Penn State Environmental Law Review

Volume 12 | Number 3 Article 11

9-1-2004

# The Airport Noise and Capacity Act of 1990: Superfluous Hurdle for Airport Proprietors Who Have Assured Federal Grants

Aimee Kratovil

# The Airport Noise and Capacity Act of 1990: Superfluous Hurdle for Airport Proprietors Who Have Assured Federal Grants

## I. Introduction

The most common environmental problem posed by airports is aircraft noise. The noise problem generated from aircraft operations has become increasingly widespread since the introduction of commercial jets in the late 1950s.[1] Today, the United States (U.S.) airlines fly the oldest fleet of aircraft in the developed world.[2] The geriatric jets burn more fuel, are less safe, and are far noisier than their modern counterparts.[3] Air traffic is projected to double in the U.S. in the next fifteen to twenty years, making current problems of aircraft noise even more critical.[4] Escalating noise around U.S. airports will not dissipate until disproportionately noisy, outdated jets are retired to the scrap-pile.

The use of geriatric jets in the U.S. has recently created a national controversy, which this article undertakes to analyze. The article begins with a basic overview of aircraft noise pollution. It next discusses Congressional attempts to regulate aircraft noise pollution, and then turns to a discussion of the recent controversy in which the scope of the

---

1. Donald F. Anthrop, *The Noise Crisis*, *in* NOISE POLLUTION AND THE LAW 3, 14 (James L. Hildebrand ed., 1970).

2. *Id.* Airline deregulation is a primary contributor to the fact that United States (U.S.) airlines today fly the oldest fleet of aircraft in the developed world. Paul Stephen Dempsey, *Airline Deregulation in the United States: Competition, Concentration, and Market Darwinism*, 17 ANNALS OF AIR & SPACE LAW 199, 205 (2000). Airline deregulation within the U.S., which began in the 1970's, unleashed economic hardship and forced airlines to defer new equipment purchases. *Id.* For an in-depth discussion of airline deregulation and its consequences in the U.S., *see id.*

3. Dempsey, *supra* note 2, at 205.

4. *Technology to Reduce Aircraft Noise: Hearings Before the Subcomm. on Technology of the House Comm. on Science*, 105th Cong. 1 (1997) (statement of Constance A. Morella, Chairwoman). The U.S. currently accounts for approximately forty percent of all commercial aviation, and fifty percent of all general aviation in the world. National Civil Aviation Review Commission, *Airport Development Needs and Financing Options*, available *at* http://www.faa.gov.

national aircraft noise pollution policy has been put to the test. The article concludes with an analysis of the consequences of the FAA's Final Decision regarding the aircraft noise pollution controversy.

## II. Aircraft Noise Pollution

Aircraft noise is generated when air passes over the structure of an aircraft or through its power mechanisms, causing fluctuating pressure disturbances.[5] These disturbances ultimately transform into auditory impulses interpreted by the human ear.[6] Such impulses constitute unwanted sound for the recipient.[7] The effects of noise are primarily determined by its duration and level, but are also influenced by a sound's frequency.[8]

Jet aircrafts have two distinct kinds of engine noise that produce adverse effects on the human ear.[9] The first adverse effect is the roar of the jet exhaust.[10] The roar of the jet exhaust is heard mainly during the take-off phase, when the engines are running at maximum power, thus enabling the aircraft to become airborne.[11] The second adverse effect is the whine of the compressor fan. The whine of the compressor fan is heard mainly during the landing phase when the fan blades create turbulence and wakes resulting in a high-frequency whine in the engine's compressor.[12]

Property owners of land adjacent to airports face several serious problems from the high level of noise generated by aircraft using nearby airports.[13] Negative effects associated with airport noise include the

---

5. J. RAYLEIGH, THE THEORY OF SOUND 21 (2d ed., Dover Publications, 1945). For more recent discussions on aircraft noise, see L.E. KINSLER ET AL., FUNDAMENTALS OF ACOUSTICS 82 (3d ed., Wiley, 1982); *see also* P.M. NELSON, TRANSPORTATION IN NOISE HANDBOOK 231 (London: Butterworth, 1987).

6. RAYLEIGH, *supra* note 4, at 21.

7. K.D. KRYFER, THE EFFECTS OF NOISE ON MAN 1 (Toronto: Academic Press Inc., 1985). A logarithmic unit called the decibel (dB) measures the amount of pressure exerted on the ear. *See* D.V. Harper, *Regulation of Aircraft Noise at Major Airports: Past, Present and Future,* 17:1 TRANSP. L.J. 117, 121 (1988). A small increase in decibel can represent a large increase in sound energy. *Id.* For example, a noise pressure level of 130 dB is ten times greater than one of 120 dB and 100 times greater than 100 dB. *Id.* Although the Federal Aviation Administration (FAA) has adopted 65 dB, the Environmental Protection Agency (EPA) has set 55 dB as the requisite level to protect against interference with outdoor activities, 45 dB for indoor activities, and 70 dB to protect against hearing loss. *See* Sidney A. Shapiro, *Lessons From a Public Policy Failure: EPA and Noise Abatement,* 19 ECOLOGY L.Q. 1, 5 (1992).

8. *See* ALICE H. SUTER, NOISE AND ITS EFFECTS 3 (Nov. 1991) (report prepared for the Administrative Conference of the U.S.).

9. Harper, *supra* note 7, at 121 (1988).

10. *Id.*

11. J. GREY, NOISE, NOISE, NOISE 72 (Westminster Press, 1975).

12. *Id.*

13. *See, e.g.,* Griggs v. County of Allegheny, 369 U.S. 84, 86-90 (1962); United

reduction of neighboring property values, disruption of daily life, and commercial enterprise effects.[14] Excessive noise can also cause significant health problems, such as emotional distress, hearing loss, hypertension, cardiovascular disease, gastrointestinal problems, and other disorders.[15]

For instance, in the oft-cited case of *United States v. Causby*, the plaintiffs were forced to shut down their business when the noise and lights from low-level aircraft flights caused their chickens to fly into the walls of their coops in fright, resulting in approximately 150 chicken deaths and the end of the use of the property as a commercial chicken farm.[16] Similarly, in *Griggs v. Allegheny County*, aircraft taking off from and landing at a county-owned airport that came within 30 to 300 feet of the plaintiff's residence resulted in noise comparable to a steam hammer at regular and continuous intervals.[17] The low altitude flights over the

---

States v. Causby, 328 U.S. 256, 259-67 (1946); GREY, *supra* note 11, at 120.

14. *See, e.g., Griggs*, 369 U.S. at 86; *Causby*, 328 U.S. at 259; SUTER, *supra* note 8, at 15, 20-21, 24-25.

15. SUTER, *supra* note 8, at 15, 20-21, 24-25. A survey of residents near airports found a significant association between the level of noise annoyance and reported symptoms, including minor accidents, waking, irritability, depression, chronic tinnitus (buzzing in the ear), and health service use. Health Council of the Netherlands, Report on Public Health Impacts of Large Airports (draft of March 10, 1999). According to one source:

> The negative appraisal of noise leads to acute dysregulation of the organism both in a physiological and psychological sense: physiologically by, *inter alia*, the production of stress hormones, magnesium excretion and constriction of the blood vessels; psychologically by, *inter alia*, strain, annoyance and resignation. Continuing noise exposure would result in chronic dysregulation of the organism that would become manifest by chronic elevated cortisol and noradrelin levels, changes in calcium and magnesium ration in the heart muscle and atherosclerosis. In the long run, this may lead to an increased prevalence of cardiovascular disease in the exposed population and possibly of other diseases.

*Id.* Another study conducted in relation to psychiatric hospital admissions in England revealed a distinct relationship between the disturbed mental state of the hospital's inmates and the high-frequency, intermittent noise levels from Heathrow Airport to which they were exposed. L Abbey-Wickrama et al., Mental Hospital Admissions and Aircraft Noise, 2 Lancet 1275 at 1276 (1969).

16. *United States v. Causby*, 328 U.S. 256, 258 (1946). In *Causby,* the U.S. Supreme Court held that a servitude had been imposed by the U.S. upon the plaintiff's land by prohibiting the operation of a chicken farm from resulting aircraft noise. *Id.* at 261-62. According to the Court, although the U.S. is allowed exclusive national sovereignty in the air space under the Air Commerce Act, the landowner must have exclusive control of the immediate reaches of the enveloping atmosphere of his land if he is to have full enjoyment of the land. *Id.* at 263-266. After *Causby*, whenever there is some limit on the exclusive control of one's land or immediate airspace from low-level aircraft flights, an avigation easement had been taken. *See generally United States v. Causby*, 328 U.S. 256 (1946).

