

COMMENTS OF THE CITY OF BURBANK
ON THE FAR PART 161 APPLICATION
FOR A PROPOSED CURFEW – BOB HOPE AIRPORT

INTRODUCTION

The City of Burbank (“City”) is pleased to present these comments in strong support of the application (“Application”) submitted by the Burbank-Glendale-Pasadena Airport Authority (“Airport Authority”) requesting FAA approval of a mandatory curfew on all nighttime aircraft operations at the Bob Hope Airport (“Airport”). The Application represents the culmination of decades of work by the Airport Authority, the City, and the community, and more than amply demonstrates that the curfew satisfies the six conditions of approval specified in the Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47521 - 47533 (“ANCA”) and its implementing regulations, 14 C.F.R. Part 161 (“Part 161”). The City urges the FAA to approve the mandatory curfew and permit the Airport Authority to bring meaningful nighttime noise relief to the residents of Burbank and Los Angeles who live near the Airport.

In the almost 20 years since Congress enacted ANCA, no airport operator has submitted an application for a noise or access restriction on Stage 3 aircraft under ANCA and Part 161 that has been accepted as complete by the FAA. The Authority’s Application will be the first such application to be acted upon by the FAA and, consequently, will be the first opportunity for the FAA formally to apply the six statutory conditions for noise or access restrictions affecting Stage 3 aircraft.¹ It therefore is appropriate that that FAA has requested that comments “relate to the factors that Part 161 requires an airport sponsor to address.”² Careful consideration by the FAA

¹ See 49 U.S.C. § 47524(c)(2)(A) through (F).

² FAA, Notice of Proposed Airport Access Restriction and Opportunity for Public Comment, 74 Fed. Reg. 29,530 (June 22, 2009).

of *how* to apply those conditions, particularly in light of Congress's manifest intent in enacting ANCA, is essential to the appropriate implementation of the FAA's delegated responsibility.

The City has pursued and supported a mandatory curfew at the Airport for decades and has fully supported the Airport Authority's efforts to complete and submit the Application. While we understand that the City lacks the legal authority to unilaterally impose a mandatory curfew at the Airport, the City considers itself to be a partner in this effort. The Airport is located primarily within the City of Burbank; the vast majority of residents affected by Airport noise are Burbank residents; and three of the nine Airport Authority Commissioners are appointed by the City. The City trusts that the FAA will accord the requisite weight to these comments considering the City's role and responsibilities.

On June 13, 2008, the City submitted extensive comments on the Airport Authority's draft application. These comments are attached hereto and submitted for the FAA's consideration. The Airport Authority incorporated many of the City's comments in its final application, providing further support and justification for a mandatory curfew. For the reasons explained in the City's June 13, 2008 comments, we believe that there are numerous valid reasons, even beyond those articulated in the Application, why a mandatory curfew is appropriate and permissible. Because the City already has detailed its views on these issues, and in light of the FAA's direction in its solicitation of comments, the City focuses herein on the meaning, scope and application of the six statutory conditions.

The City respectfully requests that these comments, along with the City's June 13, 2008 comments submitted herewith, be included in the administrative record of this proceeding.

DETAILED COMMENTS OF THE CITY OF BURBANK

General Comments

In commenting on the Airport Authority's draft application, the FAA indicated that Congress intended ANCA to be applied to preclude restrictions such as the proposed mandatory curfew.³ The FAA comment is factually and legally inaccurate. In enacting ANCA, Congress recognized and anticipated that local conditions may warrant restrictions on Stage 3 aircraft at particular airports. Congress did *not* intend for the six conditions of approval to serve as an implicit bar to Stage 3 restrictions. Rather, Congress expressly required that proposals be evaluated using the traditional tests applied by the courts in the years prior to ANCA's adoption, which tests were relatively modest and were found to be satisfied by numerous reviewing courts in evaluating airport noise rules and access restrictions.

Each of these points is examined in detail in the specific comments below. In particular, the City exhaustively has reviewed the legislative history of ANCA and the proper meaning and application of the six statutory conditions. Considering that its decision on the Application will be the first such determination under ANCA, the City encourages the FAA to address these fundamental issues in its final order and, in particular, to identify the basis for its informal comment to the Airport Authority as to the FAA's understanding of Congress' direction in ANCA.

Taking into account Congress' general and specific intent in ANCA, several points become clear that should guide the FAA's evaluation of the Application. First and foremost, the

³ Letter from Kirk Shaffer, FAA Associate Administrator for Airports, to Part 161 Comment Docket 1 (June 12, 2008) ("A curfew at an airport, when there are other mitigation options available, is the type of access restriction Congress intended ANCA to address."); Comments of the Federal Aviation Administration on the Proposed Curfew at Bob Hope Airport, Burbank, CA at 1 (June 12, 2008) ("BUR's proposal is the type of restriction on the national air transportation system that Congress intended to remedy with the noise and access restriction requirements in the Airport Noise and Capacity Act of 1990.").

FAA's delegated responsibility is to interpret strictly and to apply precisely each test prescribed by Congress.

In particular, while the FAA has a low regard for the Airport Authority's description of a nighttime noise problem and would prefer that the Authority pursue sound insulation instead of a mandatory curfew, it would be inappropriate for the FAA to substitute its judgment for the airport proprietor's on these critical issues. Neither the plain language of ANCA nor its legislative history state or imply that Congress intended to confer such broad authority upon the FAA, and the long line of cases examining airport proprietary powers explicitly recognized the airport proprietor's responsibility for such matters.

In this regard, the FAA's declaration that the Application is complete provides a strong indication that the Application contains both the "essential information" and "substantial evidence"⁴ that the proposed mandatory restriction satisfies all six statutory conditions. Given this record, the only basis upon which the FAA might deny the Application would be by finding that the information supplied by the Airport Authority – particularly the evidence that the proposed mandatory curfew has a positive benefit-to-cost ratio – is insufficient, in light of the FAA's views as to the existence of a noise problem and the existence of less- and non-restrictive measures to address any problem. Such a result would permit the FAA to substitute its judgment for the airport proprietor's as to these core issues, regardless of the factual record, and thus would be inconsistent with FAA's administrative charge under ANCA.

Second and related, when viewed in the context of ANCA's plain language and legislative history, the only permissible finding is that the proposed mandatory curfew is

⁴ "Essential information" is the term used in 14 C.F.R. § 161.305(e)(2). "Substantial evidence" is the term used in 49 U.S.C. § 47524(c).

precisely the kind of restriction that Congress intended to *permit* under ANCA. Congress recognized and accepted that certain local conditions may justify local Stage 3 restrictions. The nighttime noise problem associated with this Airport is exactly the kind of unique local problem that Congress sought to accommodate in ANCA. The particular set of facts and circumstances in connection with this Airport is unlikely to be replicated at any other airport in the country.

