

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

**IN THE MATTER OF
COMPLIANCE
WITH FEDERAL OBLIGATIONS
BY THE NAPLES AIRPORT
AUTHORITY, NAPLES, FLORIDA**

FAA Docket No. 16 - 01-15

DIRECTOR'S DETERMINATION

I. INTRODUCTION AND SUMMARY

This matter is before the Federal Aviation Administration (FAA) based on the Notice of Investigation (NOI) filed by the FAA on October 31, 2001, under *FAA Rules of Practice for Federally-Assisted Airport Proceedings*, 14 Code of Federal Regulations (C.F.R.) Part 16 (FAA Rules of Practice).

The FAA filed the NOI against the Naples Airport Authority (NAA/Authority/Respondent), the sponsor of the Naples Municipal Airport (APF/ Airport). The FAA issued the NOI in accordance with FAA Rules of Practice for Federally Assisted Airport Proceedings, 14 C.F.R. Part 16, Subpart D.

After reviewing all the information provided by the NAA in support of the adopted Stage 2 ban, including materials generated for the Part 161 process, the FAA continued to have concerns that the NAA's Stage 2 ban is inconsistent with the NAA's grant agreement obligation to make the airport available for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities without granting an exclusive right.

Under the particular circumstances existing at the Airport and the evidence of record, as discussed below, we conclude that the Stage 2 ban as currently implemented by the NAA is unreasonable and unjustly discriminatory in violation of 49 U.S.C. § 47107(a) (1) and Grant Assurance 22. We also conclude that the Stage 2 ban is preempted by Federal law.

Our decision in this matter is based on the applicable Federal law and FAA policy, and review of the pleadings and supporting documentation submitted and researched by FAA, which comprise the administrative record reflected in the attached FAA Exhibit 1.

The NAA asserts that the FAA is precluded from addressing the issues raised in the Notice of Investigation as a result of National Business Aviation Association v. City of Naples Airport Authority, 162 F.Supp.2d 1343 (M.D. Fla. 2001) due to the legal doctrines of res judicata, collateral estoppel, issue preclusion, and comity. In NBAA, an aviation trade group alleged that the NAA's ban violated the Commerce Clause and the Supremacy Clause of the United States Constitution. The court provided summary judgment to the NAA; however, the FAA was not a party to this case. The FAA finds that under Federal law, the agency cannot be bound by a judgment that was entered in litigation to which it was not a party. The FAA also finds that the principles of comity (where courts of one jurisdiction will give effect to laws and judicial decisions of another jurisdiction out of deference and respect) do not bar the FAA's investigation. In addition, according to the doctrine of intra-court comity, the NBAA decision is neither binding on the FAA nor other district courts in the Eleventh Circuit.

Local governments that operate airports may adopt noise abatement measures that do not impinge on aircraft operations. However, under Federal law, in order for an airport operator to enact a noise abatement measure that restricts aircraft operations, the operator must face actual or potential liability for noise damages. In the absence of liability, as here, the restriction is federally preempted and the NAA does not have the right to use its proprietary powers to regulate.

The NAA argues that the Stage 2 ban is not subject to the grant assurance requirements identified in the Notice of Investigation because Congress, in the Airport Noise and Capacity Act of 1990 (ANCA), granted airport proprietors the "express right" to ban Stage 2 aircraft, thus superseding other Federal law, including the statutory grant assurance requirements in 49 U.S.C. § 47107(a). The NAA's argument, however, is contrary to the language and legislative history of ANCA, as well as the FAA's long-standing interpretation of the statute, and would lead to a meaningless and illogical distinction between Stage 2 and other operations.

The FAA interprets the requirement in 49 U.S.C. § 47107(a)(1) that a federally-funded airport will be "available for public use on reasonable conditions" as requiring that a regulation restricting airport use for noise purposes: (1) be justified by an existing noncompatible land use problem; (2) be effective in addressing the identified problem; and (3) reflect a balanced approach to addressing the identified problem that fairly considers both local and Federal interests.

The record shows that the Stage 2 ban is not adequately justified by existing non-compatible land uses. Although the NAA bases its use of a DNL 60 decibel (dB)¹ land use compatibility criterion on ordinances and actions of the City of Naples and Collier County, the record shows that at the time the Stage 2 ban was implemented, neither the City nor the County prohibited residential land use within the DNL 60 dB contour. The NAA's contention that it is faced with credible and identifiable threats of liability from property owners is not supported by the record evidence. The NAA's use of complaints and Sound Exposure Level ("SEL") data does not support a finding that the Stage 2 ban is reasonable. Complaints and SEL data are not valid indicators of noncompatible

¹ Day-Night Average Sound Level (DNL) is a single number measure of community noise exposure. It is an enhancement of the 24-hour Equivalent Sound Level (Leq) with a 10 decibel (dB) penalty applied to nighttime (10 P.M. to 7 A.M.) sound levels to account for increased annoyance due to noise exposure during these hours. An average sound metric such as DNL takes into account the sound levels of all individual events that occur during a 24 hour period, and the number of times those events occur. The averaging of sound over a 24-hour period does not ignore the louder single events, and it actually tends to emphasize both the sound level and number of those events. The logarithmic nature of the dB unit causes sound levels of the loudest events to control the 24-hour average.

land use, and the specific data presented by the NAA do not justify banning all Stage 2 aircraft from the Naples Airport. The NAA's analysis of background and ambient noise levels is flawed and does not justify the NAA's stated land use compatibility goal or the Stage 2 ban. The ambient noise methodology and measurements presented by the NAA do not support the assertion that Naples is an unusually quiet community that justifies a lower noise compatibility threshold to support an airport restriction.

Even if the Stage 2 ban were justified by existing non-compatible land uses, it would still be unreasonable because it does not reflect a balanced approach to addressing the NAA's stated land use compatibility goal that fairly considers both the local interest in noise mitigation and the Federal interest in maintaining access to Federally-funded airports, as reflected in 49 U.S.C. § 47107(a)(1) and Grant Assurance 22.

Although the NAA's Part 161 Study states that the NAA "has exhausted all reasonably feasible non-restrictive measures to achieve its land use compatibility goal," the record in this matter shows that the NAA did not adequately consider the costs and benefits of alternatives to the Stage 2 ban. For example, the NAA failed to consider the costs and benefits of combining non-restrictive measures, and instead rejected each measure simply because, individually, it would not be as effective as, or would be more costly than, the Stage 2 ban. Furthermore, the NAA unreasonably concluded that the only acceptable mitigation measure for people residing inside the DNL 60 dB contour was to remove them from the contour, even though some of these residents had consented to such noise levels by conveying easements to the NAA or had prior knowledge through noise disclosure. The NAA also disregarded non-restrictive measures, including property acquisition and noise disclosure to potential home buyers, that the FAA earlier had approved for the NAA's 1997 noise compatibility study.

Because the NAA did not employ a balanced approach when considering the costs and benefits of non-restrictive and less restrictive alternatives, the cost-benefit analysis of the Stage 2 ban prepared by the NAA pursuant to 14 C.F.R. Part 161 is not a reliable indicator of the reasonableness of the ban in this proceeding. For example, the NAA included the costs of land acquisition and sound attenuation for those residences that were already made compatible through the acquisition of easements prior to the Stage 2 ban. Consequently, the NAA overstated the costs of land acquisition and sound attenuation. Likewise, to the extent that a change in flight tracks would further reduce the number of noncompatible residences inside the DNL 60 dB noise contour, the costs of land acquisition and sound attenuation, for example, may be further overstated.

The NAA's conclusion that the Stage 2 ban is the most cost-effective alternative did not take into account all of the costs of the Stage 2 ban on airport users. For example, the NAA did not properly account for the costs to airport users of replacing or modifying their Stage 2 aircraft. When costs are appropriately considered, the analysis does not support the NAA's conclusion.

Given the important Federal interest in maintaining access to Federally-funded airports, as reflected in 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, it was not reasonable for the NAA to totally ban an entire class of aircraft based on an analysis that: (1) did not fairly consider non-restrictive alternatives for achieving the NAA's asserted land use compatibility goal; and (2) was flawed in that it did not include the full estimated cost of the Stage 2 ban.

In sum, the NAA position relies substantially on the following arguments:

- “Neither ANCA nor Part 161 require that restrictions affecting Stage 2 aircraft comply with any reasonableness/nondiscrimination standard,”² (although such a standard continues to apply to Stage 1, Stage 3, and non-stage certificated aircraft).
- An airport operator has “full discretion to make its own judgment about the appropriate level of noise in the community”³ and restrict use of the airport to achieve that level.
- An airport operator “is not required to select any specific measure either prior to or as an alternative to”⁴ an access restriction, much less consider a balanced approach of all measures.
- “[I]t is eminently reasonable for the Authority to restrict aircraft that are ... responsible for ... complaints,” to provide “a measure of noise relief to *all* of those individuals living and/or working in areas subject to Airport and aircraft noise”⁵ (but outside of the DNL 60 dB contour identified by the NAA as the area of noncompatible land use) (emphasis added).

Based on the discussion of legal authority and factual circumstances discussed below, the FAA does not find these arguments sound.

In evaluating the significance of the restriction implemented by NAA, we are required to consider the degree to which its Stage 2 ban establishes a precedent for future restrictions with significant effects on the national air transportation system. If the action taken by the NAA were considered reasonable, for the reasons offered by the NAA, the effect would not be limited to Stage 2 aircraft or limited to the Naples Municipal Airport. For example, if NAA has full discretion to make its own judgment about the appropriate level of noise in the community and restrict use of the airport to achieve that level, regardless of its actual or potential liability for noise damages, then that same criterion arguably could be cited in support of restrictions on operations by Stage 3 aircraft at Naples and other airports. These and other positions argued by NAA would have potential adverse effects on the national airspace system that have not been seriously considered, much less studied in detail, and have not been raised in any forum in which all affected members of the aviation community could comment.

II. THE AIRPORT

Located on 732 acres, this two-runway airport is a public-use airport owned and operated by Naples Airport Authority, Naples, Florida.⁶ In early 1942, the City of Naples and Collier County, which had purchased property for use as an airport, leased the property to the U.S. government for improvements and use as a training facility for the U.S. Army Air Corps. This took place under the auspices of an AP-4 Agreement⁷, under the Development of Landing Areas National Defense (DLAND) Program. In 1948, the Air Force declared the facility to be surplus, cancelled the lease and quitclaim, and the facility was returned to civilian use.

² FAA Exhibit 1, item 2, page 11.

³ FAA Exhibit 1, item 2, page 20.

⁴ FAA Exhibit 1, item 2, page 17.

⁵ FAA Exhibit 1, item 2, page 15.

⁶ FAA Exhibit 1, Item 5 (FAA Form 5010 "Airport Master Record" for APF) Date: 6/18/2002, FAA Exhibit 1, Item 27, NAA General Information.

⁷ This was an agreement between the U.S. Government and the airport sponsor under which the sponsor provided the land and the U. S. Government planned and constructed the airport improvements. See FAA Order 5190.6A, Section 2-18.

Collier County and the City of Naples jointly operated the airport until the county sold its interests to the city in 1958.⁸ In 1969, the Naples City Council asked the Florida Legislature to create an independent authority whose members would be appointed by the City Council.⁹ Chapter 69-1326, Laws of Florida, as amended, created the City of Naples Airport Authority as an independent body for the purpose of operating and maintaining the Airport.¹⁰

The management and operating power of the airport was transferred from the City of Naples to the NAA under lease for 99 years.¹¹ The facility is a commercial service airport, classified as a primary airport.¹² The Airport is the base of operations for 370 aircraft and accounts for approximately 138,185 operations each year, more than 92,000 of which are itinerant.¹³

FAA records indicate that the planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, (AAIA), as amended, 49 U.S.C. § 47101, *et seq.* Since 1982, the Airport has received a total of \$14,617,978 in Federal airport development assistance.¹⁴

III. BACKGROUND

In 1996, the NAA submitted to the FAA for approval under 14 C.F.R. Part 150 a revision to its noise compatibility program (NCP). The revision included a recommendation for a land use measure that would create a "buffer of compatible land use" around the airport within the DNL 60 dB noise contour.¹⁵ In the 1996 revised NCP, the NAA used the FAA Part 150 guidelines to define the level of noise at which land uses were compatible.¹⁶ In the September 29, 1997, Record of Approval for the 1996 revised NCP, the FAA stated that the "NAA has adopted the DNL 65 dB noise contour as the threshold of incompatibility for residential areas, but for zoning and land use planning this measure recommends that the area within the DNL 60 dB noise contour apply the same standards as part 150 recommends for the DNL 65 dB noise contour as a buffer to ensure that residential and noise sensitive uses are not developed too close to the Airport." The FAA approved this land use measure, noting that the measure was "within the authority of the local land use planning jurisdictions."¹⁷

⁸ FAA Exhibit 1, Item 27, NAA General Information. http://flynaples.com/general_info.html.

⁹ FAA Exhibit 1, Item 28, National Plan of Integrated Airport Systems (NPIAS), 1998-2002.

¹⁰ FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 12.

¹¹ FAA Exhibit 1, Item 27, NAA General Information. http://flynaples.com/general_info.html.

¹² National Plan of Integrated Airport Systems (NPIAS), 1998-2002.

¹³ FAA Exhibit 1, Item 5 (FAA Form 5010 "Airport Master Record" for APF) Date: 6/18/2002.

¹⁴ FAA Exhibit 1, Item 6 (Airport Sponsor AIP Grant History), Dated 10/11/01.

¹⁵ FAA Exhibit 1, Item 2, Attachment 28, p. 5-11. A noise contour is a continuous line on a map of the airport vicinity connecting all points of the same noise exposure level. In the Aviation Safety and Noise Abatement Act of 1979, Congress directed the FAA to "identify land uses normally compatible with various exposures of individuals to noise." 49 U.S.C. § 47502. The FAA has determined that residential land use is normally compatible with noise levels of less than DNL 65 dB. See 14 C.F.R. Part 150, App. A, Table 1.

¹⁶ See, e.g., FAA Exhibit 1, Item 2, Attachment 28 p. 4-1 (1996 Revised NCP). ("The [noise exposure map] presents the land use information for the geographic area within the 65 L_{dn} contour and identifies areas of incompatible land uses based on FAA guidelines."). See also, FAA Exhibit 1, Item 2, Attachment 29, FAA Record of Approval, Revised Noise Compatibility Program 1996 (September 1997).

¹⁷ FAA Exhibit 1, Item 2, Attachment 29, FAA Record of Approval, Revised Noise Compatibility Program 1996 (September 1997), Section 7.3.3.

In November 1997, in a memorandum from the Naples City Attorney to the Mayor, proposed Policy 7-8 directed the NAA, by January 1, 1999, to complete a Part 161 Study to justify additional restrictions with particular emphasis on banning Stage 1 and ultimately Stage 2 aircraft.¹⁸ In 1998, the NAA submitted an update to its Part 150 program that recommended extending to 24 hours the existing curfew on nighttime operations by Stage 1 aircraft at the airport. In explaining how this measure would meet the Part 150 criterion of being “consistent with the goal of reducing noncompatible land use,” the 1998 Part 150 update stated that the measure would significantly reduce the residents and dwelling units within the DNL 65 dB contour.¹⁹ The FAA approved the extension of the Stage 1 restriction in 1999.²⁰

Soon after the FAA approved the Stage 1 ban, the Mayor of the City of Naples wrote to the NAA stating that while the Stage 1 ban would be effective in eliminating the noisiest aircraft, the Authority should turn its attention to the newer, but still noisy, Stage 2 aircraft.²¹

In response to noise concerns, the NAA tasked a consultant team in August of 1999 to conduct a Part 161 study to identify operational restrictions authorized by Federal law.²²

On June 22, 2000, the NAA adopted Resolution 2000-7 setting forth the NAA’s intent to propose ban on Stage 2 aircraft.²³

On June 30, 2000, the NAA released for public comment the Naples Municipal Airport Part 161 Study (the Part 161 Study). The Part 161 Study proposed a ban on all Stage 2 aircraft weighing less than 75,000 pounds,²⁴ with limited exceptions.²⁵ In the Part 161 Study, the NAA stated that it had established a “land use compatibility goal” of “minimizing residential land within [the] 60 dB DNL [contour] to the maximum feasible extent.”²⁶ The study stated that this goal had been adopted because the City of Naples and Collier County had adopted DNL 60 dB as the limit for land use compatibility and “[a]irports are instructed to adopt compatibility criteria established by local jurisdictions.”²⁷ Based on complaint data, the NAA also asserted that restricting Stage 2 jets was justified since they are the “principal source of the noise impact that causes community concern.”²⁸ In conjunction with the FAA’s review of the adequacy of the study under the requirements of

¹⁸ FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 12, p.10, (Question 12).

¹⁹ The 1998 Part 150 update stated that the population within the DNL 65 dB contour would be reduced from 304 residents in 112 dwelling units to 184 residents in 77 dwelling units in 1998, and from 596 residents in 185 dwelling units to 440 residents in 146 dwelling units in 2003. See FAA Exhibit 1, Item 2, Attachment 30, p. 21. The document also stated that a school would be removed from the DNL 60 dB contour, and that the City of Naples and Collier County had “adopted DNL 60 dB *for land use planning purposes.*” Id. at 13 (emphasis added).

²⁰ FAA Exhibit 1, Item 2, Attachment 31.

²¹ FAA Exhibit 1, Item 2, Attachment 6, p. 14.

²² FAA Exhibit 1, Item 2, Attachment 6 (History of Noise Compatibility Efforts for Naples Municipal Airport, October 2000), p.14.

²³ FAA Exhibit 1, Item 2, Attachment 3, p. 5.

²⁴ There are no operations in the continental U.S. by civil subsonic turbojet Stage 2 aircraft weighing more than 75,000 pounds because the Airport Noise and Capacity Act of 1990, required operators to phase-out such operations and operate aircraft that meet Stage 3 noise levels by January 1, 2000.

²⁵ FAA Exhibit 1, Item 2, Attachment 15, p. 1.

²⁶ FAA Exhibit 1, Item 2, Attachment 3, Naples Municipal Airport Part 161, June 22, 2000, p. 16.

²⁷ FAA Exhibit 1, Item 2, Attachment 3, Naples Municipal Airport Part 161, June 22, 2000, p. 16.

²⁸ FAA Exhibit 1, Item 2, Attachment 3, Naples Municipal Airport Part 161, June 22, 2000, p. 1.

ANCA, the FAA also reviewed the proposal for adequacy under federal grant assurance obligations and other Federal law.

On August 21, 2000, the FAA provided comments on the Notice of Proposed Restrictions on Stage 2 Aircraft Operations at Naples Municipal Airport and the accompanying Part 161 Study. In these comments, the FAA stated that "[i]t is not clear that the City of Naples and Collier County have in fact determined that residential use is non-compatible within the DNL 60 dB contour." The FAA also noted that the Part 161 Study "does not indicate whether any of the residential development cited as non-compatible within the DNL 60 dB contour was permitted by the City" after the FAA approved a land use measure in the 1997 revision of the NAA's Noise Compatibility Program. NAA's Noise Compatibility Program would create a "buffer" within the DNL 60 dB contour to ensure that residential and noise sensitive uses are not developed too close to the Airport.²⁹

On September 18, 2000, the FAA's Director of the Office of Airport Safety and Standards provided additional comments to the NAA regarding the proposed Stage 2 ban. This letter stated that on the basis of an initial review, the FAA had identified aspects of the proposed ban that appeared to be, or had the potential to be, inconsistent with the obligation to provide reasonable access to the airport (Grant Assurance 22a). Additionally, the FAA expressed its concerns that not only was the operating restriction based solely on impacts to the DNL 60 dB noise contour (since there were no incompatible land uses within the DNL 65 dB contour), it was also the broadest type of restriction, representing a total ban on a category of operator.³⁰

The FAA reiterated its doubts regarding whether the City of Naples or Collier County had in fact determined that residential use is non-compatible within the DNL 60 dB contour and whether the City and County had taken appropriate action to limit development within the DNL 60 dB contour. The FAA also noted that "[w]hile local airport restrictions are generally preempted, the courts have defined a limited exception to this preemption for local airport proprietors, based on their legitimate interest in avoiding liability for excessive noise generated by airports they own." On this last point, the FAA requested information from the NAA on "[a]ny court-ordered action or estimated liability concerns."³¹

In an attempt to understand the NAA's reliance upon complaint data to support the proposed ban, on October 19, 2000, the FAA requested information regarding the origin of the noise complaints received with respect to the noise contours, the frequency of calls from each complainant, the time of day and date of each complaint and the type of aircraft causing the noise complaint.³² The NAA's response, dated October 28, 2000, included noise complaint figures from 1999.³³

On October 24, 2000, counsel for the NAA responded to both the August 21 and September 18, 2000 FAA letters. In response to the FAA's September 18 letter from the Director of the Office of Airport Safety and Standards, counsel for the NAA stated that the proposed restriction would fully comply with the NAA's obligations under Grant Assurance 22. In the letter to the Director, counsel for the NAA included information regarding the NAA's potential liability

²⁹ See FAA Exhibit, Item 2, Attachment 29 (1997 Record of Approval Part 150 NCP, Section 7.3.3).

³⁰ FAA Exhibit 1, Item 19(h)

³¹ Id.

³² FAA Exhibit 1, Item 19(b)

³³ FAA Exhibit 1, Item 2, Attachment 7.

concerns, and stated that the City of Naples, Collier County, and the NAA "selected a reasonable threshold of land use compatibility based upon their reasonable assessment of potential liability."³⁴

On November 16, 2000, the NAA passed resolution 2000-8, implementing the rule banning operations by Stage 2 aircraft.³⁵

Representatives of the NAA and the FAA met on January 4, 2001, and FAA representatives attended a meeting of the NAA Board on January 18, 2001. In a letter dated January 30, 2001, the FAA notified the NAA that the FAA would perform a substantive review of any analysis provided by the NAA, including information provided in connection with the Part 161 process, to determine whether or not the proposed restriction is consistent with the applicable grant assurances. In the letter, the FAA stated that this review would include "a determination whether or not the NAA has reasonably demonstrated a legitimate interest in avoiding liability for excessive noise generated by the airport." The FAA also stated that "our substantive considerations to date are not favorably inclined to find it reasonable to address the particular circumstances at Naples between the DNL 60 and 65 dB noise contours with a total ban on a class of user."³⁶

By letter dated February 16, 2001, the FAA gave a "preliminary opinion," based on the information available at the time, that "the ban on Stage 2 is not a reasonable restriction on use of the airport and is not permitted under the assurances in the Authority's grant agreements." The FAA identified several considerations to support this conclusion, including: (1) doubt regarding whether the local communities have in fact determined that residential use between the DNL 65 and 60 dB contours is incompatible; (2) lack of factual or legal support for the NAA's "concern [about liability] as it relates to the location of residential property between the DNL 65 and 60 dB contours"; and (3) doubt regarding whether the NAA's noise complaint data support a total ban on Stage 2 operations.³⁷

In a letter dated March 19, 2001, the NAA notified the FAA that it had decided to proceed with a Supplemental Analysis to the Part 161 Study intended to address unresolved Part 161 issues raised by the FAA. Furthermore, the NAA expressed an interest "in working with the FAA to negotiate a resolution to the grant compliance issues. The Board adopted a motion directing the staff to work and meet informally with the appropriate FAA officials to focus on grant compliance issues and to report back to the Board on those efforts."³⁸ On June 23, 2001, the NAA submitted to the FAA a draft of the Supplemental Analysis.³⁹

On August 16, 2001, the NAA approved starting a new 45-day comment period and 180-day notification period regarding the Part 161 study, including the Supplemental Analysis, and deferred enforcement of the Stage 2 ban until March 1, 2002.⁴⁰ The FAA provided comments on the Supplemental Analysis in correspondence dated October 31, 2001. As stated in that correspondence, the Supplemental Analysis did not resolve the FAA's concerns regarding

³⁴ FAA Exhibit 1, Item 22(g)

³⁵ FAA Exhibit 1, Item 2, Attachment 9.

³⁶ FAA Exhibit 1, Item 19(j).

³⁷ FAA Exhibit 1, Item 19(f)

³⁸ FAA Exhibit 1, Item 22(a)

³⁹ FAA Exhibit 1, Item 2, Attachment 15

⁴⁰ FAA Exhibit 1, Item 12, Exhibit 1

compliance with other Federal law, including sponsor assurances in the NAA's Federal grant agreements.⁴¹

Also, on October 31, 2001, the FAA issued a NOI in accordance with 14 C.F.R. Part 16, Subpart D, concerning the proposed ban of operations by Stage 2 aircraft at Naples Airport. In the notice, the FAA expressed serious concerns that the ban is contrary to Federal law and related sponsor Federal grant assurance obligations.⁴²

On December 3, 2001, the NAA filed a Reply to the NOI. In the Reply, the NAA asserted that the NOI “states no grounds for finding violations of federal law or related grant assurance obligations.”⁴³ More particularly, the NAA claimed that the NOI: (1) writes requirements into ANCA that do not exist and were intentionally excluded by Congress; (2) demands justifications for the restriction that have no basis in any requirement imposed by statute, regulation, or prior judicial decision; (3) imposes requirements for use restrictions that likely could not be satisfied under any conditions; (4) exceeds the jurisdiction and mandate of the Agency by attempting to elevate the FAA’s application of grant agreement provisions above the clear mandate of Congress as expressed both in ANCA and other federal aviation statutes; (5) allows the FAA not only to ignore the decision of a Federal District Court that is directly on point but also to apply wholly different standards to the same issues; and (6) renders the exhaustive and costly Part 161 process a nullity.⁴⁴

On March 1, 2002, the NAA initiated enforcement of the Stage 2 ban.⁴⁵ The NAA permits Stage 1 and Stage 2 propeller-driven aircraft to use the airport while restricting both Stage 1 and Stage 2 jet aircraft.⁴⁶ Additionally, the NAA permits aircraft that are not certificated under 14 CFR Part 36, Appendix C Subsection 36.5, to continue to operate at the Airport.⁴⁷

On December 27, 2002, the Naples Daily News quoted NAA officials as stating that NAA is prohibiting all Stage 2 jets from using the airport.⁴⁸

IV. APPLICABLE LAW AND POLICY

A. The Airport Improvement Program and the Airport Sponsor Assurances

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the AIP established by the AAIA as amended. Section 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving

⁴¹ FAA Exhibit 1, Item 1(b), Letter from Mr. Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, and topical comments, October 31, 2001.

⁴² FAA Exhibit 1, Item 1(a), Letter from Mr. David L. Bennett, Director, Office of Airport Safety and Standards, to Mr. Theodore D. Soliday, including Notice of Investigation.)

⁴³ FAA Exhibit 1, Item 2, p. 3.

⁴⁴ FAA Exhibit 1, Item 2, p. 3.

⁴⁵ FAA Exhibit 1, Item 12, Exhibit 1

⁴⁶ In the FAA Airport Facility Directory, NAA advises that “Stage 1 and 2 jet” aircraft operations are prohibited from using APF.

⁴⁷ We note that approximately 92 percent of aircraft in the United States do not have a Stage designation. Of the approximately 227,000 powered aircraft in the fleet (FY 2000 data), 17,000 (commercial passenger jets, cargo jets, corporate jets, propeller-driven commuters and helicopters) have Stage designations. See FAA Exhibit 1, Item 29 and Item 30.

⁴⁸ FAA Exhibit 1, Item 4

Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.⁴⁹ FAA Order 5190.6A, *Airport Compliance Requirements*, issued on October 1, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The Congress mandated conditions such as these on grants to local airport proprietors in part to ensure the maintenance of conditions essential to an efficient national air transportation system. A grant agreement under the AAIA “is not an ordinary contract, but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress’ will.”⁵⁰

B. Public Use of the Airport - Grant Assurance 22

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. Grant Assurance 22, Economic Nondiscrimination, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

will make its 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. [Assurance 22(a)]

* * *

may establish such reasonable and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)]

The FAA uses the standards for approval of airport noise and access restrictions under the Aviation Safety and Noise Abatement Act (ASNA), 49 U.S.C. § 47501 *et seq.*, as implemented by 14 C.F.R. Part 150, to define the responsibilities under Grant Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Specifically, describing compliance with grant assurances, FAA Order 5190.6A states that noise-related airport use restrictions: (1) must be reasonably consistent with reducing non-compatibility of land uses around the airport; (2) must not create an undue burden on interstate or foreign commerce; (3) must not be unjustly discriminatory; (4) must not derogate safety or adversely affect the safe and efficient use of airspace; (5) meet both local needs and the needs of the national air transportation system to the extent practicable; and (6) must not adversely affect any other powers or responsibilities of the FAA Administrator prescribed by the law or any other program established in accordance with the law.⁵¹

⁴⁹ See, e.g., 49 U.S.C. § 40101, 40103(e), 40113, 40114, 46101, 46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d), 47106(e), 47107, 47108, 47111(d), 47122

⁵⁰ *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991)

⁵¹ FAA Order 5190.6A, Section 4-8 (f)

In addition to constitutional limitations, the contractual obligations under Grant Assurance 22 incurred by airport operators in exchange for Federal grant funds place limitations on the operators' ability to control aircraft noise, including the enactment of aircraft curfews or bans.⁵² In United States v. County of Westchester,⁵³ the court struck down a 1981 County curfew banning all aircraft between the hours of 12:00 midnight and 7:00 a.m., regardless of noise emission level or degree of noise produced. The County enacted the curfew without supporting noise data and against the FAA's advice,⁵⁴ and was immediately challenged in court. The Court invalidated the curfew because it violated the County's grant assurance requirement to make its airport available for public use on fair and reasonable terms and without unjust discrimination.⁵⁵

In addition to the lack of factual support for the curfew, the court also found that “[a]s an alternative to imposing a curfew, there are a number of other means of mitigating and reducing noise from aircraft in and around an airport, including (1) use of reduced power on take-off and landing; (2) preferential runway systems; (3) imposition of noise-level restrictions; (4) altitude restrictions; and (5) designation of arrival and departure routes over less populated areas.”⁵⁶

The court found as well that the curfew had an adverse effect on corporate and business aircraft based at the Airport. According to the court, the curfew caused

economic harm, delays, disruption in business scheduling, reduced flexibility, and reduction in the corporations' ability to use aircraft as a business tool. These adverse effects pertain not only to large corporate aircraft owners, but to individual businessmen as well. Flights in and out of other airports are not an adequate substitute for the flexibility provided by business and corporate air flights in and out of the Airport.⁵⁷

⁵² See, e.g., United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983) (upholding the FAA's refusal to pay further grant monies to airport operator that imposed a curfew in violation of the grant assurances).

⁵³ 571 F. Supp. 786 (S.D.N.Y. 1983).

⁵⁴ Studies conducted before 1981 did not support the curfew. For example, a 1978 study concluded that an existing voluntary curfew was effective and that “any hard and fast rule would make an insignificant difference in cumulative community noise exposure.” 571 F. Supp. at 792. An earlier study had “rejected imposition of a nighttime curfew, and instead suggested several operational changes to minimize noise impact.” *Id.* The FAA had advised the County that the curfew was an “action of last resort” that was “appropriate only when all other noise reduction techniques have been found to be inadequate and after an appropriate public hearing process.” *Id.* at 793. At a meeting with the County, a representative of the FAA also suggested that “action on a nighttime curfew be tabled to allow time to further develop and implement less severe but potentially equally effective operational controls.” *Id.*

Nor was the curfew supported by studies conducted after its enactment. A study conducted in 1982 included a survey of community response to changes in nighttime noise exposure resulting from a temporary reinstatement of nighttime operations at the airport. The results of this survey showed that “the overall pattern of findings did not support an inference of substantial community reaction to the operational changes” at the airport. *Id.* at 794-95. In addition, FAA noise studies conducted after the curfew was enacted indicated that certain aircraft could operate at the airport at night without causing sleep interference. *Id.* at 795.

⁵⁵ The court ruled that because the County's curfew violated the grant assurances, the FAA had properly refused to pay further grant monies to the County. 571 F. Supp. at 798. The Court also held that the curfew adversely impacted the flow of interstate commerce and represented an unlawful police power regulation. 571 F. Supp. at 797-98.

⁵⁶ 571 F. Supp. at 796. The Court also found that “[t]he weight of the credible evidence presented at trial demonstrates that some aircraft can operate into and out of the Airport without producing noise levels which would interfere with the sleep of the residents in communities in the vicinity of the Airport.” *Id.*

⁵⁷ 571 F. Supp. at 797. While Westchester is qualified and distinguished in National Helicopter Corp. v. City of New York, 952 F. Supp. 1011, 1028 (S.D.N.Y. 1997), *aff'd*, 137 F.3d 81, 89-90 (2d Cir.1998), it is still relevant authority as cited in this Determination. The appellate court in National Helicopter stated that “[t]o the extent that [United States v.

C. The FAA Airport Compliance Program

The FAA ensures that airport owners comply with their Federal grant obligations through the FAA's Airport Compliance Program. The program is based on the contractual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

As a general rule, the FAA Compliance Program is designed to achieve voluntary compliance with Federal obligations. In addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable Federal obligations. FAA has to make a judgment of whether the airport sponsor is reasonably meeting the Federal obligations. FAA can also take into consideration any action or program the sponsor has taken or implemented or proposed action or program the sponsor intends to take, which in FAA's judgment, is adequate to reasonably carry out the obligations under the grant assurances.⁵⁸

Thus, the FAA can take into consideration reasonable corrective actions by the airport sponsor as measures to resolve alleged or potential violations of applicable Federal obligations, and as measures that could prevent recurrence of noncompliance and ensure compliance in the future.

D. Legal Responsibilities of the Federal Government

Responsibility for the oversight and implementation of aviation laws and programs is assigned to the FAA under the Federal Aviation Act of 1958 (FAA Act), as amended, 49 U.S.C. § 40101 et seq.

State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), and *Westchester* have stricken curfews for their failure to target the noisiest aircraft or the noisiest times of operation, they have since been overturned by our opinion in *Global International Airways v. Port Authority of New York and New Jersey*, 727 F.2d 246, 251 (2d Cir. 1984), 731 F.2d 127 (2d Cir. 1984), which permits proprietors to reduce cumulative noise levels, as opposed to only targeting peak noise levels or the noise level produced by an individual aircraft." *National Helicopter*, 137 F.3d at 90. According to the district court in *National Helicopter*, "[t]he better interpretation of *Westchester* -- the interpretation with continued vitality -- is that a proprietor's noise based regulations, of whatever type, must be reasonably formulated to ameliorate identified noise related problems. From this vantage, the *Westchester* holding was certainly correct. Because the county had no evidence either of unacceptable noise levels at its airport -- at night or during the day -- or of substantial benefits flowing from the enforcement of the curfew, the county could not proceed with that curfew." *National Helicopter Corp. v. City of New York*, 952 F. Supp. 1011, 1028 (S.D.N.Y. 1997). The *Westchester* curfew, banning all aircraft between the hours of 12:00 midnight and 7:00 a.m., was struck down not because it attempted to regulate cumulative noise levels, but because the County enacted the restriction without considering noise data, the restriction adversely impacted the flow of interstate commerce and represented an unlawful police power regulation, and it violated the County's grant assurance requirement to make its airport available for public use on fair and reasonable terms and without unjust discrimination.

⁵⁸ See FAA Order 5190.6A, Sec. 5-6.

The basic national policies intended to guide FAA actions under the FAA Act are set forth in 49 U.S.C. § 40101(d), which declares that certain matters are in the public interest.⁵⁹

To achieve these statutory purposes, 49 U.S.C. §§ 40103(b), 44502, and 44721 provide extensive and plenary authority to the FAA concerning use and management of the navigable airspace, air traffic control, and air navigation facilities. The FAA has exercised this authority by promulgating wide-ranging and comprehensive Federal regulations on the use of navigable airspace and air traffic control.⁶⁰ Similarly, the FAA has exercised its aviation safety authority, including the certification of airmen, aircraft, air carriers, air agencies, and airports under 49 U.S.C. § 44701 *et seq.* by extensive Federal regulatory action.⁶¹

The Federal government, through this exercise of its constitutional and statutory powers, has preempted the areas of airspace use and management, air traffic control and aviation safety. Under the legal doctrine of Federal preemption, which flows from the Supremacy Clause of the Constitution, state and local authorities do not generally have legal power to act in an area that already is subject to Federal regulation.

Since the late 1950s, noise from aircraft and airport operations has generated controversy with many surrounding communities and has emerged as a constraint on airport development. Although new technology is making aircraft quieter, at some airports growth in air traffic may achieve levels that offset the net reduction in overall noise levels.

Because of the increasing public concern about aircraft noise that accompanied the introduction of turbojet powered aircraft into commercial service in the 1960s, and the constraints such concern posed for the continuing development of civil aeronautics and the air transportation system of the United States, the Federal Government in 1968 sought--and Congress granted--broad authority to regulate aircraft for the purpose of noise abatement. This authority, codified at 49 U.S.C. § 44715, constitutes the basic authority for Federal regulation of aircraft noise.

Under section 44715, the FAA is required to consider whether a proposed aircraft noise rule is consistent with the highest degree of safety in air commerce and air transportation, economically reasonable, technologically practicable and appropriate for the particular type of aircraft.⁶² On November 18, 1969, the FAA promulgated the first aircraft noise regulations, which were codified at 14 C.F.R. Part 36.⁶³ The new Part 36 became effective on December 1, 1969, and prescribed noise standards for the type certification of subsonic transport category airplanes and for subsonic turbojet powered airplanes regardless of category.

⁵⁹ These include: (1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce; (2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements; developing civil aeronautics, including new aviation technology; (4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations; (5) consolidating research and development for air navigation facilities and the installation and operation of those facilities; and (6) developing and operating a common system of air traffic control and navigation for military and civil aircraft.

⁶⁰ See 14 C.F.R. Parts 71, 73, 77, 91, 93, 95, and 97.

⁶¹ See 14 C.F.R. Parts 21-43, 61-67, 91, 121 through 147.

⁶² 49 U.S.C. § 44715(b)(3), (4).

⁶³ 34 Fed. Reg. 18355 (1969).

Part 36 was initially applicable only to new types of aircraft. As soon as the technology had been demonstrated, the standard was to be extended to all newly manufactured aircraft of already certificated types. Ultimately, the preamble indicated, when technology was available the standard would be extended to aircraft already manufactured and in operation. This last step would require modification or replacement of all aircraft in the fleet that did not meet the Part 36 noise levels.

