UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

IN THE MATTER OF COMPLIANCE WITH FEDERAL OBLIGATIONS BY THE NAPLES AIRPORT AUTHORITY, NAPLES, FLORIDA	**FAA Docket No. 16-01-15**

REPLY OF THE CITY OF NAPLES AIRPORT AUTHORITY

December 3, 2001

The City of Naples Airport Authority (the "Authority") is in receipt of the Notice of Investigation In The Matter of Compliance With Federal Obligations By the Naples Airport Authority, Naples, Florida, FAA Docket No. 16-01-15. This writing constitutes the Authority's reply pursuant to 14 C.F.R. § 16.103.

INTRODUCTION

The Authority has been engaged for more than fifteen years in developing and implementing reasonable measures designed to reduce noise associated with the operation of Naples Municipal Airport (the "Airport" or "Naples Airport"). The Federal Aviation Administration ("FAA" or the "Agency") has participated actively in this endeavor and has approved numerous measures proposed by the Authority, including aircraft operational restrictions, land use controls, and a restriction based on aircraft noise certification (the Stage 1 ban). Most recently, the Authority has been studying and working for more than two years on the use restriction at issue in the Notice of Investigation, a ban on the operation of Stage 2 aircraft at the Naples Airport (the "Stage 2 Ban"). The Authority has spent approximately one-half million dollars studying the Stage 2 Ban and its alternatives (and an additional considerable sum defending the Stage 2 Ban from its detractors), in addition to funds expended in previous studies to comprehensively analyze noise control measures. These efforts have resulted in a comprehensive and thorough assessment of the Stage 2 Ban that has been approved by the FAA under 14 C.F.R. Part 161 ("Part 161") and a determination by the Federal District Court for the Middle District of Florida that the Stage 2 Ban is reasonable, valid, and enforceable.

Although the FAA's decision and that of the District Court should be the end of the matter, the Authority has been served with the above-captioned Notice of Investigation. The FAA appears to be unsatisfied with the justification for the Stage 2 Ban provided in the voluminous Part 161 Study, which, by the FAA's own admission, satisfies the requirements of the Airport Noise and Capacity Act of 1990, 49 U.S.C. §§ 47521-47533 ("ANCA") and Part 161. Specifically, the Notice of Investigation questions whether, by enacting the Stage 2 Ban, the Authority has: (a) denied public use of the Airport in violation of 49 U.S.C. § 47107(a)(1)-(6);

(b) granted an "exclusive right" to use the Airport in violation of 49 U.S.C. §§ 40103(e) and 47107(a)(4); and (c) enacted a restriction that is preempted by federal law. In support of these contentions, the Notice of Investigation implies that the Authority must establish that it has the requisite proprietary interest in imposing the Stage 2 Ban based upon financial liability. Additionally, the Notice of Investigation questions the Authority's: (a) consideration of the beneficial effects of the Stage 2 Ban on residents exposed to noise in excess of DNL 60 dB; (b) decision not to ban aircraft other than Stage 2 aircraft that allegedly are noisier than Stage 2 aircraft; and (c) analysis of the costs and benefits of the Stage 2 Ban, including judgments as to the potential use of sound insulation as an alternative to the Stage 2 Ban.

The Authority appreciates the difficult job the FAA has in promoting and maintaining the efficient use of airspace in the United States. This, after all, is a central mission of the Agency. Yet Congress has taken pains to ensure that the Agency's promotion of the efficient use of airspace is not unbridled and, in particular, is not pursued without regard to the inevitable impacts that aircraft operations impose on local communities. Thus, since the adoption of the Federal Aviation Act (and the creation of the FAA itself), Congress has scrupulously preserved – and in some areas strengthened – the right of airport proprietors to restrict certain types of aircraft from operating at their particular airport. As stated by the Secretary of Transportation in hearings on a key 1968 amendment to the FAA Act: "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." S. Rep. No. 1353, at *6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2688.[1]

The Authority acknowledges that its right to restrict the use of certain aircraft is not entirely unconstrained. The constraints on such right, however, are those strictly defined by Congress through federal legislation; these rights cannot be inhibited by ad hoc, piece-meal determinations without regard to Congress' direction. So long as the Authority complies with the controlling statutes – which it has assiduously done in this case, as the FAA concedes – the

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[1] As stated in the Senate Report:

> [T]he 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 that 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. . . . ***[T]he Federal Government is in no position to require an airport to accept service by noisier aircraft*** . . . . The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, ***the Federal Government should not substitute its judgment for that of the States or elements of local government*** who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations. Id. (emphasis added).

Stage 2 Ban cannot be deemed to be in violation of any federal law, regulation, or commitment, as alleged in the Notice of Investigation.

The fact that the Authority has a grant agreement with the FAA does not alter this conclusion. As stated in the Notice of Investigation, "[g]rant agreements under the AAIA are not ordinary contract[s], but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will." Notice of Investigation at 3. There is nothing about the Stage 2 Ban that is in contravention of the will of Congress. To the contrary, the Stage 2 Ban fully comports with the will and mandate of Congress. As discussed more fully below, while the FAA's imposition of its own reasonableness/nondiscrimination standards under grant agreement provisions and 49 U.S.C. § 47107(a) may apply to ***some*** access restrictions implemented by an airport proprietor, they do not apply to a Stage 2 restriction adopted pursuant to ANCA – in which Congress has: (a) specifically restricted certain aircraft within this category; (b) declined to require that restrictions on aircraft within this category be shown to be "reasonable and nondiscriminatory", while specifically requiring such a showing for a restriction affecting Stage 3 aircraft; and (c) declined to require FAA approval of restrictions affecting aircraft within this category, while specifically requiring FAA approval for restrictions affecting Stage 3 aircraft.

