# 15-2334-cv(L)

## 15-2465-cv(XAP)

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ANALAR CORPORATION, ASSOCIATED AIRCRAFT GROUP, INC., ELEVENTH STREET AVIATION LLC, HELICOPTER ASSOCIATION INTERNATIONAL, INC., HELIFLITE SHARES, LLC, LIBERTY HELICOPTERS, INC., SOUND AIRCRAFT SERVICES, INC., NATIONAL BUSINESS AVIATION ASSOCIATION, INC.,

*Plaintiffs-Appellees-Cross-Appellants,*

*v.*

TOWN OF EAST HAMPTON,

*Defendant-Appellant-Cross-Appellee.*

*On Appeal from the United States District Court for the Eastern District of New York in Case No. 2:15-CV-2246-JS-ARL Joanna Seybert, United States District Judge*

## BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS WITH ADDENDUM

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## CORPORATE DISCLOSURES

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees-Cross-Appellants state the following:

(1) Plaintiff Liberty Helicopters, Inc. is 100% owned by Sightseeing Tours of America, Inc., a New York corporation.

(2) Plaintiff Associated Aircraft Group, Inc. is 100% owned by Sikorsky Aircraft Corporation (a Delaware corporation), which in turn is 100% owned by Lockheed Martin Corporation, a publicly traded company. State Street Corporation and State Street Bank and Trust Company own 10% or more of Lockheed Martin Corporation's stock.

(3) Plaintiff Eleventh Street Aviation LLC is 100% owned by Brooklyn NY Holdings LLC, a Delaware limited liability company.

(4) For the remaining Plaintiffs, there is no parent corporation or any publicly held corporation that owns 10% or more of the Plaintiff's stock.

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## PRELIMINARY STATEMENT

The cross-appeal in this action by Plaintiffs-Appellees Friends of the East Hampton Airport, Inc. *et al.* ("Plaintiffs") presents a straightforward question that ultimately is dispositive of both the appeal and cross-appeal: Did Congress mean what it said in Sections 9304(b) and 9304(c) of the Airport Noise and Capacity Act of 1990 ("ANCA") when it commanded that "no airport noise or access restriction … shall" be imposed on certain classifications of aircraft unless the airport operator first complies with ANCA's procedural requirements?

The answer to that question is equally straightforward: Yes. ANCA's requirements in Sections 9304(b) and 9304(c) are mandatory – a conclusion compelled by the statute's plain text, and confirmed by its purpose, context, legislative history, and implementing regulations. Accordingly, the series of airport noise and access restrictions enacted by Defendant-Appellant Town of East Hampton (the "Town") in April 2015 – all in clear violation of ANCA's requirements – are preempted by federal law.

The district court correctly recognized that settled precedent supported Plaintiffs' invocation of the court's equity powers to enjoin the Town's restrictions if they violated ANCA or otherwise exceeded the "extremely limited role" reserved by Congress for local airport proprietors to regulate noise levels for the airport and its immediate environs. *British Airways Bd. v. Port Auth. of*

*N.Y. & N.J.*, 564 F.2d 1002, 1010 (2d Cir. 1977) ("*Concorde II*"). The district court erred, however, in declining to interpret ANCA in accordance with the plain meaning of its text – effectively reading the command "shall" as the equivalent of "should" and construing a statute that is, on its face, mandatory as instead merely precatory.

As a result, instead of enjoining all three of the Town's restrictions as violative of ANCA, the district court enjoined only the most draconian of those restrictions – a provision imposing a one trip per week limit during the busiest season – on the ground that a sufficient showing had been made on the current record before the court that the provision was likely unreasonable and therefore violative of the narrow "proprietor's exception" to the general federal preemption of aviation noise regulation. While the district court indisputably was correct in concluding that a sufficient showing had been made as to the likely unreasonableness of the one-trip limit, that is an issue that this Court ultimately need not reach because *all* of the Town's restrictions violate the mandatory requirements of ANCA and are for that reason alone properly enjoined as preempted by federal law.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and its equitable jurisdiction. The Town filed a timely notice of appeal from the district

court's June 26, 2015 decision, and Plaintiffs filed a timely notice of cross-appeal. A511-13. This Court has jurisdiction over the appeal and cross-appeal under 28 U.S.C. § 1292(a)(1).

## ISSUES PRESENTED

1. Whether the district court correctly concluded that settled precedent supported invocation of the court's equity powers to enjoin local laws that are violative of ANCA and the regulations promulgated thereunder.

2. Whether the district court's decision not to enjoin the Town's recently enacted local laws as preempted by ANCA and the regulations promulgated thereunder was predicated upon an erroneous interpretation of ANCA.

3. Whether the district court acted within its broad discretion by preliminarily enjoining the Town's one-trip limit after finding that Plaintiffs would suffer irreparable injury absent injunction, that Plaintiffs had made a sufficient showing that the one-trip limit was likely to be unreasonable and therefore preempted, and that provisional relief would appropriately preserve the status quo pending factual development of the record and a full hearing.

## STATEMENT OF CASE

Plaintiffs include aircraft operators and national aviation organizations whose members are subject to the severe airport access restrictions enacted by

the Town in April 2015 and to the criminal and monetary penalties imposed by those local laws for violations of the restrictions. Plaintiffs filed this action on April 21, 2015, promptly after those laws were enacted, seeking equitable relief to enjoin the local laws as federally preempted.

Plaintiffs moved for a temporary restraining order, which the district court (Seybert, J.) treated as a motion for a preliminary injunction. SPA15.[1] On June 26, 2015, the district court granted the motion in part and denied it in part.

Plaintiffs cross-appeal only from that portion of the district court's decision construing ANCA as non-mandatory and therefore ruling that the Town's local laws were not preempted by ANCA and its implementing regulations and that the balance of hardships as to two of the restrictions tipped in favor of the Town.

## A. Statutory and Regulatory Framework

### 1. Federal Preemption of Aviation Regulation – Generally

In few areas has Congress so thoroughly preempted a field of regulation as in aviation. *See* 49 U.S.C. § 40103(b); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Air Transport Ass'n of Am., Inc. v. Cuomo*,

[1] References to the Joint Appendix and Special Appendix, filed by the Town, are cited as "A__" and "SPA__," respectively. Citations to the Town's appellate brief are cited as "Br.__." References to Plaintiffs' Addendum, filed with this brief, are cited as "PA__."

520 F.3d 218, 222-225 (2d Cir. 2008). As Justice Jackson aptly observed in 1944 (and is all the more true today):

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. … The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. … Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

*Northwest Airlines v. State of Minn.*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

Moreover, because no national air transportation system could function without publicly accessible airports, Congress enacted the Airport and Airway Improvement Act of 1982 (the "AAIA"), establishing the Airport Improvement Program (the "AIP"), to provide federal grants to airports that, in return, provide statutorily mandated assurances to keep the airports publicly accessible and to abide by federal aviation law and policy. 49 U.S.C. §§ 47107(a)(1), 47108(a).

**2. Federal Preemption of Aviation Noise Regulation Pre-ANCA**

Federal regulation specifically relating to aviation noise long predates ANCA's passage in 1990. A33. By 1973, given that "pervasive" regulatory scheme, the Supreme Court found that Congress had impliedly preempted the field of aviation noise regulation. *Burbank*, 411 U.S. at 639-40 (holding that local governments are barred from using police powers to regulate aviation noise).

*Burbank* left open whether Congress had reserved any role for local airport proprietors, and cases following *Burbank* found that Congress had reserved only an "extremely limited role" to regulate noise levels for the airport and its immediate environs. *Concorde II*, 564 F.2d at 1010. That narrow carve-out from an otherwise entirely preempted field – referred to as the "proprietor's exception" – was based on the rationale that an airport proprietor, as property owner, may be liable to other property owners for noise damage and therefore should have some power to insulate itself from this liability. *See Griggs v. Allegheny Cty.*, 369 U.S. 84, 88-90 (1962).

To fit within the proprietor's exception, local regulations must comport with federal law and be "reasonable, nonarbitrary, and non-discriminatory." *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 84 (2d Cir. 1977) ("*Concorde I*"). *Concorde I* established that "Congress has left room only for local action that advances and is consistent with federal policy; other, noncomplementary exercises of local prerogative are forbidden." *Id.* at 84-85. In 1978, in the Airline Deregulation Act, Congress codified the proprietor's exception as to regulation of air carrier "rates, routes, and services" (subsequently recodified at 49 U.S.C. § 41713(b)(1), (3)).

In 1979, Congress enacted the Aviation Safety and Noise Abatement Act of 1979 ("ASNA"), Pub. L. No. 96-193, 94 Stat. 50 (recodified at 49 U.S.C.

§§ 47501-47510) – ordering the Federal Aviation Administration ("FAA") to establish uniform federal standards for measuring airport-related noise, and establishing a *voluntary* program (known as a Part 150 program) giving airport operators financial and legal incentives to conduct noise studies under those federal standards and to implement noise mitigation programs with federal input. *Id.* §§ 47502-06. But again, ASNA expressly made airport participation in the program voluntary.

**3. ANCA – Legislative History**

By 1990, Congress perceived the future of the national air transportation system to be in peril. Although consumer demand for air transportation exceeded airport capacity, local airport access restrictions had proliferated as a means of responding to local noise complaints. That "patchwork quilt" of local restrictions was stymieing airport development. 136 Cong. Rec. S13619 (Sept. 24, 1990) (statement of Sen. Wendell H. Ford).

On September 24, 1990, Senator Ford sponsored "The Airport Capacity Act" – the template for what later became ANCA – to mandate "the development and implementation of a national noise policy." *See* Airport Capacity Act of 1990, S.3094, 101st Cong. (2d Sess. 1990); 136 Cong. Rec. S13620-S13624 (copy of bill). Senator Ford introduced the bill stating that it was time the federal government "end[ed] the noise debate":

> No issue facing air transportation is more important than settling the noise debate. The greatest obstacle to expanding airports and increasing air carrier service is the opposition to aircraft noise and not the cost of building more runways and establishing more technologically advanced air traffic control. …
>
> Airports are now telling the airlines what kind of aircraft they can fly as a method of regulating noise. Some airports have enforced restrictions on the type of aircraft, the number of operations and the time of day for operations.

136 Cong. Rec. S13619.

Senate bill S.3094 proposed to completely outlaw all restrictions on Stage 3 aircraft and to require FAA approval for all Stage 2 restrictions. *See* S.3094, § 302.[2] The Senate bill also incorporated features of a House bill by authorizing airports to start collecting passenger facility charges ("PFCs") – a new (non-federal) pool of money that airports could use to fund capacity-increasing or noise-mitigation projects – but contingent upon a national policy first being implemented to govern airport restrictions. S.3094, § 402.

S.3094 contained no grandfather clause, so even airports with existing restrictions would need to comply. The bill thus included a provision notifying airports with existing restrictions that, unless they rescinded those restrictions, they would be ineligible to collect PFCs or receive federal grant funding. *Id.* § 305.

[2] The FAA classifies aircraft based upon their ability to operate beneath specified noise levels. Generally, the higher the stage, the less noise it emits. At the time of ANCA's enactment, Stage 3 was the quietest aircraft classification.

S.3094 also included a liability-shifting provision providing for the federal government's assumption of liability for noise damages resulting from the FAA's disapproval of a restriction. *Id.* § 303. No Senate Committee Report was issued on S.3094.

Beginning in September 1990, the House of Representatives held four days of hearings on federal aviation noise policy, eliciting views from airports, carriers, local governments, aircraft manufacturers and interest groups. *See Federal Aviation Noise Policy: Hearings Before the Subcomm. on Aviation of the H. Comm. on Public Works & Transportation*, 101st Cong. (1990) ("House Hearings").

Although the hearings were not held specifically to discuss Senate bill 3094, a number of witnesses – for and against – addressed S.3094 in their testimony. What stands out in that testimony is the universal recognition that S.3094, if passed, would impose mandatory requirements altering the balance of power between local proprietors and the federal government. *See* House Hearings at 100, 130-131, 389-90, 566, 708, 853. Some witnesses testified that such a shift in the power balance would necessitate a similar shift of liability for noise damages, and S.3094 in fact included such a liability-shifting provision. *See, e.g.*, *id.* at 118-19, 374, 478, 585-586.

On October 18, 1990, a modified version of the Senate bill was introduced. *See* 136 Cong. Rec. S15816-S15818 (Oct. 18, 1990). Reiterating its importance, Senator Ford stated:

> We now have over 440 different [local] ordinances, and aircraft, airlines, and air carriers do not know exactly when to get in, when to get out, or what aircraft they can take. It is about time we started doing something on a national level.

*Id.* at S15819. The modified version added a grandfather clause exempting existing restrictions from the Stage 2 and Stage 3 procedural requirements. It also replaced the outright ban on Stage 3 restrictions with a provision permitting Stage 3 restrictions if first approved by the FAA or unanimously agreed to by aircraft operators. *See id.* at S15818.

The senators who vocally opposed even the modified version did so because they understood that its requirements would be mandatory. *See id.* at S15818, S15819, S15820 (remarks of Sens. Lautenberg, Durenberger, Sarbanes). Senator Lautenberg voiced particular concern that the legislation, if passed, would preempt Newark Liberty International Airport from restricting Stage 2 aircraft. *See id.* at S15818.

Following intense negotiation, two significant additional modifications were made to strike a compromise: First, the legislation added the mandatory phase-out of certain Stage 2 aircraft by December 31, 1999. Second, FAA approval was no longer required for Stage 2 restrictions; instead, the legislation

required airport operators to publish specified analyses for public comment at least 180 days before the effective date. H.R.5835, §§ 9308(a), 9304(c), 101st Cong. (2d Sess. 1990); 136 Cong. Rec. S17527 (Oct. 27, 1990). Those modifications resolved Senator Lautenberg's concern. *See* 136 Cong. Rec. S17543.

ANCA became law on November 5, 1990. *See* Airport Noise & Capacity Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-378 (1990) (PA1-7).

**4. ANCA's Provisions**

As passed by Congress and reprinted in the Statutes at Large, ANCA is a compact statute. It is only seven pages in length and includes eight discrete sections. PA1-7.[3]

The first section, Section 9302, recites Congress's "Findings" including, among others, that:

> (1) aviation noise management is crucial to the continued increase in airport capacity;

[3] In 1994, a recodified version of ANCA was published, with certain of ANCA's language, subtitles and organization altered as part of an expressly "non-substantive" re-organization of Title 49. *See* Pub. L. 103-272, 108 Stat. 745 (1994). As discussed below, *see infra* p.42, the district court accorded substantive significance to certain aspects of ANCA's non-substantive recodification, in contravention of the settled rule that when the language in the Statutes at Large and codified versions differ, the former controls. *See* 1 U.S.C. §§ 112, 204(a); *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam); *Cheney R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1076 (D.C. Cir. 1995); *In re Eloise Curtis, Inc.*, 388 F.2d 416, 418 n.1 (2d Cir. 1967).

> (2) community noise concerns have led to uncoordinated and inconsistent restrictions on aviation which could impede the national air transportation system;
>
> (3) a noise policy must be implemented at the national level;
>
> (4) local interest in aviation noise management shall be considered in determining the national interest;
>
> (5) community concerns can be alleviated through the use of new technology aircraft, combined with the use of revenues, including those available from passenger facility charges, for noise management; [and]
>
> (6) federally controlled revenues can help resolve noise problems and carry with them a responsibility to the national airport system.

§ 9302 (PA1).

ANCA's next section, entitled "National Aviation Noise Policy," commanded that the Secretary of Transportation (which has delegated its authority to the FAA), not later than July 1, 1991, "**shall** issue regulations establishing a **national aviation noise policy**. …" § 9303(a) (PA1-2).[4]

Next, Section 9304 commands that the national aviation noise policy "**shall**" include "**a national program for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft**," and dictates the requirements of that program. § 9304(a)(1) (PA2).

[4] All bold-faced terms in this brief reflect emphasis added by Plaintiffs to aid the Court in its review of the relevant statutory and regulatory language.

Specifically, for Stage 3 restrictions, Section 9304(b) states, in relevant part:

> **No airport noise or access restriction on the operation of Stage 3 aircraft** … **shall be effective unless** it has been agreed to by the airport proprietor and all aircraft operators or has been submitted to and approved by the Secretary pursuant to an airport or aircraft operator's request for approval. …

§ 9304(b) (PA3-4).[5] (It is undisputed that the Town's local laws are "noise and access restrictions" as defined in § 9304(b).)

For Stage 2 restrictions, Section 9304(c) states:

> **No airport noise or access restriction shall include a restriction on operations of Stage 2 aircraft, unless** the airport operator publishes the proposed noise or access restriction and prepares and makes available for public comment at least 180 days before the effective date of the restriction –
>
> (1) an analysis of the anticipated or actual costs and benefits of the existing or proposed noise or access restriction;
>
> (2) a description of alternative restrictions; and
>
> (3) a description of the alternative measures considered which do not involve aircraft restrictions, and a comparison of the costs and benefits of such alternative measures to the costs and benefits of the proposed noise or access restriction.

[5] Since the passage of ANCA, the FAA has promulgated a Stage 4 classification. By definition, Stage 4 aircraft operate beneath the noise thresholds specified for Stage 3 and are therefore protected by these same requirements. A118.

§ 9304(c) (PA4).[6]

Section 9304 also includes a subsection, entitled "Limitations on Applicability," exempting from ANCA's requirements restrictions already in effect on October 1, 1990 (or, in certain circumstances not applicable here, restrictions proposed or agreed to before ANCA's enactment, or later amended without reducing or limiting aircraft operations). § 9304(a)(2) (PA2-3). Section 9304 provides no exemption of any kind for restrictions proposed after ANCA's enactment.

Next, Section 9304 sets out additional provisions relating only to Stage 3 restrictions – including a requirement that before approving any Stage 3 restriction, the FAA must find it to be "supported by substantial evidence" that, *inter alia*, the proposed restriction is "reasonable" and "not inconsistent with maintaining the safe and efficient utilization of the navigable airspace." § 9304(d) (PA4). Section 9304 also specifies procedures for the FAA to reevaluate its approval or disapproval of a Stage 3 restriction and a mandatory financial sanction stating that airport operators that impose noncompliant Stage

[6] When ANCA was recodified in 1994, the wording of Section 9304(b) was altered to say that a "restriction … may become effective only if," 49 U.S.C. § 47524(c), instead of "no restriction … shall be effective unless." The wording of Section 9304(c) was similarly adjusted. *Compare* § 9304(c) *with* 49 U.S.C. § 47524(b). While either form of wording expresses a mandatory requirement, this Court must of course consider the wording actually used by Congress in determining its intent.

3 restrictions "shall not be eligible" for PFCs or federal AIP grants unless the restriction has been approved by the FAA, agreed to by aircraft operators, or rescinded. § 9304(e)-(g) (PA4-5).

Section 9304 also contains a savings clause, entitled "Effect on Existing Law," that states:

> Except to the extent required by the application of the provisions of this section, nothing in this subtitle shall be deemed to eliminate, invalidate, or supersede –
>
> (1) existing law with respect to airport noise or access restrictions by local authorities;
>
> (2) any proposed airport noise or access regulation at a general aviation airport where the airport proprietor has formally initiated a regulatory or legislative process on or before October 1, 1990; and
>
> (3) the authority of the Secretary to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief.

§ 9304(h) (PA5).

Section 9306 contains a liability-shifting provision in which Congress assumed federal liability for noise damages directly resulting from the FAA's disapproval of a proposed Stage 3 restriction, and Section 9307 states that "[u]nder no conditions shall any airport" receive federal grants or collect PFCs "unless the Secretary assures that the airport is not imposing any noise or access restriction not in compliance with this subtitle." PA5.

ANCA's three remaining sections address the Stage 2 phase-out requirements. *See* §§ 9305, 9308 & 9309 (PA5-7).

**5. Part 161**

In 1991, in accordance with Section 9303 of ANCA, the FAA promulgated Part 161 – interpreting and implementing ANCA's requirements. *See* 14 C.F.R. Part 161 (PA8-28).

Part 161 reflects the FAA's clear understanding that Congress intended Sections 9304(b) and (c)'s requirements to be mandatory, and the FAA itself made those requirements mandatory in Part 161. Part 161 unequivocally states that "the notice, review, and approval requirements set forth in this part apply to **all airports** imposing noise or access restrictions" on Stage 2 and Stage 3 aircraft after October 1, 1990. *Id.* §§ 161.3(a), (c) (PA9). There are no exceptions other than for pre-ANCA restrictions grandfathered by Congress.