In 1973, the FAA amended Part 36 to extend the applicability of the noise standards to newly produced airplanes irrespective of type certification date.⁶⁴ In 1977, the FAA amended Part 36 again to provide for three stages of aircraft noise levels, each with specified limits. This regulation required applicants for new type certificates applied for on or after November 5, 1975, to comply with “Stage 3” noise limits, which were stricter than the noise limits then being applied. Airplanes in operation at the time that did not meet the Stage 3 noise limits were designated either as “Stage 2” or “Stage 1” airplanes. In 1976, the FAA amended the aircraft operating rules in 14 C.F.R. Part 91 to phase out operations in the United States by January 1, 1985, of so-called “Stage 1 aircraft” weighing more than 75,000 pounds. These aircraft were defined as civil subsonic aircraft that did not meet Stage 2 or 3 Part 36 noise standards.

In the Airport Noise and Capacity Act of 1990, as one of three elements in a national aviation noise policy, Congress directed the FAA to adopt regulations to provide for the phase-out of operations by January 1, 2000, of Stage 2 aircraft weighing more than 75,000 pounds. The regulations implementing this requirement were effective on September 25, 1991, and are codified at 14 C.F.R. Part 91, Subpart I. The regulations provided two options to meet the schedule for the transition to 100 percent Stage 3 operations in the contiguous United States by December 31, 1999. One option allowed an operator to meet the compliance schedule by phasing out Stage 2 airplanes. Under this option, an operator could operate no more than 75 percent of its Stage 2 base level after December 31, 1994, 50 percent after December 31, 1996, and 25 percent after December 31, 1998. The second option allowed an operator to meet the compliance schedule by attaining a fleet composition of not less than 55 percent Stage 3 airplanes after December 31, 1994, 65 percent after December 31, 1996, and 75 percent after December 31, 1998. New entrant operators (those that did not conduct operations on or before November 5, 1990) had to operate a fleet composed of at least 25 percent Stage 3 airplanes after December 31, 1994, 50 percent after December 31, 1996, and 75 percent after December 31, 1998. All operators were required to operate 100 percent Stage 3 fleets after December 31, 1999.

In addition to its regulatory authority over aircraft safety and noise, the FAA has long administered a program of Federal grants-in-aid for airport construction and development. By virtue of its decision-making on whether to fund particular projects, the FAA has been able, to a degree, to ensure that new airports or runways will be selected after evaluating environmental effects including noise impacts. That indirect authority was measurably strengthened when in 1970 the Airport and Airway Development Act expanded and revised the FAA's grant-in-aid program for airport development, and added environmental considerations to project approval criteria.⁶⁵

⁶⁴ 38 Fed. Reg. 29569 (1973).

⁶⁵ These criteria include consideration of whether the project is consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport.

The 1976 amendments to the 1970 Act increased funding levels and provided new authority to share in the costs of certain noise abatement activities, as part of a pilot program initiated under the 1976 Aviation Noise Abatement Policy.⁶⁶ In 1979, Congress enacted the ASNA, 49 U.S.C. § 47501 et seq., to support Federal efforts to reduce noise and to encourage development of compatible land uses around civil airports in the United States. This was done because residential development adjacent to an airport may greatly restrict the usefulness of Federal funding in aviation due to aircraft noise. In 1981, the FAA adopted 14 C.F.R. Part 150 to implement ASNA. Under ASNA, the FAA is authorized to provide grants to airport sponsors to fund voluntary preparation of noise exposure maps, comprehensive noise compatibility planning, soundproofing, land acquisition, and other projects to carry out noise compatibility programs. Noise compatibility programs are developed in consultation with surrounding communities and airport users. The airport must notify the public and afford an opportunity to comment at a public hearing.⁶⁷

The AAIA established the AIP and first made funds available for noise compatibility planning and to carry out noise compatibility programs authorized under ASNA. The AAIA has been amended several times, and provides the authority for the current Federal AIP program. Applications for airport development projects have consistently exceeded available funding, although the amounts available for obligation under the AIP have ranged from approximately \$450 million in Fiscal Year 1982 to a recent high of approximately \$3.6 billion in FY 2002.

In addition to the AIP program, the FAA is responsible for the Passenger Facility Charge (PFC) program, which also funds airport capital development projects and noise-related projects.⁶⁸ Together, these programs have, as of the year 2000, provided airports with about \$3 billion a year; Of that total, about \$284 million was targeted in fiscal year 1999 for projects to reduce airport-related noise or mitigate its effects.⁶⁹ Between 1982 and 2001, the agency committed over \$156 million of Airport Improvement Program funds for compatible land use, noise compatibility planning and noise mitigation projects in Florida.⁷⁰

In 1990, Congress established the basics of a National Aviation Noise Policy in ANCA, 49 U.S.C. § 47521.⁷¹ This Policy included several elements. The first was a program for transition to an all-

⁶⁶ FAA Exhibit 1, Item 35

⁶⁷ ASNA directed FAA to issue regulations which would (1) establish a single system of noise measurement to be uniformly applied in measuring noise at airports and in surrounding areas for which there is a highly reliable relationship between projected noise and surveyed reaction of people to noise; (2) establish a single system for determining the exposure of individuals to noise which results from the operations of an airport; and (3) identify land uses which are normally compatible with various exposures of individuals to noise.

⁶⁸ In 1990, Congress amended the Anti-Head Tax Act (codified within the Federal Aviation Act) to authorize FAA to approve collection and use of PFCs by public agencies. Public agencies that control commercial service airports may, subject to FAA approval, receive passenger facility charges collected from enplaning passengers using the airport, and use these charges for airport development or noise abatement projects. PFCs may be used, among other things, to finance remedial measures that would qualify for AIP funding if included in an approved airport noise compatibility program. The PFC program has assumed increasing importance in providing revenue for noise as well as capacity-enhancing projects.

⁶⁹ FAA Exhibit 1, Item 37

⁷⁰ FAA Exhibit 1, Item 38, Grant History Report, AIP Noise Projects for the State of Florida.

⁷¹ The Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. § 47521, et seq., required the phase out of Stage 2 civil subsonic turbojet aircraft over 75,000 pounds maximum gross takeoff weight, required a national noise policy to be implemented in consideration of local interests, and required a final rule establishing procedures for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft. The latter requirement was implemented by the FAA at 14 C.F.R. Part 161, and applies to new or amended

Stage 3 civil subsonic turbojet aircraft fleet. In 1991, pursuant to ANCA, the FAA amended Part 91 to establish a phased program to require operations by aircraft weighing more than 75,000 pounds to meet Stage 3 noise standards by the year 2000. This phase out requirement applied to all operators of large Stage 2 civil subsonic turbojet aircraft, not just air carriers, operating in the contiguous United States.

The second element was a national program for review of airport noise and access restrictions on operations by Stage 2 and Stage 3 aircraft.⁷² ANCA applies to restrictions affecting operations by any Stage 2 aircraft⁷³ proposed after October 1, 1990, and to restrictions affecting operations by any Stage 3 aircraft if the restriction was not in effect before October 1, 1990. In 1991, as a companion rulemaking to the Part 91 amendment, the FAA adopted Part 161 to implement the requirements under ANCA relating to airport restrictions.

E. The Airport Noise Compatibility Planning Program

In ASNA, Congress directed the FAA to: (1) establish a single system of noise measurement to be uniformly applied in measuring noise at airports and in surrounding areas for which there is a highly reliable relationship between projected noise and surveyed reactions of people to noise; (2) establish a single system for determining the exposure of individuals to noise from airport operations; and (3) identify land uses that are normally compatible with various exposures of individuals to noise.⁷⁴ As stated above, the FAA adopted 14 C.F.R. Part 150 to implement ASNA.

Part 150 established the “day-night average sound level” (DNL) as the noise metric for determining the exposure of individuals to airport noise, and identified residential land use as being normally compatible with noise levels below DNL 65 dB.⁷⁵

noise and access restrictions that affect Stage 2 and Stage 3 aircraft operations. See 49 U.S.C. § 47524(b) and (c); 14 C.F.R. § 161.3(a). Under ANCA, before a restriction that affects Stage 2 aircraft may be found to be in compliance with ANCA by FAA, the airport sponsor proposing it must comply with Subpart C of Part 161. The requirements for a Stage 2 restriction proposal include an extensive consultation and notice process and a study of the proposal and alternatives in a cost-benefit analysis. Either Subpart B or D of Part 161 must be satisfied if the restriction affects Stage 3 aircraft. This includes, for Subpart D, Federal approval of the restriction proposal and completion of any required environmental analysis. The FAA reviews a Stage 2 restriction proposal to determine if the requirements of the analysis and consultation processes were satisfied, for purposes of compliance with ANCA. The FAA is not required to approve the Stage 2 restriction under Part 161; it must approve a Stage 3 restriction before it can be imposed. The penalty for violation of Part 161 is rescission of Federal grants-in-aid and authority to collect passenger facility charges.

⁷² The final element of the national noise policy was the provision of another source of funds eligibility (the PFC program) conditioned upon compliance with the national program for review of airport noise and access restrictions on Stage 2 or Stage 3 aircraft.

⁷³ As directed by ANCA, section 47525, the FAA concluded after careful study that Part 161 should cover operations by all Stage 2 aircraft, including those weighing less than 75,000 pounds that are not subject to the phase out requirement. ANCA, as implemented by Part 161, provides that airports must give 180 days notice and an opportunity for public comment on a cost-benefit analysis concerning proposals to restrict operations by Stage 2 aircraft. Proposals to restrict operations by Stage 3 aircraft must (1) be agreed upon by the airport and all users at the airport or (2) meet specific requirements and be approved by FAA.

⁷⁴ 49 U.S.C. § 47502.

⁷⁵ 14 C.F.R. § 150.9(b); *id.*, App. A, Table 1. DNL is an energy-averaged A-weighted sound level measured over a 24-hour period. The Federal Interagency Committee on Noise (FICON)—which included representatives from the FAA; EPA; the Departments of Defense, Housing and Urban Development, Veterans Affairs, and Justice; and the Council on Environmental Quality—recommended the continued use of DNL “as the principal means for describing long-term noise exposure for civil and military aircraft operations.” FAA Exhibit 1, Item 21, “Federal Agency Review of Selected

ASNA also provided for Federal funding and other incentives for airport operators to voluntarily prepare noise exposure maps and noise compatibility programs.⁷⁶ Under ASNA, noise compatibility programs “shall state the measures the [airport] operator has taken or proposes to take to reduce existing noncompatible uses and prevent introducing additional noncompatible uses in the area covered by the [noise exposure] map” submitted by the airport operator.⁷⁷

Consistent with ASNA, Part 150 requires airport operators preparing noise compatibility programs to analyze the following alternative measures: (1) acquisition of land and interests therein, including but not limited to air rights, easements, and development rights; (2) construction of barriers and acoustical shielding, including the soundproofing of public buildings; (3) implementation of a preferential runway system; (4) use of flight procedures to control the operation of aircraft to reduce exposure of individuals or specific noise sensitive areas to noise in the area around the airport; (5) implementation of restrictions on the use of the airport by type or class of aircraft based on the noise characteristics of the aircraft; (6) other actions or combinations of actions which would have a beneficial noise control or abatement impact on the public; and (7) other actions recommended for analysis by the FAA for the specific airport.⁷⁸

Under Part 150, an airport operator “shall evaluate the several alternative noise control actions” and develop a noise compatibility program that: (1) reduces existing noncompatible uses and prevents or reduces the probability of the establishment of additional noncompatible uses; (2) does not impose an undue burden on interstate and foreign commerce; (3) provides for revision as necessary; (4) is not unjustly discriminatory; (5) does not derogate safety or adversely affect the safe and efficient use of airspace; (6) to the extent practicable, meets both local needs and needs of the national air transportation system; and (7) can be implemented in a manner consistent with all of the powers and duties of the Administrator of the FAA.⁷⁹

Airport Noise Analysis Issues” (FICON, 1992) p.3-1. In support of this recommendation, FICON noted that “no other metrics are of sufficient scientific standing to replace DNL,” and DNL “continues to be the superior metric to account for variations in the noise environment” *Id.* The FAA’s identification of residential land use as compatible with noise levels below DNL 65 dB (see 14 C.F.R. Part 150, App. A, Table 1) is based on studies of noise-induced annoyance and is consistent with land-use compatibility recommendations of the Federal Interagency Committee on Urban Noise (FICUN), which consisted of representatives from EPA; the Veterans Administration; and the Departments of Transportation, Housing and Urban Development, and Defense. 46 Fed. Reg. 8316, 8325 (1981) (preamble to Part 150 interim rule); “Guidelines for Considering Noise in Land Use Planning and Control” (FICUN, 1980) at Table 2. For the purpose of compliance with Part 150, all land uses are considered to be compatible with noise levels below DNL 65 dB. 14 C.F.R. App. A, § A150.101(d). Although “[l]ocal needs or values may dictate further delineation,” such delineation must be “based on local requirements or determinations.” *Id.*

With respect to airport noise and access restrictions, although airport operators have flexibility in defining the “airport noise study area” (ANSA) for purposes of the analysis required by 14 C.F.R. Part 161, extension of the ANSA outside the DNL 65 dB contour must be justified by “reasonable circumstances.” See FAA Exhibit 1, Item 3, Notice and Approval of Airport Noise and Access Restrictions, Final Rule, 14 C.F.R. Part 161, Federal Register Notice, September 25, 1991, 56 Fed. Reg. 48661, 48669-70 (preamble to Part 161 final rule). As the FAA has stated in correspondence with the NAA, “no airport access restriction has previously been approved based solely on the existence of residential areas outside the DNL 65 dB contour.” FAA Exhibit 1, Item 19 (h), p.2.

⁷⁶ 49 U.S.C. §§ 47503-47505.

⁷⁷ 49 U.S.C. § 47504(a)(2).

⁷⁸ 14 C.F.R. Part 150, App. B, § B150.7(b)

⁷⁹ 14 C.F.R. Part 150, App. B, § B150.5

As a matter of policy, FAA encourages airport proprietors to implement airport noise compatibility programs under Part 150.⁸⁰ Where an airport proprietor is considering an airport use restriction, Part 150 provides an effective process for determining whether the proposed restriction is consistent with applicable legal requirements, including the grant assurances in airport development grants. As recognized by the FAA in the preamble to the Part 150 final rule:

[T]he ASNA Act and Part 150 set forth an appropriate means of defining the noise problem, determining the wide range of affected interests, ensuring broad public and aeronautical participation, and, finally, balancing all of these interests in a manner that is needed to assure a reasonable, nonarbitrary, and nondiscriminatory result that is consistent with the airport proprietor's broad duties under the constitution and its specific duties under applicable airport development grants.⁸¹

Accordingly, the FAA included in Part 161 an option to use the Part 150 process to provide public notice and opportunity to comment on a proposed Stage 2 restriction.⁸² In the proposed Part 161 rule, the FAA encouraged the use of Part 150 for meeting the notice and comment requirements of Part 161, noting that the Part 150 process "is more comprehensive in scope in that it includes compatible land use planning, as well as restrictions on aircraft operation."⁸³ The FAA further noted, in the preamble to the Part 161 final rule, that a Part 150 determination "may provide valuable insight to the airport operator regarding the proposed restriction's consistency with existing laws, and the position of the FAA with respect to the restriction."⁸⁴

V. ISSUES UNDER INVESTIGATION

The issues under investigation are:

- Whether the NAA has a proprietary interest in reducing noise from aircraft using the airport, such that the Stage 2 ban is not preempted by Federal law.
- Whether the NAA's ban on Stage 2 aircraft is consistent with its statutory and contractual obligation to make its airport available for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities.
- Whether the NAA's ban is consistent with its statutory and contractual prohibition from granting or permitting any person, firm, or corporation, either directly or indirectly, the exclusive right at the airport to conduct any aeronautical activities.⁸⁵

⁸⁰ See, e.g., Advisory Circular 150/5020-1, "Noise Control and Compatibility Planning for Airports" (1983), ¶ 1.

⁸¹ 49 Fed. Reg. 49260, 49263-64 (1984).

⁸² 14 C.F.R. § 161.211.

⁸³ 56 Fed. Reg. 8644, 8650 (February 28, 1991).

⁸⁴ 56 Fed. Reg. 48681(1991). See also FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, 43802, 43809 (2000) "the FAA encourages [airport proprietors proposing noise and access restrictions] to integrate the required Part 161 analysis into a Part 150 planning process which first analyzes nonrestrictive measures to mitigate noise, and then analyzes the proposed restriction".

⁸⁵ The FAA has decided that it is not necessary to reach this issue in this proceeding.

VI. ANALYSIS AND DISCUSSION

A. The Relationship Between ANCA And Grant Assurances

In its Reply, the NAA asserts that the Stage 2 ban “is not subject to the grant assurance requirements identified in the Notice of Investigation, including the requirement to provide public access to the Airport on reasonable terms and without unjust discrimination.”⁸⁶ The basis for this assertion appears to be the NAA’s contention that Congress, in 49 U.S.C. § 47524, granted airport proprietors the “express right” to ban Stage 2 aircraft,⁸⁷ thus superseding other Federal law, including the statutory grant assurance requirements in 49 U.S.C. § 47107(a). This argument is without merit. As explained below, the language and legislative history of ANCA show that Congress intended to preserve, and add to, preexisting law relating to local noise and access restrictions on Stage 2 aircraft, including the applicable grant assurance requirements in section 47107(a). Moreover, the NAA’s interpretation of ANCA would lead to absurd results.

Under well-established legal principles, the first inquiry in interpreting a statute is whether Congress has “directly spoken” on the subject at issue. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” Id. at 843 n.9.⁸⁸ If congressional intent is not clear, an agency may “fill[] the statutory gap ‘in a way that is reasonable in light of the legislature’s revealed design.’” Lopez v. Davis, 531 U.S. 230, 242 (2001). An interpretation of a statute by the agency charged with administering it will be accorded deference, provided the interpretation is “based on a permissible construction of the statute.” Yellow Transportation, Inc. v. Michigan, 123 S. Ct. 371, 377 (2002) (quoting Chevron, *supra*, 467 U.S. at 843). See also Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 466 (D.C. Cir. 1998) (where Congress is silent or ambiguous on an issue, an agency’s interpretation need only be “reasonable in light of the [statute’s] text, legislative history, and purpose”).

In ANCA, Congress directed the FAA to “establish[] by regulation a national program for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft.”⁸⁹ The FAA promulgated 14 C.F.R. Part 161 to implement this statutory requirement. In the Part 161 rulemaking, the FAA interpreted section 9304(h) of ANCA, codified as amended at 49 U.S.C. § 47533⁹⁰, as preserving the preexisting grant assurance requirements in 49 U.S.C. § 47107(a), which include the requirement that before approving a grant application for an airport development project the Secretary of Transportation must receive satisfactory written assurance that the airport

⁸⁶ FAA Exhibit 1, Item 2, p. 11.

⁸⁷ FAA Exhibit 1, Item 2, p. 6.

⁸⁸ In Chevron, the Supreme Court examined both the language and legislative history of the Clean Air Act to determine congressional intent. Id. at 845.

⁸⁹ 49 U.S.C. § 47524(a).

⁹⁰ As originally enacted, section 9304(h) stated, in pertinent part, that “[e]xcept 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 . . . existing law with respect to airport noise or access restrictions by local authorities Pub. L. No. 101-508, § 9304(h), 104 Stat. 1388-382 (1990). When Congress recodified Title 49 of the United States Code in 1994, this provision was revised to read as follows: “Except as provided by section 47524 of this title, this subchapter does not affect . . . law in effect on November 5, 1990, on airport noise or access restrictions by local authorities” 49 U.S.C. § 47533. Congress made clear that it did not intend this revision to have any substantive effect. See Pub. L. No. 103-272, § 6, 108 Stat. 1378-79 (1994).

“will be available for public use on reasonable conditions and without unjust discrimination.”⁹¹ In the preamble to the proposed rule, for example, the FAA stated that “the FAA’s determination that an airport operator or public agency was imposing a noise or access restriction in violation of [Part 161] would be separate from any finding of a violation of the grant assurances required under the Airport and Airway Improvement Act (AAIA).”⁹² The FAA further explained its interpretation of ANCA on this issue in the preamble to the final rule:

[ANCA] in no way grants airport operators any authority they did not have prior to the Act. Under section 9304(h), 49 U.S.C. App. 2351(h), preexisting legal limitations on airport operators’ authority are not affected except as required by applying the terms of section 9304. The courts have consistently recognized FAA’s legal authority to challenge airport noise and access restrictions that are discriminatory, unreasonable, or impose an undue burden on interstate commerce. This authority is expressly preserved and recognized by the Act.⁹³

The FAA’s interpretation gives effect to the intent of Congress in enacting ANCA, as discussed below.

1. Congressional Intent Regarding Preservation Of Preexisting Law Relating To Airport Noise And Access Restrictions On Operations By Stage 2 Aircraft

Congress has directly spoken to the issue of the effect of ANCA on preexisting law relating to local noise and access restrictions. Section 47533 of the statute includes the following “savings” provision:

Except as provided by section 47524 of this title, this subchapter does not affect—
(1) law in effect on November 5, 1990, on airport noise or access restrictions by local authorities⁹⁴

⁹¹ 49 U.S.C. § 47107(a)(1). This requirement is implemented through Grant Assurance 22.

⁹² 56 Fed. Reg. 8644, 8655-56 (1991).

⁹³ Id. at 48662. See also id. at 8647 (“Determinations and actions by the Administrator under [part 161] would not constitute determinations or actions with respect to an airport’s compliance status under specific grant agreements, or preclude the Administrator from responding to complaints involving grant compliance.”); id. at 8649 (ANCA “maintains the existing authority (*and limitations thereon*) and discretion of airport operators to restrict the operation of Stage 2 aircraft.”) (emphasis added); id. at 8650 (FAA solicitation of public comment on whether an airport proposing a restriction on Stage 2 aircraft operations should be required to explain explicitly why the restriction is not unreasonable, arbitrary, or discriminatory; an undue burden on interstate or foreign commerce; or an undue burden on the national aviation system, “since these are among the grounds for FAA legal action”). Also pertinent in this regard is a letter dated April 1, 1991, from James Busey, Administrator of the FAA, to Senator Frank Lautenberg in which Mr. Busey stated that “except for the specific responsibilities imposed on airport proprietors by [ANCA], that legislation did not change previous substantive legal requirements affecting the authority of airport proprietors to limit Stage 2 aircraft operations to control noise.” 138 Cong. Rec. S5880 (April 30, 1992). Mr. Busey’s letter also made specific reference to continuing grant obligations, stating that “[t]hese obligations are imposed pursuant to applicable airport grant legislation and are an important aspect of the limitations on an airport sponsor’s authority to control airport access.” Id. The FAA reiterated its interpretation of 49 U.S.C. 47533 in its Proposed Aviation Noise Abatement Policy 2000, 43802, 43814, 43817-18. See FAA Exhibit 1, Item 40.

⁹⁴ 49 U.S.C. § 47533.

The “law in effect on November 5, 1990, on airport noise or access restrictions by local authorities” included the grant assurance requirements in 49 U.S.C. § 47107(a)(1).⁹⁵ For Stage 2 aircraft, these grant assurance requirements are still the primary substantive statutory requirements governing access to Federally-funded public-use airports.⁹⁶ Section 47533(1) expressly preserves such preexisting law “[e]xcept as provided by section 47524.” With respect to noise or access restrictions on operations by Stage 2 aircraft, section 47524 establishes requirements relating to public notice, opportunity for comment, and analysis prior to the effective date of a restriction. Section 47524 adds to, but does not otherwise affect, preexisting law, including the applicable grant assurance requirements in 49 U.S.C. § 47107(a). Indeed, as discussed below, these statutory provisions must be harmonized so as to give full effect to both.⁹⁷

Congressional intent on this issue is also reflected in one of ANCA’s primary purposes: preventing the uncontrolled proliferation of local airport noise and access restrictions that could impede the national air transportation system.⁹⁸ Interpreting the statute as allowing a restriction on Stage 2 aircraft weighing 75,000 pounds or less, regardless of the reasonableness of the restriction or its compliance with other Federal law, is inconsistent with this purpose. It simply defies logic to assume that despite Congress’ stated concern with “uncoordinated and inconsistent” restrictions on aircraft,⁹⁹ ANCA was intended to remove preexisting legal requirements governing such restrictions.¹⁰⁰

The legislative history of ANCA, though sparse, provides further evidence of congressional intent on this issue. ANCA was included as Subtitle D to Title IX of the Omnibus Budget Reconciliation Act of 1990.¹⁰¹ The provisions of ANCA governing review of noise and access restrictions originated in the Senate, which amended them onto the House bill, H.R. 5835, on October 18, 1990.¹⁰² Under the House bill as amended by the Senate, FAA approval was required both for restrictions on Stage 3 aircraft and for restrictions on Stage 2 aircraft weighing less than 75,000 pounds.¹⁰³ Section 3202(h) of the bill contained a “savings” clause providing that “[e]xcept to the extent required by the application of the provisions of this section, nothing in this Act shall be

⁹⁵ These grant assurances were originally enacted in 1982. Pub. L. No. 97-248, § 511(a)(1), 96 Stat. 686 (1982).

⁹⁶ The requirements in ANCA relating to local noise and access restrictions on operations by Stage 3 aircraft incorporate the applicable grant assurance requirements. See 49 U.S.C. § 47524(c)(2).

⁹⁷ The text of section 9304(h) of ANCA as enacted, the predecessor to 49 U.S.C. § 47533(1), compels the same conclusion. Section 9304(h) provided:

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 . . . existing law with respect to airport noise or access restrictions by local authorities

¹⁰⁴ Stat. 1388-382 (1990). Section 9304 also contained the new requirements for Stage 2 restrictions that were recodified in 49 U.S.C. § 47524. Nothing in section 9304 or its application required that the provisions of ANCA relating to Stage 2 restrictions be deemed to supersede the grant assurance requirements in 49 U.S.C. § 47107(a).

⁹⁸ See 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”).

⁹⁹ See *id.*

¹⁰⁰ The FAA recognizes that ANCA effectively supersedes preexisting requirements relating to noise and access restrictions on Stage 3 aircraft, in the sense that these requirements are incorporated into the six conditions for FAA approval in 49 U.S.C. § 47524(c)(2). This is entirely consistent with Congress’ stated concern in 49 U.S.C. § 47521(2), as it does not remove any preexisting requirements applicable to noise or access restrictions on Stage 3 aircraft.

¹⁰¹ Pub. L. No. 101-508, Title IX, Subtitle D, 104 Stat. 1388-378 (1990).

¹⁰² See 136 Cong. Rec. S15868 (Oct. 18, 1990).

¹⁰³ See *id.* at S15875 (§ 3202(b) of the H.R. 5835, as amended by the Senate).

deemed to eliminate or supersede existing law with respect to restrictions by local authorities on operation of *Stage 2 aircraft*.”¹⁰⁴ The exception in this savings clause could only have applied to the provision in section 3202 of H.R. 5835 that would have required FAA approval prior to implementation of restrictions on Stage 2 aircraft weighing less than 75,000 pounds, because application of this provision effectively would have superseded any other subsequent FAA review of such restrictions under existing law, including review under the grant assurance requirements in 49 USC 47107(a). Conversely, the savings clause made clear that Congress did not intend to limit the application of existing law to restrictions on other Stage 2 aircraft (i.e., those weighing 75,000 pounds or more). The Conference Committee subsequently removed the requirement for FAA approval of restrictions on lighter Stage 2 aircraft, and directed the Secretary of Transportation to determine by study how to handle such restrictions for purposes of ANCA.¹⁰⁵ Because this left only restrictions on Stage 3 aircraft subject to FAA approval under ANCA, the “savings” provision in section 9304(h) was revised accordingly.¹⁰⁶

In sum, the legislative history of ANCA shows that Congress intended to preserve all preexisting law relating to airport noise or access restrictions for which ANCA does not require FAA approval. This makes perfect sense because the conditions for such approval incorporate existing law,

¹⁰⁴ Id. (emphasis added).

¹⁰⁵ 136 Cong. Rec. H12534-35 (Oct. 26, 1990).

¹⁰⁶ During the Senate debate on the Conference Report, the following colloquy occurred between Senator Lautenberg and Senator Ford, chairman of the Aviation Subcommittee:

Mr. LAUTENBERG. With regard to the modified proposal, I ask the Senator from Kentucky if he would confirm these points to be true:

* * *

Second, that, under this proposal, an airport operator would be allowed to impose restrictions on Stage 2 operations, without the approval of the FAA, and without risking the loss of AIP money.

* * *

Mr. FORD. The Senator is correct on each of those points.

136 Cong. Rec. S17543 (Oct. 27, 1990). Counsel for the NAA, in a recent article, argued that this brief excerpt from the floor debate shows congressional intent to supersede the grant assurance requirements applicable to restrictions on Stage 2 aircraft operations. *The Air & Space Lawyer*, Spring 2002, p. 17. The fallacy of NAA counsel’s conclusion becomes clear when the quoted exchange is read in the larger context of the legislative history of ANCA. In prefacing his questions to Senator Ford, Senator Lautenberg noted that he had “opposed the original aviation noise policy proposal” because it would “preempt the accomplishments we’ve made, or efforts we are making” in dealing with aircraft noise in New Jersey. 136 Cong. Rec. S17543 (Oct. 27, 1990) (remarks of Sen. Lautenberg). Senator Lautenberg had earlier explained his opposition during the Senate debate on the original Senate bill, when he complained that the bill “prejudges the outcome; it says that it should be national policy to preempt local controls, even in the absence of any real Federal controls. And it says that if an airport is not willing to play ball, it is not going to get Federal funding.” 136 Cong. Rec. S15818 (Oct. 18, 1990). These comments by Senator Lautenberg were directed at the original Senate bill, under which restrictions on Stage 3 aircraft would have been prohibited and restrictions on other aircraft would have required FAA approval. S. 3209 (as placed in the Senate), § 3202. Failure to comply with these requirements would have rendered an airport ineligible for AIP grants. Id., § 3205. Read in this context, the above-quoted question to Senator Ford simply reflected Senator Lautenberg’s desire to confirm that his previously-mentioned concerns with the original Senate bill had been addressed in the final bill agreed to by the conference committee. Because the bill had been amended to remove the requirement for FAA approval of Stage 2 restrictions, and the associated sanction of loss of AIP funding for failure to obtain such approval, Senator Ford was able to respond to Senator Lautenberg’s question in the affirmative. Thus, correctly understood, this excerpt from ANCA’s legislative history supports the FAA’s interpretation of 49 U.S.C. § 47533(1).

including the grant assurance requirements in 49 USC 47107(a).¹⁰⁷ Since the FAA, under 49 U.S.C. § 47525, decided to treat restrictions on Stage 2 aircraft weighing not more than 75,000 pounds the same as restrictions on heavier Stage 2 aircraft,¹⁰⁸ all preexisting law relating to such restrictions continues to apply.

In order for the provisions of ANCA relating to Stage 2 restrictions to supersede the otherwise applicable grant assurance requirements in 49 U.S.C. § 47107(a), as the NAA asserts, the former statute would have to be read as repealing the latter by implication. The U.S. Supreme Court has established a “cardinal rule . . . that repeals by implication are not favored.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 189 (1978). The Supreme Court has held, “in no uncertain terms,” that legislative intent to repeal must be “clear and manifest.” *Id.* “In practical terms, this ‘cardinal rule’ means that ‘[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.’” *Id.* at 190. Indeed, it is a long-standing principle of statutory construction that “[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible” United States v. Borden Co., 308 U.S. 188, 198 (1939).

Nothing in ANCA or its legislative history demonstrates “clear and manifest” legislative intent to repeal or limit the application of any of the statutory grant assurances with respect to noise or access restrictions on Stage 2 aircraft. To the contrary, as discussed above, the language and legislative history of ANCA make clear that Congress intended to preserve all preexisting law, including the applicable grant assurance requirements in 49 U.S.C. § 47107(a), relating to noise and access restrictions on Stage 2 aircraft.

Nor is there anything in the provisions of ANCA relating to noise and access restrictions on Stage 2 aircraft that is irreconcilable with the statutory grant assurance requirements in section 47107(a). These statutes can be harmonized by interpreting ANCA to establish the procedural steps necessary for implementing a restriction on operations by Stage 2 aircraft, while leaving the substantive requirements under the grants in place. Indeed, the procedural requirements of ANCA relating to Stage 2 restrictions complement the substantive obligations under the grant assurances in that the analysis and public comments generated during the ANCA process provide valuable information that can be considered by the FAA in determining grant compliance.¹⁰⁹ This interpretation is

¹⁰⁷ Under the House bill (H.R. 5835), FAA approval of both restrictions on Stage 3 aircraft and restrictions on Stage 2 aircraft under 75,000 pounds was subject to the same conditions as FAA approval of Stage 3 restrictions under ANCA as enacted. See 49 U.S.C. § 47524(c)(2).

¹⁰⁸ In section 9305 of ANCA (recodified at 49 U.S.C. § 47525), Congress directed the FAA to determine by a study the applicability of subsections (a), (b), (c), and (d) of section 9304 of the Act (recodified at 49 U.S.C. § 47524).

¹⁰⁹ In the preamble to the final Part 161 rule, for example, the FAA noted that for restrictions on Stage 2 operations ANCA “only requires that airports provide for notice and comment, and does not mandate an evaluation of, or response to, the comments. However, . . . the FAA will consider these commenters’ opinions in determining whether to consider action against a restriction that is alleged to be unreasonable, an undue burden, or discriminatory.” 56 Fed. Reg. 48,661, 48,678 (Sept. 25, 1991).

This works differently in the context of operations by Stage 3 aircraft, where in order to apply the requirements of ANCA, which duplicate the existing criteria under ASNA and other federal laws as part of FAA approval, ANCA does supersede or replace existing law, including the identical requirements under grant assurances. Thus, once the FAA approves a restriction on Stage 3 operations, there is no further AIP grant review.

consistent with the FAA's pre-ANCA policy of encouraging airport proprietors to conduct studies under, or like those under, 14 C.F.R. Part 150 to support airport use restrictions.¹¹⁰

2. Implications Of The NAA's Argument

As further evidence that Congress did not intend ANCA to supersede existing Federal review of Stage 2 access restrictions under the grant assurances in section 47107(a), we note that it would be nonsensical to conclude that Congress or the FAA intended to make it more difficult to restrict access by non-Stage, Stage 1, and Stage 3 aircraft than it would be to restrict Stage 2 aircraft. Moreover, the NAA's argument that Congress eliminated Federal review of Stage 2 restrictions, together with the NAA's argument in NBAA v. NAA that restrictions on Stage 2 aircraft are not preempted and cannot have an undue burden on interstate or foreign commerce,¹¹¹ would give airport proprietors unfettered discretion to adopt unreasonable or unjustly discriminatory restrictions on operations of Stage 2 aircraft under 75,000 pounds.

There is no support whatsoever for the argument that Congress intended to give airport sponsors limitless authority to impose restrictions on operations by Stage 2 aircraft that are unreasonable, unjustly discriminatory, or impose an undue burden on interstate or foreign commerce, without regard to the effect on the national aviation system, the public interest, or the federal investment in the restricted facilities. Furthermore, such an argument would be inconsistent with the FAA's rationale in deciding that the Stage 2 requirements of ANCA should apply to Stage 2 aircraft weighing less than 75,000 pounds.¹¹² In making this determination, the FAA considered, among other options: (1) excluding restrictions on these lighter Stage 2 aircraft from 14 C.F.R. Part 161; and (2) subjecting these restrictions to the same requirements as restrictions on Stage 3 aircraft. Noting that "[e]xclusion from the regulatory protections would have the effect of placing [Stage 2 aircraft] in the same position as Stage 1 aircraft," the FAA concluded that it would be inappropriate to "give aircraft of less than 75,000 pounds *less* protection than larger aircraft against local restrictions."¹¹³ Thus, the FAA clearly understood that making ANCA applicable to restrictions on lighter Stage 2 aircraft would provide operators of these aircraft *more* protection than operators of Stage 1 aircraft, which were not subject to ANCA but were subject to other Federal law, including grant assurance requirements under 49 U.S.C. § 47107(a). Under the NAA's position, restrictions on lighter Stage 2 aircraft would be exempt from Federal requirements relating to reasonableness, unjust discrimination, and undue burdens on interstate and foreign commerce, which would be inconsistent with the FAA's reasoning in implementing the requirements of 49 U.S.C. § 47525.

¹¹⁰ See 49 Fed. Reg. 49260, 49263 (1984) ("[t]he FAA . . . views Part 150, or a process similar to it (whether or not the process is approved by the FAA), as setting forth the kind of rational decision-making procedure that is appropriate to meet the test of reasonableness . . ."); Aviation Noise Abatement Policy (1976), p. 59 ("notification of a proprietary use restriction should occur after and be accompanied by a detailed description of the alternative noise reduction techniques the proprietor has considered and the reasons supporting the adoption of the restriction in question instead of any other alternatives"). See also U.S. v. County of Westchester, 571 F.Supp. 786 (S.D.N.Y. 1983) (finding a nighttime curfew unlawful based on lack of supporting analysis).

¹¹¹ See Memorandum in Support of Defendant's Motion for Summary Judgment in NBAA v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d.

¹¹² In section 9305 of ANCA (recodified at 49 U.S.C. § 47525), Congress directed the FAA to determine by a study the applicability of subsections (a), (b), (c), and (d) of section 9304 of the Act.

¹¹³ Study of the Application of Notice and Analysis Requirements to Operating Noise/Access Restrictions on Subsonic Jets Under 75,000 Pounds (FAA Office of Environment and Energy, 1991), p. 11 (emphasis in original).

Under the NAA’s position, the Stage 2 requirements in ANCA would also supersede 49 U.S.C. § 41713(b) to the extent that this provision is applicable to restrictions on operations of Stage 2 aircraft weighing not more than 75,000 pounds. Section 41713(b) generally preempts States and their political subdivisions from implementing requirements related to prices, routes, or services of air carriers that may provide air transportation. Congress provided an exception, however, for airport operators “carrying out [their] proprietary powers and rights.”¹¹⁴ This exception to preemption would be superseded under the NAA’s interpretation of ANCA, since Stage 2 restrictions would not be preempted in the first place. There is no evidence in ANCA or its legislative history that Congress intended such an implied repeal of Section 41713(b).¹¹⁵

3. The FAA’s Reservation Of Issues Relating To Grant Compliance In Its Determination Regarding The NAA’s Compliance With Part 161

During the process of reviewing the NAA’s compliance with Part 161, the FAA identified issues of concern relating to the lawfulness of the Stage 2 ban under the NAA’s grant assurances and repeatedly reminded the NAA that compliance with Part 161 would not assure compliance with the grant assurances.¹¹⁶ Although the FAA urged the NAA to address the FAA’s compliance concerns in conjunction with the conduct of its Part 161 Supplemental Analysis,¹¹⁷ the NAA failed to do so. Accordingly, the FAA did not make any judgment as to the reasonableness of the NAA’s decision to implement the Stage 2 ban when it determined that NAA’s Part 161 Supplemental Analysis “responds to the Part 161 consultation, notice and analysis requirements of Subpart C of that part.”¹¹⁸ Indeed, the FAA letter conveying the Part 161 determination contained a clear proviso on the FAA’s continuing concern with the reasonableness of the ban under the grant assurances. In the letter, for example, the FAA specifically advised the NAA that the ANCA requirements were “largely procedural” and that compliance with provisions of ANCA and Part 161 does not assure the NAA that the proposed Stage 2 ban complies with other Federal law.¹¹⁹

¹¹⁴ 49 U.S.C. § 41713(b)(3).