Accordingly, it is the Authority's position that the Notice of Investigation states no grounds for finding violations of federal law or related grant assurance obligations. More particularly, the position espoused in the Notice of Investigation reflects a position that: (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 decisions; (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.

The Authority has more fully described its position below. Because, however, the Authority exhaustively has detailed in other documents its position on the issues identified in the Notice of Investigation, we do not restate all of them here. Accordingly, in addition to the discussion below, the Authority responds to the Notice of Investigation by directing your attention to the following documents:

Exhibit 1	Naples Municipal Airport Part 161 Study, Presentation of Recommendations (June 22, 2000)
Exhibit 2	Resolution 2000-7, Inviting Public Comment on a Proposed Restriction on Stage 2 Jet Operations at the Naples Municipal Airport (June 22, 2000)
Exhibit 3	Naples Municipal Airport Part 161 Study (June 30, 2000)

Exhibit 4	Letter from Peter J. Kirsch, Cutler & Stanfield, L.L.P., to David Bennett, FAA (Oct. 24, 2000)
Exhibit 5	Letter from Peter J. Kirsch, Cutler & Stanfield, L.L.P., to Woodie Woodward, FAA (Oct. 24, 2000)
Exhibit 6	History of Noise Compatibility Efforts for Naples Municipal Airport (Oct. 2000)
Exhibit 7	Letter from Ted Baldwin, HMMH, to Wayne Heibeck, FAA (Oct. 28, 2000)
Exhibit 8	Naples Municipal Airport Part 161 Study, Response to Comments (Nov. 16, 2000)
Exhibit 9	Resolution 2000-8, Adopting a Restriction on Stage 2 Jet Operations at the Naples Municipal Airport (Nov. 16, 2000)
Exhibit 10	Waiver From Naples Municipal Airport Stage 2 Aircraft Restriction, Information Package and Application
Exhibit 11	Transcript of Proceedings, City of Naples Airport Authority Meeting (Jan. 18, 2001)
Exhibit 12	Resolution 2001-2 (Feb. 7, 2001)
Exhibit 13	Resolution 2001-4 (March 15, 2001)
Exhibit 14	Resolution 2001-6 (June 21, 2001)
Exhibit 15	Naples Municipal Airport Part 161 Study, Supplemental Analysis (June 2001)
Exhibit 16	Letter from Eric West, City of Naples Airport Authority, to Lynn Pickard, FAA (July 27, 2001)
Exhibit 17	Memorandum in Support of Defendant's Motion for Summary Judgment, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (June 18, 2001)
Exhibit 18	Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 16, 2001)
Exhibit 19	Joint Pretrial Statement, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 16, 2001)

Exhibit 20 Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 19, 2001)

Exhibit 21 Sanford Fidell, Expert Report, Review of FAA's Technical Rationale for Assessing the Significance of Aircraft Noise Impacts, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (July 27, 2001)

Exhibit 22 David Dubbink, Expert Report, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (April 12, 2001)

Exhibit 23 Order, National Business Aviation Ass'n v. City of Naples Airport Authority, Case No. 2:00-CV-572-ftm-29d (Aug. 8, 2001)

Exhibit 24 Resolution 59 (1979)

Exhibit 25 Resolution 77 (1983)

Exhibit 26 Part 150 Study for Naples Municipal Airport (Feb. 1987)

Exhibit 27 Naples Municipal Airport, Revised Noise Exposure Map 1996 (Feb. 1997)

Exhibit 28 Naples Municipal Airport, Revised Noise Compatibility Program 1996 (Feb. 1997)

Exhibit 29 FAA Record of Approval, Naples Municipal Airport, Naples, Florida (Sept. 1997)

Exhibit 30 Naples Municipal Airport, FAR Part 150 Update, Amendment of Noise Exposure Maps and Noise Compatibility Program to Extend Nighttime Stage 1 Use Restriction to 24 Hours (Feb. 1998)

Exhibit 31 FAA Record of Approval, Naples Municipal Airport, Revision 1 (March 1999)

Exhibit 32 Naples Municipal Airport, FAR Part 150 Noise Exposure Map Update (June 2000)

Exhibit 33 Naples Municipal Airport, Quarterly Noise Reports (1999 through 2001)

Exhibit 34 Naples Airport Authority Waiver Approval and Expiration Dates

Exhibit 35 Information on Levels on Environmental Noise Requisite to Protect Public Health and Welfare With an Adequate Margin of Safety (March 1974)

Each of the documents referenced herein is attached and should be considered a part of this reply and part of the Agency's record. They contain not only the positions of the Authority but also the data and information supporting those positions. Please note that we have not attached copies of ***all*** referenced statutes, regulations, FAA guidance, legislative or regulatory history, and judicial opinions, since these documents are in the Agency's possession or can be obtained readily.

