

STATE OF MINNESOTA

IN COURT OF APPEALS

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State of Minnesota by the City of Minneapolis,  
Minneapolis Public Housing Authority in and for the  
City of Minneapolis, City of Eagan, and City of Richfield;  
City of Minneapolis, Minneapolis Public Housing Authority in and  
for the City of Minneapolis, City of Eagan, and City of Richfield,

Respondent,

v.

Metropolitan Airports Commission,

Defendant,

and

Northwest Airlines, Inc.,

Petitioner.

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**PETITION FOR DISCRETIONARY REVIEW OF  
NORTHWEST AIRLINES, INC.**

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Date of Filing of Order: November 30, 2005

**Trial Court Case Number: MC 05-5474**

**TO: The Court of Appeals For The State Of Minnesota**

Pursuant to Minn. R. App. P. 105.01, Petitioner, Northwest Airlines, Inc. (“NWA”) requests discretionary review of the district court’s November 30, 2005 order, denying NWA’s and the Metropolitan Airports Commission’s motion to dismiss. This discretionary appeal is appropriate because – as the district court noted – the Complaint raises novel questions of law regarding an issue of significant importance to the parties, as well as to the public at large. This suit seeks to move responsibility for decisions about airport noise remediation from the MAC and the FAA to the courts. It is unprecedented.

**I. Statement of Facts Necessary To Understand The Issue Presented.**

A. The MAC Agrees To A Noise Mitigation Program For Homes Experiencing Airplane Noise in the 60-64 Decibel Range.

The Metropolitan Airports Commission (“MAC”) is a governmental agency responsible for administering the Minneapolis-St. Paul International Airport (“MSP”). See Minn. Stat. §§ 473.601 et seq. (2005). Northwest Airlines, Inc. (“NWA”) is by far the largest tenant of MSP, and a Fortune 500 company with its headquarters here in Minnesota. NWA is currently reorganizing its business under the bankruptcy laws.

Beginning in the early 1990’s, the MAC engaged in a long-term and costly program to provide noise insulation for homes near MSP. See Complaint at ¶ 26 (starting on NWA App. 100029). This program provided insulation for homes experiencing noise in excess of 65 dB DNL. (The phrase “dB DNL” or “DNL” is a noise measurement that measures the average decibels of noise experienced over a 24-hour period). Id. ¶ 28. This program provided these residents with home improvements (e.g., new soundproof windows) that improved the homes’ already existing noise insulation effect. Id. at ¶ 27. The goal of this program was to provide homes with an additional 5 DNL noise reduction. Id. at ¶ 27.

In the mid-1990's, after substantial debate, the Minnesota Legislature decided to expand MSP at its present site rather than move it to a new location . Id. at ¶ 35. As a part of the compromise, the Legislature required the MAC to complete the existing 65+ DNL insulation program. See Minn. Stat. § 473.661, subd. 4(d). It also required the MAC to “examine” providing some noise insulation for homes experiencing 60-64 DNL noise levels (the “60-64 DNL Homes”). Id. at subd. 4(f).

The MAC subsequently drafted its “Noise Mitigation Program” in 1996.<sup>1</sup> This program reiterated the MAC’s existing noise insulation program for 65+ DNL homes. NWA App. at 100082. As required, the MAC also “examined” whether to provide mitigation to 60-64 DNL Homes. Id. at 100076-82. The MAC determined that it would provide some mitigation for these homes, but left the exact nature and amount of that mitigation open for future consideration. Id. at 100082. In fact, the MAC reserved the right to modify the program as necessary to deal with changes in the noise environment. Id. at 100051.

As the 65+ DNL insulation program continued, the MAC considered the exact type of insulation that it would provide to 60-64 DNL Homes. See Complaint at ¶¶ 61-71. The MAC had extensive input from all affected parties, including the Cities. The MAC determined that providing the full 5 DNL program to these homes would be prohibitively expensive, with estimates exceeding \$300 million. Given these estimates, the more modest noise disruptions in

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<sup>1</sup> Because the Noise Mitigation Program was repeatedly referenced in the Complaint, it is appropriate to review the provisions of the Noise Mitigation Program on a Motion to Dismiss. See Northern States Power Co. v. Minnesota Metropolitan Counsel, 684 N.W.2d 485, 491 (Minn. 2004). The Noise Mitigation Program is contained in the NWA Appendix beginning at page 100046.

the 60-64 DNL zone,<sup>2</sup> and the economic setbacks the airline industry suffered following September 11, 2001, the MAC adopted a modified insulation program for 60-64 DNL Homes. Id. The MAC agreed to provide these homeowners with funding to help purchase air conditioning. Id. This would allow residents to close their doors and windows during summer, thus reducing the level of interior noise from aircraft. Id.