¹¹⁵ See also 49 U.S.C. §§ 47101(a)(9) (stating the “policy of the United States” that “artificial restrictions on airport capacity . . . should not discriminate unjustly between categories and classes of aircraft”) and 47101(d) (“Each airport and airway program should be carried out consistently with section 40101(a), (b), (d), and (f) of this title to . . . prevent unjust and discriminatory practices, including as the practices may be applied between categories and classes of aircraft.”) Prior to the 1994 recodification of Title 49 of the U.S. Code in Pub. L. No. 103-272, the Airport and Airway Improvement Act of 1982, as amended, provided that “all airport and airway programs should be administered in a manner consistent with the provisions of sections 102 and 103 of the Federal Aviation Act of 1958, with due regard for the goal[] expressed therein of . . . preventing unjust and discriminatory practices, *including as they may be applied between category and class of aircraft*” and that “artificial restrictions on airport capacity are not in the public interest . . . and should not unjustly discriminate between categories and classes of aircraft . . .” 49 U.S.C. App. § 2201(a)(5), (13) (Supp. II 1991) (emphasis added). The italicized language was added in the Aviation Safety and Capacity Expansion Act of 1990, which was enacted as a subtitle of the same title of the Omnibus Budget Reconciliation Act of 1990 that included ANCA. See Pub. L. No. 101-508, Title IX, Subtitle V, 104 Stat. 1388, 1388-353 (1990). In explaining this language, the House Committee on Public Works and Transportation stated that it “make[s] clear that it is Congress’ intent that unjust and discriminatory practices are prohibited with respect to all classes of users and that the prohibition is particularly meant to protect the rights of small aircraft users.” H.R. Rep. No. 101-581, at 23 (1990).

¹¹⁶ FAA Exhibit 1, Item 19(h), (i), (j)

¹¹⁷ See FAA Exhibit 1, Item 19 (c), (e), (f), (h), (i), and (j).

¹¹⁸ FAA Exhibit 1, Item 1(b), Letter from Mr. Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, and topical comments, October 31, 2001.

¹¹⁹ Id.

B. Effect Of National Business Aviation Association (NBAA) v. City of Naples Airport Authority, 162 F.Supp.2d 1343 (M.D. Fla. 2001)

In its Reply to the FAA's Notice of Investigation, the NAA argues that because "the FAA is subject to the doctrines of res judicata, collateral estoppel, issue preclusion, and comity," the agency "is precluded from addressing most or all of the issues raised in the Notice of Investigation" as a result of National Business Aircraft Association v. City of Naples Airport Authority, 162 F.Supp.2d 1343 (M.D. Fla. 2001). In this case, the National Business Aviation Association (NBAA) alleged that the NAA's efforts to ban Stage 2 aircraft from operating at the Naples Airport violated the Commerce Clause and the Supremacy Clause of the United States Constitution. The court concluded that NBAA failed to raise a genuine issue of material fact as to the reasonableness or nondiscriminatory nature of the NAA's Stage 2 ban. It therefore provided summary judgment to the NAA. The FAA was not a party to this case. The NAA's assertion, however, is fundamentally at odds with the underlying premises of full faith and credit, res judicata, and collateral estoppel: FAA cannot be bound by a judgment that was entered in litigation to which it was not a party.

In two recent Federal cases, Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213 (10th Cir. 2001), and American Airlines v. City of Dallas, 202 F.3d 788 (5th Cir. 2000), an airport sponsor or owner argued that the United States Department of Transportation (DOT) or FAA was barred from carrying out its duties to administer the Federal aviation laws because of pending state court cases or an earlier state court decision finding that the airport's conduct was lawful. In both cases, the courts of appeals held that the pending or prior state court litigation did not bar the Federal agency from conducting its own proceeding and determining whether an airport was complying with its obligations under Federal law.

In Arapahoe County, the Tenth Circuit noted:

As to the potential impact of the Colorado Supreme Court's ruling in Arapahoe County Public Airport Authority v. Centennial Express Airlines on federal regulation of the airport grant program, we perceive a direct and significant conflict inasmuch as this and similar state court rulings, if deemed preclusive, would frustrate the FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances. See 49 U.S.C. 47122. If given preclusive effect, state court rulings favoring local airport authorities in actions tangentially involving federal grant assurances would further lead to inconsistent enforcement of the federally mandated assurances, potentially jeopardizing the efficiency and equality of access to our Nation's air transportation system. For these reasons, we hold the strong policy of federal supremacy in the field of aviation prevails over full faith and credit principles in this case. The Colorado Supreme Court's decision in Arapahoe County Public Airport Authority v. Centennial Express Airlines therefore has no bearing on the FAA decision before us.

242 F.3d at 1221.

Also, in American Airlines, the Fifth Circuit held "because of the important Federal interests here, we decline to hold that common law preclusion doctrines apply in this case. Instead, DOT properly declined to give preclusive effect to the state court judgment." 202 F.3d at 801. See also New England Legal Foundation v. Massport, 883 F.2d 157, 171 (1st Cir. 1989) (concluding that "the [Federal] district court committed error, not only in its decision, but also in not deferring to the

Secretary's primary jurisdiction over this controversy as was requested by the DOT in its last minute amicus intercession).

While the court case at issue here, NBAA v. City of Naples Airport Authority, is a Federal district court decision, the same result is applicable. The FAA is not precluded from adjudicating issues raised in its NOI.

As the exclusive Federal aviation agency, the FAA is charged with significant *national* aviation responsibilities to carry out its obligations to enforce the Federal statutes governing aviation and airport operations. The FAA has substantial interests in areas such as regulating air commerce in a way that best promotes safety and fulfills national defense requirements, controlling the use of the navigable airspace, and preventing artificial restrictions on airport capacity to ensure safety and efficiency of flight operations. In fact, Congress has granted the FAA an independent and unqualified right to “take action to carry out this subchapter [49 U.S.C. §§ 47101-47137], including conducting investigations ... and issuing orders.” 49 U.S.C. §47122. See also, Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) (“The Secretary of Transportation is charged with administering the federal aviation laws ...”). In fact, as discussed below, there is no private right of action under the AAIA; only the FAA may enforce the grant assurances and it has a statutory responsibility to do so. See also Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213, 1220 (10th Cir. 2001) (noting “[t]he FAA's interest in fulfilling its statutory responsibility to ensure airport compliance with federal aviation laws and grant assurances, and to protect the public interest”), and American Airlines v. City of Dallas, 202 F.3d 788 (5th Cir. 2000). See also Massport, 883 F.2d at 169 (“In other words, in insuring compliance with [49 U.S.C. 47107, the statutory grant assurances], it is up to the Secretary to decide what is necessary and satisfactory.”).

The FAA is neither required by principles of res judicata (i.e., “claim preclusion”), collateral estoppel (i.e., “issue preclusion”), nor comity to forgo its adjudication of the issues raised in the NOI including whether the NAA has a proprietary interest in reducing noise from aircraft using the airport and whether the NAA’s ban is consistent with its various statutory and contractual obligations.

The preclusive effects of former adjudication are referred to collectively by most commentators as the doctrine of “res judicata.” Under res judicata, a “full and fair opportunity to litigate protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” Montana v. U.S., 440 U.S.147 (1979). Res judicata consists of two preclusion concepts: “issue preclusion” and “claim preclusion.” Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991), see also 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402 (1981).

1. Claim Preclusion Generally

Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. New Hampshire v. Maine, 532 U.S. 742, 748 (2001). When the term “res judicata” is used in a narrow sense, so as to exclude issue preclusion or collateral estoppel, “res judicata” becomes virtually synonymous with “claim preclusion.” Id. See also, Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1, 104 S. Ct. 892, 894 n. 1, 79 L. Ed. 2d 56 (1984).

Under Eleventh Circuit precedent, a claim is barred only if the parties, or those in privity with them, are the same, and if the same cause of action is involved in both. Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999). See also Trustmark Insurance Co. v. ESLU, Inc., 299 F.3d 1265, 1269-1270 (11th Cir. 2002).

The doctrine of res judicata/claim preclusion has no application here because not all of the above requirements are met: the FAA was neither a party in NBAA (which the NAA acknowledges) nor was the FAA in privity with any party or parties in NBAA. As a result, the same cause of action is not present in NBAA and FAA's NOI.

a. Claim Preclusion - Privity Requirement

Concerning privity, the FAA was not in privity to any party to the litigation. To identify the nexus necessary between two parties to justify finding them in privity, several factors are relevant. Privity may be found where a non-party substantially controls, or is represented by, a party to the action. Montana v. United States, 440 U.S.147, 154 (1979); United States v. Perchitti, 955 F.2d 674, 676 (11th Cir. 1992). Another formulation requires that the party estopped must have been "... so closely related to the interest of the party to be fairly considered to have had his day in court." Perchitti at 676. Still another derivative is that there must be a "substantial identity" of the parties such that the party to the action was the virtual representative of the party estopped. Id.

First, the FAA did not control NBAA's litigation nor did NBAA represent the FAA's interests. For example, the FAA neither requested nor required NBAA to file suit against the NAA. In addition, FAA neither reviewed nor approved the complaint or compensated NBAA in any way for initiating the litigation. Cf., Montana v. U.S., 440 U.S. 147 (1979) (Federal Government estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax on contractors of public construction firms where that issue had previously been litigated in state court by an individual contractor whose litigation had been totally financed and controlled by the Federal Government. U.S. required suit to be brought, reviewed and approved complaint, paid attorneys' fees and costs, and directed appeal). Nor does the FAA have any legal or special relationship with NBAA. Cf., Citibank, N.A. v. Data Lease Financial Corporation, 904 F.2d 1498, 1502-1503 (11th Cir. 1990) (finding of privity resulted from one party being related to another through vicarious liability/respondeat superior). Moreover, NBAA has no legal authority to represent the FAA's interests whether in litigation or not. Nor did NBAA have any obligation to safeguard the FAA's interests in its litigation. Antrim Mining, Inc. v. Davis, 775 F. Supp. 165, 169 (M.D. Pa. 1991), citing Moldovan v. Great Atlantic & Pacific Tea Co., 790 F.2d 894 (3d Cir. 1986).

Second, the FAA's interests are not "so closely related" to the interests of NBAA to be fairly considered to have "had its day in court." Neither does there exist a "substantial identity" between the FAA and NBAA such that NBAA served as the "virtual representative of the FAA. Cf., In Re Airlift International, Inc. v United States, 97 B.R. 664 (S.D. Fla. 1989) (in order to find privity between PBGC and IRS, court relied upon determination that these agencies were "related governmental agencies" (i.e., the "Secretary of the Treasury, who is responsible for administering and enforcing the Internal Revenue Code, sits on the Board governing the PBGC."))).

As explained above, the FAA is the exclusive Federal agency charged with significant national aviation responsibilities and has substantial interests in regulating air commerce in a way that best

promotes safety and fulfills national defense requirements, controlling the use of the navigable airspace, and preventing artificial restrictions on airport capacity to ensure safety and efficiency of flight operations.

When FAA initiates a formal investigation, takes administrative enforcement action, or sues for statutory violations, the agency seeks not only to remedy the immediate issue at hand, but must also take into account many other factors such as its Federal responsibilities to:

- Uphold its statutory obligations, such as protecting the navigable airspace and enforcing the grant assurances consistent with the will of Congress,
- Uphold important Federal policies that may reach beyond a certain limited segment of aviation,
- Take into account issues relating to the National Airspace System,
- Guarantee uniform compliance with the AAIA,
- Protect the integrity of the Federal airport grant program and to ensure grant monies are spent in accordance with Federal requirements, assess civil penalties when called for.

NBAA, on the other hand, as a not-for-profit trade group/corporation “dedicated to the success of the business aviation community,”¹²⁰ has substantially different and much narrower interests from those of the FAA. The Association represents only a limited segment of aviation users – members of the business aviation community.¹²¹ When NBAA files suit, it does so to redress the business aviation-related grievances of its members. In its challenge to the NAA’s Stage 2 ban, NBAA sued on behalf of “at least one member of the NBAA.”¹²² Unlike NBAA, FAA does not represent only one segment of aviation users. The agency concerns in civil aviation are more extensive, ranging from weekend experimental aircraft operators to domestic and international air carriers.

Based upon these wide-ranging differences between FAA and NBAA, and the fact that the FAA has significant “national public interests separate and distinct” from those of NBAA, it is self-evident that FAA did not “have its day in court” when NBAA entered into litigation with the NAA over the Stage 2 ban. Herman v. South Carolina National Bank, 140 F.3d 1413, 1424 (11th Cir. 1998) (Res judicata did not apply because the Secretary of Labor was not a party to the first case and has national public interests separate and distinct from those of the first case’s private litigants); American Airlines, Inc. v. DOT, 202 F.3d 788, 801 (5th Cir. 2000) (“In sum, because of the

¹²⁰ NBAA’s Web Site, <http://www.nbaa.org/aboutnbaa/>

¹²¹ NBAA’s mission is

[t]o promote the aviation interests of corporations, in the United States and its possessions, operating aircraft as an aid to the conduct of their businesses; to foster among them the highest degree of operational efficiency and safety; to bring Members into closer personal and friendly relations with each other; to interchange ideas on operational matters; to advance and maintain an enlightened understanding on the part of government and airport authorities of Member problems; to take such steps as are proper and necessary in order to promote better relations and secure proper advantages from regulatory and other agencies, and by these means to attain wider recognition of the fact that business aviation is of primary importance to the economy of the nation.

NBAA Statement of Purpose, from Article III of its Articles of Incorporation.
<http://www.nbaa.org/aboutnbaa/>.

¹²² The General Aviation Manufacturers Association (GAMA) filed suit along with NBAA. GAMA sued on behalf of suppliers of aircraft services for Stage 2 aircraft at Naples Airport (e.g., fuel, repairs). NBAA v. Naples Airport Authority, 162 F. Supp. 2d 1343, 1345-1346 (M.D. Fla. 2001).

important federal interests here, we decline to hold that common law preclusion doctrines apply in this case.”). See also Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1471-1473 (11th Cir. 1986) (parent and subsidiary corporations not in privity merely because identical claims were made against them).

Nor did NBAA serve as FAA’s “virtual representative” in the litigation. The doctrine of “virtual representation” supports a finding of privity “when the respective interests are closely aligned and the party to the prior litigation adequately represented those interests.” Jaffree v. Alabama, 837 F.2d 1461, 1467 (11th Cir. 1988), citing Delta Air Lines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582, 587 (11th Cir. 1983). According to Jaffree, several factors are relevant, including “participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties.” Id., citing 18 Wright & Miller, *Federal Practice & Procedure*, sec. 4457, at 494-99. No such factors are present here between the FAA and NBAA. The FAA did not participate in the prior litigation nor did it consent to be bound.¹²³

To allow the NAA to effectively foreclose the FAA from investigating the legality of the NAA’s Stage 2 ban “would trump the key federal interests that motivated Congress to create DOT [and FAA] and give it authority over these laws.” American Airlines, Inc. v. DOT, 202 F.3d 788, 801 (5th Cir. 2000) (while both federal and state actions were pending, DOT initiated an interpretive proceeding leading to the issuance of a Declaratory Order). In short, as the agency was neither a party nor in privity with NBAA, the FAA lacks a “sufficient ‘laboring oar’ in the conduct of the [NBAA] litigation to actuate the principles of estoppel.” Montana, 440 U.S. at 155.

The cases cited by the NAA to support their view that the FAA was in privity with NBAA offer no such support. In fact, both National Labor Relations Board v. Donna-Lee Sportswear Co., 836 F.2d 31 (1st Cir. 1987) and National Labor Relations Board v. Heyman, 541 F.2d 796 (9th Cir. 1976) are easily distinguishable and have no relevance to the FAA’s NOI. Both cases addressed the issue of whether a district court’s prior determination that a binding labor contract between two parties had not been formed precluded the National Labor Relations Board (NLRB) from deciding at a later date that in fact a contract had been formed.

In Donna-Lee, the court held that no collective bargaining agreement existed between Donna-Lee and Local 229, International Ladies Garment Workers Union, an intervenor in the litigation. Thereafter, an NLRB administrative law judge (ALJ) issued an opinion contrary to the court that an enforceable contract had been formed. The ALJ’s decision was affirmed by the NLRB. Donna-Lee challenged the Board’s order for it to make payments to a benefits fund, arguing, among other things, that the Board was collaterally estopped by the district court’s judgment. At issue was whether the NLRB, not a party to the first litigation, could be bound by the court’s ruling that no contract had been formed. Specifically at issue was whether the Board and Local 229 were in privity. If so, the Board would be bound by the court’s earlier ruling.

¹²³ Wright and Miller discuss various decisions in which courts have checked any expansion of the doctrine of virtual representation. In addition to Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978), “[s]everal other decisions as well have refused to adopt any general rule that a nonparty may be precluded from relitigating issues that have been lost after vigorous advocacy by a party who seems to hold interests identical to the interests of the nonparty.” 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4457 (1981), p. 500.

The court found the NLRB to be in privity with Local 229 and denied the Board's enforcement of their order. The court noted several unique factors present that led to its finding of privity. First, the NLRB had no power to investigate the alleged unfair labor practices until a formal charge had been filed. The General Counsel had to depend upon a charge being filed first by the unions. The court noted that "the Board's presence in the dispute derives from parties that are clearly bound by the district court's judgment." 836 F.2d at 35. No such limitation exists for the FAA. The agency has independent statutory and regulatory authority to investigate unilaterally any suspected noncompliance. 49 U.S.C. 46101, 14 C.F.R. 16.101. It requires no relationship with a third party as in the case of the NLRB in Donna-Lee to initiate any investigation.

Second, as part of its privity finding, the court found that in the NLRB proceeding, the Board and the unions asserted the exact same interests and positions. However, in the case of the FAA's proceeding, not only is the FAA not asserting the same interests and positions as NBAA adopted in the litigation but NBAA is not a party (nor could it be) to the FAA's NOI process.

Third, the court found that no broad policy question was implicated in the determination that a contract did not exist nor would any precedent be established which would have wide ranging effect on labor relations. The FAA proceeding, however, raises significant national policy issues of first impression.

Fourth, the court found that "the interests of the Board cannot be disassociated from interests of Local 229 – indeed, in this setting they are virtually identical." 836 F.2d at 35. Unlike Donna-Lee, FAA's interests in the NOI proceeding reach far beyond those of the business or general aviation communities to include all aircraft users and operators, many of which have interests different from NBAA or GAMA. As already noted, unlike those parties, the FAA has significant responsibilities to carry out its obligations to enforce the Federal statutes governing aviation and airport operations. The Congress has granted the FAA an independent and unqualified right to take action to conduct investigations and issue orders to ensure compliance with the sponsor assurances. The FAA has substantial interests in areas such as regulating air commerce in a way that best promotes safety and fulfills national defense requirements, controlling the use of the navigable airspace, and preventing artificial restrictions on airport capacity to ensure safety and efficiency of flight operations. Thus, the Donna-Lee court acknowledged that "the geographic breadth to Government litigation [] is not found in private disputes," and that "the issues litigated by the Government are far more numerous and of a far different nature than those litigated by even the most litigious private entity." Id. at 37.

Finally, after noting that the National Labor Relations Act and labor policies invoke public interests, the court found that adherence to the "doctrine that the Government is generally exempted from issue preclusion" was not warranted here because "in this case, it is the private interest of the disputants that predominates." 836 F.2d at 38. This is not the case in FAA's NOI proceeding where the FAA is not seeking to vindicate solely the interests of the business aviation community but to enforce Federal law governing airport access for the benefit of the national air transportation system. As noted, the FAA has statutory responsibilities and interests concerning the implications on the national air transportation system of banning a category of aircraft operators from using an airport. Precedent affirming the right of airport operators such as the NAA to ban Stage 2 aircraft operations without sufficient evidence of compliance with applicable Federal law could have substantial nationwide implications. The FAA is aware that several airports around the country are currently contemplating similar restrictions.

Similarly, Heyman is also not relevant to the FAA's NOI proceeding. As in Donna Lee, the Board was faced with a contract issue, similar Union arguments, and the presence of a judicially decreed rescission of contract. In contrast, the FAA is faced with a grant compliance issue which the district court did not consider (nor could it have without the FAA first issuing an order), and different arguments are being offered by the FAA. Also, under the statute involved in Heyman, Congress set up alternative forums for the resolution of contract disputes. In fact, according to the statute's conference report footnoted by the Heyman court, the Board and the district court had overlapping jurisdiction to handle contract issues ("when two remedies exist one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.") There is no such overlapping jurisdiction in the context of the AAIA or Part 16 between the FAA and NBAA.

As noted by the Supreme Court, the Secretary of Transportation (including FAA) "is charged with administering the federal aviation laws," and "[h]is Department is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances." Northwest Airlines v. County of Kent, 510 U.S. 355, 366-67 (1994). Finally, the Heyman court noted that had the Board found unfair labor practices "extrinsic to the collective bargaining agreement," there would have been no estoppel "and the Board would properly be operating solely within its own jurisdictional authority." 541 F.2d at 800. Under this rationale, since the district court in NBAA did not rescind a contract nor was any contract at issue, the FAA is not precluded from operating solely within its jurisdictional authority in order to complete its investigation and issue a final order.

b. Claim Preclusion - Same Cause of Action Requirement

Concerning the "same cause of action" requirement in claim preclusion, the NAA's argument that FAA's NOI claims "are in essence the same" as those claims(s) addressed in NBAA fails because there is no identity between the causes of action in NBAA and the FAA's NOI. As discussed above, the FAA was neither a party nor privy in NBAA. "Preclusion of such nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action. And the cause of action which a nonparty has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right." Montana, 440 U.S. at 154. Thus, since FAA was neither a party nor in privity with NBAA, it could not possibly be asserting the same claim or claims as NBAA in the district court litigation.

Even if there existed such identity, however, NBAA and the FAA's NOI do not involve the same cause of action. "The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case ... a court must compare the substance of the actions, not their form." I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). In NBAA, the primary right at issue was the Constitutional right of NBAA's members who operate Stage 2 aircraft to have access to Naples Airport. The primary right at issue in the NOI is the Congressionally-mandated, contractual grant assurances that protect the rights of all users of the national air transportation system. The FAA seeks redress for a different harm (violations of the NAA's contractual grant assurances) than NBAA sought in its

litigation.¹²⁴ See Richardson v. Alabama State Board of Education, 935 F.2d 1240, 1244 (11th Cir. 1991) (“We agree with the district court’s decision that the class action suit does not bar this litigation because the plaintiff seeks redress for different harm, although it is related to the previous suit and both suits were brought under Title VII.”). Since the substance of these two causes of action is different, the application of res judicata/claim preclusion is therefore not appropriate. To the extent that similar defenses are operative here and in NBAA, the defenses do not “arise out of the same transaction” or come from “the same nucleus of operative fact.” Trustmark Insurance Co. v. ESLU, Inc., 299 F.3d 1265, 1269-1270 (11th Cir. 2002). The substance of the proceedings are different: NBAA sought redress for Constitutional violations and the FAA here seeks to enforce the contractual grant assurances.

2. Issue Preclusion Generally

Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. New Hampshire v. Maine, 532 U.S. 742, 748-749 (2001). Once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153 (1979).

In the Eleventh Circuit, a party seeking to invoke the doctrine of issue preclusion must establish its propriety by demonstrating that (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

a. Issue Preclusion - Opportunity to Litigate Requirement

The NAA is not able to assert issue preclusion here for several reasons. First, even if there were a private right of action¹²⁵, the FAA did not have a full and fair opportunity to litigate grant compliance in NBAA. Congress through the AAIA specifically and expressly requires the Secretary to enforce the sponsor assurances. To prohibit the FAA from pursuing discovery and enforcement action under the AAIA on the basis of claim or issue preclusion would render Congress’ statutory provision irrelevant. Indeed, “[t]he courts should not jam judicially created doctrines such as res judicata into the gears of Congress’ carefully crafted statutory machinery.” United States v. Barnette, 10 F.3d 1553, 1561 (11th Cir. 1994).

¹²⁴ As indicated in the FAA’s NOI, another issue is whether the NAA has a proprietary interest in reducing noise from aircraft using the airport, such that the Stage 2 ban is not preempted by Federal law. However, NBAA did not make this argument in its litigation.

¹²⁵ There is no private right of action under the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §47101 et seq. Arrow Airways, Inc. v. Dade County, 749 F.2d 1489 (11th Cir. 1985); Four T’s, Inc. v. Little Rock Municipal Airport Commission, 108 F.3d 909 (8th Cir. 1997).

The Supreme Court has observed that the Secretary of Transportation (including FAA) “is charged with administering the federal aviation laws,” and “[h]is Department is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances.” Northwest Airlines v. County of Kent, 510 U.S. 355, 366-67 (1994)(emphasis added).

Moreover, it is a

“... general principal of law that the United States will not be barred from independent litigation by the failure of a private plaintiff ... This principle is based primarily upon the recognition that *the United States has an interest in enforcing federal law that is independent of any claims of private citizens ... any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.*”

United States v. East Baton Rouge Parish School Board, 594 F.2d 56, 58 (5th Cir. 1979) (emphasis added).

See also Herman v. South Carolina National Bank, 140 F.3d 1413, 1426 (11th Cir. 1998) (“As the Seventh Circuit noted, Congress ‘never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata;’” Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1982) (to bar the Secretary of Labor’s ERISA action as a result of private settlement “would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.”); U.S. v. Killough, 848 F.2d 1523, 1526 (11th Cir. 1988), citing Heckler v. Community Health Services of Crawford Co., Inc., 467 U.S. 51, 60 (1984) (the government may not be estopped on the same terms as any other litigant).

b. Issue Preclusion - Identical Issues Requirement

Concerning this next requirement, the issues raised in FAA’s NOI are not “identical” to those in NBAA. As stated above, the issues under investigation in the FAA’s NOI include (a) whether the NAA has a proprietary interest in reducing noise from aircraft using the airport, such that the Stage 2 ban is not preempted by Federal law, (2) whether the NAA’s ban is consistent with its statutory and contractual obligations to make its airport available for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities, and (c) whether the NAA’s ban is consistent with its statutory and contractual prohibition from granting or permitting any person, firm, or corporation, either directly or indirectly, the exclusive right at the airport to conduct any aeronautical activities. However, neither NBAA nor GAMA raised these issues in their litigation. In NBAA, the Associations contended that the NAA’s Stage 2 ban violated both the Supremacy Clause and the Commerce Clause of the United States Constitution (i.e., that the ultimate issue was whether the ban was unreasonable, arbitrary and discriminatory and thus preempted). It makes no difference whether the standards for actions that are reasonable and not unjustly discriminatory in the realm of grant compliance may be similar to standards applied to actions in the Constitutional realm. Similar standards do not make the issues “identical.”

c. Issue Preclusion - Actual Litigation Requirement

Grant compliance issues could not possibly have been litigated in NBAA because NBAA has no authority to litigate such issues. There is no private right of action under the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §47101 et seq. Arrow Airways, Inc. v. Dade County, 749 F.2d 1489 (11th Cir. 1985); Four T's, Inc. v. Little Rock Municipal Airport Commission, 108 F.3d 909 (8th Cir. 1997) (the fact that 49 U.S.C. § 47107 requires the various written assurances of nondiscrimination and the like to be given to the Secretary of Transportation “indicates that Congress intended to establish an administrative enforcement scheme” rather than a private right of action. 108 F.3d at 916, quoting Northwest Airlines, Inc. v. County of Kent, 955 F.2d 1054 (6th Cir. 1992), aff'd on other grounds, 510 U.S. 355 (1994)). For this reason alone, there can be no issue preclusion because not all of its requirements can be met.¹²⁶ Indeed, “[if] the rights asserted are so far public that private suitors lack standing to pursue them, there is no occasion to worry about preclusion between public and private litigation.” 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4458 (1981), p. 513.

To the extent that an issue or claim are identical in NBAA and here, such as whether ANCA authorizes the NAA's Stage 2 ban, the NAA's arguments still lack all of the essential elements of any attempt to assert that claims or issues are precluded under the theories of res judicata or collateral estoppel. As indicated, the FAA was neither a party in NBAA nor was the FAA in privity with any party or parties in NBAA. As a result, the same cause of action is not present in NBAA and FAA's NOI. In addition, the FAA did not have a full and fair opportunity to litigate grant compliance in NBAA and grant compliance issues could not possibly have been litigated in NBAA because NBAA has no authority to litigate such issues.

3. Comity

Offering no support or citation, the NAA also argues that the principles of comity¹²⁷ should bar the FAA's Part 16 investigation because “the FAA's conduct – standing by during a judicial proceeding and ignoring the outcome – imposes an undue burden on the Authority and the courts and conflicts with public policy.” However, the Supreme Court has squarely rejected a similar argument in Martin v. Wilks, 490 U.S. 755, 762-765 (1989) (white fire fighters, who had failed to intervene in earlier employment discrimination proceedings in which consent decrees were entered, were able to challenge employment decisions taken pursuant to those decrees). Here, the Court stressed that

¹²⁶ The FAA, rather than NBAA or GAMA, has a substantial and indisputable interest in ensuring that airports comply with the conditions imposed on them by Federal laws and grant agreements. The FAA alone has a statutory mandate to ensure that airport sponsors comply with the grant assurances. See, 49 U.S.C. 47101, et seq. The FAA's statutory responsibility to ensure airport compliance with Federal aviation laws and grant assurances and to protect the public interest is independent of the interests of any particular air carrier, airport user, or aviation association. See, New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 172-173 (1st Cir. 1989) (discussing FAA's primary role in administering and ensuring compliance with grant assurances). This federal scheme regulating airport grant compliance is “designed in part to insure the maintenance of conditions essential to an efficient national air transportation system, including access to airports on a reasonable and nondiscriminatory basis.” Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213 (10th Cir. 2001), quoting City & County of San Francisco v. FAA, 942 F.2d 1391, 1395 (9th Cir. 1991), cert. denied, 503 U.S. 983 (1992).

¹²⁷ Under principles of comity, courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and respect. *Blacks Law Dictionary* 267 (6th ed. 1990).

[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment and decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on the m a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Id. at 765.

See also Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213, 1220 (10th Cir. 2001) (“Mere knowledge of the state court proceedings did not oblige the FAA to participate in those proceedings,” citing Martin v. Wilks).

Concerning public policy, comity “is not a rule of law; it is a rule of practice, convenience, and expediency ... [b]eing voluntary and not obligatory, [it] rests in the discretion of the tribunals of the forum” Comity is also not generally accorded when it violates a strong public policy of the state. 16 Am. Jur. 2d *Conflict of Laws* §15 (1998). As discussed elsewhere, the FAA disagrees with the district court’s findings in NBAA. Airport noise and access restrictions that are not adequately supported by documentary evidence or are otherwise unreasonable and unjustly discriminatory violate important Federal policies concerning airport access, noise, and airspace management. Similarly, while principles of comity command careful respect by federal courts, “[w]here important federal interests are at stake ...” (as they are here, e.g., enforcement of the Congressionally-mandated grant assurances and upholding of FAA’s national policies affecting flight management, efficiency, and aircraft noise), “... comity yields.” Federal Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1246 (11th Cir. 2000)¹²⁸, quoting United States v. Gillock, 445 U.S. 360, 373 (1980).

In any event, as discussed above, it would be unreasonably burdensome to impose on the FAA an obligation to intervene in every state and federal court suit in which issues of interest to the FAA are being litigated, or bear the risk of a preclusive judgment. FAA simply does not have the resources to intervene in the innumerable federal and state court proceedings in which aviation issues arise. United States v. East Baton Rouge Parish School Board, 594 F.2d 56, 58 (5th Cir. 1979); Herman v. South Carolina National Bank, 140 F.3d 1413, 1426 (11th Cir. 1998); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1982).

4. Precedent and Intra-Court Comity

According to the doctrine of “intra-court comity,” not only is NBAA not binding on the FAA, but the decision is not binding on other district courts in the Eleventh Circuit. Neither is NBAA binding on other district court judges within the Middle District of Florida. Although the doctrine “generally dictates that judges of coordinate jurisdiction should follow brethren judges’ rulings on identical issues,” it is “discretionary.” American Silicon Technologies v. U.S., 261 F.3d 1371, 1381

¹²⁸ In Federal Reserve Bank, because a federal reserve bank had an “unfettered” statutory right to defend in federal court, the district court lacked discretion to remand the case back to state court on the basis of comity.

(Fed. Cir. 2001). More importantly, unlike circuit court panels where one panel will not overrule another, district courts are *not* held to the same standard. Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., 240 F.3d 956, 965 (11th Cir. 2001) (finding that a district court “cannot be said to be bound by a decision of one of its brother or sister judges” and noting the “lack of precedent to conclude that intra-court comity applies between courts on the district court level”) (emphasis added). See also, United States v. Anaya, 509 F. Supp. 289, 293 n.2 (S.D. Fla. 1980), *aff’d sub nom* United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982), and Aguirre v. U.S., 956 F.2d 1166 (9th Cir. 1992) (unpublished but cited by 11th Cir. in Fishman). Even district court cases decided by panels of three are not binding upon other judges in the same district. Anaya at 293, n.2.

The American Silicon court sums up the doctrine as follows:

In other words, judges of a unified federal district ... are not constitutionally or legally bound to march in lockstep. The responsibility for maintaining the law’s uniformity is a responsibility of appellate rather than trial judges. Moreover, a judge should be able to depart from the holding of a brother judge of the same district if he is convinced through independent analysis that the holding of his colleague is incorrect.

261 F.3d at 1381 (citations omitted).

Thus, if a different party or parties were to raise issues similar to those in NBAA within the Eleventh Circuit or even the Middle District of Florida, district court judges would not be constrained by Judge Presnell’s views on NBAA’s Commerce Clause and Supremacy Clause arguments and the reasonableness of the NAA’s Stage 2 ban.

Consequently, against this legal background, the Director is not persuaded by the NAA’s argument that FAA is precluded from raising grant compliance issues in the current proceeding.

C. Burden Of Proof

By a letter dated February 16, 2001, the FAA stated that in acting to restrict access to the airport by some aircraft operators, the Authority has the burden of demonstrating that the ban meets the Authority’s obligations under the grant assurances.¹²⁹ In its Answer, the NAA states that the FAA has the burden of proof to establish that the Authority has violated its grant assurance obligations, citing 14 C.F.R. § 16.229(a). The NAA further maintains that its arguments that the Stage 2 ban is reasonable, that it does not confer an exclusive right, and that it is not preempted, do not constitute affirmative defenses and therefore do not shift the burden of proof.¹³⁰

The burden of proving facts that show noncompliance with a statute, regulation, order, grant agreement, deed of conveyance or other document, including 49 U.S.C. 47107(a)(1) and Grant Assurance 22, is on the FAA. This burden is stated at 14 C.F.R. 16.229 in the context of administrative hearings.¹³¹ This does not mean the burden of proving every fact rests with the FAA,

¹²⁹ FAA Exhibit 1, Item 19 (f)

¹³⁰ FAA Exhibit 1, Item 2, p. 23.

¹³¹ See 14 C.F.R. Part 16.229 (a) & (b).

however. The proponent of a motion, request, or order also has the burden of proof.¹³² If the respondent asserts an affirmative defense, the respondent has the burden of proving the affirmative defense.¹³³ An affirmative defense can be considered to be a statement that would constitute a valid defense to the FAA's finding of noncompliance, if the facts on which the FAA finding is based are deemed to be true.

Also, the rules for burden of proof in administrative hearings apply to proof of facts, not assertion of agency policy. FAA must prove facts that would show the airport sponsor is in noncompliance. If the facts are proven and/or not in dispute, then the question of whether the application of agency policy to those facts shows the sponsor to be in noncompliance is a question of law, involving interpretation of statute and determination of agency policy, not proof of facts.

Where a case involves a fact situation that is subject generally to existing law and policy but not previously raised before the agency, the agency can issue an interpretative rule through the adjudication of the case. That is the case here. The NAA and other airport operators obligated under AIP grant assurances have long had clear guidance that the FAA considers the AIP grant assurances to continue to apply following enactment of ANCA; that access restrictions are the exception to the general requirement for public access to the airport; that exceptions must be reasonable and not unjustly discriminatory; that DNL 65 dB is the federal threshold of significant noise impact on residential land use; that land use compatibility guidelines issued by FAA in 14 CFR Part 150 consider residential land uses to be compatible with aircraft noise exposure levels below DNL 65 dB; and that lower DNL levels may be used for planning and local mitigation measures, such as buffer land purchase and home insulation, but that levels below DNL 65 dB have never been used to support access restrictions.

The NAA had also been advised consistently for more than a year and a half that the FAA did not believe the evidence showed that the ban on Stage 2 aircraft at the Naples Municipal Airport to be reasonable under the grant assurances. Accordingly, the conclusions of this Director's Determination do not reverse or revise existing policy other than to interpret that policy and apply it to a set of facts not previously encountered by the agency.

D. Implications Of The FAA's Approval Of The Stage 1 Ban At The Airport

The NAA argues that the FAA's approval under 14 C.F.R. Part 150 of the 1999 ban of Stage 1 aircraft at the Naples Municipal Airport represented an agency approval of a ban of a category of aircraft, defined by noise certification stage, and based on circumstances similar to those that support the Stage 2 ban. Accordingly, the NAA contends, the same policy must be applied to the ban of Stage 2 aircraft, and that policy, the NAA argues, requires an agency finding that the Stage 2 ban is reasonable and not unjustly discriminatory.¹³⁴

However, the NAA's characterization of the FAA action approving the Stage 1 ban is selectively described to make it appear similar to the Stage 2 issue under consideration. It is not, and there are

¹³² 14 C.F.R. 16.229(b).

¹³³ 14 C.F.R. 16.229(c).

¹³⁴ FAA Exhibit 1, Item 2, p. 21-22.

significant differences, several of which were pointed out to the NAA during the January 18, 2001 meeting, which FAA representatives attended.¹³⁵

In its arguments, the NAA omits any mention of the primary difference: the Stage 1 ban removed the residents exposed to noise above the level of DNL 65 dB, the federally recognized land use compatibility criterion in residential areas.¹³⁶ At the time the Stage 2 ban was adopted, there were no residences within the DNL 65 dB contour.

