

**STATE OF MINNESOTA**

**COUNTY OF HENNEPIN**

**DISTRICT COURT**

**FOURTH JUDICIAL DISTRICT**

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**STATE OF MINNESOTA BY THE  
CITY OF MINNEAPOLIS, et al.,**

**Plaintiffs,**

**Case No. 27-CV-05-5474**

**v.**

**METROPOLITAN AIRPORTS  
COMMISSION,**

**Defendant, and**

**NORTHWEST AIRLINES,**

**Defendant-Intervenor.**

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... iii

**GLOSSARY OF ACRONYMS** .....v

**LIST OF EXHIBITS**..... vi, vii

**INTRODUCTION**.....1

**STATEMENT OF THE ISSUES INVOLVED THAT ARE GROUNDS FOR MOTION FOR SUMMARY JUDGMENT** .....2

**STATEMENT IDENTIFYING ALL MATERIALS THAT COMPRISE THE RECORD** ...2

**RECITAL OF UNDISPUTED FACTS [Not subject to 35-page limit per Rule 115.03]** .....3

    A. Origins of MAC Noise Insulation Program .....3

    B. The Dual-Track Process and Expansion of MSP .....5

    C. 1996 MSP Noise Mitigation Program.....8

    D. 1998 Final Environmental Impact Statement .....14

    E. MAC’s Completion of the MEPA Process .....16

    F. Community Reliance on MAC DNL 60-65 Noise Insulation Commitments.....18

    G. MAC’s Public Interpretation of the Noise Insulation Provisions .....19

    H. 1999 Airline Lease Provisions .....20

    I. MAC’s Undoing of the DNL 60-65 Noise Program.....21

**I. STANDARDS FOR SUMMARY JUDGMENT**.....23

    A. Standard for Summary Judgment.....23

    B. The Meaning of the 1996 Noise Mitigation Program and the 1998 FEIS Must Be Based on Their Text and the Minutes of the Meetings Leading to their Promulgation .....23

**II. MERA PROVIDES A BROAD AND INCLUSIVE REMEDY FOR THE VIOLATION OF ENVIRONMENTAL STANDARDS AND LIMITATIONS**.....24

    A. The Legislature, Through MERA, Provided a Mechanism for the Enforcement of An Environmental Standard Such as That at Issue.....24

        1. MERA’s Provision of a Civil Remedy for Violations of Environmental Standards and Limitations Is Sweeping ..... 24

        2. MERA Requires a Broad Reading of “Environmental Standard” and “Limitation”.. 25

            a) *Judicial Definition of “Standard” Has Been Inclusive* ..... 26

            b) *The Frequent Reference to Comparable Noise Insulation Provisions as “Standards”* ..... 27

            c) *Minnesota Courts Have Stressed the Need to Read MERA in an Inclusive Way*. 28

**III. THE MAC UNAMBIGUOUSLY COMMITTED TO PROVIDE MITIGATION TO THE DNL 60-64 DECIBEL CONTOURS IN THE FORM OF THE SAME FIVE-DECIBEL REDUCTION PACKAGE PROVIDED IN THE DNL 65 AND GREATER CONTOURS**  
**30**

- A. MAC Committed to Provide Sound Insulation in the DNL 60-64 Contours .....30
  - 1. 1996 MSP Noise Mitigation Program..... 30
  - 2. 1998 Final Environmental Impact Statement ..... 31
- B. MAC Unambiguously Committed to Provide the Five-Decibel Package .....32
  - 1. The Plain Meaning of MAC’s Commitment Was to Extend the Five-Decibel Noise Reduction Package to the DNL 60-65 Contours..... 32
    - a) *The 1996 Mitigation Program and the 1998 FEIS Unambiguously Defined the Program To Be Expanded*..... 33
    - b) *MAC’s Testimony To the EQB Confirms MAC’s Unambiguous Intent To Supply Full Insulation*..... 36

**IV. THE MAC’S COMMITMENT TO PROVIDE SOUND INSULATION IS ENFORCEABLE AS AN ENVIRONMENTAL STANDARD OR LIMITATION PURSUANT TO MERA**.....**38**

- A. MAC has a Mandatory Duty to Minimize the Impacts of Noise.....38
  - 1. MAC’s Enabling Laws Require It to Minimize Noise Impacts and Provide Mitigation ..... 39
  - 2. MERA and MEPA Create Independent Substantive Standards Binding on MAC .... 40
- B. MAC’s Mitigation Plan Would Violate the Environmental Standard .....43
- C. The Circumstances in Which MAC Provided the Mitigation Commitments Make It Unreasonable To Construe Them as Anything Other Than Binding.....44

**CONCLUSION** .....**45**

## TABLE OF AUTHORITIES

### **Cases**

<u>Alevizos v. Metro. Airports Comm’n of Minneapolis and St. Paul</u> 216 N.W.2d 651 (Minn. 1974).....	25
<u>Amaral v. St. Cloud Hosp.</u> 598 N.W.2d 379 (Minn. 1999).....	43
<u>Bangs v. Town of Wells</u> 760 A.2d 632 (Me. 2000).....	33
<u>Borough of Kenilworth v. Dep’t of Transp.</u> 376 A.2d 1266 (N.J. Super. Ct. App. Div. 1977).....	27
<u>Citizens for a Better Env’t. v. Deukmejian</u> 731 F.Supp. 1448 (N.D. Cal. 1990).....	27
<u>Clark v. Crossroads Center</u> 172 N.W.2d 560 (Minn. 1969).....	23
<u>Committee for Environmentally Sound Development., Inc. v. City of New York</u> 737 N.Y.S.D.2d 792 (N.Y. Sup. Ct. 2001) .....	43
<u>Communities for a Better Env’t v. Cenco Refining Co.</u> 180 F.Supp.2d 1062 (C.D. Cal. 2001) .....	27
<u>Coon Creek Watershed Dist. v. Minn. Env’tl. Quality Bd.</u> 315 N.W.2d 604 (Minn. 1982).....	42
<u>County of Freeborn by Tuveson v. Bryson</u> 210 N.W.2d 290 (Minn. 1973).....	29
<u>County of Freeborn by Tuveson v. Bryson</u> 243 N.W.2d 316 (Minn. 1976).....	28, 29
<u>Drabik v. Martz</u> 451 N.W.2d 893 (Minn. App. 1990).....	29
<u>Engine Mfrs. Assoc. v. South Coast Air Quality Mgmt. Dist.</u> 541 U.S. 246 (2004).....	26
<u>In re Greater Morrison Sanitary Landfill</u> 435 N.W.2d 92 (Minn. App. 1989).....	29
<u>In re Indep. Spent Fuel Storage Installation</u> 501 N.W.2d 638 (Minn. App. 1993).....	25
<u>In re the Contested Case of REM, Inc.</u> 382 N.W.2d 539 (Minn. Ct. App. 1986).....	23, 38
<u>Louisiana Chem. Ass’n v. Bingham</u> 657 F.2d 777 (5 <sup>th</sup> Cir. 1981) .....	26
<u>McGuire v. County of Scott</u> 525 N.W.2d 583 (Minn. App. 1995).....	27
<u>Miklas v. Parrott</u> 684 N.W.2d 458 (Minn. 2004).....	29
<u>Minn. Pub. Interest Research Group v. White Bear Rod and Gun Club</u> 257 N.W.2d 762 (Minn. 1977).....	28, 41
<u>Minn. Pub. Lobby v. MAC</u> 520 N.W.2d 388 (Minn. 1994).....	40
<u>Minnesota Center for Env’tl Advocacy v. Minnesota Pollution Control Agency</u> 644 N.W.2d 457 (Minn. 2002).....	42, 43

<u>Minnesota Pub. Interest Research Group v. Minnesota Env't. Quality Council</u> 237 N.W.2d 375 (Minn. 1975).....	41, 42
<u>Nelson v. Productive Alternatives, Inc.</u> 715 N.W.2d 452 (Minn. 2006).....	36
<u>People for Env'tl. Enlightenment and Responsibility (PEER), Inc v. Minn. Env'tl. Quality Council</u> 266 N.W.2d 858 (Minn. 1978).....	25, 40, 41
<u>Reserve Mining Co. v. Herbst</u> 256 N.W.2d 808 (Minn. 1977).....	25
<u>State v. Indus. Tool &amp; Die Works, Inc.</u> 21 N.W.2d 31 (Minn. 1945).....	29
<u>Workplace Health and Safety Council v. Reich</u> 56 F.3d 1465 (D.C. Cir. 1995).....	26
<b>Statutes</b>	
42 U.S.C. § 7543(a) .....	26
42 U.S.C. § 7604.....	26
Minn. Stat. §§ 116D.02, subd. 1 .....	41
Minn. Stat. §§ 116B.02, subd. 5 .....	1, 24, 29
Minn. Stat. §§ 116B.03, subd. 1 .....	1, 24
Minn. Stat. §§ 116D.04, subd. 2 .....	41
Minn. Stat. §§ 116D.04, subd.6 .....	41, 43
Minn. Stat. §§ 473.601.....	40
Minn. Stat. §§ 473.602.....	39, 40
Minn. Stat. §§ 473.608, subd. 25 .....	40
Minn. Stat. §§ 473.608, subd. 29 .....	18, 39
Minn. Stat. §§ 473.616.....	5
Minn. Stat. §§ 473.618.....	5
Minn. Stat. §§ 473.655.....	39, 40
Minn. Stat. §§ 473.661, subd. 4(f).....	8, 39
Minn. Stat. §§ 645.16.....	43
<b>Other Authorities</b>	
City of Minneapolis Resolution 2003R-182 (May 2, 2003).....	19
City of Richfield Resolution No. 9336 (May 13, 2003) .....	19
Order Denying Motion to Dismiss.....	24, 30, 40, 45
Pls.' Mem. of Law in Resp. to Def. MAC's Mot. to Dismiss.....	28
Webster's II New Riverside Dictionary (1996).....	33
Webster's Second New Int'l Dictionary (1945) .....	26
Webster's Third New Int'l Dictionary (1976) .....	31, 33
<b>Regulations</b>	
Minn.R.Civ.P. 56.03 .....	23

## GLOSSARY OF ACRONYMS

CAA – Clean Air Act  
DEIS – Draft Environmental Impact Statement  
DNL or LDN – Day-Night Level  
EQB – Environmental Quality Board  
EPA – United States Environmental Protection Agency  
FAA – Federal Aviation Administration  
FEIS – Final Environmental Impact Statement  
HUD – United States Department of Housing and Urban Development  
MAC – Metropolitan Airports Commission  
MASAC – Metropolitan Aircraft Sound Abatement Council  
MEPA – Minnesota Environmental Policy Act  
MERA – Minnesota Environmental Rights Act  
MSP – Minneapolis–St. Paul International Airport  
NEPA – National Environmental Policy Act  
NJERA – New Jersey Environmental Rights Act  
NLR – Noise Level Reduction  
NWA – Northwest Airlines, Inc.  
PFC – Passenger Facility Charge  
SIP – Sound Insulation Program