The long and costly history of this community's unique struggle with nighttime noise is detailed in the Application and in the City's June 13, 2008 comments submitted herewith. The highlights of this long history include the following:

- The City of Burbank adopted a mandatory curfew at the Airport in 1970, leading to the seminal case of *Lockheed Air Terminal v. City of Burbank*, and, perhaps more importantly for present purposes, starting a forty year struggle with the problem of nighttime noise at the Airport.
- The community noise problem was the single most important factor in the creation of the Airport Authority and transfer of the Airport in 1977, which led directly to the incorporation of restrictions on Airport growth in the Authority's enabling legislation. The FAA explicitly recognized and ratified use restrictions and growth limitations at the Airport when it authorized and funded acquisition of the Airport from the private owner.
- The Airport has been considered a "noise problem" airport under California state law since it was transferred to public ownership, and has continued to operate only pursuant to a variance from the California Noise Standard since that time. The variance that the Airport Authority has obtained from the California Department of Transportation repeatedly has recognized the seriousness of the noise problem at this Airport and included conditions (within the limits of the law) demanding action by the Authority to address the problem. (The City encourages the FAA to investigate the history of litigation surrounding the variance program and the rigorous scrutiny that has been applied to the noise problem at this Airport and the Authority's efforts to address the problem.)
- The Airport Authority has developed numerous plans over the last several decades to expand and/or relocate the commercial passenger terminal but has not yet been able to implement any such plan, largely as a result of the Authority's inability to mitigate the nighttime noise problem that is attributable to the Airport and would be exacerbated by increased airport capacity.
- The community repeatedly has expressed a concern with nighttime noise, reflected not only in complaints to the City and Airport Authority but also in an attempt to change local law to essentially require the Authority to restrict nighttime aircraft operations.

- The Airport Authority initiated the Part 161 Study in 1999 and has reaffirmed over the last ten years its intent to pursue a mandatory curfew.
- The noise problems at this Airport have led to repeated and extremely costly litigation – perhaps more than any other airport in the nation. Without exception, the dozens of lawsuits have concerned local efforts to address the adverse noise and other impacts of the Airport on the local community.

Any perceived negative effects of the proposed mandatory curfew are quite modest, particularly when viewed relative to this longstanding noise problem. While the City is not insensitive to the costs and burden that would be imposed on certain aircraft operators if the Authority implements a mandatory curfew, the Application confirms that the costs of the restriction would be outweighed by the benefits. Moreover, based on the City’s own examination of the Application, the City considers the benefits to be understated and the costs to be overstated, meaning that the restriction would be far more cost-effective than disclosed in the Application.

For these reasons, as more fully explained below, the proposed mandatory curfew fully satisfies the six statutory conditions of approval and should be approved.

Comment 1. **In Enacting ANCA, Congress Recognized That Local Conditions May Warrant a Restriction on Stage 3 Aircraft.**

Beginning with the U.S. Supreme Court’s decision in *City of Burbank v. Lockheed Air Terminal*⁵ and continuing to recent cases, courts consistently have recognized the power of airport proprietors to adopt noise rules. Reviewing courts have recognized that such restrictions are subject to a number of constraints, including the Supremacy, Commerce, Due Process and Equal Protection Clauses of the U.S. Constitution and the Grant Assurances under the Airport

⁵ *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

and Airway Improvement Act of 1982 and predecessor grant funding statutes.⁶ While the record of decisions is mixed, courts have upheld several restrictions, including mandatory curfews, upon application of these tests and standards.⁷

Upon its passage in 1990, ANCA changed preexisting law in three principal ways. First, it provided for a nationwide phase-out of Stage 2 aircraft weighing more than 75,000 pounds,⁸ which were considered the loudest aircraft in common use and the source of a significant noise problem affecting communities throughout the country. Second, ANCA provided that airport proprietors could adopt noise or access restrictions on Stage 2 aircraft weighing 75,000 pounds and less, by providing notice to affected parties and completing a particular type of study.⁹ The statute does not require FAA approval for such restrictions. Third, airport proprietors could adopt noise or access restrictions affecting Stage 3 aircraft with the prior approval of the FAA, based on a specified study and consideration of six specific conditions of approval, or upon consent of aircraft operators.¹⁰ Taken as a whole, ANCA represented a balanced legislative approach to aircraft noise by forcing a costly transition from the noisiest aircraft and providing a uniform, national administrative process for the review, approval and adoption of local noise or access restrictions on Stage 3 aircraft.

It has been observed that ANCA was adopted somewhat hastily in the 101st Congress as part of the Omnibus Budget Reconciliation Act of 1990.¹¹ Because of the manner in which the

⁶ For a detailed description of these legal standards, *see* Detailed Comments of the City of Burbank Regarding the Draft Part 161 Application for a Proposed Curfew at Bob Hope Airport at 27 – 34.

⁷ *See* note 43 *infra* and accompanying text.

⁸ 49 U.S.C. § 47528.

⁹ 49 U.S.C. § 47524(b).

¹⁰ 49 U.S.C. § 47524(c).

¹¹ Airport Noise and Capacity Act of 1990, Pub. L. No. 101-508 Subtitle D, 104 stat. 1388-378, 378-385 (1990).

bill was presented in the Senate¹² and negotiated in the Committee of Conference,¹³ the specific text of the legislation was not debated publicly in House or Senate hearings or similar public forums.¹⁴ Nevertheless, the subject of aviation noise had been debated publicly for some time prior to ANCA's adoption and, in particular, had been the subject of several contemporaneous studies conducted by the U.S. General Accounting Office,¹⁵ a series of hearings, in September and October 1990, before the House Aviation Subcommittee,¹⁶ and a hearing in September 1990 before the House Subcommittee on Transportation, Aviation and Materials.¹⁷ Coupled with statements from key legislators who crafted and negotiated the text of the legislation, the information from these studies and hearings provides useful insight into the specific problem that Congress sought to address and the manner in which the identified problem was to be solved.

It is important to recognize that the pressing issue before Congress at the time was the expected proliferation of local restrictions on *Stage 2* aircraft.¹⁸ Considering the extensive

¹² S.3209, 101st Cong. (1990).

¹³ H.R. REP. NO. 101-964 (1990) (Conf. Rep.).

¹⁴ See Letter from Rep. James Oberstar to Richard Leone, Port Authority of New York and New Jersey 1 (Nov. 28, 1990) (“Unfortunately, the Senate, after no hearings and minimal debate, passed legislation linking a noise policy to other very much needed aviation legislation. This tactic forced the House of Representatives to confront noise issues in the final ten days of the Congress and to make quick decisions on legislation that will have an impact for years to come.”).

¹⁵ See *Federal Aviation Noise Policy: Hearing Before the H. Subcomm. on Aviation of the Comm on Public Works and Transportation*, 101st Cong. 1 (1990) (statement of Kenneth Mead, U.S. Gen. Accounting Office of the United States).

¹⁶ *Federal Aviation Noise Policy: Hearing Before the H. Subcomm. on Aviation of the Comm. on Public Works and Transportation*, 101st Cong. 1 (1990).

¹⁷ *Hearing Before the H. Subcomm. on Transportation, Aviation and Materials of the Comm. on Science, Space and Technology*, 101st Cong. (1990).

¹⁸ See e.g., *Federal Aviation Noise Policy: Hearing Before the H. Subcomm. on Aviation of the Comm on Public Works and Transportation*, 101st Cong. 1 (1990) (statement of Rep. Oberstar, Chairman of H. Subcomm. on Aviation (“In the absence of any federal restrictions on stage 2 aircraft, airport proprietors are stepping into the breach and they are setting limits and posing restraints on operations of stage 2 aircraft. Those limits that add up to a patchwork quilt of regulatory actions do not add up to a national policy.”); Aviation Subcommittee Hearings, *Summary of Subject Matter, Federal Aviation Noise Policy* at 8 (“There is a widespread belief that local restrictions will increase substantially in the next few years. As more airports limit Stage 2 operations, there will be greater pressure on other airports to follow suit, to prevent their airport being subject to increased noise from the shift of

discussion of this issue – particularly during four days of hearings before the House Aviation Subcommittee, during which representatives from virtually every interest group connected to the issue of aircraft noise testified – it is fair to conclude that Congress’ finding in ANCA as to the risk presented by “uncoordinated and inconsistent restrictions on aviation”¹⁹ principally concerned restrictions on Stage 2 aircraft.

