

## FAA Responses to Questions from Rep. Tim Bishop East Hampton Airport

Question 1: In the absence of FAA Grant Assurances, are municipal restrictions to mitigate or reduce noise impacts on the surrounding community permissible? If not, under what basis in law does the FAA assert the Town of East Hampton's proprietary powers are restricted in the absence of specific Grant Assurances?

FAA Response: The FAA's role is to advise sponsors subject to Grant Assurance obligations concerning proposed actions to facilitate their compliance with applicable Federal laws (see FAA Order 5190.6B, Airport Compliance Manual). **Particularly absent such obligations, the FAA does not typically provide advisory opinions about hypothetical situations.** Rather, the FAA provides an opinion when requested by a Federal court and determines on a case-by-case basis whether and to what extent to participate when requested by private parties. See title 49 Code of Federal Regulations, part 9, generally. As a rule, nonfederally obligated airport operators obtain advice from private counsel concerning the scope of their proprietary authority.

**The issue presented here relating to the "absence of FAA Grant Assurances" is a novel one, of first impression,** because the FAA is a party to a settlement agreement under which two of the nine provisions comprising the economic nondiscrimination Grant Assurance and Grant Assurance 29, with one exception not relevant here, will expire at HTO after December 31, 2014. The FAA further agreed not to enforce the expiring provisions after December 31, 2014. **The town of East Hampton will generally otherwise remain grant obligated until 2021.** Under the settlement agreement, all grants awarded to HTO after 2005 will include Grant Assurances 22a, 22h, and 29. For purposes of answering this question, it is assumed that no new grants have been awarded and that the town is proposing to restrict access after December 31, 2014.

The FAA's agreement not to enforce means that as of December 31, 2014, unless and until the FAA awards a new grant to the town, the FAA will not initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators under title 14 CFR, part 16, or seek specific performance of Grant Assurances 22a, 22h, and 29.

**The FAA's agreement not to enforce also means that unless the town wishes to remain eligible to receive future grants of Federal funding, it is not required to comply with the requirements under the Airport Noise and Capacity Act of 1990 (ANCA), as implemented by title 14 CFR, part 161, in proposing new airport noise and access restrictions.** See title 49 United States Code (U.S.C.), § 47524(e). ANCA applies to restrictions affecting operations by any Stage 2 or Stage 3 aircraft (including helicopters) if the restriction was not in effect on October 1, 1990<sup>1</sup> (title 49 U.S.C., § 47524(b), (c)).

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<sup>1</sup> Restrictions on operations of Stage 3 aircraft in effect on October 1, 1990, are "grandfathered" and are not subject to the requirements of ANCA (see title 49 U.S.C., § 47524(c)). Amendments to "grandfathered" restrictions that further reduce or limit Stage 3 aircraft operations or affect aircraft safety are subject to part 161 (title 49 U.S.C., § 47524(d)(4)).

Under ANCA, prior to implementing a restriction on Stage 3 aircraft, an airport operator must provide notice to the public. This includes a clear, concise description of the proposed restriction, an opportunity to comment, and an adequate environmental assessment. The airport operator's analysis must provide substantial evidence supporting the following six statutory conditions:

- (1) The restriction is reasonable, nonarbitrary, and nondiscriminatory;
- (2) the restriction does not create an undue burden on interstate or foreign commerce;
- (3) the restriction is not inconsistent with maintaining the safe and efficient use of the navigable airspace;
- (4) the restriction does not conflict with a law or regulation of the United States;
- (5) an adequate opportunity has been provided for public comment on the restriction; and
- (6) the restriction does not create an undue burden on the national aviation system.

Title 49 U.S.C., § 47524(c)(2)(A)-(F).

Although FAA approval is not required for an airport operator to implement a Stage 2 restriction, an airport operator must provide an analysis of the proposed restriction, as well as a public notice and opportunity to comment, at least 180 days prior to the effective date of the restriction. The analysis must include a benefit-cost analysis; a description of alternative measures considered that do not involve aircraft restrictions (including a benefit-cost analysis of such alternatives).

We are responding to the balance of your question because the town is partially grant obligated and it raises an unusual issue. It is well settled that airport operators have limited proprietary authority to restrict access to control noise. Whether or not they have accepted grants from the FAA, they are vested only with the power to promulgate reasonable, nonarbitrary, and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster. *British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75, 84 (2d Cir. 1977), *aff'd, as modified*, 564 F.2d 1002 (2d Cir. 1977) (*British Airways I and II*) (see § 3, Authorities and Responsibilities—Legal Framework, Aviation Noise Abatement Policy 2000, 65 Fed. Reg. 43,802-01 (July 14, 2000)).

In the opinion of the FAA, should the town of East Hampton propose any restriction that denies access on fair and reasonable grounds or is unjustly discriminatory at HTO, the aforementioned Federal and constitutional law would provide a basis for aircraft operators to prevail in seeking a declaratory judgment and injunction. This basis is independent of Grant Assurances 22a, 22h, and 29. In such circumstances, the United States would have to determine whether affirmative litigation could and should be initiated on that same basis consistent with the terms of the settlement agreement.

Question 2: Barring emergency situations, in the absence of FAA Grant Assurances, is it correct that a municipal owner of a general aviation airport may do the following things for the specific purpose of protecting the community from noise? If not, please clarify.

- Limit hours of operation, including imposing curfews or closing on weekends;
- Limit the number of airport operations per day;
- Exclude particular aircraft types based on associate noise levels.

FAA Response: See response to Question 1. Any restriction must, consistent with Federal and constitutional law, be reasonable, nonarbitrary, and nondiscriminatory, establishing acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster.