**LIST OF EXHIBITS**

<b>Exhibit #</b>	<b>Description</b>	<b>Date</b>
1	MAC Official Statement Re: Sales and Delivery of the Series 2005 Bonds	May 26, 2005
2	Part 150 Update	Nov. 2004
3	Aircraft Noise Research Project	June 1987
4	1998 FEIS	May 1998
5	Draft EIS	Undated
6	Memo from N. Finney to Dual Track Task Force	March 7, 1996
7	City of Minneapolis Resolution 96R-052	March 14, 1996
8	City of Egan Dual Track Planning Position	Dec. 19, 1995
9	MAC & Metropolitan Council Report to the Legislature	March 1996
10	MSP Noise Mitigation Program	Nov. 1996
11	MAC Meeting Summary Part 150 Land Use Compatibility Design	May 7, 1996
12	MAC MSP Mitigation Committee Meeting Materials	May 16, 1996
13	Minn. Advisory Council Letter to Legislature	Feb. 10, 1997
14	1998 Comments by City of Minneapolis on FEIS	June 12, 1998
15	Final Record of Decision	Sept. 1998
16	Letter from M. Sullivan to N. Finney	March 23, 1998
17	Richfield Memo Re: Adequacy of FEIS	Oct. 19, 1998
18	1998 MAC Report to MN EQB	Oct. 1998
19	1998 MAC Supplemental Info to MN EQB	Nov. 10, 1998
20	MAC Press Release, "Richfield's Tactics"	Nov. 16, 1998
21	Letter from J. Himle to M. Kirsch	Oct. 29, 1998
22	MN EQB Findings of Fact	Nov. 23, 1998
23	Minneapolis-MAC Contract Pertaining to Limits on Construction	Nov. 1998
24	Richfield-MAC Noise Mitigation Agreement	Dec. 18, 1998
25	Richfield Resolution No. 9336	May 13, 2003
26	Minneapolis Resolution 2003R-182	May 2, 2003
27	Letter from P. Geagan and C. Thorkildson	July 14, 2004
28	Letter from J. Hamiel to J. Ranum	Feb. 10, 1997
29	Letter from J. Hamiel to Richfield Residents	May 13, 1998
30	Letter From J. Hamiel to S. Sayles Belton	Aug. 31, 1999
31	EA for Revised Air Traffic Control Procedures Off of Runway 30L-30R	June 25, 1999
32	MAC Airline Operating Agreement	Jan 1, 1999
33	N. Finney Deposition	Oct. 18 & 26, 2006
34	MAC Official Statement Re: Sale and Delivery of the Series 2001 Bonds	May 17, 2001
35	MAC Official Statement Re: Sale and Delivery of the Series 14 Bonds	Oct. 10, 2001

<b>Exhibit #</b>	<b>Description</b>	<b>Date</b>
36	MAC Official Statement Re: Sale and Delivery of the Series 15 Bonds	Jan. 8, 2002
37	Minutes of April 15, 2002 MAC Meeting	April 15, 2002
38	Minutes of May 20, 2002 MAC Meeting	May 20, 2002
39	Memo from N. Finney re: Homeowner Co-Pay Loan Program	Dec. 30, 2004
40	2030 Transportation Policy Plan	Dec. 15, 2004
41	Minutes of August 9, 1996 MSP Mitigation Committee Meeting	Aug. 9, 1996
42	Metropolitan Council Aviation Policy Plan	Dec. 1996
43	MAC Press Release, "MAC's Statement on EQB Delay"	Oct. 26, 1998
44	FAA Guidelines for the Sound Insulation of Residences	Oct. 1992
45	P. Dmytrenko Deposition	Oct. 30, 2006
46	Amendment to Airline Operating Agreement	March 29, 2002

## INTRODUCTION

Plaintiffs City of Minneapolis, City of Eagan, City of Richfield and the Minneapolis Public Housing Authority (“Communities”) file this memorandum of law in support of their motion for partial summary judgment. Summary judgment is appropriate with regard to Count II of the Complaint, which seeks an injunction pursuant to the Minnesota Environmental Rights Act (“MERA”) to enjoin the Metropolitan Airports Commission’s (“MAC”) violation of environmental standards and limitations.<sup>1</sup> MERA provides a remedy for the violation of any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit of any instrumentality or subdivision of the State. Minn. Stat. §§ 116B.03, subd. 1, 116B.02, subd. 5.

Count II is appropriate for summary judgment because MAC’s own documents demonstrate that MAC created a binding standard or limitation for MERA purposes by committing to provide five decibels of noise insulation to homes in the day-night level (“DNL”) 60-64 contours.<sup>2</sup> MAC did so to secure approval for, and avoid time-consuming challenges to, the decision to retain the Minneapolis-St. Paul International Airport (“MSP” or “Airport”) at its current site and engage in almost \$3 billion worth of expansion, now largely completed. These standards and limitations must be construed based on the documents in front of MAC when it made its decision, as well as the four corners of MAC’s 1996 Noise Mitigation Program and 1998 Final Environmental Impact Statement (“FEIS”). These sources can only be read to show that MAC created a standard to provide the five-decibel package at no cost to homeowners.

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<sup>1</sup> As a result of factual disputes between the parties regarding the noise levels in the communities surrounding MSP, Plaintiffs are not seeking summary judgment relating to Count I of the Complaint, which alleges that the MAC is impairing the natural resource of quietude.

<sup>2</sup> DNL is a noise measure that averages noise levels throughout the day and applies a 10-decibel “penalty” to noise levels occurring between 10 p.m. and 7 a.m. The contours at issue here are the 60-64, inclusive, although in many cases these are referred to in the historic documents as the 60-65 DNL contours. While the form of the reference varies, there is no dispute between the parties that the contours at issue here are the 60-64, inclusive.

The commitments made by the MAC have multiple indicia that they fall within the category of environmental quality standards or limitations under MERA: (1) they were implemented through formal action of the MAC; (2) they are couched in mandatory and specific terms; (3) they were created in response to statutory obligations to minimize impact; (4) they were committed to induce reliance by other government entities and the public; and (5) they take the form of the classic “if a threshold (60dB) is exceeded, remedy (5dB package) will be provided” standard.

The primary dispute between the Communities and MAC on Count II is not whether MAC should provide mitigation in the DNL 60-64 contours, but instead whether MAC committed to provide, at no cost, the five-decibel relief as opposed to MAC’s currently proposed air-conditioning-only package with a homeowner copayment of up to half of the cost. The 1996 MSP Noise Mitigation Program and 1998 FEIS are clear on their face that MAC specified the five-decibel reduction, a commitment MAC made in order to secure the approvals to expand MSP at its current location.

The Communities seek an injunction requiring MAC to comply with its standard to supply a five-decibel reduction package to homes in the DNL 60-64 contours.

**STATEMENT OF THE ISSUES INVOLVED THAT ARE GROUNDS FOR MOTION  
FOR SUMMARY JUDGMENT**

Whether MAC has violated the Minnesota Environmental Rights Act (MERA) by failing to comply with the noise mitigation standard that it established for homes in the 60-64 DNL contours surrounding the Minneapolis-St. Paul Airport.

**STATEMENT IDENTIFYING ALL MATERIALS THAT COMPRISE THE RECORD**

The documents comprising the record upon which this motion is made are attached as exhibits, an index to which appears at pages vi and vii.

**RECITAL OF UNDISPUTED FACTS [Not subject to 35-page limit per Rule 115.03]**

The following undisputed facts support the conclusion that MAC must minimize its noise impacts and that it intended its noise mitigation commitment to be binding.

**A. Origins of MAC Noise Insulation Program**

The MAC operates MSP, which has about half a million aircraft operations per year. MAC, Official Statement Re: the Series 2005 Bonds at 51 (May 26, 2005), Ex. 1; N. Finney Depo. at 12, Ex. 33. These aircraft operations using MSP create noise that affects the communities surrounding MSP—noise that it falls to MAC to abate. In 1996, MAC estimated that there are 6,357 homes within the 60-64 DNL contours, the majority in Minneapolis. MSP Noise Mitigation Program at 30, 33, Ex. 10.

MAC and the City of Minneapolis began to study noise insulation for homes near MSP in 1984. See MAC and City of Minneapolis, Aircraft Noise Research Project at 1 (June 1987), Ex. 3. The initial project involved testing interior noise levels and different sound insulation for 15 homes in South Minneapolis exposed to noise from MSP. Id. at 1-2.

The joint study found that “[a]ircraft noise is a major problem for residents living near the Airport.” Id. at 1. “People experienced problems with aircraft noise while living in noise contours of about 60 to 80 [DNL].” Id. at 28.

The study also considered the challenge of determining an appropriate standard for interior noise levels in the environs of the Airport:

Trying to define an acceptable interior noise level is a difficult and subjective task. The US Department of Housing and Urban Development in its noise regulations establishes a standard of 45 [DNL] as the maximum allowable interior noise level. The Metropolitan Council of the Twin Cities Area in their “Guidelines for Land Use Compatibility with Aircraft Noise” set a standard of 45 dBA as the maximum interior sound level.

Id. at 11.

Previously developed noise level standards may not be applicable for residents near the airport. For example, HUD has defined an interior noise level of 45 [DNL] as the maximum permissible for residential housing under their programs. This standard is the maximum noise level which the federal government will allow low income tenants to be subjected to in subsidized housing. It is not a level they would prefer. It is not necessarily a level that residents in a neighborhood near the airport would find acceptable.

Id. at 25.

The study found that homes near MSP already provided higher levels of noise level reduction than other areas of the country due to Minnesota's climate. "A significant finding of the research project was the high level of noise reduction achieved by the existing housing stock."

Id. at 2. The study found that the average South Minneapolis home had noise level reductions of 29.1 decibels with windows shut. Id. at 2, 15.

Nonetheless, the study considered future noise insulation measures for the DNL 65 and noisier contours. The study identified air conditioning and ventilation as one necessary strategy to reduce noise exposures. Id. at 24. "All houses need to have the capability of keeping storm and prime windows closed in order to be effective. This suggests that air conditioning and/or baffled through-the-wall venting would need to be included as *part of any noise attenuation program.*" Id. at 16 (emphasis added).

However, the report also evaluated the other elements of noise insulation. "Window replacement or upgrade is a major component of all aircraft noise attenuation projects throughout the country." Id. at 12. "Windows are the most common weak link in a structure's noise attenuation ability and window replacement is the most common major noise abatement strategy." Id. at 19.

After the completion of the initial research project in 1987, MAC developed another demonstration-level sound insulation program for the airport in 1992, which it implemented in

143 homes through MAC's Residential Sound Insulation Pilot Program. Under the Pilot Program, MAC established a noise reduction level goal of 10-15 decibels greater than base home noise level reduction for homes in the DNL contours greater than 75, 5-10 decibels of noise level reduction in the DNL 70-74 contours, and 5 decibels in the 65-69 DNL contours. See Part 150 Study Update at 8-10 – 8-11, Ex. 2. For all of these noise zones, the noise level reductions would be achieved by providing at least “window and door treatments, wall and attic insulation, and central air conditioning.” Id. at 8-10. MAC implemented a \$25,000 per home limit on this phase of the sound insulation modifications. Id.

After its experience with the pilot program, MAC expanded the program to a greater scale and made some adjustments to the sound insulation program. Id. at 8-11, 8-12. One step taken by the MAC was the elimination of the differential noise level reduction goals for the different noise contours and the establishment of a universal “5-Decibel Reduction Package” for all homes in the DNL 65-75 contours. Id. at 8-12. In addition, the MAC eliminated the \$25,000 modification per home limit due to larger homes and higher construction costs. Id.

#### **B. The Dual-Track Process and Expansion of MSP**

In the late 1980s, the Legislature directed the MAC to evaluate whether to keep and expand MSP at its current location or move it to a new location. See Minn. Stat. §§ 473.616, 473.618. MAC conducted this assessment along with the Metropolitan Council and others through the Dual Track Process.

In order for the MAC and the Federal Aviation Administration (“FAA”) to meet their independent obligations under the Minnesota Environmental Policy Act (“MEPA”) and the National Environmental Policy Act (“NEPA”), MAC and FAA agreed to prepare joint Draft and Final Environmental Impact Statements (EIS's) for the Dual Track Process. Final EIS (“FEIS”) at i-ii, Ex. 4. The Draft EIS (“DEIS”) was released in December, 1995. However, MAC also

entered into an agreement with the Minnesota Environmental Quality Board (“EQB”) in 1992 to have EQB determine the adequacy of the FEIS for MEPA purposes. FAA was responsible for issuing a Record of Decision relating to NEPA compliance.

