order that will, if executed through final judgment, require MAC to fulfill its commitment and mitigate homes in the DNL 60-64 dB contour area, MAC’s settlement of the case in a manner that doesn’t exceed the cost of what the court would order is reasonable.

By analogy to the justification required for AIP and PFC funding, airport revenues normally should not be used to provide sound insulation for homes that would not have qualified. This could result either from the lack of a 5 decibel reduction considering their respective noise exposure levels or the lack of interior noise levels greater than DNL 45 dB. Sound insulation in these circumstances would represent a windfall for homeowners and would have no legitimate airport purpose or relation to airport impacts.

However, by analogy to the AIP, these qualifying criteria should be reasonably applied. Due to the level of thermal insulation in most residential construction in the Minneapolis area, some latitude for interior noise level measurement has historically been afforded in administering the MAC noise mitigation program. Based on the factors noted above, we have concluded that the Consent Decree reflects a reasonable application of the criteria here. In any event, in these circumstances equitable exceptions are warranted to permit use of airport revenues as proposed in the Consent Decree.

As we understand the facts presented in the Consent Decree and MAC's earlier letter of June 7, 2007, MAC proposes to use airport revenues to fund the Consent Decree and the settlement of the *Wienke* case using substantially the same terms to mitigate residences within the 2007 Mitigated NEM and in certain specific limited defined instances between the 2005 and 2007 Mitigated NEM.

This opinion is premised upon noise mitigation projects for residences covered by the Consent Decree and a settlement based upon consistent terms in the *Weinke* case. The FAA considers this an appropriate use of airport revenue. Payment of costs to mitigate noise for other residences would not constitute a permissible use of airport revenue.

#### B. Passenger Facility Charge (PFC) Eligibility

The eligibility criteria for funding noise mitigation projects under the PFC program are identical to those under the Airport Improvement Program (AIP), with two exceptions. First, a PFC funded project need not be included in a noise compatibility program approved by the FAA under 49 U.S.C. §47504, as implemented by 14 C.F.R. Part 150 to be eligible. It must only be the type of measure that would qualify for approval if the airport sponsor were to submit it under Part 150. Second, PFC financing need not be affected by FAA's Final Policy on Part 150 Approval of Noise Mitigation Measures.<sup>1</sup>

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<sup>1</sup> FAA's Final Policy on Part 150 Approval of Noise Mitigation Measures establishes a distinction between remedial and preventive noise mitigation measures recommended by an airport sponsor and submitted to the FAA for approval under Part 150. As of the effective date of the policy, October 1, 1998, the FAA approves under Part 150 only remedial noise mitigation measures for existing noncompatible development and only preventive noise mitigation measures in areas of potential new noncompatible development. The FAA will not approve or use AIP to fund measures like soundproofing for new residential development that occurs in the vicinity of airports after the effective date of the policy. This policy does not need to affect financing noise projects with PFC revenue because part 150 approval is not required for such projects. PFC funding is only affected to the extent that an airport sponsor chooses to rely on an approved part 150 program for FAA's approval to use PFC funds. FAA's Final

Section 189 of Vision 100 prohibited the FAA from approving measures to mitigate noise in Fiscal Years 2004 through 2007 that contemplated expenditure of AIP funds in areas experiencing cumulative noise exposure levels below DNL 65 dB. However our office has determined that Congress did not intend to repeal other sources of funding for noise mitigation projects by implication. Therefore Section 189 did not preclude the use of airport revenues or PFC funding outside DNL 65 dB.<sup>2</sup>

Subject to resolution of the issue relating to local land use compatibility standards, noise mitigation projects in the Consent Decree would qualify for PFC funding provided MAC shows that: (1) the noise contours relied upon are a reasonable representation of current and/or forecast conditions at Minneapolis St. Paul International Airport and (2) the measures qualify for FAA approval under 14 CFR Part 150. Just as for AIP eligibility, airport sponsors applying for approval to use PFC funds must demonstrate that the noise contours upon which the application is based are reasonably representative of current or forecast conditions at the airport. FAA Order 5100.38C, paragraph 801. Based upon the information available to us, the Consent Decree includes one noise contour, the 2007 Mitigated Noise Exposure Map (NEM), which may qualify as a reasonable representation of current conditions at MSP. However, this is not true of the other noise contour in the Consent Decree, the 2005 Mitigated NEM. The additional residences within the larger 60 to 64 DNL db contour area on the 2005 Mitigated NEM are not likely to qualify for PFC funding.