The FAA's approval of the Stage 1 ban was based in part on a determination that both the local and national effect of the ban would be insignificant, and that the likelihood of frequent Stage 1 use of APF would have been very low. The FAA approval of the Stage 1 ban cited the fact that there were no Stage 1 aircraft based at the airport, nor were there any objections registered with either the FAA or the airport operator from any registered owners of Stage 1 aircraft. The FAA approval of the Stage 1 ban was based on information supplied by the NAA that the total U.S. fleet of Stage 1 aircraft was less than 50. New information indicates that the actual number of Stage 1 aircraft in the U.S. fleet was substantially higher.

Unlike the Stage 1 aircraft fleet, the national fleet of Stage 2 turbojet only, as cited by the NAA and confirmed by FAA, numbers more than 2,000.¹³⁷ In other words, the Stage 2 turbojet jet fleet continues to represent a substantial component of the corporate aviation fleet in the United States. Approximately 28 percent of the aircraft in the general aviation and air taxi fleet, which could also be defined as the corporate turbojet fleet, are Stage 2 aircraft.¹³⁸

¹³⁵ On January 18, 2001, during a NAA public meeting, representatives from the FAA addressed the issue of the relevance of the Stage 1 ban with regards to the grant assurances and the then proposed Stage 2 ban. One of the NAA commissioners asked the following question: "Okay, a question about the concern about grant assurances for Stage 2. It comes to mind was this a consideration for the Stage 1 ban?" In response, Mr. Bennett of the FAA [Director, Office of Airport Safety and Standards] stated:

It was and it is actually kind of helpful to note the differences there because, yes, certainly the airport had the same obligation for access. And we looked at whether this was a reasonable access restriction. But I did take a quick look at the approval of the Stage 1 yesterday. There the airport had no Stage 1 based aircraft. They were only transient. The national fleet of all Stage 1 aircraft was somewhere in the nature of 50, I think. It was a tiny portion. It was a very low probability that any would come through. More importantly, it went to solve compatible use for residential areas above 65 DNL. So it did solve a problem that is already recognized under the longstanding and conventional federal guidelines. And for those reasons, because ANCA doesn't really protect or regulate Stage 1 aircraft, they are gone from that standpoint. There wasn't the level of federal preemption there that there is here. And all of those things were considered and a few more. But each one of the things was kind of very carefully analyzed and went into the decision. And all of those things come out differently when you look at the Stage 2. So having it done before is not necessarily precedent for this.

See FAA Exhibit 1, Item 2, Attachment 11, Transcript of Proceedings, City of Naples Airport Authority Meeting (January 18, 2001), pp. 128-29.

¹³⁶ See 14 C.F.R. Part 150, Appendix A, Table 1.

¹³⁷ NAA data, FAA Exhibit 1, Item 14, Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000, p. 23. FAA estimates also approximate this number, but it is valid for turbojet only. It does not include other Stage 2 aircraft such as turboprop and helicopters.

¹³⁸ NAA data estimated the number of Stage 2 jets at 2,000. See FAA Exhibit 1, Item 14, Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000, Appendix C, p. 23. FAA estimates also approximate this number. We note that there are approximately 7,000 turbojets in the general aviation and air taxi fleet. NBAA data,

In contrast to the Stage 1 situation, there were Stage 2 aircraft based at the Airport when the NAA adopted the Stage 2 ban, and the operators and their businesses have indicated that they would be substantially affected by that ban. While the FAA Stage 1 ban approval did refer to the availability of other airports within 30 miles for transient operators, this was one of many factors, and not considered by FAA to be a significant factor even for those transient flights, and it certainly does not offset the impact on based operators of Stage 2 aircraft.

The NAA states that the Stage 1 ban was approved without consideration of the relative costs and benefits. This is not correct. The FAA did consider the impact (cost) on aircraft operators as outlined above and the benefit of reducing airport noise contours within the DNL 65 dB and removing people from significant levels of noise exposure.

The NAA notes that the FAA approved the Stage 1 ban without regard to a showing of potential liability on the part of the airport. This would have been due to the fact that the Stage 1 ban under review had the actual effect of reducing the number of residences impacted at noise levels above DNL 65 dB.¹³⁹ There is no such benefit from the Stage 2 ban.

The NAA cites language in the Stage 1 approval that the Stage 1 ban applied to the “loudest type of aircraft operating at Naples.” FAA did make that statement in support of a finding of no unjust discrimination. Whether or not that statement would actually be supported by a detailed comparison of aircraft noise measurements, we would not consider that to be sufficient grounds for a finding that discrimination was justified.¹⁴⁰

Setting aside the differences between noise levels, FAA did not consider any one single factor to be sufficient grounds for approval of a ban on a class of aircraft. As we stated in our approval under Part 150, as a matter of policy, FAA does not consider the use of aircraft stage designations to be unjustly discriminatory per se. However, it does not imply that it would apply to all airport situations.

In summary, the Stage 1 ban approved in 1999 bears little resemblance to the facts of the Stage 2 ban considered here. The Stage 1 ban addressed residential land use within the DNL 65 dB contour and was based on the agency’s determination that the ban imposed a minimal burden on actual and potential airport users.

Finally, the fact that in the past the FAA approved a Stage 1 ban at APF under Part 150 does not define the FAA’s position on a new restriction on airport access with different circumstances or limit the agency’s ability to apply a thorough review under applicable Federal law.

Aircraft Owners and Pilots Association 2000 Aviation Fact Card and FAA Aerospace Forecasts, FY 2002-2013, General Aviation and Air Taxi Activity Survey, Calendar Year 2000.

¹³⁹ As explained in the next section of this Determination, while it is reasonable to presume an airport proprietor’s potential liability at noise levels above DNL 65 dB, there is no similar basis for this presumption at lower noise levels.

¹⁴⁰ While some airplanes that have not been required to demonstrate compliance with 14 C.F.R. Part 36 can be designated as Stage 1, this does not mean that some of these airplanes would not meet the Stage 2 or 3 standard.

E. Federal Preemption

In the Notice of Investigation, we advised that information provided by the NAA did not demonstrate that the NAA had a proprietary interest sufficient to bring the Stage 2 ban within the scope of the “proprietor exception” to Federal preemption. Specifically, the information did not show that the NAA had potential liability for existing levels of noise generated by aircraft using the airport.

In its Reply to the Notice of Investigation, the NAA contends that there is no Federal requirement that it demonstrate liability in order to impose a Stage 2 ban. Specifically, the NAA states that “there is simply nothing in [ANCA] or its legislative history that even implies that an airport proprietor must establish, or even discuss, potential liability as a predicate to imposing a Stage 2 restriction.”¹⁴¹ The NAA also claims that since its Stage 2 ban was “adopted pursuant to an express Congressional grant of power [*i.e.*, 49 U.S.C. 47524(b)],” it cannot be preempted.¹⁴² In the NAA’s view, ANCA “gives a proprietor the express right to ban or otherwise restrict Stage 2 aircraft.”¹⁴³

Local governments may adopt noise abatement measures that do not impinge on aircraft operations.¹⁴⁴ However, under Federal preemption law, states and localities cannot regulate noise by controlling the flight of aircraft taking off or landing at local airports, for this method of regulating noise control is to be exercised exclusively by the Federal government.¹⁴⁵ A limited exception to this preemption (*i.e.*, the “proprietor powers exception”) exists for an airport proprietor that faces actual or potential liability for noise damages from aircraft using its airport.¹⁴⁶ Congress preserved this existing law when it enacted ANCA.¹⁴⁷

This case presents an issue of first impression for the FAA: whether an airport proprietor must face actual or potential liability for noise damages in order to restrict aircraft operations. As discussed in the Background section of this Determination, FAA regulations provide that residential land use is normally compatible with noise levels below DNL 65 dB.¹⁴⁸ However, the NAA’s ban addresses noise levels below DNL 65 dB. As discussed below, while it is reasonable to presume liability exposure within the DNL 65 dB contour, which is used by Federal agencies and recognized by the courts as the threshold of noise compatibility for residential land use, there is not the same basis for such a presumption outside the DNL 65 dB contour. Therefore, in reviewing the Stage 2 ban, the FAA requested that the NAA provide information regarding its actual or potential liability for noise damages. The NAA conceded that there is no judicial determination of actual liability but asserted that it had potential liability based on alleged oral and written threats of liability and complaints. As explained below, these alleged threats and letters do not demonstrate that the NAA faced actual or potential liability for noise damages based on aircraft noise levels existing when the Stage 2 ban

¹⁴¹ FAA Exhibit 1, Item 2, p. 20

¹⁴² FAA Exhibit 1, Item 2, p. 9

¹⁴³ FAA Exhibit 1, Item 2, p. 9

¹⁴⁴ San Diego Unified Port District v. Gianturco, 651 F.2d 1306, 1314 (9th Cir. 1981), *cert. denied sub nom. Department of Transportation v. San Diego Unified Port District*, 455 U.S. 1000 (1982), citing S. Rep. No. 1353, 90th Cong., 2d Sess. 7 (1968), reprinted in 1968 U.S. Code Cong. & Admin. News 2698, 2694. For example, local jurisdictions are not prevented by Federal preemption principles to control the effects of aircraft noise through the exercise of land use planning and zoning powers.

¹⁴⁵ See, e.g., City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

¹⁴⁶ See, e.g., Gianturco, 651 F.2d at 1316-17.

¹⁴⁷ See section VI.A of this Determination.

¹⁴⁸ 14 C.F.R. Part 150, Appendix A, Table 1.

was implemented. In the absence of such actual or potential liability, the Stage 2 ban is preempted. Moreover, none of the arguments advanced by the NAA in its Reply to the Notice of Investigation provide a basis for finding otherwise.

1. Federal Preemption Law Generally

In 1973, the Supreme Court held that a local noise ordinance was preempted under the FAA's implementing statute, the Federal Aviation Act of 1958 (as amended in 1968), and the Noise Control Act of 1972. In City of Burbank v. Lockheed Air Terminal,¹⁴⁹ the Supreme Court further held that the Federal Government regulates aircraft and airspace pervasively¹⁵⁰, preempting regulation of aircraft noise by state or local governments.¹⁵¹ While acknowledging that noise control is "deep-seated in the police power of the States," the Supreme Court held that the pervasive control over aircraft noise vested in the Federal Government left no room for local curfews or other local controls."¹⁵² The Court noted the fact that since the FAA is required to balance many interdependent factors, a "uniform and exclusive system" of federal regulation was required if the Congressional objectives underlying the Federal Aviation Act were to be fulfilled.¹⁵³

While the Supreme Court acknowledged that the Federal Government has full control over aircraft noise, preempting state and local control under their police power, the Court left open the question of whether an airport proprietor could enact aircraft noise restrictions based upon its proprietary powers as the landlord of the airport.¹⁵⁴ Federal courts since Burbank have recognized the "proprietary powers exception," under which airport proprietors may enact noise-based restrictions affecting aircraft operations in order to protect themselves from liability for noise damages.¹⁵⁵ The rationale for the proprietary powers exception to Federal preemption is the fact that airport proprietors (rather than the airlines or the Federal Government) bear monetary liability for excessive aircraft noise under the Supreme Court's decision in Griggs v. County of Allegheny.¹⁵⁶ As stated by the Ninth Circuit Court of Appeals in San Diego Unified Port District v. Gianturco, which interpreted Griggs:

¹⁴⁹ 411 U.S. 624 (1973).

¹⁵⁰ The United States Government has exclusive sovereignty over the airspace of the United States. 49 U.S.C. 40103(a). The Congress has provided extensive and plenary authority to the FAA concerning the efficient use and management of the navigable airspace, air traffic control, air navigation facilities, and the safety of aircraft and persons and property on the ground. 49 U.S.C. 40103(b)(1) and (2). In legal terms, the FAA has preempted the areas of airspace use and management, air traffic control, and aviation safety. Congress foresaw that local regulation of airspace use and the sources of aviation noise would severely limit the flexibility of the FAA in controlling air traffic flow and would increase congestion, cause a loss of efficiency, and aggravate the noise problem. Federal law and policy continues to confirm that State and local police power regulation of aircraft noise is Federally preempted when it impinges on airspace management, aircraft flight, or operations.

¹⁵¹ Other Federal courts, such as the Eleventh Circuit Court of Appeals, have described the Burbank decision as "invalidat[ing] ordinances which placed a curfew on jet flights on the basis that pervasive federal regulation gave the Federal Aviation Administration and the Environmental Protection Agency exclusive responsibility for noise control at airports." Pirollo v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983), reh'g denied, 720 F.2d 688 (11th Cir. Fla. 1983).

¹⁵² 411 U.S. at 638.

¹⁵³ *Id.* at 639

¹⁵⁴ 411 U.S. at 635-636, n. 14.

¹⁵⁵ See, e.g., San Diego Unified Port District v. Gianturco, 651 F.2d 1306, 1314 (9th Cir. 1981), cert. denied sub nom. Department of Transportation v. San Diego Unified Port District, 455 U.S. 1000 (1982); British Airways Board v. Port Authority of New York and New Jersey, 558 F.2d 75, 84 (2d Cir. 1977), aff'd, as modified, 564 F.2d 1002 (2d Cir. 1977).

¹⁵⁶ 369 U.S. 84 (1962).

The rationale for this exception is clear. Since airport proprietors bear monetary liability for excessive aircraft noise under [Griggs], fairness dictates that they must also have power to insulate themselves from that liability. But before an entity may possess this power, it must bear the responsibility, either actual or potential, for excessive aircraft noise.¹⁵⁷

Thus, the Gianturco court held that the State of California was not entitled to invoke the proprietary powers exception because it bore no liability for excessive aircraft noise at Lindbergh Field in San Diego.¹⁵⁸

In the Eleventh Circuit as well, a showing of whether a proprietor has “potential liability for excessive noise” is also required to invoke the proprietary powers exception. Pirola v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983), reh’g denied, 720 F.2d 688 (11th Cir. Fla. 1983) (if the city had not contracted away its right to impose the desired restrictions, the court would have inquired whether the city faced potential liability for excessive aircraft noise).

Thus, noise liability serves as the basis for the extraordinary ability of local airport proprietors to enact noise-based restrictions that impinge on aircraft operations in an otherwise preempted area. To invoke lawfully the proprietary powers exception, the NAA must face either actual or potential liability for noise damages caused by aircraft using its airport. In this case, if no actual or potential liability exists, then the Stage 2 ban is preempted.

Although numerous Federal courts have addressed the proprietor powers exception to Federal preemption, no court has directly addressed the issue of whether noise conditions at a particular airport present a legitimate liability concern sufficient to invoke the proprietary powers exception. As a result, the existing case law noted by the NAA¹⁵⁹ addressing the proprietary powers exception is of limited applicability to the NAA situation.

The legislative history surrounding the 1968 amendments to the Federal Aviation Act of 1958 and the Noise Control Act of 1972 supports the FAA’s position that an airport proprietor must face actual or potential liability for noise damages in order to invoke the proprietary powers exception. The origins of the proprietary powers exception are described in a June 22, 1968, letter by Secretary of Transportation Alan S. Boyd to Senator Monroney, Chairman of the Senate Subcommittee on Aviation, in response to a question concerning the 1968 amendments.

During the hearings, subcommittee members expressed their concern regarding whether, by entering into the aircraft noise abatement field, the Federal Government was taking on noise liability for aircraft operations. In response to a question from Chairman Monroney – “Will enactment of this legislation causing direct Federal involvement in the field of aircraft noise abatement and control increase the legal liability of the Federal Government for damage and damage claims caused by aircraft noise or sonic boom?” – Secretary Boyd’s legal advisor, Matthew

¹⁵⁷ Gianturco, 651 F.2d at 1316-17.

¹⁵⁸ Gianturco, 651 F.2d at 1319.

¹⁵⁹ E.g., National Helicopter Corp. of America v. City of New York, 137 F.3d 81 (2d Cir. 1998); Santa Monica Airport Association v. City of Santa Monica, 659 F.2d 100, 103 (9th Cir. 1981); British Airways Board v. Port Authority of New York and New Jersey, 558 F.2d 75 (2d Cir. 1977); and Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977 (9th Cir. 1992). See FAA Exhibit 1, Item 2, p. 10.

S. Perlman, answered, “We see nothing in this legislation which would affect the liability of the Federal Government as spelled out by the Supreme Court in Griggs v. Allegheny County.”¹⁶⁰ In response to a further question from the Chairman on the extent to which the Federal Government would be liable for aircraft noise by enacting noise standards, Perlman further testified, “We do not believe we would. Under the Supreme Court [Griggs] decision, the airport is required to take easements, noise easements, and clearance easements, necessary for the operation of the airport.”¹⁶¹ Chairman Monroney’s next question – “Would this legislation to any degree preempt State and local government regulation of aircraft noise and sonic boom?” – led to Secretary Boyd’s requesting permission to “submit an opinion for the record” on preemption.¹⁶² The June 22, 1968, Boyd letter resulted.

The Boyd letter noted that “the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft” and that under the proposed amendments to the Federal Aviation Act, “[s]tate and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.”¹⁶³ Against this backdrop of Federal preemption, the Boyd letter described the rights of an airport proprietor as follows:

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.¹⁶⁴

In explaining this exception to Federal preemption for airport proprietors, the letter stated that “[j]ust as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft.”¹⁶⁵ This statement reflects the Supreme Court’s Griggs decision, in which the Court ruled that it was the airport proprietor, Allegheny County, that “took the air easement in the constitutional sense. [The County] decided ... where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed.”¹⁶⁶

The Boyd letter further explained that “[t]he Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements.”¹⁶⁷ This is true only because the proprietor rather than the Federal Government is subject to noise liability for operating the airport as discussed in Griggs. The Secretary succinctly summarized the heart of the letter as follows: “[t]he

¹⁶⁰ Aircraft Noise Abatement Regulation: Hearing before the Aviation Subcomm. of the Committee on Commerce, 90th Cong., 2d Sess. 28 (1968).

¹⁶¹ Id. at 28-29.

¹⁶² Id. at 29.

¹⁶³ S. Rep. No. 1353, 90th Cong., 2d Sess. 6 (1968), reprinted in 1968 U.S. Code Cong. & Admin. News, pp. 2688, 2393-2694.

¹⁶⁴ Id.

¹⁶⁵ S. Rep. No. 1353, 90th Cong., 2d Sess. 7 (1968), reprinted in 1968 U.S. Code Cong. & Admin. News, pp. 2688, 2393-2694.

¹⁶⁶ 369 U.S. at 89.

¹⁶⁷ S. Rep. No. 1353, 90th Cong., 2d Sess. 7 (1968), U.S. Code Cong. & Admin. News 1968, pp. 2688, 2393-2694.

issue is the service desired by the airport owner and the steps [*i.e.*, to reduce noise liability] it is willing to take to obtain the service.¹⁶⁸

Thus, not only does the Secretary's letter articulate the proprietary powers exception recognized by the Supreme Court in Burbank, but it also sets forth the exception's *rationale*: that airport proprietors bear monetary liability for excessive aircraft noise under the Supreme Court's 1962 Griggs decision.¹⁶⁹ Thus, based upon the original justification for the proprietary powers exception, a direct and necessary nexus exists between the ability of an airport proprietor to lawfully invoke the proprietary powers exception to regulate airport access for noise purposes and being subject to noise liability.

The Senate Report on the 1968 amendments to the Federal Aviation Act quoted extensively from the Boyd letter, including the excerpts quoted above, and documented the Senate Commerce Committee's explicit concurrence in Secretary Boyd's views as expressed in the letter.¹⁷⁰ The subsequent reference to the proprietary powers exception in Section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b),¹⁷¹ further indicates the weight Congress placed on the Boyd letter. The Supreme Court cited the Senate Report several times in Burbank, including the Boyd letter, as relevant legislative history.¹⁷²

Consistent with congressional intent, as reflected in the Boyd letter, the FAA's position is that an airport proprietor can regulate airport access for noise purposes *only if* existing noise conditions at the airport expose the proprietor to potential or actual Griggs liability. In the absence of such liability exposure, any such regulation would constitute a prohibited police power regulation and would thus be preempted under Burbank.

2. Actual Or Potential Griggs Liability Based On Current Conditions At The Airport

The FAA's analysis thus begins with an examination of the NAA's potential or actual Griggs liability exposure based upon noise levels at the airport. While it is reasonable to presume such

¹⁶⁸ Id.

¹⁶⁹ The Supreme Court held a municipal airport owner liable for a "taking" of private property resulting from overflights of the property by aircraft using the airport. The proprietor, the Court noted, planned the location of the airport and the direction and length of the runways, and had the ability to acquire more land around the airport. From this control flowed the liability, based on the constitutional requirement of just compensation for property taken for a public purpose. The Court concluded: "[r]espondent in designing [the airport] had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough." 369 U.S. at 90. The role of the proprietor described by the Court remains the same today. See also Pirola v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983), reh'g denied, 720 F.2d 688 (11th Cir. Fla. 1983); Santa Monica Airport Association v. City of Santa Monica, 659 F.2d 100, 103 (9th Cir. 1981).

¹⁷⁰ S. Rep. No. 1353, 90th Cong., 2d Sess. 6, reprinted in 1968 U.S. Code Cong. & Admin. News, p. 2393.

¹⁷¹ This section prohibits state or local governments from enacting or enforcing a law or regulation "related to a price, route, or service of an air carrier but reserves the state's authority to carry out its "proprietary powers and rights." See also Department of Transportation regulation 14 C.F.R. 399.110, "State economic regulation of federally authorized carriers prohibited." This regulation similarly states that an airport owner's conduct is not preempted as an exercise of its proprietary powers when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies of the aviation provisions of Title 49 of the United States Code. 14 C.F.R. 399.110(f).

¹⁷² 411 U.S. at 634-41.

liability exposure within the DNL 65 dB contour, which is used by Federal agencies¹⁷³ and recognized by the courts¹⁷⁴ as the threshold of noise compatibility for residential land use, there is not the same basis for such a presumption outside the DNL 65 dB contour.

As a result of the NAA proposing a direct ban on Stage 2 aircraft to address noise levels *below* DNL 65 dB, the FAA requested specific information from the NAA concerning its liability concerns. The NAA submitted documentation to support its claim that it faces liability for noise damages.

In the submitted material, the NAA asserted that it faced a “credible and identifiable threat of liability from property owners.”¹⁷⁵ The FAA has examined each item used as justification by the NAA and concludes that the evidence in that material, and the record generally, does not demonstrate that the NAA had potential or actual noise liability exposure under Griggs for existing levels of noise generated by aircraft using the airport. As a result, the proprietary powers exception does not apply to the Naples situation and the Stage 2 ban is preempted as an invalid police power regulation under Burbank.

First, the NAA concedes that “[t]here is no judicial determination of noise-related liability against the NAA.”¹⁷⁶ Nor are there any pending lawsuits against the NAA. This is not surprising in light of what the NAA describes as its “success in promoting land use compatibility, considering and

¹⁷³ As discussed in the Background section of this determination, the FAA has determined, consistent with the Aviation Safety and Noise Abatement Act of 1979 (ASNA), that residential land use is normally not compatible with noise levels greater than DNL 65 dB. See 14 C.F.R. Part 150, Appendix A, Table 1. Similarly, the Department of Housing and Urban Development (HUD) has established a “site acceptability standard” of DNL 65 dB. 24 C.F.R. § 51.103.

¹⁷⁴ The DNL 65 dB residential land use compatibility threshold has been acknowledged in several court cases. For example, in City of Bridgeton v. FAA, 212 F.3d 448, 460 (8th Cir. 2000), reh’g denied, 2000 U.S. App. LEXIS 13701, cert. denied, 531 U.S. 1111 (2001), the Eighth Circuit stated:

The FAA’s guidelines for determining significant noise impact are found in the Part 150 Noise Compatibility Program, 14 C.F.R. §§ 150, et seq. These guidelines were developed to satisfy the mandate that the agency “establish a single system of measuring noise” that can be uniformly applied at airports and surrounding areas. 49 U.S.C. § 47502(1). * * * The land use compatibility table [14 C.F.R. Part 150, Appendix A, Table 1] provides that all the listed categories of use are compatible with [a DNL] below 65 dB “without restrictions.” The “implicit conclusion” is that an average noise level below [DNL] 65 dB would not amount to a “use” of any property whose protected use is fairly encompassed by the compatibility table. Allison v. DOT, 908 F.2d at 1029; accord, City of Grapevine v. Department of Transportation, 17 F.3d 1502, 1507-1508 (D.C. Cir), cert. denied, 513 U.S. 1043 (1994); Communities, Inc. v. Busey, 956 F.2d 619, 623-25 (6th Cir.), cert. denied, 506 U.S. 953 (1992).

212 F.3d at 460. Courts have also applied the DNL 65 dB standard in the context of noise-related liability. See Persyn v. United States, 34 Fed. Cl. 187 (1995); Baker v. Burbank-Glendale-Pasadena Airport Authority, 220 Cal. App. 3d 1602 (1990); Stephens v. United States, 11 Cl. Ct. 352 (Cl. Ct. 1986) (noted in the NAA’s Supplemental Analysis, page 13, footnote 39). In Persyn, the U.S. Court of Federal Claims referred to the HUD “site acceptability standard” of DNL 65 dB in determining the onset of “high noise levels” that could support a taking claim. In Baker, an action by airport neighbors for inverse condemnation and nuisance, the California Court of Appeals noted that “[t]he evidence substantially supports the court’s determination that CNEL values exceeding 65 decibels are sufficiently intrusive to amount to a taking or to give a rise to a prescriptive easement, and that lesser CNEL values are not.” 220 Cal. App. 3d at 1608, n. 2. The court further noted that “CNEL contours provided a consistent and accurate means for distinguishing between the various plaintiff’s claims, and that the cutoff line should be drawn at the 65 decibel CNEL level.” 220 Cal. App. 3d at 1607.

¹⁷⁵ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 16.

¹⁷⁶ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 11.

adopting both remedial and preventative noise abatement and mitigation measures, and attempting to address specific concerns about noise”¹⁷⁷

Second, lacking any existing liability, the NAA argues that its Stage 2 ban may be justified not on any past, present, or pending lawsuits determining liability but on “identifiable and credible threats of suit” that “cannot be discounted” due to “settlements and judgments regarding other airports around the country.”¹⁷⁸ The NAA asserts that it has received oral and written threats of litigation claiming damages for inverse condemnation from the owner of Rock Creek Campground, which lies within the DNL 60 dB contour. According to the NAA, the campground owner recently has attempted to negotiate regarding his noise-related concerns while preserving the right to sue. However, this assertion by the NAA does not reveal any information about the noise exposure faced by the campground owner. The NAA also states that it has received “numerous informal complaints” from other property owners located in areas below the DNL 65 dB noise contour. However, the NAA has not provided any record evidence of such “informal complaints.” The only record evidence identifying the location of complaints, as depicted in section VI.F.1.c.i. (see Figure 1) indicates that the vast majority of the complainants are located well outside the DNL 60 dB contour. This data does not support NAA’s claim that it has received “numerous” complaints, informal or otherwise, from residents within the DNL 60 dB contour. Finally, the fact that the NAA “believes it is possible” that it may be sued by the campground owner or by other property owners, and the fact that there exist general discussions of inverse condemnation and nuisance in legal encyclopedias (as noted by the NAA) is not sufficient to permit the NAA to restrict aircraft operations.

As discussed in more detail later in this determination, the record shows that when the NAA implemented the Stage 2 ban, the City and County allowed residential development *within* the DNL 60 dB contour. In addition, the record indicates that the NAA was able to purchase an easement for a mere \$10 for an entire condominium complex in response to an alleged threat by the developer of the Waterfront condominium complex (located within the DNL 60 dB contour) to take legal action after new residents began complaining about airport noise.¹⁷⁹ These facts are not consistent with the NAA’s assertion that it faces potential noise liability exposure.

Third, the NAA states that it is not aware of even a single inverse condemnation case in which the cumulative noise level experienced by a plaintiff, as measured by the DNL metric, was the basis for, or a factor in, the court’s decision.¹⁸⁰ From this, the NAA argues that “it cannot ignore potential claims from homeowners simply because a property may be located outside the 65 dB DNL contour.”¹⁸¹ However, in the same paragraph, the NAA then acknowledges that it is possible that “property owners whose property lies within the 60 dB DNL contour could not maintain a claim for inverse condemnation”¹⁸²

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ FAA Exhibit 1, Item 2, Attachment 6 (History of Noise Compatibility Efforts for Naples Municipal Airport, October 2000), p. 9-10 and Tab 8.

¹⁸⁰ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 13.

¹⁸¹ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 13.

¹⁸² FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 13.

Examples of cases in which DNL noise levels have been a factor in courts' decisions include Stephens v. United States,¹⁸³ (noted in the NAA's Supplemental Analysis, page 13, footnote 39); Persyn v. United States;¹⁸⁴ and Baker v. Burbank-Glendale-Pasadena Airport Authority.¹⁸⁵ In Persyn, the U.S. Court of Federal Claims referred to the HUD residential standard of DNL 65 dB in determining the onset of "high noise levels" that could support a taking claim.¹⁸⁶ In Baker, an action by airport neighbors for inverse condemnation and nuisance, the trial court had determined that "CNEL [Community Noise Equivalent Level]¹⁸⁷ contours provided a consistent and accurate means for distinguishing between the various plaintiffs' claims, and that the cutoff line should be drawn at the 65 decibel CNEL level."¹⁸⁸ The California Court of Appeals found that "[t]he evidence substantially supports the court's determination that CNEL values exceeding 65 decibels are sufficiently intrusive to amount to a taking or to give a rise to a prescriptive easement, and that lesser CNEL values are not."¹⁸⁹

Fourth, to demonstrate further that "there exists a credible risk of liability," the NAA offers a description of legal standards governing inverse condemnation and nuisance claims under Florida law. The NAA asserts that it faces liability under the constitution and laws of the State of Florida, especially since "Florida courts do not focus on the physical location of the property and/or actual noise levels but instead on the nature of the overflights and the consequential damage, including effects on the market value of particular parcels."¹⁹⁰ The NAA states that it recognizes itself "to be exposed to liability under the constitution and laws of the State of Florida."¹⁹¹ However, it is not clear from the documentation provided by the NAA how the NAA can support such a categorical statement. As the NAA correctly states, a required element for inverse condemnation in Florida is a substantial adverse impact on the market value of the property. However, reduced appreciation in value is not sufficient.¹⁹² The NAA's submission shows that property prices have increased significantly, not decreased. According to the NAA, properties in the area have been appreciating at a rate of approximately 15 percent per year.¹⁹³ In fact, the NAA has utilized property values in the affected areas within the DNL 60 dB contour to demonstrate the benefits of banning Stage 2 aircraft.¹⁹⁴

The NAA states that in addition to claims for unlawful takings, Florida courts have also considered suits for damages resulting from airport and aircraft activity based upon nuisance claims (e.g., noise, vibrations, and air pollution). The NAA states that analysis of nuisance claims in Florida, like inverse condemnation claims, "turns on the damage resulting from the offensive activity rather than the particular location of or noise experienced by the plaintiffs."¹⁹⁵ However, the "law in Florida about airport operations has long been that the lawful operation of such a facility in the

¹⁸³ 11 Cl. Ct. 352 (Ct. Cl. 1986).

¹⁸⁴ 34 Fed. Cl. 187 (1995).

¹⁸⁵ 220 Cal. App. 3d 1602 (1990).

¹⁸⁶ 34 Fed. Cl. at 201.

¹⁸⁷ See FAA Exhibit 1, Item 21, Page A-3.

¹⁸⁸ 220 Cal. App. 3d at 1607.

¹⁸⁹ 220 Cal. App. 3d at 1608, n.2.

¹⁹⁰ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 14.

¹⁹¹ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 14.

¹⁹² Fields v. Sarasota-Manatee Airport Authority, 512 So.2d 961, 964 (Fla.App. 1987).

¹⁹³ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 35.

¹⁹⁴ FAA /14/2000, FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), p. 80.

¹⁹⁵ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 14.

‘usual, normal and customary manner prescribed’ cannot constitute a nuisance.”¹⁹⁶ In addition, in Corbett v. Eastern Air Lines, Inc.,¹⁹⁷ where operators of a restaurant adjacent to an airport sued the air carrier alleging the noise and other effects of its aircraft constituted a private nuisance, the court noted that the *location* of the complaining party was an important factor.¹⁹⁸

Finally, in an attempt to further demonstrate liability, the NAA provides “several specific reported instances” where airport owners have had to defend litigation initiated by property owners in which the property at issue was located in areas exposed to noise less than DNL 65 dB (Wake County, North Carolina; DuPage County, Illinois; Palm Beach County, Florida, and Plainfield, Indiana).¹⁹⁹ However, only one case involves a Florida airport and none of the four cases resulted in a judicial determination of liability outside the DNL 65 dB contour. Moreover, the “reported instances” come from newspaper articles and anecdotal telephone conversations between the NAA counsel and unknown parties.

3. The NAA’s Other Arguments Regarding Federal Preemption

In NAA’s Reply to the Notice of Investigation, it argues generally that its Stage 2 ban is not preempted because it “was not adopted pursuant to the proprietor exception contained at 49 U.S.C. § 41713(b)(3) but rather pursuant to 49 U.S.C. § 47524(b).”²⁰⁰ NAA further asserts that because 49 U.S.C. § 47524(b) “gives a proprietor the express right to ban or otherwise restrict Stage 2 aircraft,”

¹⁹⁶ St. Lucie County v. Town of St. Lucie Village, 603 So.2d 1289, 1293 (Fla.App. 1992), quoting Brooks v. Patterson, 159 Fla. 263, 31 So.2d 472 (1947).

¹⁹⁷ 166 So.2d 196 (Fla. Dist. Ct. App. 1st Dist., June 9, 1964; reh’g denied Aug. 5, 1964).

¹⁹⁸ The court stated, in reference to the plaintiff’s airport restaurant,

[i]t appears to be well settled that if one voluntarily elects to live in an industrial area, he cannot complain of noise, noxious odors or any other unpleasant factors that may arise from the normal operation of businesses in the area merely because they may interfere with his personal satisfaction or aesthetic enjoyment. It is said that no one can move into an area given over to foundries and boiler shops and demand the quiet of a farm.

166 So. 2d at 203.

The court further noted that in order to prove nuisance, “the general rule in most jurisdictions seems to be that ... the invasion complained of must be unreasonable, unwarrantable, or unlawful. We think that this rule is applicable to such actions in Florida, as indicated in innumerable decisions of our appellate courts.” 166 So. 2d at 201. The court concluded that

people who establish a business on property adjoining an airport do so with the knowledge that changes and improvements are being, and will long continue to be, made in aircraft using the airport, requiring different flight patterns and different procedures in warm-up, take-off, and landing in the interest of the safety of the human lives aboard the planes; that the national and international airlines serving the airport must, in this highly competitive field, utilize the latest advancements in air transport, including jet aircraft, in order to stay in business and continue to serve the public in the community and throughout the nation. The adjoining landowners, then, may have to make some “compromises” and to be “generally compensated by the advantages incident to living in a civilized state.”

Id. The court acknowledged that nearby landowners may generally have a cause of action against the airport operator for its failure to acquire sufficient land; however, as noted, the nuisance standard is a high one.

¹⁹⁹ FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), pp. 15-16.

²⁰⁰ FAA Exhibit 1, Item 2, p. 9.

the ban “cannot be preempted because it was adopted pursuant to an express Congressional grant of power.”²⁰¹

The NAA’s argument has no merit. The Stage 2 ban was not enacted pursuant to an “express Congressional grant of power” under ANCA. As discussed in detail in section VI.A. above, ANCA did not supersede any preexisting law with respect to noise or access restrictions on operations by Stage 2 aircraft. Thus, ANCA did not affect preexisting law regarding Federal preemption of aircraft noise regulation, including the proprietor exception as recognized by Congress and the courts. As explained above, ANCA imposed *additional* requirements that must be met by airport operators before they can implement Stage 2 restrictions. Compliance with these requirements, however, does not establish an airport proprietor’s underlying authority to adopt such a restriction. Lawful noise or access restrictions are enacted by airport operators pursuant to their proprietary powers, the exercise of which is allowed by the proprietary powers exception to Federal preemption.²⁰² ANCA does not provide any independent authority or power for an airport proprietor to enact a restriction.

Even if ANCA did expressly authorize airport operators to implement restrictions on Stage 2 aircraft operations, this would not immunize the NAA’s Stage 2 ban from Federal preemption, as

²⁰¹ Id.

²⁰² The NAA advises on page 9, footnote 2 of its Reply that it disputes the validity of the term “proprietary exception.” The Authority argues that an airport proprietor’s right to restrict aircraft is “not an exception to anything but rather a right that Congress has engrained in the framework of aviation statutory law.” We disagree. Under the Federal statutory and regulatory framework, “states and localities cannot regulate noise by controlling the flight of aircraft taking off or landing at local airports, for this method of regulating noise control is to be exercised exclusively by the federal government.” Global International Airways v. Port Authority of New York and New Jersey, 727 F.2d 246, 248 (2d Cir. 1984). This is the general rule. As an exception to the general rule, airport proprietors have *limited* powers to establish requirements as to the level of permissible noise created by aircraft using their airport. As stated in the latest iteration of the DOT Aviation Noise Abatement Policy (an update of the 1976 DOT Aviation Noise Abatement Policy, found at 65 Fed. Reg. 43802),

[w]hile the Federal government’s exclusive statutory responsibility for noise abatement through regulation of flight operations and aircraft design is broad, the noise abatement responsibilities of state and local governments, through exercise of their basic police powers, are circumscribed. The scope of their authority has been most clearly described in negative terms, arising from litigation over their rights to act. The chief restrictions on state and local police powers arise from the exclusive Federal control over the management of airspace” in accordance with 49 U.S.C. 40103(b).

FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, . 43802, 43814.