In the DEIS, the MAC and FAA evaluated several airport alternatives, including an expanded MSP and a new airport in Dakota County. The DEIS concluded that retaining MSP at its current location would expose 7,445 more persons to high levels of noise than moving the Airport to a new rural location. Dual Track Airport Planning Process Draft Environmental Impact Statement at iv, Ex. 5. The DEIS evaluated noise impacts out to the 65 DNL noise contour, providing counts of homes, residents and noise-sensitive institutions. Id. at vii.

As mitigation, the DEIS proposed to provide sound insulation to all homes within the DNL 65 contour. Id. at V-142. This was a commitment to continue with an existing sound insulation program that had already begun to provide such insulation to the most noise-impacted homes. Part 150 Study Update at 8-10–8-12, Ex. 2. The DEIS included no provisions for mitigation within the DNL 60-65 contours.

Nearby communities and residents commented on the absence of both noise mitigation and consideration of impacts in the DNL 60-65 contours. MAC identified the lack of mitigation in the DNL 60-65 contours as one of the categories of “major comments” on the DEIS. Memo from N. Finney, MAC, to Dual Track Task Force re: Comments on the DEIS for the Dual Track Airport Planning Process at 2, 11, 13, 15 (March 7, 1996), Ex.6. Local governments such as Dakota County and cities of Minneapolis, Bloomington, Eagan and Mendota Heights all commented that additional mitigation was necessary to address noise impacts associated with airport operations. FEIS at I-87, Ex. 4 (Bloomington comments on DEIS) (“Appropriate Noise Mitigation is perhaps the preeminent issue of the MSP Development and No Action alternatives. . . .

The area eligible for noise mitigation needs to be expanded beyond the forecast 2005 LDN 65 contour.”); *Id.* at I-91 (Eagan Comments on DEIS) (“the City of Eagan believes that the airport should only be expanded at the current location if: . . . 2. Noise abatement funds and tools sufficient to meet the needs of the true noise impact area are provided as a part of the Dual Track decision. . . . Without these conditions, the City of Eagan cannot support expansion of the airport at its current site.”); *Id.* at I-95 (Eagan Comments on DEIS) (“[S]ound insulation improvements should be made available to all residents within one mile of the 60 LDN contour . . . .”); *Id.* at I-111 (similar Minneapolis comments); see also *id.* at I-3, I-7.

Some jurisdictions explicitly stated that their support to the retention of the MSP location was contingent on providing adequate noise insulation at least to the DNL 60 contour. For example, the Minneapolis City Council passed a resolution in March 1996 providing that the City would not oppose the expansion of MSP at its current location, conditioned on “Development of a comprehensive community mitigation plan for the area surrounding MSP. This must include a monetary commitment by MAC to insulate homes within the [DNL] 60 contour.” Minneapolis Resolution 96R-052 (March 1996), Ex. 7. See also Eagan Dual Track Airport Planning Position at 1 (Dec. 19, 1995), Ex. 8; FEIS at I-91 (Eagan Comments on DEIS) (“Without these conditions, the City of Eagan cannot support expansion at the airport at its current site.”), Ex. 4.

In March 1996, the MAC and Metropolitan Council reached closure on MAC’s proposed recommendations and issued a report to the Legislature. MAC and Metropolitan Council, Dual Track Planning Process Report to the Legislature (March 1996), Ex.9. In this report, MAC recommended retaining MSP at its current location and expanding it with a new runway and other infrastructure. *Id.* at 8-1. The report concluded that “[t]he cost for a new airport, considering

construction (including inflation) and financing costs, is \$2.2 billion greater than for expansion of MSP.” Id. at xix.

The report acknowledged that expanding the airport at the current location would cause greater numbers of people to be exposed to high noise levels. Id. at 6-20. It predicted that in 2005, 22,030 persons would be in the DNL 60-65 contour for the existing site, versus 560 for a new airport. Id. The report stated that:

The MAC is committed to providing the appropriate level of mitigation for adverse environmental impacts, as required by applicable environmental laws and regulations. This is particularly true for noise impacts, where additional reports to the Legislature are required following the MAC/Metropolitan Council recommendation re future airport development.

Id. at 6-18.

In April 1996, the Legislature passed a bill to end the Dual Track Process, directing MAC to develop a noise mitigation plan within 180 days of its long-term planning report:

Within 180 days ... the commission, 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 Minneapolis-St. Paul International Airport and in the neighboring communities. The recommendation shall examine mitigation measures to the 60 Ldn level. The state Advisory Council on Metropolitan Airport Planning shall review the recommendation and comment to the legislature within 60 days after the recommendation is submitted to the council.

Minn. Stat. § 473.661, subd. 4(f).

### **C. 1996 MSP Noise Mitigation Program**

In response to the Legislature’s direction, MAC formed the MSP Noise Mitigation Committee in May 1996. The Committee’s final report noted: “The 1996 Dual Track Legislation requires MAC to develop a committee to develop a noise mitigation plan.” MAC, MSP Noise Mitigation Program at 5 (Nov. 1996), Ex.10. The Committee was composed of six MAC Commissioners, eight mayors from cities surrounding MSP (including the Plaintiffs), and repre-

sentatives of the Metropolitan Council, Northwest Airlines and the Metropolitan Aircraft Sound Abatement Council (“MASAC”). *Id.* at 5–6. MAC staff noted in early 1996 regarding the Mitigation Committee:

The plan is to consider those areas encompassed by the 60 DNL contour for the airport, and should take into consideration proposed runway development at the airport. This is viewed as a critical element in the continuation of the airport at its current location.

MAC, Meeting Summary Part 150 Land Use Compatibility Implementation Design Policy Advisory Committee at 2 (May 7, 1996). Ex.11.

The Committee met eight times from May through October 1996 and evaluated noise insulation, possible operational measures for aircraft using MSP, runway use and community stabilization issues. MSP Noise Mitigation Program at 6; Appendix A, Ex. 10. In the June 3 and June 26 meetings, the Committee heard presentations from communities regarding their expectations. For example, the 1996 Noise Mitigation Program contains the following statement from Mayor Sharon Sayles Belton of the City of Minneapolis:

We believe that the sound insulation program must be expanded to the [DNL] 60 contour. We hear repeatedly that the [DNL] 65 is arbitrary and far too stringent a standard for community noise abatement.

*Id.* at Ex. 10-A. Similarly, the City of Mendota Heights observed:

As a result of increased noise exposure, these older Mendota Heights residential neighborhoods have experienced disinvestment and decline. In order to stabilize these areas and maintain their viability, the use of property value guarantees, tax credits for housing revitalization, aggressive sound insulation programs, and other described community stabilization programs is necessary and warranted.

*Id.* at Ex. 10-B. Similarly, the Noise Mitigation Program contains the City of Eagan’s expectation that “If the airport is expanded at its current location ... the aggressive application of Com-

munity Protection tools such as expanded sound insulation, property value guarantees, preferential tax treatments and the other tools outlined in the package are essential.” Id. at 10-C.

At the first meeting of the Mitigation Committee, MAC presented materials regarding what the existing DNL 65+ noise insulation program provided in the environs of MSP. See Materials Provided at May 16, 1996, MSP Mitigation Comm. Meeting, Ex. 12. The materials stated that the “Part 150 Sound Insulation Program is designed to reduce the interior sound level of a home by a goal of 5 decibels.” Figure 1. Figures 1 and 2 are graphic representations of the “sound insulation program” that MAC presented to the Committee.

During the process, the Committee recommended to the MAC:

1. The residential sound insulation program for the area encompassed by the 1996 DNL 65 contour be completed on the currently approved schedule;
2. The program be expanded after completion of the current program to incorporate the area encompassed by the 2005 60 DNL;
3. The 2005 60 DNL contour be based on the most accurate projection of traffic levels and use of appropriate ANOMS data;
- ...
6. The program be funded by a combination of PFC revenues, airline fees, internally generated funds, and federal aid, with the estimated total and annual costs as summarized below; to the extent that MAC cannot fund this program in a reasonable period of time, support from the State of Minnesota should be sought. In no case should unreimbursed financial impacts fall on affected residents or their local governments.
7. The Metropolitan Airports Commission commit to funding its community based noise abatement program on an accelerated basis beyond its current level of \$25.5 million annually;
8. That the Commission evaluate the airport noise environment 18 months prior to the estimated completion of the expanded program. If conditions warrant, a modified sound insulation package should be offered to eligible dwellings/buildings within the 54 DNL contour which achieves at least a 3-5 dB interior noise level reduction.

MSP Noise Mitigation Program at 35-36, Ex. 10.

The provisions of Paragraph 8 relating to mitigation in the DNL 54-60 contours were the first and only discussion in the Noise Mitigation Program that sound insulation would consist of anything other than the five-decibel reduction package being provided to homes in the higher contours. Id. at 26-36. In the section entitled “Current Sound Insulation Program,” the residential program is described as being “designed to reduce exterior noise levels by 5 db.” Id. at 26.

Depending on the characteristics of the home, this is achieved by:

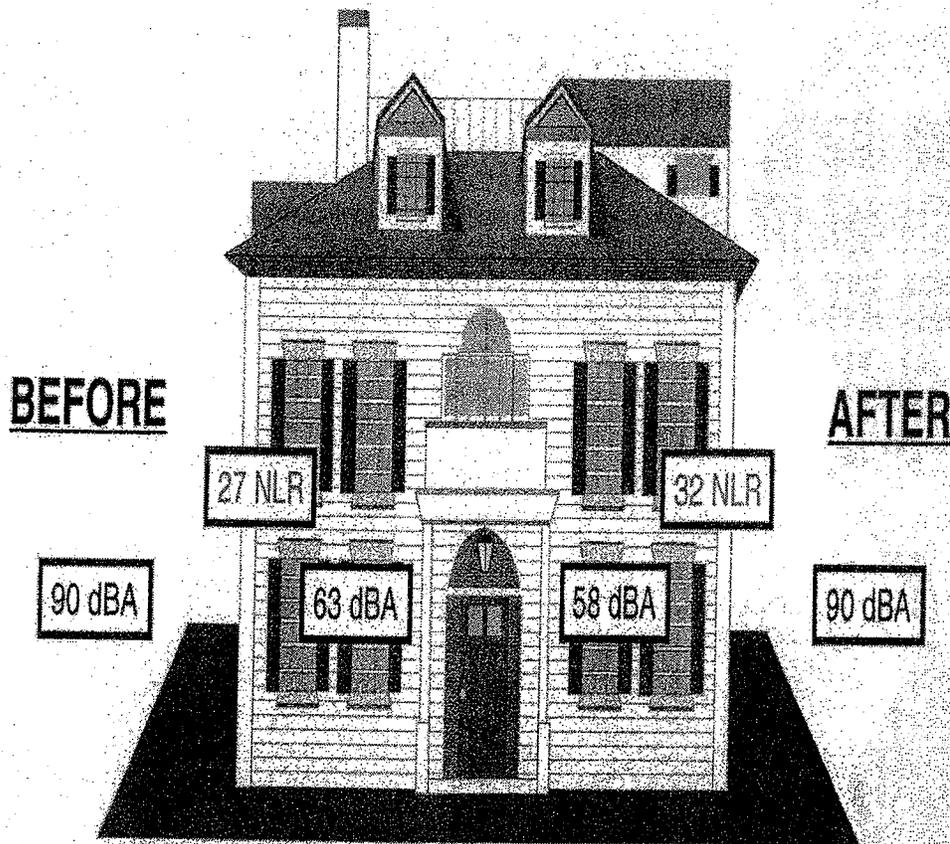
1. Repair/replacement of exterior windows.
2. Addition of exterior acoustic storm windows.
3. Repair/replacement of existing prime doors.
4. Addition of exterior acoustic storm doors.
5. Addition of cellulose wall and attic insulation.
6. Baffling of roof vents and chimney treatment.
7. Addition of central air conditioning.

Id. The cost estimate for completing the sound insulation package in the 60-64 was essentially the same as the estimate for the package in the 65 and higher. Id. at 28-31; See also MSP Mitigation Committee Meeting Summary at 6, Ex. 43.