Congress addressed this concern by requiring the phase out, by December 31, 1999, of all Stage 2 aircraft weighing more than 75,000 pounds.²⁰ Although the text as initially introduced in the Senate would have conferred expansive powers upon the FAA to determine when Stage 2 aircraft could be phased out as part of a broader “national aviation noise policy,”²¹ the final text was far more definitive and limited the FAA’s role to prescribing by regulation a schedule for the orderly phase out of Stage 2 aircraft by December 31, 1999.²²

Local restrictions on Stage 3 aircraft were viewed and addressed very differently. The pressing issue with respect to Stage 3 aircraft was *not* the number of restrictions in effect at the time or an anticipated proliferation of such restrictions in the future, but rather the need to provide some assurance to the airline and cargo industries that their investment in Stage 3

Stage 2 aircraft banned at other airports.”); Mead statement *Supra* note 15 at 2 (“Based on our survey, the number of airports requiring the use of the quieter stage 3 aircraft will grow slowly until 1995, but will increase rapidly between 1995 and 2000. Our survey shows that, by the year 2000, 41 percent of the nation’s 29 largest airports plan to have banned stage 2 aircraft.”).

¹⁹ 49 U.S.C. § 47521(2) (“community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system.”).

²⁰ 49 U.S.C. § 47528(a).

²¹ S. 3209 § 3201(b) (“The National Aviation Noise Policy shall include the establishment of a date or dates for the phasing out of stage 2 technology aircraft as part of a comprehensive national noise management scheme.”).

²² 49 U.S.C. § 47523.

technology would not be undermined.²³ In its final form, ANCA provided this protection by altering the process for adopting Stage 3 restrictions from one in which airport proprietors could adopt and implement a restriction but face after-the-fact enforcement action by the FAA or challenge by regulated parties, to one in which restrictions could be adopted only upon approval by the FAA or the advance consent of affected parties.²⁴ But, it is critical to understand that Congress neither barred Stage 3 restrictions outright nor gave any indication that it intended that the FAA use its approval process as a procedural mechanism to bar such restrictions indirectly.

The fact that Congress understood the meaning and implications of its approach to Stage 3 restrictions is evidenced in large part by the evolution of the legislation from the initial proposal in the Senate to the language ultimately adopted by both chambers. The bill as initially proposed would have been far more onerous and would have, for example, subjected *preexisting* restrictions to FAA review,²⁵ prohibited the adoption of any new restriction on Stage 3 aircraft,²⁶ and conferred a private right of action upon airport operators to enforce the requirements of the

²³ *Supra* note 18 at 88 (statement of Rep. Oberstar) (“If the Federal Government requires a phase-out of stage 2 aircraft, then in exchange, should there be any limitations on the authority of airports to affect stage 3 aircraft? The question the carriers will ask is, where do the costs end? If we make this investment, if we re-engine an aircraft at the cost of \$3.5 to \$4 million and achieve stage 3, are we then going to be subject to further regulatory action that will cost additional money?”); *Supra* note 18 at 380 (statement of Rep. Clinger) (“If we’re going to mandate that the airlines all must be converted to stage 3 aircraft by a time certain, that’s going to be a rather large investment they’ll have to make. Shouldn’t we perhaps have some sort of a carrot there that says, okay, if you convert and we have all stage 3 aircraft, which, you know, establish a certain noise level, shouldn’t they at least be able to be free from local inconsistent ordinances, requirements, and restrictions and so forth that are going to further impede their ability to really operate their fleet in the most cost effective way?”).

²⁴ 49 U.S.C. § 47524(c)(2); *See* 136 CONG. REC. S17543 (Oct. 27, 1990)(statement of Sen. Ford) (“This measure will give the air carriers the assurance they need to go forward with the modernization of their fleets, to borrow money to buy the stage 3 aircraft, which, ultimately, will improve the quality of life for those citizens living near airports.”).

²⁵ S.3209 § 3202(a) (“The National Aviation Noise Policy shall required the establishment of a program for the mandatory review and approval of all existing or proposed local airport noise or access restrictions by the Federal Aviation Administration, except for restrictions which have been approved by the Federal Aviation Administration by regulation prior to enactment of this Act.”).

²⁶ S. 3209 § 3202(b) (“No airport noise or access restriction could be submitted for approval or approved in accordance with the program if it contains any restriction on the operation of a stage 3, quite technology aircraft . . .”).

law.²⁷ The bill's sponsor, Senator Wendell Ford, spoke in absolute terms when he characterized his proposals as follows: "Under the provisions of this legislation Stage 3 will be the nationally acceptable noise standard. . . . Stage 3 must not be restricted even if technological improvements are developed by aircraft manufacturers."²⁸

Senator Ford's proposals faced immediate opposition and were rejected as the bill moved through the Senate and the Committee of Conference. The final legislation instead permits preexisting noise or access restrictions to remain in effect without FAA review or approval, prescribes a precise process by which airport proprietors can restrict Stage 3 aircraft upon FAA approval or agreement of all affected aircraft operators, and does not confer a private right of action.²⁹

The public record contains some evidence of the staunch opposition by certain Members of Congress to Senator Ford's proposal.³⁰ While the discussion leading to changes in the legislation was hasty and mostly unrecorded, the opposition to Senator Ford's proposal almost certainly was influenced by the recognition – expressed repeatedly during the contemporaneous hearings before the House Aviation Subcommittee – that local conditions may warrant local restrictions on Stage 3 aircraft. While it is unsurprising that noise control activists expressed this view, it is particularly significant that members of the airport, cargo and airline industries had

²⁷ S. 3209 § 3204 ("An aircraft operator may commence a civil action against an airport proprietor for the purpose of protecting its rights under this part, in any United States District Court without regard to citizenship or amount in controversy.").

²⁸ CONG. REC. S13619 (Sept. 24, 1990) (statement of Sen. Ford) (introducing S.3094).

²⁹ See 49 U.S.C. § 47524.

³⁰ 136 CONG. REC. H13065-66 (Oct. 26, 1990)(statement of rep. Hyde) ("The noise preemption aspects of the bill are a blatant attempt by the airline industry to destroy the longstanding structure of Federal, State, and local power to address aircraft noise that has been established by the courts, the Congress, and the executive branch for the last 30 years. . . . The bill attempts to destroy significant longstanding local powers to control noise – leaving important decisions as to how much noise an airport community may desire and tolerate to the whim of a Federal bureaucrat hundreds, if not thousands, of miles away in Washington.").

reached a consensus position that local restrictions on Stage 3 aircraft may be appropriate in certain circumstances and that subjecting such restrictions to FAA review and approval was an appropriate means to balance local and national interests.³¹ In the end, Congress recognized that there was no compelling need to prohibit Stage 3 restrictions outright or to impose the other draconian limits on airport proprietors that Senator Ford had proposed.