“Subsequent to the Burbank decision, the courts have confirmed that Congress has reserved a limited role for local airport proprietors to regulate noise levels at their airports.” Id. at 43816. Numerous Federal courts refer to the proprietors’ “extremely limited role in the system of aviation regulation,” underscoring the fact that their powers are an exception to the general rule of Federal preemption. See, e.g., American Airlines v. City of Dallas, 202 F.3d 788, 804, 806 (5th Cir. 2000) (“The ADA includes an express preemption provision, § 41713(b)(1), which generally prohibits states from enacting or enforcing a law or regulation ‘related to a price, route, or service of an air carrier.’ 49 U.S.C. 41713(b)(1). At the same time, the ADA reserves the state’s authority to carry out its ‘proprietary powers and rights.’ 49 U.S.C. 41713(b)(3)”); San Diego Unified Port District v. Gianturco, 651 F.2d 1306, 1316-17 (9th Cir. 1981) (referring to the “proprietor exception” and explaining that the “rationale for this exception is clear. Since airport proprietors bear monetary liability for excessive aircraft noise under [Griggs], fairness dictates that they must also have power to insulate themselves from that liability.”)

the NAA asserts. In New England Legal Foundation v. Massport,²⁰³ Massport enacted its capacity enhancement plan (PACE) leading to changes in rates and charges assessed to air carriers pursuant to the Anti-Head Tax Act (AHTA).²⁰⁴ However, PACE did not survive the preemption challenge. The First Circuit reversed the district court for failing to defer to DOT/FAA's primary jurisdiction to interpret 49 U.S.C. 41713 "and the issues raised in these cases thereunder."²⁰⁵ Massport relied upon the fact that the AHTA permits reasonable landing fees, but the court found the pricing scheme to be preempted under 49 U.S.C. § 41713.

The NAA next argues that even if its power to adopt the Stage 2 ban "emanates from a reserved power recognized in Section 41713 rather than an express grant contained in Section 47524," the ban is valid because § 41713 does not preempt an airport proprietor from carrying out its proprietary rights and powers. This argument is circular and lacks any merit. Obviously, the mere fact that an airport proprietor enacts an airport noise restriction does not establish that the restriction comes within the proprietary powers exception.

In its Reply, the NAA also asserts that its view of its authority to adopt the Stage 2 ban is supported by: (1) a statement in the 1969 preamble to 14 C.F.R. Part 36; and (2) a table in an FAA advisory circular relating to Part 150. The Part 36 preamble states that the "[r]esponsibility for determining the permissible noise levels for aircraft using an airport remains with the airport proprietor." This statement, which is consistent with a similar statement in the Boyd letter, discussed above, does not address the scope of the proprietor exception. The FAA recognizes that Congress did not intend to completely preempt airport proprietors from regulating aircraft noise. However, any such regulation remains subject to the supremacy of Federal law. If not within the limited scope of the proprietor exception as recognized by Congress, the regulation is preempted.

The advisory circular referenced by the NAA appears to be AC 150/5020-1, which includes a "matrix of noise control actions . . . , [which] while not necessarily exhaustive, illustrates an array of options or possible solutions to a cross section of noise compatibility problems."²⁰⁶ A footnote to the matrix, which applies to various actions listed in the matrix that are marked with an asterisk, states: "These are examples of restrictions that involve FAA's responsibility for safe implementation. They should not be accomplished unilaterally [sic] by the airport operator."²⁰⁷ This footnote is not applied to either "Limitations on Number or Types of Operations or Types of Aircraft" or "Use Restrictions," both of which are listed on the matrix.²⁰⁸ On this basis, the NAA appears to argue in its Reply that "Use Restrictions" and "Limitations on Number or Types of Operations or Types of Aircraft" cannot be Federally preempted. The NAA reads far too much into the matrix and the accompanying footnote, neither of which addresses the scope of the proprietor exception to Federal preemption. The footnote, and the actions listed on the matrix to which the footnote applies (e.g., restrictions on aircraft ground movements, raising glide slope angle or intercept, power and flap management), explicitly relate to the FAA's *safety* responsibilities. Moreover, the same paragraph of the advisory circular that references the matrix also states that

²⁰³ 883 F.2d 157 (1st Cir. 1989).

²⁰⁴ 49 U.S.C. § 40116.

²⁰⁵ 883 F.2d at 173.

²⁰⁶ AC 150/5020-1, ¶ 306.

²⁰⁷ *Id.*

²⁰⁸ *Id.*, Figure 2.

“[e]ach alternative considered should...be legally implementable within existing State/Federal legislation and/or regulation.”²⁰⁹

NAA finally argues that Federal preemption is a matter of Constitutional law, “not a matter of Agency interpretation of regulations, or for that matter, grant assurance contracts. Violation of a grant agreement provision is just that (violation of a contract term), and cannot be reformulated into a Supremacy Clause violation.”

NAA’s argument has no merit. Federal agencies routinely must interpret and apply the statutes they are charged with administering. They do so in a legislative context when promulgating rules. They do so in an adjudicatory context when processing complaints under administrative processes such as 14 C.F.R. Part 16. In short, the FAA and DOT, like other Federal agencies, must on occasion determine whether the Federal law entrusted to them is being complied with or not. In this instance, that requires a conclusion concerning Federal preemption.

Preemption is relevant to grant compliance because if the NAA’s Stage 2 ban is preempted, it is per se unreasonable under the grant assurances. Federal courts recognize the FAA’s power to interpret the law it is charged with administering, including the law of Federal preemption. As in the below cases, the NAA will have the right to appeal FAA’s determinations.

For example, in the Massport case, initiated by the filing of a complaint under 14 C.F.R. Part 13, the predecessor regulation to Part 16, a DOT administrative law judge (ALJ) made specific findings on Massport’s compliance with the Federal preemption provision.²¹⁰ The ALJ concluded that

the PACE plan was unconstitutional because it was preempted by federal law through the Supremacy Clause and because it was contrary to the Commerce Clause ... The ALJ then ruled that the new Massport rate scheme violated section 105 of the Federal Aviation Act [49 U.S.C. 41713]. The conclusion flowed from his finding that the landing fees were unreasonable or discriminatory and were therefore impermissible within Section 105(b) “proprietary powers and rights” exception to Section 105(a)

New England Legal Foundation v. Massport, 883 F.2d 157, 164-165 (1st Cir. 1989).

The Secretary issued an Opinion and Order substantially adopting the ALJ’s recommendations and affirmed his finding that Massport’s fee structure was unreasonable and contrary to federal statute. The Court of Appeals concluded that the district court erred in not deferring to DOT the primary jurisdiction to interpret 49 U.S.C. 41713 and the issues in cases raised thereunder. The Court also held that DOT’s findings on 49 U.S.C. 41713 were “eminently correct.” 883 F.2d at 175.

In another FAA administrative complaint action, this time under Part 16, Centennial Express Airlines filed a complaint against Arapahoe County, Colorado, alleging that the County’s ban on all scheduled air carrier service violated the County’s AIP grant assurances and 49 U.S.C. 41713. The FAA made findings on compliance with the assurances and the Federal preemption provision. The

²⁰⁹ Id., ¶ 306.

²¹⁰ In addition to the complaint filed by the National Business Aircraft Association, similar complaints were filed by the Aircraft Owners and Pilots Association and the Regional Airline Association. As a result, the Secretary concluded that reasonable grounds existed for commencing a formal investigation and issued an Order of Investigation referring the matter to a DOT administrative law judge.

FAA Director of Airport Safety and Standards issued a Director's Determination concluding that the Arapahoe County Public Airport Authority's ban on scheduled passenger service violated the grant assurances and section 41713. Those findings were reviewed by a Part 16 hearing officer in FAA Docket No. 16-98-05, 13-94-25, and 13-95-03, and by the Tenth Circuit Court of Appeals in Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213 (10th Cir. 2001). The hearing officer affirmed the Director's findings and the FAA's ability to rule on "supremacy principles" ("Turning to supremacy principles, we reiterate that the issue before the FAA was whether the Authority complied with the conditions imposed on it by federal law and agreement with a federal administrative agency, in return for the Authority's receipt of federal funds." 242 F.3d at 1220). The Tenth Circuit noted that:

[t]his federal scheme regulating airport grant compliance is "designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and nondiscriminatory basis." City and County of San Francisco v. FAA, 942 F.2d 1391, 1395 (9th Cir. 1991), cert. denied, 112 S.Ct. 1665 (1992). On this point, we must agree with the Fifth Circuit that in the arena of aviation regulation "federal concerns are preeminent," and the Department of Transportation, through the FAA, is statutorily mandated to represent those concerns. American Airlines v. City of Dallas, 202 F.3d 788, 800-801 (5th Cir. 2000). Indeed, it is "difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation." New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 172-173 (1st Cir. 1989) (discussing the FAA's primary role in administering and ensuring compliance with grant assurances) (quotation marks and citation omitted). This certainly tilts the balance toward the application of supremacy principles to protect against state courts trumping the federal interests and concerns embodied within the airport grant program.

Arapahoe, 242 F.3d at 1220-1221.

4. Conclusion On Federal Preemption

Because the evidence in the record does not show that noise conditions at the Naples Municipal Airport exposed the NAA to potential or actual liability for damages caused by noise from aircraft operations at the airport, there is no basis for the NAA to invoke the proprietary powers exception to Federal preemption. The NAA's Stage 2 ban thus constitutes an unlawful exercise of police powers to regulate aircraft noise. As a result, the ban is Federally preempted and void.

Even assuming that the Stage 2 ban fell within the scope of the proprietary powers exception, the ban would still be subject to the reasonableness and nondiscrimination requirements within the NAA's Airport Improvement Program (AIP) contractual grant assurances.

F. Compliance With Grant Assurance 22 - Reasonableness

The NAA maintains that the Stage 2 ban is not subject to the reasonableness requirement under the grant assurances.²¹¹ However, as discussed more fully above, ANCA preserved the requirements under 49 U.S.C. § 47107(a) and related Grant Assurance 22 for the sponsor of a Federally-obligated

²¹¹ FAA Exhibit 1, Item 2, p. 8.

airport to make its airport available for public use on reasonable terms to all types, kinds, and classes of aeronautical activities.

The NAA also maintains that the Stage 2 ban is “amply supported by a comprehensive study” that was “approved by the FAA.”²¹² However, in addressing the NAA’s compliance with Part 161, the FAA determined only that the NAA’s Part 161 analysis “respond[ed] to the Part 161 consultation, notice and analysis requirements of Subpart C of that part.”²¹³ This determination was limited to the context of the “largely procedural” requirements of ANCA and Part 161,²¹⁴ and did not address whether the NAA’s analysis was sufficient to demonstrate the reasonableness of the Stage 2 ban under Grant Assurance 22.

In the alternative, the NAA argues that the Stage 2 ban is reasonable by any measure.²¹⁵ The NAA contends that the reasonableness of the ban is shown by the Part 161 Study, the Part 161 Study Response to Comments, the Supplemental Part 161 Analysis, and the pleadings and oral argument in NBAA v. NAA.²¹⁶ In addition to referencing these documents, the NAA, in its Reply, makes the following specific points regarding the reasonableness of the Stage 2 ban: (1) the Stage 2 ban addresses a real and significant noise problem; (2) the Stage 2 ban is amply supported by a comprehensive study conducted by qualified professionals and is targeted with precision to address a real and significant noise problem; (3) the Stage 2 ban does not place an undue burden on affected users; (4) the Stage 2 ban is supported by the NAA’s cost-benefit analysis; (5) the NAA need not fund additional noise insulation or otherwise institute alternative noise mitigation or reduction actions in order to justify a Stage 2 restriction as reasonable; (6) the NAA is authorized to consider the benefits of the Stage 2 ban for residents located within the DNL 60 dB contour; and (7) the NAA is not required to establish liability as a justification for adopting the Stage 2 ban.²¹⁷

In its order entitled “Airport Compliance Requirements,” which includes guidance regarding grant compliance requirements, the FAA states that noise-based airport use restrictions imposed by owners of Federally-assisted public use airports must, among other things, be reasonably consistent with reducing non-compatibility of land uses around the airport, not create an undue burden on interstate or foreign commerce, and meet both local needs and the needs of the national air transportation system to the extent practicable.²¹⁸ These standards derive from criteria for approval

²¹² FAA Exhibit 1, Item 2, pp. 1, 15.

²¹³ FAA Exhibit 1, Item 1(b), Letter from Mr. Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, and topical comments, October 31, 2001.

²¹⁴ FAA Exhibit 1, Item 1(b), Letter from Mr. Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, and topical comments, October 31, 2001.

²¹⁵ FAA Exhibit 1, Item 2, p.13.

²¹⁶ FAA Exhibit 1, Item 2, p.13.

²¹⁷ FAA Exhibit 1, Item 2 pp. 14-20. NAA’s contention, on page 16 of its Part 161 Supplemental Analysis [FAA Exhibit 1, Item 2, Attachment 15], that it is faced with a “credible and identifiable threat of liability from property owners,” and the relationship between liability and the NAA’s authority to impose the Stage 2 ban is addressed in s is addressed in section VI.E.

²¹⁸ FAA Order 5190.6A, ¶ 4-8.f. In a report to Congress on the Part 150 program, the FAA addressed these requirements as follows:

The reasonableness of the relationship between the noise problem, the compatible land use goal, and the formulation of the proposed restriction is evaluated by the FAA.

* * *

Part of an undue burden determination relates to having a well substantiated reason to place a burden on air commerce. Under part 150, the reason must be a documented significant noise problem and the

of airport noise and access restrictions under ASNA and Part 150.²¹⁹ In ASNA, Congress directed the Secretary of Transportation to “establish a single system for determining the exposure of individuals to noise resulting from airport operations” and “identify land normally compatible with various exposures of individuals to noise.”²²⁰ In response to this congressional direction, the FAA determined, in 1981, that DNL was the proper noise metric for assessing land use compatibility with aircraft noise, and that residential land use is normally compatible with aircraft noise levels below DNL 65 dB.²²¹

The FAA has continuously, consistently, and actively encouraged a balanced approach to address noise problems and discouraged unreasonable and unwarranted airport use restrictions.²²² It is long-standing FAA policy that airport use restrictions should be considered only as a last resort when other mitigation measures are inadequate to satisfactorily address the noise problem and a restriction is the only remaining option that could provide noise relief.²²³ This policy furthers the

contribution to the noise problem of the use proposed to be restricted. There must be a documented noise benefit of the restriction and a showing that the problem, the benefit, and the lack of availability or reasonable applicability of other alternative measures to solve the problem and produce the benefits all justify the burden. The program standard of meeting both local needs and needs of the national air transportation system, to the extent practicable, is also addressed by a balanced comparative analysis of commerce benefits and impacts and noise impacts, benefits, and costs of alternative mitigation.

Report to Congress: FAR Part 150, Airport Noise Compatibility Program (November 1988) at 7-9.

²¹⁹ As stated in the preamble to the final Part 150 rule, the Part 150 process provides an appropriate means to “assure a reasonable, nonarbitrary, and nondiscriminatory result that is consistent with the airport proprietor’s . . . specific duties under applicable airport development grants.” 49 Fed. Reg. 49260, 49264 (1984). See also “Policy on Funding of Combined Part 150 and Part 161 Studies and Analyses,” 61 Fed. Reg. 48727, 48728 (1996) (“The FAA’s part 150 determinations may provide valuable insight to the airport operator regarding the proposed [Stage 2] restriction’s consistency with existing laws and the position of the FAA with respect to the restriction.”); 14 CFR Part 161, Notice and Approval of Airport Noise and Access Restrictions, FAA Exhibit 1, Item 3, Notice and Approval of Airport Noise and Access Restrictions, Final Rule, 14 C.F.R. Part 161, Federal Register Notice, September 25, 1991, 56 Fed. Reg. 48661, 48681 (same).

²²⁰ 49 U.S.C. § 47502(2), (3).

²²¹ FAA Exhibit 1, Item 23, codified at 14 C.F.R. Part 150, App. A, Table 1.

²²² “Policy on Funding of Combined Part 150 and Part 161 Studies and Analyses,” 61 Fed. Reg. 48727, 48728 (1996).

See also Report to Congress: FAR Part 150, Airport Noise Compatibility Program (November 1988) at 9 (“The program standard of meeting both local needs and needs of the national air transportation system, to the extent practicable, is . . . addressed by a balanced comparative analysis of commerce benefits and impacts and noise impacts, benefits, and costs of alternative mitigation.”); Advisory Circular 150/5020-1 (August 5, 1983), ¶ 3.d.(1) (noting that the noise compatibility program under Part 150 includes a “balanced approach producing realistic and practical solutions fair to both aviation and non aviation interests”).

²²³ “Policy on Funding of Combined Part 150 and Part 161 Studies and Analyses,” 61 Fed. Reg. 48727, 48728 (1996). See also FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, 43802, 43809 (2000) (stating that if an airport proprietor proposes a use restriction, “the FAA encourages the proprietor to integrate the required Part 161 analysis into a Part 150 planning process which *first* analyzes nonrestrictive measures to mitigate noise, and *then* analyzes the proposed restriction”); 14 CFR Part 161, Notice and Approval of Airport Noise and Access Restrictions, FAA Exhibit 1, Item 3, Notice and Approval of Airport Noise and Access Restrictions, Final Rule, 14 C.F.R. Part 161, Federal Register Notice, September 25, 1991, 56 Fed. Reg. 48661, 48669 (1991) (same); FAA Exhibit 1, Item 24, Report to Congress: FAR Part 150, Airport Noise Compatibility Program (November 1988) at 8-9 (“There must be a documented noise benefit of the restriction and a showing that the problem, the benefit, and the lack of availability or reasonable applicability of other alternative measures to solve the problem and produce the benefits all justify the burden [on commerce].”); FAA Order 1050.11A, “Noise Control Planning,” ¶ 8 (1986) (stating FAA policy under Part 150 that “[a]ll possible measures to reduce noise should be considered before airport restrictions are imposed”); Advisory Circular 150/5020-1, “Noise Control and Compatibility Planning for Airports,” ¶ 326 (1983) (stating that curfews “should be reserved as a strategy of last resort . . . when all other options have been shown to be clearly inadequate”); Aviation Noise Abatement Policy (November 18, 1976) at 59 (airport proprietors should provide a

Federal interest in maintaining the efficiency and capacity of the national air transportation system²²⁴ and, in particular, the FAA's responsibility to ensure that Federally-funded airports maintain reasonable public access in compliance with Grant Assurance 22.²²⁵

Consistent with these federal requirements and policies, the FAA interprets the requirement in 49 U.S.C. § 47107(a)(1) that a federally-funded airport will be "available for public use on reasonable conditions" as requiring that a regulation restricting airport use for noise purposes: (1) be justified by an existing noncompatible land use problem; (2) be effective in addressing the identified problem; and (3) reflect a balanced approach to addressing the identified problem that fairly considers both local and Federal interests.

Upon consideration of the evidence and argument presented by NAA, as explained in detail below, we conclude that the Stage 2 ban is not reasonable and therefore violates Grant Assurance 22. Specifically, based on the record evidence we conclude that the Stage 2 ban is not adequately justified by existing non-compatible land uses. In addition, it shows that even if its land use

"detailed description" of alternatives considered and reasons supporting adoption of an airport use restriction "instead of any other alternatives"). This approach has also been adopted by the International Civil Aviation Organization (ICAO), of which the United States is a member. See FAA Exhibit 1, Item 20, ICAO Resolution A33-7, adopted at the 33rd Session of the Assembly, September 25 to October 5, 2001.I (encourages states to "not apply operating restrictions as a first resort").

The FAA "last resort" policy is also consistent with U.S. Supreme Court precedent regarding local regulations that affect interstate commerce. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (noting that "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities"). Although we have not raised the effect of the NAA's Stage 2 ban on interstate commerce as an issue in this proceeding, we note that "there is no question that a total ban on a category of aircraft in corporate and commercial use throughout the United States has an effect on interstate commerce." See, FAA Exhibit 1, Item 19 (f), Letter from Paul L. Galis, Deputy Associate Administrator for Airports, to Mr. Eric West, Dated February 16, 2001. Indeed, the record in this proceeding reflects that there were Stage 2 interstate commerce operations into and out of APF at the time the Stage 2 ban was implemented. For example, one of the parties that provided comments to the NAA during the Part 161 comment period was a Stage 2 commercial operator engaged in interstate commerce, FAA Exhibit 1, Item 2, Attachment 8, Tab 2. According to the Naples Daily News, another operator engaged in interstate commerce was fined for landing a Stage 2 jet at Naples Municipal Airport. See, FAA Exhibit 1, Item 4, NY Company Fined For landing Stage 2 at Naples Airport, 04/10/2002.

²²⁴ See, e.g., City and County of San Francisco v. FAA, 942 F.2d 1391, 1395 (9th Cir. 1991) ("The conditions Congress imposed on the grant to local airport proprietors of money from the Airport and Airway Trust Fund [recodified at 49 U.S.C. § 47107(a)(1)] are designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and nondiscriminatory basis."); British Airways Board v. Port Authority of New York and New Jersey, 564 F.2d 1002, 1011 (2^d Cir. 1977) ("The maintenance of a fair and efficient system of air commerce, of course, mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport. We must carefully scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." (Citation omitted.)) In British Airways, the court cited the national goals of "provision of fast, safe, efficient and convenient transportation," 49 U.S.C. § 1651(a) (recodified at 49 U.S.C. § 101(a)), and "encourag[ing] . . . the development of civil aeronautics and air commerce," 49 U.S.C. § 1346 (recodified as amended at 49 U.S.C. § 40101(d)(2), (3)). The latter goal was amended in 1996 to remove the reference to "promoting" civil aeronautics and air commerce. Pub. L. No. 104-264, 110 Stat. 3255 (1996). However, Congress retained the goal of "encouraging and developing civil aeronautics." 49 U.S.C. § 40101(d)(3). Since 1987, moreover, it has been national policy that "artificial restrictions on airport capacity . . . are not in the public interest...." 49 U.S.C. § 47101(a)(9)(A) (originally enacted in Act of Dec. 30, 1987, Title I, § 102(c), 101 Stat. 1486, 1488).

²²⁵ See 49 U.S.C. §§ 47107(g), 47122(a); FAA Order 5190.6A, ¶¶ 1-1 ("The FAA bears the important responsibility of seeing that these commitments are met."), 1-5 ("Responsibility to ensure compliance with airport owner obligations is vested in, or imposed on, the FAA by law or through FAA contractual authority.")

compatibility goal were justified, the NAA has not taken a balanced approach to achieve that goal that fairly considers both the local and Federal interests.

1. *Noncompatible Land Use As A Justification For The Stage 2 Ban*

As directed by Congress in ASNA, the FAA has established DNL as the metric for “determining the exposure of individuals to noise resulting from airport operations.”²²⁶ Also in compliance with ASNA, the FAA has established the land uses normally compatible with exposures of individuals to various levels of noise.²²⁷ The FAA determined that residential land use is “normally compatible” with noise levels of less than DNL 65 dB.²²⁸ Under FAA guidelines, there are no existing noncompatible land uses around the Naples Municipal Airport because there are no noise sensitive land uses within the DNL 65 dB noise contour and because residential land uses below DNL 65 dB are compatible. The Stage 2 ban is, therefore, not justified based on noncompatible land uses according to Federal guidelines. However, airport proprietors may under Part 150 designate incompatible land uses at noise levels below DNL 65 dB based on local standards.²²⁹

Under Part 161, the “airport noise study area” for a proposed airport noise or access restriction “must include the noise contours required to be developed for noise exposure maps specified in [Part 150].”²³⁰ The preamble to the Part 161 final rule explains that the intent was to “permit the applicant airport operator the same flexibility as that provided under Part 150.”²³¹ The preamble also explains that Part 150 “permits, for reasonable circumstances, a degree of flexibility in determining a study area and the compatibility of land uses to noise.”²³²

The proposal to adopt a restriction on airport access based upon a local land use compatibility standard presents the FAA with an issue of first impression with respect to compliance with Grant Assurance 22. Under Part 150, the FAA has approved non-restrictive (i.e., not restricting aircraft operations) remedial noise mitigation projects outside the DNL 65 dB contour based on “explicitly documented locally determined land use compatibility values.”²³³ The agency considers such projects to be eligible for federal funding when supported by appropriate documentation from the sponsor and approved in a Part 150 program or FAA environmental document.²³⁴ However, no airport proprietor has recommended a restriction on aircraft operations for approval under Part 150 based on a claimed local land use compatibility standard.

In its Reply to the Notice of Investigation, the NAA argues that the Stage 2 Ban is designed to address an “empirically observed noise problem” that is “a product of, and exacerbated by, the nature of the Naples community as a resort/retirement area and the seasonal fluctuation in

²²⁶ 49 U.S.C. § 47502(2); 14 C.F.R. § 150.9(b).

²²⁷ 14 C.F.R. Part 150, App. A, Table 1

²²⁸ 49 U.S.C. § 47502(3); 14 C.F.R. Part 150, App. A, Table 1.

²²⁹ As stated in Part 150, “[l]ocal needs or values may dictate further delineation based on local requirements or determinations.” [14 C.F.R. Part 150, App. A, § A150.101(d)]

²³⁰ 14 C.F.R. § 161.5 (definition of “airport noise study area”).

²³¹ FAA Exhibit 1, Item 3, Notice and Approval of Airport Noise and Access Restrictions, Final Rule, 14 C.F.R. Part 161, Federal Register Notice, September 25, 1991, 56 Fed. Reg. 48661, 48670.

²³² FAA Exhibit 1, Item 3, Notice and Approval of Airport Noise and Access Restrictions, Final Rule, 14 C.F.R. Part 161, Federal Register Notice, September 25, 1991, 56 Fed. Reg. 48668.

²³³ See FAA Exhibit 1, Item 39, Report to Congress: Eligibility of Noise Abatement Proposals for Grants-in-aid under the Airport Improvement Program (January 1989) at 21.

²³⁴ See, e.g., FAA Order 5100.38B, “Airport Improvement Program (AIP) Handbook,” ¶ 704.

population and aircraft operations.”²³⁵ The NAA asserts that this noise problem is “reflected in incompatible land use surrounding the Airport and in complaint data.”²³⁶ The NAA’s 2000 update of its Part 150 noise exposure map defines the “Naples Municipal Airport Land Use Compatibility Criteria” as follows:

In compliance with the FAA direction in Part 150 that airport proprietors must defer to local authorities in determining land use compatibility, the NAA is respecting the City of Naples and Collier County 60 dB DNL land use compatibility criterion, and considers residential land within the 60 dB DNL contour to be incompatible with airport noise.²³⁷

Based on this land use compatibility criterion, the NAA established its “land use compatibility goal” of “minimizing residential land within [the] 60 dB DNL [contour] to the maximum feasible extent.”²³⁸

As discussed below, however, the record shows that when the Stage 2 ban was implemented, neither the City nor the County had determined that residential use was incompatible with aircraft noise levels lower than DNL 65 dB.²³⁹ Given the NAA’s stated land use compatibility goal and its basis, the absence of such a determination of incompatibility rendered unreasonable the NAA’s use of the DNL 60 dB contour to justify the Stage 2 ban.²⁴⁰

²³⁵ FAA Exhibit 1, Item 2, p. 14.

²³⁶ FAA Exhibit 1, Item 2, p. 14.

²³⁷ FAA Exhibit 1, Item 14, Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000, p. 19.

²³⁸ FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study) p. 16.

²³⁹ On June 5, 2002, nearly 16 months after the NAA adopted the Stage 2 ban, three months after the NAA initiated enforcement of the ban, and seven months after the FAA issued its Notice of Investigation in this matter, the City of Naples adopted Ordinance 02-9648, which established a “Noise Impact Zone D” around APF that approximates the area between the DNL 65 dB and DNL 60 dB contours “based on future aircraft operations.” *Id.* at 23, See FAA Exhibit 1, Item 15, City of Naples Ordinance 02-9648, June 5, 2002. Within Zone D, the ordinance prohibits certain residential land use but allows “transient lodging” as a “conditional use.” *Id.* The FAA considers transient lodging to be residential development (see Table 1, Appendix A, 14 CFR Part 150). Evidence in the record suggests that the NAA viewed the prohibition of residential development in the new Zone D as strengthening its legal position in the present proceeding. See, e.g., FAA Exhibit 1, Item 12, Exhibit 11, p. 3 (“It was noted that the concern of the [NAA] is that if [multifamily residential and transient lodging] are permitted [in Zone D], then the FAA will take the position that the airport has not taken all measures to fight inappropriate property development in noise sensitive areas around the airport. That position could negatively impact the airport’s litigation with respect to the Stage 2 aircraft ban.”). In any event, the new ordinance is immaterial to our findings in this case; our determination regarding the reasonableness of the NAA’s adoption and implementation of the Stage 2 ban is based upon conditions existing at that time, and is not affected by *post facto* actions such as the new ordinance. Moreover, the DNL 60 dB contour used by the NAA to justify the Stage 2 ban is not the same as the DNL 60 dB contour that defines Zone D under the new ordinance. By prohibiting development inside the DNL 60 dB contour only after the contour was contracted by a restriction on operations, the City has minimized any burden on development, at the expense of airport users.

²⁴⁰ Surprisingly, the NAA makes the following argument in its Reply to the Notice of Investigation:

[T]he actions of the City and County are not a predicate to the Authority taking action to control noise. Stage 2 restrictions need not be based on existing land use regulation by local governments or on the vigor with which these governments enforce their own land use standards. Under the statutory scheme established by Congress, the airport proprietor identifies the area of concern and consideration—it is not imposed upon the proprietor by neighboring local governments.

In the NAA’s Part 161 Supplemental Analysis and its Reply to the Notice of Investigation, the NAA provides several local circumstances, besides the City and County ordinances, that it claims support the use of its land use compatibility goal of minimizing residential land within the DNL 60 dB contour for purposes of justifying the Stage 2 ban. A review of the applicable portions of these documents identified the following circumstances which the NAA believes provide a reasonable basis for its use of the land use compatibility goal: (a) the NAA faces a credible and identifiable threat of liability from property owners due to noise from aircraft using the airport; (b) the Stage 2 ban will address 40 percent of the noise complaints the NAA receives; and (c) residents in Naples have an outdoor lifestyle in a low-ambient-noise-level environment.²⁴¹

Upon close review of the information submitted by the NAA to support its imposition of the Stage 2 ban, we find that: (a) at the time that the NAA implemented the Stage 2 ban, neither the City nor the County had prohibited residential development within the DNL 60 dB contour; (b) the NAA’s contention that it is faced with credible and identifiable threats of liability from property owners is not supported by the record evidence; (c) the NAA’s use of complaint and Sound Exposure Level (“SEL”) data does not support a finding that the Stage 2 ban is reasonable; and (d) the NAA’s analysis of background and ambient noise levels is flawed and does not justify the NAA’s stated land use compatibility goal or the Stage 2 ban.

a. Allowance Of Residential Development Within The DNL 60 dB Contour By The City Of Naples And Collier County

The record does not support the NAA’s contention that the City of Naples and Collier County considered residential development within the DNL 60 dB contour to be incompatible at the time the Stage 2 ban was implemented. Indeed, the record evidence demonstrates that when the NAA adopted the Stage 2 ban, neither the City nor the County prohibited residential construction inside the DNL 60 dB contour.

In fact, both the City and the County recognized that development could be compatible above DNL 60 dB if certain non-restrictive measures were taken to mitigate the noise, such as sound attenuation. Local governmental decisions to approve noise sensitive development in the DNL 60 dB contour further undermine the NAA’s assertion that the City and County had determined that noise exposure was not compatible with residential development below DNL 65 dB. Consequently, we find the NAA’s assertion that it was “respecting the City of Naples and Collier County DNL 60

There is no doubt that an airport proprietor (the Authority included) is guided and informed by local regulations and actions regarding tolerable levels of noise. In the end, however, the airport proprietor has full discretion to make its own judgment about the appropriate level of noise in the community that suffers the impacts of the operations of the airport. In this case, the Authority has made that judgment in large part on the basis of actual numbers of people affected by Stage 2 aircraft within the DNL 60 dB [contour], and not by mere mechanical adherence to a local standard promulgated by a different governmental body.

FAA Exhibit 1, Item 2, p. 20. According to the NAA’s own documentation, it selected its “land use compatibility criteri[on]” of DNL 60 dB “[i]n compliance with the FAA direction in Part 150 that airport proprietors must *defer to local authorities in determining land use compatibility*” FAA Exhibit 1, Item 14, Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000, p. 19 (emphasis added). See FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study) p.16.

²⁴¹ FAA Exhibit 1, Item 2, Attachment 15, pp. 10-16, 33; and FAA Exhibit 1, Item 2, p. 14.

dB land use criterion” to be misleading. If the NAA was simply respecting the City and County criterion, the NAA could not have reasonably concluded, as it did in its Part 161 analysis, that sound attenuation of existing residences within the DNL 60 dB contour would not be an effective alternative to the Stage 2 ban. As discussed in more detail below, Collier County’s land use compatibility ordinance expressly states that residential construction within the DNL 60 dB contour is “*generally compatible ...*”²⁴²

i. The City Of Naples

The NAA asserted, in its Part 161 Supplemental Analysis, that the City of Naples had “taken steps that establish DNL 60 dB as the level above which residential land use has been deemed not to be compatible with airport and aircraft operations.”²⁴³ However, as acknowledged by the NAA, the City of Naples Ordinance No. 98-8165, upon which NAA based this assertion, required that the City Council provide general development site plan (“GDSP”) approval for residential construction within the DNL 60 dB contour.²⁴⁴ The ordinance did not prohibit residential development within the DNL 60 dB contour.

Within weeks of the FAA’s final letter commenting on the NAA’s Part 161 analysis²⁴⁵ and issuance of the instant Notice of Investigation, a representative of the City of Naples Planning Advisory Board (PAB) discussed the City’s consideration of the Lido Bay Resort proposal at an NAA board meeting. This proposal would have permitted the construction of a 58-unit three-story hotel/resort located between the DNL 60 dB and DNL 65 dB contours and in almost perfect alignment with Runway 05-23, just 2,700 feet away from the end of the runway. When the representative from the PAB was asked if the PAB considered residential development adjacent to the airport to be compatible with airport operations, the representative stated:

As you know again, we have entered into the Interlocal Agreement. We have formed an Airport Zoning Commission. The first meeting is scheduled for November 28[, 2001]. You all will be receiving a notice and agenda of that meeting. And one of the items that the commission will be addressing is the different types of land uses in proximity to the airport and what the appropriateness of those types of land uses are. So, I think that will be the process in which you will address the different land uses adjacent to the airport property.²⁴⁶

The PAB representative’s comments clearly indicate that the City of Naples had not determined that residential development within the DNL 60 dB contour was incompatible with airport and aircraft operations at the time NAA studied and implemented the Stage 2 ban.

²⁴² See FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 4, Appendix III of Ordinance 2000-43, p. 71 (emphasis added).

²⁴³ FAA Exhibit 1, Item 2, Attachment 15, p. 10

²⁴⁴ FAA Exhibit 1, Item 2, Attachment 6, p. 11

²⁴⁵ See FAA Exhibit 1, Item 1(b), Letter from Mr. Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, and topical comments, October 31, 2001.

²⁴⁶ FAA Exhibit 1, Item 11, Video Tape of Naples Airport Authority Meeting, November 15, 2001, FAA Exhibit 1, Item 4, *Lido Bay Resort Project Revamped After Airport Noise Concerns*, Naples Daily News, 01/05/2002.

Moreover, the record shows that the Naples City Council approved residential development within the DNL 60 dB contour subsequent to enactment of Ordinance No. 98-8165.²⁴⁷

In 1999, the City issued building permits for the 156-unit Bayfront condominium development (selling for approximately \$500,000 per unit).²⁴⁸ These condominiums, which are within the DNL 60 dB contour, were constructed in the year 2000.²⁴⁹ The development is located in an area the NAA refers to as “exceptionally noise-sensitive neighborhoods” and is located within a half mile from the end of runway 05-23.²⁵⁰ In fact, this development accounts for a population of 320 out of a total impacted population count of 1,306 within the DNL 60 dB contour that the NAA now seeks to use to justify the ban.²⁵¹

In 1998, the Naples City Council approved a rezoning petition for the River Point Marina Planned Development, also known as the Naples Bay Yacht and Boat Barn. City staff had recommended approval, provided that the petitioner provide an avigation easement to the Airport Authority because of the “proximity of the site to the airport.”²⁵² The development included, among other things, condominiums well within the DNL 60 dB contour and generally aligned with runway 05-23, in what the NAA defines as “exceptionally noise-sensitive neighborhoods.”²⁵³ While the development never occurred, the fact remains that the City approved residential development within the 60 dB DNL contour after adoption of Ordinance No. 98-8165.

The Bayfront condominium development and the River Point Marina Planned Development were approved by the City within the DNL 60 dB contour despite the FAA’s approval of the Authority’s proposal to prevent construction within the DNL 60 dB contour. Specifically, in its “FAR Part 150 Study,” dated February 1997, the NAA advised the FAA that

it is important to create a buffer of compatible land use around the Airport. As such, another standard should be designated by the local land use planning agencies to ensure that residential and noise sensitive uses are not developed too close to the Airport. One possible standard is the 60 L_{dn} contour. . . . Applying the land use compatibility guidelines normally used for the 65 L_{dn} contour to [the] 60 L_{dn} contour should create an adequate area of compatible land use.²⁵⁴

The FAA approved the DNL 60 dB “buffer zone” as a land use measure in September 1997.²⁵⁵

²⁴⁷ Ordinance 98-8165 was enacted on January 1, 1998. FAA Exhibit 1, Item 2, Attachment 6, Tab 11

²⁴⁸ FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 28.

²⁴⁹ This development was listed as “under construction” as early as March 2000 in FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), Appendix B, 14.

²⁵⁰ <http://www.rlest.com>, FAA Exhibit 1, Item 2, Attachment 6 (History of Noise Compatibility Efforts for Naples Municipal Airport, October 2000), Tab 6.

²⁵¹ FAR Part 150 Noise Exposure Map Update, November 2000, Appendix F; FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), Appendix B; FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 3.

²⁵² FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 30, (Petition No. 98-R1).

²⁵³ FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 30, April 1, 1998 City Council Regular Meeting, p. 5. See location, 1332 5th Avenue S, FAA Exhibit 1, Item 2, Attachment 6 (History of Noise Compatibility Efforts for Naples Municipal Airport, October 2000), Tab. 6.

²⁵⁴ FAA Exhibit 1, Item 2, Attachment 28, FAA Approval, Revised Compatibility Program 1996, February 1997.

²⁵⁵ FAA Exhibit 1, Item 2, Attachment 29, FAA Approval, Revised Compatibility Program 1996, September 1997.