Part 161 also uses commanding terms to describe airport operators' obligations. *See, e.g.*, *id.* §§ 161.205, 161.305 (PA14, 16-19) (airport operator proposing Stage 2 or Stage 3 restrictions "**shall** prepare" requisite analyses); § 161.301 (PA15) (Stage 3 restriction "**may not** become effective **unless** … approved by the FAA"); § 161.203 (PA13-14) (airports "**may not**" implement a Stage 2 restriction "**unless**" analysis and notice requirements have been met); *see also* Proposed Rules, 56 Fed. Reg. at 8646-62 & Final Rules, 56 Fed. Reg. at

48661-98 (using phrase "Congress mandated" or form of the word "mandate" 36 times in describing ANCA's requirements; form of the word "require" 717 times; "must" 91 times); Proposed Rules, 56 Fed. Reg. at 8661-62 (ANCA's requirements are mandatory for smaller and larger airports alike); *id.* at 8646 (Stage 3 restrictions "**must be** approved by the FAA").

Part 161 further requires all airport operators proposing Stage 2 or Stage 3 restrictions to prepare a noise study using the uniform, federal standards previously prescribed under ASNA. *See* 14 C.F.R. §§ 161.9(a), 161.205(b), 161.305(e)(2)(ii)(A) (PA11, 14, 17); A145-146 (discussing those standards).

Thus, in contrast to ASNA – which had made it *voluntary* for airports to perform such noise studies – the FAA in implementing ANCA made it a national *requirement* for all airports proposing Stage 2 or Stage 3 restrictions. The FAA determined that it was essential for airports to measure and evaluate noise using uniform, federal standards to ensure compliance with ANCA and "eliminat[e] inconsistent treatment among airports." Final Rules, 56 Fed. Reg. at 48668.

Part 161 also contains more than three pages of regulations specifying the extensive types of analysis that proprietors must prepare for any proposed Stage 3 restriction. *See* 14 C.F.R. § 161.305 (PA16-19). Those requirements include a cost-benefit analysis of the proposed restriction using "currently accepted economic methodology," and evidence "that other available remedies are

infeasible or would be less cost-effective." *Id.* §§ 161.305(e)(2)(i)(2) & 161.305(e)(2)(ii)(A)(1) (PA17-18).

Part 161 further addresses the various ways the FAA can respond to violations of ANCA, including by initiating financial sanctions, instituting legal proceedings to compel compliance, or both. *See id.* § 161.501 (PA26) (mandatory financial sanctions "may be used **with or in addition to any judicial proceedings** initiated by the FAA to protect the national aviation system and related Federal interests"); § 161.7(d)(3) (PA11) (recognizing FAA's undiminished authority "to seek and obtain such **legal remedies … including injunctive relief**"). During rulemaking proceedings, the FAA explained, by way of example, what would happen if the FAA reevaluated a previously approved Stage 3 restriction and found that it no longer met ANCA's requirements:

> [I]f a restriction is found to no longer meet the statutory conditions, the airport operator would be required to rescind the restriction. Failure to do so would subject the airport operator to the [financial] sanctions …, plus possible administrative action by the FAA and legal action by the United States.

Proposed Rules, 56 Fed. Reg. at 8655.

## B. East Hampton Airport and the Local Laws Enacted by the Town in April 2015

East Hampton Airport (the "Airport") is a public-use, general aviation airport that connects the eastern end of Long Island to the rest of the nation and world. A17. The FAA has designated the Airport as a "regional" airport that is

"significant" to the national system. A115-117. Built with federal funds, the Airport has been open to commercial and recreational aircraft of all kinds throughout its 80-year history. A17. Plaintiffs use the Airport to conduct intra-state, interstate and international flights. *See, e.g.*, A177, 212.

The Airport is also federally obligated. Most recently, the Town accepted AIP funds in September 2001. It is undisputed that the Airport therefore remains federally obligated until September 2021. SPA37 & A32. In accepting AIP funds, the Town executed a grant agreement certifying it would comply with at least 37 specified assurances, including assurances to:

> make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport[;]

A61 (Grant Assurance 22(a)), and to:

> comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to … Title 49 U.S.C., subtitle VII, as amended.

A53.[7]

[7] The Town's signed grant agreement with the FAA has recently been filed by the FAA as part of the administrative record in the related action in *Friends of the East Hampton Airport, Inc. v. FAA*, 15 Civ. 441 (JS) (E.D.N.Y.) (the "*FAA Action*"). *See* FAA's Administrative Record (Part 1), Dkt. No. 41, at 8-37.

### 1. Events Preceding the Town's Enactment of its Local Laws

For more than a decade – from 2001 through 2011 – the Town was repeatedly counseled that it could not impose any restriction on Stage 2 or Stage 3 aircraft without first complying with its federal obligations under ANCA, Part 161, and its grant assurances. A239-240, 266, 273. And for more than a decade the Town heeded that advice.

In 2012, however, following the election of a new Town Board eager to restrict airport use, the Town radically changed its position. Seizing upon conduct by certain FAA officials, the Town began for the first time to contend that it had no legal obligation to comply with ANCA, Part 161, or Grant Assurance 22(a) (which relates to public access) after December 31, 2014. A477-479.

The FAA conduct at issue is the subject of the related *FAA Action* pending before the district court, 15 Civ. 441 (JS).[8] As alleged in the *FAA Action*, FAA officials have taken actions with respect to the Airport that violated the FAA's statutory duties and created confusion about the Town's federal obligations. A42-45.

[8] The plaintiffs in the *FAA Action* overlap with, but are not identical to, Plaintiffs in this action.

More specifically, the FAA entered into a settlement agreement in 2005 with an anti-airport community group (the "2005 Settlement Agreement," A402-412) in which the FAA agreed (in return for dismissal of litigation against it) not to enforce three of the Town's grant assurances after December 31, 2014, including Grant Assurance 22(a) regarding the maintenance of public access to the Airport (the "Public Access Grant Assurance"). A43. The FAA entered that agreement (to which the Town and Airport were not parties) in direct contravention of the FAA's statutory duties to ensure airports' compliance with grant assurances – duties that the FAA itself has described as depriving it of authority to waive grant assurances or its enforcement jurisdiction in order to settle civil litigation. A44.

The FAA then compounded its error in 2012, when someone at the FAA authored an unsigned writing to then-U.S. Representative Timothy Bishop interpreting the 2005 Settlement Agreement as: (i) stripping the FAA of jurisdiction after December 31, 2014, to enforce the Public Access Grant Assurance or adjudicate administrative complaints regarding the Town's violations of the Public Access Grant Assurance; (ii) waiving the Town's obligation to comply with the Public Access Grant Assurance after 2014; and (iii) further waiving the Town's obligation to comply with ANCA after 2014

"unless the [T]own wishes to remain eligible to receive future grants of Federal funding" (the "Bishop Responses"). A391.[9]

The pending *FAA Action* seeks declaratory relief confirming that: (i) the FAA remains able and indeed statutorily required to ensure that the Town complies with all of its grant assurances until September 2021; and (ii) the Bishop Responses erroneously interpreted the 2005 Settlement Agreement to mean that the Town has no legal obligation to comply with certain of its grant assurances or ANCA after 2014. *See* Complaint, *FAA Action*, 15 Civ. 441, Dkt. No. 1 at 25.

After the *FAA Action* was filed, and without waiting for its resolution, the Town moved ahead with its local laws, claiming reliance on the Bishop Responses and the FAA's silence as grounds for its disregard of the requirements of ANCA and Part 161. A296. To be clear, however, the Town has never contended – and does not contend on appeal – that the Town could assert an estoppel claim against the FAA or be legally excused from its federal legal obligations by either the Bishop Responses or the 2005 Settlement Agreement.[10]

[9] In fact, while the 2005 Settlement Agreement purportedly waived the FAA's authority to *enforce* certain grant assurances, it did not purport to release the Town's obligations to *comply* with its grant assurances. Nor did it mention ANCA. A402-412.

[10] The Town conceded below that it cannot assert estoppel against the FAA based on the Bishop Responses. Town's Brief in Opposition, Dkt. No. 38,

**2. The Town's Local Laws**

On April 16, 2015, the Town adopted local laws (hereafter the "Restrictions") imposing mandatory restrictions on operations by Stage 2, Stage 3 and Stage 4 aircraft, including: (i) a curfew prohibiting use of the Airport between 11:00 p.m. and 7:00 a.m. (the "Mandatory Curfew"); (ii) an extended curfew banning flight from 8:00 p.m. to 9:00 a.m. for so-called "Noisy Aircraft" (a classification of the Town's creation that applies to certain Stage 2, 3, and 4 aircraft) (the "Extended Curfew"); and (iii) a one-trip limit banning "Noisy Aircraft" from flying more than one trip per week during the five-month "season" from May through September (the "One-Trip Limit"). A33, 73-109.

Under the local laws, transgressions of the Restrictions are deemed criminal violations punishable by fines, injunctions, and Airport bans. *See* A107-108, 503. Aircraft operators face escalating fines of $1,000, $4,000, and $10,000 for each first, second, and third violation, respectively. A108. A fourth violation is enforced through a mandatory ban on Airport use for up to two years. A108.

The laws also provide that any convicted entity additionally faces a "fine of not less than the amount of the actual costs incurred" by the Town in securing the conviction, and potentially up to twice the Town's actual costs. A108.

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at 10 n.2.

Further, the laws impose yet another fine of up to $2,000 for any violation within five years of a previous one, and an additional fine of up to $10,000 against any person or entity that "caused, permitted, or allowed" a violation. A108.

The local laws also authorize the Town to bring injunctive action against "any person, organization, corporation, group or other entity which holds an ownership interest in the Individual Aircraft." A108.

It is undisputed that the Town never complied with ANCA and Part 161 before enacting the Restrictions. The Town never prepared a Part 161 study, never sought FAA or aircraft operator approval for Stage 3 restrictions, and never provided 180-days notice for its Stage 2 restrictions. The Town also reneged on its promise to evaluate whether the Airport could remain financially viable and able to meet its maintenance needs if the Restrictions were adopted. A34, 504. Moreover, despite being a federally obligated airport that had expressly agreed to abide by federal aviation law and policy, the Town spurned federal standards for measuring and evaluating noise impact. A147-149.[11]

[11] The Town's portrayal of itself as a "model" airport operator (Br. 23) is thus a chimera; what the Town in fact did was contravene federal policy at every turn, hoping that the FAA's own errors and self-entanglements would enable the Town to escape accountability.

### C. Proceedings Below

Plaintiffs promptly moved for emergency relief to enjoin enforcement of the Restrictions while this action proceeds on the merits. Plaintiffs asserted that the Restrictions are preempted because they conflict with the federal law and policy set out in ANCA, Part 161, the AAIA, and federal regulations governing aircraft classification and safety. *See* A35-42; Dkt. No. 32. The Town opposed the motion, and each side submitted briefing with fact and expert declarations. *See* Dkt. Nos. 38, 45; A111-233, 236-454. No discovery occurred and no testimony was heard prior to the district court's ruling on the motion. The Court heard legal argument on May 18, 2015. A455-491.

The FAA appeared (through counsel) at oral argument and supported Plaintiffs' motion for preliminary injunctive relief. A234, 469. While taking no position on the ultimate merits, the FAA advised the court that an injunction was necessary to afford the federal government sufficient time to evaluate the issues, which were described as being reviewed "at the highest levels of both the FAA and the Department of Transportation." A469. The FAA also unequivocally rejected the Town's characterization of the Bishop Responses as constituting the FAA's legal interpretation of ANCA, calling the Town's claimed reliance on the Bishop Responses "disingenuous at best." A470-471.

### D. The District Court Decision

On June 26, 2015, the district court granted Plaintiffs a preliminary injunction as to the One-Trip Limit, but denied interim relief as to the curfews, on the following grounds:

*First*, the court held that Plaintiffs could invoke the court's inherent equitable jurisdiction to bring a preemption claim under ANCA, but could not do so under the AAIA. SPA28. Citing the AAIA's comprehensive administrative enforcement scheme, the court found that Congress intended to foreclose equitable enforcement of that statute. SPA24.[12] The court then held that, by contrast, "[t]here is nothing in the text or structure of ANCA indicating that Congress intended to preclude a federal court sitting in equity from entertaining Plaintiffs' preemption challenge." SPA28.

*Second*, the court held that Plaintiffs had demonstrated irreparable harm from the Town's Restrictions absent a preliminary injunction. SPA30-32. The Town has not challenged that ruling on appeal.

[12] Because it is not necessary to a determination of the district court's ability to enjoin the Restrictions, Plaintiffs have not appealed the court's ruling as to the AAIA. It bears noting, however, that in foreclosing Plaintiffs' AAIA-based preemption claim, the district court recognized that the FAA had "complicated" matters by entering the 2005 Settlement Agreement, which "on its face … appears to violate the Secretary's statutorily mandated duty to ensure compliance with the AAIA." SPA26.

*Third*, the court ruled that Plaintiffs had demonstrated a likelihood of success on the merits as to the One-Trip Limit, but not as to the curfews. In that regard, the court first held that the Restrictions were not preempted by ANCA, interpreting ANCA as merely "encouraging, but not requiring" airport compliance with ANCA's procedural requirements. SPA36.[13]

The court then held that Plaintiffs had nonetheless preliminarily demonstrated the One-Trip Limit to be unreasonable and therefore violative of the narrow "proprietor's exception" to the general federal preemption of aviation noise regulation. SPA43-44. The court found, however, that Plaintiffs had not preliminarily demonstrated the Town's curfews to be unreasonable, arbitrary, or discriminatory. SPA43-44.

*Fourth*, the court ruled that the balance of the hardships tipped in favor of Plaintiffs on the One-Trip Limit and in favor of the Town on the curfews. SPA44-45.

## SUMMARY OF ARGUMENT

The district court correctly held that Plaintiffs could invoke the court's equitable powers to enjoin local laws that were violative of ANCA's procedural

[13] Even in so holding, however, the court appeared to be troubled by the notion that a federally obligated airport could violate ANCA. As a result, the court acknowledged the FAA's injunctive relief powers under ANCA in a footnote and suggested, without deciding, that the Town might nevertheless "need to comply with ANCA's procedural requirements" because it is "still federally obligated." SPA37.

requirements. As the court recognized, the analysis recently undertaken by the Supreme Court in *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), makes clear that there is no basis for inferring that Congress intended to foreclose private actions for equitable relief from local laws that conflict with ANCA. Unlike the provision of the Medicaid Act at issue in *Armstrong*, the straightforward procedural requirements of ANCA are anything but "judicially unadministrable," and no alternative administrative mechanism exists for Plaintiffs to challenge a local law as violative of ANCA. Moreover, unlike the plaintiffs in *Armstrong*, who faced no form of enforcement action as a result of the local law at issue, Plaintiffs here face criminal fines and other serious penalties if they violate local laws that are themselves violative of federal law. As a result, this action falls squarely within the doctrine established more than a century ago in *Ex parte Young*, 209 U.S. 123, 145 (1908), that courts sitting in equity will grant injunctive relief to assure the supremacy of federal law in aid of those who would otherwise face criminal conviction, penalties, and enforcement proceedings for violating local laws that conflict with federal law.

But having correctly recognized its authority to entertain Plaintiffs' ANCA-based preemption claim, the district court then erred in interpreting ANCA as merely "encouraging, but not requiring" compliance with its

procedural provisions. The court's reading of ANCA cannot be squared with its plain text, which speaks in terms that are as mandatory as they are unambiguous.

It is of no moment that ANCA includes a provision prescribing the loss of eligibility for federal funds and certain other revenue as a sanction for failing to comply with ANCA's procedural requirements. Even if that were the *only* potential sanction for violating ANCA – and, as the district court itself appeared to recognize in a footnote to its opinion, it is not – that still would not render the terms of ANCA any less mandatory.

Further still, both the express findings recited in ANCA as well as its legislative history make clear that ANCA was enacted as a response to the failure of earlier measures that had merely encouraged voluntary compliance with federal standards. As a result, even if ANCA's provisions were ambiguous on the point – and they are not – the context and legislative history of ANCA negate any possibility that the provisions of ANCA were intended to be precatory rather than mandatory.

Because the procedural requirements of ANCA are mandatory – thus rendering the Town's Restrictions preempted on that basis alone – this Court need not reach the issue of whether a sufficient showing has been made that the Town's One-Trip Limit is likely unreasonable on other grounds and therefore outside the narrow scope of the "proprietor's exception" to the general federal

preemption of aviation noise regulation. But there is, in any event, no basis for disturbing the district court's ruling that the requisite showing had in fact been made.

It has long been the law in this Circuit that a district court's decision to grant preliminary relief will not be overturned unless the findings upon which it is based lack any support in the record or the district court has committed legal error. *See Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740-41 (2d Cir. 1953). Here, far from lacking support, the findings upon which the district court based its ruling as to the One-Trip Limit were either undisputed or amply supported by the record. Moreover, notwithstanding the Town's rewriting of the district court's opinion in an effort to suggest legal error – claiming, incorrectly, that the court employed a "least restrictive means" test – the court's assessment of the reasonableness of the One-Trip Limit in fact employed the very methodology endorsed by Congress and the FAA for reviewing noise and access restrictions. Particularly given that a restriction is reasonable and therefore within the limits of the proprietor's exception *only* if it is consistent with federal policy, *Concorde I*, 558 F.2d at 84-85, the district court manifestly did not err in assessing reasonableness in a manner consistent with federal policy.

## STANDARD OF REVIEW

The district court's ruling that it had equitable jurisdiction to hear Plaintiffs' ANCA-based preemption claim and its statutory interpretation of ANCA are legal holdings subject to *de novo* review by this Court. *See Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 220 (2d Cir. 2014). The district court's ultimate decision on a preliminary injunction is reviewed for abuse of discretion. *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005); *see also Hamilton Watch*, 206 F.2d at 740-43.

## ARGUMENT

## POINT I

## THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS COULD INVOKE THE COURT'S EQUITY POWERS TO ENJOIN LOCAL LAWS THAT VIOLATE ANCA AND THE REGULATIONS PROMULGATED THEREUNDER

The district court indisputably was correct in holding that both settled precedent and the Supreme Court's recent ruling in *Armstrong v. Exceptional Child Ctr., Inc.* support invocation of the court's equity powers to enjoin local laws that violate ANCA and the regulations promulgated under ANCA.

Even in holding a provision of the Medicaid Act to be beyond the scope of equitable review, the *Armstrong* majority took care to stress the "significant role that courts play in assuring the supremacy of federal law," and to affirm the permissibility of preemption challenges by private plaintiffs as long as Congress

did not intend to preclude such challenges. 135 S. Ct. at 1384; *see also id.* at 1390-91 (Sotomayor, J., dissenting) (citing cases); *Air Transport Ass'n of Am.*, 520 F.3d at 221. And here, as the district court correctly noted, "[t]here is nothing in the text or structure of ANCA indicating that Congress intended to preclude a federal court sitting in equity from entertaining Plaintiffs' preemption challenge." SPA28.

Importantly, and in sharp contrast to the provision of the Medicaid Act at issue in *Armstrong*, the procedural requirements of ANCA are anything but "judicially unadministrable." 135 S. Ct. at 1385. Indeed, the Town itself does not even attempt to – because it cannot – characterize any aspect of Sections 9304(b) or 9304(c) as difficult for a court to administer. That is because ANCA's requirements are straightforward and abundantly clear.

Unlike in *Armstrong*, where enforcement of Section 30(A) of the Medicaid Act would have required courts to second-guess the Secretary of Health's interpretation and implementation of a complex, "judgment-laden standard," 135 S. Ct. at 1385, Plaintiffs' ANCA claim seeks no relief that would require judicial review of, or interference with, any FAA judgment. Plaintiffs seek only to enjoin the Town from enforcing its Restrictions until it has complied with the unambiguous and mandatory procedural requirements of Section 9304(b) and (c) – *namely*, seeking and obtaining FAA approval for Stage

3 restrictions, and publishing certain analyses 180 days before imposing Stage 2 restrictions – all of which the Town concedes it has not done. Whether the FAA would ultimately approve any Stage 3 restriction proposed by the Town is up to the FAA and beyond the scope of Plaintiffs' claims in this action.