The legislative history also sheds light on the six conditions to be applied by the FAA in reviewing an application to impose a noise or access restriction on Stage 3 aircraft. The initial bill proposed in the Senate contained essentially the same criteria, although such criteria would have applied only to requests to restrict Stage 2 aircraft, since Stage 3 restrictions were to be prohibited, as described above.³²

³¹ *Supra* note 18 at 359 (statement of Stephen Alterman, Executive Director and General Counsel, Air Freight Association) (“[O]ne of the proposals in the Air Freight Association proposal for a Federal policy is a proposal that local airports with unique problems should be permitted to come and request permission from the Federal Government to impose restrictions not otherwise authorized because of their unique problems.”); *Supra* note 18 at 373 (statement of Donald Reilly, Aviation System Capacity Task Force) (describing the Task Force recommendations: “[L]ocal airports would retain the right to establish local noise restrictions on all aircraft but with a Federal review approval process of restrictions applying to stage 3 aircraft.”); *Supra* note 18 at 584 (Statement of Robert Aaronson, Air Transport Association (“[H]aving this national standard, which the Air Transport Association advocates . . . doesn’t preclude local restrictions of some types that are deemed appropriate within the frame work of that national policy. So there may be room for both levels of government to function as long as we maintain that essential national perspective which we are rapidly losing . . .”); *Supra* note 18 at 595-96 (statement of George Howard, Airport Operators Council International (“AOCI has agreed to the concept of a federal review and approval of all new local restrictions on Stage 3 aircraft, as long as the Federal Government assumes liability for damages resulting from an airport’s inability to impose a specific restriction disapproved by DOT.”); *Supra* note 18 at 605 (statement of Charles Barclay, American Association of Airport Executives) “[O]ur argument would be there are still local actions to take that won’t impact dramatically the national system but will help a locality fine tune and adjust to its problems that are different from another community’s problems.”).

³² S.3209 § 3202(e) (“The Administrator shall not approve a noise or access regulation unless the Administrator finds the following conditions to be supported by substantial evidence – (1) the regulation is reasonable, nonarbitrary and nondiscriminatory; (2) the regulation does not create an undue burden on interstate or foreign commerce; (3) the regulation is not inconsistent with maintaining the safe and efficient utilization of the navigable airspace; (4) the regulation does not conflict with any existing Federal statute or regulation; (5) the airport operator provided an adequate opportunity for public comment with respect to the regulation; (6) the airport operator’s rejection of alternative means of minimizing or otherwise managing noise was reasonable; and (7) the benefits accruing from the regulation outweigh the associated costs, including all costs attributable to the impact or potential impact of the regulation on the national air transportation system.”).

Several of the final criteria plainly reflect Congress' interest – also evidenced throughout the Congressional debate – in ensuring that the broader consequences of a restriction, if any, are considered prior to adoption. This is entirely in keeping with Congress' decision to confer power upon the FAA to review and approve Stage 3 restrictions, since the FAA maintains delegated responsibility for many aspects of aviation safety and oversight of the national air transportation system.³³

The legislative history also reinforces Congress' interest in applying the same criteria that had been applied for many years in administrative and judicial proceedings concerning local restrictions. In particular, Congress considered whether the federal government should assume liability for the impacts of aircraft noise if it changed the law to preempt, in part or in whole, an airport proprietor's authority to adopt local noise rules. As part of the broad balancing of interests, the final legislation provides that the federal government may be liable for noise damages upon disapproving a Stage 3 restriction.³⁴ The FAA observed at the time that continuing to apply the existing criteria would be a means for the federal government to reduce or eliminate this liability exposure.³⁵ The final legislation further captures this point by providing expressly that the statute “does not affect (1) law in effect on November 5, 1990, on airport noise or access restrictions by local authorities.”³⁶

³³ See 49 U.S.C. § 40103(b).

³⁴ 49 U.S.C. § 45727 (“When a proposed airport noise or access restriction is disapproved under this subchapter, the United States Government shall assume liability for noise damages only to the extent that a taking has occurred as a direct result of the disapproval.”).

³⁵ *Supra* note 18 at 568 (statement of Dale McDaniel, Deputy Assistant Administrator for Policy, Planning and International Aviation, FAA) (“[I]f the federal government moves to restrict an airport's ability to impose limits apart from the existing legal tests – and those aren't FAA tests, those are the court legal tests of what an airport can or cannot do – if the Federal Government moves beyond that, there are implications with regard to liability, and that is a serious question for the Administration. There's no doubt about it.”).

³⁶ 49 U.S.C. § 47533. The statute also required the FAA to provide certain recommendations to Congress within a prescribed period, including a recommendation on “the need for changes in the standards and procedures

In sum, Congress clearly understood that ANCA would *allow* airport proprietors to restrict access by Stage 3 aircraft. The statute provides two paths: approval by FAA or advance consent of aircraft operators. Congress specifically *rejected* early versions of the legislation that would have banned restrictions on Stage 3 aircraft. Concerned with potential liability exposure in the event that the FAA disapproved such a restriction, Congress was careful to draft the conditions of approval in a manner that essentially ratified the preexisting substantive standards for adopting local restrictions.

The primary effect of ANCA was to require prior approval by the FAA, rather than rely on post-hoc litigation, and to codify the appropriate standards, rather than rely on the inherent uncertainty of litigation in multiple forums. Under this approach, Congress, the FAA and the aviation industry were satisfied that ANCA would protect industry's investment in Stage 3 aircraft while still allowing local communities to adopt access restrictions to address local noise problems.

In approaching the Airport Authority's Application, and in applying ANCA's conditions of approval, it is critical that the FAA remain faithful to this legislative history. Contrary to policy statements by a former FAA official, Congress did not intend ANCA to set a "high bar"³⁷ or otherwise to impose any extraordinary burden of proof or obstacle to the adoption of Stage 3 restrictions. Instead, the FAA must apply the six statutory conditions with the understanding that Congress expressly recognized that local conditions may warrant Stage 3 restrictions.

which govern the rights of State and local governments (including airport authorities) to restrict aircraft operations for the purpose of limiting aircraft noise." Pub. L. 101-508 § 9303. It does not appear that the FAA provided any such recommendations to Congress.

³⁷ Shaffer letter *supra* note 3 at 1.

Comment 2. **Condition 1 and Condition 2 Should be Applied in the Same Manner as Reviewing Courts Evaluated Local Noise Rules Prior to ANCA’s Passage.**

Condition 1 (“the restriction is reasonable, nonarbitrary and nondiscriminatory”) and Condition 2 (“the restriction does not create an unreasonable burden on interstate or foreign commerce”) reflect the continuation of existing Constitutional standards applied by reviewing courts in the years before and after ANCA. Condition 1 uses the precise language applied by reviewing courts when evaluating noise rules under the Supremacy Clause,³⁸ and Condition 2 uses substantially the same language used in analyzing noise rules under the Commerce Clause.³⁹

As examined above, Congress intentionally used these preexisting standards to limit the federal government’s liability exposure and provided explicitly that the statute would not affect preexisting law. Moreover, as a general rule of statutory construction, when Congress incorporates into a statute words that have a particular meaning in then-existing caselaw, Congress is presumed to have intended to codify that caselaw as it was then understood. As the U.S. Supreme Court has explained:

³⁸ See *British Airways Bd. v. Port Auth. of New York and New Jersey*, 558 F.2d 75, 84 (2d. Cir. 1977) (“It is clear to us that the Port Authority is vested only with the power to promulgate *reasonable, nonarbitrary and nondiscriminatory* regulations that establish acceptable noise levels for the airport and its immediate environs.”) (emphasis added); *Am. Airlines v. U.S. Dep’t. of Transp.*, 202 F.3d 788, 806 (5th Cir. 2000) (“In defining the permissible scope of a proprietor’s power to regulate under § 41713(b)(3), federal courts have repeatedly held that an airport proprietor can issue only ‘reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest.’”) (citations omitted); *Santa Monica Airport Ass’n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) (“The legislative history shows that Congress intended that municipal proprietors enact *reasonable* regulations to establish acceptable noise levels for airfields and their environs.”) (emphasis added) (citations omitted). See generally *Nat’l Bus. Aviation Ass’n v. City of Naples Airport Auth.*, 162 F.Supp.2d 1343, 1351 - 1353 (M.D. Fla. 2001) (examining the origin of this standard); J. Cross, *Airport Perimeter Rules: An Exception to Federal Preemption*, 17 TRANSP. L. J. 101, 108 (1988) (“Other courts as well have acknowledged that airport proprietors may enact reasonable noise control regulations.”) (citations omitted).