The City's actions establish that the City considered residential development to be compatible within the 60 dB DNL contour, with some land use mitigation measures, such as the acquisition of easements as was the case with the Bayfront condominium development. In fact, at the aforementioned NAA board meeting, the representative from the City's PAB stated, in reference to the PAB process for recommending development to the City Council:

That is what the whole planning process is; you identify the problem, and then [find] significant ways to mitigate those incompatibilities. And if it is not, then your recommendation should be for denial. If you can make it a compatible land use through various measures, then I would believe your recommendation should be for approval.²⁵⁶

The NAA asserts that even though the City's Ordinance 98-8165 permitted residential land use within the DNL 60 dB contour, the ordinance allowed such residential development only with "extraordinary" City Council approval.²⁵⁷ However, the NAA cited no City policy to support this representation, and admitted, in its Reply to the Notice of Investigation, that the NAA could not control the actions of the City.

ii. Collier County

The NAA argues that Collier County adopted DNL 60 dB as the limit for compatible land use and amended its County Land Development Code ("CLDC") accordingly.²⁵⁸ However, the NAA also acknowledges that "[i]n Collier County, the Ordinance allows residential development with sound proofing requirements in the 70 and 65 LDN contour. . . . It also currently allows homes within the 60 LDN contour with a certain amount of soundproofing."²⁵⁹

The CLDC was amended in June 2000 by Ordinance 2000-43 to, among other things, "provide development standards for land uses within prescribed noise zones associated with the normal operation of public use county airports."²⁶⁰ The amendment added a new Airport Noise Zone D,²⁶¹ which extends from the DNL 65 dB contour to the DNL 60 dB contour. Section 2.2.23.4.3 of the amended ordinance sets forth the sound level requirements ("SLR") for buildings and structures, and Section 2.2.23.4.5 provides that "[n]o building or structure for which an SLR 25, SLR 30, or SLR 35 is required by appendix III of this amendment may be constructed . . . unless and until a building permit has been issued," and "[n]o such permit shall be issued unless and until the requirements in appendix III are met. . . ."²⁶²

Appendix III of the amended ordinance requires that soundproofing requirements be met for residential structures located within the airport noise zones. It states that "NR" indicates that

²⁵⁶ FAA Exhibit 1, Item 11, Video Tape of Naples Airport Authority Meeting, November 15, 2001.

²⁵⁷ FAA Exhibit 1, Item 2, Attachment 6, p. 11. Similarly, in commenting on a draft of the City's Ordinance 02-9648, adopted on June 5, 2002, which allows "transient lodging" in Zone D as a "conditional use," the NAA stated its expectation that "conditional uses will be allowed only in the most extraordinary circumstances where the applicant can present a compelling argument that the proposed use in no manner violates the principles of land use compatibility that the City and the Authority have sought to achieve." FAA Exhibit 1, Item 12, Exhibit 13.

²⁵⁸ FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), p. 16.

²⁵⁹ FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 31, under the heading "Noise Compatibility."

²⁶⁰ See FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 24.

²⁶¹ FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 21, p. 2.

²⁶² FAA Exhibit 1, Item 7, Volume 2, (Chronology of Events, Collier County), Tab 21, p. 46.

residential development is “Not recommended, the land use is not compatible with the identified noise zone. However, if the applicant chooses to develop within the identified noise zone, a sound level reduction (SLR) of 35 must be incorporated into the design and construction of the structure.” The designation of SLR-35, 30, or 25 indicates that “the land use is *generally compatible*, however, a sound level reduction (SLR) of 35, 30 or 25 must be incorporated into the design and construction of the structure.”²⁶³

Thus, a plain reading of the County’s amended ordinance indicates that the County permits construction in the DNL 60 dB contour with some required sound attenuation. Moreover, the County’s amended ordinance directly contradicts the NAA’s assertion that the County has determined the DNL 60 dB contour to be incompatible with residential development when the ordinance states that residential construction within the DNL 60 dB is “*generally compatible* . . . ,” with appropriate sound attenuation required for new construction and for alterations or repairs to exterior walls or ceilings of existing structures.²⁶⁴ Also, since the sole effect of the ordinance is to reduce *interior* noise levels, the ordinance does not support the NAA’s argument for special consideration for outside noise levels in the Naples area, as discussed more fully below.

Consistent with our reading of the County’s amended noise ordinance, recent public statements by NAA staff indicate that the ordinance would permit continued residential construction in the DNL 60 dB contour. In May 2000, NAA Staff testified at a Collier County Planning Commission meeting. In its testimony, NAA Staff expressly stated that the purpose of the change from 65 to 60 dB as part of the Airport Overlay District was to protect “the same amount of land, and that protection, essentially provides for soundproofing and residential development within the noise zone, provides some restrictions if people do want to build in that area, and it also provides notification as well.”²⁶⁵

Finally, the NAA’s reliance on the County’s noise ordinance to justify the Stage 2 ban contradicts the express intent of the amendment of the ordinance. Specifically, Section 2.2.23.1.3 of the CLDC provides that it is “[t]he purpose and intent of these regulations . . . [t]o attempt to promote full utility of the public-use airports within Collier County. . . .” The Stage 2 ban degrades, rather than promotes, the utility of APF.

While even unequivocal action by the City and County to prohibit residential construction in the DNL 60 dB contour would not itself support a restriction on access to the airport, it is clear that neither the City nor the County had at the time the ban was implemented prohibited all residential within the DNL 60 dB contour that was used to define the land use compatibility goal the NAA used to justify the Stage 2 ban.

b. The NAA’s Contention That It Is Faced With Credible and Identifiable Threats of Liability From Property Owners

In the Part 161 Supplemental Analysis, the NAA asserts that it is faced with a “credible and identifiable threat of liability from property owners.”²⁶⁶ The FAA has examined the material

²⁶³ FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 24, p. 72.

²⁶⁴ See FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 3-4, Appendix III of Ordinance 2000-43, pp 22-23, -72 (emphasis added).

²⁶⁵ FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 19, p. 9, 10.

²⁶⁶ FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 16.

submitted by the NAA in support of this assertion and, as discussed more fully above, concludes that neither that material, nor the record generally, supports the NAA's allegation that it has potential or actual noise liability exposure.

c. The NAA's Use Of Complaints And SEL Data To Support The Stage 2 Ban

As discussed above, the NAA defined its "land use compatibility goal" in the 2000 NEM update and the Part 161 Study as "minimizing residential land within 60 dB DNL to the maximum extent feasible."²⁶⁷ The Part 161 Study stated that "[c]onsistent with this goal, the 2000/2005 NEM (Noise Exposure Map) Update used the 60 dB DNL contour as the basis for identifying potentially non-compatible land use"²⁶⁸ The Part 161 Study also asserted, however, that "the basis for NAA action is supported by more than just the population within the NEM contours."²⁶⁹ Specifically, the Part 161 Study asserted that in addition to cumulative noise exposure, the "basis for community concern regarding noise impacts can be demonstrated" by reference to single event noise exposure and noise complaints.²⁷⁰

Accordingly, the NAA's Reply to the Notice of Investigation asserts that in addition to "incompatible land use surrounding the Airport," the NAA's "noise problem also is reflected in . . . complaint data."²⁷¹ The Reply also refers to complaint data and SEL data as support for the statement that "[t]he data in the Part 161 Study and related analyses makes [sic] clear that noise impacts are disproportionately attributable to the operations of Stage 2 aircraft."²⁷²

We can appreciate the NAA's desire and efforts to address noise complaints. As explained below, however, complaints and SEL data are not valid indicators of noncompatible land use. Moreover, the complaint and SEL data presented by the NAA do not, in any event, justify banning all Stage 2 aircraft from the Naples Airport. Thus, the NAA's analyses of complaints and SEL data do not support a finding that the Stage 2 ban is reasonable under 49 U.S.C. § 47107(a) and Grant Assurance 22.

i. Complaints and SEL Data As Indicators Of Noncompatible Land Use

Complaints and SEL data are not valid indicators of noncompatible land use,²⁷³ and thus do not support a finding of reasonableness under 49 U.S.C. § 47107(a) and Grant Assurance 22. Land use compatibility with airport noise is determined through assessment of objective data regarding community impacts from long-term noise exposure, expressed in terms of DNL. Congress, in ASNA, directed the FAA to address land use compatibility through a single system of noise measurement to be uniformly applied in measuring noise at airports and in surrounding areas for which there is a highly reliable relationship between projected noise and surveyed reactions of

²⁶⁷ FAA Exhibit 1, Item 14 (Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000), p. 19; FAA Exhibit 1, Item 2, Attachment 3 (Part 161 Study), p. 16.

²⁶⁸ Id.

²⁶⁹ Id.

²⁷⁰ Id.

²⁷¹ FAA Exhibit 1, Item 2, p. 14.

²⁷² Id.

²⁷³ It would appear that the NAA understands this fact, since it used a DNL contour, rather than complaint data, "as the basis for identifying potentially non-compatible land use" in the vicinity of the airport. FAA Exhibit 1, Item 2, Attachment 3 (Part 161 Study), p. 16.

people to noise.²⁷⁴ In 14 C.F.R. Part 150, the FAA adopted DNL to fulfill this statutory obligation.²⁷⁵

- **Complaints**

As the NAA noted in the Part 161 Study, “complaint analyses are not normally considered a scientific basis for evaluating noise impacts because of their *highly subjective* nature”²⁷⁶ The Part 161 Study went on to state, however, that complaints are nonetheless “a valid indication of annoyance.”²⁷⁷ While complaints may be a valid indication of *individual* annoyance, they do not accurately measure *community* annoyance.²⁷⁸ Reactions of individuals to a particular level of noise vary widely, while community annoyance correlates well with particular noise exposure levels. As the FAA stated in a 1994 report to Congress on airport noise:

The attitudes of people are actually more important in determining their reactions to noise than their noise exposure level. Attitudes that affect an individual’s reactions include (1) apprehension regarding the safety of a noise source, (2) the belief that the noise is preventable, (3) awareness of nonnoise environmental problems, (4) a general sensitivity to noise, and (5) the perceived economic importance of the noise source.

The resultant variability in the way individuals react to noise makes it essentially impossible to predict with any accuracy how any one *individual* will respond to a

²⁷⁴ 49 U.S.C. § 47502.

²⁷⁵ As noted in the preamble to the Part 150 interim rule, Part 150 “specifies [DNL] as the acoustical measure to be used in assessing compatibility between various land uses and an outdoor noise environment resulting from aircraft operations at, and in the vicinity of, an airport.” 46 Fed. Reg. 8316, 8325 (1981). The preamble explained that

[f]or evaluating the exposure of individuals to noise from airports, the appropriate unit is a cumulative noise measure. While people certainly do respond to the noise of single events (particularly to the loudest single event in a series), *the long-range effects of prolonged exposure to noise appear to best correlate with various cumulative measures.*

46 Fed. Reg. 8316, 8323 (1981) (emphasis added); see also 56 Fed. Reg. 48661, 48669 (1991) (preamble to Part 161 final rule, stating that “[l]ong-term noise exposure is the accurate measure of community annoyance and land-use compatibility”). See generally “Day Night Average Sound Level (DNL): *The Descriptor of Choice for Airport Noise Assessment*” (<http://www.aee.faa.gov/noise/DNL.htm>).

²⁷⁶ FAA Exhibit 1, Item 2, Attachment 3, p. 27 (emphasis added). It would also appear that the NAA understood the subjective nature of complaint data when it stated that its complaint data provide clear evidence that the *subjective* annoyance of Stage 2 operations is significantly greater than that caused by Stage 3 operations or non-jet operations. FAA Exhibit 1, Item 2, Attachment 7, Letter from Ted Baldwin, HMMH, to Wayne Heibeck, Manager, Airport Compliance Division, FAA (October 28, 2000) (emphasis added). The limitations on the use of complaint data are evident in this case. For example, while the NAA defined the ban as reasonable because complaints “clearly” identify Stage 2 aircraft as responsible, the NAA acknowledges that banning those aircraft may not bring relief. In the NAA’s Reply to the Notice of Investigation, which states that “[a]lthough the Authority cannot guarantee that complaints will be eliminated, it is eminently reasonable for the Authority to restrict operations of the aircraft that clearly are responsible for the complaints.” FAA Exhibit 1, Item 2, p. 15.

²⁷⁷ FAA Exhibit 1, Item 2, Attachment 3, p. 27.

²⁷⁸ FAA Exhibit 1, Item 21 (“Federal Agency Review of Selected Airport Noise Analysis Issues” (FICON, 1992)), Vol. 2, p. 3-6. The FICON report was the product of an interagency working group, initiated by the respective Deputy Administrators of the FAA and EPA, to review the technical and policy issues related to measuring noise impacts around airports. As explained in the FICON report, community annoyance “can exist without complaints and, conversely, complaints may exist without high levels of annoyance.” *Id.*

given noise. When *communities* are considered as a whole, however, reliable relationships are found between reported annoyance and noise.²⁷⁹

This relationship between community annoyance and noise exposure levels “remains the best available source of predicting the social impact of noise on communities around airports”²⁸⁰ As the Federal Interagency Committee on Noise (FICON) noted in its 1992 report, “the best available measure of [community annoyance] is the percentage of the area population characterized as ‘highly annoyed’ (%HA) by long-term exposure to noise of a specified level (expressed in terms of DNL).”²⁸¹

If complaints could justify noise restrictions, a handful of people could effectively justify any noise restriction by consistently complaining. For example, the record reflects that 36 percent of all complaints filed with the NAA in the first quarter of 2000 came from eight families, and 154 calls came from two households.²⁸² In the last quarter of 1999, three families generated 27 percent of the complaints filed.²⁸³

We also note that when complaint data are placed on a map showing the airport runways and noise contours, the locale of complaints does not correlate with the area within the DNL 60 dB noise contour. In fact, an NAA handout for the April 2001 Collier County staff meeting indicates that most of the noise complaints are generated from residents outside the DNL 60 dB contour.²⁸⁴ A comparison of the geographic distribution of aircraft noise complaints in Figures 10 to 12 of the Fidell Study to the pre-restriction DNL 60 dB contour, shows that the vast majority of complaints come from well outside the DNL 60 dB contour.²⁸⁵ (See Figure 1, Complaints v. DNL 60 dB Contour)

²⁷⁹ FAA Exhibit 1, Item 26 (“Report to Congress on Effects of Airport Noise” (FAA, 1993)), p. 20 (emphasis in original).

²⁸⁰ *Id.*, p. 1.

²⁸¹ FAA Exhibit 1, Item 21 (“Federal Agency Review of Selected Airport Noise Analysis Issues” (FICON, 1992)), Vol. 2, pp. 3-3, 3-4.

²⁸² FAA Exhibit 1, Item 13, City of Naples Airport Authority Quarterly Noise Report, Number 13 (January 1, 2000 - March 31, 2000).

²⁸³ FAA Exhibit 1, Item 13, City of Naples Airport Authority Quarterly Noise Report, Number 12 (October 1, 1999 - December 31, 1999) p. 12. There have been statements in the media that in 1998, more than half of the complaints came from one family residing in Port Royal, located in the Southwest quadrant of the airport. (FAA Exhibit 1, Item 4, Naples Daily News, *Airport Authority Rejects Noise Disclosure Plan*, 06/25/1998).

²⁸⁴ See FAA Exhibit, Item 7, Volume 2, Tab 31.

²⁸⁵ See FAA Exhibit, Item 2, Attachment 21, Sanford Fidell, p.22-23.

Figure 1 **Complaints v. DNL 60 dB Contour (Pre-Stage 2 Ban)**



The purple dots, representing complainants, are compared with the pre-restriction DNL 60 dB contour (continuous red line). It is clearly depicted that most of the complaint locations are well outside the DNL 60 dB contour. Sources: Figure 10-12 of the Fidell Study [FAA Exhibit, Item 2, Attachment 21] and the 2000 60 dB DNL contour (2000 Day-Night Average Sound Level (DNL) Contours [FAA Exhibit, Item 2, Attachment 3 (Part 161 Study), Figure 3-2, p.18].

It also appears that the NAA itself has questioned the utility and efficacy of relying on complaints as a measure of its noise problem and as justification for the Stage 2 ban. In May 2000, when specifically asked by Collier County officials whether the change from 65 to 60 dB was going to be effective in stopping complaints, a NAA representative stated, “I wish...No, I don’t think this is going to reduce the complaints...”²⁸⁶

Accepting the NAA’s rationale that it is justified in banning Stage 2 aircraft because of complaints would have serious implications for the FAA. To accept the NAA’s use of complaint data, the FAA would have to agree that 0.7 complaints per day justify a ban of an entire class of aircraft²⁸⁷ – all Stage 2 jets under 75,000 pounds. Given the very small number of complaints, this fact could be true at many airports in the national air transportation system. Allowing other airports to use the same complaint-based justification could result in airports banning 28 percent of the general

²⁸⁶ FAA Exhibit 1, Item 7 (Chronology of Events, Collier County), Tab 19, p. 10-11.

²⁸⁷ FAA Exhibit 1, Item 13, City of Naples Airport Authority Quarterly Noise Report, Numbers 17-20. The total number of Stage 2 complaints from January 1 to December 31, 2001 was 250 (101+64+22+63); 250 complaints/365 days= 0.68 complaints per day, rounded to 0.7. (October 1, 2001 - December 31, 2001). The *Naples Municipal Airport Part 161 Study*, provides data related to the total number of operations conducted by certain aircraft types. We note for example, that the *2000 Average Daily Operations Table With No Restrictions*, attributes Stage 2 aircraft with 2.36 daily operations. FAA notes that the number of Stage 2 operations targeted by the NAA is 2.36 Stage 2 operations per day. FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), p. 31.

aviation jet fleet in the United States based on an average of less than one complaint per day at each airport.²⁸⁸

- **SEL Data**

As discussed in the 1992 FICON report, single event prediction methods such as SEL have limited application in land use planning and in determining long-term noise impacts.²⁸⁹ An SEL contour depicts a compressed, 1-second snapshot of an area exposed to a particular level of noise from a single overflight event; what it does *not* do is show the long-term effects of multiple overflights, annoyance reactions, or land use compatibility within the contour. Single event noise levels have never been shown to be of any use in predicting community reactions to aircraft noise or developing compatible land use plans.²⁹⁰ SEL does not provide information concerning, among other things, the total duration of an event, the number of individual events, or the timing of events relative to activities that are subject to noise interference--information that is required to assess compatibility of residential land uses at airports like Naples. Because single event metrics are not composites of cumulative events, they do not distinguish between impacts of single and multiple events. Thus, as measured by SEL, 100 aircraft operations a day would be no worse than one operation.

For example, in arguing that a significantly higher number of residents are impacted by the 85 dB SEL from a Stage 2 jet as compared to a Stage 3 jet, the NAA fails to indicate that all of the residents in the DNL 60 dB contour will experience 85 dB or greater SEL events from Stage 3 aircraft approximately 16 times more often than from Stage 2 aircraft, simply because there are more Stage 3 aircraft operating at the airport.²⁹¹

Similarly, one event at 90 dB would be assessed as worse than 100 events at 89 dB. While the SEL metric can be used for certain purposes,²⁹² it does not reflect long-term noise impacts or annoyance reactions accurately,²⁹³ making it an inaccurate and unreliable measure of community noise impacts. The NAA appears to understand that SEL is of limited use when it stated that the “analysis

²⁸⁸ NAA data estimated the number of Stage 2 jets at 2,000. See FAA Exhibit 1, Item 14, Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000, Appendix C, p. 23. FAA estimates also approximate this number. We note that there are approximately 7,000 turbojets in the general aviation and air taxi fleet. NBAA data, Aircraft Owners and Pilots Association 2000 Aviation Fact Card and FAA Aerospace Forecasts, FY 2002-2013, General Aviation and Air Taxi Activity Survey, Calendar Year 2000.

²⁸⁹ FAA Exhibit 1, Item 21, “Federal Agency Review of Selected Airport Noise Analysis Issues” (FICON, 1992), p. 2-4.

²⁹⁰ See, e.g., “Day Night Average Sound Level (DNL): *The Descriptor of Choice for Airport Noise Assessment*” (<http://www.aee.faa.gov/noise/DNL.htm>).

²⁹¹ See FAA Exhibit 1, Item 2, Attachment 3, p.46. Comparing number of Stage 2 operations (2.33) with the number of Stage 3 operations (36.46).

²⁹² Part 161 does not prohibit the appropriate use of supplemental metrics. See 56 Fed. Reg. at 48669-70, 48673 (1991) (preamble to Part 161 final rule). Appropriate uses of SEL include comparing aircraft operating procedures, quantifying the merits of different noise abatement procedures, comparing aircraft types, describing noise exposure at noise-sensitive locations, assessing the impacts of aircraft operations on sleep disturbance, and demonstrating transmission loss and noise level reduction through the use of insulation. See “Aircraft Noise: How We Measure It and Assess Its Impact” (http://www.aee.faa.gov/noise/Aircraft_Noise.htm); FAA Order 1050.1D, “Policies and Procedures for Considering Environmental Impacts”; “Day Night Average Sound Level (DNL): *The Descriptor of Choice for Airport Noise Assessment*” (<http://www.aee.faa.gov/noise/DNL.htm>); “Effects of Aviation Noise on Awakenings from Sleep (Federal Interagency Committee on Aviation Noise, June 1997), p. 6.

²⁹³ See, e.g., FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, 43802, 43820 (July 14, 2000).

of SEL contours was not the basis for any of the conclusions reached in this report [Part 161 Study].”²⁹⁴ Additionally, there is no accepted methodology for aggregating only the impacts of single events into some form of cumulative impact metric, and single event metrics do not describe the overall noise environment.²⁹⁵ Moreover, there are no scientific data supporting the NAA’s implied assumption that a particular SEL contour, such as the 85 dB SEL contour, constitutes an “adverse effect.”²⁹⁶

ii. *The NAA’s Use Of Complaints And SEL Data To Justify A Ban On All Stage 2 Aircraft*

In its Reply to the Notice of Investigation, the NAA states:

The data in the Part 161 Study and related analyses makes [sic] clear that *noise impacts are disproportionately attributable to the operations of Stage 2 aircraft*. For example, if one uses a typical noise contour to measure impacts (85 dB SEL), a Lear 25 Jet (the most common Stage 2 aircraft at the Airport) adversely affects 70,000 people while a Lear 35 Jet (a Stage 3 jet) affects only 16,000 people. Part 161 Study (Exhibit 3) at 24-26 (depicting noise contours of the Lear 25 and Lear 35). Moreover, as summarized in the first report of the Part 161 Study:

1. Although Stage 2 aircraft operations account for less than one percent of aircraft operations at the Airport (3.15 operations per day in 2000 and 2.17 per day projected for 2005), they account for almost 40 percent of all noise complaints;
2. The rate of complaints associated with Stage 2 aircraft operations is 25 times that of complaints for Stage 3 aircraft operations and 250 times that of propeller-driven aircraft operations;
3. Stage 2 aircraft operations were over 50 times more likely to cause multiple noise complaints (more than one home) than Stage 3 aircraft operations and 800 times more likely than propeller-driven aircraft operations.

²⁹⁴ FAA Exhibit, Item 2, Attachment 3 (Part 161 Study), p. 24.

²⁹⁵ FAA Exhibit 1, Item 21, “Federal Agency Review of Selected Airport Noise Analysis Issues” (FICON, 1992), Vol. 2, p. 2-5. Also see FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, 43821. As EPA has so clearly stated in the Levels Document, any contention that single event noise analysis is needed to supplement DNL to describe airport noise impacts runs counter to the fact that annoyance already embodies interference with human activity, which includes sleep and speech. Other recent studies continue to indicate that DNL is the descriptor of choice in representing community reaction to noises of all kinds. A recent study to assess the nighttime weighting factor used in DNL concluded that there is no credible evidence to use anything other than the accepted DNL. “Cumulative Airport Noise Exposure Metrics: An Assessment of the Evidence for Time-of-Day Weightings,” DOT/FAA/EE-86/10.

²⁹⁶ See, e.g., FAA Exhibit 1, Item 26 (“Report to Congress on Effects of Airport Noise” (FAA, 1993)), p. 11 (“there are no reliable data correlating single event noise levels with impacts on humans”). While “[s]ingle event analysis is sometimes conducted to evaluate sleep disturbances and, less frequently, specific speech interference issues, primarily at locations where the DNL is below 65 dB[,] . . . [t]he DNL methodology includes a 10-dB nighttime penalty which reflects the potential for increased annoyance associated with nighttime noise intrusions due to sleep disturbance, speech interference, and other effects.” FAA Exhibit 1, Item 21, Vol. 2, p. 2-5.

Id. at 27-28.²⁹⁷

The NAA's SEL analysis is limited to a comparison between composite SEL contours for two aircraft, the Lear 25 and the Lear 35. The NAA's Reply states that the Lear 25 is the "most common Stage 2 aircraft at the Airport."²⁹⁸ The Part 161 Study states that the SEL analysis "clearly reveal[s] the reduced noise impact of Stage 3 operations compared to Stage 2," and "clearly indicat[es] the significantly greater impact associated with Stage 2 operations."²⁹⁹ With respect to complaints specifically, the Part 161 Study states that the complaint data "provide clear evidence that Stage 2 operations are much more likely to annoy residents than Stage 3 operations."³⁰⁰ The Reply concludes that "it is eminently reasonable for the [NAA] to restrict operations of the aircraft that clearly are responsible for the complaints."³⁰¹

Assuming, without conceding, the validity of the NAA's analyses of complaints and SEL data, these analyses do not justify a ban on *all* Stage 2 aircraft. The analyses do not show—indeed, do not even purport to show—that "noise impacts" are "disproportionately attributable" to *all* Stage 2 aircraft. The SEL analysis shows only that a Lear 25 is noisier than a Lear 35; it does not show that *all* Stage 3 aircraft using the airport have "reduced noise impact" compared to *all* Stage 2 aircraft, nor that *all* Stage 2 operations have "significantly greater impact" than *all* Stage 3 operations.³⁰² Similarly, the analysis of complaint data does not show that *all* Stage 2 operations are "much more likely to annoy residents" than *all* Stage 3 operations.

Thus, even assuming the validity of the NAA's analyses of complaints and SEL data, these analyses do not support a finding that the Stage 2 ban is reasonable under 49 U.S.C. § 47107(a) and Grant Assurance 22.

²⁹⁷ FAA Exhibit 1, Item 2, p. 14 (emphasis added).

²⁹⁸ *Id.*

²⁹⁹ FAA Exhibit 1, Item 2, Attachment 3 (Part 161 Study), pp. 23-24.

³⁰⁰ *Id.*, p. 28.

³⁰¹ FAA Exhibit 1, Item 2, p. 15. Also, the record indicates that the U.S. District Court for the Middle District of Florida relied on the NAA's assertion regarding complaints in dismissing the NBAA's complaint. Specifically, the court concluded that

[the NBAA did not] controvert the essential finding of [the Part 161] study – that Stage 2 operations, though relatively minimal, account for a hugely disproportionate share of residents' noise complaints. However "unscientific" the NBAA might consider such complaints, there is nothing in the record that suggests they are an inappropriate consideration for any entity that is charged with assessing and addressing the noise problem at a particular airport.

See FAA Exhibit 1, Item 2, Attachment 23, p. 14.

As discussed above, the FAA is not bound by the court's decision, which was based on a factual record much different than that before the FAA in this proceeding.

³⁰² Indeed, due to the limited scope of the SEL analysis, it does not even support the NAA's contention that Stage 2 aircraft, *as a group*, have greater noise impacts than Stage 3 aircraft. Moreover, the FAA disagrees with the NAA's assumption in its SEL methodology that the Lear 25 is representative of all Stage 2 aircraft. For example, a Lear 25 is not representative of a Stage 2 Falcon 20, a Sabreliner 80, an Hawker Siddeley HS-125-700, or an Lockheed L-1329, all of which have been reported to have operated at APF during the study period. See FAA Exhibit 1, Item 18.

d. The NAA's Analysis of Background and Ambient Noise Levels

The NAA argues that the low ambient noise levels in the City of Naples support, in part, its land use compatibility goal of minimizing residential land use within the DNL 60 dB.³⁰³ In support of its assertion, the NAA presents an analysis conducted by NAA staff using portable noise monitors. The analysis was performed with the use of the L₉₀ noise descriptor, which, according to the NAA, considers community reaction to noise in the context of the “residual” level. According to the NAA, the use of the L₉₀ noise descriptor identifies corrections to be added to the DNL of “intrusive” noise to obtain “normalized” DNL, based on recommendations in an EPA report entitled “Community Noise.” The NAA supports its analysis by citing the EPA report as the most widely accepted basis for selection of normalizing factors.

According to the NAA, the EPA report recommends that the intruding noise be adjusted upward by five decibels for a “normal suburban community (not located near industrial activity)” and upward by ten decibels for a “quiet suburban or rural community (remote from large cities and from industrial activity and trucking).” The NAA asserts that the residential areas within the DNL 60 dB contour are not immediately adjacent to industrial activity, large cities, and any trucking activity, other than normal delivery vehicles. The NAA also asserts that the residual levels at 7 sites monitored by NAA staff within the DNL 60 dB contour are “extremely low,” generally between 40 to 50 dB, with one level of 39.4 and one of 53.4. Based on this information, the NAA concludes that the background noise levels clearly support a local compatibility criterion at least five decibels below the Federal DNL 65 dB compatibility guideline.³⁰⁴

As explained below, we do not find it reasonable for the NAA to restrict access to the airport on the basis of ambient noise levels.

i. The NAA's Use Of Normalized DNL

The NAA's applied use of a “normalization” technique to DNL lacks a clear scientific foundation, peer review, or a basis in current noise policy. In an early 1990's technical review, FICON did not support the use of normalized DNL. The 1992 FICON report states that the concept of normalized DNL was never widely accepted within the scientific community. The report also states that there is insufficient scientific data to provide a basis for development of guidance on what level of difference between aircraft and ambient noise levels should trigger analysis of possible enhancement noise effects. When aircraft noise exposure levels approach 15 dB or more above the ambient, it is probable that enhancement occurs; however, it is difficult to predict the amount of increase in annoyance.³⁰⁵

³⁰³ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 30, 33.

³⁰⁴ FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), p. 33. We note that Collier County's amended ordinance is directed to reducing *interior* noise levels only, and therefore does not support NAA's argument for special consideration for outside noise levels in the Naples area.

³⁰⁵ FAA Exhibit 1, Item 21, Federal Agency Review of Selected Airport Noise Analysis Issues” (FICON, 1992), p. 2-11.

ii. Exclusion Of Noise From The NAA's Background And Ambient Noise Level Analysis

The body of literature in the area of ambient noise measurements is extremely limited. A clear understanding of the ambient sound level measured in the study is an essential prerequisite to knowing if the data collection, reduction, and interpretation are correct. The term “residual” used by the NAA in its description of the methodology employed by the NAA is a rarely-used and ambiguous term in reference to the ambient sound level or “background” (this term is used in aircraft certification to account for the marginal reduction of sound system electrical noise). In addition to using ambiguous terminology, the analysis does not clearly state what ambient sound level is actually measured or what types of controls and protocols were used to insure that it was collected properly (e.g., field monitoring or measurement standards, meteorological instrumentation, and acoustic observer or alternative aircraft identification procedures).

Ambient noise is traditionally defined as the composite, all-inclusive sound associated with a given environment, excluding the sound source of interest, which is aircraft noise in this case. It appears that the “residual” noise data collected in this study refers to a very restrictive data set characterizing a low natural ambient sound level, which excludes existing noise from human and mechanical sources, such as roadways, as well as many natural sounds.

The NAA's incorrect definition and inappropriate use of the L_{90} descriptor raises the FAA's concern about how the data analysis was performed. The L_{90} noise descriptor used by the NAA in its analysis of the ambient noise levels at locations in the DNL 60 dB contour has been rejected by FAA for statistical analysis of monitored ambient data in low-level noise environments. The FAA objects to the use of L_{90} for several technical reasons. L_{90} is a statistical measure that represents the quietest 10 percent of data. The quietest 10 percent of data excludes the full range of natural sounds. In effect, the L_{90} represents a minimum noise level, not an average or prevailing noise level. Moreover, the simple L_{90} statistical approach to data analysis can result in contamination of the data because it does not distinguish sources of sounds and includes all sounds, including man-made sounds such as aircraft. L_{90} produces an unreasonably low statistical evaluation of an ambient noise environment.

The NAA's exclusion of noise that should be included is not reasonable since many, if not most, of the properties at issue in this case are located in areas zoned as “commercial mixed use.” For example, the noise disclosure document issued for the Bayfront Condominium development, in addition to stating that the condominiums are subject to common noises and disturbances created by the airport, also states that:

THE UNITS IN THIS CONDOMINIUM WILL BE LOCATED ABOVE, AND IN CLOSE PROXIMITY TO RESTAURANTS, BARS, RETAIL STORES OR OTHER BUSINESSES WHICH MAY OPERATE AT UNUSUALLY LATE OR EARLY HOURS, UNAVOIDABLY CAUSING NOISE, AND EMITTING STRONG ODORS ASSOCIATED WITH COOKING OR OTHER BUSINESS-RELATED ACTIVITIES. NO ONE TO WHOM A QUIET, SERENE RESIDENTIAL ENVIRONMENT IS

IMPORTANT SHOULD CONSIDER PURCHASING A UNIT IN THIS
CONDOMINIUM FOR HIS OWN USE AND OCCUPANCE.³⁰⁶

iii. The NAA's Assertion That The Ambient Noise Within The DNL 60 dB Contour Is Extremely Low

The deficiencies associated with the use of the L_{90} , as discussed above, may explain the discrepancies in the data. Specifically, the NAA states that low ambient noise levels in residential areas within the airport noise study area increase the intrusiveness of aircraft operations, particularly operations by Stage 2 aircraft. In an attempt to establish a baseline noise level within the DNL 60 dB contour, the NAA asserts that ambient noise levels are extremely low at most locations, generally between 40 and 50 dB. The NAA argues that these low ambient noise levels support the use of the DNL 60 dB contour, rather than DNL 65 dB contour, to justify the Stage 2 ban.³⁰⁷

The reported data suggest, however, that background noise levels in some residential areas are higher than the levels advanced by the NAA.³⁰⁸ Following are some examples from NAA's Quarterly Noise Reports. In its October 1, 1999 through December 31, 1999, report, the NAA reports noise observations at Site 6 over a two-day period. According to the NAA, on the first day, the background noise was between 53.0 and 58.0 decibels due to local traffic and construction trucks. On the second day of testing, "45 events occurred," with 31 of the events attributable to construction trucks.³⁰⁹ Also, on March 3, 2000, observations noted at Site 6, "constant construction noise" due to road construction background noise was noted between 60.0 and 62.0 dB.³¹⁰ Similarly, on March 7, 2000, background noise levels between 53.0 and 59.0 decibels was noted "due to local traffic and construction noise."³¹¹

In another instance, observers reported constant construction noise in the background at Site 2 that registered between 55 and 59 dB "nearly constantly."³¹² Finally, at yet another site, Site 3, background noise was recorded at 54.0 decibels with no aircraft noise exceeding the background level.³¹³

While these data are inconclusive, they do illustrate that there are residential areas around the airport where the levels of ambient noise are high, or at least typical for a community of this size, due to non-aircraft sources.³¹⁴ In many cases, these levels result from surface traffic and

³⁰⁶ FAA Exhibit 1, Item 2, Attachment 6, History of Noise Compatibility Efforts for Naples Municipal Airport (October 2000, Tab 13).

³⁰⁷ FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), p. 33.

³⁰⁸ FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), p. 33.

³⁰⁹ See Site 6, FAA Exhibit 1, Item 13, City of Naples Airport Authority Quarterly Noise Report, Number 12 (October 1, 1999 - December 1999).

³¹⁰ FAA Exhibit 1, Item 13, City of Naples Airport Authority Quarterly Noise Report, Number 13 (January 1, 2000 - March 31, 2000).

³¹¹ FAA Exhibit 1, Item 13, See City of Naples Airport Authority Quarterly Noise Report, Number 12 (October 1, 1999 - December 1999).

³¹² FAA Exhibit 1, Item 13, See City of Naples Airport Authority Quarterly Noise Report, Number 12 (October 1, 1999 - December 1999).

³¹³ See FAA Exhibit 1, Item 13, City of Naples Airport Authority Quarterly Noise Report, Number 12 (October 1, 1999 - December 1999).

³¹⁴ In fact, the data appears to illustrate that in lower DNL values, the existing non-aircraft noise may mask the aircraft noise and that the non-aircraft noise may begin to dominate aircraft noise at levels below DNL 60 dB. See FAA Exhibit 1, Item 21, Federal Agency Review of Selected Airport Noise Analysis Issues" (FICON, 1992), Section 3-4.

construction, both widespread throughout the community and recurrent in many residential locations near and around the airport environment,³¹⁵ suggesting that the communities surrounding the airport are typical of urban areas rather than atypical. Essentially, the NAA provides no adequate evidence to demonstrate that Naples is distinguishable from other U.S. communities with a warm climate and outdoor lifestyle.

In summary, the ambient noise methodology and measurements presented by the NAA do not support the assertion that Naples is an unusually quiet community that justifies a lower of noise compatibility threshold to support an airport restriction. The FAA does not find it reasonable to restrict access to the airport on the basis of Naples' ambient noise levels.

e. Conclusion On Noncompatible Land Use

For all of the reasons set forth above, we find that the NAA's Stage 2 ban is not justified by an existing noncompatible land use problem. Therefore, we need not determine whether the Stage 2 ban is effective in addressing the NAA's stated land use compatibility goal.

2. The NAA's Failure To Take A Balanced Approach To Addressing Its Stated Land Use Compatibility Goal

Even if the Stage 2 ban were adequately justified by existing non-compatible land uses, it would still be unreasonable because the NAA's implementation of the ban does not reflect a balanced approach to addressing its stated land use compatibility goal at APF that fairly considers both local and Federal interests. Although the NAA's Part 161 Study states that the NAA "has exhausted all reasonably feasible non-restrictive measures to achieve its land use compatibility goal,"³¹⁶ the record in this matter shows that the NAA did not adequately consider the costs and benefits of alternatives to the Stage 2 ban.

For example, the NAA failed to consider the costs and benefits of combining non-restrictive measures. Instead, it rejected each measure simply because, individually, it would not be as effective as, or would be more costly than, the Stage 2 ban.³¹⁷ Furthermore, the NAA unreasonably concluded that the only acceptable mitigation measure for all people residing inside the DNL 60 dB contour was to remove them from the contour, even though some of these residents had consented to such noise levels by conveying easements to the NAA or had prior knowledge through noise disclosure.³¹⁸

The availability of a combination of non-restrictive measures that could achieve adequate noise mitigation and minimize the apparent need for an access restriction goes directly to the

³¹⁵ Indeed, compatible land-use designations may be affected if the self-generated noise from that use and/or the ambient noise from other non-aircraft and non-airport uses are equal to or greater than the noise from aircraft and airport sources. 14 C.F.R. Part 150, App. A, Part B, Sec. A150.101(e)(5). "Ambient sound" connotes the ever-present collection of sound of both natural and manmade origin. "Background noise" connotes total acoustic and electrical noise for all sources in the system that interferes with the measurement of the intrusive noise being measured. FAA Exhibit 1, Item 21, Federal Agency Review of Selected Airport Noise Analysis Issues" (FICON, 1992), 2-3-1.

