

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

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

Plaintiffs,

Case No. 05-5474

v.

Case Type: Other Civil

Metropolitan Airports Commission,

Defendant, and

Northwest Airlines,

Defendant-Intervenor.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT METROPOLITAN
AIRPORTS COMMISSION'S MOTION FOR SUMMARY JUDGMENT**

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ARGUMENT

I. THE CITIES' MERA CLAIMS ARE CONTRACT ENFORCEMENT CLAIMS.

The cities offer nothing in their opposition brief that forecloses summary judgment on MAC's argument that the cities allege contract claims rather than MERA claims. By insisting that this Court's decision on the motion to dismiss settles the issue, the cities ignore that the summary judgment review standard is less deferential than that for a motion to dismiss and that additional evidence developed in discovery supports MAC's argument. MAC's Summ. J. Br. at 39-41; MAC's Opp. Br. at 2-3. In addition, the cities' opposition brief continues to assert what amount to "promissory estoppel" and "detrimental reliance" claims with regard to MAC's actions. *See, e.g.*, Pls.' Opp. Br. at 63, 67 (suggesting that MAC promised a five decibel noise reduction package in the 60 to 64 DNL contours to induce EQB approval of the FEIS).¹

The cities also do not dispute MAC's factual assertions. For example, the cities cannot deny the testimony of their own witnesses regarding reliance on enforcement of MAC's commitments. Pls.' Opp. Br. at 69-70. Nor can the cities disavow their repeated use of contract law concepts such as "commitment" when explaining MAC's alleged violations. *See* MAC Opp. Br. at 2-3 (citing Pls.' Summ. J. Br. at 30-32, 36-38, 43-44). In addition, the cities' assertion that MAC's use of the word "commitment" somehow shields against an allegation that the MERA claims are a pretext for a contract action lacks any legal support. Pls.' Opp. Br. at 70. MERA does not provide a cause of action for breach of contract. MAC Summ. J. Br. at 38-41. The differing standards of review for motions to dismiss and summary judgment, the evidence

¹ The cities' assertion that MAC misrepresented its mitigation intentions to gain EQB approval of the 1998 FEIS is itself a misrepresentation of the law. Mitigation set forth in an EIS need not be fully developed and does not constitute an enforceable component of the EIS. A governmental unit, therefore, may change subsequent mitigation measures that an EIS identifies without violating MEPA. MAC's Summ. J. Br. at 52-53, n. 16; MAC's Opp. Br. at 30-32.

developed in discovery, and the lack of material factual issues establish that the cities are bringing a contract enforcement action under the guise of MERA.

II. MAC IS ENTITLED TO SUMMARY JUDGMENT ON COUNT II BECAUSE ITS “COMMITMENTS” ARE NOT ENVIRONMENTAL QUALITY STANDARDS.

MAC established in its initial summary judgment brief that the only way it may issue an “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit” under its enabling statute is by enacting a “rule, regulation, or ordinance.” MAC’s Summ. J. Br. at 47-49. The cities do not rebut this argument directly; instead they offer the assertion that MERA distinguishes between “issued” environmental quality standards and “promulgated or issued” environmental quality standards. Pls.’ Opp. Br. at 47. This is a distinction without a difference. *See* Black’s Law Dictionary (5th ed. 1979) (defining the verb “issue” as “to promulgate”). The 1996 Noise Mitigation Program, the 1998 FEIS, the 2002 Metropolitan Council action, and MAC’s enabling statute satisfy neither the definitions of nor the administrative procedures prerequisite to issuing an “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit,” which are each terms of art with specific meanings. MAC’s Summ. J. Br. at 47-56; MAC’s Opp. Br. at 3-12.

The cities offer irrelevant federal case law and unpersuasive distinctions of applicable MERA precedent in suggesting that a “standard” may be amorphous and general. Pls.’ Opp. Br. at 48-51. MAC has already demonstrated that MERA requires “standards” to be substantive and enforceable, and has distinguished the unpersuasive cases upon which cities rely. MAC’s Summ. J. Br. at 49-51; MAC’s Opp. Br. at 9-12, 27-29. The cities assert that MAC “lost” this argument on the motion to dismiss, ignoring that the summary judgment review standard is less deferential than the motion to dismiss standard. MAC’s Summ. J. Br. at 39-41; MAC’s Opp. Br. at 2-3. Moreover, the cities cannot rely on the theory of “liberal construction” to ignore MERA’s

express terms. MAC Summ. J. Br. at 56-57; MAC's Opp. Br. at 8-9. In addition, contrary to the cities' assertions, Pls.' Opp. Br. at 50-51, the express language of the 1996 Noise Mitigation Program distinguished between the "current" five-decibel mitigation in the 65 and greater contours and the "proposed" program to "be expanded." MAC's Opp. Br. at 15-19.