DETAILED REPLY TO THE NOTICE OF INVESTIGATION

The Authority first will address the three alleged violations of law set forth in the Notice of Investigation. The Authority then will address a number of the subpoints or "concerns" raised by the FAA in the Notice of Investigation.

I. The Authority Has Not Denied Public Use Of The Airport In Violation Of 49 U.S.C. § 47107(a) (1)-(6)

The contention in the Notice of Investigation that the Authority has denied public use of the Airport in violation of 49 U.S.C. § 47101(a) (1)-(6) appears to center on the FAA's view that the Stage 2 Ban is unreasonable and unjustly discriminatory. Yet, under this reasoning, one could say that the ban imposed by Congress on Stage 2 aircraft above 75,000 pounds, 49 U.S.C. § 47528(a), is unreasonable and unjustly discriminatory. Congress singled out a class of aircraft to be banned, even though there existed aircraft not characterized by stage certification (and even Stage 3 aircraft) that were, under certain conditions and using certain noise metrics, noisier than the banned Stage 2 aircraft. Congress imposed the ban on an entire class of aircraft even though the costs of that ban were enormous (estimated to be billions of dollars) and without any determination that the ban was warranted by a thorough cost/benefit analysis. Congress imposed the ban without determining that Stage 2 aircraft above 75,000 pounds caused significant impacts within specific noise contours (e.g., above or below DNL 65 dB). Congress implemented the ban without regard to whether the operation of Stage 2 aircraft above 75,000 pounds contributed to likely liability of airport proprietors, and if so, by how much. Finally, Congress enacted the ban even though airports around the country as well as the FAA had myriad alternative methods to reduce or mitigate noise from such aircraft, including but not limited to, additional use of sound insulation. Notwithstanding these facts, the ban on Stage 2 aircraft above 75,000 pounds cannot be determined by the FAA to be unreasonable or unjustly discriminatory because it was mandated by Congress.

Although it did not impose a similar blanket prohibition on Stage 2 aircraft ***below*** 75,000 pounds, Congress, in 49 U.S.C. §47524, granted airport proprietors the ***express right*** to ban such aircraft. In doing so, Congress made a number of choices. First, Congress could have required that the proprietor impose restrictions based on variables other than stage certification, but it did not. Indeed, the entire structure of ANCA and related laws and regulations indicates that Congress and the FAA recognize that stage certification is a reasonable and non-discriminatory basis upon which to distinguish aircraft on noise grounds. Congress also could have chosen to

require an airport proprietor to establish that, absent a ban on Stage 2 aircraft, the proprietor would suffer liability, but it did not. Congress could have chosen to require that the quantified benefits of a restriction exceed the quantified costs to impose the restriction, but it did not. Congress could have chosen to require an airport proprietor to base a restriction only on noise impacts within the DNL 65 dB contour, a threshold the FAA uses in other areas of aviation law, but it did not. Finally, and perhaps most importantly, Congress could have chosen to give the FAA approval authority over such restrictions, but it did not.

In fact, both Congress and the FAA expressly rejected efforts to impose the very type of requirements that the Notice of Investigation implies are present. Under 49 U.S.C. § 47524, some of the requirements at issue in the Notice of Investigation are applicable to restrictions placed on Stage 3 aircraft but are not applicable to a restriction affecting only Stage 2 aircraft. Congress also gave the FAA a clearly defined and important role in the review and approval of proposals to restrict operations of Stage 3 aircraft. In the very same statute, Congress considered and rejected a similar role for the FAA with regard to Stage 2 restrictions. Further, under 49 U.S.C. § 47525, Congress tasked the FAA with evaluating the requirements that should apply to restrictions affecting Stage 2 aircraft under 75,000 pounds. In that study, the FAA rejected expressly the idea of making restrictions affecting Stage 2 aircraft under 75,000 pounds subject to the requirements for restrictions on Stage 3 aircraft.

The FAA may not now circumvent the clear will of Congress by relying on an earlier enacted statute, 49 U.S.C. § 47107, and imposing it in a manner that Congress and the Agency previously rejected. More specifically, the FAA may not under the grant agreement provisions find a particular access restriction to be unreasonable and discriminatory when Congress has itself authorized that particular access restriction and deemed it to be reasonable and based on a meaningful distinction between types of aircraft.

The Agency's contemplated application of 49 U.S.C. § 47107 is in derogation not only of ANCA but also of the entire statutory scheme carefully constructed by Congress. Congress consistently has expressed its intent to allow airport proprietors the right to decide for themselves what type of access should be permitted at their airport. As explained by the Second Circuit Court of Appeals in interpreting the AAIA (which includes 49 U.S.C. § 47107):

> Under this [federal statutory scheme], 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. On the other hand, states and localities retain power in their capacity as airport proprietors to establish requirements as to the level of permissible noise created by aircraft using their airports. This power includes the right to deny use of airports to aircraft on the basis of non-discriminatory noise criteria.

Global Int'l Airways Corp. v. American Trans Air, Inc., 727 F.2d 246, 248 (2nd Cir. 1984). A ban based on stage certification can hardly be said to be a discriminatory noise criterion when Congress itself chose the criterion.