B. Minneapolis, Eagan, and Richfield Challenge The MAC's Mitigation Program Under State Environmental Statutes.

The cities of Minneapolis, Eagan, and Richfield, as well as the Minneapolis Public Housing Authority (collectively the “Cities”) brought suit against the MAC, alleging that its new noise mitigation program violated state environmental statutes. Their complaint alleges three separate causes of action, and the relief they seek is that the Court order additional noise insulation expenditures by the MAC.<sup>3</sup> See NWA App. at 100040-41.<sup>4</sup>

The Cities’ first two claims are under the Minnesota Environmental Rights Act (“MERA”). MERA allows a party to petition for injunctive or equitable relief to prevent “conduct” that causes the “pollution, impairment, or destruction” of a protected natural resource.

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<sup>2</sup> Studies demonstrate that the average Minnesota home provides an interior noise reduction of over 30 DNL, which means that the interior noise level of 60-64 DNL homes is well below the EPA’s interior noise level guideline of 45 DNL. See NWA’s Answer at ¶ 69; Affidavit of Nigel Finney in Support of MAC’s Motion to Dismiss at ¶ 5. Indeed, the FAA itself only recognizes noise above the 65 DNL level as significant. 14 C.F.R. Part 150, App. § 150.101(d)

<sup>3</sup> As discussed later in this petition, there is no statute or other authority that requires the MAC to provide any insulation to homes within the 60-64 DNL zone. Rather, the Legislature delegated to the MAC the authority to determine whether these homes would receive any insulation, and if so, what type. See Minn. Stat § 473.661, subd 4(d). Thus, the MAC would have been well within its rights to provide no insulation to 60-64 DNL Homes.

<sup>4</sup> NWA later moved to intervene in the case, which the district court permitted. NWA then joined MAC’s Motion to Dismiss. Although Plaintiffs do not charge that any of the statutes or rules in this case bound NWA to provide noise mitigation for 60-64 DNL Homes, MAC may be able to recover some of the cost of noise insulation from NWA under their current lease.

See Minn. Stat § 116B.02, subd. 5, and § 116B.03, subd. 1. A party can allege the “pollution, impairment, or destruction” of the environment in one of two ways: (1) by alleging “conduct” that “materially adversely affects” a protected natural resource; or (2) by alleging “conduct” that violates any “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit.” See Minn. Stat § 116B.02, subd. 5.

The Cities’ MERA claims (Counts I and II of the Complaint) are based upon the Cities’ allegation that air traffic from MSP caused the “pollution, impairment, or destruction” of a protected natural resource – quietude within residents’ homes. They allege in Count I that the noise from MSP has a “materially adverse affect” on the residents’ quietude, but there is no request to prevent this “conduct.” They allege in Count II that various sources – what they describe as a “constellation” of sources – combined to create an “environmental quality standard,” which the MAC violated by failing to give 60-64 DNL Homes the 5 DNL noise insulation program.

Count III of the Complaint alleges a claim for mandamus relief, alleging that the MAC has a clear and unambiguous duty to provide the full 5 DNL insulation program for 60-64 DNL Homes, which they breached. See Minn. Stat. § 586.01 (mandamus claim must be based upon a clear an unambiguous duty by the entity). The Cities do not identify any statute requiring a specific action for homes in the 60-64 DNL zone.

The district court denied the Defendants’ Motion to Dismiss on all three counts. First, on Counts I and II, the district court recognized that Supreme Court in Minnesota Public Lobby v. MAC, 520 N.W.2d 388 (1994), rejected as preempted by federal law a claim alleging that noise from MSP violated a state environmental standard. Even though MERA only allows a district court to issue an injunction or other equitable relief preventing (or regulating) the polluting

conduct at issue, and even though Minnesota Public Lobby barred courts from interfering with the conduct of airport noise, the district court nevertheless determined that Counts I and II stated claims. See App. at 100013-20.

Second, with respect to the second MERA claim (Count II), the district court failed to point to any specific statute or other “environmental quality standard” requiring the MAC to provide 5 DNL insulation. The district court, however, concluded the MAC acted unfairly by indicating that it would provide a full 5 DNL insulation program, and then altering its plans as the economic and security situation changed. The court adopted what it called a “novel” theory: it concluded that a “constellation” of various sources might obligate the MAC to provide 60-64 DNL Home insulation, even if none of them individually did. See App. at 100020-26.

The Court also refused to dismiss the mandamus claim. Although it recognized that a mandamus claim could only proceed if the complaint alleged a “clear and unambiguous” duty on the part of the MAC, and although the Complaint did not allege such a duty, the Court refused to dismiss the mandamus claim stating that it would be “considered if it is determined that MAC has an unequivocal duty.” See App. at 100026-27.