The cities also assert that MEPA "prohibits the airport expansion . . . without the accompanying feasible and prudent noise mitigation measures to reduce impacts." Pls.' Opp. Br. at 51-52. In actuality, MEPA's reference to "feasible and prudent alternatives" establishes substantive criteria for MAC to apply in conducting the 1998 FEIS and does not create a substantive standard requiring mitigation. MAC's Opp. Br. at 29-35. MAC is also under no MERA duty to implement feasible and prudent alternatives, as the cities now acknowledge. MAC's Summ. J. Br. at 52-53, n.16; Pls.' Opp. Br. at 52, n.15.

Although the cities' initial brief does not identify the Metropolitan Council's 2002 approval of MAC's capital improvement program ("CIP") as an environmental quality standard, the cities belatedly attempt to resurrect the assertion. Pls.' Opp. Br. at 52-57. As the cities admit, MAC did not promulgate any ordinances, rules, or regulations in submitting the 2002 CIP for Metropolitan Council review. MAC's Summ. J. Br. at 54-55; Pls.' Opp. Br. at 54-55. Moreover, contrary to the cities' protestations, the Metropolitan Council's budgetary review for policy consistency is not "akin to permits, stipulation agreements or license conditions." Pls.' Opp. Br. at 55. "Permits," "stipulation agreements," and "licenses" are particular documents issued through specific administrative procedures; a Metropolitan Council budgetary review meets neither the definition of nor the administrative procedures prerequisite to issuing such documents. MAC's Opp. Br. at 3-12. Despite offering a convoluted argument as to the Metropolitan Council's use of a \$150 million figure, the cities also do not deny that the

Metropolitan Council's approval fails to mention a five decibel noise reduction package. Pls.' Opp. Br. at 55-56. In addition, blatantly misinterpreting the Metropolitan Council's 2002 language, the cities claim that the reference to "as approved by FAA" refers to FAA approval of the 1998 FEIS. *Id.* at 56-57. FAA's Record of Decision ("ROD") actually notes in approving the 1998 FEIS that mitigation in the 60 to 64 DNL contours "is planned to be evaluated by the FAA through a *future MAC-initiated* Part 150 Noise Compatibility Plan." MAC's Summ. J. Br., Hefner Aff., Ex. 5 (August 18, 2005 Mineta Letter re: MSP Noise Mitigation Program), at 1 (quoting ROD at 12 (emphasis in original)). *See also* MAC's Opp. Br. at 22-23. The MAC-initiated plan to which FAA referred is the November 2004 Part 150 Study Update.

In addition, the cities acknowledge that the Metropolitan Council's subsequent approvals of MAC's CIP did not include any mitigation conditions, but assert without analysis that this "later silence" is insufficient "to impute an entire policy change." Pls.' Opp. Br. at 57. The cities ignore that the Metropolitan Council in 2005 actually *approved* the MAC CIP that contained funding for MAC's proposed "mechanical package" mitigation in the 60 to 64 DNL contours. MAC's Summ. J. Br. at 55, n.19. Far from constituting "silence," the Metropolitan Council's 2005 approval of MAC's proposed mitigation is an actual, not imputed, policy change.

The cities' initial brief does not identify MAC's enabling statute as an environmental quality standard, but the opposition brief resuscitates the assertion. Pls.' Opp. Br. at 57-59. Whether the enabling statute articulates "policy goals" as MAC argues or "duties" as the cities assert, nothing in the statute creates an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit" requiring that MAC implement a five decibel noise reduction package in the 60 to 64 DNL contours. MAC's Summ. J. Br. at 53-54; MAC's Opp. Br. at 20-22. Consistent with its duty in its enabling statute to balance the competing goals of

developing aviation and minimizing environmental impacts, MAC proposed mitigation designed to achieve its noise mitigation target of an interior noise level not exceeding 45 DNL. *Id.*