Question 3: According to local organizations, 37 out of 39 Grant Assurance at East Hampton Airport will remain in effect until 2021; however, Grant Assurance 22a and 22h and 29a and 29b – the assurances that allow the FAA to substitute its view of the need for noise restrictions for that of the Town as airport proprietor – will become unenforceable, by agreement, on December 31, 2014. Is this correct. If not, please clarify.

FAA Response: According to the settlement agreement, two of the nine subsections comprising of Grant Assurance 22 (Economic Nondiscrimination) will expire after December 31, 2014, as would Grant Assurance 29 (Airport Layout Plan) with one exception. The two subsections that expire are 22a and 22h. These subsections address access restrictions. The settlement agreement states that the FAA agrees to take no action to enforce Grant Assurances 22a, 22h, 29a, and 29b (except where the town takes an action or proposes to take an action that will adversely affect the safety of the airport) after December 31, 2014. As discussed in detail in response to Questions 1 and 2, the Grant Assurances relating to airport noise and access parallel existing requirements under current Federal and constitutional law. From a legal perspective, airport operators have limited proprietary authority to restrict access as a means of reducing aircraft noise impacts in order to improve compatibility with the local community. This limitation applies to the same degree whether or not the airport operator has accepted grants of Federal funding from the FAA. Should the town and the FAA have a difference of opinion concerning whether proposed restrictions exceed this limitation, it is an open question whether the United States could and would initiate affirmative litigation after Grant Assurances 22a, 22h, and 29 expire in December 2014. The issue in any court proceeding, whether brought by private parties or the United States, would be the same: whether the noise restriction adopted by the town is reasonable, nondiscriminatory, and justified. The assurances, which reflect limitations in applicable Federal and constitutional law, do not “allow the FAA to substitute its view of the need for noise restrictions for that of the town as proprietor.”

Question 4: Should the town of East Hampton apply for and receive additional AIP funds, would the town be [by] restricted by a new set of Grant Assurances that would prevent them [that] from implementing noise reduction policies, such as those that are currently in effect.

FAA Response: The settlement agreement specifically states that all grants awarded to HTO after the effective date of the settlement agreement (April 2005) would include Grant

Assurances 22a, 22h, and 29a. By law, any future grant executed by the town must include all Grant Assurances in effect at the time of the grant. The town currently has voluntary noise abatement helicopter routes in effect. We see no reason that a new set of Grant Assurances would prevent continued use of these routes. Nor would new assurances impede any reasonable restriction that complies with other applicable Federal and constitutional law.

The FAA has continuously, consistently, and actively encouraged a balanced approach to address noise problems and to discourage unreasonable and unwarranted airport use restrictions. It is a longstanding FAA policy that all possible measures to reduce noise should be considered before airport noise restrictions are proposed to provide noise relief. An airport operator's efforts at land use control are factors to be considered in determining whether there are nonaircraft restrictions that could achieve noise benefits more effectively than a restriction. The ability of an airport operator to attain the benefits of an access restriction through the exercise of land use control powers may be a factor to be considered in determining the reasonableness of a restriction. Voluntary measures, such as asking flight crews to expedite climbs (safely) or apply airport specific noise procedures, are inherently reasonable elements of a balanced approach. The FAA would encourage HTO to continue to work with aircraft operators to ensure voluntary measures are communicated and implemented, as well as educate users on the importance of participating in such voluntary abatement programs for the mutual benefit of the airport and the community.

Question 5: According to *National Helicopter Corp. of America v. The City of New York*, 137 F. 2d 81 (2d Circuit, 1998), any restriction properly adopted in the exercise of its powers as a proprietor cannot violate the Commerce Clause of the U.S. Constitution and that the proprietor's exception is an exception to federal control of airspace management. Does the FAA agree that use restrictions that are reasonably related [to] the legitimate local interest in limiting noise are not an unconstitutional interference with either interstate commerce or federal control of the airways?

FAA Response: The cited case, to which the United States was not a party, raises issues of Federal authority under the dormant Commerce Clause and implied preemption. Cases invoking these legal doctrines are very fact-specific and the legal issues raised can be complex. Under these circumstances, it would not be appropriate for the FAA to opine hypothetically.

Question 6: In the absence of specific Grant Assurances, on what basis could the FAA bring suit on the town of East Hampton for enacting noise reduction policies at the East Hampton Airport, such as limits on hours of operation and imposing curfews or closing on weekends?

FAA Response: See response to Question 1.

Question 7: Does the Town of East Hampton have an FAA approved Airport Layout Plan (ALP)? If so, when was it most recently approved by the FAA?

FAA Response: Yes, the FAA's New York Airports District Office received a revised ALP and conditionally approved it on September 6, 2011.

Question 8: The 65 DNL decibel contour in East Hampton is within the boundaries of the East Hampton Airport itself. Given this fact, are there any conditions under which the FAA would consent to use restrictions in order to reduce noise in the community?

FAA Response: See responses to Questions 1 and 4. The FAA consents to reasonable, nonarbitrary, and nondiscriminatory restrictions that establish acceptable noise levels for the airport and its immediate environs. Title 14 CFR, part 161, provides detailed information about how the FAA evaluates potential noise benefits in reviewing proposed airport noise and access restrictions. In proposing restrictions, just as it does in proposing measures to increase airport noise compatibility under title 14 CFR, part 150, the town would have the flexibility to supplement day/night average sound level with other noise analyses. As discussed in response to Question 4, the Town should consider measures to reduce noise in the community other than use restrictions. The Town may apply for and receive grants of federal funding to sound insulate homes subject to noise levels below 65 DNL dB. To qualify the Town would have to conduct an airport noise compatibility planning study under Part 150 to explore a range of alternative noise abatement measures and adopt a standard for local land use compatibility lower than 65 DNL dB.