# MAC Part 150 Residential Sound Insulation Program

## Noise Attenuation Goals

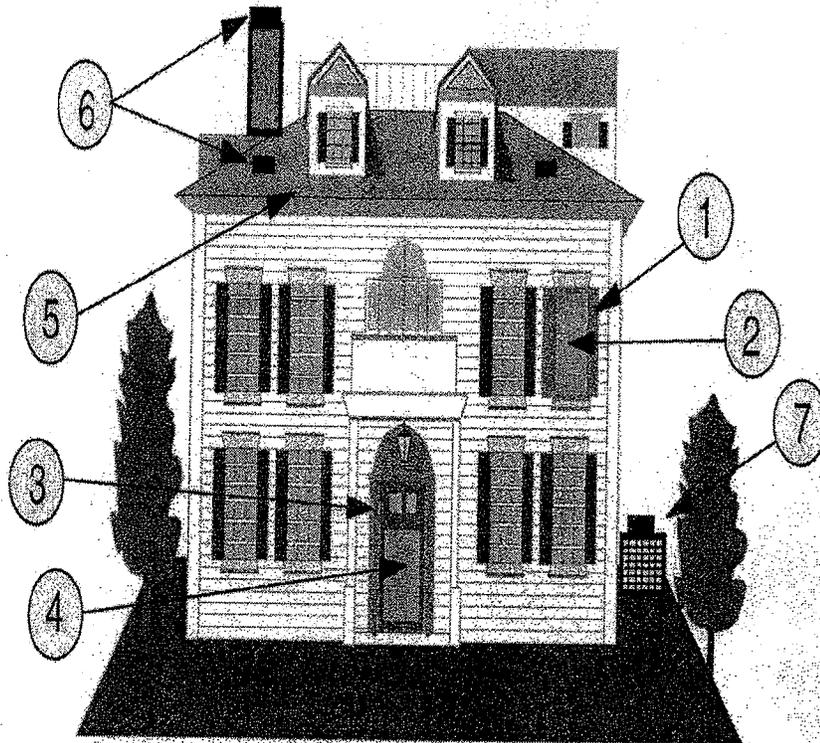
The Part 150 Sound Insulation Program is designed to reduce the interior sound level of a home by a goal of 5 decibels



MACC00000386

Figure 1: MAC Background Regarding Sound Insulation Program Provided to MSP Mitigation Committee Members, May 16, 1996

# MAC Part 150 Residential Sound Insulation Program



## 5 DECIBEL MODIFICATION PACKAGE

1. Repair or Replacement of Existing Windows
2. Addition of Exterior Acoustic Storm Windows
3. Repair or Replacement of Existing Prime Doors
4. Addition of Exterior Acoustic Storm Doors
5. Addition of Cellulose Wall & Attic Insulation
6. Baffling of Attic/Roof Vents & Chimney Treatment
7. Addition of Central Air Conditioning

MACC0000387

Figure 2: MAC Background Regarding Sound Insulation Program Provided to MSP Mitigation Committee Members, May 16, 1996

MAC also presented its own survey data finding that more than 84% of residents who had received the MAC five-decibel package found it effective in reducing aircraft noise, improving interior home activities, improving home comfort, talking on the phone, sleeping and listening to the television. Materials Provided at May 16, 1996, MSP Mitigation Committee Meeting, “Part 150 Homeowner Opinion Survey,” Ex. 12.

On October 28, 1996, the MAC unanimously passed a resolution approving the noise mitigation program recommended by the Mitigation Committee, with two amendments. First, the Commission deleted the provision regarding a modified sound insulation package in the DNL 54-60 noise contours. MSP Noise Mitigation Program at 2, Ex. 10. Second, it added a Section 9 that provided: “Completion of the sound insulation program is contingent upon the MAC maintaining a bond rating of at least A.” *Id.* at 2.

Following the Commission’s approval of the Noise Mitigation Program, MAC forwarded the Program to the Minnesota Advisory Council on Metropolitan Airport Planning (“Advisory Council”), consisting of State Senators and Members of the House. The Advisory Council sent the Program to the Legislature without substantive comment. *See* Letter from Sen. K. Langseth and Rep. B. Lieder to P. Flahaven, Secretary of the Senate, and E. Burdick, Chief Clerk of the House of Representatives (Feb. 10, 1997), Ex. 13.

#### **D. 1998 Final Environmental Impact Statement**

In May 1998, MAC and FAA issued a Final Environmental Impact Statement for the Dual Track Process (“1998 FEIS”), Ex. 4. In the 1 FEIS, MAC expanded consideration of the noise impacts of the alternatives to the 60 DNL contour: “Recognizing that noise concerns can occur beyond DNL 65, DNL 60 contours are also shown and assessed.” FEIS at V-76, Ex. 4. “The EIS acknowledges that noise can annoy some people outside the DNL 65. For this reason, the MAC addresses mitigation for people within the DNL 60 . . . .” *Id.* at I-210.

The 1998 FEIS incorporated the 1996 MSP Mitigation Program and provided:

The following mitigation measures will be implemented if the proposed action (MSP 2010 LTCP) is implemented:

- the residential sound insulation program (SIP) within the 1996 DNL 65+ contour be completed on the approved current schedule (Note: the current program is scheduled for completion in the year 2002)
- the SIP be expanded to incorporate the area within the 2005 DNL 60-65 contour (see Appendix B)
- the 2005 DNL 60 contour be based on the most accurate projection of traffic levels and use of appropriate ANOMS data
- ...
- the program be funded by a combination of Passenger Facility Charge (PFC) revenues, airline fees, internally generated funds and federal aid; to the extent that MAC cannot fund the expanded program in a reasonable period of time, support from the state of Minnesota will be sought; however, in no case will unreimbursed financial impacts fall on affected residents or their local governments
- MAC will fund the program on an accelerated basis beyond its current annual level of \$25.5 million
- ...
- completion of the program is contingent on MAC maintaining a bond rating of at least A.

Id. at vii, V-81, B-1.

In the FEIS, MAC also responded to comments on the DEIS made by Plaintiffs and others in 1996 regarding the effects and mitigation of noise in the DNL 60-65 contours by referring to the mitigation committed in the FEIS. Id. at I-3 (General Comment 2), I-7.

In comments on the FEIS, the City of Minneapolis stated:

The City is pleased to see that the 1996 Noise Mitigation Plan as adopted by the MAC has been included in the FEIS. The Part 150 sound insulation program must be completed for areas currently in the DNL 65 contour by year 2002, and extended out to DNL 60 immediately after, as described in the 1998 MSP Capital Improvement Plan and the Noise Mitigation Plan.

Comments by the City of Minneapolis on the FEIS for the Minneapolis-St. Paul Dual Track Airport Planning Process at 3 (June 12, 1998), Ex. 14.

Finally, in the Record of Decision on the FEIS, the FAA explicitly relied on MAC's commitments in the 1996 Program document. Record of Decision at 60-61, 12, Ex. 15.

**E. MAC's Completion of the MEPA Process**

As noted above, under an agreement with the Minnesota Environmental Quality Board ("EQB") in 1992, MAC agreed that EQB would make the final determination under MERA of the adequacy of the 1998 FEIS. MAC's Deputy Executive Director noted that:

This will have the advantage of the State's primary agency making the adequacy determination, avoiding the issue of MAC evaluating its own work, and lending credibility to the final decision as a result of the EQB making the decision on adequacy of the EIS.

Letter from M. Sullivan, Exec. Director of EQB, to N. Finney, Deputy Exec. Director of MAC with attached MAC Planning and Env't Comm. Meeting Minutes at 15 (Aug. 1992), Ex. 16; N. Finney Depo. at 97, Ex. 33.

As a result, after the publication of the 1998 FEIS, MAC sought the EQB's determination that the EIS was adequate for MEPA purposes. However, the City of Richfield challenged MAC's proposed finding of adequacy on the ground, *inter alia*, that MAC had failed to adequately address and mitigate low-frequency noise from operations using the new Runway 17-35. Memo of Richfield re: Adequacy of the FEIS at 1-3 (October 19, 1998), Ex. 17.

Prior to EQB meetings on October 26, 1998, and November 23, 1998, MAC submitted documents to the EQB to convince the Board to make the adequacy determination. For example, prior to the October meeting, MAC specifically identified as one of the reasons it believed that the FEIS was adequate:

The MAC has committed in the Final EIS to provide standard sound insulation to homes within the DNL 60, 65 and 70 noise contours. The noise impacts and committed mitigation disclosed in the Final EIS go beyond that required by the current noise compatibility guidelines and policies of the FAA and Metropolitan Council.

MAC, Report to the Minnesota EQB Final EIS Dual Track Airport Planning Process at 8 (Oct. 1998), Ex. 18. See also id. at 7 (“The MAC has committed in the Final EIS to provide standard sound insulation to homes within the DNL 60, 65 and 70 noise contours.”).

MAC made similar comments in supplemental submissions to EQB:

*These same studies [regarding low frequency noise] establish that installation of standard sound insulation materials, such as windows and storm doors, effectively mitigates the effects of low frequency noise. MAC is committed to implementing mitigation to the 60 DNL contour, as part of MAC’s existing sound insulation for MSP.*

MAC’s Supplemental Information Presented to the Minnesota EQB at 4 (Nov. 10, 1998) (emphasis added), Ex. 19. MAC reiterated this commitment to the public in contemporaneous press releases:

MAC has committed to provide residential sound insulation out to the DNL (day-night level) 60 noise contour. The mitigation commitments go beyond those required by the current noise compatibility guidelines and policies of the FAA and Metropolitan Council.

MAC Press Release, Richfield’s Tactics Threaten Needed Airport Improvements at 2 (Nov. 16, 1998), Ex. 20. MAC expressed its concerns regarding the effects of Richfield’s opposition to its proposed runway project. Id.

Your tactics in this matter threaten more than the construction of a new runway. The greater consequences involve the ability of this airport to continue to support the economic growth of this region, thousands of jobs and MAC’s desire to expand airport assets for more airline competition.

Letter from J. Himle to Mayor M. Kirsch at 3 (Oct. 29, 1998), Ex. 21.

On November 23, 1998, the EQB made a determination of adequacy, allowing MAC to proceed with implementation of the expansion program. See Minnesota Environmental Quality Board Findings of Fact, Conclusions of Law and Order, Ex. 22.

**F. Community Reliance on MAC DNL 60-65 Noise Insulation Commitments**

In addition to the MEPA and NEPA process, MAC in 1998 was working with communities to develop contracts relating to the development of a third parallel northwest/southeast runway at MSP. The Legislature directed that MAC “must enter into a contract with each affected city that provides the corporation may not construct a third parallel runway at the Minneapolis-St. Paul International Airport without the affected city’s approval.” Minn. Stat. § 473.608, subd. 29(a). An “affected city” is defined as “any city that would experience an increase in the area located within the 60 Ldn noise contour as a result of operations using the third parallel runway.” Id. at § 473.608, subd. 29(d).

Going beyond the terms of the Legislative requirement, MAC secured provisions in the Minneapolis and Richfield agreements that they would not bring any legal challenge to the Dual Track EIS generally or the Runway 17/35 specifically. See Minneapolis and MAC, Contract Pertaining to Limits on Construction of a Third Parallel Runway (Nov. 1998), Ex. 23; Richfield-MAC Noise Mitigation Agreement (Dec. 1998) Ex. 24. Bloomington also signed an agreement, which MAC’s chairman noted when he was trying to convince Richfield to conclude a third parallel runway agreement:

Despite the reservations and concerns among some parties, MAC has been able to forge cooperative agreements with every other entity affected by the decision. MAC has reached an agreement with the City of Minneapolis whose residents bear the majority of noise impacts. Bloomington will lose major development potential under the safety zones of the north/south runway, yet, they have cooperated in this process.

Letter from J. Himle to Mayor M. Kirsch at 1 (Oct. 29, 1998), Ex. 21. After the agreements were signed, no City mounted any judicial challenge to the Runway 17/35 project.