MAC did not abandon the 45 DNL interior noise target or “forfeit” its discretion to amend a purported “standard” that it created in the 1996 Noise Mitigation Program. Pls.’ Opp. Br. at 61-69.² The 1996 Noise Mitigation Program was a MAC *resolution*, not an “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit.” MAC’s Opp. Br. at 15-19. MAC establishes an environmental quality standard under its enabling statute by enacting a “rule, regulation, or ordinance,” and MAC did not issue or promulgate the 1996 Noise Mitigation Program as a “rule, regulation, or ordinance.” MAC’s Summ. J. Br. at 48-49. The cities have no support for their assertion, Pls.’ Opp. Br. at 63, n.17, that MAC cannot alter a *resolution*. MAC’s Summ. J. Br. at 58-60; MAC’s Opp. Br. at 12-15. MAC may alter a Commission resolution, just as it may change mitigation measures discussed in the 1998 FEIS without violating MERA or MEPA and without submitting changes to EQB. MAC’s Summ. J. Br. at 51-52; MAC’s Opp. Br. at 19, 29-35.³ Under the cities’ own theory, MAC “officially rescinded” the five decibel environmental quality “standard” in 2001 and 2002, and “adopted” another in its place 2004. Pls.’ Summ. J. Br. at 21-23. The “standard” that the cities seek to enforce no longer exists. MAC’s Summ. J. Br. at 58-60; MAC’s Opp. Br. at 14-15.

² In the FAA-recognized noise “significance” areas of the 65 and greater DNL contours, MAC implemented noise mitigation using all of the flexibility that FAA provides, including use of a Sound Exposure Level adjustment, consistent with MAC’s goal of a 45 DNL interior noise level. MAC’s Summ. J. Br. at 15-16 (Stmt. of Fact ¶¶ 34-36). The cities offer no evidence that by employing FAA flexibility MAC “abandoned” the 45 DNL interior noise target. Pls.’ Opp. Br. at 68. Similarly, providing *any* mitigation in the 60 to 64 DNL contours goes beyond what FAA requires. MAC’s Summ. J. Br. at 10 (Stmt. of Fact ¶ 24); MAC’s Opp. Br. at 23-24. Providing *any* mitigation in the 60 to 64 DNL contours also goes beyond what the Metropolitan Council required, because at the time the Metropolitan Council deemed any development in the 60 to 64 DNL contours as “compatible.” MAC’s Summ. J. Br. at 12 (Stmt. of Fact ¶ 27); MAC’s Opp. Br. at 23-24.

³ Information that MAC submitted to EQB also does not constitute an “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit.” MAC’s Opp. Br. at 3-12.

The cities' attempts to distinguish the *Bloomington* decision and the 2003 Office of Legislative Auditor report are equally unpersuasive. Pls.' Opp. Br. at 59-61. Contrary to the cities' assertions, the court in *Bloomington* concluded that MAC did not commit to a five decibel noise reduction package based upon a review of the 1996 Noise Mitigation Program. *Bloomington* at 10-11. *See also* MAC's Opp. Br. at 17-18. Similarly, the Legislative Auditor clearly explained its methodology in concluding that MAC did not commit to a five decibel noise reduction package, noting its extensive review of the 1996 Noise Mitigation Program and other relevant meeting minutes and documents, as well as interviews with members of the Noise Mitigation Committee. Hefner Aff., Ex. 15 at 65. *See also* MAC's Opp. Br. at 17-18.

III. MAC IS ENTITLED TO SUMMARY JUDGMENT ON COUNT III BECAUSE THE CITIES HAVE NOT ESTABLISHED A NONDISCRETIONARY DUTY.

MAC's motion for summary judgment regarding the cities' writ of mandamus claim (count III) does not involve *any* disputed factual issues. MAC moved for summary judgment on the claim because the cities fail to establish a clear and unequivocal legal duty exists to provide a five decibel noise reduction package. The cities respond not by asserting any material factual disputes or citing statutes or regulations, but with the argument that MAC's own "actions" form the basis of the mandamus claim. Pls.' Opp. Br. at 94-96. MAC's enabling statute does not create the "unequivocal duty" necessary for mandamus. Similarly, the 1996 Noise Mitigation Program, the 1998 FEIS, and the 2002 Metropolitan Council action do not create a "mandatory duty" to implement a five decibel noise reduction package. MAC's Summ. J. Br. at 61-62.

IV. MAC IS ENTITLED TO SUMMARY JUDGMENT ON COUNT I BECAUSE ITS MITIGATION IS NOT MERA "CONDUCT."

The only ostensible "conduct" over which this Court has jurisdiction—MAC's proposed mitigation—is not MERA conduct. The mitigation will not "materially adversely affect" the

environment because under the proposal, the existing noise environment in the 60 to 64 DNL contours will either stay the same or will improve. MAC's Summ. J. Br. at 43-47 (citing *In re University of Minnesota Steam Serv. Facilities*, 566 N.W.2d 98, 105 (Minn. Ct. App. 1997)). It is undisputed that the MAC proposed mitigation will not change exterior noise or interior noise for those homeowners in the 60 to 64 DNL contours that already have central air conditioning. *Id.* See also MAC's Summ. J. Br. at 35-36 (Stmt. of Fact ¶¶ 77-78); Pls.' Opp. Br. at 33 (cities do not "dispute" MAC's Stmt. of Fact ¶¶ 77-78). Similarly, it is undisputed that homeowners receiving the MAC proposed mitigation will achieve some interior noise benefit; the cities merely allege that a five decibel noise reduction package would provide a greater benefit. *Id.*

