

Airport Law Alert No. 6

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Aviation-Related Climate Change

There presently is no aviation-specific legislation, regulation or guidance on greenhouse gas (GHG) emissions. It does not appear that Congress or the FAA will impose restrictions in the near future.

Nevertheless, airport proprietors are coming under increasing pressure from local governments, community and interest groups to address GHG emissions, and have started to take steps to address it. For example, the Port Authority of New York and New Jersey recently announced its goal of reducing GHG emissions by 5% a year. Several communities, including Denver, Colorado; Aspen, Colorado; and Seattle, Washington, have considered airports in their community-wide emissions inventories.

One significant issue that airports will have to confront is the limit on their power under federal law and the grant assurances to regulate greenhouse gas emissions and to impose fees to reduce and offset emissions. To address this issue, former firm partner John Putnam co-authored "The Law of Aviation-Related Climate Change: The Airport Proprietor's Role in Reducing Greenhouse Gas Emissions," appearing in the current issue of the *Journal of Airport Management*.

Another significant issue will be the extent to which airports and the FAA are required to consider climate change impacts in Environmental Impact Statements and Environmental Assessments under NEPA. On November 15, the U.S. Court of Appeals for the Ninth Circuit remanded a fuel economy standard for light trucks issued by the National Highway Traffic Safety Administration for its failure to address the implications of the rule on climate change under the National Environmental Policy Act and the Energy Policy and Conservation Act. While not an aviation case, the opinion contains an extensive discussion about the consideration of climate change under NEPA.

Finally, the Transportation Research Board Committee on the Environmental Impacts of Aviation has created a subcommittee to address aviation and climate change. The Subcommittee will present a panel evaluating the role of offsets for transportation at the TRB Annual Meeting in January 2008.

Litigation Updates

MAC Settles on Sound Insulation

On October 19, the District Court for Hennepin County, Minnesota, approved a settlement between the Metropolitan Airports Commission (MAC) and the Cities of Minneapolis, Richfield and Eagan. The settlement resolves litigation regarding the MAC's obligation to provide sound insulation between the DNL 60 and 65 contours of Minneapolis-St. Paul International Airport.

Under the settlement, MAC will provide approximately \$130 million worth of sound mitigation to homes in the DNL 60-65 contours of MSP, with more mitigation provided to the homes in the louder noise contours. The plaintiff Cities agreed to have their City Councils consider ordinances to require additional noise attenuation in noise contours outside of the DNL 65 contour.

The settlement is contingent on an FAA opinion regarding the use of airport revenue and settlement of a parallel class action lawsuit filed after the Cities' suit. Implementation of the noise mitigation is scheduled to begin in 2008.



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Challenges Filed to Airspace Redesign

On September 5, the FAA issued a Record of Decision approving the redesign of airspace in the New York, New Jersey, and Philadelphia metropolitan areas. The FAA estimates that the move will reduce delays by 20% by 2011 and significantly reduce noise exposure and fuel burn.

Thirteen lawsuits were filed recently challenging the FAA's Environmental Impact Statement. Suits were filed in the Second, Third, and D.C. Circuits. Petitioners include the State of Connecticut, the New Jersey Coalition Against Aircraft Noise, the Alliance for Sensible Airspace Planning, Delaware County (PA), and Rockland County (NY). Although petitioners have requested a stay pending the appeal, such relief is seldom granted in environmental cases of this kind. The Government Accountability Office also is reviewing the project for the House Aviation Subcommittee.

ATA Challenges Airport "Privilege Fee"

On September 24, the Air Transport Association and Air Carrier Association of America petitioned DOT to declare that a "privilege fee" for air carrier use of an airport imposed by a local government that is not the airport sponsor violates the Anti-Head Tax Act. The Township of Tincum, Pennsylvania imposed the fee for use of Philadelphia International Airport despite the fact that it does not operate the Airport or contribute financially to its operation or development. The Township thereafter brought suit against the carriers for failure to pay the fee. Both the ATA/ACAA petition and the Township's suit are pending. Additional information and copies of the ATA/ACAA petition are available on the ATA website.