Unable to point to any difficulty in judicial administration of the statutory provisions that are at issue, the Town resorts to noting the "various factors" that the FAA would have considered in determining whether to approve the Town's Restrictions on Stage 3 aircraft if the Restrictions had in fact been submitted to the FAA for review. Br. 32-33. But as the Complaint in this action makes clear, Plaintiffs are not seeking to have the courts step into the shoes of the FAA to assess whether the Restrictions should have or would have been approved; they are merely seeking to enjoin the Town from ignoring its obligation to seek and obtain FAA approval. As a result, the Town's discussion of the review process that would have occurred if the Town had followed its statutory obligations is wholly beside the point and, if anything, simply underscores why the claim in this case bears no resemblance to the claim at issue in *Armstrong.*

In addition, and again in sharp contrast to *Armstrong*, Plaintiffs here do not complain that local government action or inaction improperly caused them to lose or receive diminished federal benefits – a circumstance that the *Armstrong* Court found to be suggestive, though not dispositive, of an intent by Congress to

foreclose equitable review by the courts. 135 S. Ct. at 1385.[14] Instead, Plaintiffs here are subject to criminal fines and other serious penalties if they do not follow local laws that are themselves in violation of federal law. And, as the *Armstrong* Court reaffirmed, that is precisely the sort of scenario that has been "long recognized" as warranting invocation of a federal court's equity power to "assur[e] the supremacy of federal law." *Id.* at 1384 (discussing doctrine established by *Ex parte Young*, 209 U.S. 123 (1908)); *see also Douglas v. Indep. Living Ctr.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting) (noting federal courts' traditional authority to enforce supremacy of federal law where plaintiffs threatened with state enforcement proceedings bring a "pre-emptive

[14] In that regard, the *Armstrong* Court characterized the Medicaid Act as Spending Clause legislation – in which the sole remedy for failure to adhere to the legislation is loss or diminution of federal funds – and noted that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 135 S. Ct. at 1385 (citation and internal quotes omitted). The Court went on to note, however, that such a factor "might not, *by itself*, preclude the availability of equitable relief," and acknowledged, through citation, that the Court had in fact recently rejected a claim that equitable review was unavailable for local violations of Spending Clause legislation. *Id.* (citing *Virginia Office for Prot. & Advocacy (VOPA) v. Stewart*, 131 S. Ct. 1632 (2011)). And, as a result, the *Armstrong* Court found the Medicaid Act's status as Spending Clause legislation sufficient to suggest an intent to preclude equitable review *only* when "combined with the judicially unadministrable nature of [the statute's] text." *Id.* Here, there exists no such combination of factors sufficient to preclude the availability of equitable relief. ANCA is not Spending Clause legislation, is not judicially unadministrable and manifestly contemplates remedies other than the loss of federal funds. *See infra* Point II.B.

assertion in equity" to enjoin state law as unconstitutional (quoting *VOPA*, 131 S. Ct. at 1642 (Kennedy, J., concurring)).

Further still, and again in sharp contrast to *Armstrong*, there is no mechanism for Plaintiffs to pursue their ANCA claims administratively. *See Aircraft Owners & Pilots Ass'n Members v. City of Pompano Beach, Fla.*, No. 16-04-01, 2005 WL 3722717, at *25 ("*Pompano Beach*") (Dec. 15, 2005 Director's Determination) (noting that claims under ANCA cannot be raised through Part 16 proceedings). Instead, as the district court correctly recognized, a federal court sitting in equity is the *only* mechanism for preventing Plaintiffs from suffering criminal and other serious consequences for violating local laws that themselves flout federal law. The Town has not suggested – nor can it – any basis for concluding that Congress intended to preclude such a traditional and justifiable exercise of the court's equitable powers.[15]

[15] Moreover, denying Plaintiffs the protection of the court's equitable powers would work a particular injustice where, as here, the agency charged with enforcing the federal law at issue has – for reasons that it is best situated to explain – elected to abdicate those responsibilities. *Cf. Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (noting "duty of all courts" to observe the conditions defined by Congress even if wayward government officials misunderstood or misapplied them).

## POINT II

## THE DISTRICT COURT ERRED IN DECLINING TO ENJOIN THE TOWN'S RESTRICTIONS ON THE GROUND THAT THEY ARE PREMEMPTED BY ANCA

The district court's ruling that ANCA does not preempt the Town's Restrictions was premised upon a conclusion that ANCA intended merely to "encourage, but not require" compliance with its provisions. SPA36. That conclusion, in turn, was premised upon a one-paragraph analysis of ANCA that:

- disregarded the plain text of the relevant provisions, which are unambiguously cast as mandatory;
- construed a financial eligibility provision of ANCA in isolation and gave substantive weight to a heading that does not appear in the version of ANCA passed by Congress;
- disregarded the savings clause contained in ANCA, which confirms that the FAA can enforce the mandatory requirements of ANCA through injunctive action;
- disregarded the legislative history of ANCA, which confirms that the requirements of ANCA are mandatory;
- disregarded the implementing regulations of ANCA, which further confirm that the requirements of ANCA are mandatory; and
- characterized this Court's decision in *National Helicopter Corp. of America v. City of N.Y.*, 137 F.3d 81 (2d Cir. 1998) as having rejected "the same ANCA-preemption argument that Plaintiffs assert here, " SPA36-37, when in fact that case did not even purport to construe ANCA, much less conclude that compliance with its provisions was voluntary.

In *City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005) ("*Naples*") – the only appellate decision that has, to date, construed the provisions of ANCA at issue here – the Court of Appeals for the D.C. Circuit recognized that the provisions of ANCA are indisputably mandatory. Thus, as the *Naples* Court held, airports "must comply" with the procedural requirements contained in Section 9304(c) of ANCA before imposing restrictions on Stage 2 aircraft, and Section 9304(b) "[o]n its face" commands that "no airport operator can impose a Stage 3 restriction unless the FAA gives its approval." *Id.* at 433-34.

The district court's ruling to the contrary in this action is the product of a series of legal errors and must be reversed. Moreover, because the district court's decision not to enjoin all three of the Town's Restrictions was, in turn, the product of its erroneous interpretation of ANCA, this action should be remanded with instruction to enter an injunction as to all three Restrictions.

### A. The District Court Erred in Not Construing Sections 9304(b) and 9304(c) of ANCA in Accordance with Their Plain Meaning.

The "most basic" cannon of statutory construction is that statutes should be construed in accordance with their plain meaning. *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir. 2002). Statutory construction must begin with "the plain text, and, where the statutory language provides a clear answer, it ends there as well." *Raila v. United States*, 355 F.3d 118, 120 (2d Cir. 2004)

(citations and quotation marks omitted); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004).

Whether the meaning of the statute is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Moreover, courts are to assume "that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (internal quotation marks omitted).

As a result, when Congress uses words like "shall" and "must," the normal inference is that those words confer a mandatory obligation. *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 156 (2d Cir. 2003); *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999) ("'shall' describes a course of action that is mandatory"); *Fowlkes v. Thomas*, 667 F.3d 270, 272 (2d Cir. 2012) (statutory text providing that "no payment [of benefits] shall be made" was plain on its face and "clearly bars such payments").

As the D.C. Circuit held in *Naples*, Sections 9304(b) and (c) of ANCA on their face confer mandatory obligations on all airport operators. Section 9304(b) states that: "**No airport noise or access restriction** on the operation of Stage 3

aircraft … **shall be effective unless** … approved by the [FAA]." PA3-4. Section 9304(c) states that: "**No airport noise or access restriction shall include** a restriction on the operations of Stage 2 aircraft, **unless**" the specified notice and analysis requirements have been met. PA4. Thus, as the *Naples* Court explained:

> [ANCA] governs the manner in which individual airports may adopt noise restrictions on aircraft. … Section [9304(c)] sets forth certain procedural requirements with which an airport *must* comply in order to restrict Stage 2 aircraft. … *On its face*, § [9304(b)] gives the FAA considerably more power than it had [previously]. For one thing, the Stage 3 restriction cannot go into effect without the FAA's say-so. For another thing, subsection [9304(b)]'s requirement of FAA approval is not tied to grants; *grants or not, no airport operator can impose a Stage 3 restriction unless the FAA gives its approval*.

*Naples*, 409 F.3d at 433-34 (emphasis added).[16]

In reaching the contrary conclusion, the district court here offered no theory as to why the word "shall" could be construed as an invitation rather than a command. Instead the district court simply disregarded the plain text of Sections 9304(b) and (c). That was error. *See Pavelic & LeFlore v. Marvel*

[16] Moreover, until quite recently, even the Town's own counsel in this action (Kaplan Kirsch & Rockwell LLP) had no difficulty recognizing the mandatory nature of ANCA's requirements. As that counsel argued to another court (on behalf of a different client), it would be "facially preposterous" to argue that ANCA did not narrow the scope of the proprietor's exception, because "in ANCA, Congress explicitly requires airports to submit all proposals to impose restrictions on Stage 3 aircraft to the FAA for approval." Brief by Palm Beach County, *Trump v. Palm Beach County*, 2011 WL 10068524, at 3-4 (Fl. Cir. Ct. Mar. 4, 2011) ("*Trump* Brief").

*Entm't Grp.*, 493 U.S. 120, 127 (1989) (reversing decision below for failing to provide "plain meaning" to federal law); *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7, 12 (1983) (same); *Theodoropoulos*, 358 F.3d at 171 (same).

### B. The District Court Further Erred in Reading ANCA's Financial Eligibility Provision in Isolation and in According Substantive Significance to a Heading that Does Not Appear in the Version of ANCA Passed by Congress.

The district court then compounded its error by basing its entire interpretation of ANCA on a single financial eligibility provision, read in isolation, and by according substantive weight to a heading that does not appear in the version of ANCA that was passed by Congress. In that regard, the district court stated:

> [U]nder Section 47526 of ANCA, entitled "Limitations for noncomplying airport noise and access restrictions," the only consequences for failing to comply with ANCA's review program are that the "airport may not – (1) receive money under [the AAIA]; or (2) impose a passenger facility charge under [49 U.S.C. § 40017]." 49 U.S.C. § 47524. This provision raises an obvious question. If Congress intended to preempt all airport proprietors from enacting noise regulations without first complying with ANCA, why would it also include an enforcement provision mandating the loss of eligibility for federal funding and the ability to impose passenger facility charges? The logical answer is that Congress intended to use grant and passenger facility charge restrictions to encourage, but not require, compliance with ANCA.

SPA36.

The district court's analysis of Congress's intent fails for a series of independent reasons.

***First***, as discussed above, the district court ignored that Congress cast ANCA's requirements in unambiguously mandatory terms, and that the words actually chosen by Congress are the best evidence of its intent. *Hardt*, 560 U.S. at 251 (courts are to assume that the language chosen by Congress "accurately expresses the legislative purpose").

***Second***, the district court ignored other provisions of ANCA that confirm the mandatory nature of Sections 9304(b) and (c). Those provisions include, most notably, a grandfather clause that exempted pre-ANCA restrictions from compliance with Sections 9304(b) and (c) – a provision that would improperly be rendered superfluous if compliance with Sections 9304(b) and (c) were construed as merely voluntary. *See* § 9304(a)(2); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).[17]

[17] Similarly, there would be no need for the liability-shifting provision contained in Section 9306 of ANCA – in which the federal government assumed *Griggs* liability for noise damages resulting from the FAA's denial of a proposed Stage 3 restriction – unless Congress intended to narrow the scope of the proprietor's exception by requiring FAA approval for enactment of Stage 3 restrictions.

***Third***, the district court's analysis of Congressional intent relied upon a heading that was added as part of the non-substantive recodification of Title 49 and does not appear in the version of ANCA that was passed by Congress. As a result, that heading – "Limitations for Noncomplying Airport Noise and Access Restrictions" – provides no support for the district court's conclusion that Congress intended the loss of eligibility for certain revenue sources to be the *only* consequence of failing to comply with ANCA. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995) (specifically noting that Congress intended "no substantive change" in the 1994 recodification of Title 49); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972) (wording added during consolidation of laws not evidence of Congressional intent unless Congress "clearly expressed" intent to change the law (internal quotation marks omitted)).[18]

***Fourth***, the heading that *does* in fact appear in the version of the statute passed by Congress – "Ineligibility for PFC's and AIP Funds" (PA4) – in no way suggests that Congress intended the loss of eligibility for certain revenue sources to be the only consequence of failing to comply with ANCA. Instead, it does no more than state – as the text of the provision itself does – that loss of eligibility

[18] Notably, the Town itself did not argue below that the heading cited by the district court had any significance, and Plaintiffs therefore did not have occasion to note that the heading was not part of the statute actually passed by Congress.

for those revenue sources is *one* consequence of failing to comply with ANCA's requirements for the imposition of Stage 3 restrictions. § 9304(e).

***Fifth***, the provision focused on by the district court – Section 9304(e) of ANCA (recodified as 49 U.S.C. § 47524(e)) – makes *no* reference to ANCA's requirements for Stage 2 restrictions, and it is anything but "logical" to assume that Congress would enact procedural provisions for imposing Stage 2 airport noise restrictions – using the command "shall" – without intending any consequences for non-compliance.

***Sixth***, the savings provision of ANCA, § 9304(h), makes plain that loss of eligibility for certain revenue sources is by no means the only consequence of failing to comply with the statutory commands of Sections 9304(b) and (c). That clause expressly preserves "the authority of the Secretary to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief." § 9304(h)(3) (PA5).

Unable to reconcile that savings clause with its analysis, the district court simply relegated it to a footnote in which the court observed that the Airport remained federally obligated and "offer[ed] no opinion whether or not the FAA has the authority to enjoin the Town laws on the basis that the Airport is still federally obligated and therefore would need to comply with ANCA's procedural requirements." SPA37. But as the D.C. Circuit noted, ANCA unambiguously

commands *all* airport operators to comply with its requirements, not merely those who had already received federal monies. *Naples*, 409 F.3d at 433-34.

There is thus no basis for reading the savings clause contained in ANCA as suggesting that ANCA's requirements are mandatory *only* for those airports that are federally obligated. Moreover, and even more importantly, even if the statute *were* construed in that manner, it still would yield the conclusion that ANCA's requirements are mandatory for the airport at issue here because that airport indisputably remains federally obligated through 2021.[19]

[19] In apparent anticipation of Plaintiffs' cross-appeal, the Town attempts a different method of addressing the savings clause, contending for the first time that because the clause purportedly begins with the phrase "[e]xcept as provided for by section 47524," the clause reflects an intent to *limit* the FAA's traditional enforcement powers with respect to ANCA's requirements for enacting Stage 2 and 3 restrictions. Br. 31-32. In making that argument, however, the Town (like the district court) improperly accords substantive significance to phrasing that appears only in the non-substantive recodification of Title 49. As passed by Congress, the savings clause begins with the phrase "except to the extent required by application of the provisions of this section," § 9304(h), and there is no theory under which stripping the FAA of its enforcement powers is even consistent with, much less required by, the limitations imposed by ANCA on an airport proprietor's enactment of Stage 2 and 3 restrictions. *See Naples*, 409 F.3d at 433-34 (deferring to the FAA's interpretation of its undiminished enforcement powers, relying in significant part on ANCA's savings clause). Instead, the introductory phrase in the savings clause (as passed by Congress) plainly qualifies a *different* aspect of the three-part clause – namely, the extent to which existing law regarding airport proprietors is preserved – and the phrase makes clear that existing law is preserved *only* to the extent it does not conflict with the limitations imposed by ANCA on the enactment of Stage 2 and 3 restrictions. § 9304(h). Otherwise stated, far from supporting the Town's position, the introductory phrase to ANCA's savings clause confirms that ANCA was intended to narrow the proprietor's exception.

***Seventh, and finally***, even if loss of eligibility for certain revenue sources were in fact the only consequence of failing to comply with the statutory commands of Sections 9304(b) and (c) of ANCA – and, as demonstrated above, it is not – that still would not make those commands any less mandatory or any less preemptive of inconsistent local laws. *See VOPA*, 131 S. Ct. at 1639 n.3 ("The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds … does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." (internal quotation marks omitted)).

### C. The Context, Congressional Findings, Legislative History and Implementing Regulations of ANCA All Confirm that Compliance with Sections 9304(b) and (c) Is Mandatory, Not Voluntary.

Further still, even if the district court regarded Sections 9304(b) and (c) as ambiguous regarding whether compliance with their provisions is mandatory – and they are not – the proper course would have been to construe the provisions in light of ANCA's context, findings, legislative history, and implementing regulations. *See, e.g.*, *Reves v. Ernst & Young*, 507 U.S. 170, 183-184 (1993); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984); *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998) (statutory findings are

"'particularly useful'" in determining Congress's intent (quoting *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990)).

Had the district court done so, it would have rapidly confirmed that ANCA was intended to mean what it says. In that regard, it bears particular emphasis that ANCA was enacted only after the failure of voluntary incentives to encourage local proprietors to consider federal interests in addressing noise mitigation. *See supra* pp. 6-7. As a matter of simple logic, it is anything but likely that Congress would have addressed the failure of a voluntary program by enacting yet another voluntary program.

And, in fact, the Congressional findings contained in ANCA leave no room for doubt that Congress had concluded that the time for encouraging voluntary compliance had passed, and that a national noise policy was urgently needed. Those findings expressly state that the continued imposition of "uncoordinated and inconsistent" restrictions "could impede the national air transportation system," and that a "noise policy **must** be implemented at the **national** level." § 9302(2) & (3) (PA1).

Similarly, the entirety of ANCA's legislative history can fairly be characterized as discussion of the need for, and potential impact of, mandatory limits on the ability of local airports to impose restrictions. *See supra* pp. 7-11. Not a single lawmaker or witness commenting on the legislation characterized

the proposed limitations as voluntary. Instead, all statements in support or opposition to the limitations recognized that they were mandatory in nature. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 582 (1995) (the "conspicuous absence in the legislative history" of a proffered statutory claim is significant).

The agency charged with interpreting and enforcing ANCA likewise recognized that compliance with Sections 9304(b) and (c) was mandatory, and that failure to comply with those provisions would leave an airport proprietor subject to, among other things, enforcement action by the FAA and/or suit by the Department of Justice. *See* 14 C.F.R. §§ 161.3(a), (c) 161.501(a) (PA9, 26). Instead of deferring to the FAA's contemporaneous interpretation of ANCA, the district court simply disregarded it. That, too, was error. *Kruse v. Wells Fargo Home Mortg. Inc.*, 383 F.3d 49, 58-59 (2d Cir. 2004) ("[D]eference is said to be required 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).[20]

[20] Nor do the Bishop Responses alter that analysis. Under settled law, informal statements by an agency are not accorded deference, particularly where, as here, those informal statements conflict with unambiguous statutory terms and "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question."

### D. This Court's Decision in *National Helicopter* Did Not Purport to Interpret ANCA and Accordingly Carries No Precedential Weight with Respect to the Interpretation of ANCA.

The district court further erred in suggesting that this Court's 1998 decision in *National Helicopter* required or supported a conclusion that compliance with Sections 9304(b) and (c) of ANCA was voluntary. Far from analyzing the import of ANCA or the text of Sections 9304(b) and (c), the Court barely mentioned the statute. ANCA appears exactly once in the Court's opinion at the end of a string cite noting that the topic of airport noise abatement has been the subject of extensive federal legislation. *See National Helicopter*, 137 F.3d at 88.

It is well-settled that decisions that do not "squarely address an issue" do not constitute a ruling on the issue. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 118 (1993) (discussing "longstanding rule that, if a decision does not squarely address an issue, this Court remains free to address it on the merits at a later date") (internal quotation marks and alterations omitted)); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (issue that was raised in briefing but "by no means adequately presented" to or decided by the court did not constitute binding precedent); *Webster v. Fall*, 266 U.S. 507,

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*Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks omitted); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 490 (2d Cir. 2001) *adhered to on reconsideration*, 451 F.3d 77 (2d Cir. 2006).

511 (1925) ("Questions which merely lurk in the record" but were not ruled upon "are not to be considered as having been so decided as to constitute precedents."); *Blum v. Schlegel*, 18 F.3d 1005, 1015 (2d Cir. 1994) (the court is not bound by its prior cases where a "question was implicated, but not squarely addressed"); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) ("not every aspect of each opinion has precedential force" especially in situations where "[n]either the district court nor this Court addressed the question currently appealed" (internal quotation marks omitted)).

In *National Helicopter*, this Court manifestly did not address – squarely or otherwise – any specific provision of ANCA. As a result, regardless of whether and how the parties may have addressed ANCA in their briefs, that statute at best "merely lurk[s] in the record" of *National Helicopter*, and the Court's decision accordingly has no precedential weight with respect to the interpretation of ANCA. *Webster*, 266 U.S. at 511. Indeed, as the Town's own counsel correctly noted in a brief filed on behalf of another client, *National Helicopter* "simply does not address ANCA and thus is not authority for how ANCA affected proprietary powers." *Trump* Brief, 2011 WL 10068524, at 4.

### E. The District Court's Legal Error in Interpreting ANCA Caused It to Improperly Decline to Enjoin All Three of the Town's Restrictions As Preempted by ANCA.

As the district court recognized, if the procedural requirements of Sections 9304(b) and (c) are mandatory – as they unquestionably are – then any local law that fails to abide by those requirements is necessarily preempted by ANCA. *See Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.*, 727 F.2d 246, 251 (2d Cir. 1984) (federal law preempts the exercise of local authority that "stands as an obstacle to the accomplishment and execution of an established federal policy" (internal quotation marks omitted)).