³¹⁶ FAA Exhibit 1, Item 2, Attachment 3 (Part 161 Study), p. 4.

³¹⁷ FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), pp. 35-70. We note that the NAA's cost benefit analysis underestimated the cost of the Stage 2 ban.

³¹⁸ FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), pp. 19-29.

reasonableness of a decision to bypass non-restrictive alternatives and instead to rely almost totally on the restriction of airport use. A balanced approach—using a combination of non-restrictive measures and considering use restrictions only as a last resort—is inherently reasonable and is used nationally³¹⁹ and internationally.³²⁰

The FAA’s concern for this lack of a balanced approach is amplified by the fact that the NAA has failed to advocate and/or implement the majority of these non-restrictive measures that the FAA approved for the NAA’s 1997 Part 150 study. The NAA has disregarded several non-restrictive alternatives that it adopted in its earlier Part 150 studies. For example, in its 1997 Part 150 study, the NAA recommended and the FAA approved, among other things, land and easement acquisition in the Rock Creek Campground and Naples Villas and the development of a fair disclosure program to educate potential home buyers.³²¹ The Rock Creek Campground is in the pre-Stage 2 ban DNL 60 dB contour. As stated in the NAA’s 1997 Part 150 study, the fair disclosure measure “should be extended beyond the boundaries of the 65 L_{dn} contour so all potential residents who would be located along the flight paths of the runways would be aware of their location.”³²² In its November 2000 Part 150 Noise Exposure Map update, the NAA reported that neither of these measures had been implemented.³²³ Certainly, such actions, or rather lack of action, do not support the NAA’s contention that it “has exhausted all reasonably feasible non-restrictive measures to achieve its land use compatibility goal...”³²⁴

The FAA does not find it reasonable for the NAA to now reject these measures on the basis that they are allegedly more costly or less effective than the Stage 2 ban. As discussed more fully below and supported by information elsewhere in this Determination, the NAA unreasonably concluded that all people residing inside the DNL 60 noise contour needed to be removed from that area of noise exposure, with no complementary past or present local program to achieve such a goal. Furthermore, the NAA’s reliance on its Part 161 benefit-cost analysis to support the reasonableness of the Stage 2 ban is misplaced. In the letter dated October 31, 2001, the FAA did not approve that analysis and in fact identified flaws in the analysis that undermine the NAA’s contention that the Stage 2 ban is far superior to other alternatives. Finally, the NAA failed to give fair consideration to non-restrictive alternatives that would appropriately balance Federal and local interests in both noise abatement and a national airport system open to all users.

a. The NAA’s Conclusion Regarding Mitigation Of All People Residing Inside The DNL 60 dB Contour

The NAA contended, in its Part 161 Study, that the estimated population residing within the DNL 60 dB contour based on the pre-restriction airport operations would be 1,306 people by 2005.

³¹⁹ See, e.g., Advisory Circular 150-5020-1, August 5, 1983 “*Noise Control and Compatibility Planning for Airports,*” p.2 (Part 150 includes a “balanced approach producing realistic and practical solutions fair to both aviation and non aviation interests”); id., p.32 (curfews “should be reserved as a strategy of last resort ... when all other options have been shown to be clearly inadequate”).

³²⁰ The balanced approach has been adopted by the International Civil Aviation organization (ICAO), of which the United States is a member. See FAA Exhibit 1, Item 20, ICAO Resolution A33-7, adopted at the 33rd Session of the Assembly, September 25 to October 5, 2001.

³²¹ FAA Exhibit 1, Item 2, Attachment 28, p. 5-14.

³²² FAA Exhibit 1, Item 2, Attachment 28, p. 5-14.

³²³ FAA Exhibit 1, Item 14, p. 9. See also FAA Exhibit 1, Item 4, Media and Newspaper articles, Naples Daily News, Airport Authority Rejects Noise Disclosure Plan, 06/25/1998.

³²⁴ FAA Exhibit, Item 2, Attachment 3 (Part 161 Study), p. 4.

According to the NAA's analysis, this number would be reduced to 370 people as a result of the Stage 2 ban, which results in the removal of 936 people from inside the DNL 60 dB contour.³²⁵ However, some of the 1,306 people included by the NAA reside in properties that are already subject to avigation easements acquired by the NAA. The NAA's inclusion of these people as impacted in its analysis supporting the Stage 2 ban is unreasonable.

As previously discussed in this determination, Federal guidelines do not classify residential land uses as noncompatible with noise exposure levels below DNL 65 dB; therefore, Federal guidelines do not recommend the removal of residents from such areas. The FAA does support local efforts to establish a noise buffer in areas of moderate noise exposure, i.e., between DNL 60 and 65 dB; and in fact, FAA approved such a buffer in the NAA's 1997 Part 150 update.³²⁶ However, given that aircraft noise exposure is moderate, rather than significant, between DNL 60 and 65 dB, as a general rule fewer mitigation measures are appropriate and practicable at these noise levels.³²⁷ The FAA endorses this position in laying out the first Federal noise buffer policy in the draft Aviation Noise Abatement Policy 2000, which states,

A combination of methods, comprising a graduated response from the most to the least adversely affected land uses, may serve communities effectively and can prudently balance costs with levels of noise exposure. The FAA strongly encourages the reduction and prevention of noncompatible land uses at noise exposure levels of DNL 65 dB and higher. Mitigation techniques short of reduction and prevention may be more viable in buffer areas. Methods may support each other for the same properties, such as combining sound insulation, an easement, and disclosure.³²⁸

The noise buffer area at Naples has not been treated locally (i.e., by the City of Naples or Collier County) as an area to be cleared of all (or as many as possible) residential uses. In fact, as previously described, new residential land uses have been permitted in this area since the FAA's approval of APF's buffer concept in 1997.³²⁹

In adopting an airport use restriction to remove residents from the DNL 60 dB noise contour, the NAA unreasonably and unfairly placed a burden on Federal interests in a publicly funded and maintained national airport system open and available to all users. There has not been, nor is there now, a comparable local goal or burden to remove people from this area; on the contrary, local government has allowed residences to be added to this area. At the time the Stage 2 ban was implemented, neither Collier County nor the city of Naples prohibited residential development within the DNL 60 dB contour.³³⁰

³²⁵ See FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 3.

³²⁶ FAA Exhibit 1, Item 2, Attachment 29, FAA Approval, Revised Compatibility Program 1996, September 1997.

³²⁷ See FAA Exhibit 1, Item 21, Federal Agency Review of Selected Airport Noise Analysis Issues" (FICON, 1992), Volume 1, Section 3.5.

³²⁸ FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, 43810.

³²⁹ See e.g. FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 28.

³³⁰ Collier County continues to allow mitigated residential development within the DNL 60 dB contour. See e.g. FAA Exhibit 1, Item 7, Volume 2, (Chronology of Events, Collier County), Tab 21, p. 46. Although the city, in its June 2002 ordinance, prohibits most, but not all, residential development within the DNL 60 dB contour, it has no program to remove existing residences that it has allowed. Moreover, the DNL 60 dB contour used by the NAA to justify the Stage 2 ban is not the same as the DNL 60 dB contour that defines Zone D under the City's June 2002 ordinance. FAA Exhibit 1, Item 15, City of Naples Ordinance 02-9648, June 5, 2002.

Moreover, the NAA has failed to offer adequate reasons why residents within the DNL 60 dB contour that have been the beneficiaries of mitigation measures (e.g., avigation easements and noise disclosure), now should be regarded as essentially unmitigated and needing to be removed from that contour. A number of these residents have effectively consented to such noise levels by selling easements to the NAA or buying or renting property after receiving noise warnings. For example, the record reflects that in the case of the Bayfront³³¹ and Waterfront condominium³³² developments, the NAA had acquired easements prior to the Stage 2 ban.³³³ The total estimated population residing at these properties, by the NAA's own count, exceeded 400 people.³³⁴ The NAA's inclusion of these properties and their residents in determining the decrease in population within the DNL 60 dB contour as a result of the Stage 2 ban,³³⁵ and in calculating the costs of the non-restrictive alternatives to the ban, is not reasonable.

The NAA chooses to discount the fact that some properties within the DNL 60 dB contour have already been effectively mitigated through measures that are widely used to mitigate noise exposure by other airports around the country.

b. The NAA's Conclusion That The Stage 2 Ban Is The Most Cost-Effective Alternative

In its Reply to the Notice of Investigation, the NAA argues that the Stage 2 ban is "supported by" the NAA's Part 161 cost-benefit analysis, as documented in the original Part 161 Study and the Part 161 Supplemental Analysis.³³⁶ According to the NAA, this analysis shows that the Stage 2 ban is "far superior to any other alternative—no other alternative reduced the number of affected residents to the level achieved by the Stage 2 ban, and most other alternatives were more costly by orders of magnitude."³³⁷

The results of the NAA's Part 161 cost-benefit analysis are summarized in Table 1.1 of the Supplemental Analysis. However, Table 1.1 does not provide an appropriate basis for comparing the costs of the alternatives studied. According to Table 1.1, the "incremental cost over 2005 baseline" of the Stage 2 ban ranges from \$781,000 to \$1.6 million. According to Exhibit 8-2 of the original Part 161 Study, however, this cost includes only the estimated annual cost of the Stage 2 ban in the year 2005, and does not include other estimated costs of the Stage 2 ban, including

³³¹ FAA Exhibit 1, Item 8 (Chronology of Events, City of Naples), Tab 28, See FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), pp. 23-24.

³³² FAA Exhibit 1, Item 2, Attachment 6 (History of Noise Compatibility Efforts for Naples Municipal Airport, October 2000), p. 9-10, See FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 27.

³³³ As stated by the FAA in its 1988 report to Congress on the Part 150 program, the acquisition of easements is considered to render a property compatible because the property owner has granted the airport proprietor the legal right to allow aircraft to make noise flying over the property. See FAA Exhibit 1, Item 24, Report to Congress "FAR, Part 150, Airport Noise Compatibility Program," November 21, 1988, Section III, Technical and Economic Data Required by FAA to Complete a Part 150 Review, p. 4.

³³⁴ 2000 Existing Conditions Population Estimates. Easements: Bayfront (320) and Waterfront (88). See FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), FAA Exhibit 1, Item 2, Attachment 15, pp. 23, 27. Disclosure: Beau Mer (200), for a total of 608. See FAA Exhibit 1, Item 2, Attachment 3 (Naples Municipal Airport Part 161 Study), FAA Exhibit 1, Item 2, Attachment 15, p. 22. We note that the data provided by the NAA does not allow a review of the majority of single-family structures. Population the NAA claims are removed from the DNL 60 dB contour by Stage 2 ban is 936. See FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 3.

³³⁵ See, e.g., [FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), Table 1.1].

³³⁶ FAA Exhibit 1, Item 2, p. 16.

³³⁷ FAA Exhibit 1, Item 2, p. 16.

one-time costs to aircraft owners for aircraft replacement and modification. Nonetheless, in Table 1.1, this 2005 cost was compared to the full estimated costs of other alternatives. As a result, Table 1.1 significantly underestimates the cost of the Stage 2 ban. Indeed, as stated in the FAA’s October 31, 2001, letter commenting on the NAA’s Part 161 Supplemental Analysis, “when the costs are spread over a ten-year period (without discounting), sound insulation and the limited acquisition of Rock Creek Campground appear to have approximately the same cost effectiveness as the proposed restriction of Stage 2 aircraft.”³³⁸ This is reflected in Table 1, “Naples Airport Part 161 Comparative Cost Analysis of Noise Mitigation Alternatives,” below. Thus, contrary to the NAA’s contention, the Stage 2 ban is clearly *not* less costly than most other alternatives by orders of magnitude.

Table 1 - Naples Airport Authority Part 161 Comparative Cost Analysis of Noise Mitigation Alternatives

Alternative Mitigation Measure	Population Effect within DNL 60 in 2005	Change from 2005	Cost Range (\$000s)						Cost per abated resident (\$000s)	
			2000		2005		10-Year Cost(s)*			
			Lower	Upper	Lower	Upper	Lower	Upper		Mean
24-hr Restriction of Stage 2 Jets	370	-936	6,618	8,009	781	1,600	13,647	22,409	18,028	19
One Time Cost For Aircraft Modification And Replacement			5,488	5,694						
Night Restriction of Stage 2 Jets	1282	-24	4,353	4,911	479	770	8,664	11,841	10,253	427
Full Night Restriction	1104	-202	11,403	18,355	16,615	26,747	160,938	259,078	210,008	1,040
Land Acquisition	0	-1306					67,500	100,913	84,207	64
Sound Insulation Offered to All Residents of Permanent Dwellings	144	-1162					13,988	18,044	16,016	14
Sound Insulation With Acquisition of Rock Creek Campground	0	-1306					15,558	19,614	17,586	13
Revised Preferential Runway Use	2046 – 2374	740 - 1068			Not estimated in SA					0
Revised Preferential Flight Tracks	1036	-270			Not estimated in SA**		541	2,165	1,353	1
Departure Profiles					Not estimated in SA					
100 % Use of Noise Abatement	1290	-16								0
75% Compliance With Voluntary Restriction	1178	-128	1,302	1,847	906	1,285	9,456	13,412	11,434	89
65% Compliance With Voluntary Restriction	1194	-112	1,041	1,484	724	1,032	7,557	10,772	9,164	82

(*) Costs were spread over a ten-year period (without discounting).

(**) FAA estimate assuming range of 0.25 to 1 minute of jet flight time using 2005 forecast operations.

Sources: Naples Municipal Airport Part 161 Study, June 30, 2000, FAA Exhibit 1, Item 2, Attachment 3 and Naples Municipal Airport Part 161 Supplemental Analysis, Draft June 23, 2001, FAA Exhibit 1, Item 2, Attachment 15.

³³⁸ FAA Exhibit 1, Item 1(b), Letter from Mr. Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, and topical comments, October 31, 2001. Attachment entitled “Comments On Naples Supplemental

The FAA's October 31, 2001, letter also noted that the summary of costs of the alternatives considered by the NAA "as presented in Table 1.1 may not provide an appropriate basis for comparing the costs of alternatives" because "[i]t appears that what the table labels 'incremental costs' are a mix of estimates of annual costs and one time capital investments. If this is the case, costs should be discounted and aggregated for a time period that reflects the life span of those alternatives that require capital investments."³³⁹ The NAA, in its Reply to the Notice of Investigation, asserts that "through its October 31, 2001 approval of the Part 161 Study, the FAA has found the Authority's cost/benefit analysis to be adequate."³⁴⁰ The NAA's contention that the FAA "approved" the Part 161 study is incorrect. There is no provision in law or regulation for the FAA to approve Stage 2 restrictions under Part 161. As discussed above, the FAA's October 31, 2001, letter dealt only with the issue of the NAA's compliance with the requirements of ANCA and Part 161, which the letter noted were "largely procedural," and did not address whether the NAA's Part 161 cost-benefit analysis was sufficient to demonstrate the reasonableness of the Stage 2 ban.

Furthermore, because the NAA did not employ a balanced approach when considering the costs and benefits of non-restrictive and less restrictive alternatives, as discussed above, the NAA's cost-benefit analysis is not a reliable indicator of the reasonableness of the Stage 2 ban in this proceeding. By including, into the costs of land acquisition and sound attenuation, those residences compatible through the acquisition of easements prior to the Stage 2 ban, for example, the NAA overstated the costs of land acquisition and sound attenuation. Likewise, to the extent that a change in flight tracks would further reduce the number of noncompatible residences in the DNL 60 dB, the costs of land acquisition and sound attenuation, for example, may be further overstated.

c. The NAA's Consideration Of Non-Restrictive Alternatives to the Stage 2 Ban

The NAA's Part 161 Supplemental Analysis identifies several non-restrictive measures considered by the NAA when it conducted the Part 161 Analysis.³⁴¹ Those measures include:

- Land acquisition
- Sound insulation
- Noise Abatement Airport Operating Procedures
- Noise Abatement Aircraft Operating Procedures
- Voluntary Restraint of Stage 2 Operations

The NAA rejected these measures, either because, in its view, the benefits of the individual measure did not provide the same level of benefit as the Stage 2 ban, or because the cost of the individual measure far exceeded the cost of the Stage 2 ban,³⁴² or both. As indicated in the NAA's Part 161 Supplemental Analysis:

Analysis," p. 3.

³³⁹ Id.

³⁴⁰ FAA Exhibit 1, Item 2, p. 16.

³⁴¹ FAA Exhibit 1, Item 2, Attachment 15, p. 35.

³⁴² We note that, as discussed in section VI.G.2.b. of this decision, the NAA's cost benefit analysis underestimated the cost of the Stage 2 ban.

- Land acquisition-- The very high cost of land acquisition and the likelihood of strong public opposition to this approach would make it extremely difficult to implement.
- Sound insulation-- Sound insulation is an incomplete substitute, since it addresses only indoor activity; it does not benefit residents outside the 60 dB DNL contour; and it is very unlikely that NAA would be able to find local funds to cover the very high implementation cost.
- Noise Abatement Airport Operating Procedures -- Any significant change to the preferential runway use program would be likely to increase the population within the contours. There are no realistic options for preferential arrival flight paths.
- Noise Abatement Aircraft Operating Procedures – The use of noise abatement departure procedures (NADPs) is strictly voluntary and the NAA cannot mandate the use of NADPs, nor can they determine whether a pilot uses the preferred procedures on any given takeoff. Even assuming 100 percent compliance by Stage 2 aircraft, the reduction of people in the 60 dB DNL is negligible (a reduction of approximately 16 people).
- Voluntary Restraint of Stage 2 Operations – a voluntary ban with either 60 percent or 75 % percent daytime compliance reduces the population within the 60 dB contour by less than 10 percent, compared to the base case. Voluntary ban scenarios do not offers the benefits of a mandatory ban that reduces the population within the 60 dB DNL contour by over 70 percent.³⁴³

In its Reply to the Notice of Investigation, the NAA contends that there is no requirement that it implement all non-restrictive alternatives before imposing the Stage 2 ban.³⁴⁴ The FAA’s “balanced approach,” discussed above, does not require that all non-restrictive measures be implemented at a Federally-funded airport regardless of the costs and benefits they achieve. However, what is required is an adequate analysis to determine whether there is a reasonable alternative to restricting access to the airport to achieve a legitimate noise mitigation objective. Such an analysis is necessary to ensure that the local and Federal interests receive fair consideration, thus avoiding an unreasonable restriction that would violate Grant Assurance 22.

FAA Advisory Circular (AC) 150/5020-1, “Noise Control and Compatibility Planning for Airports,” discusses the importance of exploring a wide range of feasible options and alternatives. The AC states:

Development of reasonable alternatives is the nucleus of the compatibility planning process. The objective is to explore a wide range of feasible options and alternative compositions [sic] of land use patterns, noise control actions, and noise impact patterns, seeking optimum accommodation of both airport users and airport neighbors within acceptable safety, economic, and environmental parameters. . . . It is . . . unlikely that any single option, by itself, will be capable of totally solving the problem(s) without having objectionable impacts of its own. Some options may have little or no value in the situation, especially if used alone. *Realistic alternatives, then, will normally consist of combinations of the various*

³⁴³ See FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), pp. 35-69.

³⁴⁴ FAA Exhibit 1. Item 2, p. 17.

*options in ways which offer more complete solutions with more acceptable impacts or costs.*³⁴⁵

The NAA's Part 161 Study states that "the NAA has exhausted all reasonably feasible nonrestrictive measures to achieve its land use compatibility goal"³⁴⁶ The FAA's review of the NAA's analysis of alternatives to the Stage 2 ban reveals, however, that the NAA only considered whether any of the measures listed above, *individually*, could achieve benefits comparable to those of the Stage 2 ban at a comparable cost. Except for combining sound insulation and the acquisition of Rock Creek Campground, as one alternative, the NAA does not appear to have considered the adoption of a *combination* of the above measures that might have provided a "reasonably feasible" alternative to the Stage 2 ban.³⁴⁷ In the absence of such analysis, and for the other reasons discussed below, the FAA concludes that the NAA did not give fair consideration to alternatives to the Stage 2 ban.

i. Acquisition of Land And Interests Therein

The NAA dismisses the alternative of land acquisition based on its high cost. The NAA calculates this cost to be \$67.5 million to \$101 million based on the cost of acquiring all residences within the DNL 60 dB contour.³⁴⁸ However, acquiring all of the homes inside the DNL 60 dB contour is not the only alternative for achieving the NAA's stated land use compatibility goal. Home acquisition might reasonably be used in combination with one or more other mitigation measures, including sound attenuation and/or acquisition of easements. A reasonable approach might include, for example, acquiring property in only the most critical areas, sound insulating homes in others, and perhaps using other mitigation measures to address the remaining areas where some mitigation is an objective.³⁴⁹ Acquisition in fee simple can be complemented by commonly used landside noise

³⁴⁵ AC 150/5020-1 at ¶ 306 (emphasis added). The FAA encourages local jurisdictions to (1) establish zoning ordinances or other control measures to preclude new noise sensitive development; acquire existing non-compatible properties and relocate people; implement policies and programs to redevelop noise sensitive areas into more compatible land uses; (2) if noise sensitive development cannot be removed or precluded: acoustically insulate existing structures; establish local building codes for new residential and other noise sensitive construction requiring attenuation of exterior noise levels; purchase noise easements; (3) require formal disclosure of aviation noise exposure levels as a part of real estate transactions for properties located near airports, where authorized by State and local law; provide transaction assistance to noise impacted property owners wishing to sell. See FAA Exhibit 1, Item 40, Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000, 43811. Also see 1976 noise policy.) Land use measures, such as easements, disclosure, sound insulation and property acquisition are used to minimize incompatible land uses and become very effective when combined.

³⁴⁶ FAA Exhibit, Item 2, Attachment 3 (Part 161 Study), p.4.

³⁴⁷ The NAA did combine two measures, sound insulation and the acquisition (Rock Creek Campground), as one alternative. However, the NAA rejected this alternative because of the "inherent" high costs resulting from sound insulating all dwellings in the contour (and not just targeted ones in the most critical noise sensitive areas) and self-imposed limitations of the efficacy of sound insulation. FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), p. 3 and 36-39. The NAA's categorization of these costs as comparatively high stems from the fact that the Stage 2 ban was underestimated as analyzed in more detail below.

³⁴⁸ FAA Exhibit 1, Item 2, Attachment 15, p. 35-36.

³⁴⁹ Targeting specific areas with specific land use measures may have the effect of reducing the number of impacted people substantially. Targeting certain areas for land acquisition or sound insulation appears possible in light of the fact that according to the NAA, there is no residential population within the DNL 60 dB contour within the northeast and northwest contour lobes (although the NAA depicts incompatible land areas in those lobes in its contour maps). The main noise impact area appears to be southwest (and potentially southeast), where mitigation measures could be concentrated. FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), p. 51. The southwest area also contains over 70% percent of the estimated population within the DNL 60 dB contour. Also see FAA Exhibit 1, Item 2,

mitigation measures that include easement acquisition, development rights to restrict new noise sensitive development, and real estate disclosure.³⁵⁰

The NAA rejected the acquisition of easements that would be far less costly than the purchase of all of the homes in the DNL 60 dB contour.³⁵¹ In its 1988 report to Congress on the Part 150 program, the FAA stated that the acquisition of easements is considered to render a property compatible because the property owner has granted the airport proprietor the legal right to allow aircraft to make noise flying over the property.³⁵² The NAA's 1996 Revised Noise Compatibility Program includes the following discussion of the benefits of using easements as opposed to sound insulation or land acquisition:

While it is preferable to acquire easements in exchange for sound insulation or other actions which reduce potential incompatibilities, residents can be compensated in exchange for an easement with no restrictions placed on the use of the money. Compensation coupled with an aviation easement provides compensated fair disclosure and constitutes a suitable compatibility measure by federal guidelines.

Compensatory easements are appropriate where residents do not wish to relocate, land acquisition is not feasible, or social costs of relocation are unjustifiably high. For those homeowners who wish to leave, the compensation allows them to sell their home at a marketable price while notifying the future homeowner of airport operations in the vicinity. Compensatory easements typically do not create a degree of community disruption that land acquisition, purchase assurance, or even rezoning can generate. They are usually less expensive than purchase or sound insulation, allowing broader and more rapid implementation for any given funding level.³⁵³

Despite these observations, the NAA states, for the first time in its Part 161 Supplemental Analysis, that “[t]he Authority ... has decided that easements alone do not provide a feasible approach because they do not improve conditions unless sound insulation is also accomplished.”³⁵⁴

Although local governments have authority to adopt local guidelines that differ from the Federal guidelines, the measures available to achieve compatibility at noise levels of DNL 65 dB and above also normally apply at lower noise levels. It is not reasonable for the NAA to define its land use compatibility goal so narrowly that it renders meaningless the consideration of alternatives, other than an airport access restriction, to achieve that goal. This is not a balanced approach that fairly considers both Federal and local interests.

Attachment 15, (Part 161 Supplemental Analysis), (F-3)-(F-4), 930/1306=71%. Targeting certain areas with sound insulation and land acquisition can be combined or supplemented with the potential benefits of flight tracks changes for example.

³⁵⁰ Final Policy on Part 150 Approval of Noise Mitigation Measures: Effect on the Use of Federal Grants for Noise Mitigation Projects, Notice on Final Policy, 63 Fed Reg. 16409-16414 (1998).

³⁵¹ FAA Exhibit 1, Item 2, Attachment 6, p. 10.

³⁵² See FAA Exhibit 1, Item 24, Report to Congress “FAR, Part 150, Airport Noise Compatibility Program,” November 21, 1988, Section III, Technical and Economic Data Required by FAA to Complete a Part 150 Review, p 4.

³⁵³ FAA Exhibit 1, Item 2, Attachment 28, Revised Noise Compatibility Program 1996, February 1997, 5-8.

³⁵⁴ FAA Exhibit 1, Item 2, Attachment 6, p.10. The NAA further determined that sound insulation does not provide a feasible approach because many Naples residents keep their windows open and that sound insulation is an incomplete substitute, since it addresses only indoor activity. FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 39.

Additionally, the record appears to indicate that easements could be an extremely cost-effective alternative for the NAA. For example, the record indicates that the NAA acquired easements at a nominal cost of ten dollars (\$10) with no recital of other consideration, on property where several hundred residents lived within the pre-restriction DNL 60 dB contour.³⁵⁵ Even though these easements effectively made those properties compatible, the NAA included the cost of mitigating these residences in the costs associated with other non-restrictive alternatives it compared to the cost of the Stage 2 ban, as discussed more fully below. Inclusion of the costs to mitigate these residences resulted in an overstatement of the cost of these other non-restrictive alternatives.

ii. *Sound Insulation*

The NAA rejects the use of sound insulation of homes because it contends that sound insulation is an incomplete substitute, since it addresses only indoor activity and does not benefit residents outside the DNL 60 dB contour.³⁵⁶ However, the NAA's conclusions are inconsistent with the County's Ordinance 2000-43, which allows sound-insulated residential construction within the DNL 60 dB contour.³⁵⁷ Additionally, the NAA's conclusion indicates that its goal is broader than reducing non-compatible land use within the DNL 60 dB contour since the NAA bases its rejection of sound insulation, at least in part, on residents outside of that contour. However, the NAA has made no claim that local land use compatibility standards justify consideration of mitigation in areas outside the DNL 60 dB contour. The NAA has asserted that it is "respecting the City of Naples and Collier County 60 dB DNL land use criterion."³⁵⁸ We find this to be misleading. If the NAA is simply respecting the City and County criterion, the NAA cannot reasonably conclude, as it has in its Part 161 Analysis, that sound attenuation of existing residences within the DNL 60 dB contour is not a locally acceptable alternative to the Stage 2 ban.

We also note that the Florida Department of Transportation (FDOT) publishes the "*Airport Compatible Land Use Guidance for Florida*," which includes recommended sound level reduction construction methods and materials lists to achieve noise reduction levels from 25 to 35 dB.³⁵⁹ This publication addresses zoning ordinances identifying Noise Zones as areas where no building or structures may be constructed, altered, moved, demolished, or repaired unless construction plans and specifications for the building or structure reflect methods and materials that result in specified sound level reductions.³⁶⁰ This guidance indicates that sound insulation can be an adequate noise mitigation measure, even in Florida.

In rejecting the use of sound insulation, the NAA has arbitrarily under-represented the benefits of this measure, even if used only on a limited basis. Sound insulation, in combination with other non-restrictive measures (e.g., acquisition of homes and/or easements), could be a reasonable alternative to the Stage 2 ban.³⁶¹ Indeed, providing sound insulation to a homeowner in exchange

³⁵⁵ See e.g. FAA Exhibit 1, Item 8, Tab.28.

³⁵⁶ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 39.

³⁵⁷ FAA Exhibit 1, Item 7, Volume2, (Chronology of Events, Collier County), Tab 21, p. 46.

³⁵⁸ FAA Exhibit 1, Item 2, Attachment 3, pp.3, 16.

³⁵⁹ FAA Exhibit 1, Item 34, *Airport Compatible Land Use Guidance for Florida*, Florida Department of Transportation (FDOT), Office of Public Transportation, Aviation Office, 1994, Appendix 6.

³⁶⁰ Id., Appendix 1.

³⁶¹ We note that even if all the homes inside the DNL 60 dB contour were sound-insulated—a relatively expensive mitigation measure—the cost to the NAA would still be less than the cost to aircraft operators when properly calculated. See Table 1. Of course, it is unlikely that all homes in the DNL 60 dB contour would need to be sound-insulated, and we are not suggesting that it would be necessary to do so. If, for example, sound insulation were offered on a voluntary

for an easement to the NAA may be a viable alternative when the homeowner does not agree to allow the NAA to purchase the residence. In light of language in the City and County ordinances that residential land use inside the DNL 60 dB contour can be made compatible with sound attenuation, the NAA's elimination of this option as an alternative is inconsistent with a balanced approach to achieving its stated land use compatibility goal.

iii. Flight Track Alternatives And Noise Abatement Aircraft Operating Procedures

- **Flight Track Alternatives**

In its Part 161 Supplemental Analysis, the NAA examined alternative noise abatement flight paths to those currently utilized at APF. The NAA stated that “[t]he two flight track alternatives produce only a 21 percent reduction in population within the contours, compared to the 72 percent reduction associated with the recommended restriction.”³⁶² However, completely rejecting the potential benefits of the flight path alternatives by comparing those benefits individually to the benefits of the restriction unreasonably skews the choice of alternative measures and is inconsistent with a balanced approach to achieving the NAA's stated land use compatibility goal.

In fact, there is little or no justification for the NAA to reject such a low cost (i.e., for the airport operator) non-restrictive measure, which would result in a 21 percent reduction in the population within the DNL 60 dB. Given the benefit, the FAA would consider this measure to be a very effective noise mitigation measure. It could be used in conjunction with other measures to achieve greater benefits.

- **Noise Abatement Departure Procedures**

Additional benefits from the use of noise abatement departure procedures (NADP), discussed below, could further reduce the number of residences within the DNL 60 dB noise contour. However, the NAA rejects the use of NADPs by Stage 2 aircraft because their use is voluntary; because their use cannot be determined by the NAA; and because the NAA claims they are not effective. The NAA contends the benefit from the use of NADPs by Stage 2 operators, even at 100 percent compliance, would provide only negligible benefits (i.e., a population reduction of 2 percent, or 16 people, in the DNL 60 dB contour).³⁶³ However, the fact that NADPs are voluntary does not indicate they are not used or provide no benefit. In fact, the record reflects that the NAA has valued such “voluntary” procedures in its Part 150 studies in the past, and has in fact recommended their use at APF because of their benefit in mitigating noise.

The NAA bases its rejection of the use of NADPs in large part on inconsistencies in the responses of 3 of the 27 pilots who responded to the NAA's survey seeking information on the use of NADPs at the airport by Stage 2 aircraft operators.³⁶⁴ However, the use of the survey to reject NADPs is

basis to those homeowners remaining inside the DNL 60 dB contour after the application of other non-restrictive measures, the number of homes insulated would likely be far less than the 465 residences cited by the NAA in its calculation of costs for this program. FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 36.

³⁶² FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 53.

³⁶³ FAA Exhibit 1, Item 2, Attachment 15, p. 56-61.

³⁶⁴ These inconsistencies related to the fact that two of the Gulfstream operators and one of the Falcon operators described procedures that did not involve a cutback until 3,000 feet. FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 58.

not supported by the NAA with any statistical sampling methodology and does not compare with the use of sample data in other parts of the NAA's Part 161 Study. In response to the FAA's request to examine the costs and benefits of a voluntary restraint on Stage 2 operations, the NAA conducted the survey to obtain information regarding pilots' probable response to a voluntary restriction.

In its Supplemental Analysis, the NAA stated "although such a sample is relatively limited from a statistical basis and may be subject to individual operator biases, it provides an estimate of the anticipated level of voluntary cooperation with the restriction proposal."³⁶⁵ The NAA indicates that "[all] the surveyed operators stated that they use a noise abatement departure profile of one type or another, and in some cases several different options."³⁶⁶ Despite this reliance on the survey in the analysis of a voluntary Stage 2 restraint, the NAA rejects 100 percent of the responses from pilots regarding their use of NADPs based on inconsistencies in only 11 percent of the responses received.³⁶⁷ There is no justification for using inconsistencies in 11 percent of the responses, which the NAA refers to as "examples of ambiguity," as the reason for completely rejecting NADPs. In short, the NAA rejects the use of NADPs while stating that its sampling methodology provides good data and that pilots do in fact use such procedures at APF.

The NAA's position regarding the effectiveness of NADPs is not consistent with the NAA's past Part 150 studies. The NAA's 1987 and 1997 Part 150 studies and subsequent updates have reaffirmed the value of noise abatement procedures. These include the "Quiet Flying" procedures and NBAA Close-In procedures.³⁶⁸ In fact, NAA's Part 161 Study indicates that noise abatement departure procedures "can produce significant noise abatement benefits" and that it "promotes the use of this procedure [noise abatement procedure] aggressively in its noise abatement publicity," and the use of the NBAA close-in departure procedure as well.³⁶⁹

With regard to the NBAA close-in noise abatement procedure, the NAA's 1996 revised noise compatibility program stated that this procedure would "result in significant noise reduction,"³⁷⁰ which can, in the case of a Lear 35, range as high as 6.2 dBA for an average of 3.6 dBA.³⁷¹

While every airport situation is different, we note that there have been instances where noise abatement procedures used by Stage 2 aircraft operators have resulted in noise reductions nearly to a level comparable to hushkitting.³⁷² The NAA's 1996 validation of noise abatement procedures appears to support this. The NAA's own Part 150 data show the benefits of noise abatement procedures. The NAA compared SEL contours for the Lear 35 with and without the NBAA close-in departure for runway 23. The data show that the power cutback resulting from such a procedure

³⁶⁵ FAA Exhibit 1, Item 2, Attachment 15, (Part 161 Supplemental Analysis), p. 62.

³⁶⁶ FAA Exhibit 1, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 58.

³⁶⁷ See FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 57-58.

³⁶⁸ See FAA Exhibit 1, Item 2, Attachment 8, Naples Municipal Airport Part 161 Study, Response to Comments (November 16, 2000), p.15-16.

³⁶⁹ FAA Exhibit, Item 2, Attachment 15 (Part 161 Supplemental Analysis), p. 56-57.

³⁷⁰ FAA Exhibit 1, Item 2, Attachment 28, "Revised Noise Compatibility Program 1996," p. 3-9.

³⁷¹ *Id.*, p. 3-11. A-Weighted Sound Level (dBA) - A sound pressure level, often noted as dBA, which has been frequency-filtered or weighted to quantitatively reduce the effect of the low frequency noise. It was designed to approximate the response of the human ear to sound. See also FAA Exhibit 1, Item 21, Page A-2.

³⁷² FAA Exhibit 1, Item 41, FAA Comments to the Metropolitan Airports Commission's proposed nighttime Stage 2 ban, March 24, 1992, p.42-43.

reduced the lateral noise impact significantly, starting approximately 2,000 feet from the runway threshold, benefiting noise-sensitive areas in the southwest lobe.³⁷³

Public comments filed as part of the NAA's Part 161 study also indicate benefits in noise abatement, particularly with regards to the Gulfstream Quiet Flying procedures. In fact, both the "Minimum EPR" (engine pressure ratio) and "Flex" procedures for the Gulfstream GIIB type aircraft provide significant benefits in terms of noise abatement even close to the airport.³⁷⁴

The record also indicates that the NAA valued noise abatement procedures, even by Stage 2 aircraft. The NAA instituted a "Noise Abatement Award Program," and granted an award to a based Stage 2 aircraft operator in recognition of the operator's "commitment to comply with the Naples Municipal Airport Noise Abatement Program."³⁷⁵

Even if the NAA's analysis of the benefits to be achieved by the use of noise abatement procedures by Stage 2 were accurate, the NAA considered *only* the benefits from the use of NADPs by Stage 2 operators. Stage 2 aircraft operations represent only one percent (1%) of the aircraft operations at APF. Consequently, it is reasonable to assume that NAA could realize additional noise benefits if NADPs were also used by other aircraft operators and types, especially when combined with other non-restrictive alternatives. At the very least, the NAA should have accounted for the benefits of the noise abatement procedures that were already in effect and in use by all users at the airport.³⁷⁶

d. Conclusion On Balanced Approach

Even if the Stage 2 ban were adequately justified by existing non-compatible land uses, it would still be unreasonable because it does not reflect a balanced approach that fairly considered both the local interest in noise mitigation and the Federal interest in maintaining access to Federally-funded airports, as reflected in 49 U.S.C. § 47107(a)(1) and Grant Assurance 22. Given this important Federal interest, it was not reasonable for the NAA to totally ban an entire class of aircraft from APF based on an analysis that: (1) did not fairly consider non-restrictive alternatives for achieving the NAA's asserted land use compatibility goal; and (2) was flawed in that it did not include the full estimated cost of the Stage 2 ban.

G. Compliance With Grant Assurance 22 - Unjust Discrimination

Assurance 22, Economic Nondiscrimination, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

³⁷³ FAA Exhibit 1, Item 2, Attachment 28, "Revised Noise Compatibility Program 1996," pp. 3-9, 3-11. For example, the data presented in this document indicate benefits as high as 6.0 dBA, and an average of 3.6 dBA, when a Lear 35 jet uses the NBAA close-in noise abatement procedures. See *id.*, Figure 3-3.

³⁷⁴ See FAA Exhibit 1, Item 2, Attachment 8, Naples Municipal Airport Part 161 Study, Comments by Gulfstream Aerospace Company, August 1, 2000, p.481.