FAA Upholds GA Fees

In two recent decisions issued under FAR Part 16, the FAA confirmed that it is not unreasonable or unjustly discriminatory for airport sponsors to charge fees at general aviation airports to based, but not transient, aircraft owners and operators. See *Wadsworth Airport Ass'n, Inc. v. City of Wadsworth*, Docket No. 16-06-14 (F.A.A. Aug. 8, 2007); *R/T-182, LLC v. Portage County Regional Airport Auth.*, Docket No. 16-05-14 (F.A.A. March 29, 2007). FAA decisions under Part 16 are available at <http://part16.airports.faa.gov>.

Briefs Filed Over Panama City Airport

Briefs have been filed but oral argument has not yet been scheduled in a suit filed by the Natural Resources Defense Council and Defenders of Wildlife over the planned construction of a new airport in Panama City, Florida. Petitioners allege that the FAA's EIS was insufficient and that its decision to close the existing airport was inconsistent with the AAIA.

News Desk

FAA Reauthorization Update. Congress has yet to enact FAA Reauthorization or Fiscal Year 2008 Appropriations. Congress has enacted Continuing Resolutions of limited duration, which now extend FAA programs and funding through December 14. As reported in previous *Airport Law Alerts*, there is no consensus on several key elements of Reauthorization, particularly the fee and tax structure. The appropriations debate is part of a broader disagreement between Congress and the Bush Administration over funding levels across all federal agencies. It remains uncertain when longterm resolution of these issues will occur.

FAA Considering Operating Limits at JFK. With the sunset earlier this year of the High Density Rules at the New York area airports, aircraft operations and delay increased dramatically. To combat the problems at John F. Kennedy Airport, the FAA convened a meeting with carriers in late October to discuss scheduling reductions and solicited written comments on the issue. The comment period closed November 6. The FAA has declared its intent to issue a final order soon but has made no commitment on whether it will impose mandatory operating limits. To date, the FAA has identified an operating "target" of 80-81 hourly operations. The FAA already has reestablished mandatory operating limits for New York's LaGuardia Airport, and, on November 8, adopted several changes to the program further suggesting that it will be in place for the foreseeable future. See 72 Fed. Reg. 63,224 (2007). The JFK scheduling



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reduction process can be followed through Docket No. FAA-2007-29320 (use the new government electronic docket website: www.regulations.gov).

Aviation Subcommittee Hearing on Noise. On October 24, the Aviation Subcommittee of the House Transportation and Infrastructure Committee held a hearing on airport noise. The opening statements and written testimony are available at: <http://transportation.house.gov/hearings/hearingdetail.aspx?NewsID=343>.

FAA Releases Environmental Guidance. In October, the FAA released the long-awaited Environmental Desk Reference for Airport Actions. The *Desk Reference* supplements Order 1050.1E and Order 5050.4B and provides detailed information on compliance with "special purpose laws" when conducting environmental review under the National Environmental Policy Act. The *Desk Reference* covers each of the 23 environmental impact categories required to be considered in an EA or EIS.

TRB to Release Airport Law Digest. The Transportation Research Board Airport Cooperative Research Program has released the *Compilation of Airport Law Sources*. The report contains over 500 federal sources (statutes, regulations, guidance, cases, articles) divided by subject area.

Comings & Goings

Bobby Sturgell has been nominated to be the new FAA Administrator, replacing Marion Blakey. Mr. Sturgell must be confirmed by the U.S. Senate, upon recommendation by the Committee on Commerce, Science and Transportation.

Patty Hahn resigned as General Counsel for Airports Council International – North America. ACI-NA is seeking applicants for the position. For more information, go to <http://www.aci-na.org/index.asp>.

Tom Zoeller resigned as Vice President of Regulatory Affairs for the American Association of Airport Executives to take the position of President of the National Air Carrier Association. **Melissa Sabatine**, formerly a Senior Policy Advisor to the Secretary of Transportation, is the new VP of Regulatory Affairs.

David Bennett recently announced his retirement from the FAA. Bennett currently is the Director of the Office of Airport Safety and Standards, a position he has held since 1995.

A PDF of this Airport Law Alert is available.