It is undisputed that the Town did not even attempt to comply with ANCA and Part 161 in enacting the Restrictions, and because the Town was required to do so, all three of the Restrictions are necessarily preempted. As a result, the district court's ruling that Plaintiffs had not demonstrated a likelihood of success on the merits as to all three Restrictions rests on legal error and therefore constitutes an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

The district court's legal error in interpreting ANCA likewise resulted in an abuse of its discretion with respect to the sole remaining test for issuing an injunction – a balancing of hardships. In that regard, the district court stated:

> [T]he balance of hardships tips in the Town's favor with respect to the Mandatory Curfew and Extended Curfew, as the Town's desire to protect

> its residents during sleeping hours clearly outweighs the inconvenience Plaintiffs may experience by having to minimize their flight schedules.

SPA44.

The balance struck by the district court is in direct conflict with the Congressional balancing of interests reflected in ANCA. Congress was well aware that airport noise could impact nearby residents, but nonetheless expressly found that "community concerns have led to uncoordinated and inconsistent restrictions on aviation which could impede the national air transportation system," and that "a noise policy must be implemented at the national level" §§ 9302(2)-(3) (PA1).

As a result, Congress mandated in ANCA that notice be given and various federally prescribed studies be performed before *any* restriction – including a curfew restriction – on Stage 2 aircraft is enacted, and further required FAA approval before any restriction on Stage 3 aircraft is enacted. While those limitations accord less primacy than the district court did to "the Town's desire to protect its residents during sleeping hours," that is a judgment for Congress to make, and not for the courts to second guess under the rubric of "balancing hardships." *See, e.g.*, *American Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1059-60 (9th Cir. 2009) (in preemption case involving motor carrier industry, balance of hardships favored Plaintiffs because of the "Constitution's

declaration that federal law is to be supreme," even though local authorities had "significant concerns").

In fact, when the judgments made by Congress are properly considered, it is plain that no valid balancing of hardships could favor the Town with respect to the Restrictions. If the Restrictions are enjoined as preempted by ANCA and Part 161, the Town's residents will be subject to no more than what Congress expressly intended – a requirement that notice be given, federally prescribed studies be conducted, and (in the case of Stage 3 aircraft) approval from the FAA be obtained before any noise restrictions (including curfews) are enacted. If, however, the Restrictions are not enjoined, Plaintiffs will be subject to criminal fines and other serious penalties unless they adhere to Restrictions that are in clear violation of federal law. That is anything but a balancing of hardships that favors the Town. *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (public interest served by enjoining invalid provisions of local law, whereas local government lacks an interest in "enforcing a law that is likely constitutionally infirm").

Accordingly, and particularly in light of the district court's findings on irreparable harm, the court's decision with respect to the Town's curfews should be reversed, and this action should be remanded to the district court with

instructions to enjoin all of the Town's Restrictions as preempted by ANCA and Part 161.

## POINT III

## ALTHOUGH THIS COURT NEED NOT REACH THE ISSUE, THE DISTRICT COURT CORRECTLY RULED THAT THE ONE-TRIP LIMIT SHOULD BE ENJOINED IN ANY EVENT ON THE GROUND THAT IT WAS LIKELY UNREASONABLE

Although this Court need not reach the issue – because all of the Town's Restrictions should have been enjoined as preempted by ANCA and Part 161 – there would in any event be no basis for disturbing the district court's decision that the Town's One-Trip Limit should be preliminarily enjoined on the ground that a sufficient showing had been made that the restriction was likely unreasonable. The district court acted well within its discretion in finding that a restriction that would drastically curtail commercial and charter service at a significant regional airport after 80 years of unfettered access – based upon noise complaints from only a small percentage of households and without adequate analysis of less restrictive alternatives – was likely unreasonable. Moreover, given Plaintiffs' demonstration of irreparable harm, the court's decision to grant Plaintiffs provisional relief was fair and in full accord with the "basic principle" of preliminary injunction law that a district court has authority to "preserve a state of affairs such that it will be able upon conclusion of the full trial to render

a meaningful decision for either party." *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996).

Unable to identify any error in the district court's decision, the Town attempts to manufacture one by rewriting the court's opinion. The Town thus claims that the court improperly applied a "least-restrictive alternative test" and "h[eld] that a regulation is 'reasonable' only if it is the least restrictive alternative for addressing noise." Br. 36. But the district court did no such thing. The words "least restrictive" do not even appear once in the court's 45-page opinion. And the district court's observation that the Town appeared to have given inadequate consideration to *less* restrictive alternatives (the actual term used by the court) comports with the comparative analysis that both Congress and the FAA have mandated for evaluating whether any airport access restriction is reasonable. Accordingly, the district court's consideration of that factor was anything but legal error.

Stripped of its efforts to rewrite the district court's opinion, the Town argument reduces to a complaint that the court did not blindly defer at this early stage of litigation to the Town's narrative as to why *it* believes the One-Trip Limit is reasonable. But that complaint finds no support in this Court's preliminary injunction jurisprudence. Indeed, the sole case to which the Town cites for support – this Court's decision in *National Helicopter* – did not even

involve appeal from a preliminary injunction ruling, but rather considered an appeal from a final, permanent injunction ruling based upon an established factual record. 137 F.3d at 86.

By contrast, in appellate review of a *preliminary* injunctive ruling, this Court has repeatedly held that it "cannot possibly declare" a district court's preliminary findings of fact and law to be clearly erroneous where – as here – the court's tentative findings are reasonable and its ultimate findings necessarily must await full hearing on the merits. *Hamilton Watch*, 206 F.2d at 740-41.

## A. Relevant Background

### 1. The Record Before the District Court

The Town's appeal presents a single factual narrative – its own – and treats that narrative as final and undisputed. In fact, however, the record upon which the district court based its preliminary injunction ruling is replete with disputes and competing affidavits, in which Plaintiffs' expert and fact witnesses have challenged nearly every "data" point and "finding" upon which the Town predicated the One-Trip Limit. *Compare, e.g.*, A111-164, 213-214, 459 *with* A292-295, 322-379 (reflecting fact and expert disputes regarding scope of the Town's perceived noise problem; integrity of the Town's numbers and data relating to Airport operations and noise complaints; industry standards

governing aviation acoustics and noise complaint data; credibility of the parties' respective experts; reliability and import of Town studies).

Further still, the only undisputed facts in the record are ones that affirmatively *support* issuance of a preliminary injunction, including:

- that the Airport has been fully accessible to all kinds of aircraft and passengers for 80 years (A31);
- that the FAA has consistently deemed the Airport important to the national air transportation system (A115-117);
- that each time the Town's consultants conducted noise studies using federally acceptable standards, they found no area outside the Airport perimeter that experiences aviation noise at a level greater than what the FAA has deemed generally consistent with normal residential land use (A147);
- that the Town spurned federal standards for measuring noise impact and never prepared economic cost-benefit analyses for the Restrictions or less restrictive alternatives (A34-38, 331, 504);
- that in mid-2012, the Town implemented a noise complaint hotline to gather complaints and invited complaints from a region encompassing approximately 52,000 households (A149-150, 294);[21]
- that the Town received hotline complaints from only 633 households (1.2% of the population), and that approximately 50% of those complaints came from just *10 households* (A150);[22] and

[21] It is also undisputed that in the year leading up to the Town's enactment of the Restrictions, newspaper advertisements urged residents to "LOG YOUR COMPLAINTS!" and referenced the impending restrictions as a foregone conclusion that simply needed to be supported by complaint data. A443-454.

[22] One household submitted 2,800 complaints in a 12-month period; another submitted approximately 1,800. A150. Moreover, although the Town

- that until September 2021, the Airport remains federally obligated (A32, 122).

**2. The District Court's Analysis**

After finding that Plaintiffs had demonstrated irreparable harm absent injunction – the "single most important" prong of a preliminary injunction analysis (SPA28) – the district court considered Plaintiffs' likelihood of demonstrating on the merits that the One-Trip Limit is preempted by federal law. In doing so, the court observed that Congress has preempted local regulation of aircraft and airspace "subject to a *complementary* though more limited role for local airport proprietors," SPA35 (emphasis added), and properly looked to this Court's 1977 decision in *Concorde I* as articulating the standard for when local proprietor action is federally preempted. As *Concorde I* held, if a local regulation is "in conformity with" federal law and policy and complementary to the federal scheme then it is permissible; but if it conflicts with federal law or policy or frustrates the federal scheme then it is preempted. 558 F.2d at 84-85; SPA35 (citing *Concorde I* and its further requirement that restrictions be "reasonable, nonarbitrary and non-discriminatory").

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used its total of 23,954 hotline complaints as the basis for percentages it cites, the Town made no effort to weed out complaints relating to aircraft flying to or from a *different* airport, or lodged by households subject to noise easements waiving their right to complain about aviation noise, or lacking reliability. A36-37, 150.

Turning to the record – and with the express caveat that its preliminary findings were based on the early record before it, SPA34, 39, 44 – the district court preliminarily concluded that:

- Plaintiffs had not sufficiently demonstrated – "at least at this stage of the litigation" – that the Town's "Noisy Aircraft" standard was arbitrary or discriminatory (SPA43);
- The Town's curfews appeared likely to be reasonable (SPA38-43); but
- The One-Trip Limit appeared likely to be unreasonable (SPA44).

With respect to the lattermost preliminary finding, the district court stated:

> This measure is drastic, considering the effect it poses on some of Plaintiffs' businesses, and there is no indication that a less restrictive measure would not also satisfactorily alleviate the Airport's noise problem. Accordingly, on the record before it, the Court will preliminarily enjoin the One-Trip Limit as not reasonable. In making this ruling, the Court has considered the fact that the Town's complaint data originated from a small percentage of the Town's residents.

SPA44.

Noting that "[t]he ultimate question" of the Town's authority to impose the One-Trip Limit "could still be resolved on the merits in the Town's favor" following a full hearing, the court found it equitable to grant provisional relief until such resolution. SPA44-45; SPA19 (while preliminarily enjoining the One-Trip Limit would "merely preserve[] the status quo," denying such relief would drastically harm Plaintiffs while merits were still pending).

## B. The District Court's Ruling Regarding the One-Trip Limit Should Be Affirmed.

The district court ruling as to the One-Trip Limit is reviewed under a standard that is exceedingly deferential. *See Red Earth LLC v. United States*, 657 F.3d 138, 144 (2d Cir. 2011). As this Court noted in *Hamilton Watch*, so long as a district court's preliminary fact findings have support in the record, an appellate court "cannot possibly declare them 'clearly erroneous.'" 206 F.2d at 740-41. Similarly, because a district court's preliminary legal conclusions are necessarily tentative and "subject to change after a full hearing and the opportunity for more mature deliberation," appellate courts are to be wary of reversing a preliminary injunction that is, by its "very nature," provisional and "serves as an equitable policing measure to prevent the parties from harming one another during the litigation." *Id.* at 742; *see also WarnerVision Entm't*, 101 F.3d at 261 (*Hamilton Watch* reflects "basic principle" of preliminary injunction law).

Measured against that deferential standard – which the Town entirely ignores – the district court's ruling as to the One-Trip Limit easily passes muster.

### 1. The Record Amply Supports the District Court's Preliminary Findings of Fact.

*First*, it cannot seriously be disputed that the district court was correct in finding that the One-Trip Limit is a "drastic" measure. SPA44. For 80 years, the Airport has been open to passengers and aircraft of all kinds, to commercial, recreational and charter service and even to scheduled airline service, A30-31, 117, and the One-Trip Limit is a radical departure from that long history of unfettered public access.

If enforced, the One-Trip Limit would crush Plaintiffs' businesses and effectively shutter an important regional airport to charter and commercial service by imposing a one-trip-per-week limit on Stage 2, Stage 3 and even Stage 4 aircraft during the busiest five months of the year. A restriction of that type is unprecedented not only for the Airport, but for *any* public-use, general aviation airport in the United States. A123-24.[23]

[23] The Town suggests (without supporting citation) that it was improper for the court to consider the One-Trip Limit's drastic impact upon Plaintiffs in assessing that measure's reasonableness. Br. 47. But that argument should be accorded no weight because it defies both common sense and federal policy. *See* FAA Order 5190.6B, ¶13.15 (Sept. 30, 2009); *Cf. Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 595 (1962) ("To evaluate [local ordinance's] reasonableness we [] need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.").

*Second*, the district court correctly found that complaint data used by the Town to justify the One-Trip Limit originated from a small percentage of households. SPA44. It is undisputed that although the Town expressly invited noise hotline complaints from a segment of Long Island encompassing more than 52,000 households, only 633 households lodged complaints – just 1.2% of the population, and even that 1.2% figure may well be inflated because no effort was made to discount complaints that were unrelated to landings and takeoffs at the Airport or otherwise unreliable. Moreover, approximately *one-half* of all hotline complaints came from just *10* households. A149-150. Far from challenging those figures, the Town's own expert noted them as statistical "facts." A331.[24]

*Third*, the district court was likewise correct in finding that the record contained no indication that the Town had analyzed whether any measures less extreme than the One-Trip Limit could sufficiently address the Town's perceived

[24] The Town now claims these complaint numbers do not count the "informal complaints communicated to the Town Board" (Br. 48-49), but the Town itself never factored such "informal" complaints into its statistical data, and no discovery has occurred on that issue. Equally meritless is the Town's contention that the district court should have deferred to its expert, over Plaintiffs' expert, regarding the significance of the hotline complaints. Br. 48-49. There has been no expert discovery, nor did the district court need to reach expert credibility determinations given the undisputed facts supporting its ruling. *See Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997).

noise problem. It is undisputed that the Town never prepared – and indeed abandoned – economic analysis of the One-Trip Limit. A34, A504. Having foregone such analysis, the Town could not and did not prepare a comparative analysis assessing the relative economic costs and benefits of the One-Trip Limit as compared with less restrictive measures. Moreover, the Town's analysis of the purported "benefits" of the One-Trip Limit fixated on how many hotline noise complaints would have been reduced with the One-Trip Limit in place (A325) – and accordingly was tethered to hotline complaints received from only a small percentage of households. Thus, while the Town touts the various studies it had performed, the district court properly looked at the record and discerned a gaping hole.[25]

[25] Nor, as the Town contends, are the studies that it *did* perform automatically entitled to judicial deference. Quite to the contrary, those studies give pause on their face. Two studies concluded that the Airport was *not* a significant source of noise. A146-147. Instead of addressing those conclusions, the Town quietly folds them into a glossy narrative of how it sought out "better data" during a multi-"phased" process. Br. 8, 11-12. Following discovery and a merits hearing, the district court may well find, as Plaintiffs contend, that the Town's description of its increasingly "refined" approach to noise study is euphemistic for the Town's move from studies using federal standards that did not yield results supporting any restrictions to studies lacking reliability under federal *or* industry standards that produced the predetermined outcomes the Town desired. The Town also never issued its promised follow-up analysis of the potential efficacy of voluntary noise abatement procedures after the Town's first set of consultants delivered questionable and highly criticized results on that issue. A306, 309-310. Similarly, the Town's so-called traffic diversion study, published one day before the Town adopted the Restrictions and without opportunity for public comment, included the highly significant disclaimers that

### 2. The District Court's Factual Findings Amply Support Its Preliminary Conclusion that the One-Trip Limit Is Likely Unreasonable.

The conclusion reached by the district court on the basis of those preliminary findings – namely, that under federal preemption law, it is *not* reasonable for the Town to impose so drastic a restriction on so slender a basis at a general aviation airport that has been fully accessible to the public for 80 years – is likewise eminently reasonable and comports fully with this Court's precedent.

"Inherent" in the federal scheme of national-local cooperation in regulating airports "is the understanding and, indeed, necessity that the local body will not unreasonably hinder the accomplishment of legitimate national goals." *Concorde I*, 558 F.2d at 85; *Concorde II*, 564 F.2d at 1005 ("[T]he vital importance of the aviation industry … require[s] that even the appearance of whim and caprice be eliminated from critical decisions concerning airport access.").

Here, the One-Trip Limit would plainly hinder the legitimate national goal of public airport access, a goal that is especially strong for an airport that has

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it was based upon experiences at *other, non-New York* airports, involved a "high degree of uncertainty," and "may be revised substantially as more information becomes available." A366, 369, 379.

always been open to the public, that the federal government has designated as important, and that is federally obligated.

### 3. The District Court Never Applied a "Least Restrictive Alternative Test."

Unable to mount a meaningful challenge to the district court's findings and conclusion, the Town resorts to rewriting them and thus contends on appeal that the district court erroneously applied "a least-restrictive alternative test" to decide whether the One-Trip Limit is reasonable. Br. 36. Indeed, the Town even goes so far as to put that language in quotes, as if to suggest the district court itself used those words. Br. 36.

In fact, however, the words "least restrictive" do not appear even once in the court's 45-page opinion. Moreover, the court never indicated, let alone held, that only the least restrictive alternatives could be reasonable.

Had the court applied the "strict scrutiny" test suggested by the Town (Br. 37), the district court presumably would have invalidated the Extended Curfew for being more restrictive than the Mandatory Curfew, or at least addressed why the Extended Curfew survived strict scrutiny. The court of course did neither because it never applied such a test. *See Bailey v. Pataki*, 708 F.3d 391, 408-09 (2d Cir. 2013) (rejecting argument that "mischaracterize[d]" district court's opinion).

Nor could it have been legal error for the court to consider whether the Town had performed a *less*-restrictive-means analysis given that the federal government has deemed such analysis essential to evaluating whether an airport restriction is reasonable. In ANCA, Congress expressly required such comparative cost-benefit analysis by proprietors considering Stage 2 restrictions. § 9304(c) (PA4). The FAA has implemented the same requirement for proprietors proposing Stage 3 restrictions, and the FAA routinely employs such comparative analysis in making statutorily mandated findings as to whether a Stage 3 restriction is "reasonable." 14 C.F.R. § 161.305(e)(2)(i); ANCA § 9304(d)(2)(A); *see also* Final Rules, 56 Fed. Reg. at 48668 (less-restrictive-means analysis part of "minimum necessary" to determine validity of restrictions).

Accordingly, the district court did no more than consider a factor that the federal government itself has identified as critical to evaluating reasonableness. Far from being legal error, that approach was unquestionably sound. Even if ANCA and Part 161's requirements did not mandatorily apply to the Town – and they do – they would nonetheless reflect national policy and the considered judgment of Congress and the FAA as to what analysis is important in evaluating the reasonableness of restrictions. And given that the task before the district court was to determine whether a local restriction comports with federal policy,

*Concorde I*, 558 F.2d at 84-85, it would be odd indeed to conclude that a district court had erred by considering duly promulgated federal policy in making that determination.

**4. *National Helicopter* Does Not Compel, or Even Support, Rejection of the District Court's Analysis.**

Similarly – and notwithstanding the number of times it is cited by the Town in its brief – this Court's decision in *National Helicopter* in no way supports the Town's contention that the district court's ruling as to the One-Trip Limit was erroneous. That decision does, however, underscore why airport-specific facts are relevant to evaluating reasonableness, and in that respect it further supports the district court's preliminary conclusion that the One-Trip Limit is not reasonable for this Airport.

*National Helicopter* did not involve an appeal from a preliminary injunction and thus did not speak to the standards for reviewing a preliminary injunction. The *National Helicopter* Court instead considered an appeal from a final, permanent injunction ruling based upon an established record. 137 F.3d at 86.[26]

[26] In contrast to this case, the parties in *National Helicopter* agreed at the outset that the record was sufficiently complete to permit final decision, and jointly requested that the district court treat Plaintiff's preliminary injunction motion as a trial and issue permanent rulings. *National Helicopter Corp. v. City of N.Y.*, 952 F. Supp. 1011, 1018 (S.D.N.Y. 1997).

That procedural difference is, of course, highly significant. The Court's deference to the local proprietor in *National Helicopter* did not hinge upon facts still to be developed or ultimately determined by the district court. Here, by contrast, the appeal is from a preliminary injunction, and this Court's rulings in *Hamilton Watch* and its progeny accordingly require deference to the district court's preliminary findings of fact and law so long as they are reasonable and supported by the record. *See also Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 737 (9th Cir. 1986) (review of permanent injunction "is stricter" than deferential review of preliminary injunction ruling).

Moreover, and no less significantly, this Court's decision in *National Helicopter* did not remotely dictate a one-size-fits-all approach to reasonableness. Rather, that decision – which did not undertake to define the term reasonableness – affirms that whether restrictions are reasonable for a particular airport requires fact-specific inquiry. 137 F.3d at 84-86. And the facts and circumstances in *National Helicopter* are starkly different from the facts and circumstances here.