³⁹ See *Nat’l Bus. Aviation Ass’n.*, 162 F.Supp.2d at 1348 (“The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce.”) (citations omitted). See e.g., *Alaska Airlines v. City of Long Beach*, 951 F.2d 977, 983-985 (9th Cir. 1992); *Santa Monica Airport Ass’n v. City of Santa Monica*, 481 F.Supp. 927, 943 - 45 (C.D. Cal. 1979) *aff’d* 659 F.2d 100 (9th Cir. 1981); *Nat’l Aviation v. City of Hayward*, 418 F.Supp. 417, 425-429 (N.D. Cal. 1976). *But see Nat’l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 92 (2d Cir. 1998) (“any action the City properly conducted pursuant to its powers as a proprietor cannot violate the Commerce Clause.”).

[W]hen Congress uses language with a settled meaning at common law, Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.”⁴⁰

Conversely, if Congress intends to *change* the settled meaning of words used in then-existing law, it must do so in clear, specific terms. According to the U.S. Supreme Court, “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”⁴¹

Because Congress used the precise language developed by reviewing courts and did not indicate that it intended to change the meaning of the words, the FAA must apply these conditions in the same manner as the courts applied them in 1990. While the following comments address several specific consequences of using the tests developed and applied by the courts, it is important to recognize that, in general, courts did *not* consider these standards to be particularly onerous to satisfy, and instead designed the standards to prevent the adoption of only the most extreme and harmful restrictions.⁴² Indeed, the majority of courts to consider local access restrictions before and after 1990 have *upheld* such restrictions as not preempted and as otherwise constitutional.⁴³ In several such cases, courts explicitly rejected the notion that the

⁴⁰ *Beck v. Prupis*, 529 U.S. 494, 500-501 (2000) (internal quotation marks and citations omitted); *See also Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)) (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”) (internal quotation marks omitted).

⁴¹ *Midlantic Nat. Bank v. New Jersey Dep’t. of Environmental Protection*, 474 U.S. 494, 501 (1986).

⁴² *See British Airways Bd. v. Port Auth. of New York and New Jersey*, 564 F.2d 1002, 1011 (2d. Cir. 1977) (review under this standard intended to ensure that “parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.”).

⁴³ *See e.g. City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431 (D.C. Cir. 2005) (vacating FAA decision finding that restriction on Stage 2 aircraft was unreasonable); *Nat’l Bus. Aviation Ass’n.*, 162 F.Supp.2d 1343 (affirming same restriction against Constitutional challenge); *National Helicopter Corp. of Am.*, 137 F.3d 81 (upholding curfew and other restrictions); *Alaska Airlines.*, 951 at 982 (affirming multiple restrictions);

potential proliferation of such restrictions at other airports (the so-called “domino effect”) is an appropriate consideration.⁴⁴ Conversely, courts have declared restrictions to be unreasonable only because of some specific technical problem with the restriction or the evidence supporting the restriction.⁴⁵

Comment 3. **The FAA Cannot Permissibly Second-Guess the Airport Authority’s Identification of a Nighttime Noise Problem.**

In commenting on the Airport Authority’s draft application, the FAA stated that it did not consider nighttime noise in the neighborhoods surrounding the Airport to be a legitimate noise problem.⁴⁶ The City believes that the Application contains substantial evidence of a past, present and prospective future nighttime noise problem, and, more fundamentally, the City contends that the FAA’s policy-based views on the nature and extent of the noise problem in the neighborhoods around the Airport are legally immaterial.

Western Airlines, Inc. v. Port Authority of New York and New Jersey, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff’d*, 817 F.2d 222 (2d. Cir. 1987), *cert. denied*, 108 S.Ct. 1467 (1988) (affirming a 1,500 mile perimeter rule for LaGuardia Airport); *Global Int’l Airways Corp. v. Port Auth. of New York and New Jersey*, 727 F.2d 246 (2d. Cir. 1984) (upholding restriction on cumulative noise levels of air carriers); *Santa Monica Airport Ass’n.*, 659 F.2d 100 (upholding curfew and other restrictions); *British Airways Bd.*, 558 F.2d 75 (affirming imposition of temporary ban on certain aircraft due to the “inherently local aspects” of the flights); *British Airways Bd.*, 564 F.2d 1002 (rejecting preemption challenge to ban on specific aircraft); *Nat’l.*, 418 F. Supp. at 422 (affirming curfew); *Air Transport Ass’n. v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975) (upholding State of California’s regulation of cumulative noise levels). *See generally Am. Airlines*, 202 F.2d at 806 (“Courts applying this [preemption] standard have upheld route restrictions as within proprietary powers when they are targeted at advancing a specific local interest.”) (citations omitted).

⁴⁴ *See e.g., Santa Monica Airport Ass’n v. City of Santa Monica*, 481 F.Supp. 927, 938 (C.D. Cal. 1979) (“To take the domino approach would make every airport operator the prisoner of every other airport operator, even if he is the first to initiate a given type of regulation.”) *aff’d* 659 F.2d 100 (9th Cir. 1981).

⁴⁵ *Am. Airlines.*, 202 F.3d 788 (affirming FAA’s rejection of local restriction on aircraft operations based on absence of justification for restriction); *City and County of San Francisco v. Fed. Aviation Admin.*, 942 F.2d 1391 (9th Cir. 1991) (exclusion of Q707 jets was impermissible because louder jets were permitted to operate); *United States v. County of Westchester*, 571 F. Supp. 786, 794 (S.D.N.Y. 1983) (no noise data to support a curfew); *Santa Monica Airport*, 659 F.2d 100 (ban on all jets struck down because equally loud or louder non-jet aircraft were not banned); *British Airways Bd.*, 558 F.2d 75 (temporary ban on Concorde struck down because Port Authority had refused to issue final rule and Concorde met existing noise thresholds).

⁴⁶ Comments of the Federal Aviation Administration *supra* note 3 at 1 (“BUR, without sufficient rationale, has arbitrarily established a goal to eliminate nighttime aircraft noise.”).

In its comments on the Authority's draft application, the City presented a detailed history of the nearly 40-year quest to implement a mandatory curfew at the Bob Hope Airport, as summarized above.⁴⁷ The Airport Authority agreed with much of the City's characterization of this history and added a description of this history in the Application.⁴⁸ In summary, this community has worked diligently to mitigate and abate the impact of Airport noise on the homes, parks and public spaces in close proximity to the Airport. Concern over airport noise impeded efforts to transfer the Airport from private to public ownership in 1977; has led to multiple rounds of litigation and disputes regarding almost every aspect of Airport operations and development; continues to impede the Authority's ability to achieve compliance with the California Noise Standard; and essentially has kept the Authority from further developing the Airport to address changing design standards and planning goals.