This Congressional division of authority has been continually guarded and secured through every major piece of aviation legislation, including but not limited to the enactment of 49 U.S.C. § 41713(b)(3), which recognizes the reserved rights of airport proprietors to control noise. In ANCA, Congress went even farther by affirmatively expressing the intent that the FAA have no role in deciding whether a restriction on Stage 2 aircraft is reasonable. Any attempt by the FAA to use grant agreement provisions as a tool to subvert the direct will of Congress clearly exceeds the authority of the Agency, particularly when the Agency readily admits that grant agreement provisions must be interpreted to enforce the will of Congress.

It is not necessary for the purpose of the Notice of Investigation to debate the role of the FAA in applying some type of reasonableness test to assess restrictions based on single event noise levels, numbers of operations, or other criteria not specifically addressed in ANCA. Focusing instead on the restriction at issue, it is clear that the role of the FAA with regard to Stage 2 restrictions imposed by airport proprietors under ANCA is limited to review of the analysis called for in 49 U.S.C. § 47524(b). Once the Agency has completed that review – as it has done in this case, as reported in the Agency's separate letter of October 31, 2001 – it is precluded from determining that a Stage 2 restriction is unreasonable, unjustly discriminatory or otherwise in violation of 49 U.S.C. § 47101(a) (1)-(6). Accordingly, the Stage 2 Ban cannot, as a matter of law and fact, be deemed to be unreasonable, unjustly discriminatory or otherwise in violation of 49 U.S.C. § 47101(a) (1)-(6).

II. The Stage 2 Ban Does Not Constitute The Grant Of An Exclusive Right For Purposes Of Providing Aeronautical Services

The FAA has not previously raised an objection to the Stage 2 Ban based on the theory that it constitutes the grant of an exclusive right. The Stage 2 Ban cannot, as a matter of law, constitute the grant of an exclusive right since it is a use restriction on aircraft operations and applies equally to all potential Airport users. The prohibition on exclusive rights relates to disparate treatment of particular and specific airport users and historically has been interpreted to prohibit the grant of monopoly power to an entity providing aeronautical services at an airport. City of Pompano Beach v. Federal Aviation Administration, 774 F.2d 1529, 1541 (11th Cir. 1985). The Stage 2 Ban, by its terms, imposes the same requirement on all potential Airport users and does not relate to aeronautical services or any party that provides aeronautical services.

As detailed in the studies and other documents attached hereto, the Stage 2 Ban cannot be characterized as granting the right to an exclusive set of operators or others to use the Airport. The Stage 2 Ban affects less than one percent of the operators at the Airport and applies to a classification of aircraft that has not, pursuant to the restrictions of federal law, been manufactured for more than ten years. An aircraft restriction that permits ninety-nine percent of the remaining aircraft to continue to use the Airport, including all aircraft manufactured in the last decade, can hardly be said to be a grant of an exclusive right to any identifiable Airport user(s). Under the FAA's reasoning, the Stage 1 ban at Naples, which the FAA expressly approved, would similarly constitute the grant of an exclusive right. Indeed, extending this reasoning, every restriction at every airport creates an unlawful exclusive right in favor of all users not covered by the restriction.

Moreover, an airport proprietor cannot be said to have illegally granted an exclusive right for use of its airport when it restricts a class of aircraft that Congress expressly states can be restricted. Indeed, to follow the reasoning in the Notice of Investigation, 49 U.S.C. § 47524(b) would be rendered a nullity, since an airport proprietor could never use the power it confers without granting an "exclusive right" to the owners and operators of non-Stage 2 aircraft to use the airport.

To the extent that the Stage 2 Ban is subject to this prohibition, the FAA has asserted inaccurately that the standard for exclusive rights is identical to the reasonableness/ nondiscrimination standard. Numerous cases and FAA opinions reveal that the standard is distinct and that the prohibition on exclusive rights is implicated by the grant of monopoly power to a provider of aeronautical services in a manner that is not tied directly to the nature of the enterprise or operation of the airport. See, e.g., Lange v. Federal Aviation Administration, 208 F.3d 389, 393 (2d Cir. 2000); Penobscot Air Services v. Federal Aviation Administration, 164 F.3d 713, 725 (1st Cir. 1999); City of Pompano Beach, 744 F.2d at 1542.

III. The Stage 2 Ban Is Not Preempted

As stated above, ANCA grants airport proprietors the power to adopt noise or access restrictions affecting Stage 2 aircraft. Contrary to the FAA's characterization, the Stage 2 Ban 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).[2]

While the former provision preserves and secures to an airport proprietor a general right to restrict aircraft at its airport, the latter provision gives a proprietor the express right to ban or otherwise restrict Stage 2 aircraft. Accordingly, the Stage 2 Ban cannot be preempted because it was adopted pursuant to an express Congressional grant of power.

Even if the FAA is correct in its belief that the power to adopt a noise or access restriction emanates from a reserved power recognized in Section 41713 rather than an express grant contained in Section 47524, that statute makes clear that a restriction on Stage 2 aircraft such as that imposed at Naples Airport is not preempted. This statute expressly states that the preemption of areas including airport service "does ***not*** limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3) (emphasis added).

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[2] The term "proprietor exception" is one used by the FAA but is disputed by the Authority. The legislative declarations and history of all relevant statutes make clear that the right of an airport proprietor to restrict aircraft based on its own local standards is not an exception to anything but rather a right that Congress has engrained in the framework of aviation statutory law.