Finally, the Court recognized the difficult and unresolved nature of these claims. “The issues in the instant case are complex,” it stated, and “[m]any of the arguments have never been addressed by Minnesota case law.” See App. at 100028.

## **II. Statement of Issues.**

Whether the district court erred in ruling that the Cities stated valid MERA claims where they did not seek (and could not seek) to limit the “conduct” that allegedly caused the “pollution, impairment, or destruction” of the environment.

Whether the district court erred in ruling that the Cities’ alternate MERA claim stated a valid claim where they did not identify any specific “environmental quality standard” requiring 5 DNL insulation for 60-64 DNL Homes.

Whether the district court erred in ruling that the Cities stated a valid mandamus claim where the court did not cite any authority imposing upon the MAC a clear and unambiguous duty to provide 5 DNL insulation to 60-64 DNL Homes.

**III. Statement Explaining Why Immediate Review of an Interlocutory or Otherwise Nonappealable Order is Necessary.**

Rule 105.01 of the Minn. R. of App. P. states that this Court may, “in the interests of justice,” allow an appeal from an order not otherwise immediately appealable.

The “interests of justice” support an interlocutory appeal because Judge Aldrich’s decision includes various errors of law, which this Court will inevitably review *de novo* in a future appeal. E.g., City of Ogema v. Bevins, 341 N.W.2d 298 (Minn. App. 1983) (noting that discretionary review is appropriate in cases where the lower court’s ruling is open to significant dispute). Resolving these novel and unanswered questions of law regarding the scope of MERA (and the mandamus statute) now could bring to an efficient end to litigation involving potentially hundreds of millions of dollars in damages, which may eventually involve the FAA, the Minnesota Legislature, Minnesota’s air traveling public, and many Twin Cities’ homeowners. See Gordon v. Microsoft Corp., 645 N.W.2d 393, 402 (Minn. 2002) (noting factor to be considered is whether the case involved “an important legal issue that is also important to the particular litigation.”); Price v. Amdal, 256 N.W.2d 461, 462 n.1 (Minn. 1977) (granting discretionary review under Rule 105 because of “troublesome and vexing question”).

At bottom, this case is an unprecedented attempt to shift responsibility for deciding the proper level of noise insulation to provide to 60-64 DNL Homes from the governmental agency responsible for that decision – the MAC – to the court system. The Minnesota Legislature clearly gave the MAC the discretion to “examine” whether and what type of noise insulation to provide to 60-64 DNL Homes. See Minn. Stat § 473.661, subd 4(f). There is no statute or other

authority requiring the MAC to provide any insulation for these homes, and there is no basis for a court to step in and override the Legislature's grant of authority to the MAC.

Absent any statute or other authority requiring 60-64 DNL zone insulation, the Cities could only raise a spurious MERA claim (adopted by the district court) that stretches the statute far beyond its intended effect. MERA only allows a party to seek equitable relief preventing "conduct" that causes the "pollution, impairment, or destruction" of the environment. See Minn. Stat. § 116B.03, subd. 1. And in Minnesota Public Lobby v. MAC, 520 N.W.2d 388 (1994), the Minnesota Supreme Court has already recognized that federal law preempts any attempt to regulate the "conduct" of air traffic to and from MSP. Even so, the Cities attempted an end-run around Minnesota Public Lobby by arguing that they did not seek to regulate air traffic itself, but instead seek an order requiring the MAC to pay to insulate certain homes affected by the alleged noise pollution. The district court agreed that MERA would allow the Cities to receive their requested remedy: "an injunction ordering MAC to mitigate the noise pollution generated by MSP flights." See App. at 100019.

In adopting this argument, the district court allowed the Cities to pursue relief in this case that is not authorized under MERA. MERA only allows a court to order equitable relief preventing or limiting "conduct" that pollutes, impairs, or destroys a natural resource. See Minn. Stat. §§ 116B.02, subd. 5 and 116B.03, subd. 1; Kennedy Building Associates v. Viacom, Inc., 375 F.3d 731, 747-48 (8th Cir. 2004); Soo Line Railroad Co. v. B.J. Carney & Co., 797 F. Supp. 1472, 1486 (D. Minn. 1992). But the conduct in question here – air traffic noise – is admittedly beyond the district court's control. MERA cannot be interpreted to allow 60-64 DNL homeowners what is, in essence, a damages remedy – money to pay for home noise insulation. E.g., Kennedy, 375 F.3d at 747-48. See also e.g., Thompson v. America Tobacco Co., 189

F.R.D. 544, 553 (D. Minn. 1999) (rejecting requested injunction because it was “in substance, a claim for damages”). The district court misinterpreted MERA in holding that it allows a court to fashion a remedy providing economic relief to residents affected by pollution, but not one (because of federal preemption) affecting the alleged polluting conduct.