While aircraft noise is a common concern in many communities, we are not aware of any other community in which the particular problem of nighttime noise has been so contentious for such a long period of time. In short, the nighttime noise problem has defined this Airport and this community for several decades.

More fundamentally, it would be inappropriate for FAA officials and staff in Washington D.C. to substitute their judgment for the indisputable historical record assembled by the Airport Authority as to the existence of a local noise problem. For the reasons described in Comment #2 above, the FAA should apply the same deferential standard as the courts in considering whether the Airport Authority has propounded sufficient evidence that a noise problem exists in connection with this Airport.

⁴⁷ See Comments of the Federal Aviation Administration *supra* note 3 at 1 - 6.

⁴⁸ Application at 2-1 – 2-4.

Courts consistently have rejected claims that a local restriction is unreasonable because of how local officials have defined their particular noise problem. For example, the U.S. Court of Appeals for the Second Circuit explicitly upheld the Port Authority of New York and New Jersey's power to address the problem presented by the cumulative noise of each air carrier's fleet, concluding as follows:

We do not agree with the underlying assumption of plaintiff's argument that a regulation of the permissible level of noise is limited to controlling the decibel level of individual takeoffs and landings and may not seek to limit cumulative noise exposure. The FAA itself has stated that in localities in which noise events are relatively constant, as is the case with the three airports here, cumulative noise exposure is a more serious irritant than the peak noise level of an individual noise event. When Congress affirmed the power of local proprietors to regulate the level of noise in the Noise Abatement Act of 1968, it drew no distinction between regulations aimed at single-event noise levels and ones aimed at cumulative levels. Absent such an expression of Congressional intent, we will not create such a distinction.⁴⁹

The U.S. Court of Appeals for the Ninth Circuit, in recognizing that liability exposure serves as a partial basis for the so-called "proprietor's exception," advised that the airport proprietor concomitantly must be able to gauge its risk tolerance. "The City of Santa Monica should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment."⁵⁰

With respect to nighttime noise in particular, federal courts consistently have deferred to the airport proprietor's identification of a nighttime noise problem. According to the U.S. Court of Appeals for the Second Circuit, "The protection of the local residential community from undesirable heliport noise during sleeping hours is primarily a matter of local concern and for

⁴⁹ *Global Int'l Airways Corp.*, 727 F.2d at 250-51.

⁵⁰ *Santa Monica Airport Ass'n.*, 659 F.2d at 104 n.5.

that reason falls within the proprietor's exception."⁵¹ The U.S. Court of Appeals for the Ninth Circuit employed substantially similar reasoning in upholding a mandatory curfew.⁵² The Second Circuit further found that prior decisions within the circuit rejecting curfews as not targeted at a legitimate noise problem were overturned by the court in *Global International Airways Corporation*, based on the language quoted above.

Finally, the U.S. Court of Appeals for the District of Columbia Circuit expressly rejected the FAA's determination that a local community had not properly defined its noise problem based on the local threshold of significant noise impacts and based on the quiet character of the community.⁵³ A federal district court previously upheld the same restriction, relying in part on the FAA's own regulations, which recognize that local governments exclusively are responsible for establishing standards for the compatibility of particular land uses with airport and aircraft operations.⁵⁴ The district court further upheld the airport proprietor's reliance on complaint data as one indicator of a noise problem.⁵⁵

These cases plainly establish that the responsibility for determining the existence of a local noise problem rests squarely with the airport proprietor. While airport proprietors cannot impose a noise or access restriction without any factual support or without articulating a

⁵¹ *National Helicopter Corp. of Am.*, 137 F.3d at 89 (citations omitted).

⁵² *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927, 938 – 939 (C.D. Cal. 1979) (“I also find that the interest being protected, protecting the sleep of the surrounding residential community from the noise of aircraft operations at night, is a matter of peculiar local concern.”) *aff'd* 659 F.2d 100 (9th Cir. 1981).

⁵³ *City of Naples Airport Auth.*, 409 F.3d at 435-36.

⁵⁴ *Nat. Bus. Aviation Ass'n.*, 162 F. Supp. 2d at 1351 (“If Congress or the FAA had intended to preclude local authorities from considering noise levels below 65 dB DNL in making an access restriction decision, either could easily have done so. They did not.”). *See also* 14 C.F.R. Part 150, App. A, Table 1 (“The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities.”).

⁵⁵ *Nat. Bus. Aviation Ass'n.*, 162 F. Supp. 2d at 1353 (“However ‘unscientific’ the NBAA might consider such complaints, there is nothing in the record that suggests they are an inappropriate consideration for an entity that is charged with assessing and addressing the noise problem at the particular airport.”) (citations omitted).

particular problem,⁵⁶ ANCA and Part 161 prescribe a detailed process for ensuring that the nature and extent of a noise problem is fully examined and documented prior to adoption and implementation of a restriction.

The Airport Authority plainly has substantiated the existence of a noise problem in the Application. Having done so, the FAA cannot substitute its judgment for the Authority's as to whether the information disclosed reflects a legitimate noise problem.

Comment 4. **The FAA Cannot Use the Existence of Less-Restrictive and Non-Restrictive Alternatives as a Basis to Reject the Application.**

The FAA stated in its comments on the Authority's draft application that it believes that the Authority gave inadequate consideration of less-restrictive and non-restrictive measures.⁵⁷ The Authority addressed the FAA's general and specific concerns and expanded its examination of alternatives to the mandatory curfew in the Application.⁵⁸

More fundamentally, neither ANCA nor Part 161 state or imply that the existence of less- and non-restrictive alternatives renders a Stage 3 restriction impermissible. ANCA does not explicitly require the consideration of alternatives. Here again, the legislative history is instructive, since the legislation as initially proposed would have required, with respect to Stage 2 restrictions, both consideration of alternatives⁵⁹ and the explicit finding that the airport

⁵⁶ See e.g., *County of Westchester*, 571 F.Supp. at 794 (airport proprietor did not conduct any study prior to adoption of curfew, and studies conducted after implementation of curfew did not support it) *overruled in part as stated in Nat'l Helicopter Corp. of Am.*, 137 F.3d 81; *Am. Airlines*, 202 F.3d 788 (airport proprietor had not articulated specific local problem or concern).

⁵⁷ See Comments of the Federal Aviation Administration *supra* note 3 at 1 ("BUR has not made a convincing argument of unacceptable growth of a nighttime noise problem that cannot and should not be cost-effectively managed with a continuation of existing measures.").

⁵⁸ See Application at 5-19 – 5-28.

⁵⁹ S.3209, § 3202(c) ("No airport noise or access restriction could include a restriction on other than stage 3 aircraft, unless the airport operator submitting the existing or proposed noise or access regulation to the Administrator for review and approval in accordance with this Act has submitted concurrently - . . . (2) a detailed description of alternative regulations; (3) a detailed description of the alternative measures considered not involving

operator's rejection of alternatives was reasonable.⁶⁰ Not only did Congress fundamentally reshape the legislation to impose procedural requirements and substantive standards on Stage 3 restrictions, rather than banning all such restrictions outright, but Congress rejected the supremacy of less- and non-restrictive alternatives over mandatory noise rules when it abandoned these proposed conditions. This is entirely in keeping with Congress' recognition that local conditions may justify Stage 3 restrictions.