³⁷⁵ FAA Exhibit 1, Item 42, http://www.flynapples.com/main%20web%20pages/noise_abatement_award_program.htm

³⁷⁶ It is appropriate and reasonable for the FAA to expect the NAA to consider the benefits of the forecasted use of NADPs by all aircraft using the airport since the NAA did not consider the use of NADPs in modeling its baseline DNL 60 db contour.

will make its 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. [Assurance 22(a)]

Consistent with Grant Assurance 22, airport sponsors are prohibited from unjustly discriminating among airport users when implementing a noise-based restriction.³⁷⁷

The FAA has determined, and the federal courts have held, that the use of noise control regulations to bar aircraft on a basis unrelated to noise is unjustly discriminatory in violation of grant agreement obligations.³⁷⁸ For example, in City and County of San Francisco v. FAA,³⁷⁹ the application of an airport noise regulation resulted in the exclusion from the airport of a retrofitted Boeing Q-707 that met Stage 2 standards, while permitting use of the airport by 15 other models of aircraft emitting as much or more noise than the Q-707. The Ninth Circuit Court of Appeals affirmed the FAA's determination that the airport noise regulation resulted in unjust discrimination because it allowed planes that were equally noisy or noisier than the aircraft being restricted to operate at the airport and increase in number without limit, while excluding the Q-707 based on a characteristic that had no bearing on noise (date of type-certification as meeting Stage 2 requirements).³⁸⁰

In Santa Monica Airport Association v. City of Santa Monica,³⁸¹ the Court struck down the airport's ban on the operation of jet aircraft on the basis of noise under the Commerce and Equal Protection clauses of the U.S. Constitution. The Court found that "... in terms of the quality of the noise produced by modern type fan-jets and its alleged tendency to irritate and annoy, there is absolutely no difference between the noise of such jets and the noise emitted by the louder fixed-wing propeller aircraft which are allowed to use the airport."³⁸²

³⁷⁷ See, FAA Order 5190.6A, Sec. 4-8(f). See also, 49 USC 47101(d), declaring that airport and airway programs, including the airport grant program, "should be carried out consistently with section 40101(a), (b), (d), and (f) of this title to . . . prevent unjust and discriminatory practices, including as the practices may be applied between categories and classes of aircraft." As a result of litigation regarding increased landing fees at Logan International Airport, Congress became concerned that "some ambiguity may exist concerning the scope of the [Airport and Airway Improvement] Act's policy against discrimination." H.R. Rep. No. 101-581, at 23 (1990). In the Aviation Safety and Capacity Expansion Act of 1990, Congress amended the policy declaration of the AAIA to clarify its intent to prohibit unjust discrimination against all classes of users, and that the prohibition is particularly meant to protect the rights of small aircraft users. *Id.*

³⁷⁸ In its response to public comments on the Part 161 study, the NAA's position appeared to be consistent with the above-cited position. Specifically, the NAA states "a noise restriction that bans only one type of aircraft but allows other, equally noisy aircraft to operate at an airport may be unjustly discriminatory because the discrimination among types of aircraft is not based on actual differences among the levels of noise generated by those types." [FAA Exhibit 1, Item 2, Attachment 8, Naples Municipal Airport Part 161 Study, Response to Comments (November 16, 2000), 13.]

³⁷⁹ 942 F.2d 1391 (9th Cir. 1991).

³⁸⁰ The aircraft operator filed a complaint with the FAA alleging that exclusion of its retrofitted Q-707 was unjustly discriminatory in violation of the city's AIP grant assurances. The FAA affirmed the determination of the administrative law judge that the airport's noise regulation allowed aircraft that were equally noisy or noisier than Q-707s to operate at the airport and increase in number without limit, while excluding the Q-707 based on a characteristic that had no bearing on noise (date of type-certification as meeting Stage 2 requirements). Thus, the regulation violated the city's obligation under its federal grant assurances to make the airport available on fair and reasonable terms, without unjust discrimination. The Ninth Circuit Court of Appeals upheld the FAA's interpretation of the statutory and grant assurance requirements as reasonable.

³⁸¹ 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

³⁸² 481 F. Supp. at 943.

Although the NAA's Rules and Regulations would appear to prohibit operations by "all aircraft certificated as meeting Stage 2 noise limits identified in 14 CFR Part 36, Appendix C, Section 36.5," including both Stage 2 jet and propeller-driven aircraft, the record indicates that NAA has implemented the ban only on Stage 2 jet aircraft. For example, NAA published in the Airport Facilities Directory that "Stage 2 Jets" are prohibited from using the airport.³⁸³ In its Reply to our Notice of Investigation, the NAA argues that

The Authority's decision to permit the continued operation at the Airport of propeller-driven and turbo-prop aircraft is based upon a material difference in the quality of the noise emitted by such aircraft and the attendant community response.³⁸⁴

As recently as December 27, 2002, the Naples Daily News quoted NAA officials as stating that NAA is prohibiting all Stage 2 jets from using the airport.³⁸⁵

It also appears that NAA continues to allow Stage 1 and Stage 2 propeller-driven and turbo-prop aircraft to use the airport while restricting both Stage 1 and Stage 2 jet aircraft.³⁸⁶ Additionally, the NAA permits aircraft that are not certificated under 14 CFR Part 36, Appendix C, Subsection 36.5, to continue to operated at the airport.³⁸⁷ As discussed more fully below, distinguishing non-jets from jet aircraft at APF can result in the unjustly discriminatory treatment of individual aircraft operators.

1. Noise Complaints and the Jet Ban

As discussed above, the NAA states that its "decision to permit the continued operation at the Airport of propeller driven and turbo-prop aircraft is based upon a material difference in the quality of the noise emitted by such aircraft and the attendant community response."³⁸⁸

The question regarding the quality of noise emitted by jet aircraft versus propeller-driven aircraft was specifically addressed in Santa Monica Airport Association v. City of Santa Monica, *supra*. In holding that a ban of jet aircraft was unjustly discriminatory, the Court noted that "[t]he testimony that we have heard of a scientific nature contending that there are certain components of fan-jet noise that are scientifically differentiated from noise produced by piston planes did not convince [the court]."

³⁸³ FAA Exhibit 1, Item 25.

³⁸⁴ FAA Exhibit 1, Item 2, p.18.

³⁸⁵ FAA Exhibit 1, Item 4

³⁸⁶ In the FAA Airport Facility Directory, NAA advises that "Stage 1 and 2 jet" aircraft are prohibited from using APF. FAA Exhibit 1, Item 25.

³⁸⁷ We note that approximately 92 percent of the entire aircraft fleet in the United States do not have a Stage designation. There are approximately 227,000 powered aircraft in the US (FY 2000 data). Of these, 5,000 commercial passenger jets, 1,000 cargo jets, 7,000 corporate jets, approximately 2,000 (estimated) commuters and 2,700 helicopters have Stage designations. Therefore, approximately 92 percent (209,300/227,000) do not. See FAA Exhibit 1, Item 29, FAA Aerospace Forecasts, Fiscal Year 2002-2013, and FAA APO-02-1, March 2002, and General Aviation Air Taxi Activity Survey, calendar year 2000, FAA APO 110, February 2002 [FAA Exhibit 1, Item 30].

³⁸⁸ FAA Exhibit 1, Item 2, p. 18.

In this case, the NAA provides no scientific study that shows that the noise from jet aircraft is objectively different from a similar level of noise emitted from a propeller-driven or turbo-prop aircraft. Instead, the NAA contends in its Reply:

Complaint data reveals that the community has an adverse reaction to Stage 2 aircraft far in excess of its negative reaction to turbo-prop aircraft. For example, the instances of multiple complaints (more than one home submitting a complaint) associated with Stage 2 operations exceeded those associated with propeller-driven operations by 800 percent.³⁸⁹

The FAA assembles and publishes the results of aircraft noise certification levels reported from witnessed tests and estimated noise levels for types of aircraft in FAA Advisory Circular 36-1H and 36-2C. This is the kind of data about the noise characteristics of types and classes of aircraft that airport proprietors should consider in formulating restrictions.³⁹⁰ As discussed above in section VI.F., complaints are not a reliable, scientific measure of community impact. Annoyance from noise can exist without complaints, and, conversely, complaints may exist without high levels of noise. The NAA's reliance upon complaint data thus reinforces the lack of objective supporting noise data.

Even if we were willing to consider the NAA's complaint data as a justification, *arguendo*, the NAA provides no detailed comparison to demonstrate that multiple complaints are received more often for jet aircraft operations when compared to operations by propeller-driven aircraft that *emit the same or similar levels of noise*.

2. *The NAA Permits Stage 2 Propeller-Driven Aircraft Noisier Than Stage 2 Jets To Operate at APF*

If complaint data do not justify a ban that applies only to jet aircraft at APF, as we have found above, then the justification for such a discriminatory restriction could only rest on a showing that aircraft banned from using the airport are noisier than aircraft not subject to the ban. The record demonstrates that certain propeller-driven Stage 2 aircraft types noisier than some banned Stage 2 jet aircraft can continue to use APF. Therefore, the ban is unjustly discriminatory.

The NAA has not based its ban on Stage 2 jets upon objective noise data. FAA noise certification levels show that the NAA's Stage 2 jet ban permits at least one Stage 2 propeller-driven airplane to continue to be allowed to operate at APF even though the propeller-driven airplane generates at least as much cumulative noise (i.e., combined takeoff, side-line, and approach noise measurements) as some of the banned Stage 2 jet aircraft, as shown in Table 2, "Cumulative Noise Levels, AC-36-1H (Appendix 1 and 6)." Table 2 compares the cumulative noise levels (i.e., the sum of takeoff, side-line, and approach noise measurements) for several aircraft listed in AC-36-1H.

³⁸⁹ FAA Exhibit 1, Item 2, p. 18.

³⁹⁰ 14 CFR B150.7(a)(5)(iv).

TABLE 2 - CUMULATIVE NOISE LEVELS, AC-36-1H (Appendix 1 and 6)

<u>MFG</u>	<u>MODEL</u>	<u>1000#</u>	<u>Engine Model</u>	<u>TO</u>	<u>SL</u>	<u>AP</u>	<u>Cumulative</u>	<u>STAGE</u>	<u>Propulsion Type</u>
GULFSTREAM	G-IIB/G-III	69.70	SPEY 511-8	91.1	103.4	97.3	291.8	2	Jet
DASSAULT	FALCON 20-F (M1400)	28.66	CF700-2D-2	90.0	92.3	103.0	285.3	2	Jet
FOKKER	F-27 Mk.500	45.00	DART Mk. 535-7R	90.6	92.2	100.3	283.1	2	Propeller-Driven
LEARJET	24F-A	12.50	CJ610-6	83.6	103.9	95.3	282.8	2	Jet
LOCKHEED	1329-23 (AIRESEARCH)	43.80	TFE731-3-1E	92.7	88.1	96.9	277.7	2	Jet

- Gray shading indicates propeller-driven aircraft that may continue to use APF.
- All aircraft listed in Table 2 and not shaded in yellow are prohibited from using APF.
- In the interest of efficiency, not all Stage 1 and Stage 2 jet aircraft with a cumulative noise level within the range of aircraft listed are included in the table.

3. NAA's Conclusions Regarding Non-Stage Aircraft

In our Notice of Investigation, we expressed concern that all Stage 2 jets were banned, regardless of noise emissions, while certain aircraft not certificated under 14 CFR Part 36, Appendix C, Section C36.5, with estimated noise levels higher than Stage 2 jets are being permitted to continue to operate at APF. Specifically, the FAA indicated, for example, that the Stage 2 ban would permit a DC-3 aircraft with a noise level at take-off of 85 dBA to utilize the airport, yet bar operations by a Sabreliner 75A with a noise level at take-off of 77.7 dBA.³⁹¹

The NAA provided no analysis in its Reply to the Notice of Investigation to show that the DC-3 is not as noisy or noisier than the banned Sabreliner 75A. Instead, the NAA argues that it need not restrict aircraft that are not certificated under 14 CFR Part 36 to justify a ban on Stage 2 aircraft as nondiscriminatory.³⁹² We disagree that the NAA may disregard objective data regarding the noise characteristics and contributions of other types of aircraft operating at the Airport in determining to ban operations by Stage 2 jets.

In support of its contention, the NAA states “Congress and the FAA use stage certification in numerous ways to distinguish and restrict aircraft,” citing 14 CFR Parts 36 and 91. In addition, the NAA contends that courts have found “... it is appropriate to define and base a noise restriction on the stage classifications provided by the FAA in Part 36,”³⁹³ citing Global Int’l Airways Corp. v.

³⁹¹ FAA Exhibit 1, Item 1(a), Letter from Mr. David L. Bennett, Director, Office of Airport Safety and Standards, to Mr. Theodore D. Soliday, including Notice of Investigation. The FAA’s comparison of the noise levels of these two aircraft was based on noise levels provided in FAA Advisory Circular 36-3H, “Estimated Airplane Noise Levels in A-Weighted Decibels.” In the past, the FAA has recommended the use of this Advisory Circular for comparing the noise levels of aircraft that were not subject to noise certification rules to those aircraft that are certificated as Stage 1, Stage 2, or Stage 3 under 14 CFR Part 36. For example, in its May 15, 1992, letter to Fort Lauderdale [FAA exhibit 1, Item 32] in response to the sponsor’s request for information regarding a proposed restriction, the FAA suggested the use of AC-36-3 as the means of identifying a decibel noise level as the basis for a decibel-level ordinance. See also, 14 CFR 150.7(a)(5)(iv)].

³⁹² FAA Exhibit 1, Item 2, p. 17-18.

³⁹³ FAA Exhibit 1, Item 2, p. 17-18.

American Trans Air, Inc., 727 F.2d at 248, and Arrow Air, Inc. v. Port Authority of New York and New Jersey, 602 F.Supp. 314 (S.D.N.Y. 1985).

Although abatement of aircraft noise is a shared responsibility, airport proprietors have more limited authority than the Federal Government.³⁹⁴ It is not appropriate for the NAA to replicate the FAA's use of stage designations because grant assurance obligations and proprietary authority are not analogous to or congruent with the authority of the FAA under 49 USC 44715 and 49 USC 47521, *et seq.*

In any event, the manner in which the FAA and Congress used Stage designations differs materially from the NAA Stage 2 jet ban. The FAA considered the economic reasonableness and technological feasibility of Stage 2 technology in developing a schedule for the phaseout of operations by Stage 1 turbojet aircraft over a period of 8 years. Similarly, the FAA considered economic impacts on the industry in establishing the interim schedule for compliance with requirements to transition to Stage 3 civil subsonic turbojet aircraft under ANCA over a period of 9 years. In contrast, the NAA adopted a ban effective two months after its enactment,³⁹⁵ not a phased schedule for transition to quieter aircraft based upon economic impacts on users and the cost and availability of conversion technology.

As a matter of policy, the FAA has advised airport proprietors that the use of Stage classifications to restrict aircraft operations, while not per se unjustly discriminatory, may be unjustly discriminatory depending upon the specific airport situation.³⁹⁶ Assuming, *arguendo*, that this policy applies to operations by aircraft weighing 75,000 pounds or less, the airport-specific inquiry is whether the types of aircraft subject to the restriction are as quiet or quieter than those being permitted to continue to operate without limit. This inquiry is consistent with the reasoning in City and County of San Francisco v. FAA, *supra*, and with congressional intent to protect the rights of operators of small aircraft.³⁹⁷

In addition, the FAA's use of Stage designations under Part 36 and Part 91, and the cases cited by the NAA are not relevant. Both are distinguishable because they apply only to aircraft weighing more than 75,000 pounds.

The NAA contends that ANCA created a scheme by which airport proprietors may restrict aircraft weighing 75,000 pounds or less using the same basis used by the FAA in addressing aircraft weighing more than 75,000 pounds. However, ANCA and its Part 161 implementing regulations established no such scheme. Rather, ANCA and Part 161 set forth the requirements that must be met by an airport proprietor before it implements a restriction on aircraft that affects Stage 2 and/or Stage 3 aircraft. Nowhere in Part 161 does the FAA indicate that an airport proprietor can ignore the noise associated with aircraft not having a stage designation under Part 36, when determining if an operating restriction is warranted.

³⁹⁴ See FAA Exhibit 1, Item 35, pp. 2, 34. See also FAA Exhibit 1, Item 40, "Aviation Noise Abatement Policy 2000," 65 Fed. Reg. 43803, 43804, 43818 (2000).

³⁹⁵ FAA Exhibit 1, Item 2, Attachment 9. While the ordinance indicated that the ban would become effective within two months of when the ordinance was adopted, January 1, 2001 and November 16, 2000, respectively, the NAA delayed its enforcement for several reasons, including to correct deficiencies identified by the FAA with the initial Part 161 submittal.

³⁹⁶ FAA Exhibit 1, Item 31, Part 150 Newsletter (1987).

³⁹⁷ See H.R. Rep. No. 101-581, at 23 (1990).

The NAA argues that the FAA, in its consideration of comments on the Part 161 regulations, specifically rejected a comment proposing that aircraft be restricted on a more specific basis than by stage classification.³⁹⁸ The NAA contends the FAA concluded that restricting aircraft on bases other than stage classifications would lead to assertions of unjust discrimination. However, the FAA comments cited by the NAA are irrelevant to the NAA's position that the use of stage designations, alone, cannot be unjustly discriminatory, and do not support that position. The FAA's policy concerning use of stage designations for airport restrictions is discussed above.

The comments cited involved the FAA's consideration of options for treatment of Stage 2 aircraft weighing 75,000 pounds or less under Part 161. In this regard, the FAA did not conclude that the use of other than stage designations can lead to assertions of unjust discrimination, as argued by the NAA. Rather, the FAA concluded that ANCA, as it pertains to Stage 2 aircraft, provides protection to all segments of aviation, and that to exclude restrictions on Stage 2 aircraft below 75,000 pounds from the requirements of Part 161 would have the effect of making them vulnerable to local restrictions. The FAA was clearly concerned that a decision to exclude Stage 2 aircraft weighing 75,000 pounds or less from the protections of ANCA and Part 161 could have the effect of earmarking them for a restriction.

The NAA finally argues that the FAA "has steadfastly resisted attempts by airport proprietors or other local governments to assess noise impacts and take actions thereon based on single event or other similar types of individualized noise metrics. Thus, an assertion that an airport proprietor must now base access restrictions on individualized noise levels of specific aircraft operating in specific noise events is wholly inconsistent with the position of the FAA as well as applicable statutes and regulations."³⁹⁹

We agree with NAA that it has generally been the FAA's position that single event metrics should not be used to "assess noise impacts" on a community, for the reasons discussed in section VI.F.1.c. above. However, the FAA has a long history of supporting the use of FAA certificated or estimated aircraft noise levels as published in FAA Advisory Circulars for determining the noise characteristics of aircraft using an airport.⁴⁰⁰

³⁹⁸ In support of its position, NAA cites 56 Fed. Reg. 48,661, 48,665 (Sept. 25, 1991).

³⁹⁹ FAA Exhibit 1, Item 2, p. 18.

⁴⁰⁰ The FAA used and advised sponsors, Congress and the public of the acceptability of estimated A-Weighted data as a means to compare aircraft. In the formulation of the Metropolitan Washington Airports Policy in 1980, FAA adopted estimated A-Weighted data as per AC-36-3, as the means to established noise limits at National Airport, FAA Exhibit 1, Item 33, "Metropolitan Washington Airports Policy," (1980). In its 1988 Part 150 Report to Congress, the FAA stated that with regards to airport restrictions, a single-event limit would be expected to apply AC-36-3, FAA Exhibit 1, Item 24, Report to Congress "FAR, Part 150, Airport Noise Compatibility Program," November 21, 1988. In *Study of the Application of Notice and Analysis Requirements to Operating Noise/Access Restrictions on Subsonic Jets Under 75,000 Pounds*, (FAA Study pursuant to Section 9305 of the Airport Noise and Capacity Act of 1990; 1991), the FAA used A-weighted data (AC-36-3) and ranked aircraft from the noisiest to the quietest, FAA Exhibit 1, Item 2, Attachment 17, Tab 14. In its May 15, 1992, letter to Fort Lauderdale in response to the sponsor's request for information regarding a proposed restriction, FAA suggested the use of AC-36-3 as a means of identifying a decibel noise level as the basis for a decibel-level ordinance, FAA Exhibit 1, Item 32. In Part 150, the FAA described the range of airport noise and access restrictions available for study as including landing fees based on FAA certificated or estimated aircraft noise levels. See also 14 C.F.R. § B150.7(b)(5)(iv).

Finally, we note that NAA's position would have absurd results. It would essentially permit an airport sponsor to restrict even Stage 3 aircraft, the quietest technology in the industry, without consideration of the noise impacts from noisier aircraft not certificated under FAA procedures. A review of FAA's Advisory Circular 36-3H, which lists the estimated noise levels of aircraft in A-weighted decibels,⁴⁰¹ reveals that significant numbers of non-stage aircraft may be noisier than Stage 3 aircraft. Under NAA's position, these noisier non-stage aircraft could continue to operate at an airport even though an airport sponsor has imposed a restriction on quieter Stage 3 aircraft.

We decline at this time to further consider the issue of unjust discrimination relative to non-Stage aircraft, as raised in our Notice of Investigation.⁴⁰²

VIII. FINDINGS AND CONCLUSIONS

Under the particular circumstances existing at APF and the entire record herein, and upon consideration of the submissions and responses by the party and the applicable law and policy and for the reasons stated above, we conclude that:

- A. The NAA's Stage 2 ban is preempted by Federal law; and
- B. The NAA's Stage 2 ban is not consistent with its statutory and contractual obligation to make its airport available for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical users.

ORDER

ACCORDINGLY, it is ordered that:

1. Pursuant to 49 U.S.C. § 47106(d), unless and until the Naples Airport Authority (NAA) rescinds or takes formal action to cease enforcement of the ban on the use of the Naples Municipal Airport by Stage 2 aircraft, the FAA hereby withholds approval of any applications submitted by NAA for amounts apportioned under 49 U.S.C. § 47114(c) and (d) and any application by the NAA for discretionary grants authorized under 49 U.S.C. § 47115.
2. All motions not specifically granted herein are denied.

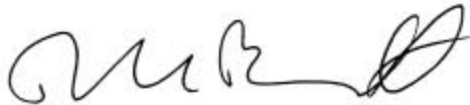
⁴⁰¹ A-Weighted Sound Level (dBA) - A sound pressure level, often noted as dBA, which has been frequency filtered or weighted to quantitatively reduce the effect of the low frequency noise. It was designed to approximate the response of the human ear to sound. Also See FAA Exhibit 1, Item 21, Page A-2.

⁴⁰² We also note that even in the under-75,000 lb. category, some Stage 2 aircraft types, including types that have operated at Naples Municipal Airport, may have lower noise emissions than some Stage 3 or other aircraft permitted to use Naples Airport. In the absence of a complaining party and a fully developed record, we are not making a finding on unjust discrimination with regard to such aircraft in this Determination. However, we remind NAA that the operator of an aircraft affected by a Stage-based access restriction is not precluded from presenting evidence of unjust discrimination in a complaint under 14 C.F.R. Part 16. If an aircraft type is subject to an airport restriction, and there is evidence that that aircraft type is quieter than some types that are not subject to the restriction, the operator of the restricted aircraft would have the opportunity to bring a complaint for unjust discrimination under Part 16 whether or not the restriction is based on the Stage designation of permitted and/or restricted aircraft.

RIGHT TO APPEAL OR REQUEST A HEARING

Pursuant to 14 C.F.R. Part 16, the NAA may request a hearing under subpart F of Part 16 within 20 days after service of the Director's Determination. 14 C.F.R. §§ 16.31(d) and 16.109(c)(1). The NAA may waive a hearing and appeal the Director's Determination directly to the FAA Associate Administrator. 14 C.F.R. §§ 16.31(c), 16.33, and 16.109(c)(2). Alternatively, the NAA may submit, jointly with FAA counsel, a proposed consent order under §16.243(e). 14 C.F.R. §16.109(c)(4).

This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 U.S.C. § 46110. See also 14 C.F.R. § 16.247. However, if the NAA elects not to request a hearing or to file an appeal in writing within the time period specified in 14 C.F.R. §16.109(c), the Director's Determination becomes final. 14 C.F.R. §16.109(d).



David L. Bennett, Director
Office of Airport Safety and Standards

March 10, 2003

Date

**IN THE MATTER OF COMPLIANCE
WITH FEDERAL OBLIGATIONS BY THE NAPLES AIRPORT AUTHORITY, NAPLES,
FLORIDA**

FAA Docket No. 16 - 01- 15

INDEX OF THE ADMINISTRATIVE RECORD

The following items constitute the administrative record in this proceeding:

FAA Exhibit 1

Item 1

- a. Notice of Investigation, FAA Docket No. 16-01-15, dated October 31, 2001, *In the Matter of Compliance With Federal Obligations by the Naples Airport Authority, Naples, Florida*.
- b. Letter from Paul Galis, Deputy Associate Administrator for Airports, to Mr. Theodore D. Soliday, October 31, 2001. Includes Topical Comments.

Item 2

Respondent's Answer, dated December 3, 2001, *Reply of the City of Naples Airport Authority*, by Mr. Perry M. Rosen, David H. Quigley, Peter J. Kirsch and Daniel S. Reimer, representing the Naples Airport Authority, and including the following exhibits:

- Attachment 1 Naples Municipal Airport Part 161 Study, presentation of Recommendations (June 22, 2000).
- Attachment 2 Resolution 2000-7, Inviting Public Comment on a Proposed Restriction on Stage 2 Operations at the Naples Municipal Airport (June 22, 2000).
- Attachment 3 Naples Municipal Airport Part 161 Study (June 30, 2000).
- Attachment 4 Letter from Peter J. Kirsch, Cutler & Stanfield, L.L.P., to David Bennett, Director, Office of Airport Safety and Standards, (October, 24, 2000).
- Attachment 5 Letter from Peter J. Kirsch, Cutler & Stanfield, L.L.P., to Woodie Woodward, Associate Administrator for Airports, (October, 24, 2000).
- Attachment 6 History of Noise Compatibility Efforts for Naples Municipal Airport (October 2000).

- Attachment 7 Letter from Ted Baldwin, HMMH, to Wayne Heibeck, Manager, Airport Compliance Division, (October 28, 2000).
- Attachment 8 Naples Municipal Airport Part 161 Study, Response to Comments (November 16, 2000).
- Attachment 9 Resolution 2000-8, Adopting a Restriction on Stage 2 Jet Operations at the Naples Municipal Airport (November 16, 2000).
- Attachment 10 Waiver From Naples Municipal Airport Stage 2 Aircraft restriction, Information Package and Application.
- Attachment 11 Transcript of Proceedings, City of Naples Airport Authority Meeting (January 18, 2001).
- Attachment 12 Resolution 2001-2 (February 7, 2001).
- Attachment 13 Resolution 2001-4 (March 15, 2001).
- Attachment 14 Resolution 2001-6 (June 21, 2001).
- Attachment 15 Naples Municipal Airport Part 161 Study, Supplemental Analysis (June 2001).
- Attachment 16 Letter from Eric West, City of Naples Airport Authority, to Lynne Pickard, FAA (July 27, 2001).
- Attachment 17 Memorandum in Support of Defendant's Motion for Summary Judgment, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (June 18, 2001).
- Attachment 18 Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 16, 2001).
- Attachment 19 Joint Pretrial Statement, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 16, 2001).
- Attachment 20 Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 19, 2001).

- Attachment 21 Sanford Fidell, Expert Report, review of FAA’s Technical Rationale for Assessing the Significance of Aircraft Noise Impacts, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 27, 2001).
- Attachment 22 David Dubbink, Expert Report, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (April 12, 2001).
- Attachment 23 Order, National Business Aviation Association v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (August 8, 2001).
- Attachment 24 Resolution 59 (1979).
- Attachment 25 Resolution 77 (1983).
- Attachment 26 Part 150 Study for Naples Municipal Airport (February 1987).
- Attachment 27 Naples Municipal Airport, Revised Noise Exposure Map 1996 (February 1997).
- Attachment 28 Naples Municipal Airport, Revised Noise Compatibility Program 1996 (February 1997).
- Attachment 29 FAA Record of Approval, Revised Noise Compatibility Program 1996 (September 1997).
- Attachment 30 Naples Municipal Airport, FAR Part 150 Update, Amendment of Noise Exposure Maps and Noise Compatibility Program to Extend Nighttime Stage 1 Use Restrictions to 24 Hours (February 1998).
- Attachment 31 FAA Record of Approval, Naples Municipal Airport, Revision 1 (March 1999).
- Attachment 32 Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update (June 2000).
- Attachment 33 Naples Municipal Airport, Quarterly Noise Reports (through #18).
- Attachment 34 Naples Airport Authority Waiver Approval and Expiration Dates.

- Attachment 35 Information on levels on Environmental Noise Requisite to Protect Public Health and Welfare With an Adequate Margin of Safety (March 1974).

Item 3

Notice and Approval of Airport Noise and Access Restrictions, Final Rule, 14 C.F.R. Part 161, Federal Register Notice, September 25, 1991, 56 Fed. Reg. 48668.

Item 4

Media and Newspaper articles:

Naples Daily News:

- *Airport Authority Rejects Noise Disclosure Plan, 06/25/1998.*
- *Airport Authority: Proposal to Query realtors for Cooperation on Noise Issue Defeated, 04/21/2000.*
- *Noise Consultants Recommend 24-Hour Ban on Stage 2 Jets, 06/14/2000.*
- *Airport Authority Consultants Agree to Take New Look at Jet Ban Noise Study, 03/16/2001.*
- *Lido Bay Resort Project revamped After Airport Noise Concerns, 01/05/2002.*
- *NY Company Fined for Landing Stage 2 jet at Naples Airport, 04/10/2002*
- *Property Owners Objections Complicate Attempts at Zoning Overlay, 05/05/2002*
- *No More Stage 2 Jets to Fly Out of Naples Airport, 12/27/02.*

GA News:

- *Naples Follows Through with Stage 2 Ban, Despite FAA Warning, 01/12/2001.*
- *Naples Airport Reinstates Jet Ban, 02/28/2002.*

Item 5

FAA Form 5010 "Airport Master Record" for APF. Date: 06/18/2002.

Item 6

Airport Sponsor AIP Grant History, listing the Federal airport improvement assistance provided by FAA to the NAA since 1982.

Item 7

Chronology of Events, Collier County.

Item 8

Chronology of Events, City of Naples.

Item 9

Letter to David Bennett, Director of Airport Safety and Standards, from Frank J. Costello, February 19, 2002.

Item 10

Chronology of Events, Naples Airport Authority.

Item 11

Video Tape of Naples Airport Authority Meeting, November 15, 2001.

Item 12

City of Naples Airport Authority's Motion in Response to Letter From National Business Aviation Association (Dated February 19, 2002), April 5, 2002, and Exhibits to Declaration of Lisa Leblanc-Hutchings and City of Naples Airport Authority's Motion. (exhibits 1-13)

Item 13

City of Naples Airport Authority Quarterly Noise Reports, No. 9-23, January 1999 - September 2002.

Item 14

Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update, November 2000.

Item 15

City of Naples Ordinance 02-9648, June 5, 2002.

Item 16

- a. Case 2000base, November 18, 1999, modeling for the "2000 DNL Contours," INM 6.0 Echo Report, dated November 1, 2002.
- b. Case 2000alt2, May 3, 2000, modeling for the "2000 Alternative 2, the 24 hour restriction on Stage 2 jet," INM 6.0 Echo report, dated October 30, 2002.

Item 17

Agreement between United States and the City of Naples, April 21, 1948. Cancellation of Lease and Quitclaim.

Item 18

NAA Survey Data of Stage 2 Operators and Owners.

Item 19

FAA letters to the NAA.

- a. Letter from Paul Galis, Deputy Associate Administrator for Airports, to Theodore D. Soliday, October 31, 2001.
- b. Fax from Wayne Heibeck, Airport Compliance Division, to Lisa LeBlanc-Hutchings.
- c. Letter from Woodie Woodward, Associate Administrator for Airports, to Lisa LeBlanc-Hutchings, August 21, 2000.
- d. Letter from Woodie Woodward, Associate Administrator for Airports, to Theodore D. Soliday, November 30, 2001.
- e. Letter from Paul Galis, Deputy Associate Administrator for Airports, to Theodore D. Soliday, March 14, 2001.
- f. Letter from Paul Galis, Deputy Associate Administrator for Airports, to Eric West, February 16, 2001.
- g. Letter from W. D. Stringer to Theodore D. Soliday, December 7, 2000.
- h. Letter from David L. Bennett, Director, Office of Airport Safety and Standards, to Lisa LeBlanc-Hutchings, September 18, 2000.
- i. Letter from Woodie Woodward, Associate Administrator for Airports, to Theodore D. Soliday, December 27, 2000.
- j. Letter from Paul Galis, Deputy Associate Administrator for Airports, to Theodore D. Soliday, January 30, 2001.

Item 20

ICAO Resolution A33-7, adopted at the 33rd Session of the Assembly, September 25 to October 5, 2001

Item 21

Federal Agency Review of Selected Airport Noise Analysis Issues” (FICON, 1992), Volume 1 (Policy Report) and Volume 2 (Technical Report).

Item 22

Letters to the FAA.

- a. Letter from Theodore D. Soliday to Paul Galis, Deputy Associate Administrator for Airports, March 19, 2001.
- b. Letter from Perry M. Rosen to David L. Bennett, Director, Office of Airport Safety and Standards, February 25, 2002.
- c. Letter from Ted Baldwin to Lynne Pickard, June 28, 2001.
- d. Letter from Peter J. Kirsch to Nancy LoBue, February 13, 2001.
- e. Letter from Eric West to Paul Galis, Deputy Associate Administrator for Airports, January 24, 2001.
- f. Letter from Ted Baldwin to Wayne Heibeck, Airport Compliance Division, October 28, 2000.

- g. Letter from Special Counsel NAA to David L. Bennett, Director, Office of Airport Safety and Standards, October 24, 2000.
- h. From Frank J. Costello to Lynne Pickard, August 1, 2000.
- i. Letter from Theodore D. Soliday to Victoria Catlett, June 29, 2000.
- j. Letter from Theodore D. Soliday to Lynne Pickard, February 14, 2001.

Item 23

“Part 150 – Airport Noise Compatibility Planning,” Federal Register 46FR 8316, dated January 26, 1981.

Item 24

Report to Congress “FAR, Part 150, Airport Noise Compatibility Program,” November 21, 1988.

Item 25

“Airport Facility Directory,” April 18, 2002.

Item 26

Report to Congress on Effects of Airport Noise (FAA, 1993).

Item 27

NAA General Information. http://flynaples.com/general_info.html.

Item 28

FAA Exhibit 1, Item 28, National Plan of Integrated Airport Systems (NPIAS), 1998-2002. (<http://www.faa.gov/arp/planning/npias/index.cfm>)

Item 29

“FAA Aerospace Forecasts,” Fiscal Year 2002-2013, FAA APO-02-1, March 2002. (<http://api.hq.faa.gov/clientfiles/CONTENT.htm>)

Item 30

“General Aviation Air Taxi Activity Survey,” calendar year 2000, FAA APO 110, February 2002. (<http://api.hq.faa.gov/GASurvey/index.htm>)

Item 31

Part 150 Newsletter (1987).

Item 32

Letter from Ms. Louise E. Maillet to Mr. David Feldheim, Assistant City Attorney, Ft. Lauderdale, Florida, May 15, 1992.

Item 33

Metropolitan Washington Airports Policy. (1980).

Item 34

Airport Compatible Land Use Guidance for Florida, Florida Department of Transportation (DOT), Office of Public Transportation, Aviation Office, 1994.

Item 35

Aviation Noise Abatement Policy, November 18, 1976.
(http://www.aee.faa.gov/noise/aee100_files/1976ANAP.pdf)

Item 36

Day Night Average Sound level (DNL). (1980)

Item 37

GAO Report GAO/RCED-00-98 April 2000, AVIATION AND THE ENVIRONMENT: FAA's Role in Major Airport Noise Programs.

Item 38

Grant History Report, AIP Noise Projects for the State of Florida

Item 39

Report to Congress: Eligibility of Noise Abatement Proposals for Grants-in-aid under the Airport Improvement Program (January 1989)

Item 40

Aviation Noise Abatement Policy 2000 (proposed policy document), July 14, 2000.
(http://www.aee.faa.gov/noise/aee100_files/fr_anap.pdf)

Item 41

FAA Comments to the Metropolitan Airports Commission's proposed nighttime Stage 2 ban, March 24, 1992.

Item 42

Noise Abatement Award Program

(http://www.flynaples.com/main%20web%20pages/noise_abatement_award_program.htm)

**IN THE MATTER OF COMPLIANCE
WITH FEDERAL OBLIGATIONS BY THE NAPLES AIRPORT AUTHORITY, NAPLES,
FLORIDA**

FAA Docket No. 16 - 01- 15

INDEX OF THE ADMINISTRATIVE RECORD

FAA Exhibit 2

List of Acronyms

%HA	Percent of population characterized as Highly Annoyed
AAIA	Airport and Airway Improvement Act of 1982
AC	Advisory Circular
ADA	Airline Deregulation Act of 1978
AHTA	Anti-Head Tax Act
AIP	Airport Improvement Program
ALJ	Administrative Law Judge
ANCA	Airport Noise and Capacity Act
ANSI	American National Standards Institute
APF	Naples Municipal Airport
ASNA	Aviation Safety and Noise Abatement Act
C.F.R.	Code of Federal Regulations
CLDC	County Lane Development Code
dB	decibels
DNL	Day-night average sound level
DOT	Department of Transportation
EPA	Environmental Protection Agency

EPR	Engine Pressure Ratio
FAA	Federal Aviation Administration
FDOT	Florida Department of Transportation
FICON	Federal Interagency Committee on Noise
FICUN	Federal Interagency Committee on Urban Noise
GAMA	General Aviation Manufacturers Association
GDSP	General Development Site Plan
ICAO	International Civil Aviation Organization
IRS	Internal Revenue Service
NAA	Naples Airport Authority
NADP	Noise Abatement Departure Procedures
NBAA	National Business Aviation Association
NCP	Noise Compatibility Program
NEM	Noise Exposure Map
NLRB	National Labor Relations Board
NOI	Notice of Investigation
PAB	Planning Advisory Board
PACE	Massport Capacity Enhancement Plan
PFC	Passenger Facility Charge
SA	Supplemental Analysis
SEL	Sound Exposure Level
SLR	Sound Level Requirements
U.S.C.	United States Code