This view is similarly reflected in many FAA regulations. For example, 14 C.F.R. Part 36, in establishing technical standards by which to classify aircraft by noise into the various Stage categories, declares:

> Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable," from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport ***remains with the proprietor of that airport***.

34 Fed. Reg. 18,355 (Nov. 18, 1969) (emphasis added).

Similarly, the Agency's Advisory Circular that ponder guidance for regulation of 14 C.F.R. Part 150 includes a section entitled "Airport Proprietor Options," which explains what actions an airport proprietor may take to reduce noise impacts ***beyond*** imposing land use controls. This section contains a table (entitled "Matrix of Noise Control Actions") which very clearly states that an airport proprietor may impose "Limitations on Number or Types of Operations or Types of Aircraft" and "Use Restrictions." Id. at 29 (Table items 10 and 11). Some of the items in the table reference a footnote that states "restrictions that involve FAA's responsibility for safe implementation . . . should not be accomplished unilaterally by the airport operator." This footnote, however, does ***not*** apply to "Use Restrictions" or "Limitations on Number or Types of Operations or Types of Aircraft."[3]

Similarly, prior judicial decisions addressing Congress' division of responsibility relating to access to airports make clear that Congress did not intend to preempt an airport operator's power to adopt aircraft operating restrictions. See, e.g., National Helicopter Corp. of Am. v. City of New York, 137 F.3d 81, 88 (2d Cir. 1998) ("Under this 'cooperative scheme,' Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population."); Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981) (contrasting how access restrictions imposed by non-proprietor municipalities have been deemed to be preempted); British Airways Bd. v. Port Authority of N.Y. and N.J., 558 F.2d 75, 84 (2d Cir. 1977) ("In light of this clear expression of legislative intent, the Supreme Court has refrained from holding that Congress has occupied the field of noise regulation to the exclusion of airport proprietors."); Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1992); Global Int'l Airways Corp., 727 F.2d at 248 "[S]tates and localities retain power in their capacity as airport proprietors to establish requirements as to the level of permissible noise created by aircraft using their airports. This power includes the right to deny use of airports to aircraft on the basis of non-discriminatory noise criteria.").

Federal preemption is, of course, a matter of constitutional law – application of the Supremacy Clause. It is not a matter of Agency interpretation of regulations or, for that matter,

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[3] Although the FAA is free to reject a proposed access restriction incorporated into a proprietor's Part 150 noise compatibility program, such disapproval does not limit the ability of the airport proprietor to impose such restrictions outside of the noise compatibility program, such as through Part 161.

grant agreement contracts. Violation of a grant agreement provision is just that (violation of a contract term), and cannot be reformulated into a Supremacy Clause violation. Alleged violation of 49 U.S.C. § 47107(a) also is just that, violation of a federal statutory requirement, not an action that usurps clear federal authority. More importantly in this case, because the restriction at issue is specifically and expressly permitted by federal statute, no examination into the basis or factual support for that restriction can lead to a determination that the restriction is preempted by federal law.

As reflected in the decision of the District Court for the Middle District of Florida, federal preemption does not turn on the reasonableness of the restriction. As correctly stated in the Court's Order, there is no independent, constitutional standard of reasonableness. While it may or may not be plausible to assess whether the ban of a specific company's aircraft or aircraft causing specific noise levels is "reasonable and nondiscriminatory" so as not to violate the Supremacy Clause, this analysis clearly does not arise when an airport proprietor follows clear Congressional direction regarding aircraft restrictions. In the case of the restriction or ban of a class of aircraft specifically permitted under ANCA (in this case, Stage 2 aircraft), the ban cannot plausibly be deemed to be preempted.

IV. Even Applying The Law As Viewed By The Agency, There Is No Basis To Conclude That The Stage 2 Ban Violates Any Federal Law, Regulation Or Obligation

Even if one were to assume that the Authority must satisfy some type of reasonableness or other standard before imposing a restriction on Stage 2 aircraft or otherwise taking actions in excess of that which is required by Congress and applicable regulations, there still exists no basis to conclude that the Stage 2 Ban is unreasonable, unjustly discriminatory or otherwise in violation of federal law, Agency regulations, or contractual obligations. The Authority will summarize each of the relevant points below, many of which are discussed in greater detail in the attached documents submitted herewith.

A. The Interpretation of Federal Law Outlined in the Notice of Investigation is Contrary to Federal Law

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. Neither ANCA nor Part 161 require that restrictions affecting Stage 2 aircraft comply with any reasonableness/nondiscrimination standard, although both the statute and regulation require explicitly that restrictions on Stage 3 aircraft be reasonable, nonarbitrary, and not unjustly discriminatory. The FAA cannot superimpose this requirement on restrictions affecting Stage 2 aircraft through the grant assurances. To do so would contradict the plain language of ANCA and Part 161 and clear Congressional intent and vitiate the meaningful statutory distinction between the requirements for imposing restrictions on Stage 2 and Stage 3 aircraft.