17. *Griggs v. Allegheny County,* 369 U.S. 84, 87 (1962). In *Griggs,* the U.S. Supreme Court found that avigation easements are necessary for the operation of an

plaintiff's property caused the plaintiff and occupants of his property to become nervous and distraught, and eventually caused the property to become undesirable and unbearable for residential use.[18]

## III. Congressional Regulation of Aircraft Noise

Responding to concerns over aircraft noise and other concerns about the impact on aviation of local attempts to regulate it, Congress has passed three statutes related to aircraft noise: the Noise Control Act of 1972, the Aviation Safety and Noise Abatement Act (ASNAA) of 1979, and the Airport Noise and Capacity Act (ANCA) of 1990.[19] The Noise Control Act of 1972 is now incorporated into and superceded by the provisions of the ANCA.[20] To understand how these statutes limit aircraft noise pollution, it is necessary to first understand how aircraft are classified.

Aircraft are classified on the level of noise they emit while taking off and landing.[21] Noise is measured in decibels (dB), which are defined on a logarithmic scale.[22] An increase of 10 dB corresponds to a 1,000 percent increase in sound intensity and a roughly 200 percent growth in

---

airport and stated that it saw no difference between the airport's responsibility for the air easements necessary for the operation of the airport and its responsibility for the land on which the runways were built. 86-90. By holding that airports may be required to obtain avigation easements when their operations interfere with the rights of neighboring property owners to full enjoyment of their land, the Supreme Court set the stage for a maze of litigation in state and lower courts over the existence of avigation easements and the corresponding necessity on the part of airports to compensate neighboring property owners for such easements. *See e.g.,* Baker v. Burbank-Glendale-Pasedena Airport Auth., 220 Cal. App. 3d 1602, 1609-10 (1990); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

18. *Id.*

19. Congress first dealt with aircraft noise in the Aircraft Noise Abatement Act of 1968, which authorized the FAA to set noise control and abatement standards for aircraft. 49 U.S.C. § 44715(b) (2003). The FAA was required to promulgate standards "consistent with the highest degree of safety" and "economically reasonable, technologically practicable, and appropriate for the applicable aircraft. . . ." *Id.* The Airport Noise and Capacity Act (ANCA), which incorporated and superceded the Noise Control Act of 1972, was adopted in 1990 and is codified as 49 U.S.C. §§ 47521-47533 (2003). The Aviation Safety and Noise Abatement Act (ASNAA) was adopted in 1979 and is codified as 49 U.S.C. §§ 47501-47510 (2003).

20. 49 U.S.C. § 47501 (2003).

21. Congress amended the Federal Aviation Act in 1958 to require the FAA to prescribe standards for noise measurement and abatement. Pub. L. 90-411 (____). The FAA promulgated regulations thereunder for aircraft certification. 14 C.F.R.§§ 21, 36 (2003). See 14 C.F.R. § 36.1 (2003) for an explanation of the certification criteria for Stage 1, 2, and 3 aircraft.

22. The techniques for evaluating noise levels are discussed at length in Jon P. Nelson, *Economic Analysis of Transportation Noise* (Occupational Paper, American Enterprise Institute 1987).

the sensation of loudness.[23] The effective perceived noise level (EPNdB) is a measure of noise caused by one aircraft event (takeoff, overhead flight, or landing) and considers the sound pressure, duration, and tone of the event at a given location.[24]

The Stage 1, 2, and 3 classifications for aircraft are based on measures of the EPNdB from the ground for the takeoff, sideline (flyover at a 450-meter distance), and approach of different types of aircraft.[25] The FAA has adopted a noise threshold of 65 dB Day-Night Average Sound Level (DNL) as the trigger for unacceptable noise levels.[26] Many environmentalists have criticized the 65 dB DNL standard on grounds that it is based on an averaging of noise, rather than a loud single event such as passing aircraft, and that the threshold of 65 dB DNL is significantly lower than many people find annoying.[27]

Stage 1 aircraft are the noisiest aircraft, such as the original Boeing 707 and Douglas DC-8.[28] Stage 1 aircraft were comprehensively banned in 1987.[29] Stage 2 aircraft fall in the middle of the aircraft noise scale and include the older Boeing 727, 737, 747 and the McDonnell-Douglas DC-9 and DC-10.[30] The quietest aircraft are the Stage 3 aircraft, which

---

23. Nelson, *supra* note 5, at 231. Weighting scales, such as the A-scale (dBA), are frequently used to reflect the greater sensitivity of the human ear to certain frequencies. *Id.*

24. *Id.*

25. 14 C.F.R. § 36.1 (2003).

26. *Id.* Airport noise is generally measured using a metric known as the Day-Night Average Sound Level (DNL) to report average annual noise exposure. DNL "means the 24-hour average sound level in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for the period between midnight and 7 a.m. and between 10 p.m. and midnight, local time." 14 C.F.R. § 150.7 (2003) (definition of day-night average sound level). The extent of an airport's noise problem is generally expressed as the number of people or land area exposed to noise in excess of a defined DNL level. *Id.* FAA regulations set forth the formula for calculating DNL levels and require airports to use the DNL metric in most circumstances for measuring the extent of nearby noise exposure. *Id.*

27. JENNIFER STENZEL & JONATHAN TRUTT, FLYING OFF COURSE: ENVIRONMENTAL IMPACTS OF AMERICA'S AIRPORTS 4-5 (National Resources Defense Council 1996). As an alternative, California and several European governments have adopted the community noise equivalent level (CNEL), which imposes a 5 dB penalty during the hours of 7:00 p.m. to 10:00 p.m., in addition to the DNL's 10 dB nighttime penalty. *Reducing Aircraft Noise, Hearings Before the Subcomm. on Technology of the U.S. House Science Comm.* (Oct. 21, 1997) (testimony of Donald MacGlashan). Environmentalists have argued the threshold should be 55 dB CNEL rather than 65, and that single event noise rather than averaging should be taken into account by using the single exposure level (SEL) in conjunction with the CNEL. STENZEL & TRUTT, *supra* note 26, at 4-5.

28. 14 C.F.R. § 36 (2003). In 1969, the FAA adopted regulations requiring implementation of noise abatement technology on aircraft. 14 C.F.R. § 36 (2003). *Id.*

29. 14 C.F.R. § 36.1 (2003); 14 C.F.R. § 36.1 app. B, B35.1(a) (2003).

30. 14 C.F.R. § 36.1(3), (4) (2003); 14 C.F.R. § 36.1 app. B, B35.1(b) (2003). A Stage 2 aircraft cannot exceed a maximum EPNdB of 102-108 dBA for approach (the

include the newer Boeing 737, 747, 757, and 767, McDonnell-Douglas MD-80 and MD-11, and the European Airbus.[31]

Most of the major U.S. airlines have been replacing the older Stage 2 aircraft with more modern Stage 3 aircraft or retrofitting Stage 2 aircraft with hush-kits, a device or devices fitted to aircraft engines to reduce engine noise. Retrofitting with hush-kits allows older Stage 2 aircraft to meet Stage 3 aircraft requirements.[32] Stage 2 turbojet aircraft comprise 28 percent of the general aviation and air taxi jet fleet in the U.S.[33] The Stage 1, 2, and 3 classifications for aircraft encompass not only the large, popularly known commercial jets discussed *infra*, but also encompass smaller, less well-known general aviation jets and non-jet aircraft.[34]

### *A. The Aircraft Safety and Noise Abatement Act of 1979 (ASNAA)*

Congress enacted the ASNAA to establish a single system of measuring noise from aircraft operations and the exposure of individuals to that noise.[35] The system is required to identify land uses that are "normally compatible" with various levels of noise exposure.[36] A land use is "normally compatible" with various levels of noise exposure if the land use does not exceed the threshold at which health begins to be affected by noise exposure.[37] Under the ASNAA, any airport operator may prepare a noise exposure map, based on the system mentioned above, that details the noncompatible land uses around their airports.[38] Once the airport operators have completed a noise exposure map, they may use it to prepare a noise compatibility program for approval by the Administrator.[39]

---

greatest noise is allowed for the heaviest planes). *Id.*

31. 14 C.F.R. § 36.1 (2003); 14 C.F.R. § 36 app. B, B36.5(c) (2003). To meet Stage 3 requirements, aircraft on their approach cannot exceed 98-105 dBA. Similar requirements are imposed for takeoff and sideline noise. *Id.*

32. MATTEW BENDER AND COMPANY, INC., *Zoning for and Around Airports, in* 2-15 ZONING AND LAND USE CONTROLS § 15.01[2][b] (Eric Damian Kelly ed., 2001).