A different approach – like the conditions proposed by Senator Ford and explicitly rejected – would have created an indirect bar to all restrictions for the simple reason that less- and non-restrictive measures always are available. In particular, as noted by the FAA in its comments on the draft application, sound insulation is a recognized means to render dwellings compatible with aircraft noise.⁶¹ Theoretically at least, an airport proprietor could respond to any noise problem, or increase in noise exposure, simply by purchasing property exposed to the highest noise levels and insulating dwellings inside the DNL/CNEL 65 dB contour. That approach may be the FAA's current policy preference, but that policy preference has no role in the agency's evaluation of an application under ANCA and Part 161. Congress did not require the exhaustion of all less- and non-restrictive measures as a precondition to seeking or obtaining FAA approval of a Stage 3 restriction, and Congress deliberately drafted ANCA to *omit* any such requirement.

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 regulation.”).

⁶⁰ S.3209, § 3202(e) (“The Administrator shall not approve a noise or access regulation unless the Administrator finds the following conditions to be supported by substantial evidence - . . . (6) the airport operator's rejection of alternative means of minimizing or otherwise managing noise was reasonable . . .”).

⁶¹ See Comments of the Federal Aviation Administration *supra* note 3 at 1 (“[C]ontinuation of the sound attenuation program would eliminate incompatible dwellings by 2015.”).

Further, the case law cited and quoted above makes clear that each proposed restriction is to be evaluated on its own terms to consider whether the restriction is an appropriate way to address the defined noise problem at the particular airport. In none of the cases did the court consider the existence of alternatives as decisive, or even particularly influential, in its analysis.⁶² Thus, there is no basis in the law as it existed before or after ANCA to find that the mere existence of less- and non-restrictive alternatives renders a proposed restriction unreasonable or otherwise inappropriate.

At most, the purpose of identifying and analyzing less- and non-restrictive measures is to gauge whether a proposed restriction is more cost-effective than its alternatives. The FAA explicitly adopted such a standard in Part 161 by requiring that, in order to satisfy Condition 1, the airport operator must supply the following:

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.⁶³

While the FAA further required that, in order to satisfy Condition 6 (“the restriction does not create an unreasonable burden on the national aviation system”), the airport operator demonstrate “that nonaircraft alternative measures to achieve the same goals as the proposed subject restrictions are inappropriate,”⁶⁴ this test also should be understood as requiring consideration of the *relative* merit of the proposed restriction and its alternatives.

⁶² See e.g., *Santa Monica Airport Ass’n v. City of Santa Monica*, 481 F.Supp. at 938 (“[I]n terms of equal protection, an inquiry as to whether there is a preferable, easier or better method to accomplish the legislative goal is irrelevant.”).

⁶³ 14 C.F.R. § 161.305(e)(2)(i)(A)(2).

⁶⁴ *Id.* § 161.305(e)(2)(vi).

Here, it is entirely appropriate for the Airport Authority to pursue the proposed mandatory curfew instead of sound insulation because the restriction is both more efficacious and more cost-effective. As a practical matter, sound insulation is only partly effective in that the homeowner experiences its benefits only when indoors with the windows closed. This limitation is particularly acute in Southern California, considering the climate and abundant opportunities for outdoor activities. In contrast, noise abatement such as the proposed mandatory curfew eliminates noise at its source and therefore provides a complete solution for individuals indoors and outdoors.

Further, the Authority's Application conclusively demonstrates that the monetary and non-monetary benefits of the proposed mandatory curfew exceed the costs. Built into the benefit-cost analysis is the fact that controlling noise at its source through a mandatory curfew is a more cost-effective way to address the noise problem *at this particular Airport* than by simply continuing to sound insulate residences near the Airport. This conclusion may not be the same at other airports but is sufficient under ANCA, both as Condition 1 was understood by reviewing courts prior to ANCA's adoption, and as Condition 1 is interpreted by the FAA in Part 161.

Comment 5. **The FAA Should Apply Condition 4 Consistently with Longstanding Judicial Interpretation of the Standards in Condition 1 and Condition 2.**

Condition 4 ("the restriction does not conflict with a law or regulation of the United States") is something of a catch-all condition that appears intended to capture other requirements and standards, perhaps including those unforeseen at the time of ANCA's adoption, that may be applicable to local noise or access restrictions. The plain language of ANCA does not provide any insight into what specific laws or regulations might apply, and the legislative history of ANCA is devoid of any specific guidance.

In Part 161, the FAA specified that the applicable laws and regulations include those governing: exclusive rights,⁶⁵ control of aircraft operations, and existing federal grant agreements.⁶⁶ The City questions whether the FAA correctly understood this statutory condition to include the Grant Assurances. The structure of ANCA suggests it does not. For example, Section 47524(e) provides that an airport operator will be eligible for federal grants if the restriction has been approved by the FAA.⁶⁷ This provision seemingly would be unnecessary if Congress had intended the FAA to apply the requirements and standards under the Grant Assurances in deciding whether to approve an application for a Stage 3 restriction in the first instance.

Equally significant, the statutory conditions are quite specific and overlap to a considerable degree with the Grant Assurances. Indeed, both the FAA and reviewing courts have tended to meld the constitutional standards described above and the Grant Assurance requirement that the airport proprietor make the airport publicly available on reasonable terms and without unjust discrimination.⁶⁸ Thus, there would seem to be no particular need for Congress to have incorporated the Grant Assurances into ANCA, because the other statutory conditions, particularly Condition 1, would have addressed the same concerns.

⁶⁵ The FAA recently confirmed that an indispensable element of an exclusive rights claim is proof that the restriction would have an anti-competitive result. FAA Order 2009-1, *In the Matter of the City of Santa Monica*, Docket No. 16-02-08 at 51 (July 8, 2009). Because the proposed mandatory curfew applies even-handedly to all Airport users and therefore would provide no competitive advantage or disadvantage to any commercial aeronautical user at the Airport, there should be no question that the proposed restriction does *not* confer an exclusive right.

⁶⁶ 14 C.F.R. § 161.305(e)(2)(iv).

⁶⁷ See *City of Naples Airport Auth.*, 409 F.3d at 434 (“Section 47524(e) states that when an airport operator adopts an FAA-approved Stage 3 restriction in compliance with § 47524(c), the operator becomes eligible for grants under the [Airport and Airway] Improvement Act. In other words, the FAA may not withhold grants under the Improvement Act on the basis of a Stage 3 noise restriction imposed under § 47524(c) of the Noise Act.”).

⁶⁸ 49 U.S.C. § 47107(a)(1). See *City and County of San Francisco*, 942 F.2d at 1397 (“The central issue was whether San Francisco’s regulation was unjustly discriminatory within the meaning of the statute, and the Second Circuit’s *Concorde Cases* were sound authority for the conclusion that it was.”).

Moreover, had Congress intended to allow the FAA similar discretion in evaluating Part 161 applications as it allows the FAA in administering the grant compliance program, Congress would have done so expressly. Congress deliberately altered the FAA's role under ANCA. ANCA admittedly expanded FAA's powers by subjecting all proposed Stage 3 restrictions to FAA review and approval.⁶⁹ However, Congress did *not* delegate responsibility to the FAA to establish the criteria for evaluating proposed Stage 3 restrictions. For example, Congress could have, but did not, simply leave it to the FAA to develop the conditions of approval and/or provide broad parameters (e.g., to approve restrictions considered to be "in the public interest"). Rather, Congress prescribed six specific conditions. As detailed above, several of these conditions had a clear and definite meaning, as developed by reviewing courts over the course of many years. There is no indication that Congress intended to create or permit a means for the FAA to make an end-run around Congress' specific delegation of responsibility and Congress' articulation of the six conditions of approval.