B. The Lack of Requirements or Standards Beyond Those Imposed by Congress has been Recognized by the FAA and Established in FAA Regulations

The FAA had the opportunity to impose a reasonableness/nondiscrimination standard on restrictions affecting only Stage 2 aircraft but declined to do so. The FAA was obligated by 49 U.S.C. § 47525 to consider the requirements for imposing a noise or access restriction affecting Stage 2 aircraft weighing less than 75,000 pounds and concluded that such noise or access restrictions should be subject only to the requirements of 49 U.S.C. § 47524(b). See 49 U.S.C. § 47525; 56 Fed. Reg. 48,661, 48,664-65 (1991); FAA Office of Environment and Energy, Study of the Application of Notice and Analysis Requirements to Operating Noise/Access Restrictions on Subsonic Jets Under 75,000 Pounds (June 1991).[4]

Further, in drafting Part 161, the FAA considered whether to add any additional requirements and standards to those set forth in Section 47524(b) and concluded explicitly that no additional requirements or standards were necessary or appropriate. See 56 Fed. Reg. at 48,679-80. Part 161 addresses this issue and provides only that the information required for restrictions affecting Stage 3 aircraft "are useful elements of an adequate analysis of a noise or access restriction on Stage 2 aircraft operations." See 14 C.F.R. § 161.205(c).

C. Grant Assurance Requirements Do Not Supercede Statutes That Expressly Define the Class of Aircraft That Can be Restricted and the Requirements (or Lack Thereof) for Imposing Such Restrictions

Contrary to the FAA's assertions, 49 U.S.C. § 47533 (Relationship to Other Laws) does not dictate that the grant assurance obligations identified at 49 U.S.C. § 47107(a) may be used to apply standards and requirements in excess of the requirements and standards for Stage 2 restrictions prescribed by Section 47524(b). Section 47533 recognizes that Section 47524 (the source of the Stage 2 Ban) supercedes existing law by expressly stating that existing law (e.g., any existing reasonableness requirements) is not affected by ANCA ***"[e]xcept*** as provided by section 47524." (emphasis added). As detailed above, Section 47524 does not include for Stage 2 restrictions (and Congress specifically rejected) the reasonableness and non-discrimination requirements expressed in certain cases and expressly applied to Stage 3 restrictions.

[4] In June 1991, the Secretary issued the report required under 49 U.S.C. § 47525. The Secretary's Report explains that many pro-aircraft groups argued for stringent requirements as a prerequisite to imposing Stage 2 access restrictions, including the reasonableness requirement that is expressly applicable to a Stage 3 access restriction. According to the Report: "The National Business Aviation Association (NBAA) proposed that Stage 2 restrictions be subject to FAA approval using the same criteria as for Stage 3." Id. The Secretary rejected this proposal. After full analysis, the Secretary concluded that the simple requirements of an airport conducting a self-analysis before placing a Stage 2 access restriction in force (the requirements set forth in 49 U.S.C. § 47524(b)) shall be the only requirements for imposing a Stage 2 ban or other access restriction. Id. at 16.

D. Approval of the Authority's Part 161 Study Precludes Any Further Action by the FAA, Including the Part 16 Investigation and Potential Withholding of Grants

To the extent that the FAA has any role in the review of restrictions affecting Stage 2 aircraft, that role is limited to review of the Authority's fulfillment of the procedures set forth in Part 161. Both the Notice of Investigation and the Agency's comments on the Supplemental Analysis (both dated October 31, 2001) state that the FAA has concluded that the Authority has satisfied its obligations under that regulation. This determination is conclusive and dispositive.[5]

Contrary to the FAA's suggestion, the Authority has never conceded that satisfaction of the obligations of ANCA and Part 161 does not also satisfy its obligations under grant agreements. See Letter from Eric West, City of Naples Airport Authority, to Lynn Pickard, FAA (July 27, 2001) (Exhibit 16) ("We understand that this does not resolve the issue of any action our Board may take relative to the Grant Assurances, and we are not expecting a response from the FAA on this issue at this time; however, we are hopeful that we can satisfy the FAA with the analysis that we have conducted to complete the process for a Federal Regulation, Part 161 Study.") The fact that the Authority acknowledged that FAA officials had insisted that the Part 161 process and the question of grant assurances were distinct does not represent any concession that the FAA is legally free to withdraw grant eligibility once the Agency has concluded that a Stage 2 restriction fully complies with Part 161.

E. The Stage 2 Ban at Naples is Reasonable and Nondisriminatory by Any Measure

The Stage 2 Ban satisfies all of the requirements identified by the courts in evaluating the reasonableness of use restrictions adopted by airport proprietors. The Authority exhaustively has reviewed the Stage 2 Ban and all reasonable alternatives in the various reports of the Part 161 Study, and we direct your attention specifically to the Part 161 Study (June 2000) (Exhibit 3); the Part 161 Study Response to Comments (Exhibit 8); and the Supplemental Analysis (Exhibit 15) and the supporting documentation accompanying these exhibits. The Authority also has presented abundant evidence of the reasonableness of the Stage 2 Ban in pleadings and oral argument in NBAA v. NAA, and we direct your attention specifically to: Memorandum in Support of Defendant's Motion for Summary Judgment (Exhibit 17); Defendant's Motion in Opposition to Plaintiff's Motion for Summary Judgment (Exhibit 18); Joint Pretrial Statement (Exhibit 19); Expert Report of Sanford Fidell (Exhibit 21); and Expert Report of David Dubbink (Exhibit 22). Beyond reference to these documents, the Authority attempts to address below some of the FAA's stated concerns.