33. Final Agency Decision and Order, FAA Docket No. 16-01-15, dated August 25, 2003, *In the Matter of Compliance with Federal Obligations by the Naples Airport Authority, Naples, Florida* 15 [hereinafter Final Decision.] There are approximately 2000 Stage 2 turbojet aircraft in the U.S. *Id.* In comparison, as of September 1998, Stage 3 aircraft constituted approximately 80 percent of the combined domestic and foreign fleets of large turbojet aircraft operating to and from U.S. airports. BENDER, *supra* note 31, at § 15.01[2][b].

34. Final Decision, *supra* note 32.

35. 49 U.S.C. § 47501-47502 (2003).

36. *Id.*

37. *Id.*

38. 49 U.S.C. § 47503 (2003).

39. 49 U.S.C. § 47504 (2003).

The Administrator must approve a noise compatibility program under ASNAA if, among other things, the proposed plan is reasonably consistent with achieving the goal of reducing noncompatible uses and preventing the introduction of additional noncompatible uses.[40] If approved, the program entitles the airport operators to federal grants for measures intended to reduce noncompatible land uses, such as acquiring the property in excessively noisy areas.[41] The measures of the noise compatibility program may also include "restricting the use of the airport by a type or class of aircraft because of the noise characteristics of the aircraft."[42]

The FAA implements the ASNAA through regulations found at title 14 of the Code of Federal Regulations, section 150 (Part 150).[43] Part 150 prescribes requirements for airport operators who choose to develop airport planning compatibility programs and establishes a single system of measuring airport noise and a single system for determining the exposure of individuals to airport noise.[44] Appendix A of Part 150 establishes a uniform methodology for developing and preparing airport noise exposure maps.[45] Noise exposure maps must include continuous contours for yearly day-night average sound levels (YDNL) of 65, 70, and 75 dB.[46] Airport proprietors must identify the land uses in the contours with YDNL 65 dB or greater, and determine whether those land uses are compatible with those noise levels.[47]

Regarding land use compatibility, the FAA determined for purposes of Part 150 that all land uses are considered to be compatible with noise levels less than 65 DNL, while noting that "local needs or values may dictate further delineation based on local requirements or determinations."[48] The FAA also describes in greater detail what land

---

40. 49 U.S.C. § 47504(b)(1)(B) (2003).
41. 49 U.S.C § 47504 (2003).
42. 49 U.S.C § 47504(a)(2)(C) (2003).
43. 14 C.F.R. § 150 (2003).
44. 14 C.F.R. § 150.9 (2003). Section 150.9 provides as follows:

> For purposes of this part, the following designations apply:
>
> (a) The noise at an airport and surrounding areas covered by a noise exposure map must be measured in A-weighted sound pressure level . . . in units of decibels (dBA) in accordance with the specifications and methods prescribed under appendix A of this part.
>
> (b) The exposure of individuals to noise resulting from the operation of an airport must be established in terms of yearly day-night average sound level (YDNL) calculated in accordance with the specifications and methods prescribed under appendix A of this part.

*Id.*

45. *Id.*
46. 14 C.F.R. § 150, app. A (2003).
47. 14 C.F.R. § 150, app. A, sec. A150.101(a) (2003).
48. 14 U.S.C. § 150, app. A, sec. A150.101(d) (2003). As stated in the preamble to

uses are compatible or incompatible with various YDNL average sound levels.[49] For instance, it is stated that residential land uses are compatible with YDNL below 65 and incompatible with YDNL above 65.[50] The ASNAA and ANCA, which will be discussed next, often interact and overlap.[51]

### *B. Airport Noise and Capacity Act of 1990 (ANCA)*

Congress enacted the ANCA for the purpose of establishing a national noise policy.[52] Congress intended this policy to bring federal oversight to what was perceived as a patchwork of local airport noise and access restrictions.[53] Accordingly, the policy was intended to reduce disputes over noise that were impeding airport development projects.[54] The ANCA created a scheme of requirements for restricting aircraft based upon the level of noise and the financial implications of such restrictions on aircraft operators.[55]

This scheme included a 10-year phaseout of the largest Stage 2 aircraft.[56] The ANCA specifically states that after December 31, 1999, no person may operate a civil turbojet weighing *more than* 75,000

---

the interim rules:

> By identifying "normally compatible land uses, Part 150 does not usurp or preempt the authority and responsibility of State and local authorities to exercise their police powers with respect to the development and implementation of local land use policy.

46 Fed. Reg. at 8317.

49. 14 U.S.C., app. A, sec. A150.101, table 1 (2003). The following statement appears beneath Table 1:

> The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State, or local law. *The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities. FAA determinations under part 150 are not intended to substitute federal determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.* (Emphasis added.)

*Id.*

50. The FAA based this determination upon the findings of the Federal Interagency Committee on Urban Noise (FICUN), which was formed in 1979 to develop Federal policy and guidance on noise. *See* Final Decision, *supra* note 32, at 7, n.11. In its 1980 report, FICUN found that standard residential construction was compatible with noise exposure form all sources up to DNL 65 dB. *Id.*

51. Nat'l Bus. Aviation Ass'n v. City of Naples Airport Authority, 162 F. Supp.2d 1343 (M.D. Fla. 2001).

52. *See* Airport Noise and Capacity Act, 49 U.S.C. §§ 47521-47533 (2002).

53. *Id.*

54. *Id.*

55. *Id.*

56. 49 U.S.C. § 47521(b) (2003).

pounds in the contiguous United States unless that aircraft meets Stage 3 noise requirements.[57] This language addresses only the large, commercial jets such as the Boeing 727, 737, 747 and the McDonnell-Douglas DC-9 and DC-10.[58]

Concerning smaller, less well-known Stage 2 aircraft, the ANCA requires the FAA to issue regulations establishing a national aviation noise policy, which must include regulations for reviewing airport noise and airport access restrictions on Stage 2 and Stage 3 aircraft operations.[59]

Congress expressly allows airport operators to ban smaller Stage 2 aircraft not subject to the phaseout as long as specific statutory requirements are met.[60] Pursuant to the ANCA, an airport operator may ban smaller Stage 2 aircraft after giving the public 180 days notice of (and opportunity to comment on) the proposed restriction, as well as:

> (1) An analysis of the anticipated or actual costs and benefits of the existing or proposed restriction;
>
> (2) A description of alternative restrictions;
>
> (3) A description of the alternative measures considered that do not involve aircraft restrictions; and
>
> (4) A comparison of the costs and benefits of the alternative measures to the costs and benefits of the restriction.[61]

---

57. 49 U.S.C. § 47521 (2003). The Act also required that a schedule of phased-in compliance be established. *Id.* In September 1991, the FAA issued a Final Rule to phase out operations of Stage 2 aircraft weighing more than 75,000 pounds. 56 Fed. Reg. 48628 (September 25, 1991).

58. 49 U.S.C. § 47521 (2003).

59. 49 U.S.C. § 47523(a) (2003).

60. 49 U.S.C. § 47524(b) (2003).

61. *Id.* 49 U.S.C. § 47524(b) specifically provides:

> **Stage 2 aircraft.**—[A]n airport noise or access restriction may include a restriction on the operation of stage 2 aircraft . . . only if the airport operator publishes the proposed restriction and prepares and makes available for public comment at least 180 days before the effective date of the proposed restriction—
>
> (1) an analysis of the anticipated or actual costs and benefits of the existing or proposed restriction;
>
> (2) a description of alternative restrictions;
>
> (3) a description of the alternative measures considered that do not involve aircraft restrictions; and
>
> (4) a comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction.

*Id.* Similarly, the corresponding FAA regulation, 14 C.F.R. § 161.205(a) (2003) provides:

By way of comparison, a restriction on Stage 3 aircraft requires either an agreement by aircraft operators or approval by the FAA.[62] Such approval requires that the Secretary find that the restriction is "reasonable, nonarbitrary, and nondiscriminatory" and not an unreasonable burden on interstate or foreign commerce, among other requirements.[63] The ANCA imposes no such approval prerequisite upon an airport operator that wants to restrict Stage 2 aircraft operations.[64]

In passing the ANCA, Congress found, among other things, that aviation noise management is crucial to the continued increase in airport capacity, that a national noise policy must be carried out at the national level, and that the local interest in aviation noise management must be considered in determining the national interest.[65]

The FAA implements the ANCA through regulations found at title 14 of the Code of Federal Regulations, section 161 (Part 161).[66] Under Part 161, an airport operator, i.e., the person operating or managing the airport, may not implement a Stage 2 restriction unless the operator provides an analysis of the proposed restriction and public notice and opportunity for comment.[67]

---

> Each airport operator proposing a noise or access restriction on Stage 2 aircraft operations shall prepare the following and make it available for public comment:
>
> (1) An analysis of the anticipated or actual costs and benefits of the proposed noise or access restrictions;
>
> (2) A description of alternative restrictions; and
>
> (3) A description of the alternative measures considered that do not involve aircraft restrictions, and a comparison of the costs and benefits of such alternative measures to costs and benefits of the proposed noise or access restrictions.
>
> Public notice and an opportunity for comment must be completed not less than 180 days prior to the effective date of the restriction. Such notice must be provided to each federal, state and local agency with land-use control jurisdiction within the airport noise study area. 14 C.F.R. § 161.203 (2003).