*National Helicopter* involved the imposition of restrictions at a local heliport owned by the City of New York that principally serviced city sightseeing tours. *Id.* at 86. The heliport was neither federally obligated nor designated by the FAA as important to the national aviation system. Moreover,

the heliport was one of four owned by the City, and the restrictions at issue (which were designed to address a noise problem based upon actual measurements, not merely household complaints) redistributed sightseeing flights from one of the heliports to the other three. *Id.* at 86, 91. In the specific circumstances of that case, the *National Helicopter* Court gave broad leeway to the City, holding that it was reasonable for the City to reduce operations at the heliport by 47% and impose curfews. *Id.* at 90-91.

Here, by contrast, the Airport is a general aviation airport that, for 80 years, has serviced aircraft and operations of all kinds. The Airport *is* important to the national air transportation system and *is* federally obligated (*see infra* Point III.B.5). In addition, unlike the City in *National Helicopter*, the Town does not merely seek to redistribute operations to another airport within its control. The Town imposed the unprecedented One-Trip Limit with the goal of eliminating broad swaths of service and aircraft – including the charter and commercial operations that generate the bulk of the Airport's revenue. A41-42, 231-232. Further still, the restrictions at issue in *National Helicopter* affected only older Stage 2 helicopters, while the Restrictions here affect state-of-the-art Stage 3 and Stage 4 aircraft. A174, 207-208, 222.

Simply put, even if the *National Helicopter* Court had reviewed a preliminary injunction ruling – and it did not – the Court's conclusions as to

reasonableness in that setting in no way support, much less compel, a conclusion that the district court erred in assessing reasonableness.[27]

**5. The Airport's Federally Obligated Status Provides Further Support for the District Court's Analysis.**

Finally, the Airport's undisputed status as a federally obligated airport – and the analysis the FAA typically has undertaken in connection with scrutinizing restrictions imposed by federally obligated airports – provide further support for the district court's conclusion that the One-Trip Limit is likely unreasonable.

Federally obligated airports are ones that have received federal funding in return for their specific agreement to "operate the airport for the use and benefit of the public," and it raises serious concerns for the national airport system if those agreements are not followed. *Pompano Beach*, 2005 WL 3722717, at *8; ANCA, § 9302(6) ("federally controlled revenues … carry with them a responsibility to the national airport system"); *Clay Lacy Aviation v. City of L.A.*,

[27] The handful of additional cases cited by the Town in passing are likewise inapposite. *SeaAir NY, Inc. v. City of N.Y.*, 250 F.3d 183, 187 (2d Cir. 2001) did not involve federal preemption analysis because the restrictions affected only *intra*-state transportation. In *NBAA v. City of Naples Airport Auth.*, 162 F. Supp. 2d 1343 (M.D. Fla. 2001), the defendant had complied with ANCA, in striking contrast to the Town. Moreover, the Stage 2 restriction deemed reasonable in that case did not affect Stage 3 and Stage 4 aircraft. *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 105 (9th Cir. 1981) was decided many years before ANCA and does not reflect current federal law and policy. *See Trump* Brief, 2011 WL 10068524, at 4.

00 Civ. 9255, 2001 WL 1941734, at *3 (C.D. Cal. July 27, 2001) (applying "rigorous" reasonableness inquiry in case of federally obligated airport); FAA's Burbank Decision at 14 (FAA distinguishing *National Helicopter* because it did not involve a "federally funded and obligated airport").[28]

Thus, the FAA has rejected as "unreasonable" many restrictions far less onerous than the One-Trip Limit.[29] Moreover, the FAA has never permitted access restrictions at a federally obligated airport to be predicated primarily or solely on noise complaint data. *See* FAA's LAX Decision at 9 ("The FAA does not rely on complaints as a measure of community impact[.]"); *Pompano Beach*, 2005 WL 3722717, at *28 (same); FAA Order 5190.6B, ¶ 13.16 (Sept. 30, 2009) ("Complaint data (i.e., from homeowner complaints filed with the airport) are generally not statistically valid indicators or measurements of a noise problem … [nor] an acceptable justification for a restriction.").[30]

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[28] Full citation to FAA administrative decisions is set forth in Plaintiffs' Table of Authorities.

[29] *See* FAA's LAX Decision (rejecting as unreasonable a departure-based curfew from 12:00 a.m. to 6:30 a.m. for certain aircraft); FAA's Burbank Decision (rejecting as unreasonable mandatory 10:00 p.m. to 7:00 a.m. curfew); *Pompano Beach*, 2005 WL 3722717 at *27-29 (rejecting as unreasonable prohibition on stop-and-go operations, intersection take-offs, taxi-back activity, prolonged running of aircraft engines).

[30] *Helicopter Association International v. FAA*, 722 F.3d 430 (D.C. Cir. 2013), cited by the Town, is distinguishable as it did not involve airport access restrictions but rather the FAA's broad authority to set flight routes. *Id.* at 436.

Particularly in light of the above, it is plain that the district court did not err in preliminarily enjoining the Town's draconian One-Trip Limit on the ground that the record before it indicated that the restriction was likely unreasonable.

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Both before and after *HAI*, the FAA has rejected the notion that a federally obligated airport may restrict aircraft on the basis of residential noise complaint data.

## CONCLUSION

For the reasons stated, the district court's decision to grant a preliminary injunction as to the One-Trip Limit should be affirmed, its decision to deny a preliminary injunction as to the Town's curfews should be reversed, and this action should be remanded to the district court with instructions to grant a preliminary injunction as to the curfews on the ground that they are preempted by ANCA and Part 161.

Dated: New York, New York
February 3, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 28.1(e)(2)(B)(i) of the Federal Rules of Appellate Procedure ("FRAP") because this brief contains 16,439 words, excluding the parts of the brief exempt by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: February 3, 2016

/s/ Lisa Zornberg

*Attorney for Plaintiffs-Appellees-Cross-Appellants*

# PLAINTIFFS' ADDENDUM

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transportation excellence, universities, corporations, associations, consumers, and other Government agencies are represented.".

(c) RESEARCH AUTHORITY OF ADMINISTRATOR.—Section 312(c) of the Federal Aviation Act of 1958 (49 App. U.S.C. 1353(c)) is amended by inserting after the third sentence the following: "The Administrator shall undertake or supervise research programs concerning airspace and airport planning and design, airport capacity enhancement techniques, human performance in the air transportation environment, aviation safety and security, the supply of trained air transportation personnel including pilots and mechanics, and other aviation issues pertinent to developing and maintaining a safe and efficient air transportation system.".

(d) CONFORMING AMENDMENT.—That portion of the table of contents contained in the first section of the Federal Aviation Act of 1958 relating to section 312 of that Act is amended by adding at the end the following:

"(i) Aviation research and centers of excellence.".

Airport Noise and Capacity Act of 1990.

## Subtitle D—Aviation Noise Policy

49 USC app. 2151 note.

SEC. 9301. SHORT TITLE.

This subtitle may be cited as the "Airport Noise and Capacity Act of 1990".

49 USC app. 2151.

SEC. 9302. FINDINGS.

The Congress finds that—

(1) aviation noise management is crucial to the continued increase in airport capacity;

(2) community noise concerns have led to uncoordinated and inconsistent restrictions on aviation which could impede the national air transportation system;

(3) a noise policy must be implemented at the national level;

(4) local interest in aviation noise management shall be considered in determining the national interest;

(5) community concerns can be alleviated through the use of new technology aircraft, combined with the use of revenues, including those available from passenger facility charges, for noise management;

(6) federally controlled revenues can help resolve noise problems and carry with them a responsibility to the national airport system;

(7) revenues derived from a passenger facility charge may be applied to noise management and increased airport capacity; and

(8) a precondition to the establishment and collection of passenger facility charges is the issuance by the Secretary of Transportation of a final rule establishing procedures for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft.

49 USC app. 2152.

SEC. 9303. NATIONAL AVIATION NOISE POLICY.

(a) DEVELOPMENT.—Not later than July 1, 1991, the Secretary of Transportation (hereinafter in this subtitle referred to as the "Secretary") shall issue regulations establishing a national aviation noise policy which takes into account the findings, determinations,

and provisions of this subtitle, including the phaseout and nonaddition of Stage 2 aircraft as provided in this subtitle and implementation dates and reporting requirements consistent with this subtitle and existing law.

(b) BASIS.—The national aviation noise policy shall be based upon a detailed economic analysis of the impact of the phaseout date for Stage 2 aircraft on competition in the airline industry, including the ability of air carriers to achieve capacity growth consistent with the projected rate of growth for the airline industry, the impact of competition within the airline and aircargo industries, the impact on nonhub and small community air service, and the impact on new entry into the airline industry.

(c) RECOMMENDATIONS.—Not later than July 1, 1991, the Secretary shall transmit to Congress recommendations on—

(1) the need for changes in the standards and procedures which govern the rights of State and local governments (including airport authorities) to restrict aircraft operations for the purpose of limiting aircraft noise;

(2) the need for changes in the standards and procedures which govern law suits by persons adversely affected by aircraft noise;

(3) the need for changes in standards and procedures for Federal regulation of airspace (including the pattern of operations for the air traffic control system) in order to take better account of environmental effects;

(4) the need for changes in the Federal program providing assistance for noise abatement planning and programs, including the need for greater incentives or mandatory requirements for local restrictions on the use of land impacted by aircraft noise;

(5) whether any changes in policy recommended in paragraphs (1) through (4) should be accomplished through regulatory, administrative, or legislative action; and

(6) specific legislative proposals necessary for implementing the national aviation noise policy.

**SEC. 9304. NOISE AND ACCESS RESTRICTION REVIEWS.** 49 USC 2153.

(a) IN GENERAL.—

(1) ESTABLISHMENT OF PROGRAM.—The national aviation noise policy to be established under this subtitle shall require the establishment, by regulation, in accordance with the provisions of this section of a national program for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft. Such program shall provide for adequate public notice and comment opportunities on such restrictions.

(2) LIMITATIONS ON APPLICABILITY.—

(A) APPLICABILITY DATE FOR STAGE 2 AIRCRAFT.—With respect to Stage 2 aircraft, the requirements set forth in subsection (c) shall apply only to restrictions proposed after October 1, 1990.

(B) APPLICABILITY DATE FOR STAGE 3 AIRCRAFT.—With respect to Stage 3 aircraft, the requirements set forth in subsections (b) and (d) shall apply only to restrictions that first become effective after October 1, 1990.

(C) SPECIFIC EXEMPTIONS.—Subsections (b), (c), and (d) shall not apply to—

(i) a local action to enforce a negotiated or executed airport aircraft noise or access agreement between the airport operator and the aircraft operator in effect on the date of the enactment of this Act;

(ii) a local action to enforce a negotiated or executed airport aircraft noise or access restriction the airport operator and the aircraft operators agreed to before the date of the enactment of this Act;

(iii) an intergovernmental agreement including airport aircraft noise or access restriction in effect on the date of the enactment of this Act;

(iv) a subsequent amendment to an airport aircraft noise or access agreement or restriction in effect on the date of the enactment of this Act that does not reduce or limit aircraft operations or affect aircraft safety;

(v)(I) a restriction which was adopted by an airport operator on or before October 1, 1990, and which was stayed as of October 1, 1990, by a court order or as a result of litigation, if such restriction or a part thereof is subsequently allowed by a court to take effect; and

(II) in any case in which a restriction described in subclause (I) is either partially or totally disallowed by a court, any new restriction imposed by an airport operator to replace such disallowed restriction if such new restriction would not prohibit aircraft operations in effect as of the date of the enactment of this Act; and

(vi) a local action which represents the adoption of the final portion of a program of a staged airport aircraft noise or access restriction where the initial portion of such program was adopted during calendar year 1988 and was in effect on the date of the enactment of this Act.

(D) ADDITIONAL WORKING GROUP EXEMPTIONS.—Subsections (b) and (d) shall not apply where the Federal Aviation Administration has prior to the date of the enactment of this Act formed a working group (outside the process established by part 150 of title 14 of the Code of Federal Regulations) with a local airport operator to examine the noise impact of air traffic control procedure changes. In any case in which an agreement relating to noise reductions at such airport is entered into between the airport proprietor and an air carrier or air carrier constituting a majority of the air carrier users of such airport, subsections (b) and (d) shall apply only to local actions to enforce such agreement.

(b) LIMITATION ON STAGE 3 AIRCRAFT RESTRICTIONS.—No airport noise or access restriction on the operation of a Stage 3 aircraft, including but not limited to—

(1) a restriction as to noise levels generated on either a single event or cumulative basis;

(2) a limit, direct or indirect, on the total number of Stage 3 aircraft operations;

(3) a noise budget or noise allocation program which would include Stage 3 aircraft;

(4) a restriction imposing limits on hours of operations; and

(5) any other limit on Stage 3 aircraft;

shall be effective unless it has been agreed to by the airport proprietor and all aircraft operators or has been submitted to and ap-

proved by the Secretary pursuant to an airport or aircraft operator's request for approval in accordance with the program established pursuant to this section.

(c) LIMITATION ON STAGE 2 AIRCRAFT RESTRICTIONS.—No airport noise or access restriction shall include a restriction on operations of Stage 2 aircraft, unless the airport operator publishes the proposed noise or access restriction and prepares and makes available for public comment at least 180 days before the effective date of the restriction—

(1) an analysis of the anticipated or actual costs and benefits of the existing or proposed noise or access restriction;

(2) a description of alternative restrictions; and

(3) a description of the alternative measures considered which do not involve aircraft restrictions, and a comparison of the costs and benefits of such alternative measures to the costs and benefits of the proposed noise or access restriction.

(d) APPROVAL OF STAGE 3 AIRCRAFT RESTRICTIONS.—

(1) IN GENERAL.—Not later than the 180th day after the date on which the Secretary receives an airport or aircraft operator's request for approval of a noise or access restriction on the operation of a Stage 3 aircraft, the Secretary shall approve or disapprove such request.

(2) REQUIRED FINDINGS.—The Secretary shall not approve a noise or access restriction applying to Stage 3 aircraft operations unless the Secretary finds the following conditions to be supported by substantial evidence:

(A) The proposed restriction is reasonable, nonarbitrary, and nondiscriminatory.

(B) The proposed restriction does not create an undue burden on interstate or foreign commerce.

(C) The proposed restriction is not inconsistent with maintaining the safe and efficient utilization of the navigable airspace.

(D) The proposed restriction does not conflict with any existing Federal statute or regulation.

(E) There has been an adequate opportunity for public comment with respect to the restriction.

(F) The proposed restriction does not create an undue burden on the national aviation system.

(e) INELIGIBILITY FOR PFC'S AND AIP FUNDS.—Sponsors of facilities operating under airport aircraft noise or access restrictions on Stage 3 aircraft operations that first became effective after October 1, 1990, shall not be eligible to impose a passenger facility charge under section 1113(e) of the Federal Aviation Act of 1958 and shall not be eligible for grants authorized by section 505 of the Airport and Airway Improvement Act of 1982 after the 90th day following the date on which the Secretary issues a final rule under section 9304(a) of this Act, unless such restrictions have been agreed to by the airport proprietor and aircraft operators or the Secretary has approved the restrictions under this subtitle or the restrictions have been rescinded.

(f) REEVALUATION.—The Secretary may reevaluate any noise restrictions previously agreed to or approved under subsection (d) upon the request of any aircraft operator able to demonstrate to the satisfaction of the Secretary that there has been a change in the noise environment of the affected airport and that a review and reevaluation pursuant to the criteria established under subsection

(d) of the previously approved or agreed to noise restriction is therefore justified.

(g) PROCEDURES FOR REEVALUATION.—The Secretary shall establish by regulation procedures under which reevaluations under subsection (f) are to be accomplished. A reevaluation under subsection (f) of a restriction shall not occur less than 2 years after a determination under subsection (d) has been made with respect to such restriction.

(h) EFFECT ON EXISTING LAW.—Except to the extent required by the application of the provisions of this section, nothing in this subtitle shall be deemed to eliminate, invalidate, or supersede—

(1) existing law with respect to airport noise or access restrictions by local authorities;

(2) any proposed airport noise or access regulation at a general aviation airport where the airport proprietor has formally initiated a regulatory or legislative process on or before October 1, 1990; and

(3) the authority of the Secretary to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief.

49 USC app. 2154.

**SEC. 9305. DETERMINATION REGARDING NOISE RESTRICTIONS ON CERTAIN STAGE 2 AIRCRAFT.**

The Secretary shall determine by a study the applicability of subsections (a), (b), (c), and (d) of section 9304 to noise restrictions on the operations of Stage 2 aircraft weighing less than 75,000 pounds. In making such determination, the Secretary shall consider—

(1) noise levels produced by such aircraft relative to other aircraft;

(2) the benefits to general aviation and the need for efficiency in the national air transportation system;

(3) the differences in the nature of operations at airports and the areas immediately surrounding such airports;

(4) international standards and accords with respect to aircraft noise; and

(5) such other factors which the Secretary deems necessary.

49 USC app. 2155.

**SEC. 9306. FEDERAL LIABILITY FOR NOISE DAMAGES.**

In the event that a proposed airport aircraft noise or access restriction is disapproved, the Federal Government shall assume liability for noise damages only to the extent that a taking has occurred as a direct result of such disapproval. Action for the resolution of such a case shall be brought solely in the United States Claims Court.

49 USC app. 2156.

**SEC. 9307. LIMITATION ON AIRPORT IMPROVEMENT PROGRAM REVENUE.**

Under no conditions shall any airport receive revenues under the provisions of the Airport and Airway Improvement Act of 1982 or impose or collect a passenger facility charge under section 1113(e) of the Federal Aviation Act of 1958 unless the Secretary assures that the airport is not imposing any noise or access restriction not in compliance with this subtitle.

49 USC app. 2157.

**SEC. 9308. PROHIBITION ON OPERATION OF CERTAIN AIRCRAFT NOT COMPLYING WITH STAGE 3 NOISE LEVELS.**

(a) GENERAL RULE.—After December 31, 1999, no person may operate to or from an airport in the United States any civil subsonic

turbojet aircraft with a maximum weight of more than 75,000 pounds unless such aircraft complies with the Stage 3 noise levels, as determined by the Secretary.

(b) WAIVER.—

(1) APPLICATION.—If, by July 1, 1999, at least 85 percent of the aircraft used by an air carrier to provide air transportation comply with the Stage 3 noise levels, such carrier may apply for a waiver of the prohibition set forth in subsection (a) for the remaining 15 or less percent of the aircraft used by the carrier to provide air transportation. Such application must be filed with the Secretary no later than January 1, 1999, and must include a plan with firm orders for making all aircraft used by the air carrier to provide air transportation to comply with such noise levels not later than December 31, 2003.

(2) GRANTING OF WAIVER.—The Secretary may grant a waiver under this subsection if the Secretary finds that granting such waiver is in the public interest. In making such a finding, the Secretary shall consider the effect of granting such waiver on competition in air carrier industry and on small community air service.

(3) LIMITATION.—A waiver granted under this subsection may not permit the operation of Stage 2 aircraft in the United States after December 31, 2003.

(c) COMPLIANCE SCHEDULE.—The Secretary shall, by regulation, establish a schedule for phased-in compliance with the prohibition set forth in subsection (a). The period of such phase-in shall begin on the date of the enactment of this Act and end before December 31, 1999. Such regulations shall establish interim compliance dates. Such schedule for phased-in compliance shall be based upon a detailed economic analysis of the impact of the phaseout date for Stage 2 aircraft on competition in the airline industry, including the ability of air carriers to achieve capacity growth consistent with the projected rates of growth for the airline industry, the impact of competition within the airline and air cargo industries, the impact on nonhub and small community air service, and the impact on new entry into the airline industry, and on an analysis of the impact of aircraft noise on persons residing near airports.

(d) EXEMPTION FOR NONCONTIGUOUS AIR SERVICE.—This section and section 9309 shall not apply to aircraft which are used solely to provide air transportation outside the 48 contiguous States. Any civil subsonic turbojet aircraft with a maximum weight of more than 75,000 pounds which is imported into a noncontiguous State or a territory or possession of the United States on or after the date of the enactment of this Act may not be used to provide air transportation in the 48 contiguous States unless such aircraft complies with the Stage 3 noise levels.

(e) VIOLATIONS.—Violations of this section and section 9309 and regulations issued to carry out such sections shall be subject to the same civil penalties and procedures as are provided by title IX of the Federal Aviation Act of 1958 for violations of title VI.

(f) JUDICIAL REVIEW.—Actions taken by the Secretary under this section and section 9309 shall be subject to judicial review in accordance with section 1006 of the Federal Aviation Act of 1958.

(g) REPORTS.—Beginning with calendar year 1992, each air carrier shall submit to the Secretary an annual report on the progress such carrier is making toward complying with the requirements of this section (including the regulations issued to carry out this section),

and the Secretary shall transmit to Congress an annual report on the progress being made toward such compliance.