The Cities’ alternate MERA claim (Count II) should also have been dismissed for independent reasons. This claim was based upon an allegation that the MAC’s “conduct” violated a specific “environmental quality standard, limitation, rule, order, license, stipulation, or permit.” See Minn. Stat. §§ 116B.02, subd. 5, and § 116B.03 subd. 1. By its terms, this portion of MERA contemplates the breach of a specific environmental rule or statute issued by an agency with primary responsibility for the environment – the MPCA, DNR, or the Department of Health for example. See Minn. Stat. § 116B.02, subd. 5; § 116B.03, subd. 1. Although no such rule existed, the district court found it objectionable that (according to the Complaint) the MAC publicly stated its intent to provide 5 DNL insulation to 60-64 DNL homes. NWA App. 100024-25. So the district court adopted what it termed a “novel” theory – that a “constellation” of various non-environmental sources (many of which have nothing to do with 60-64 DNL Home insulation) might combine to create a MERA “environmental quality standard”:

A case could be made that the “sequence” of events orchestrated by a state agency, and the “constellation” of documents and approvals secured by the state agency, *themselves* create an environmental quality standard, limitation, rule or order, worthy of protection under MERA.

See NWA App. at 100024, 25.

This holding turns MERA on its head. The Cities did not point to any specific statute, rule, ordinance, or other authority requiring any insulation for 60-64 DNL homes. And they could not because none exist. By holding that a “constellation” of non-environmental public statements of intent to provide mitigation can form an environmental quality standard, the district

court in essence used MERA to advance what it believed was a valid, but unpleaded, contract/fraud claim. This was error, and should be reversed.<sup>5</sup>

The district court's faulty legal analysis is particularly transparent in its resolution of the mandamus claim. Similar to Count II, a successful mandamus claim requires a "clear and unequivocal duty to act in the precise manner the party seeking the writ requests." See App. at 100025-26. See also e.g., State v. Wilson, 632 N.W.2d 225, 227 (Minn. 2001). Although neither the Cities nor the district court pointed to any such statute or regulation, the district court nevertheless refused to dismiss the mandamus claim until further discovery took place: "the petition or a writ of mandamus will only be considered if it is determined that MAC has an unequivocal duty." This holding ignores Minnesota case law rejecting a mandamus claim on the pleadings for failure to allege a clear, non-discretionary duty. E.g., Friends of Animals and their Environment v. Nichols, 350 N.W.2d 489, 491 (Minn. Ct. App. 1984).

These errors, as well as the unique nature of this litigation support discretionary review. The district court itself recognized that the case was "complex," raising issues never addressed by Minnesota case law. See App. at 100028. Resolving these complex legal issues now (rather than after a trial) could obviate the need for any further proceedings. It will save the parties as well as the court system the enormous expense and time necessarily associated with litigation where the damages could potentially reach into the hundreds of millions of dollars. See Hunt v. Nevada State Bank, 172 N.W.2d 292, (Minn. 1969) (judicial and litigation efficiency is an appropriate factor to consider in Rule 105 analysis); Gordon, 645 N.W.2d at 400-02.

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<sup>5</sup> The Cities do not plead a contract/fraud claim against MAC because as a matter of law no such claim exists. E.g., Turnbladh v. Ramsey County District Court, 107 N.W.2d 307, 312 (Minn. 1960) (recognizing government agency has a "well-established right" to "reopen and redetermine" a matter).

Perhaps more importantly, review of the district court's decision will resolve an important issue to the general public at large. *E.g.*, Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (noting a factor supporting discretionary review is whether the issue is important to the public at large); Gordon, 645 N.W.2d at 401-02. As the governmental agency responsible for controlling air traffic at MSP, any judgment against the MAC is a matter of public concern. It may lead to higher costs for the flying public, and may even require the MAC to approach legislature for additional noise mitigation funding. Further, Northwest Airlines is one of Minnesota's largest companies and largest employers. The timely resolution of this issue will allow it to make crucial reorganization decisions during bankruptcy.

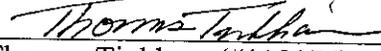
#### **IV. Conclusion**

This is a complex matter involving significant issues of interest to the Minnesota flying public and Minnesota citizens generally. While the district court struggled diligently to resolve unanswered questions of law, it nevertheless made significant legal errors. Reviewing these issues now, rather than after a trial, may save the parties and the courts system from significant time, expense, and trouble.

Respectfully submitted,

Dated: December 30, 2005

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