Congress also prohibited local restrictions on Stage 3 aircraft without the approval of all airport users or the FAA. 49 U.S.C. § 47524(c) (2003). The relevant FAA implementing regulations may be found at 49 U.S.C. § 161.103 (2003).

62. 49 U.S.C. § 47524(c)(1) (2003).

63. *Id.*

64. 49 U.S.C. § 47524 (2003).

65. 49 U.S.C. § 47521(1)-(4) (2003).

66. 14 C.F.R. § 161 (2003). The Administrator issued a final rule on September 25, 1991, to implement the ANCA's directive that the FAA develop a program for reviewing airport noise and access restrictions for Stages 2 and 3 aircraft. 56 Fed. Reg. 48661 (September 25, 1991).

67. 14 C.F.R. § 161.1(b) (2003).

## IV. Naples: The Scope of the National Aircraft Noise Pollution Policy Is Put to the Test

The scope of the ASNAA and ANCA and their respective implementing regulations (Parts 150 and 161) have been put to the test in a recent controversy arising from a Stage 2 aircraft ban at the Naples Municipal Airport in Naples, Florida.[68] Noise has increased in the past decade at the Naples Municipal Airport because of the continued operation of smaller Stage 2 aircraft and increases in general aviation activity.[69] The growth trend that smaller airports like Naples have experienced during the last decade is projected to continue.[70] Although the Naples Municipal Airport Authority (Authority) was convinced that growth of the facility was in the long-range economic interest of the region, local opposition based on noise impacts threatened to impede or abort aviation objectives.[71]

After years of study, the Authority determined that a ban on Stage 2 aircraft would further promote the balance between competing needs of airport users with those of the surrounding community.[72] The Authority

---

68. *See generally* Final Decision, *supra* note 32.

69. The Naples Municipal Airport is typical of small commercial and large general aviation airports located throughout the U.S. *See* Final Decision, *supra* note 32, at 12. It is located near residential neighborhoods and caters primarily to recreational and business aircraft, with only limited scheduled passenger service. *Id.* Most commercial service to the area takes place at the Southwest Florida International Airport, which is located nearby in Fort Myers. *Id.* Because of short runways and runway pavement limitations, the airport never handled large aircraft and so did not receive noise benefits from the nationwide phaseout of larger Stage 2 aircraft. *Id.*

The Naples Municipal Airport is now providing the Quarterly Noise Report online, available at http://www.flynaples.com/QNReports.htm. The feature became available for the First Quarterly Noise Report of 2002. If you would like a copy of a Quarterly Noise report prior to 2002, contact the Naples Municipal Airport Noise Abatement Office by phone at (239) 643-1140.

70. Peter J. Kirsch & Daniel S. Reimer, *The Airport Noise Act: Safe Harbor or Procedural Hurdle?* 16 AIR & SPACE LAWYER 4, 14 (2002). The growth trend will continue partially due to the popularity of fractional jet ownership programs, which increase the introduction of smaller jet aircraft and makes corporate flying affordable for more companies. *Id.* The inconvenience and uncertainty caused by new security requirements at major commercial airports since September 11, 2002 is also partly responsible for recent, unprecedented traffic increases at Naples and similar airports. *Id.* For further information regarding Naples Municipal Airport, please visit http://www.flynaples.com.

71. Kirsch & Reimer, *supra* note 68, at 15; *see also* http://www.flynaples.com. The dilemma the Authority faced was not unusual; for several decades the Authority has been at the forefront of efforts to balance the competing needs of airport users with those of the surrounding community and has adopted numerous measures to control noise and limit incompatible land uses surrounding the facility. Kirsch & Reimer, *supra* note 68, at 15.

72. Resolution #2000-8, *Adopting a Restriction on Stage 2 Jet Operations at the Naples Municipal Airport*, available *at* http://www.flynaples.com/RESOLUTION%20%202000-8.htm [hereinafter Naples Resolution].

projected that a Stage 2 ban would reduce the number of people exposed to high noise levels by more than 90 percent, with minimal effects on operations.[73] In June 2000, the Authority adopted a ban on Stage 2 aircraft and became the first airport operator in the U.S. to adopt a restriction pursuant to the ANCA and its implementing regulation, Part 161.[74] The Stage 2 aircraft ban was adopted upon completion of a study pursuant to Part 161 of the FAA regulations (known as a Part 161 Study).[75] The ban went into effect on January 1, 2001.[76]

The Stage 2 ban has been the subject of several legal challenges.[77] Foremost, the FAA initiated an administrative enforcement action.[78] Thereafter, a suit was brought against the Authority by two aviation industry groups in federal court alleging that the Stage 2 ban violated the U.S. Constitution via the Supremacy and Commerce Clauses.[79] Finally, the FAA initiated another administrative proceeding, this time to terminate the Authority's eligibility for federal grants.[80] These challenges will be discussed, respectively, in the remainder of this article.

### *A. The FAA Administrative Enforcement Action*

In December 2000, (less than six months after the Authority adopted the ban on Stage 2 aircraft at Naples Municipal Airport) the FAA initiated an administrative enforcement action alleging that the Stage 2 ban violated the ANCA and Part 161 because of defects in the Part 161 Study.[81] After the Airport Authority provided supplemental data, the FAA determined that the Airport Authority had fully complied with the ANCA and Part 161.[82] Enforcement of the Stage 2 ban was suspended during the time that the Authority was preparing its

---

73. *See* Kirsch & Reimer, *supra* note 68, at 15. Remarkably, both local aviation supporters and community leaders endorsed the solution. *Id.*

74. Naples Resolution, *supra* note 70; 14 C.F.R. § 161 (2003).

75. Naples Resolution, *supra* note 70.

76. *Id.*

77. See notes 76-78, *infra.*

78. *See generally* Notice of Investigation, FAA Docket No. 16-01-15, dated October 31, 2001, *In the Matter of Compliance with Federal Obligations by the Naples Airport Authority, Naples, Florida* [hereinafter NOI].

79. *See generally* Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

80. *See generally* Final Decision, *supra* note 32.

81. NOI, *supra* note 76.

82. *Id.* The supplemental study assembled in a single document the information that the Authority had collected on reasonable alternatives to the Stage 2 ban and reviewed exhaustively the costs and benefits of the ban itself. The Authority's Supplemental Study is available on the Naples Airport Authority website, www.flynaples.com.

supplemental study.[83] However, the ban has been fully enforced since March 2002.[84]

For the first time since the adoption of the ANCA and Part 161, the FAA formally stated that an airport authority had satisfied the requirements for adopting a restriction of Stage 2 aircraft.[85] Although the FAA's acknowledgement of compliance with Part 161 was not legally required, the Authority believed that the FAA's endorsement provided valuable reassurance that it could lawfully implement the Stage 2 ban.[86]

### *B. National Business Aviation Association, Inc. et al. v. City of Naples Airport Authority*

Just days before the Stage 2 aircraft ban was to have gone into effect on January 1, 2001, two aviation industry groups, the National Business Aviation Association and the General Aviation Manufacturers Association (referred to herein collectively as the NBAA) sued in federal court.[87] The NBAA argued that the Stage 2 ban was a violation of the Supremacy Clause of the U.S. Constitution because federal law preempted the Stage 2 ban.[88] Specifically, the NBAA insisted that the

---

83. Naples Resolution, *supra* note 70.

84. *Id.*

85. NOI, *supra* note 76.

86. Many airport operators have started Part 161 studies only to face substantial opposition from the FAA. Kirsch & Reimer, *supra* note 68, at 14. Unlike other airport operators, the Naples Airport Authority declined to abandon its intentions to implement the Stage 2 ban in the face of FAA opposition. *Id.* Instead, the Authority decided to respond substantively to each FAA criticism of its study and its proposed restriction. *Id.*

87. Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343, 1347-51 (M.D. Fla. 2001).