(h) DEFINITIONS.—As used in this section, the following definitions apply:

(1) AIR CARRIER; AIR TRANSPORTATION; UNITED STATES.—The terms "air carrier", "air transportation", and "United States" have the meanings such terms have under section 101 of the Federal Aviation Act of 1958.

(2) STAGE 3 NOISE LEVELS.—The term "Stage 3 noise levels" means the Stage 3 noise levels set forth in part 36 of title 14, Code of Federal Regulations, as in effect on the date of the enactment of this Act.

49 USC app. 2158.

**SEC. 9309. NONADDITION RULE.**

(a) GENERAL RULE.—Except as provided in subsection (b) of this section, no person may operate a civil subsonic turbojet aircraft with a maximum weight of more than 75,000 pounds which is imported into the United States on or after the date of the enactment of this Act unless—

(1) it complies with the Stage 3 noise levels, or

(2) it was purchased by the person who imports the aircraft into the United States under a written contract executed before such date of enactment.

(b) EXEMPTION FOR COMPLYING MODIFICATIONS.—The Secretary may provide an exemption from the requirements of subsection (a) to permit a person to obtain modifications to an aircraft to meet the Stage 3 noise levels.

(c) LIMITATION ON STATUTORY CONSTRUCTION.—For the purposes of this section, an aircraft shall not be considered to have been imported into the United States if such aircraft—

(1) on the date of the enactment of this Act, is owned—

(A) by a corporation, trust, or partnership which is organized under the laws of the United States or any State (including the District of Columbia);

(B) by an individual who is a citizen of the United States; or

(C) by any entity which is owned or controlled by a corporation, trust, partnership, or individual described in this paragraph; and

(2) enters into the United States not later than 6 months after the date of the expiration of a lease agreement (including any extensions thereof) between an owner described in paragraph (1) and a foreign air carrier.

project for terminal development, gates and related areas, or a facility occupied or used by one or more air carriers or foreign air carriers on an exclusive or preferential basis, the rates, fees, and charges payable by such carriers that use such facilities will be no less than the rates, fees, and charges paid by such carriers using similar facilities at the airport that were not financed by PFC revenue.

9. Standards and specifications. It will carry out the project in accordance with FAA airport design, construction and equipment standards and specifications contained in advisory circulars current on the date of project approval.

10. Recordkeeping and Audit. It will maintain an accounting record for audit purposes for a period of 3 years after completion of the project. All records will satisfy the requirements of 14 CFR part 158 and will contain documentary evidence for all items of project costs.

11. Reports. It will submit reports in accordance with the requirements of 14 CFR part 158, subpart D, and as the Administrator may reasonably request.

12. Airport Noise and Capacity Act of 1990. It understands 49 U.S.C. 47524 and 47526 require the authority to impose a PFC be terminated if the Administrator determines the public agency has failed to comply with that act or with the implementing regulations promulgated thereunder.

[Doc. No. 26385, 56 FR 24278, May 29, 1991, as amended by Amdt. 158–2, 65 FR 34543, May 30, 2000]

# PART 161—NOTICE AND APPROVAL OF AIRPORT NOISE AND ACCESS RESTRICTIONS

## Subpart A—General Provisions



## Subpart B—Agreements



## Subpart C—Notice Requirements for Stage 2 Restrictions



## Subpart D—Notice, Review, and Approval Requirements for Stage 3 Restrictions



## Subpart E—Reevaluation of Stage 3 Restrictions



## Subpart F—Failure to Comply With This Part



AUTHORITY: 49 U.S.C. 106(g), 47523–47527, 47533.

SOURCE: Docket No. 26432, 56 FR 48698, Sept. 25, 1991, unless otherwise noted.

## Subpart A—General Provisions

### § 161.1 Purpose.

This part implements the Airport Noise and Capacity Act of 1990 (49 U.S.C. App. 2153, 2154, 2155, and 2156). It prescribes:

(a) Notice requirements and procedures for airport operators implementing Stage 3 aircraft noise and access restrictions pursuant to agreements between airport operators and aircraft operators;

(b) Analysis and notice requirements for airport operators proposing Stage 2 aircraft noise and access restrictions;

(c) Notice, review, and approval requirements for airport operators proposing Stage 3 aircraft noise and access restrictions; and

(d) Procedures for Federal Aviation Administration reevaluation of agreements containing restrictions on Stage 3 aircraft operations and of aircraft noise and access restrictions affecting Stage 3 aircraft operations imposed by airport operators.

### § 161.3 Applicability.

(a) This part applies to airports imposing restrictions on Stage 2 aircraft operations proposed after October 1, 1990, and to airports imposing restrictions on Stage 3 aircraft operations that became effective after October 1, 1990.

(b) This part also applies to airports enacting amendments to airport noise and access restrictions in effect on October 1, 1990, but amended after that date, where the amendment reduces or limits aircraft operations or affects aircraft safety.

(c) The notice, review, and approval requirements set forth in this part apply to all airports imposing noise or access restrictions as defined in § 161.5 of this part.

### § 161.5 Definitions.

For the purposes of this part, the following definitions apply:

*Agreement* means a document in writing signed by the airport operator; those aircraft operators currently operating at the airport that would be affected by the noise or access restriction; and all affected new entrants planning to provide new air service within 180 days of the effective date of the restriction that have submitted to the airport operator a plan of operations and notice of agreement to the restriction.

*Aircraft operator,* for purposes of this part, means any owner of an aircraft that operates the aircraft, i.e., uses, causes to use, or authorizes the use of the aircraft; or in the case of a leased aircraft, any lessee that operates the aircraft pursuant to a lease. As used in this part, aircraft operator also means any representative of the aircraft owner, or in the case of a leased aircraft, any representative of the lessee empowered to enter into agreements with the airport operator regarding use of the airport by an aircraft.

*Airport* means any area of land or water, including any heliport, that is used or intended to be used for the landing and takeoff of aircraft, and any appurtenant areas that are used or intended to be used for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

*Airport noise study area* means that area surrounding the airport within the noise contour selected by the applicant for study and must include the noise contours required to be developed for noise exposure maps specified in 14 CFR part 150.

*Airport operator* means the airport proprietor.

*Aviation user class* means the following categories of aircraft operators: air carriers operating under parts 121 or 129 of this chapter; commuters and other carriers operating under part 135 of this chapter; general aviation, military, or government operations.

*Day-night average sound level (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 periods between midnight and 7 a.m., and between 10 p.m. and midnight, local time, as defined in 14 CFR part 150. (The scientific notation for DNL is $L_{dn}$).

*Noise or access restrictions* means restrictions (including but not limited to

provisions of ordinances and leases) affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such as limits on the noise generated on either a single-event or cumulative basis; a limit, direct or indirect, on the total number of Stage 2 or Stage 3 aircraft operations; a noise budget or noise allocation program that includes Stage 2 or Stage 3 aircraft; a restriction imposing limits on hours of operations; a program of airport-use charges that has the direct or indirect effect of controlling airport noise; and any other limit on Stage 2 or Stage 3 aircraft that has the effect of controlling airport noise. This definition does not include peak-period pricing programs where the objective is to align the number of aircraft operations with airport capacity.

*Stage 2 aircraft* means an aircraft that has been shown to comply with the Stage 2 requirements under 14 CFR part 36.

*Stage 3 aircraft* means an aircraft that has been shown to comply with the Stage 3 requirements under 14 CFR part 36.

[Doc. No. 26432, 56 FR 48698, Sept. 25, 1991, as amended by Amdt. 161-2, 66 FR 21067, Apr. 27, 2001]

### § 161.7 Limitations.

(a) Aircraft operational procedures that must be submitted for adoption by the FAA, such as preferential runway use, noise abatement approach and departure procedures and profiles, and flight tracks, are not subject to this part. Other noise abatement procedures, such as taxiing and engine runups, are not subject to this part unless the procedures imposed limit the total number of Stage 2 or Stage 3 aircraft operations, or limit the hours of Stage 2 or Stage 3 aircraft operations, at the airport.

(b) The notice, review, and approval requirements set forth in this part do not apply to airports with restrictions as specified in 49 U.S.C. App. 2153(a)(2)(C):

(1) A local action to enforce a negotiated or executed airport aircraft noise or access agreement between the airport operator and the aircraft operator in effect on November 5, 1990.

(2) A local action to enforce a negotiated or executed airport aircraft noise or access restriction the airport operator and the aircraft operators agreed to before November 5, 1990.

(3) An intergovernmental agreement including airport aircraft noise or access restriction in effect on November 5, 1990.

(4) A subsequent amendment to an airport aircraft noise or access agreement or restriction in effect on November 5, 1990, where the amendment does not reduce or limit aircraft operations or affect aircraft safety.

(5) A restriction that was adopted by an airport operator on or before October 1, 1990, and that was stayed as of October 1, 1990, by a court order or as a result of litigation, if such restriction, or a part thereof, is subsequently allowed by a court to take effect.

(6) In any case in which a restriction described in paragraph (b)(5) of this section is either partially or totally disallowed by a court, any new restriction imposed by an airport operator to replace such disallowed restriction, if such new restriction would not prohibit aircraft operations in effect on November 5, 1990.

(7) A local action that represents the adoption of the final portion of a program of a staged airport aircraft noise or access restriction, where the initial portion of such program was adopted during calendar year 1988 and was in effect on November 5, 1990.

(c) The notice, review, and approval requirements of subpart D of this part with regard to Stage 3 aircraft restrictions do not apply if the FAA has, prior to November 5, 1990, formed a working group (outside of the process established by 14 CFR part 150) with a local airport operator to examine the noise impact of air traffic control procedure changes. In any case in which an agreement relating to noise reductions at such airport is then entered into between the airport proprietor and an air carrier or air carrier constituting a majority of the air carrier users of such airport, the requirements of subparts B and D of this part with respect to restrictions on Stage 3 aircraft operations do apply to local actions to enforce such agreements.

(d) Except to the extent required by the application of the provisions of the Act, nothing in this part eliminates, invalidates, or supersedes the following:

(1) Existing law with respect to airport noise or access restrictions by local authorities;

(2) Any proposed airport noise or access regulation at a general aviation airport where the airport proprietor has formally initiated a regulatory or legislative process on or before October 1, 1990; and

(3) The authority of the Secretary of Transportation to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief.

### § 161.9 Designation of noise description methods.

For purposes of this part, the following requirements apply:

(a) The sound level at an airport and surrounding areas, and the exposure of individuals to noise resulting from operations at an airport, must be established in accordance with the specifications and methods prescribed under appendix A of 14 CFR part 150; and

(b) Use of computer models to create noise contours must be in accordance with the criteria prescribed under appendix A of 14 CFR part 150.

### § 161.11 Identification of land uses in airport noise study area.

For the purposes of this part, uses of land that are normally compatible or noncompatible with various noise-exposure levels to individuals around airports must be identified in accordance with the criteria prescribed under appendix A of 14 CFR part 150. Determination of land use must be based on professional planning, zoning, and building and site design information and expertise.

## Subpart B—Agreements

### § 161.101 Scope.

(a) This subpart applies to an airport operator's noise or access restriction on the operation of Stage 3 aircraft that is implemented pursuant to an agreement between an airport operator and all aircraft operators affected by the proposed restriction that are serving or will be serving such airport within 180 days of the date of the proposed restriction.

(b) For purposes of this subpart, an agreement shall be in writing and signed by:

(1) The airport operator;

(2) Those aircraft operators currently operating at the airport who would be affected by the noise or access restriction; and

(3) All new entrants that have submitted the information required under §161.105(a) of this part.

(c) This subpart does not apply to restrictions exempted in §161.7 of this part.

(d) This subpart does not limit the right of an airport operator to enter into an agreement with one or more aircraft operators that restricts the operation of Stage 2 or Stage 3 aircraft as long as the restriction is not enforced against aircraft operators that are not party to the agreement. Such an agreement is not covered by this subpart except that an aircraft operator may apply for sanctions pursuant to subpart F of this part for restrictions the airport operator seeks to impose other than those in the agreement.

### § 161.103 Notice of the proposed restriction.

(a) An airport operator may not implement a Stage 3 restriction pursuant to an agreement with all affected aircraft operators unless there has been public notice and an opportunity for comment as prescribed in this subpart.

(b) In order to establish a restriction in accordance with this subpart, the airport operator shall, at least 45 days before implementing the restriction, publish a notice of the proposed restriction in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport vicinity or airport noise study area, if one has been delineated; post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) Aircraft operators providing scheduled passenger or cargo service at the airport; affected operators of aircraft based at the airport; potential

new entrants that are known to be interested in serving the airport; and aircraft operators known to be routinely providing non-scheduled service;

(2) The Federal Aviation Administration;

(3) Each Federal, state, and local agency with land use control jurisdiction within the vicinity of the airport, or the airport noise study area, if one has been delineated;

(4) Fixed-base operators and other airport tenants whose operations may be affected by the proposed restriction; and

(5) Community groups and business organizations that are known to be interested in the proposed restriction.

(c) Each direct notice provided in accordance with paragraph (b) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the proposed restriction, including sanctions for noncompliance and a statement that it will be implemented pursuant to a signed agreement;

(3) A brief discussion of the specific need for and goal of the proposed restriction;

(4) Identification of the operators and the types of aircraft expected to be affected;

(5) The proposed effective date of the restriction and any proposed enforcement mechanism;

(6) An invitation to comment on the proposed restriction, with a minimum 45-day comment period;

(7) Information on how to request copies of the restriction portion of the agreement, including any sanctions for noncompliance;

(8) A notice to potential new entrant aircraft operators that are known to be interested in serving the airport of the requirements set forth in §161.105 of this part; and

(9) Information on how to submit a new entrant application, comments, and the address for submitting applications and comments to the airport operator, including identification of a contact person at the airport.

(d) The Federal Aviation Administration will publish an announcement of the proposed restriction in the FEDERAL REGISTER.

[Docket No. 26432, 56 FR 48698, Sept. 25, 1991; 56 FR 51258, Oct. 10, 1991]

### §161.105 Requirements for new entrants.

(a) Within 45 days of the publication of the notice of a proposed restriction by the airport operator under §161.103(b) of this part, any person intending to provide new air service to the airport within 180 days of the proposed date of implementation of the restriction (as evidenced by submission of a plan of operations to the airport operator) must notify the airport operator if it would be affected by the restriction contained in the proposed agreement, and either that it—

(1) Agrees to the restriction; or

(2) Objects to the restriction.

(b) Failure of any person described in §161.105(a) of this part to notify the airport operator that it objects to the proposed restriction will constitute waiver of the right to claim that it did not consent to the agreement and render that person ineligible to use lack of signature as ground to apply for sanctions under subpart F of this part for two years following the effective date of the restriction. The signature of such a person need not be obtained by the airport operator in order to comply with §161.107(a) of this part.

(c) All other new entrants are also ineligible to use lack of signature as ground to apply for sanctions under subpart F of this part for two years.

### §161.107 Implementation of the restriction.

(a) To be eligible to implement a Stage 3 noise or access restriction under this subpart, an airport operator shall have the restriction contained in an agreement as defined in §161.101(b) of this part.

(b) An airport operator may not implement a restriction pursuant to an agreement until the notice and comment requirements of §161.103 of this part have been met.

(c) Each airport operator must notify the Federal Aviation Administration of the implementation of a restriction

pursuant to an agreement and must include in the notice evidence of compliance with §161.103 and a copy of the signed agreement.

**§ 161.109 Notice of termination of restriction pursuant to an agreement.**

An airport operator must notify the FAA within 10 days of the date of termination of a restriction pursuant to an agreement under this subpart.

**§ 161.111 Availability of data and comments on a restriction implemented pursuant to an agreement.**

The airport operator shall retain all relevant supporting data and all comments relating to a restriction implemented pursuant to an agreement for as long as the restriction is in effect. The airport operator shall make these materials available for inspection upon request by the FAA. The information shall be made available for inspection by any person during the pendency of any petition for reevaluation found justified by the FAA.

**§ 161.113 Effect of agreements; limitation on reevaluation.**

(a) Except as otherwise provided in this subpart, a restriction implemented by an airport operator pursuant to this subpart shall have the same force and effect as if it had been a restriction implemented in accordance with subpart D of this part.

(b) A restriction implemented by an airport operator pursuant to this subpart may be subject to reevaluation by the FAA under subpart E of this part.

## Subpart C—Notice Requirements for Stage 2 Restrictions

**§ 161.201 Scope.**

(a) This subpart applies to:

(1) An airport imposing a noise or access restriction on the operation of Stage 2 aircraft, but not Stage 3 aircraft, proposed after October 1, 1990.

(2) An airport imposing an amendment to a Stage 2 restriction, if the amendment is proposed after October 1, 1990, and reduces or limits Stage 2 aircraft operations (compared to the restriction that it amends) or affects aircraft safety.

(b) This subpart does not apply to an airport imposing a Stage 2 restriction specifically exempted in §161.7 or a Stage 2 restriction contained in an agreement as long as the restriction is not enforced against aircraft operators that are not parties to the agreement.

**§ 161.203 Notice of proposed restriction.**

(a) An airport operator may not implement a Stage 2 restriction within the scope of §161.201 unless the airport operator provides an analysis of the proposed restriction, prepared in accordance with §161.205, and a public notice and opportunity for comment as prescribed in this subpart. The notice and analysis required by this subpart shall be completed at least 180 days prior to the effective date of the restriction.

(b) Except as provided in §161.211, an airport operator must publish a notice of the proposed restriction in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport noise study area; post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) Aircraft operators providing scheduled passenger or cargo service at the airport; operators of aircraft based at the airport; potential new entrants that are known to be interested in serving the airport; and aircraft operators known to be routinely providing nonscheduled service that may be affected by the proposed restriction;

(2) The Federal Aviation Administration;

(3) Each Federal, state, and local agency with land-use control jurisdiction within the airport noise study area;

(4) Fixed-base operators and other airport tenants whose operations may be affected by the proposed restriction; and

(5) Community groups and business organizations that are known to be interested in the proposed restriction.

(c) Each notice provided in accordance with paragraph (b) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the proposed restriction, including a statement that it will be a mandatory Stage 2 restriction, and where the complete text of the restriction, and any sanctions for noncompliance, are available for public inspection;

(3) A brief discussion of the specific need for, and goal of, the restriction;

(4) Identification of the operators and the types of aircraft expected to be affected;

(5) The proposed effective date of the restriction, the proposed method of implementation (e.g., city ordinance, airport rule, lease), and any proposed enforcement mechanism;

(6) An analysis of the proposed restriction, as required by §161.205 of this subpart, or an announcement of where the analysis is available for public inspection;

(7) An invitation to comment on the proposed restriction and analysis, with a minimum 45-day comment period;

(8) Information on how to request copies of the complete text of the proposed restriction, including any sanctions for noncompliance, and the analysis (if not included with the notice); and

(9) The address for submitting comments to the airport operator, including identification of a contact person at the airport.

(d) At the time of notice, the airport operator shall provide the FAA with a full text of the proposed restriction, including any sanctions for noncompliance.

(e) The Federal Aviation Administration will publish an announcement of the proposed Stage 2 restriction in the FEDERAL REGISTER.

### §161.205 Required analysis of proposed restriction and alternatives.

(a) 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 restriction;

(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 restriction.

(b) In preparing the analyses required by this section, the airport operator shall use the noise measurement systems and identify the airport noise study area as specified in §§161.9 and 161.11, respectively; shall use currently accepted economic methodology; and shall provide separate detail on the costs and benefits of the proposed restriction with respect to the operations of Stage 2 aircraft weighing less than 75,000 pounds if the restriction applies to this class. The airport operator shall specify the methods used to analyze the costs and benefits of the proposed restriction and the alternatives.

(c) The kinds of information set forth in §161.305 are useful elements of an adequate analysis of a noise or access restriction on Stage 2 aircraft operations.

### §161.207 Comment by interested parties.

Each airport operator shall establish a public docket or similar method for receiving and considering comments, and shall make comments available for inspection by interested parties upon request. Comments must be retained as long as the restriction is in effect.

### §161.209 Requirements for proposal changes.

(a) Each airport operator shall promptly advise interested parties of any changes to a proposed restriction, including changes that affect noncompatible land uses, and make available any changes to the proposed restriction and its analysis. Interested parties include those that received direct notice under §161.203(b), or those that were required to be consulted in accordance with the procedures in §161.211 of this part, and those that have commented on the proposed restriction.

(b) If there are substantial changes to the proposed restriction or the analysis during the 180-day notice period, the

airport operator shall initiate new notice following the procedures in §161.203 or, alternatively, the procedures in §161.211. A substantial change includes, but is not limited to, a proposal that would increase the burden on any aviation user class.