[5] In similar circumstances the FAA has determined that adherence to this administrative process provides the protections necessary to ensure that such restrictions are reasonably applied. See 49 Fed. Reg. 49,260, 49,263 (1984) (statement by the FAA in the preamble to 14 C.F.R. Part 150 that "[t]he FAA, therefore, views Part 150, or 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. . . .").

1. The Stage 2 Ban Addresses a Real and Significant Noise Problem

The Stage 2 Ban is designed to address an empirically observed noise problem. The noise problem is a product of, and exacerbated by, the nature of the Naples community as a resort/retirement area and the seasonal fluctuation in population and aircraft operations. The noise problem also is reflected in incompatible land use surrounding the Airport and in complaint data. For additional discussion on the use of complaint data, see Expert Report of Sanford Fidell (Exhibit 21) at 21.

The data in the Part 161 Study and related analyses makes 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.

Id. at 27-28.

As further reported in the Part 161 Study, the number of people who reside within the DNL 60 dB noise footprint would be reduced by over ninety percent with the elimination of just those two or three daily Stage 2 aircraft operations, which represent less than one percent of total operations at the Airport. Id. at 6. In contrast, the other alternatives examined by the Authority -- a nighttime restriction on Stage 2 aircraft and a curfew on all aircraft (which would require FAA approval because it would also effect Stage 3 aircraft) -- would only reduce the number of affected people within the DNL 60 dB contour by twenty-one percent and thirty-three percent respectively. Id.

The precision with which the Stage 2 Ban can be anticipated to provide significant noise reduction can be seen graphically in even more stark terms than the numbers set forth above. As seen in the Expert Report of Sanford Fidell at 22, which depicts noise emitted by the noisiest Stage 2 overflight at Naples Airport (the Lear 25), complaints from community members track closely with the noise generated by Stage 2 aircraft. Expert Report of Sanford Fidell (Exhibit 21) at 23 (showing the noise emitted by a representative Stage 3 aircraft, demonstrates that these

aircraft operations clearly are not causing the same level of annoyance in the community as the Stage 2 aircraft operations). Although 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.

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

The courts in the cases primarily relied upon in the Notice of Investigation to support the view that a noise restriction must be "reasonable" only found such restrictions to be unreasonable where essentially no study was done to support the restriction at issue. In other words, the airport proprietor lacked the ability to establish that there was any rational basis for the restriction imposed.

In contrast, the Stage 2 Ban is supported by a thorough factual examination. The Authority's Part 161 Study far exceeds any study required by the courts as a basis upon which an airport operator may impose a use restriction. The Authority used consultants with extensive experience in relevant subjects, spent approximately five hundred thousand dollars studying the Stage 2 Ban and comparing it to the alternatives, spent several hundred thousand dollars over the course of the last decade evaluating all reasonable alternatives, used the FAA-approved Integrated Noise Model to determine the effects of the Stage 2 Ban and its alternatives, measured effects based on DNL and supplemental metrics, responded to comments, and prepared a supplemental analysis specifically to address the FAA's comments and concerns.

Based upon the data collected in its many studies, the Authority enacted a restriction that is precisely targeted to carry out a legitimate local goal. This goal includes reducing residential land uses exposed to noise between DNL 60 dB and 65 dB but also includes providing a measure of noise relief to all of those individuals living and/or working in areas subject to Airport and aircraft noise.

The Authority's conclusion in the Part 161 Study, which has not been contradicted with any empirical data, is that the Stage 2 Ban will greatly reduce the level of cumulative noise exposure to the area surrounding the Airport. As noted above, the elimination of Stage 2 aircraft operations at Naples Airport will eliminate the source of the vast majority of complaints about Airport and aircraft noise. A ban of a class of aircraft that is expressly permitted by Congress, and which affects only one percent of airport operations while effectively eliminating a significant and established noise problem in the community cannot be deemed to be arbitrary or unreasonable under any applicable standard.

3. The Stage 2 Ban Does Not Place an Undue Burden on Affected Users

The reasonableness of the Stage 2 Ban is evidenced in the steps taken by the Authority to ensure that the restriction does not impose an undue burden on Airport users. Airport users subject to the Stage 2 Ban have multiple options to comply with the restriction, including substituting a compliant aircraft if available, purchasing a complaint aircraft, installing a certified

hush-kit to comply with the restriction, and using any of three airports within thirty miles of Naples. Further, the restriction adopted by the Authority contains adequate safeguards to reduce the impact of the Stage 2 Ban, including a process for obtaining a waiver from the restriction to provide adequate time to comply and a schedule of progressive penalties linking the penalty to the severity of the offense.

The actual number of airport users that are affected by the Stage 2 Ban (1-3 operations per day) is essentially identical to the number of users affected by the Stage 1 ban imposed at Naples Airport and approved by the FAA. In the case of the Stage 1 ban, the FAA found that the restriction did not place an undue burden on Airport users, given the alternatives available – the same alternatives that exist with regard to users affected by the Stage 2 Ban. FAA Record of Approval (Exhibit 31) at 2-3.