88. *Id.* Regarding preemption, Article VI of the Constitution of the United States provides, in part, that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The Supremacy Clause, as it is popularly known, establishes that state law may not override or interfere with federal law—a premise that lies at the heart of preemption doctrine. Myrick v. Freuhauf Corp., 13 F.3d 1516, 1519 (11th Cir. 1994). According to the Supreme Court, preemption may occur in one of three ways: (1) Congress can define explicitly the extent to which its enactments preempt state law; (2) In the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; (3) State law is preempted to the extent that it actually conflicts with federal law. English General Elec. Co., 496 U.S. 72, 78-79 (1990). Congressional intent is the ultimate touchstone of preemption analysis. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

ban did not pass muster under the alleged reasonableness and nondiscrimination requirements that have evolved as part of the preemption inquiry based on *City of Burbank v. Lockheed Air Terminal, Inc.* and kindred case law.[89] In addition, the NBAA argued that the ban violated the active and dormant Commerce Clauses of the U.S. Constitution because *Burbank* and kindred cases also imposed reasonableness and nondiscrimination requirements on Commerce Clause inquiries.[90]

The Authority defended the restriction by arguing that its actions could not violate the Supremacy or Commerce Clauses because the ANCA contains a direct and explicit grant of power for airport operators to adopt local restrictions on Stage 2 aircraft.[91] Additionally, the Authority asserted that even if a reasonableness and nondiscrimination requirement existed, the ban was reasonable and nondiscriminatory because it would significantly reduce the noise levels in the community

89. *Id.* at 1349. In *City of Burbank v. Lockheed Air Terminal, Inc.*, the Supreme Court recognized implied preemption of aviation noise control. 411 U.S. 624, 625 (1973). In that case, Burbank attempted to impose a ban, via a municipal ordinance, on jet takeoffs form the privately owned Hollywood-Burbank Airport between 11 p.m. and 7 a.m. *Id.* The Supreme Court found that the "pervasive nature" of the scheme of federal regulation of aircraft noise—particularly the scheme resulting from the passage of the Noise Control Act of 1972—required a conclusion that the FAA, in conjunction with the Environmental Protection Administration, "has full control over aircraft noise, preempting state and local control." *Id.* at 633. In striking down the ordinance, however, the Court emphasized that its decision applied only to local governments attempting to impose bans as exercise of their police power, and that a different scenario would be presented if the government also operated the airport (which Burbank did not). *Id.* at 635.

90. *Id.* at 1354. Article I, section 8, clause 3 of the U.S. Constitution empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, sec. 8, cl. 3. The Commerce Clause, as it is known, is seen as a limitation on state regulatory powers, as well an affirmative grant of Congressional authority. Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996). The negative or dormant implication of the Commerce Clause prohibits state regulation that discriminates against or unduly burdens interstate commerce. *General Motor Corp. v. Tracy*, 519 U.S. 278, 287 (1997). In its negative aspect, the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id.* In evaluating state regulatory measures under the dormant Commerce Clause, the Supreme Court has held that the first step is to determine whether the challenged action "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Fulton* at 331.

The Authority did not explicitly contend that the Authority's actions run afoul of any of the traditional Commerce Clause restrictions. Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d at 1354. Instead, the Authority contended that the standard for analyzing the Authority's actions under the Commerce Clause is the same as it proposed for analysis under the Supremacy Clause—i.e., that the actions must be reasonable and nondiscriminatory. *Id.*

91. *Id.* at 1352.

while imposing only a minimal burden on the current and projected users of Naples Airport.[92]

The court upheld the Authority's restriction as constitutional against both the Supremacy Clause and Commerce Clause challenges.[93] The court rejected NBAA's contention that *Burbank* imposed additional reasonableness and nondiscriminatory requirements upon Supremacy Clause and Commerce Clause analyses.[94]

Regarding the Supremacy Clause challenge, the court held that the power exercised by the Authority is not preempted since the ANCA in title 49 of the United States Code, section 46524(b), *expressly* permits airport operators to ban Stage 2 aircraft, subject to certain requirements.[95]

---

92. *Id.*

93. Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343, 1351-54 (M.D. Fla. 2001).

94. *Id.* at 1352. The court found that no such reasonableness and nondiscriminatory standards are articulated in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, (1973). *Id.* at 1325. After careful scrutiny of the *Burbank* case, the court found that the closest instance occurs in a *footnote* in which the Burbank court describes the distinction between a municipality's noise-regulating authority under its police power and under its power as the proprietor of an airport. *Id. citing Burbank* at 635, n.14. Footnote 14 contains the following language: "Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id.* The court recognized that in addition to failing to address "reasonableness," the quoted text does not represent the opinion of the Supreme Court. *Id.* Instead, it came from a letter submitted by the Secretary of Transportation to the Senate while it was considering a 1972 amendment to the Federal Aviation Act. *Id.* at 1352. Thus, the *Burbank* case did not support the NBAA's contention that both the Supremacy Clause and the Commerce Clause impose reasonableness or nondiscrimination requirements upon airport proprietors' efforts to ban aircraft. *Id.*

95. *Id.* In addition, the court reasoned that review of Appendix A makes it clear that it was not intended to prevent airport operators from considering any particular noise impact or determining that a land use deemed acceptable by the FAA is unacceptable to local residents. *Id.* at 1351. Specifically, 14 C.F.R. § 150.1, app. A, sec. A150.101(d) (2003) states: "For purpose of compliance with this part, all land uses are considered to be compatible with noise levels less than [65 dB DNL]. Local needs or values may dictate further delineation based on local requirements or determinations." In addition, 14 C.F.R. § 150.1, app. A, tbl. 1, fn (a) (2003) provides:

> The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State, or local law. The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities. FAA determinations under Part 150 were not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.

The court reasoned that the argument advanced by the NBAA would lead to precisely the result that the authors of Part 150 disavowed: imposition upon local authorities of a mandatory federal standard for making land use determinations. *Id.* at 1351.

The court rejected the NBAA's assertion that the established FAA threshold of significant noise impacts creates a federal standard of reasonableness and held that an airport proprietor could address those noise impacts it believes are worthy of consideration, regardless of federal guidelines.[96]

To the extent that cases kindred to *Burbank* could be read as identifying a reasonableness requirement as being imposed by the Commerce Clause, the court addressed and rejected the NBAA's assertions that the Authority's ban is unreasonable or discriminatory.[97]

---

96. *Id.* In support of its motion for summary judgment the NBAA argued that to impose a restriction on Stage 2 aircraft, the Authority had to prepare a Part 161 study, which must be premised on a noise exposure map prepared in accordance with Part 150. *Id.* at 1351. Appendix A to Part 150 contains a compatibility table that details compatible and incompatible uses within specific noise level contours including 65, 70, and 75 dB DNL. *Id.* at 1351. As an example, one can consult the Appendix A table—which has noise levels listed across the top and different land uses down the side—and see that land use by "Nature Exhibits and Zoos" is deemed incompatible with noise exposure in the 70-75 dB range, but compatible with noise exposure in the 65-70dB range. 14 C.F.R. § 150.1, app. A (2003).

The NBAA argued that since Appendix A does not include a 60 dB DNL contour, the Authority can not consider noise exposures at the 60 dB DNL level, which it has done, in deciding whether to implement an access restriction. 162 F. Supp. 2d at 1351. The court rejected the NBAA's argument and held that if Congress or the FAA had intended to preclude local authorities from considering noise levels below 65 dB DNL in making an access restriction decision, either could easily done so, but neither did. *Id.* The Court noted that the Appendix A compatibility table does include a column for DNLs below 65 dB, which would include the 60 dB noise level considered by the Authority. *Id.* Thus, the court stated that the NBAA's argument that "it's not listed, so it can't be considered" is without foundation. *Id.* Moreover, the court recognized that even if the chart had failed to include DNLs below 65 dB, the argument would still fail because of the absence of any language in the statutes or the regulations indicating that such a consideration is forbidden. *Id.*

97. *Id.* at 1352. The court found that the cases cited by the NBAA as applying reasonableness and nondiscriminatory requirements—primarily *National Helicopter Corp. of Am. v. City of N.Y.*, 137 F.3d 81, 90 (2d Cir. 1998) and *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F.2d 75, 84 (2d Cir. 1977) (hereinafter "*Concorde I*")—do not identify these requirements as arising from either the Commerce Clause or Supremacy Clause. *Id.* at 1352. Instead, the *Concorde I* court identified those requirements as arising from a compact entered into by the Defendant Port Authority with the Secretary of Transportation. *Id.* The compact requires John F. Kennedy Airport be "available for public use on fair and reasonable terms and without unjust discrimination." *Id.* quoting *Concorde I* at 85. Airport owners seeking funds to improve their facilities were required by statute to enter into such an agreement with the Secretary as a condition to having their grant applications approved. *Id.* at 1352. A similar requirement exists today, found at 49 U.S.C. § 47107(a)(1) and will be discussed in greater detail later in the next section of this article.