The cities' purported "disputes" regarding count I amount to complaints involving aircraft operations at MSP, an issue that the cities consistently deny they challenge. See, e.g., Pls.' Opp. Br. at 37-44.⁴ MAC's "actionable conduct," according to the cities, is that "it operates and maintains MSP." *Id.* at 38. The cities also emphasize "facts" that they believe indicate that "noise levels" at MSP are either higher than MAC asserts or will "increase again as a result of projected growth in operations." *Id.* at 30, 38-41, 78-79, 93. In the same breath, the cities state that MAC indicated through its November 2004 Part 150 Update that it has no intent to provide a five decibel package, and that this coupled with operation of MSP "constitutes 'conduct' that violates the environmental standard or limitation identified by the Plaintiffs." *Id.* at 41.

This Court may only grant relief under MERA as necessary to protect natural resources from conduct—aircraft noise from MSP—that pollutes, impairs, or destroys those natural resources. Minn. Stat. § 116B.07. As MAC established and as the cities recognize, federal law

⁴ The cities' opposition brief blurs the burdens of proof and elements of counts I and II. The brief includes a lengthy discussion of the material adverse effects on "quietude" in the context of rebutting MAC's summary judgment argument on count II. Pls.' Opp. Br. at 37-44. A material adverse effect on "quietude," however, is only relevant to count I. Minn. Stat. § 116B.02, subd. 5. Count II, by definition, involves only the allegation that MAC violated an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit. *Id.*

preempts any attempt to “reduce noise at its source” by affecting aircraft operations at MSP. MAC’s Summ. J. Br. at 44-46; Pls.’ Opp. Br. at 42. Accordingly, the *only possible* “actionable conduct” in this litigation is MAC’s proposed mitigation plan in the November 2004 Part 150 Study Update. MAC’s Summ. J. Br. at 44-46. Such mitigation, which will either improve or have no effect on “interior quietude,” cannot constitute “pollution, impairment or destruction” of a natural resource. MAC’s Summ. J. Br. at 35-36, 46-47.

The cities’ efforts to generate other factual disputes under count I are even more attenuated. For example, the cities offer previews of testimony from their citizen witnesses regarding aircraft operations at MSP. Pls.’ Opp. Br. at 75-77. The testimony does not address whether interior noise levels will either stay the same or improve following MAC’s implementation of the proposed mitigation. Opinions of Paul Schomer as to the appropriate level of interior “quietude” in the 60 to 64 DNL contours and whether MAC’s proposed mitigation “goes far enough” are similarly irrelevant. *See, e.g.*, Pls.’ Opp. Br. at 33, 77-78, 93-94. The only question before the Court is not the appropriate level of quietude within the 60 to 64 DNL contours, but whether MAC’s proposed mitigation will negatively affect the quietude that existed before MAC’s proposed mitigation “conduct.” *See, e.g., In re University of Minnesota*, 566 N.W.2d at 105 (finding no material adverse effect under MERA when proposed steam plant upgrade project would actually *decrease* air emissions from an existing steam plant). *See also* MAC Summ. J. Br. at 46. The undisputed facts establish that MAC’s conduct will not negatively affect existing quietude: the proposed mitigation does not affect the exterior noise environment in the 60 to 64 DNL contours, and the interior noise environment in the 60 to 64 DNL contours will remain the same or actually *improve*. As a result, MAC is entitled to summary judgment on count I.

CONCLUSION

For the reasons set forth above and in MAC's brief in support of its summary judgment motion and opposition to the cities' motion for partial summary judgment, MAC respectfully requests that this Court grant MAC's motion for summary judgment and deny the cities' motion for partial summary judgment.

Dated: December 15, 2006

By:  _____

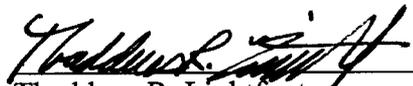
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Defendant Metropolitan Airports Commission hereby acknowledges through its undersigned counsel that sanctions may be imposed under Minn. Stat. § 549.211 if, after notice and a reasonable opportunity to respond, the Court determines that a party has violated Minn. Stat. § 549.211, subd. 2.


Thaddeus R. Lightfoot