The Cities have often indicated reliance on MAC’s mitigation commitments:

The City of Richfield has relied upon the commitments made by the MAC through the environmental process for the construction of Runway 17/35...

Richfield Resolution No. 9336 (May 13, 2003), Ex. 25. See also Minneapolis Resolution 2003R-182 (May 2, 2003) (same for Minneapolis), Ex. 26.

In 1996, the City of Eagan supported the request of the MAC to keep MSP at its current location—a decision which resulted in a \$2 billion savings to the MAC. The decision to support the airport's current location was conditioned upon the commitment made by the MAC that homes in the 60-64 DNL would receive mitigation. There are approximately 500 homes in Eagan that have waited eight long years for MAC to honor their commitments.

Letter from Mayor P. Geagan et al., Eagan, to MAC (July 14, 2004) and attached City of Eagan Resolution in Opposition to the July 13, 2004, Part 150 Recommendation, Ex. 27.

#### **G. MAC's Public Interpretation of the Noise Insulation Provisions**

MAC made no reservations about its ability to deliver the full noise insulation program for the DNL 60-65 contour, at least until limitations periods for challenge to the Dual Track decision had passed. For example, MAC's Executive Director told a State Senator soon after MAC sent the 1996 Noise Insulation Program to the Legislature:

[W]e continue to move forward on our commitment to insulate noise-impacted homes at an aggressive rate. While the program requires \$700 million of funding to finish, the Commission has committed to the community that we will complete that program knowing full well that federal programs are now being significantly reduced and alternative financing mechanisms will be required. Our home insulation is recognized nationally as being one of the most aggressive and successful programs of its kind. Recent action taken by the Commission, as you know, has now been expanded to the DNL 60 contour which is unprecedented anywhere in the United States.

Letter from J. Hamiel to Sen. J. Ranum (Feb. 10, 1997), Ex. 28. While working to convince Richfield to drop its opposition to expansion, MAC stressed that “out of the 60 DNL, MAC will pay \$182 million—without federal aid—to implement sound insulation in these areas. This is completely voluntary by MAC, demonstrating our commitment to be a good neighbor.” Letter to Richfield Residents from J. Hamiel, MAC (May 13, 1998) at 1, Ex. 29. MAC made a similar representation to the Mayor of Minneapolis:

Upon approval of the 2005 DNL 60 noise exposure map by the FAA, MAC projects that an additional 6,000 homes will gain eligibility to the Part 150 Program at a cost of \$236,000,000 during the 2003-2011 time period. The majority of these homes will, most likely, be located in the City of Minneapolis.

Letter from J. Hamiel to Mayor S. Sayles Belton at 1 (Aug. 31, 1999), Ex. 30. Mr. Hamiel's per-home estimate for the DNL 60-65 was \$39,333, slightly higher than the one (\$36,426) he made for the DNL 65+ program in the same document. Id.

The MAC agreed on October 28, 1996, based on the Dual Track Noise Mitigation Committee, to provide noise insulation to the DNL 60 contour based on the year 2005 estimates, including development of a new north-south runway.

FAA, Environmental Assessment for Revised Air Traffic Control Procedures at 11 (June 25, 1999) (Roy Fuhrmann of MAC was listed as one of the preparers of the EA), Ex. 31.

#### **H. 1999 Airline Lease Provisions**

In 1999, MAC negotiated its standard lease through 2010<sup>3</sup> for terminal facilities with the airlines using MSP and included provisions in the lease for sound insulation out to the DNL 60 contour. Airline Operating Agreement (Jan. 1, 1999), Ex. 32. While the general rule in the lease agreement requires MAC to secure approval from the airlines for major capital spending projects, the lease contained an exception for the noise mitigation program. Id. at p. 54, Exhibit I. The lease gave MAC the ability to spend up to \$150 million without airline approval on noise insulation in the DNL 60-65 decibel contours through 2010 and the potential to spend an additional \$50 million on noise mitigation that was identified as a contingency. Id. at Exhibit I. The \$150 million figure was derived from the number of homes then expected to be in the DNL 60-64 contours and the same cost (\$37,100 per home) for the five-decibel insulation program in the

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<sup>3</sup> On March 29, 2002, MAC and Northwest agreed to extend the lease through 2015. See Amendment to Airline Operating Agreement, Ex. 46.

DNL 65 and higher contours. Id. at Exhibit I (page 6 of 23); N. Finney Depo. at 110, Ex. 33. In addition, the lease provides that:

Without prior approval of a Majority-in-Interest of Signatory Airlines, MAC may incur costs to plan, design, and construct at such time or times as it deems appropriate, and may recover through airlines rents, fees and charges the costs of the following Capital Projects: (3) Any Capital Project in the Airfield Cost Center that is necessary to satisfy a final judgment against MAC rendered by a court of competent jurisdiction.

Airline Operating Agreement at 54, Ex. 32.

#### **I. MAC's Undoing of the DNL 60-65 Noise Program**

In 2000, MAC started backing away from its commitment to the 5 db package. For the first time, an official statement accompanying a bond offering in 2001 expressed a reservation on this point, while continuing to speak of mitigation in the 60-65 as a commitment:

In addition to insulating homes within the 1996 DNL 65 noise contour, the Commission has committed to provide certain types of noise mitigation (less comprehensive than the five decibel reduction package) to homes within the 2005 DNL 60 noise contour. The Commission had proposed spending \$150 million on noise mitigation within the 2005 DNL 60 contour over the next 8-10 years. ... At this time the Commission cannot predict the outcome of this proposal by the affected communities located in the 2005 DNL 60 noise contour [to obtain an estimated \$450 million in funds from the state legislature], or whether the Commission will be required to fund costs greater than \$150 million for noise mitigation in the 2005 DNL 60 noise contour.

MAC, Official Statement Re: the Series 2001 Bonds at 80 (May 17, 2001), Ex. 34. In its October, 2001 Official Statement, MAC stated that it would offer “the five decibel reduction package” first to residents within the 64 contour, and then in successively lower contours as possible within the \$150 million funding limitation. MAC estimated the cost of insulating to the 60 contour at \$450 million, with the result that the bulk of the program “will be required to be funded from outside sources, including, but not limited to federal and state funds.” MAC, Official Statement Re: the Series 14 Bonds at 68-69 (Oct. 10, 2001), Ex. 35.

At a meeting on December 17, 2001, MAC officially “rescinded its commitment to provide the five decibel reduction package to homes within the 2005 DNL 60 noise contour, and has instead decided to reevaluate the best and most efficient use of the \$150 million for noise mitigation within the 2005 DNL 60 noise contour.” MAC, Official Statement Re: the Series 15 Bonds at 72 (Jan. 8, 2002), Ex. 36.

In March, 2002, the Metropolitan Council approved the Capital Improvements Program, conditioned upon “the Metropolitan Airports Commission reaffirming its \$150 million commitment, identified in the Airline Lease Agreement, to provide noise mitigation options, as approved by the FAA, to residents within the DNL 64-60.” Minutes of MAC Meeting, April 15, 2002 at 8-9, Ex. 37. Nonetheless, at a Commission meeting in May 2002, MAC voted to withdraw its November, 2001 Part 150 Submittal to the FAA on the ground that it needed to redraw the noise contours and update flight forecasts. Minutes of MAC Meeting, May 20, 2002, at 9-11, Ex. 38.

The affected communities, which meet as an airport advisory committee known as the Noise Oversight Committee or NOC, devised a possible compromise in 2004. Dmytrenko Depo. at 74-79, Ex. 45. This contemplated a full five decibel package in the 62-64 contours and, initially, a \$13,500 capped package in the 60-61 contours. Id. MAC did not accept this compromise. Id.

In 2004, MAC adopted the \$48 million, air conditioning only, “mechanical package” that is its current proposal for the 60-64 contours. MAC, Official Statement Re: the Series 2005 Bonds at 86-87 (May 26, 2005), Ex. 1. MAC submitted this package to the FAA in the Part 150 Plan Update of November, 2004. Homeowners would co-pay a total of \$20 million of the cost. Id. at 87. MAC estimates that almost 40% of the homes already have air conditioning and would receive nothing under its program. Memo from N. Finney, MAC, re: Homeowner Co-Pay Loan

Program at 2 (Dec. 30, 2004), Ex. 39. In Eagan, that number is 80%. See Letter from Mayor P. Geagan et al., Eagan, to MAC (July 14, 2004), Ex. 27.

## ARGUMENT AND AUTHORITIES

### I. STANDARDS FOR SUMMARY JUDGMENT

#### A. Standard for Summary Judgment

Pursuant to Minn.R.Civ.P. 56.03, “[j]udgment shall be rendered forthwith if 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.”

#### B. **The Meaning of the 1996 Noise Mitigation Program and the 1998 FEIS Must Be Based on Their Text and the Minutes of the Meetings Leading to their Promulgation**

MAC promulgated the Noise Mitigation Program resolution and 1998 FEIS. As such, they must be interpreted in the same manner as administrative regulations, City ordinances and similar instruments. Like the interpretation of statutes, the meaning of such provisions must be based on the text and on the proceedings leading to the provision unless the provisions are ambiguous. See, e.g., In re the Contested Case of REM, Inc., 382 N.W.2d 539, 542 (Minn. Ct. App. 1986) (courts may not rely on extrinsic evidence to interpret administrative regulations unless such regulations are ambiguous); Clark v. Crossroads Center, 172 N.W.2d 560, 562-63 (Minn. 1969) (“we have long been committed to the general rule that records of the proceedings of local public bodies required by law to be kept may not be impeached or contradicted by parol evidence in order that the dependability of the substance of such records be insured”).

The circumstances of this case reinforce the need for this general rule. The parties dispute the meaning of MAC actions ten and eight years ago. The Court should determine their meaning through reference to the acts themselves and the documents surrounding their promul-

gation. While normally unhelpful, it would be especially fruitless to resort to a parade of former mayors, MAC commissioners and others for their recollections of decade-old acts, after years of intervening events and disputes over this issue.

**II. MERA PROVIDES A BROAD AND INCLUSIVE REMEDY FOR THE VIOLATION OF ENVIRONMENTAL STANDARDS AND LIMITATIONS**

**A. The Legislature, Through MERA, Provided a Mechanism for the Enforcement of An Environmental Standard Such as That at Issue**

Through MERA, the Legislature provided a broad mandate to ensure that public agencies comply with environmental standards such as the one at issue in this case.

1. MERA's Provision of a Civil Remedy for Violations of Environmental Standards and Limitations Is Sweeping

In MERA, the Legislature provided a remedy “against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction.” Minn Stat. § 116B.03, subd. 1.

"Pollution, impairment or destruction" is any conduct by any person which 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 which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which materially adversely affects or is likely to materially adversely affect the environment....

Id. at § 116B.02, subd. 5 (emphasis added).

This court has already rejected arguments that MAC is not engaged in conduct covered by MERA: “Minnesota law is clear; an airport proprietor is responsible for the effects of aircraft noise even if it does not operate the plane.” Order Denying Mot. to Dismiss at 19. The Court correctly noted that:

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 [v. Metro. Airports Comm’n of Minneapolis and St. Paul], 216 N.W.2d [651] at 663 [(Minn. 1974)] . . .

Id.

2. MERA Requires a Broad Reading of “Environmental Standard” and “Limitation”

Cases under MERA show that MAC’s commitment to the five-decibel package in order to retain MSP at its current site is precisely what creates a standard for MERA purposes. In discussing MERA’s definition of “pollution, impairment or destruction” as conduct that violates any environmental quality standard or limitation, the Minnesota Court of Appeals stated that “[t]he statute is necessarily couched in general terms, leaving the agencies the duty of determining precisely what standards will fulfill the environmental policy enunciated by the legislature.” In re Indep. Spent Fuel Storage Installation, 501 N.W.2d 638, 649 (Minn. App. 1993) (citing Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 838 (Minn. 1977)). The court directed the Minnesota Public Utilities Commission to “determine the standards that are appropriate under the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act and apply those standards to the proposed facility [at issue].” Id.