To the extent that the *Concorde I* decision can be read as also identifying the "reasonableness" requirement as one imposed by the Commerce Clause, the court addressed the NBAA's assertions that the Authority's ban is unreasonable or discriminatory. *Id.* at 1352. The NBAA argued that:

(1) Some Stage 3 aircraft are as noisy or noisier at takeoff or landing than some

This case is important on two grounds. First, as the first federal court decision on the scope of the ANCA, it establishes an important precedent that compliance with the ANCA should give airport operators a safe harbor against Supremacy Clause and Commerce Clause scrutiny.[98] Second, by emphasizing the advisory nature of the FAA noise guidelines, the decision reinforces the flexibility that airport operators have long pursued in tailoring their noise mitigation programs to local expectations about the acceptable level of noise impacts.[99]

### *C. The FAA . . . Again*

Despite its own decision on the adequacy of the Part 161 Study and the federal court decision on the constitutionality of the Stage 2 ban, in October 2001, the FAA initiated a second enforcement action against the Authority, this time to terminate the Authority's eligibility for federal grants.[100] To understand the FAA's position regarding the interaction of grant assurances and the ANCA, it is necessary to first understand the function of grant assurances.

Federal grants for airport development became available when Congress passed the Airport and Airway Improvement Act of 1982 to establish the Airport Improvement Program (AIP) and to authorize the FAA to make federal grants for airport development.[101] Congress

---

Stage 2 aircraft;
(2) Stage 2 aircraft operations at Naples Municipal Airport are minimal and decreasing;
(3) The Authority has adopted a variety of other measures to address noise concerns;
(4) The expense incurred by Stage 2 operators and their vendors as a result of the ban would not be offset by increased property values within the 60 dB DNL contour;
(5) Resident noise complaints, which the Authority considered in imposing the ban, are subjective and not tied to the 60 dB DNL contour;
(6) The FAA opposes the ban;
(7) The Authority has tried to retain scheduled airline service at the Naples Municipal Airport, and has even considered regional jet service.

*Id.* at 1353. The NBAA offered no explanation as to how these contentions, even if proven true, could lead the court to conclude that the Stage 2 ban is unreasonable or discriminatory. *Id.* The court held that none of the contentions controvert the Authority's position that it performed its study in conformity with the procedural requirements of 49 U.S.C. § 47524(b), Part 150 and Part 161. *Id.*

98. *Id.* at 1354. For instance, the court noted that Commerce Clause and Supremacy Clause analyses might not be necessary in assessing local Stage 2 restrictions because Congress approved both the proprietor exception under with the Authority acted, and the process by which the Authority banned the Stage 2 aircraft. *Id.*

99. *See generally* Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

100. *See generally* NOI, *supra* note 76.

101. 49 U.S.C. §§ 47101, 47104 (2003).

provided that the FAA may approve a grant application for an airport development project only if the FAA, among other things, receives written assurances (grant assurances) that the airport will be available for public use *on reasonable conditions and without unjust discrimination.*[102] Grant assurances are contractual obligations that remain in effect throughout the useful life of the facilities funded with grant money, which is not to exceed 20 years.[103] The FAA ensures that airport owners comply with their federal grant assurance obligations through the FAA's Airport Compliance Program (ACP).[104] Concerning the Naples Municipal Airport, the FAA granted funds to the Authority for planning and development under the AIP in the amount of $14,617,978 between 1982 and 2001 (when the FAA issued the latter Notice of Investigation).[105]

The FAA's enforcement action against the Authority under the ACP involved a three-step process including the investigation, hearing, and final decision.[106] Upon issuing the Notice of Investigation, the FAA alleged that its prior decision on the adequacy of the Part 161 Study was immaterial, that it was not bound by the federal court decision, and that it had the right, pursuant to the Authority's grant agreements, to decide whether the rule violated federal law.[107]

The investigation culminated on March 2003, when the Director of the FAA's Office of Airport Safety and Standards issued a 94-page decision, referred to as a Director's Determination.[108] The Director's

---

102. 49 U.S.C. § 47106 (2003) provides that:

> (a) Project grant application approval. The Secretary of Transportation may approve an application under this subchapter [49 U.S.C. §§ 7101 et seq.] for a project grant only if the Secretary is satisfied that—
>
> (1) the project is consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport;
>
> (2) the project twill contribute to carrying out this subchapter [49 U.S.C. §§ 47101 et seq.];
>
> (3) enough money is available to pay the project costs that will not be paid by the United States Government under this subchapter [49 U.S.C. §§ 47101 et seq.];
>
> (4) the project will be completed without unreasonable delay; and
>
> (5) the sponsor has authority to carry out the project as proposed.

103. FAA Order No. 5190.6A § 2-2a.

104. See generally FAA Order No. 5190.6A.

105. Final Decision, *supra* note 32, at 13.

106. *Id.* at 1-3.

107. NOI, *supra* note 76. The FAA filed the Notice of Investigation (NOI) in accordance with *FAA Rules of Practice for Federally-Assisted Airport Proceedings*, 14 C.F.R. Part 16 (FAA Rules of Practice), Subpart D.

108. *See generally* Director's Determination, FAA Docket No. 16-01-15, dated March 10, 2003, *In re the Matter of Compliance with Federal Obligations by the Naples Airport Authority, Naples, Florida* [hereinafter Director's Determination]. Interestingly,

Determination found that the Stage 2 ban violates the Authority's grant assurance obligation to make the airport available to the public on reasonable terms and without unjust discrimination and is preempted by federal law.[109]

The action then proceeded to the hearing stage when the Authority appealed the Director's Determination and requested a hearing.[110] In June 2003, the Hearing Officer issued an opinion, referred to as an Initial Decision.[111] The Hearing Officer narrowed the previous decision considerably by finding that the Stage 2 ban was not preempted and was not unjustly discriminatory.[112] He found, however, that the Stage 2 ban was unreasonable, that the ANCA did not affect the Authority's grant assurance obligations and that the FAA was not bound by the prior federal court decision.[113]

Both the Authority and the FAA appealed the Initial Decision.[114] In August 2003, the FAA Associate Administrator (Administrator) issued the Final Agency Decision and Order.[115] The Administrator did not decide whether the ban was preempted because the case could be resolved without reaching that issue.[116] With respect to the three remaining issues, the Administrator held against the Authority on each issue.[117]

First, the Administrator held that the FAA is not bound by the prior

---

Director's Determination was issued seventeen months after the FAA investigation began even though the applicable regulation explicitly gives the FAA only four months for the investigation.

109. *Id.* The Director ordered that until NAA rescinds or takes formal action to stop the enforcement of the ban, the FAA would withhold approval of any applications submitted by NAA for funds apportioned under 49 U.S.C. §§ 47114(c) and (d) and any application for discretionary grants authorized under 49 U.S.C. § 47115. *Id.* at 93.

110. *See generally* Final Decision, *supra* note 32.

111. *Id.* An FAA attorney in the FAA's Chicago office was appointed as the Hearing Officer.

112. *See generally* Hearing Officer's Initial Decision, FAA Docket No. 16-01-15, dated August 25, 2003, *In re the Matter of Compliance with Federal Obligations by the Naples Airport Authority, Naples, Florida* [hereinafter Hearing Officer's Decision].

113. *See generally* Hearing Officer's Decision, *supra* note 110.

114. *See generally* Final Decision, *supra* note 32. The Office of Airport Safety and Standards appealed the decision that the Stage 2 ban was not preempted while the Authority appealed each of the three decisions that were adverse to it. *Id.*

115. *Id.*

116. *Id.* at 4. The Associate Administrator for Airports recognized that the Supreme Court has held on numerous occasions that a fundamental principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. *Id.* at 4, n.7, *citing Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). In light of the aforementioned fundamental principle, the Administrator found that the issue of whether federal law preempts the Authority from issuing the Stage 2 ban—a constitutional issue—need not be decided because resolution of the issue is not necessary. *Id.* at 4, n. 7.