The Authority's Application presents a good example of the risk presented by unfettered discretion. The FAA has expressed a low opinion of the Airport Authority's identification of a nighttime noise problem and further disagrees with the Authority's preference for a mandatory restriction over less- or non-restrictive alternatives. The FAA apparently would prefer that the Airport Authority continue to sound insulate residences and/or pursue other less- and non-restrictive alternatives that might address noise impacts around the Airport.

⁶⁹ See *City of Naples Airport Auth.*, 409 F.3d at 434 ("On its face, § 47524(c) gives the FAA considerably more power than it had when reviewing an airport operator's Stage 3 restriction at the grant stage. For one thing, the Stage 3 restriction cannot go into effect without the FAA's say-so. For another thing, subsection (c)'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.").

Yet there is no indication in the plain language of ANCA or the statute's legislative history that Congress intended to confer such extraordinary powers upon the FAA to, under the guise of the Grant Assurances, substitute its judgment for the airport proprietor's on the existence of a local noise problem and the prioritization of restrictive measures over non-restrictive measures. Doing so essentially would render Condition 1 and Condition 2 meaningless, since the FAA could find, simply by hiding behind the shield of the Grant Assurances, that a proposed noise or access restriction violates Condition 4, even where it plainly satisfies Condition 1 and Condition 2.

Even assuming that the FAA was correct when it promulgated Part 161 in concluding that the Grant Assurances are incorporated in Condition 4, the City would contend that the proposed mandatory curfew satisfies the obligation to make the Airport publicly available on reasonable terms and without unjust discrimination.

Again, the Airport Authority has identified a real, empirically-observable nighttime noise problem, which has existed for decades and had deleterious effects not just on the surrounding community but on the operation and growth of the Airport itself. The Airport Authority did not jump immediately to a mandatory restriction and, on the contrary, has spent decades pursuing less- and non-restrictive measures, including noise mitigation in the form of sound insulation, a voluntary curfew on air carrier operations, and a series of mandatory pre-ANCA noise rules. The Airport Authority exhaustively has studied the problem and its potential solutions, not only in the Part 161 Study but in prior studies under FAR Part 150 and as part of the Airport Authority's obligation to achieve the California Noise Standard. As explored further below, the proposed mandatory curfew has no effects on aviation safety and only nominal effects on the efficiency of the navigable airspace and the national air transportation system. Under these

circumstances, there simply is no legitimate basis for the FAA to conclude that the proposed mandatory curfew violates the Grant Assurances.

Comment 6. **The FAA Should Apply Condition 3 and Condition 6 Keeping in Mind the Structure of ANCA and Congress' Intent.**

Condition 3 (“the restriction is not inconsistent with maintaining the safe and efficient use of the navigable airspace”) and Condition 6 (“the restriction does not create an unreasonable burden on the national aviation system”) plainly reflect Congress’ interest in ensuring that purely parochial interests do not combine to disrupt the safe and efficient movement of aircraft or the national air transportation system. These conditions are consistent with the broad framework of ANCA to shift responsibility to the FAA to review and evaluate Stage 3 restrictions prior to adoption. Congress expressly has delegated responsibility to the FAA to prescribe regulations governing airspace safety and efficiency.⁷⁰ It accordingly was appropriate that Congress established these two conditions as a means to further guide the FAA’s review of proposed Stage 3 restrictions.

At the same time, these conditions should not be understood to operate entirely independent of Condition 1 and Condition 2 examined above. Indeed, reviewing courts have stated explicitly that the “reasonableness” and “nondiscrimination” standards exist in order to ensure that local noise and access restrictions do not undermine the national air transportation system.⁷¹

⁷⁰ 49 U.S.C. § 40103(b)(1) (“The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.”).

⁷¹ See e.g., *British Airways Bd.*, 558 F.2d at 84 (“It is clear to us that the Port Authority is vested only with the power to promulgate reasonable, nonarbitrary and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster.”)

The essential question under Condition 3 and Condition 6 is how great the impact would have to be in order for the FAA to declare that these conditions are not satisfied. By definition, any mandatory noise or access restriction will have some effect on the movement of aircraft and, by extension, the national aviation system. Airport operators do not directly control the movement of aircraft, and, as a result, the only permissible noise or access restrictions are those that preclude use of an airport based on aircraft noise levels, or limit the time of day when aircraft may operate, such as the proposed mandatory curfew. It is virtually impossible to conceive of a noise or access restriction that would not have some effect on airspace or the national aviation system. Indeed, it is the positive noise benefits that accrue from these changes that would prompt the airport operator to pursue the restriction.

The FAA's interpretation and application of Condition 3 and Condition 6 must be understood in same context as the other conditions examined above. Again, Congress expected and intended that there would be instances in which Stage 3 restrictions are justified. Viewed in this light, Congress must have intended that the FAA set the threshold to incorporate some notion of materiality. In other words, the effects on airspace efficiency and the national aviation system must be more than *de minimus* and must interfere, in some significant way, with the FAA's ability to carry out its delegated responsibilities in order for the FAA to reject a proposed restriction under Condition 3 or Condition 6. For example, a local restriction that affected large numbers of operations, that effectively prevented air access to a rural community, or that directly or indirectly required a change in air traffic control procedures could be understood to materially impair safety, the efficient use of the navigable airspace or the national aviation system. In contrast, restrictions that affect only a small number of operations and that readily can be addressed using the existing airspace structure would not rise above a *de minimus* threshold.

This implicit requirement of materiality is reflected in the cases evaluating local noise rules in the years prior to and after ANCA's adoption. Each of the restrictions considered by the courts necessarily had some consequence for the airport in question, surrounding airports and, by extension, the national air transportation system. Courts have not hesitated to uphold restrictions in the face of these effects. As mentioned above, courts focused on the reasonableness and discriminatory effects of restrictions specifically to ensure that the consequences for aircraft operators and the movement of aircraft were justified and appropriate. Moreover, those courts that found local noise rules to be impermissible did not do so based on these effects but instead based on the merits of each restriction as a means to address an identified noise problem.

The Airport Authority has demonstrated in the Application that the proposed mandatory curfew will not impair safety or have a material effect on the efficient use of the navigable airspace or the national aviation system. The proposed mandatory curfew will not change any current operational rules, flight patterns or in any way alter FAA's control over the navigable airspace. The curfew would affect only a small number of aircraft operations at the Airport, an insignificantly small number of operations in the context of the Southern California region, and an almost imperceptible number of operations in the context of the national air transportation system.

If a mandatory curfew is approved and implemented, aircraft operators will have a choice to either adjust their schedules to operate at the Airport within permitted hours or to conduct their nighttime operations at any of several alternative airports in the immediate vicinity. Diverted operations would use existing air traffic control procedures at those alternative airports. There is existing capacity in the air traffic control system for all such operations. Indeed, the number of operations potentially affected by the proposed curfew are so small as to be within the normal

range of *daily* traffic fluctuations at most airports. In the context of the enormous volume of air traffic in the Los Angeles basin, the number of aircraft affected by the proposed curfew is so insignificant as to be imperceptible.

For these reasons, the proposed curfew will not impair safety or materially affect the efficiency of the navigable airspace or the national aviation system. As a result, the FAA should find that the proposed mandatory curfew satisfies Condition 3 and Condition 6.

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