(c) In addition to the information in §161.203(c), new notice must indicate that the airport operator is revising a previous notice, provide the reason for making the revision, and provide a new effective date (if any) for the restriction. The effective date of the restriction must be at least 180 days after the date the new notice and revised analysis are made available for public comment.

### §161.211 Optional use of 14 CFR part 150 procedures.

(a) An airport operator may use the procedures in part 150 of this chapter, instead of the procedures described in §§161.203(b) and 161.209(b), as a means of providing an adequate public notice and comment opportunity on a proposed Stage 2 restriction.

(b) If the airport operator elects to use 14 CFR part 150 procedures to comply with this subpart, the operator shall:

(1) Ensure that all parties identified for direct notice under §161.203(b) are notified that the airport's 14 CFR part 150 program will include a proposed Stage 2 restriction under part 161, and that these parties are offered the opportunity to participate as consulted parties during the development of the 14 CFR part 150 program;

(2) Provide the FAA with a full text of the proposed restriction, including any sanctions for noncompliance, at the time of the notice;

(3) Include the information in §161.203 (c)(2) through (c)(5) and 161.205 in the analysis of the proposed restriction for the part 14 CFR part 150 program;

(4) Wait 180 days following the availability of the above analysis for review by the consulted parties and compliance with the above notice requirements before implementing the Stage 2 restriction; and

(5) Include in its 14 CFR part 150 submission to the FAA evidence of compliance with paragraphs (b)(1) and (b)(4) of this section, and the analysis in paragraph (b)(3) of this section, together with a clear identification that the 14 CFR part 150 program includes a proposed Stage 2 restriction under part 161.

(c) The FAA determination on the 14 CFR part 150 submission does not constitute approval or disapproval of the proposed Stage 2 restriction under part 161.

(d) An amendment of a restriction may also be processed under 14 CFR part 150 procedures in accordance with this section.

### §161.213 Notification of a decision not to implement a restriction.

If a proposed restriction has been through the procedures prescribed in this subpart and the restriction is not subsequently implemented, the airport operator shall so advise the interested parties. Interested parties are described in §161.209(a).

## Subpart D—Notice, Review, and Approval Requirements for Stage 3 Restrictions

### §161.301 Scope.

(a) This subpart applies to:

(1) An airport imposing a noise or access restriction on the operation of Stage 3 aircraft that first became effective after October 1, 1990.

(2) An airport imposing an amendment to a Stage 3 restriction, if the amendment becomes effective after October 1, 1990, and reduces or limits Stage 3 aircraft operations (compared to the restriction that it amends) or affects aircraft safety.

(b) This subpart does not apply to an airport imposing a Stage 3 restriction specifically exempted in §161.7, or an agreement complying with subpart B of this part.

(c) A Stage 3 restriction within the scope of this subpart may not become effective unless it has been submitted to and approved by the FAA. The FAA will review only those Stage 3 restrictions that are proposed by, or on behalf of, an entity empowered to implement the restriction.

**§ 161.303 Notice of proposed restrictions.**

(a) Each airport operator or aircraft operator (hereinafter referred to as applicant) proposing a Stage 3 restriction shall provide public notice and an opportunity for public comment, as prescribed in this subpart, before submitting the restriction to the FAA for review and approval.

(b) Except as provided in § 161.321, an applicant shall publish a notice of the proposed restriction in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport noise study area; post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) Aircraft operators providing scheduled passenger or cargo service at the airport; operators of aircraft based at the airport; potential new entrants that are known to be interested in serving the airport; and aircraft operators known to be routinely providing nonscheduled service that may be affected by the proposed restriction;

(2) The Federal Aviation Administration;

(3) Each Federal, state, and local agency with land-use control jurisdiction within the airport noise study area;

(4) Fixed-base operators and other airport tenants whose operations may be affected by the proposed restriction; and

(5) Community groups and business organizations that are known to be interested in the proposed restriction.

(c) Each notice provided in accordance with paragraph (b) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the proposed restriction (and any alternatives, in order of preference), including a statement that it will be a mandatory Stage 3 restriction; and where the complete text of the restriction, and any sanctions for noncompliance, are available for public inspection;

(3) A brief discussion of the specific need for, and goal of, the restriction;

(4) Identification of the operators and types of aircraft expected to be affected;

(5) The proposed effective date of the restriction, the proposed method of implementation (e.g., city ordinance, airport rule, lease, or other document), and any proposed enforcement mechanism;

(6) An analysis of the proposed restriction, in accordance with § 161.305 of this part, or an announcement regarding where the analysis is available for public inspection;

(7) An invitation to comment on the proposed restriction and the analysis, with a minimum 45-day comment period;

(8) Information on how to request a copy of the complete text of the restriction, including any sanctions for noncompliance, and the analysis (if not included with the notice); and

(9) The address for submitting comments to the airport operator or aircraft operator proposing the restriction, including identification of a contact person.

(d) Applicants may propose alternative restrictions, including partial implementation of any proposal, and indicate an order of preference. If alternative restriction proposals are submitted, the requirements listed in paragraphs (c)(2) through (c)(6) of this section should address the alternative proposals where appropriate.

**§ 161.305 Required analysis and conditions for approval of proposed restrictions.**

Each applicant proposing a noise or access restriction on Stage 3 operations shall prepare and make available for public comment an analysis that supports, by substantial evidence, that the six statutory conditions for approval have been met for each restriction and any alternatives submitted. The statutory conditions are set forth in 49 U.S.C. App. 2153(d)(2) and paragraph (e) of this section. Any proposed restriction (including alternatives) on Stage 3 aircraft operations that also affects the operation of Stage 2 aircraft must include analysis of the proposals in a manner that permits the

proposal to be understood in its entirety. (Nothing in this section is intended to add a requirement for the issuance of restrictions on Stage 2 aircraft to those of subpart C of this part.) The applicant shall provide:

(a) The complete text of the proposed restriction and any submitted alternatives, including the proposed wording in a city ordinance, airport rule, lease, or other document, and any sanctions for noncompliance;

(b) Maps denoting the airport geographic boundary, and the geographic boundaries and names of each jurisdiction that controls land use within the airport noise study area;

(c) An adequate environmental assessment of the proposed restriction or adequate information supporting a categorical exclusion in accordance with FAA orders and procedures regarding compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321);

(d) A summary of the evidence in the submission supporting the six statutory conditions for approval; and

(e) An analysis of the restriction, demonstrating by substantial evidence that the statutory conditions are met. The analysis must:

(1) Be sufficiently detailed to allow the FAA to evaluate the merits of the proposed restriction; and

(2) Contain the following essential elements needed to provide substantial evidence supporting each condition for approval:

(i) *Condition 1: The restriction is reasonable, nonarbitrary, and nondiscriminatory.* (A) Essential information needed to demonstrate this condition includes the following:

(*1*) Evidence that a current or projected noise or access problem exists, and that the proposed action(s) could relieve the problem, including:

(*i*) A detailed description of the problem precipitating the proposed restriction with relevant background information on factors contributing to the proposal and any court-ordered action or estimated liability concerns; a description of any noise agreements or noise or access restrictions currently in effect at the airport; and measures taken to achieve land-use compatibility, such as controls or restrictions on land use in the vicinity of the airport and measures carried out in response to 14 CFR part 150; and actions taken to comply with grant assurances requiring that:

(*A*) Airport development projects be reasonably consistent with plans of public agencies that are authorized to plan for the development of the area around the airport; and

(*B*) The sponsor give fair consideration to the interests of communities in or near where the project may be located; take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land near the airport to activities and purposes compatible with normal airport operations; and not cause or permit any change in land use, within its jurisdiction, that will reduce the compatibility (with respect to the airport) of any noise compatibility program measures upon which federal funds have been expended.

(*ii*) An analysis of the estimated noise impact of aircraft operations with and without the proposed restriction for the year the restriction is expected to be implemented, for a forecast timeframe after implementation, and for any other years critical to understanding the noise impact of the proposed restriction. The analysis of noise impact with and without the proposed restriction including:

(*A*) Maps of the airport noise study area overlaid with noise contours as specified in §§ 161.9 and 161.11 of this part;

(*B*) The number of people and the noncompatible land uses within the airport noise study area with and without the proposed restriction for each year the noise restriction is analyzed;

(*C*) Technical data supporting the noise impact analysis, including the classes of aircraft, fleet mix, runway use percentage, and day/night breakout of operations; and

(*D*) Data on current and projected airport activity that would exist in the absence of the proposed restriction.

(*2*) Evidence that other available remedies are infeasible or would be less cost-effective, including descriptions of any alternative aircraft restrictions that have been considered and rejected, and the reasons for the rejection; and

of any land use or other nonaircraft controls or restrictions that have been considered and rejected, including those proposed under 14 CFR part 150 and not implemented, and the reasons for the rejection or failure to implement.

(*3*) Evidence that the noise or access standards are the same for all aviation user classes or that the differences are justified, such as:

(*i*) A description of the relationship of the effect of the proposed restriction on airport users (by aviation user class); and

(*ii*) The noise attributable to these users in the absence of the proposed restriction.

(B) At the applicant's discretion, information may also be submitted as follows:

(*1*) Evidence not submitted under paragraph (e)(2)(ii)(A) of this section (Condition 2) that there is a reasonable chance that expected benefits will equal or exceed expected cost; for example, comparative economic analyses of the costs and benefits of the proposed restriction and aircraft and nonaircraft alternative measures. For detailed elements of analysis, see paragraph (e)(2)(ii)(A) of this section.

(*2*) Evidence not submitted under paragraph (e)(2)(ii)(A) of this section that the level of any noise-based fees that may be imposed reflects the cost of mitigating noise impacts produced by the aircraft, or that the fees are reasonably related to the intended level of noise impact mitigation.

(ii) *Condition 2: The restriction does not create an undue burden on interstate or foreign commerce.* (A) Essential information needed to demonstrate this statutory condition includes:

(*1*) Evidence, based on a cost-benefit analysis, that the estimated potential benefits of the restriction have a reasonable chance to exceed the estimated potential cost of the adverse effects on interstate and foreign commerce. In preparing the economic analysis required by this section, the applicant shall use currently accepted economic methodology, specify the methods used and assumptions underlying the analysis, and consider:

(*i*) The effect of the proposed restriction on operations of aircraft by aviation user class (and for air carriers, the number of operations of aircraft by carrier), and on the volume of passengers and cargo for the year the restriction is expected to be implemented and for the forecast timeframe.

(*ii*) The estimated costs of the proposed restriction and alternative nonaircraft restrictions including the following, as appropriate:

(*A*) Any additional cost of continuing aircraft operations under the restriction, including reasonably available information concerning any net capital costs of acquiring or retrofitting aircraft (net of salvage value and operating efficiencies) by aviation user class; and any incremental recurring costs;

(*B*) Costs associated with altered or discontinued aircraft operations, such as reasonably available information concerning loss to carriers of operating profits; decreases in passenger and shipper consumer surplus by aviation user class; loss in profits associated with other airport services or other entities: and/or any significant economic effect on parties other than aviation users.

(*C*) Costs associated with implementing nonaircraft restrictions or nonaircraft components of restrictions, such as reasonably available information concerning estimates of capital costs for real property, including redevelopment, soundproofing, noise easements, and purchase of property interests; and estimates of associated incremental recurring costs; or an explanation of the legal or other impediments to implementing such restrictions.

(*D*) Estimated benefits of the proposed restriction and alternative restrictions that consider, as appropriate, anticipated increase in real estate values and future construction cost (such as sound insulation) savings; anticipated increase in airport revenues; quantification of the noise benefits, such as number of people removed from noise contours and improved work force and/or educational productivity, if any; valuation of positive safety effects, if any; and/or other qualitative benefits, including improvements in quality of life.

(B) At the applicant's discretion, information may also be submitted as follows:

(*1*) Evidence that the affected carriers have a reasonable chance to continue service at the airport or at other points in the national airport system.

(*2*) Evidence that other air carriers are able to provide adequate service to the airport and other points in the system without diminishing competition.

(*3*) Evidence that comparable services or facilities are available at another airport controlled by the airport operator in the market area, including services available at other airports.

(*4*) Evidence that alternative transportation service can be attained through other means of transportation.

(*5*) Information on the absence of adverse evidence or adverse comments with respect to undue burden in the notice process required in §161.303, or alternatively in §161.321, of this part as evidence that there is no undue burden.

(iii) *Condition 3: The proposed restriction maintains safe and efficient use of the navigable airspace.* Essential information needed to demonstrate this statutory condition includes evidence that the proposed restriction maintains safe and efficient use of the navigable airspace based upon:

(A) Identification of airspace and obstacles to navigation in the vicinity of the airport; and

(B) An analysis of the effects of the proposed restriction with respect to use of airspace in the vicinity of the airport, substantiating that the restriction maintains or enhances safe and efficient use of the navigable airspace. The analysis shall include a description of the methods and data used.

(iv) *Condition 4: The proposed restriction does not conflict with any existing Federal statute or regulation.* Essential information needed to demonstrate this condition includes evidence demonstrating that no conflict is presented between the proposed restriction and any existing Federal statute or regulation, including those governing:

(A) Exclusive rights;

(B) Control of aircraft operations; and

(C) Existing Federal grant agreements.

(v) *Condition 5: The applicant has provided adequate opportunity for public comment on the proposed restriction.* Essential information needed to demonstrate this condition includes evidence that there has been adequate opportunity for public comment on the restriction as specified in §161.303 or §161.321 of this part.

(vi) *Condition 6: The proposed restriction does not create an undue burden on the national aviation system.* Essential information needed to demonstrate this condition includes evidence that the proposed restriction does not create an undue burden on the national aviation system such as:

(A) An analysis demonstrating that the proposed restriction does not have a substantial adverse effect on existing or planned airport system capacity, on observed or forecast airport system congestion and aircraft delay, and on airspace system capacity or workload;

(B) An analysis demonstrating that nonaircraft alternative measures to achieve the same goals as the proposed subject restrictions are inappropriate;

(C) The absence of comments with respect to imposition of an undue burden on the national aviation system in response to the notice required in §161.303 or §161.321.

### §161.307 Comment by interested parties.

(a) Each applicant proposing a restriction shall establish a public docket or similar method for receiving and considering comments, and shall make comments available for inspection by interested parties upon request. Comments must be retained as long as the restriction is in effect.

(b) Each applicant shall submit to the FAA a summary of any comments received. Upon request by the FAA, the applicant shall submit copies of the comments.

### §161.309 Requirements for proposal changes.

(a) Each applicant shall promptly advise interested parties of any changes to a proposed restriction or alternative restriction that are not encompassed in the proposals submitted, including changes that affect noncompatible land

uses or that take place before the effective date of the restriction, and make available these changes to the proposed restriction and its analysis. For the purpose of this paragraph, interested parties include those who received direct notice under §161.303(b) of this part, or those who were required to be consulted in accordance with the procedures in §161.321 of this part, and those who commented on the proposed restriction.

(b) If there are substantial changes to a proposed restriction or the analysis made available prior to the effective date of the restriction, the applicant proposing the restriction shall initiate new notice in accordance with the procedures in §161.303 or, alternatively, the procedures in §161.321. These requirements apply to substantial changes that are not encompassed in submitted alternative restriction proposals and their analyses. A substantial change to a restriction includes, but is not limited to, any proposal that would increase the burden on any aviation user class.

(c) In addition to the information in §161.303(c), a new notice must indicate that the applicant is revising a previous notice, provide the reason for making the revision, and provide a new effective date (if any) for the restriction.

(d) If substantial changes requiring a new notice are made during the FAA's 180-day review of the proposed restriction, the applicant submitting the proposed restriction shall notify the FAA in writing that it is withdrawing its proposal from the review process until it has completed additional analysis, public review, and documentation of the public review. Resubmission to the FAA will restart the 180-day review.

### §161.311 Application procedure for approval of proposed restriction.

Each applicant proposing a Stage 3 restriction shall submit to the FAA the following information for each restriction and alternative restriction submitted, with a request that the FAA review and approve the proposed Stage 3 noise or access restriction:

(a) A summary of evidence of the fulfillment of conditions for approval, as specified in §161.305;

(b) An analysis as specified in §161.305, as appropriate to the proposed restriction;

(c) A statement that the entity submitting the proposal is the party empowered to implement the restriction, or is submitting the proposal on behalf of such party; and

(d) A statement as to whether the airport requests, in the event of disapproval of the proposed restriction or any alternatives, that the FAA approve any portion of the restriction or any alternative that meets the statutory requirements for approval. An applicant requesting partial approval of any proposal should indicate its priorities as to portions of the proposal to be approved.

### §161.313 Review of application.

(a) *Determination of completeness.* The FAA, within 30 days of receipt of an application, will determine whether the application is complete in accordance with §161.311. Determinations of completeness will be made on all proposed restrictions and alternatives. This completeness determination is not an approval or disapproval of the proposed restriction.

(b) *Process for complete application.* When the FAA determines that a complete application has been submitted, the following procedures apply:

(1) The FAA notifies the applicant that it intends to act on the proposed restriction and publishes notice of the proposed restriction in the FEDERAL REGISTER in accordance with §161.315. The 180-day period for approving or disapproving the proposed restriction will start on the date of original FAA receipt of the application.

(2) Following review of the application, public comments, and any other information obtained under §161.317(b), the FAA will issue a decision approving or disapproving the proposed restriction. This decision is a final decision of the Administrator for purpose of judicial review.

(c) *Process for incomplete application.* If the FAA determines that an application is not complete with respect to any submitted restriction or alternative restriction, the following procedures apply:

(1) The FAA shall notify the applicant in writing, returning the application and setting forth the type of information and analysis needed to complete the application in accordance with § 161.311.

(2) Within 30 days after the receipt of this notice, the applicant shall advise the FAA in writing whether or not it intends to resubmit and supplement its application.

(3) If the applicant does not respond in 30 days, or advises the FAA that it does not intend to resubmit and/or supplement the application, the application will be denied. This closes the matter without prejudice to later application and does not constitute disapproval of the proposed restriction.

(4) If the applicant chooses to resubmit and supplement the application, the following procedures apply:

(i) Upon receipt of the resubmitted application, the FAA determines whether the application, as supplemented, is complete as set forth in paragraph (a) of this section.

(ii) If the application is complete, the procedures set forth in § 161.315 shall be followed. The 180-day review period starts on the date of receipt of the last supplement to the application.

(iii) If the application is still not complete with respect to the proposed restriction or at least one submitted alternative, the FAA so advises the applicant as set forth in paragraph (c)(1) of this section and provides the applicant with an additional opportunity to supplement the application as set forth in paragraph (c)(2) of this section.

(iv) If the environmental documentation (either an environmental assessment or information supporting a categorical exclusion) is incomplete, the FAA will so notify the applicant in writing, returning the application and setting forth the types of information and analysis needed to complete the documentation. The FAA will continue to return an application until adequate environmental documentation is provided. When the application is determined to be complete, including the environmental documentation, the 180-day period for approval or disapproval will begin upon receipt of the last supplement to the application.

(v) Following review of the application and its supplements, public comments, and any other information obtained under § 161.317(b), the FAA will issue a decision approving or disapproving the application. This decision is a final decision of the Administrator for the purpose of judicial review.

(5) The FAA will deny the application and return it to the applicant if:

(i) None of the proposals submitted are found to be complete;

(ii) The application has been returned twice to the applicant for reasons other than completion of the environmental documentation; and

(iii) The applicant declines to complete the application. This closes the matter without prejudice to later application, and does not constitute disapproval of the proposed restriction.

### § 161.315 Receipt of complete application.

(a) When a complete application has been received, the FAA will notify the applicant by letter that the FAA intends to act on the application.

(b) The FAA will publish notice of the proposed restriction in the FEDERAL REGISTER, inviting interested parties to file comments on the application within 30 days after publication of the FEDERAL REGISTER notice.

### § 161.317 Approval or disapproval of proposed restriction.

(a) Upon determination that an application is complete with respect to at least one of the proposals submitted by the applicant, the FAA will act upon the complete proposals in the application. The FAA will not act on any proposal for which the applicant has declined to submit additional necessary information.

(b) The FAA will review the applicant's proposals in the preference order specified by the applicant. The FAA may request additional information from aircraft operators, or any other party, and may convene an informal meeting to gather facts relevant to its determination.

(c) The FAA will evaluate the proposal and issue an order approving or disapproving the proposed restriction and any submitted alternatives, in

whole or in part, in the order of preference indicated by the applicant. Once the FAA approves a proposed restriction, the FAA will not consider any proposals of lower applicant-stated preference. Approval or disapproval will be given by the FAA within 180 days after receipt of the application or last supplement thereto under § 161.313. The FAA will publish its decision in the FEDERAL REGISTER and notify the applicant in writing.