117. *Id.*

federal court decision in *National Business Aviation Association* under the doctrines of *res judicata* and collateral estoppel because the FAA was not a party to the case and because the issues in the two cases are not the same.[118] Moreover, the Administrator held that the principle of comity—i.e., respecting another adjudicatory body by giving effect to its case law—does not require the FAA to follow the district court decision since comity is only discretionary, not obligatory, and important interests within the FAA's jurisdiction are at stake.[119]

Second, the Administrator held that the ANCA has no relationship to, or effect on, grant assurance obligations.[120] The Administrator rejected the Authority's argument that the ANCA supercedes an airport proprietor's grant assurance obligations and adopted the FAA's position that regarding Stage 2 access restrictions, an airport proprietor must follow the ANCA's notice, analyis, and public comment requirements *and* demonstrate that the restriction is not contrary to the conditions in applicable grant assurances.[121] The Administrator reasoned that Congress could not have meant what it said in the ANCA based on language in the preamble to Part 161, the fact that repeal by implication is not favored, and because the Authority's interpretation of the ANCA is unreasonable.[122]

---

118. *Id.* at 20-21. The Authority argued that the district court decision binds the FAA under doctrines of *res judicata*, collateral estoppel, and comity. *Id. Res Judicata* requires a showing that: (1) a court (of competent jurisdiction) has issued a final judgment on the merits; (2) the parties, or those in privity with them, are identical; and (3) the cause of action is the same in both cases. *Id.* at 21, n.35. The Administrator found that *res judicata* did not apply because two critical elements were not met. *Id.* at 21. First, the FAA was not a party to the previous case nor was it in privity with any of the parties. *Id.* Second, the causes of action in the two cases were not the same. *Id.*

Similarly, collateral estoppel bars re-litigation of an issue if: (1) the issue at stake is identical to the one in the prior litigation; (2) the issue was actually litigated in the prior suit; (3) the determination of the issue in the prior litigation was a necessary part of the judgment in that litigation; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier litigation. *Id.* at 24, n.41. The Administrator found that collateral estoppel did not apply because two critical elements were not met. *Id.* at 23-24. First, none of the issues are identical. *Id.* at 23. Second, the FAA did not have a full and fair opportunity to litigate the issues. *Id.* at 24.

119. *Id.* at 24.

120. Final Decision, *supra* note 32, at 25.

121. *Id.* at 24. The Authority argued throughout the proceedings that the ANCA supercedes an airport operator's written assurances made when it accepted Federal Airport Improvement grants under 49 U.S.C. § 47107(a)(1). *Id.* The FAA, in contrast, maintained that regarding Stage 2 aircraft restrictions, an airport proprietor must follow ANCA's notice, analysis, and public comment requirements *AND* demonstrate that the restriction is not contrary to the conditions in any applicable grant assurances (including the requirement that the airport would be open for public use on reasonable conditions). *Id.*

122. *Id.* at 24-32. Nowhere in the decision does the Administrator explain why she refers to congressional intent and *in pari materia* statutory construction despite the fact

In the preamble to Part 161, the FAA explained its interpretation of the relationship between the ANCA and Section 47107(a)(1)'s provision regarding written grant assurances.[123] The preamble states that the ANCA does not grant airport operators any authority they did not have prior to the Act and emphasizes that courts have consistently recognized the FAA's legal authority to challenge airport noise and access restrictions that are discriminatory, unreasonable, or impose an undue burden on interstate commerce.[124] The preamble further asserts that this authority is expressly preserved and recognized by the ANCA.[125]

Regarding repeal by implication, the Administrator reasoned that to the extent that the Authority's argument was based on an inference drawn from the absence of a requirement in the ANCA itself for FAA approval of a Stage 2 restriction, that argument is not compelling because repeal by implication is not favored.[126] The Administrator asserted that when Congress passed the ANCA it did not expressly repeal or intend to repeal the statutory provisions regarding grant assurance obligations in Section 47107(a).[127]

Allegedly, Section 47524(b)'s grant of authority to airport proprietors restricting access to Stage 2 aircraft subject to clearly delineated Congressional mandates does not alter the FAA's responsibility to protect the public interest by enforcing existing grant assurances to ensure that the airport is available for use on reasonable

---

that the language of the 49 U.S.C. § 47524(b) is unambiguous. *See generally id.*

123. 56 Fed. Reg. 48661, 48662 (September 25, 1991). The Administrator explains that to understand the difference between Section 47524(b) and (c) regarding the requirement that a Stage 3 access restriction must be "reasonable, nonarbitrary, and nondiscriminatory" versus the absence of such requirement for a Stage 2 access restriction, it is necessary to look at title 49, section 47525. Final Decision, *supra* note 32, at 25-26. In section 47525, Congress directed the Administrator to "conduct a study and decide on the application of section 47524(a)-(d) . . . to airport noise and access restrictions on the operation of stage 2 aircraft with a maximum weight of not more than 75,000 pounds." 49 U.S.C. § 4725 (2003). In response to the Congressional mandate, the FAA promulgated Part 161. 56 Fed. Reg. 48661, 48662 (September 25, 1991).

124. 56 Fed. Reg. 48661, 48662 (September 25, 1991).

125. *Id.* The Administrator held that the FAA's interpretation of the ANCA in this regard was reasonable. Final Decision, *supra* note 32, at 28. Under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), an agency's interpretation of a statute which it is required to implement is given deference so long as its interpretation is reasonable.

126. Final Decision, *supra* note 32, at 29. The Supreme Court has stated that it does not favor repeal by implication unless Congress has "clearly expressed" an intention to do so. *Id. citing* Branch v. Smith, 123 S. Ct. 1429, 1441 (2003).

127. *Id.* at 29. The Administrator points to the savings clause of Section 47533 of the ANCA that provides that "Except as provided by section 47524 of this title, this subchapter does not affect . . . law in effect on November 5, 1990, on airport noise or access restrictions by local authorities." *Id.* The Airport and Airway Improvement Act, requiring written assurances from recipients of federal grants became law in 1982. *Id.*

terms to all types, kinds and classes of aircraft.[128] Thus, the Administrator reasoned that there is no need to read Section 47524(b) as superceding Section 47107(a)(1).[129]

Regarding the ANCA's interpretation, the Administrator reasoned that interpreting the grant assurance provisions and the ANCA as the Authority prompts would be unreasonable in light of Congress's goal in passing the ANCA and establishing a national noise policy that would stem the propagation of uncoordinated and inconsistent local restrictions that could impede the national air transportation system.[130]

Finally, the Administrator held that the Stage 2 ban is unreasonable because there is no incompatible land use problem in Naples that warrants a restriction on aircraft operations.[131] The Administrator focused on three specific issues in evaluating the reasonableness of the Stage 2 ban: actions by local governments concerning development surrounding the airport, noise-related liability, and the nature of the community.[132]

---

128. *Id.* at 30.

129. *Id.* So also, the Administrator reasoned that when Section 47524(b) is read together with Section 47524(c), the absence of language requiring that any Stage 2 access restriction be reasonable, nonarbitrary and nondiscriminatory does not compel the conclusion that a similar requirement established in earlier legislation (also seeking to establish some uniformity in noise policy) has been negated. *Id.* In addition, the Administrator looked the predecessor to Section 47533, P.L. 101-508 § 9304(h), which she alleges supports the FAA's interpretation. *Id.* Congress added Section 47533(1) in 1994 when Congress passed H.R. 1758, which restated certain transportation laws, including the ANCA, and enacted them as subtitles II, III, and V-X of Title 49 of the United States Code. In restating the original laws, Congress substituted simple language for awkward and obsolete term, but did not mean to make any substantive change in the laws. *Id. citing* House Report No. 103-180 at 1 & 3, *reprinted in* 1994 U.S.C.C.A.N. 818, 818 & 820. In the original version of the savings clause set forth in Section 9304(h) of P.L. 101-508, Congress wrote as follows:

> Except to the extent *required* by the application of the provisions of this section [the provisions regarding Stage 2 and Stage 3 restrictions were included in section 9304], nothing in this subtitle *shall be deemed to eliminate, invalidate, or supercede—*
>
> (1) existing law with respect to airport noise or access restrictions. (Emphasis added.)

130. *Id.* at 31. The Administrator notes that Congress expected that "revenues *controlled* by the United States Government can help resolve noise problems," while noting that these funds "carry with them a responsibility to the national airport system." *Id. citing* 49 U.C.S. § 47521(6) (emphasis added). Under the Authority's interpretation, the Administrator stated that the airport operators would be allowed to adopt restrictions—without any FAA review for reasonableness—that may be uncoordinated, inconsistent and contrary to the public interest. *Id.*

131. *Id.* at 32.