The courts have also found that the general, but substantive, provisions of MERA and MEPA themselves (i.e., to choose alternatives that avoid an action significantly affecting the environment) state a claim under MERA. See People for Env’tl. Enlightenment and Responsibility (PEER), Inc v. Minn. Env’tl. Quality Council, 266 N.W.2d 858, 868 (Minn. 1978). Further, MAC’s organic statute, the 1996 Noise Program and 1998 FEIS give specific content to the general standard by indicating what noise insulation should be provided (five decibels of additional reduction where noise levels exceed DNL 60) and under what circumstances the noise insulation commitment would become infeasible (when bond ratings drop below “A”). The mitigation

commitments squarely fall within MERA's definition of an "environmental quality standard" or "limitation."

*a) Judicial Definition of "Standard" Has Been Inclusive*

Other courts interpreting the statutory term "standard" have found it extensive in its reach. The United States Supreme Court has defined "standard" as "that which 'is established by authority, custom, or general consent, as a model or example; criterion; test.'" Engine Mfrs. Assoc. v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252-53 (2004) (quoting Webster's Second New Int'l Dictionary 2455 (1945)). At issue in Engine Manufacturers was Section 209(a) of the Clean Air Act, which prohibits states from adopting "any standard relating to the control of emissions" from new vehicles. 42 U.S.C. § 7543(a). Adopting a broad definition for "standard," the Court struck down a local rule regulating purchase of vehicles by certain fleet owners. Engine Mfrs., 541 U.S. at 258.

The United States Courts of Appeals for the D.C. and Fifth Circuits have similarly defined "standard" for purposes of the Occupational Health and Safety Act: "a standard [is] a remedial measure addressed to a specific and already defined hazard... standards should aim toward correction rather than mere inquiry into possible hazards." Workplace Health and Safety Council v. Reich, 56 F.3d 1465, 1468 (D.C. Cir. 1995) (quoting Louisiana Chem. Ass'n v. Bingham, 657 F.2d 777, 781-82 (5<sup>th</sup> Cir. 1981)).

The concept of an environmental "standard" is also employed in the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604, which, like MERA, establishes a cause of action against any person violating an "emission standard or limitation" without defining "standard or limitation." Here too, courts have ascribed an expansive definition for "standard." "[A]n emission standard or limitation is broadly construed as any type of control to reduce the amount of emissions into the air." Citizens for a Better Env't. v. Deukmejian, 731 F.Supp. 1448, 1454 (N.D.

Cal. 1990). A standard need not be reduced to numerical formulas to be deemed a standard. See Communities for a Better Env't v. Cenco Refining Co., 180 F.Supp.2d 1062, 1077 (C.D. Cal. 2001). In both Deukmejian and Cenco, state implementation plans containing non-numerical processes for achieving improved air quality were deemed “emissions standards.” An agency’s “commitment to a ‘process’ and not a specific result” can create a “standard” because “there is no reason why a process, plainly spelled out, cannot constitute a valid, identifiable strategy for achieving plan objectives.” Deukmejian, 731 F.Supp. at 1457.

In Borough of Kenilworth v. Dep't of Transp., 376 A.2d 1266, 1273 (N.J. Super. Ct. App. Div. 1977), a New Jersey court arrived at a similar result in determining that the “New Jersey Action Plan,” procedure for reviewing impacts of highway projects, together with the regulations under which the plan was formulated, constituted a “standard” under New Jersey’s Environmental Rights Act (“NJERA”). The NJERA was enacted contemporaneously with MERA and, like MERA, was based on the Michigan Environmental Protection Act. McGuire v. County of Scott, 525 N.W.2d 583, 585 (Minn. App. 1995).

Neither the review process in Kenilworth, nor the non-numerical permitting standards at issue in Cenco, nor the commitment to a process in Deukmejian provide as concrete, identifiable and verifiable a standard as the noise mitigation committed by MAC to expand MSP: if noise exceeds 60 decibels, the MAC shall provide insulation that will reduce interior noise levels by five decibels more than standard construction.

b) *The Frequent Reference to Comparable Noise Insulation Provisions as “Standards”*

The plain language understanding of the mitigation commitments as “standards” and “limitations” is also supported by the record in this case, in which many different parties referred to noise mitigation requirements and thresholds as “standards.” For example, the Metropolitan

Council, in its 1996 and 2004 Transportation Policy Plans, specifically included “Structure Performance Standards” that call for meeting a DNL 45 decibel level for certain new and expanded homes in the DNL 60-64 contours. See Metropolitan Council, Transportation Policy Plan, Appendix H “Land Use Compatibility Guidelines for Airport and Heliport Noise” at H-7 (December 15, 2004), Ex. 40. This standard is the one that MAC committed to exceeding in its submissions to the EQB in late 1998. See supra at 16-17. It would be an absurd result if the Metropolitan Council provision were a standard, but the more protective mitigation commitment was not also a standard.

Similarly, as far back as 1987, MAC characterized the Metropolitan Council 45 decibel provisions then applicable, and similar regulations of the Department of Housing and Urban Development, as “standards.” MAC and City of Minneapolis, Aircraft Noise Research Project at 11 (June 1987), Ex. 3. Minneapolis Mayor Sharon Sayles Belton likewise characterized the mitigation commitment as a “standard” in her statement to Mitigation Committee. Ex. 10-A.

c) *Minnesota Courts Have Stressed the Need to Read MERA in an Inclusive Way*

As discussed in the briefs on the motion to dismiss, the Legislature intended that the “environmental standards and limitations” language of MERA be read inclusively. See Pls.’ Mem. of Law in Resp. to Def. MAC’s Mot. to Dismiss at 21-24. The Legislature enacted MERA as a broad remedial statute to protect the environment and natural resources. See Minn. Pub. Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762, 781-82 (Minn. 1977) (MERA is a “far reaching” and “substantive” statute); County of Freeborn by Tuveson v. Bryson, 243 N.W.2d 316, 322 (Minn. 1976) (MERA has a “broad remedial purpose” and has given the “land ethic the force of law”); County of Freeborn by Tuveson v. Bryson, 210 N.W.2d 290,

296 (Minn. 1973) (“Where a statute such as this is drafted in broad and comprehensive language, we are not justified in engrafting exceptions upon it.”).

MERA establishes that the protection of natural resources is the state’s “paramount concern.” Drabik v. Martz, 451 N.W.2d 893, 896 (Minn. App. 1990). “[I]t is the duty of the courts to support the legislative goal of protecting our environmental resources.” Tuveson, 243 N.W.2d at 321.

MERA includes a deliberately broad list of environmental quality provisions, the violation of which constitutes a basis for an action: “any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit.” Minn. Stat. § 116B.02, subd. 5 (emphasis added). The all-encompassing term “any,” as well as the long and inclusive list of the types of environmental quality provisions included, reflect a clear legislative intent for an inclusive reading of this list of enforceable measures. See Tuveson, 210 N.W.2d at 296. The use of the word “any” in a statute is “all comprehensive,” “sweeping in its reach,” and “includes all persons and things referred to indiscriminately.” Id. (interpreting MERA).

“It is elementary that remedial statutes must be liberally construed for the purposes of accomplishing their objects.” State v. Indus. Tool & Die Works, Inc., 21 N.W.2d 31, 38 (Minn. 1945); Miklas v. Parrott, 684 N.W.2d 458, 461 (Minn. 2004) (same). In particular, the state’s “strong environmental policy” should be “liberally construed.” In re Greater Morrison Sanitary Landfill, 435 N.W.2d 92, 99 (Minn. App. 1989).

This Court noted MAC's ability to create a standard with which it must abide:

[T]he 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.

Order Denying Mot. to Dismiss at 27. That is precisely what MAC did and the standard to which it must be held.

**III. THE MAC UNAMBIGUOUSLY COMMITTED TO PROVIDE MITIGATION TO THE DNL 60-64 DECIBEL CONTOURS IN THE FORM OF THE SAME FIVE-DECIBEL REDUCTION PACKAGE PROVIDED IN THE DNL 65 AND GREATER CONTOURS**

The primary dispute between the parties is whether the MAC created a binding standard relating to sound insulation in the DNL 60-64 contours. The contemporaneous documents are consistent that the MAC committed to provide sound insulation in the DNL 60-64 contours to secure approvals for its expansion project. The documents are clear that the commitment was to provide the same five-decibel reduction package then being provided to the DNL 65 and greater contours. As discussed in Section IV, these commitments are enforceable as an environmental standard or limitation under MERA.

**A. MAC Committed to Provide Sound Insulation in the DNL 60-64 Contours**

MAC's own documents show that it "committed" in 1996 and 1998 to expand the sound insulation program to the DNL 60 contour to minimize the effects of noise from MSP operations. This constitutes a standard or limitation from which MAC may not backslide.

1. 1996 MSP Noise Mitigation Program

In the 1996 MSP Noise Program, MAC determined that extension of the already-existing noise insulation program to the DNL 60-65 was necessary, appropriate, and feasible to ensure the compatibility of MSP. The Program's requirements for homes in the DNL 60-65 are mandatory

(not hortatory language or policy statements) and explicitly excuse MAC for non-compliance only if MAC's bond rating slips below "A". See MSP Noise Mitigation Program at 2, Ex. 10.

2. 1998 Final Environmental Impact Statement

Soon after it promulgated the 1996 Noise Program, MAC reaffirmed in the FEIS that residents in the DNL 60-65 were adversely affected by noise from MSP and would be affected with a new Runway in operation. See e.g., FEIS at V-76, I-210, Ex. 4. As a result, MAC again provided the mitigation program in mandatory terms and with the same explicit, but narrow, provision for an escape from the requirement if its bond rating fell below "A". See id. at V-81, B-1. The FEIS used almost the same terms as the 1996 Noise Mitigation Program. FEIS at V-81, B-1.

The FEIS provided that MAC was "committed" to this mitigation, along with the study of other mitigation. Id. MAC also repeatedly stated to EQB that it was "committed" to this mitigation as one of the bases for EQB's approval of the adequacy of the FEIS. MAC, Report to the Minnesota EQB at 7, 8 (October 1998) Ex. 18.

In plain English, "commit" means "to pledge to some particular course: contract or bind by obligation to a particular course of action" or "to obligate or bind to take some ... course of action." Webster's Third New Int'l Dictionary at 457 (1976). MAC cannot "commit" to mitigation in 1996 and 1998 to secure the approvals it needed for its expansion and then say in 2004 or 2006 that it did not really mean it. The repeated use of variants of the term "commit" and the use of specific, mandatory language show that MAC intended to obligate itself to provide the insulation in the DNL 60-64 contours and for other agencies, governments and the public to rely upon them in granting approvals or restraining from potential litigation.

MAC responded to comments by Eagan, Minneapolis and others regarding the adequacy of mitigation in the DNL 60-65 contours by referencing its sound insulation "commitment" in the DNL 60+ contours:

The MAC has *committed to expand the residential sound insulation program to incorporate the area encompassed by the 2005 DNL 60 noise contour* as recommended by the MSP Noise Mitigation Committee. ... The MSP Noise Mitigation Committee considered mitigation to DNL 50 but determined that mitigation to the DNL 60 was the preferred solution for communities impacted by noise generated at MSP.

ROD, Attachment A-1 at MAC005755, Ex. 15 (Response to Eagan Comments) (emphasis added). In the ROD (in which FAA provided necessary federal approvals for MAC's expansion projects), the FAA also explicitly relied upon MAC's commitments. See ROD at 60-61 (Sept. 1998) (federal approval was "specifically conditioned upon full implementation ... of measures regarding insulation ... set out in the MSP Noise Mitigation Program"). "[The 1996 MSP Noise Mitigation Program] is a critical element in the implementation of the 2010 LTCP..." Id. at 12.