### C. AIP Eligibility, Justification, and Availability

Setting aside the local land use compatibility guidelines issue, if MAC updates its airport noise compatibility program to include the Consent Decree then the elements described above would also technically be eligible for AIP funding.<sup>3</sup> As a practical matter, however, this is of little import. The chances that AIP funds would be available considering national funding priorities are very slim. Consistent with congressional intent, the FAA allocates AIP discretionary funds

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Policy on Part 150 Approval of Noise Mitigation Measures: Effect on the Use of Federal Grants For Noise Mitigation Projects, 63 Fed. Reg. 16409, April 3, 1998.

<sup>2</sup> Vision 100 expired in September 2007. At this time, versions of FAA reauthorization legislation to succeed Vision 100 are pending in both the Senate and the House of Representatives, but neither version includes any provisions similar to Section 189.

<sup>3</sup> To justify sound insulation projects, typically initial interior noise levels would have to be greater than DNL 45 dB, and the noise insulation package would have to achieve a 5 decibel (dB) structural reduction. The purpose of noise insulation projects is to reduce interior noise levels by a minimum of 5 dB, depending upon the noise contour in which the structure is located. Table 1 of 14 CFR Part 150 provides the noise level reduction standards (NLR) that should be met by noise insulation to accomplish a 45 dB interior NLR. FAA Order 5100.38C, paragraph 812(b), explains the justification for noise insulation and the underlying reasons. However, these criteria are reasonably applied in approving grants to fund noise mitigation projects. For example, where noise insulation is proposed for a large number of structures and where a standard package of improvements will be included, eligibility may be extended to an incidental number of homes within the project area even though they would not qualify if considered individually. See FAA Order 5100.38C, paragraphs 810(a) and 812(a)(3).

for noise mitigation at a national level, to address the most severely impacted areas first and in accordance with our priority system. FAA Order 5100.39A. Even eligible projects in areas below DNL 65 dB are assigned a relatively low AIP priority ranking because there are many areas nationwide still requiring mitigation inside the DNL 65 dB contour. Therefore, it is highly unlikely that the FAA will be in a position in the foreseeable future to fund residential noise mitigation beyond the DNL 65 dB contour.

## 2. Legal and Litigation Costs

The Consent Decree provides for MAC to pay approximately \$2.25 million in attorneys' fees and costs. The airport may use airport revenues to pay for these costs for the reasons explained above in the discussion of airport revenue use. The airport may also use airport revenue to pay for reasonable attorneys' fees and costs in the *Wienke* settlement.

With respect to AIP eligibility generally, legal fees and related litigation costs necessary to accomplish an AIP project are technically eligible and allowable for reimbursement under the AIP subject to our determination of their reasonableness. FAA Order 5100.38C paragraph 310.g., Legal Fees and Litigation Costs. Here, the Consent Decree is not necessary to accomplish an AIP project. That is, the legal fees, litigation costs, and settlements were not necessary to the accomplishment of the original runway project since the runway was built without the need for any of them. Additionally, should the noise mitigation project in the Consent Decree become AIP eligible, as explained above, the resulting sound insulation project would be part of MAC's Noise Compatibility Program, that the airport could have done on its own without litigation or settlement. The legal fees and litigation costs would not be necessary to the accomplishment of that project either. Therefore, neither AIP nor PFC funds may be used.

## 3. Consistency with Federal Grant Obligations

For the reasons stated above we find that the costs and terms of the Consent Decree are reasonable in amount and consistent with MAC's obligation to operate a self-sustaining airport system, and MAC's other obligations under its grant agreements with the federal government.

If we can provide any further assistance, please let us know.

Sincerely,



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