132. Final Decision, *supra* note 32, at 36-45. Specifically, the Administrator held that: (1) she was not obligated to defer to the determinations of the local jurisdictions regarding noise compatibility; (2) the Authority faced neither actual or potential liability due to excessive aircraft noise in the DNL 60 dB contour; and (3) the area within the

Regarding actions by local governments, the Administrator rejected the Authority's argument that the Hearing Officer should have deferred to local authorities' determinations regarding land use compatibility, and that he failed to cite reliable, probative or substantial evidence to support his finding that local government actions did not establish the existence of a land use compatibility problem.[133] The FAA has determined that residential land use is normally compatible with noise levels below DNL 65 dB for the purpose of preparing noise exposure maps.[134] However, the Administrator reasoned that the preamble to Part 161 states that Part 150 permits, for *reasonable circumstances*, a degree of flexibility in determining a study area and the compatibility of land uses to noise.[135] Allegedly, Part 150 does not require the FAA to find that an airport access restriction is consistent with grant assurance obligations merely because the airport proprietor tied the restriction to local government policy that residential use is incompatible with noise levels below DNL 65 dB.[136]

Regarding noise-related liability, the Administrator held that noise-related liability is a legitimate factor to consider in determining whether a land use compatibility problem exists.[137] Absence of such proof would not defeat the Stage 2 access restriction if other compelling evidence of its reasonableness existed.[138] Interestingly, the Administrator held that once actual or substantial risk of liability is determined to be a legitimate

---

DNL 60 dB contour is not unusually peaceful and tranquil, and as a result, the local ambience does not justify the Stage 2 ban. *Id.*

133. *Id.* at 36. The Administrator noted that although an access restriction based upon the selection of a contour below DNL 65 dB is not *per se* a violation, the FAA must evaluate such a restriction to see if it is consistent with the airport operator's grant assurances. *Id.* The Authority argued that the preponderance of the evidence demonstrates that the Stage 2 ban is reasonable by any measure, and specifically, is consistent with the "reasonably consistent with reducing noncompatibility of land uses around the airport" requirements of FAA Order No. 5190.6A. *Id.* at 35. The Authority also argued that the federal district court decision of *National Business Aviation Association* should have been treated as reliable, probative and substantial evidence concerning the reasonableness of the Stage 2 ban. *Id.* at n.54. The Administrator reiterated that the FAA is not bound by the findings of the federal district court. *Id.*

134. 49 U.S.C. § 150, app. A, sec. A150.101(d) (2003). The FAA recognizes that other delineations may be appropriate depending upon local circumstances and that the responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rest with the local authorities. Final Decision, *supra* note 32, at 33-45.

135. Final Decision, *supra* note 32, at 36-37 *citing* 56 Fed. Reg. 48661, 48669 (September 25, 1991 (emphasis added)). The Administrator reasoned that the Authority's failure to consider a combination of easements, land acquisition and insulation supports a finding that it did not use a balanced approach. *Id.* at 33-45.

136. *Id.* at 37.

137. *Id.* at 39.

138. *Id.* at 40.

factor to consider, it is logical and within the alleged authority of the FAA to examine the basis for liability.[139]

Regarding the nature of the community, the Administrator held that whether the area within the DNL 60 dB contour is unusually quiet is a legitimate factor to consider in determining whether a land use compatibility problem exists.[140] The Administrator accordingly held that the relevant area in Naples located within the DNL 60 dB contour (which would be affected by the Stage 2 ban) is not unusually peaceful and tranquil, and as a result, the local ambience does not justify the Stage 2 ban.[141]

## VI. Conclusion: Analysis of the FAA's Final Decision

The FAA's Final Decision is important because it is the first substantial interpretation that the agency has ever issued on compliance with Part 161.[142] While the Decision does not provide a complete roadmap, it does offer guidance on the FAA's policy regarding Part 161 noise rules.[143] Undoubtedly, that guidance should be frightening for any airport proposing a Stage 2 aircraft ban or other access restriction under the ANCA for the reasons discussed in the remainder of this article.

### *A. The FAA Has Created an Unprecedented Two Step Process for Stage 2 Restrictions*

Foremost, the Final Decision means that the FAA must effectively approve every noise rule because airport proprietors cannot restrict Stage 2 aircraft operations without satisfying what the FAA says are the "merely procedural" requirements of Part 161 and also establishing to the FAA's satisfaction that the airport proprietor has complied with applicable grant assurances.[144] The FAA has attempted to assert authority through the back door that Congress never gave to the agency.[145] This assertion of authority is unprecedented and upsets the

139. *Id.*
140. Final Decision, *supra* note 32, at 44.
141. *Id.*
142. *See generally* Final Decision, *supra* note 32.
143. *Id.*
144. *Id.* The FAA has made it clear that it will bring separate challenges if it is not satisfied with an airport's compliance with either Part 161 or the applicable grant assurances. *Compare* 49 U.S.C. § 47524(b) and (c) *with* Final Decision, *supra* note 32. Although the ANCA and Part 161 plainly distinguish between restrictions on Stage 2 and Stage 3 aircraft, any such distinction is essentially and legally meaningless under the FAA's interpretation. *Id.* Following the process outlined in Part 161 for Stage 2 restrictions provides no safe harbor and has no bearing on the reasonableness of a restriction. *Id.*
145. *See* 49 U.S.C. §§ 47521-47533; 49 U.S.C. §§ 47101-113. Although FAA has no

balance between federal and local control that Congress and the courts have carefully struck.[146]

### *B. The ANCA is Superfluous*

Congress explicitly intended the ANCA to provide a safe harbor for Stage 2 aircraft bans, as long as the airport proprietor met the explicit requirements of the ANCA.[147] However, the Final Decision holds that even if an airport complies with every explicit mandate set by Congress, the FAA can still find that the airport cannot enact access restrictions on Stage 2 aircraft because the airport has violated applicable grant assurances.[148] The FAA Decision makes the ANCA a costly, superfluous hurdle to banning Stage 2 aircraft.[149]

### *C. Multiple Opportunities to Challenge Restrictions*

The Final Decision is also an open invitation to multiple attacks on new Stage 2 aircraft bans. By concluding that the FAA is not bound by the earlier federal court decision upholding the Stage 2 ban, the FAA has signaled that a private party can challenge a restriction in state or federal court with the comfort that, even if it loses, the FAA can file its own separate litigation bringing the same challenges.[150]

### *D. Importance of 65 dB*

In addition, the Final Decision makes it abundantly clear that the FAA will make its own *independent* assessment of whether local conditions make it appropriate for an airport proprietor to protect areas with noise levels less than a 65 dB threshold.[151] Despite FAA claims that 65 dB DNL is merely a federal guideline, the Final Decision reinforces any suspicion that the FAA in practice treats 65 dB DNL as a bright-line regulatory threshold.[152] An airport proprietor who wants to use a lower noise threshold has an extraordinarily high burden to prove to the FAA that the area is uniquely quiet if the airport wants to address noise less

---

direct approval authority over Stage 2 restrictions, the FAA can and will use its authority under the grant assurances to challenge Stage 2 restrictions. *See generally* Final Decision, *supra* note 32.

146. *See* 49 U.S.C. §§ 47521-47533; Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

147. 49 U.S.C. § 47521(1)-(4), 47524(b).

148. *See generally* Final Decision, *supra* note 32.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

than 65 dB DNL.[153] The Final Decision is a death knell for local creativity in addressing local concerns and for efforts to mitigate noise less than 65 dB DNL.

### *E. Specific Proof Now Required to Establish Reasonableness*

The Administrator focused on three specific issues in evaluating the reasonableness of the Stage 2 ban: actions by local governments concerning development surrounding the airport, noise-related liability, and the nature of the community.[154] Although the Administrator did not specifically state what a proprietor would have to prove to establish reasonableness, the Final Decision suggests three things.[155] First, it is not enough that local governments impose stringent regulation on residential development in areas declared incompatible with airport operation; instead, they must *prohibit* all such development.[156] Second, an airport proprietor must prove actual or specific instances of noise-related liability.[157] Third, an airport must demonstrate that there are rare or unique attributes of the surrounding neighborhoods indicating that the areas are unusually quiet and/or noise-sensitive if it intends to implement a use restriction.[158]

### *F. The Role of Noise-Related Liability*

The Administrator found that specific, identifiable evidence of potential liability is one factor in analyzing the reasonableness of a restriction.[159] She clearly suggested that exposure to liability (which is inherent in the operation of an airport) is not enough.[160] Ridiculous as it sounds, the FAA apparently believes that its role is to decide whether an airport proprietor is in fact liable to pay damages.[161] The FAA Decision therefore invites litigation by homeowners and community groups to prove liability.

*Aimee Kratovil*

153. *Id.*
154. *See generally* Final Decision, *supra* note 32.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *See generally* Final Decision, *supra* note 32.
161. *Id.*