#### **B. MAC Unambiguously Committed to Provide the Five-Decibel Package**

In light of the fact that MAC made a binding commitment to provide insulation to the DNL 60-65 contours, the next question is whether that commitment specifically created the standard to provide the full five-decibel reduction package. A thorough review of the 1996 Noise Mitigation Program and the 1998 FEIS, along with the meeting minutes of the MSP Mitigation Committee, make clear that MAC committed to provide the same five-decibel reduction program it has provided in the DNL 65 + contours at no cost to homeowners. This is the relief Plaintiffs seek in their Complaint.

##### **1. The Plain Meaning of MAC's Commitment Was to Extend the Five-Decibel Noise Reduction Package to the DNL 60-65 Contours**

As discussed above, MAC "committed" that "*the* program be expanded after completion of the current program to incorporate the area encompassed by the 2005 60 DNL." See e.g., MSP Noise Mitigation Program at 2, Ex. 10; FEIS at V-81, Ex. 4. (emphasis added).

MAC's use of the definite article "the" denoted that it contemplated expansion of "the residential sound insulation program" for the 65+ contours. MAC chose not to say "a program"

or to use some other indefinite qualifier. It chose to refer to “the” program, signifying the existing program. Further, the common-sense, plain-English definition of “expand” is “to increase the extent, size, number, volume or scope of.” Webster’s Third New Int’l Dictionary at 798. See also Bangs v. Town of Wells, 760 A.2d 632, 637 (Me. 2000) (“The plain meaning of the word “expand” means to “make or become greater in size”) (quoting Webster’s II New Riverside Dictionary 241 (1996)).

a) *The 1996 Mitigation Program and the 1998 FEIS Unambiguously Defined the Program To Be Expanded*

The 1996 Noise Mitigation Program approved by MAC identified what it meant by “the program [to] be expanded” that existed in the DNL 65+ contours:

The residential insulation program is designed to reduce exterior noise levels by 5 dB. This is achieved by application of the following, depending on the characteristics of each home:

1. Repair/replacement of exterior windows.
2. Addition of exterior acoustic storm windows.
3. Repair/replacement of existing prime doors.
4. Addition of exterior acoustic storm doors.
5. Addition of cellulose wall and attic insulation.
6. Baffling of roof vents and chimney treatment.
7. Addition of central air conditioning.

MSP Noise Mitigation Program at 26, Ex. 10. The 1996 Program made explicit that sound insulation “depended on the characteristics of each home,” not a one-size fits all approach (as is the provision of air conditioning only). Id. By itself, this demonstrates the plain meaning of the program to “be expanded.”

This explicit recognition of “the” sound insulation program to be expanded is consistent with the meeting minutes and other materials leading to the adoption of the Noise Mitigation Program in October 1996. For example, Figures 1 and 2 (supra at 12-13) are background material regarding the then-current Sound Insulation Program that MAC provided to the MSP Mitiga-

tion Committee at its first meeting on May 16, 1996. These materials provide graphic reinforcement of the understanding of all involved that the noise insulation program to be expanded was one that provided five decibels of relief to affected homes. If MAC had intended that the “expanded” noise program could be something less than the five-decibel program, it would have noted that fact or provided a procedure for developing an alternative. It did not do so. There is nothing in the 1996 Noise Mitigation Program or in the Mitigation Committee minutes or materials that identified anything other than a five-decibel reduction package, except, as discussed below, in contours below the DNL 60.

The plain meaning of the word “expand,” the term used in both the 1996 Noise Mitigation Program and 1998 FEIS, is that MAC intended to apply the same five-decibel noise program from the DNL 65+ contours to the DNL 60-64 contours. It is impossible to read the language of the commitment to simultaneously expand and water down the program.

The plain intent of the drafters is further reinforced through the Mitigation Committee’s recommendation (not ultimately accepted by MAC) that the program go beyond the DNL 60 to the DNL 54 contour:

The Mitigation Committee has also recommended that the MAC evaluate the potential for continuing the program beyond the DNL 60 contour when that area has been completed. The recommendation is to look at the area out to the DNL 54 contour and evaluate the possibility for a 3-5 db reduction.

MSP Noise Mitigation Program at 30, Ex.10. Thus, the Committee recommended:

That the Commission evaluate the airport noise environment 18 months prior to the estimated completion of the expanded program. If conditions warrant, a modified sound insulation package should be offered to eligible dwellings/buildings within the 54 DNL contour which achieves at least a 3-5 dB interior noise level reduction.

Id. at 10-D, MAC Minutes of October 28, 1996, at 10. See also id. at 10-E, Minutes of MSP Mitigation Committee of October 7, 1996, at 11-12 (discussing “modified insulation package”

only in the context of contours beyond the DNL 60). However, the Commission did not amend the rest of the Program or make any comments in the minutes that suggested any intent to rely on a “modified sound insulation package” for the DNL 60 and greater contours.

There is no other mention of any form of sound insulation in the DNL 60-65 contours other than the five-decibel package then being applied in the higher contours. Further, there is absolutely no mention in the record of the need to define what the form of the insulation in the DNL 60-65 contours would be. This contrasts with other mitigation tasks in the 1996 MSP Noise Mitigation Program and 1998 FEIS that called for future work to define the scope of the mitigation to be provided. For example, the Program and the FEIS explicitly contemplated that “community stabilization” elements of the Program be addressed by a working group and the Legislature. *Id.* at 2-3; FEIS at V-81, Ex. 4. Similarly, potential “airport operations” noise mitigation measures such as departure flight procedures were to be “evaluated in a Part 150 update.” MSP Noise Mitigation Program. at 3, Ex. 10; FEIS at V-81–V-82, Ex.4.

Similarly, the cost estimates provided for the proposed DNL 60-64 sound insulation program in the MSP Noise Mitigation Program were essentially the same as the estimates for completing the DNL 65+ sound insulation program—\$16,989 per home for the DNL 60-65 contours and \$17,226 for the DNL 65+ contours. Minutes of Mitigation Comm. at 6, Ex. 41.<sup>4</sup> See also MSP Mitigation Comm. Minutes of October 7, 1996, at 8 (“costs for an expanded insulation program for 2001-2010, predicated on continuing the program at the same level as the residential program”) (emphasis added), Ex. 10-E.

These costs are cross-referenced in the action portion of the Program: “with estimated total and annual costs as summarized below.” *Id.* at 2. The Program characterizes these costs as

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<sup>4</sup> See MSP Noise Mitigation Program at 28 (number of homes and total cost of DNL 65+ program), 30 (number of homes estimated for DNL 60-65 contour), 31 (DNL 60-65 sound insulation costs).

an estimate of the total cost, not a range of costs based on different possible packages or a high estimate based on the most expansive package. There was only one sound insulation package identified, implied or discussed for the DNL 60 and higher contours: the five-decibel reduction package. Indeed, the costs identified in the 1996 Program are higher than MAC's 2005 estimates of the per-home cost of its "mechanical package," \$13,500, despite years of inflation in construction costs. N. Finney Depo. at 181, Ex. 33.

The fact that the Program identified a possible weakening of the package only for homes below the DNL 60 contour confirms that MAC's intent was to continue the five decibel program to the DNL 60 decibel contour. This concept applies the well-known doctrine of *expressio unius est exclusio alterus*. See Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 457 (Minn. 2006) ("the expression of one thing is the exclusion of another"). The legislative history shows that MAC and the MSP Mitigation Committee knew how to describe a different package of mitigation than the existing program—but did not do so in the DNL 60 and greater. This confirms the meaning of the provision to extend the 5 dB reduction program, not a modified or weakened program.

The 1998 FEIS specifically identified the sound insulation program or "SIP" as a defined term based on what was being done in the DNL 65+ contours. FEIS at vii, Ex. 4. This confirms the clear intent to "expand" the five-decibel package being used in the DNL 65+ contours into the 60-65 contours.

b) *MAC's Testimony To the EQB Confirms MAC's Unambiguous Intent To Supply Full Insulation*

MAC itself reinforced the nature of its commitment in 1998, when it sought approval of the adequacy of the 1998 FEIS from the EQB. As one proposed basis for a determination of adequacy from EQB, MAC stated:

The MAC has committed in the Final EIS to provide standard sound insulation to homes within the DNL 60, 65, and 70 noise contours. The noise impacts and committed mitigation disclosed in the Final EIS go beyond that required by the current noise compatibility guidelines and policies of the FAA and Metropolitan Council.

MAC, Report to the Minnesota EQB at 8 (Oct. 1998) Ex. 18 (emphasis added). “Standard sound insulation” had no meaning other than the five-decibel package that was identified in the 1996 Noise Mitigation Program and actually installed by MAC at the time.<sup>5</sup>

MAC’s insistence that its committed mitigation went “beyond that required by the current noise compatibility guidelines and policies of ...Metropolitan Council” further shows the extensive nature of the mitigation to which it committed. At that time, the Council allowed homes to be built in the DNL 60-65 decibel noise contours if the home was insulated to provide an interior noise level of at most DNL 45 decibels. See Metropolitan Council Aviation Policy Plan at 62, 64 (Dec. 19, 1996), Ex. 42. Given that homes in the DNL 60-64 contours already achieve DNL 45 dB levels with their windows closed,<sup>6</sup> MAC was clearly intending to provide more noise reduction capacity than provided by existing structures.

MAC repeated its commitment to “standard sound insulation” a month later in another submission to the EQB. See MAC’s Supplemental Information Presented to the Minnesota EQB (Nov. 10, 1998), Ex. 19. At the time, one of the critical issues before the MAC and EQB was the adequacy of the FEIS’s treatment of low-frequency noise (the rumble and vibration of aircraft operations, especially on the ground). As part of its argument supporting its claim of adequacy, MAC again relied on the commitment to provide full sound insulation:

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<sup>5</sup> See e.g. N. Finney Depo. at 145, Ex. 33.

<sup>6</sup> MAC knew in 1998 that average existing homes in the vicinity of MSP reduced interior noise levels between 27 and 30 decibels without additional insulation. See MAC and City of Minneapolis, Aircraft Noise Research Project at 2 (June 1987), Ex. 3.

These same studies [at other airports] establish that installation of standard sound insulation materials, such as windows and storm doors, effectively mitigates the effects of low frequency noise. MAC is committed to implementing mitigation to the 60 DNL contour, as part of MAC's existing sound insulation program for MSP.

Id. at 4 (emphasis added).<sup>7</sup> Again, these statements were made during the course of the approval of the 1998 FEIS and must trump any subsequent attempts by the MAC to rewrite history. See, e.g., REM, 382 N.W.2d at 542. MAC's statements to the EQB memorialize MAC's commitment to compliance with its MEPA obligations for the 2010 capital plan. Subsequent statements and discussions do not change this standard.

#### **IV. THE MAC'S COMMITMENT TO PROVIDE SOUND INSULATION IS ENFORCEABLE AS AN ENVIRONMENTAL STANDARD OR LIMITATION PURSUANT TO MERA**

MAC's commitment to provide sound insulation at no cost to homeowners in the 1996 Noise Mitigation Program and the 1998 FEIS as a means for securing approval for its expansion program is enforceable under MERA as an environmental standard or limitation.

##### **A. MAC has a Mandatory Duty to Minimize the Impacts of Noise**

Minnesota law, including MERA, MEPA and the MAC's enabling statute, requires MAC to minimize the effects of its operations. These statutes require MAC to mitigate the impacts of its actions, inter alia, to retain the existing location of MSP as the long-term site for the metropolitan area's international airport and to expand its capacity.

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<sup>7</sup> This message is consistent with MAC's political and public relations campaign of the same time. MAC's press releases regarding the FEIS stressed the mitigation commitment: "MAC has committed to provide residential sound insulation within the DNL (day-night level) 60, 65 and 70 noise contours. The mitigation commitments go beyond those required by the current noise compatibility guidelines and policies of the FAA and Metropolitan Council." MAC Press Release, Metropolitan Airports Commission Statement on Environmental Quality Board Delay of EIS Adequacy Determination (Oct. 26, 1998), Ex. 43.