(d) The applicant's failure to provide substantial evidence supporting the statutory conditions for approval of a particular proposal is grounds for disapproval of that proposed restriction.

(e) The FAA will approve or disapprove only the Stage 3 aspects of a restriction if the restriction applies to both Stage 2 and Stage 3 aircraft operations.

(f) An order approving a restriction may be subject to requirements that the applicant:

(1) Comply with factual representations and commitments in support of the restriction; and

(2) Ensure that any environmental mitigation actions or commitments by any party that are set forth in the environmental documentation provided in support of the restriction are implemented.

### § 161.319 Withdrawal or revision of restriction.

(a) The applicant may withdraw or revise a proposed restriction at any time prior to FAA approval or disapproval, and must do so if substantial changes are made as described in § 161.309. The applicant shall notify the FAA in writing of a decision to withdraw the proposed restriction for any reason. The FAA will publish a notice in the FEDERAL REGISTER that it has terminated its review without prejudice to resubmission. A resubmission will be considered a new application.

(b) A subsequent amendment to a Stage 3 restriction that was in effect after October 1, 1990, or an amendment to a Stage 3 restriction previously approved by the FAA, is subject to the procedures in this subpart if the amendment will further reduce or limit aircraft operations or affect aircraft safety. The applicant may, at its option, revise or amend a restriction previously disapproved by the FAA and resubmit it for approval. Amendments are subject to the same requirements and procedures as initial submissions.

### § 161.321 Optional use of 14 CFR part 150 procedures.

(a) An airport operator may use the procedures in part 150 of this chapter, instead of the procedures described in §§ 161.303(b) and 161.309(b) of this part, as a means of providing an adequate public notice and opportunity to comment on proposed Stage 3 restrictions, including submitted alternatives.

(b) If the airport operator elects to use 14 CFR part 150 procedures to comply with this subpart, the operator shall:

(1) Ensure that all parties identified for direct notice under § 161.303(b) are notified that the airport's 14 CFR part 150 program submission will include a proposed Stage 3 restriction under part 161, and that these parties are offered the opportunity to participate as consulted parties during the development of the 14 CFR part 150 program;

(2) Include the information required in § 161.303(c) (2) through (5) and § 161.305 in the analysis of the proposed restriction in the 14 CFR part 150 program submission; and

(3) Include in its 14 CFR part 150 submission to the FAA evidence of compliance with the notice requirements in paragraph (b)(1) of this section and include the information required for a part 161 application in § 161.311, together with a clear identification that the 14 CFR part 150 submission includes a proposed Stage 3 restriction for FAA review and approval under §§ 161.313, 161.315, and 161.317.

(c) The FAA will evaluate the proposed part 161 restriction on Stage 3 aircraft operations included in the 14 CFR part 150 submission in accordance with the procedures and standards of this part, and will review the total 14 CFR part 150 submission in accordance with the procedures and standards of 14 CFR part 150.

(d) An amendment of a restriction, as specified in § 161.319(b) of this part, may also be processed under 14 CFR part 150 procedures.

**§ 161.323 Notification of a decision not to implement a restriction.**

If a Stage 3 restriction has been approved by the FAA and the restriction is not subsequently implemented, the applicant shall so advise the interested parties specified in §161.309(a) of this part.

**§ 161.325 Availability of data and comments on an implemented restriction.**

The applicant shall retain all relevant supporting data and all comments relating to an approved restriction for as long as the restriction is in effect and shall make these materials available for inspection upon request by the FAA. This information shall be made available for inspection by any person during the pendency of any petition for reevaluation found justified by the FAA.

## Subpart E—Reevaluation of Stage 3 Restrictions

**§ 161.401 Scope.**

This subpart applies to an airport imposing a noise or access restriction on the operation of Stage 3 aircraft that first became effective after October 1, 1990, and had either been agreed to in compliance with the procedures in subpart B of this part or approved by the FAA in accordance with the procedures in subpart D of this part. This subpart does not apply to Stage 2 restrictions imposed by airports. This subpart does not apply to Stage 3 restrictions specifically exempted in §161.7.

**§ 161.403 Criteria for reevaluation.**

(a) A request for reevaluation must be submitted by an aircraft operator.

(b) An aircraft operator must demonstrate to the satisfaction of the FAA that there has been a change in the noise environment of the affected airport and that a review and reevaluation pursuant to the criteria in §161.305 is therefore justified.

(1) A change in the noise environment sufficient to justify reevaluation is either a DNL change of 1.5 dB or greater (from the restriction's anticipated target noise level result) over noncompatible land uses, or a change of 17 percent or greater in the noncompatible land uses, within an airport noise study area. For approved restrictions, calculation of change shall be based on the divergence of actual noise impact of the restriction from the estimated noise impact of the restriction predicted in the analysis required in §161.305(e)(2)(i)(A)(*1*)(*ii*). The change in the noise environment or in the noncompatible land uses may be either an increase or decrease in noise or in noncompatible land uses. An aircraft operator may submit to the FAA reasons why a change that does not fall within either of these parameters justifies reevaluation, and the FAA will consider such arguments on a case-by-case basis.

(2) A change in the noise environment justifies reevaluation if the change is likely to result in the restriction not meeting one or more of the conditions for approval set forth in §161.305 of this part for approval. The aircraft operator must demonstrate that such a result is likely to occur.

(c) A reevaluation may not occur less than 2 years after the date of the FAA approval. The FAA will normally apply the same 2-year requirement to agreements under subpart B of this part that affect Stage 3 aircraft operations. An aircraft operator may submit to the FAA reasons why an agreement under subpart B of this part should be reevaluated in less than 2 years, and the FAA will consider such arguments on a case-by-case basis.

(d) An aircraft operator must demonstrate that it has made a good faith attempt to resolve locally any dispute over a restriction with the affected parties, including the airport operator, before requesting reevaluation by the FAA. Such demonstration and certification shall document all attempts of local dispute resolution.

[Docket No. 26432, 56 FR 48698, Sept. 25, 1991; 56 FR 51258, Oct. 10, 1991]

**§ 161.405 Request for reevaluation.**

(a) A request for reevaluation submitted to the FAA by an aircraft operator must include the following information:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the restriction and any sanctions for noncompliance, whether the restriction was approved by the FAA or agreed to by the airport operator and aircraft operators, the date of the approval or agreement, and a copy of the restriction as incorporated in a local ordinance, airport rule, lease, or other document;

(3) The quantified change in the noise environment using methodology specified in this part;

(4) Evidence of the relationship between this change and the likelihood that the restriction does not meet one or more of the conditions in § 161.305;

(5) The aircraft operator's status under the restriction (e.g., currently affected operator, potential new entrant) and an explanation of the aircraft operator's specific objection; and

(6) A description and evidence of the aircraft operator's attempt to resolve the dispute locally with the affected parties, including the airport operator.

(b) The FAA will evaluate the aircraft operator's submission and determine whether or not a reevaluation is justified. The FAA may request additional information from the airport operator or any other party and may convene an informal meeting to gather facts relevant to its determination.

(c) The FAA will notify the aircraft operator in writing, with a copy to the affected airport operator, of its determination.

(1) If the FAA determines that a reevaluation is not justified, it will indicate the reasons for this decision.

(2) If the FAA determines that a reevaluation is justified, the aircraft operator will be notified to complete its analysis and to begin the public notice procedure, as set forth in this subpart.

**§ 161.407 Notice of reevaluation.**

(a) After receiving an FAA determination that a reevaluation is justified, an aircraft operator desiring continuation of the reevaluation process shall publish a notice of request for reevaluation in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport noise study area (or the airport vicinity for agreements where an airport noise study area has not been delineated); post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) The airport operator, other aircraft operators providing scheduled passenger or cargo service at the airport, operators of aircraft based at the airport, potential new entrants that are known to be interested in serving the airport, and aircraft operators known to be routinely providing nonscheduled service;

(2) The Federal Aviation Administration;

(3) Each Federal, State, and local agency with land-use control jurisdiction within the airport noise study area (or the airport vicinity for agreements where an airport noise study area has not been delineated);

(4) Fixed-base operators and other airport tenants whose operations may be affected by the agreement or the restriction;

(5) Community groups and business organizations that are known to be interested in the restriction; and

(6) Any other party that commented on the original restriction.

(b) Each notice provided in accordance with paragraph (a) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the restriction, including whether the restriction was approved by the FAA or agreed to by the airport operator and aircraft operators, and the date of the approval or agreement;

(3) The name of the aircraft operator requesting a reevaluation, and a statement that a reevaluation has been requested and that the FAA has determined that a reevaluation is justified;

(4) A brief discussion of the reasons why a reevaluation is justified;

(5) An analysis prepared in accordance with § 161.409 of this part supporting the aircraft operator's reevaluation request, or an announcement of where the analysis is available for public inspection;

(6) An invitation to comment on the analysis supporting the proposed reevaluation, with a minimum 45-day comment period;

(7) Information on how to request a copy of the analysis (if not in the notice); and

(8) The address for submitting comments to the aircraft operator, including identification of a contact person.

### § 161.409 Required analysis by reevaluation petitioner.

(a) An aircraft operator that has petitioned the FAA to reevaluate a restriction shall assume the burden of analysis for the reevaluation.

(b) The aircraft operator's analysis shall be made available for public review under the procedures in § 161.407 and shall include the following:

(1) A copy of the restriction or the language of the agreement as incorporated in a local ordinance, airport rule, lease, or other document;

(2) The aircraft operator's status under the restriction (e.g., currently affected operator, potential new entrant) and an explanation of the aircraft operator's specific objection to the restriction;

(3) The quantified change in the noise environment using methodology specified in this part;

(4) Evidence of the relationship between this change and the likelihood that the restriction does not meet one or more of the conditions in § 161.305; and

(5) Sufficient data and analysis selected from § 161.305, as applicable to the restriction at issue, to support the contention made in paragraph (b)(4) of this section. This is to include either an adequate environmental assessment of the impacts of discontinuing all or part of a restriction in accordance with the aircraft operator's petition, or adequate information supporting a categorical exclusion under FAA orders implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

(c) The amount of analysis may vary with the complexity of the restriction, the number and nature of the conditions in § 161.305 that are alleged to be unsupported, and the amount of previous analysis developed in support of the restriction. The aircraft operator may incorporate analysis previously developed in support of the restriction, including previous environmental documentation to the extent applicable. The applicant is responsible for providing substantial evidence, as described in § 161.305, that one or more of the conditions are not supported.

### § 161.411 Comment by interested parties.

(a) Each aircraft operator requesting a reevaluation shall establish a docket or similar method for receiving and considering comments and shall make comments available for inspection to interested parties specified in paragraph (b) of this section upon request. Comments must be retained for two years.

(b) Each aircraft operator shall promptly notify interested parties if it makes a substantial change in its analysis that affects either the costs or benefits analyzed, or the criteria in § 161.305, differently from the analysis made available for comment in accordance with § 161.407. Interested parties include those who received direct notice under paragraph (a) of § 161.407 and those who have commented on the reevaluation. If an aircraft operator revises its analysis, it shall make the revised analysis available to an interested party upon request and shall extend the comment period at least 45 days from the date the revised analysis is made available.

### § 161.413 Reevaluation procedure.

(a) Each aircraft operator requesting a reevaluation shall submit to the FAA:

(1) The analysis described in § 161.409;

(2) Evidence that the public review process was carried out in accordance with §§ 161.407 and 161.411, including the aircraft operator's summary of the comments received; and

(3) A request that the FAA complete a reevaluation of the restriction and issue findings.

(b) Following confirmation by the FAA that the aircraft operator's documentation is complete according to the requirements of this subpart, the FAA will publish a notice of reevaluation in the FEDERAL REGISTER and provide for a 45-day comment period during which

interested parties may submit comments to the FAA. The FAA will specifically solicit comments from the affected airport operator and affected local governments. A submission that is not complete will be returned to the aircraft operator with a letter indicating the deficiency, and no notice will be published. No further action will be taken by the FAA until a complete submission is received.

(c) The FAA will review all submitted documentation and comments pursuant to the conditions of §161.305. To the extent necessary, the FAA may request additional information from the aircraft operator, airport operator, and others known to have information material to the reevaluation, and may convene an informal meeting to gather facts relevant to a reevaluation finding.

**§161.415 Reevaluation action.**

(a) Upon completing the reevaluation, the FAA will issue appropriate orders regarding whether or not there is substantial evidence that the restriction meets the criteria in §161.305 of this part.

(b) If the FAA's reevaluation confirms that the restriction meets the criteria, the restriction may remain as previously agreed to or approved. If the FAA's reevaluation concludes that the restriction does not meet the criteria, the FAA will withdraw a previous approval of the restriction issued under subpart D of this part to the extent necessary to bring the restriction into compliance with this part or, with respect to a restriction agreed to under subpart B of this part, the FAA will specify which criteria are not met.

(c) The FAA will publish a notice of its reevaluation findings in the FEDERAL REGISTER and notify in writing the aircraft operator that petitioned the FAA for reevaluation and the affected airport operator.

**§161.417 Notification of status of restrictions and agreements not meeting conditions-of-approval criteria.**

If the FAA has withdrawn all or part of a previous approval made under subpart D of this part, the relevant portion of the Stage 3 restriction must be rescinded. The operator of the affected airport shall notify the FAA of the operator's action with regard to a restriction affecting Stage 3 aircraft operations that has been found not to meet the criteria of §161.305. Restrictions in agreements determined by the FAA not to meet conditions for approval may not be enforced with respect to Stage 3 aircraft operations.

## Subpart F—Failure to Comply With This Part

**§161.501 Scope.**

(a) This subpart describes the procedures to terminate eligibility for airport grant funds and authority to impose or collect passenger facility charges for an airport operator's failure to comply with the Airport Noise and Capacity Act of 1990 (49 U.S.C. App. 2151 *et seq.*) or this part. These procedures may be used with or in addition to any judicial proceedings initiated by the FAA to protect the national aviation system and related Federal interests.

(b) Under no conditions shall any airport operator receive revenues under the provisions of the Airport and Airway Improvement Act of 1982 or impose or collect a passenger facility charge under section 1113(e) of the Federal Aviation Act of 1958 if the FAA determines that the airport is imposing any noise or access restriction not in compliance with the Airport Noise and Capacity Act of 1990 or this part. Recission of, or a commitment in writing signed by an authorized official of the airport operator to rescind or permanently not enforce, a noncomplying restriction will be treated by the FAA as action restoring compliance with the Airport Noise and Capacity Act of 1990 or this part with respect to that restriction.

**§161.503 Informal resolution; notice of apparent violation.**

Prior to the initiation of formal action to terminate eligibility for airport grant funds or authority to impose or collect passenger facility charges under this subpart, the FAA shall undertake informal resolution with the airport operator to assure compliance with the Airport Noise and Capacity Act of 1990 or this part upon receipt of

a complaint or other evidence that an airport operator has taken action to impose a noise or access restriction that appears to be in violation. This shall not preclude a FAA application for expedited judicial action for other than termination of airport grants and passenger facility charges to protect the national aviation system and violated federal interests. If informal resolution is not successful, the FAA will notify the airport operator in writing of the apparent violation. The airport operator shall respond to the notice in writing not later than 20 days after receipt of the notice, and also state whether the airport operator will agree to defer implementation or enforcement of its noise or access restriction until completion of the process under this subpart to determine compliance.

**§ 161.505 Notice of proposed termination of airport grant funds and passenger facility charges.**

(a) The FAA begins proceedings under this section to terminate an airport operator's eligibility for airport grant funds and authority to impose or collect passenger facility charges only if the FAA determines that informal resolution is not successful.

(b) The following procedures shall apply if an airport operator agrees in writing, within 20 days of receipt of the FAA's notice of apparent violation under § 161.503, to defer implementation or enforcement of a noise or access restriction until completion of the process under this subpart to determine compliance.

(1) The FAA will issue a notice of proposed termination to the airport operator and publish notice of the proposed action in the FEDERAL REGISTER. This notice will state the scope of the proposed termination, the basis for the proposed action, and the date for filing written comments or objections by all interested parties. This notice will also identify any corrective action the airport operator can take to avoid further proceedings. The due date for comments and corrective action by the airport operator shall be specified in the notice of proposed termination and shall not be less than 60 days after publication of the notice.

(2) The FAA will review the comments, statements, and data supplied by the airport operator, and any other available information, to determine if the airport operator has provided satisfactory evidence of compliance or has taken satisfactory corrective action. The FAA will consult with the airport operator to attempt resolution and may request additional information from other parties to determine compliance. The review and consultation process shall take not less than 30 days. If the FAA finds satisfactory evidence of compliance, the FAA will notify the airport operator in writing and publish notice of compliance in the FEDERAL REGISTER.

(3) If the FAA determines that the airport operator has taken action to impose a noise or access restriction in violation of the Airport Noise and Capacity Act of 1990 or this part, the FAA will notify the airport operator in writing of such determination. Where appropriate, the FAA may prescribe corrective action, including corrective action the airport operator may still need to take. Within 10 days of receipt of the FAA's determination, the airport operator shall—

(i) Advise the FAA in writing that it will complete any corrective action prescribed by the FAA within 30 days; or

(ii) Provide the FAA with a list of the domestic air carriers and foreign air carriers operating at the airport and all other issuing carriers, as defined in § 158.3 of this chapter, that have remitted passenger facility charge revenue to the airport in the preceding 12 months.

(4) If the FAA finds that the airport operator has taken satisfactory corrective action, the FAA will notify the airport operator in writing and publish notice of compliance in the FEDERAL REGISTER. If the FAA has determined that the airport operator has imposed a noise or access restriction in violation of the Airport Noise and Capacity Act of 1990 or this part and satisfactory corrective action has not been taken, the FAA will issue an order that—

(i) Terminates eligibility for new airport grant agreements and discontinues payments of airport grant funds,

including payments of costs incurred prior to the notice; and

(ii) Terminates authority to impose or collect a passenger facility charge or, if the airport operator has not received approval to impose a passenger facility charge, advises the airport operator that future applications for such approval will be denied in accordance with §158.29(a)(1)(v) of this chapter.

(5) The FAA will publish notice of the order in the FEDERAL REGISTER and notify air carriers of the FAA's order and actions to be taken to terminate or modify collection of passenger facility charges in accordance with §158.85(f) of this chapter.

(c) The following procedures shall apply if an airport operator does not agree in writing, within 20 days of receipt of the FAA's notice of apparent violation under §161.503, to defer implementation or enforcement of its noise or access restriction until completion of the process under this subpart to determine compliance.

(1) The FAA will issue a notice of proposed termination to the airport operator and publish notice of the proposed action in the FEDERAL REGISTER. This notice will state the scope of the proposed termination, the basis for the proposed action, and the date for filing written comments or objections by all interested parties. This notice will also identify any corrective action the airport operator can take to avoid further proceedings. The due date for comments and corrective action by the airport operator shall be specified in the notice of proposed termination and shall not be less than 30 days after publication of the notice.

(2) The FAA will review the comments, statements, and data supplied by the airport operator, and any other available information, to determine if the airport operator has provided satisfactory evidence of compliance or has taken satisfactory corrective action. If the FAA finds satisfactory evidence of compliance, the FAA will notify the airport operator in writing and publish notice of compliance in the FEDERAL REGISTER.

(3) If the FAA determines that the airport operator has taken action to impose a noise or access restriction in violation of the Airport Noise and Capacity Act of 1990 or this part, the procedures in paragraphs (b)(3) through (b)(5) of this section will be followed.

# PART 169—EXPENDITURE OF FEDERAL FUNDS FOR NONMILITARY AIRPORTS OR AIR NAVIGATION FACILITIES THEREON

Sec.



AUTHORITY: 49 U.S.C. 106(g), 40101–40107, 40113–40114, 44501–44502, 46104, 47122, 47151–47153, 47302–47306.

## § 169.1 Applicability.

(a) This part prescribes the requirements for issuing a written recommendation and certification that a proposed project is reasonably necessary for use in air commerce or in the interests of national defense. The first two sentences of section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349(a)): (1) Require such a recommendation and certification where Federal funds are to be expended for nonmilitary purposes for airports or air navigation facilities thereon; and (2) provide that any interested person may apply to the Administrator, under regulations prescribed by him, for a recommendation and certification.

(b) This part does not apply to projects for the expenditure of Federal funds for military purposes or for airports, or air navigation facilities thereon, operated by the Federal Aviation Administration.

[Doc. No. 9256, 34 FR 5718, Mar. 27, 1969]

## § 169.3 Application for recommendation and certification.

(a) Any interested person may apply to the Administrator for a recommendation and certification with respect to a proposed project for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of an airport or an air navigation facility thereon by or in his interests, on which Federal funds are proposed to be expended for nonmilitary purposes. The application