The 1996 Noise Program and the 1998 FEIS both represent enforceable standards for the mitigation required to meet MAC's substantive statutory obligations applicable to such decisions. Accordingly, they are enforceable through MERA.

1. MAC's Enabling Laws Require It to Minimize Noise Impacts and Provide Mitigation

The Legislature explicitly directs MAC to minimize the effects of its operations on nearby residents and to provide sound insulation to affected residents. Minn. Stat. §§ 473.602, 473.655.

It is the purpose of sections 473.601 to 473.679 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.

Minn. Stat. § 473.602.

It is hereby determined and declared that the purposes of sections 473.601 to 473.679 are public and governmental; ...and that the development, extension, maintenance, and operation of the system in such a manner as to assure the residents of the metropolitan area of the minimum environmental impact from air navigation and transportation, with provision for noise abatement, control of airport area land use, and other protective measures, is essential to the development of air navigation and transportation in and through this state...

Minn. Stat. § 473.655 (emphasis added).

In 1996, as part of the legislation to conclude the Dual Track Process, the Legislature directed MAC to consider whether to provide insulation to homes in the DNL 60-65. Id. at § 473.661, subd. 4(f). The Legislature also tied its definition of "affected city" (in the context of possible additional runway construction at MSP) to whether a city would experience an increase in the size of the DNL 60 noise contour. Id. at § 473.608, subd. 29(d).

In the same legislation, the Legislature directed MAC to undertake the 2010 capital plan, which was subject to MAC's obligations, identified above, to minimize and mitigate noise im-

pacts. Id. at §§ 473.608, subd. 25. The requirement to proceed with the capital plan must be read in light of the explicit direction from the Legislature in § 473.602 and § 473.655, which required MAC to implement noise mitigation in the DNL 60-65 contours if necessary to minimize noise impacts and if feasible. Through the sound insulation commitments in the 1996 Noise Program and the 1998 FEIS, MAC established the minimum standards for meeting these statutory requirements.

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.

Order Denying Mot. to Dismiss at 23 (quoting Minn. Pub. Lobby v. MAC, 520 N.W.2d 388, 393 (Minn. 1994)).

Had MAC not been under a statutory obligation to provide this insulation in the DNL 60-65, its implementation of the 1996 Noise Program (including its proposed implementation of air-conditioning-only mitigation in 2004) would have been in excess of its authority. MAC's implementing statute does not provide it with general authority to insulate residences apart from its obligations to provide necessary noise mitigation. Minn. Stat. § 473.601 et seq. By itself, this demonstrates that the noise mitigation program was by definition a legal requirement and not a gratuitous gesture.

2. MERA and MEPA Create Independent Substantive Standards Binding on MAC

MAC's compliance with the provisions of its enabling statute must also be viewed in the context of the independent requirements of MERA and MEPA. 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. E.g., PEER, 266 N.W.2d at 867-68 (Minn. 1978) (Agency's issuance of permit for high-voltage-transmission-line route

“would *only* comply with MERA if no prudent and feasible alternatives to . . . [the route] existed.”) (emphasis added). “MERA provides not only a procedural cause of action for protection of the state’s natural resources, but also delineates the substantive environmental rights, duties, and functions of those subject to the Act.” *Id.* at 866. This includes taking all available steps to mitigate the effects of an action. See e.g., White Bear, 257 N.W.2d at 783 (upholding district court’s determination that a gun club’s trap-and-skeet shooting facility would materially adversely affect the natural resources of the area but also noting that the gun club could “take whatever actions may be necessary to remedy the conditions found by the trial court to constitute pollution, impairment, or destruction of the natural resources”).

Similarly, as an arm of the State, MAC has a substantive obligation under MEPA to avoid any action “significantly affecting the quality of the environment . . . so long as there is a feasible and prudent alternative . . .” Minn Stat. § 116D.04(6). In this case, MAC appropriately determined in 1996 and 1998 that the noise insulation commitment was the necessary means to avoid significant effects on the environment.

By enacting MEPA, the Minnesota Legislature “intended to supplement the public’s right to a clean environment, recognized in . . . the Minnesota Environmental Rights Act.” Minnesota Pub. Interest Research Group v. Minnesota Env’t. Quality Council, 237 N.W.2d 375, 380 (Minn. 1975). MEPA identifies “the critical importance of restoring and maintaining environmental quality” (Minn. Stat. § 116D.02, subd. 1) as well as “the state’s paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction.” *Id.* at § 116D.04, subd. 6. To implement these principles, the legislature required investigation of “methods by which adverse environmental impacts of an action could be mitigated.” *Id.* at 116D.04, subd. 2a.

Coon Creek Watershed Dist. v. Minn. Env'tl. Quality Bd. clarified that EISs play an important role in determining mitigation to be provided when agencies are under substantive obligations to minimize harm: “The requirement of an EIS does not preclude the repair [to a ditch at issue] but merely ensures that the environmental effects will be considered and that the repair will be done in the least harmful way.” 315 N.W.2d 604, 605 (Minn. 1982) (emphasis added). “In addition, [MEPA] requires that, where possible, other state laws be interpreted and administered in accordance with its provisions.” Id. at 606. This means that the provisions of the MAC organic statute that required MAC to undertake the 2010 capital plan and “minimize the public’s exposure to noise” must be read to require feasible mitigation.

The Minnesota Supreme Court has acknowledged that the substantive protections of MEPA make MEPA different than the National Environmental Protection Act (NEPA): “The Minnesota Environmental Policy Act, because of its provision authorizing citizens to petition for an EIS, goes further than NEPA in the creation of environmental rights.” Minnesota Pub. Interest Research Group, 237 N.W.2d at 381 (recognizing a “stronger presumption in favor of judicial review for decisions regarding environmental impact statements under . . . [MEPA] than under NEPA.”). Recently, the court again recognized that MEPA may be more substantive than NEPA. See Minnesota Center for Env'tl Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 468 (Minn. 2002). The court stated, “The National Environmental Policy Act of 1969 (NEPA) is similar to the MEPA in that both *primarily* operate by requiring administrative agencies to take a ‘hard look’ at the environmental consequences of government action, without imposing substantive requirements.” Id. (emphasis in original). The court stated, “We note that the question whether the MEPA contains substantive protections above and beyond the procedural protections it shares with federal law is not before this court, and we will not address that

issue here. Rather, we merely indicate that the procedural protections relevant to this case are similar to the federal protections found in NEPA . . . .” *Id.* at 468 n.10.

Considering the statute in its entirety, MEPA required MAC to investigate methods by which adverse environmental impacts could be mitigated and also imposed a substantive obligation to avoid any action “significantly affecting the quality of the environment . . . so long as there is a feasible and prudent alternative...” Minn. Stat. § 116D.04, subd. 6. This substantive provision of the statute must be given effect just as the other sections are. “Every law shall be construed, if possible, to give effect to all its provisions. Minn. Stat. § 645.16. Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void or insignificant.” Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999).

The alternative suggested by MAC and NWA would be that the EIS process in this case was really nothing more than dumb show. Under MAC’s and NWA’s view, a public agency could “commit” to certain mitigation measures to secure approval for its projects and then simply abandon them once the statute of limitations for a MEPA challenge to an EIS has passed. The Legislature did not contemplate such a fraud on the public and the environment of the State. See, e.g., Committee for Environmentally Sound Development., Inc. v. City of New York, 737 N.Y.S.D.2d 792, 800 (N.Y. Sup. Ct. 2001) (holding that “[to] allow a lead agency to completely wash its hands of all responsibility over a project after the EIS . . . [was] completed and . . . to violate the restrictions contained in the EIS would . . . render [New York’s State Environmental Quality Review Act] SEQRA a hollow law.”).

**B. MAC’s Mitigation Plan Would Violate the Environmental Standard**

MAC’s announced intent to include only the air conditioning component of the five-decibel package is facially inconsistent with its commitment to provide a five decibel noise package and to minimize the effects of airport noise. Further, the air-conditioning-only proposal

by MAC does not live up to MAC's commitment to "expand" the MSP noise insulation program, because air-conditioning, by itself, does not constitute "insulation." At most, air conditioning allows a resident to use the existing noise-reduction capabilities of a house; it does not improve them. See FAA, Guidelines for the Sound Insulation of Residences Exposed to Aircraft Operations at 3-45 (Oct. 1992), Ex. 44.

MAC's current proposal also violates the standard by requiring homeowners to contribute between 10 and 50% of the cost of the "mechanical package." Part 150 Study Update at 8-20, Ex. 2. This contravenes the explicit provision in both the 1996 Noise Program and the 1998 FEIS that "[i]n no case should unreimbursed financial impacts fall on affected residents or their local governments." MSP Noise Mitigation Program at 35, Ex. 10; FEIS at V-81, Ex. 4. None of the homeowners in the DNL 65+ contours were required to make a co-payment. N. Finney Depo. at 59, Ex. 33. MAC's co-payment scheme is inconsistent with the standard set by the MAC in 1996 and 1998, id. at 60, and with fundamental fairness, and must be enjoined under MERA.

**C. The Circumstances in Which MAC Provided the Mitigation Commitments Make It Unreasonable To Construe Them as Anything Other Than Binding**

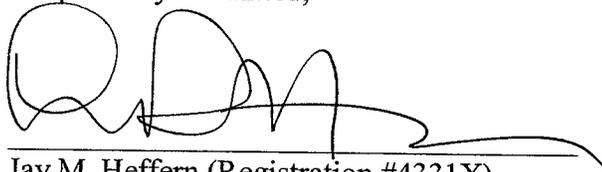
The need to enforce the MAC's mitigation commitments under MERA is especially evident in the circumstances of this case. Minneapolis and Eagan commented early in the environmental review process that they would not oppose the expansion and retention of MSP in its current location if mitigation were provided in the DNL 60-64 contours. MAC then committed, inter alia, to expand the insulation program to the DNL 60 contour in the 1996 MSP Noise Mitigation Program and the 1998 FEIS. MAC then secured commitments from Minneapolis, Bloomington and Richfield not to challenge the expansion of the Airport. It also secured federal approval from the FAA on the condition that it implement the 1996 Noise

Mitigation Program. It also secured the EQB's approval of the FEIS by repeatedly stressing the commitment to provide "standard sound insulation" to the 60 DNL contour that would exceed the standards of the FAA and Metropolitan Council. These MAC commitments fit within MERA's call for adherence to any "environmental standard, limitation, rule, order, license, stipulation agreement, or permit" provision. As this Court said in denying the motion to dismiss: "It should not be easy for public bodies to break commitments on which so many private and public entities have claimed to rely." Order Denying Mot. to Dismiss at 27.

### CONCLUSION

Based on the foregoing, there are no genuine issues of material fact that would preclude a finding that MAC is violating or will violate the environmental standard or limitation requiring the provision of the five-decibel noise package at no cost to homeowners in the DNL 60-65 contours. Accordingly, pursuant to Rule 56, the Court should issue an order forthwith granting Plaintiffs' motion for partial summary judgment.

Respectfully submitted,



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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. 27-CV-05-5474

v.

METROPOLITAN AIRPORTS  
COMMISSION,

CERTIFICATE OF SERVICE

Defendant, and

NORTHWEST AIRLINES,

Defendant-Intervenor.

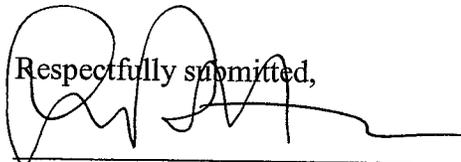
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I hereby certify that, by agreement of counsel, true and correct copies of the Plaintiffs' Memorandum Of Law In Support Of Their Motion For Partial Summary Judgment is being served by electronic mail and overnight delivery on the 22nd day of November 2006, on the following:

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