4. The Stage 2 Ban is Supported by the Authority's Cost/Benefit Analysis

The Stage 2 Ban is supported by the Authority's cost-benefit analysis contained in the first report of the Part 161 Study (June 2000) (Exhibit 3) and the Supplemental Analysis (June 2001) (Exhibit 15). The Authority already has responded directly to questions and concerns about the cost-benefit analysis in the Naples Municipal Airport Part 161 Study Response to Comments (Exhibit 8) at 16-24.

As the FAA concedes, the Authority is not required to reduce all variables to dollar values. Further, the FAA stated its approval of the cost-benefit analysis provided in the initial report of the Part 161 Study (Exhibit 3). The cost-benefit analysis performed as part of the Supplemental Analysis was consistent with currently accepted economic methodologies as required by Part 161 and FAA guidance. Indeed, through its October 31, 2001 approval of the Part 161 Study, the FAA has found the Authority's cost/benefit analysis to be adequate.

After a thorough review and study, the Supplemental Analysis concluded that the proposed ban on Stage 2 aircraft operations was 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. See Supplemental Analysis (Exhibit 15) at 3-5. The Notice of Investigation provides no data or other information that would cast doubt on this conclusion.

As explained above, neither ANCA nor any other federal statute or regulation imposes any specific reasonableness requirement on a Stage 2 restriction, and there certainly exists no statute or regulation that requires an airport proprietor to meet some cost/benefit test before imposing such a restriction. Moreover, the Authority is completely puzzled, if the FAA is suggesting that such a test exists, what that test might be and how it could be met. For if banning, pursuant to an express right granted by Congress, approximately one percent of an airport's operations, where the ban involves aircraft that legally have not been manufactured for over a decade and where the FAA already has determined that the banning of a similar number of operations at the Airport in question does not result in any undue burden to Airport users, does not pass some unstated cost/benefit test, then clearly no locally imposed ban of aircraft ever will

pass such a test. A test such as this clearly is in contravention to federal law and Congressional intent.

5. The Authority 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

The Authority is not required to select any specific measure either prior to or as an alternative to the Stage 2 Ban. Neither ANCA nor any reviewing court requires an airport proprietor to select a less restrictive or less costly alternative to a restriction on Stage 2 aircraft. Congress knows how to impose such a requirement when it chooses to do so. For example, under the AAIA, an airport proprietor may risk loss of federal funding if it imposes an access restriction to alleviate traffic delays (not noise) unless "other reasonably available and less burdensome alternatives have been tried." 49 U.S.C. § 47101(a)(9)(B). No such requirement appears under 49 U.S.C. § 47107(a) or with regard to ***any*** noise-based restrictions and certainly not with regard to Stage 2 restrictions implemented pursuant to ANCA. Indeed, the courts have rejected this very argument. See Santa Monica Airport Ass'n v. City of Santa Monica, 481 F.Supp. 927, 943 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981):

> I do not believe that under the law the City is required by any of the case law or the Constitution to adopt any particular system of noise control for given airplane landings or takeoffs. It is not required to adopt the best or most advanced system. The inquiry is only whether the system adopted is a reasonable method of achieving a legitimate purpose.

See also Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959) ("If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective.").

Nevertheless, the Authority exhaustively has reviewed less restrictive alternatives and has implemented numerous measures to control noise, all of which are detailed in the attached documents. Moreover, the Part 161 Study reveals that the Stage 2 Ban is far superior to all other reasonable alternatives in terms of its costs and benefits. This includes sound insulation, which the Authority finds to be impractical for certain structures and an inadequate remedy considering the nature of the Naples community.

6. The Authority Need Not Restrict Aircraft That Are Not Certificated Under FAR Part 36 to Justify a Ban of Stage 2 Aircraft as Reasonable or Nondiscriminatory

The use of stage certification pursuant to FAR Part 36 is an appropriate and authorized basis upon which to distinguish between aircraft. Congress and the FAA use stage certification in numerous ways to distinguish and restrict aircraft. See e.g., 14 C.F.R. pts. 36 and 91. As the cases state, it is appropriate to define and base a noise restriction on the stage classifications provided by the FAA in Part 36. Global Int'l Airways, 727 F.2d at 248; Arrow Air, Inc. v. Port Authority of N.Y. and N.J., 602 F.Supp. 314 (S.D.N.Y. 1985). Moreover, ANCA reaffirms the

distinctions based on stage certification, both by banning aircraft based on stage certification (Stage 2 aircraft above 75,000 pounds) and in creating a scheme by which proprietors may restrict additional aircraft on the same basis.

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. 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. See generally Quarterly Noise Reports (Exhibit 33).

During the consideration of the Part 161 regulations it was suggested that aircraft be restricted on a more specific basis than by stage classifications. The FAA specifically rejected this proposal, concluding that restricting aircraft on bases ***other than*** stage classifications would lead to assertions of unjust discrimination. 56 Fed. Reg. 48,661, 48,665 (Sept. 25, 1991) (Exhibit 17). Indeed, this and related suggestions were rejected by the FAA when it had the opportunity, under 49 U.S.C. § 47525, to define what is required for a Stage 2 restriction.

Finally, 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 type 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.

7. The Authority is Authorized to Consider the Beneficial Effects of The Stage 2 Ban on Residents Located Within the DNL 60 dB Contour

Part 150 and numerous statements of FAA policy state expressly that there is no federally mandated standard of significant noise exposure and no prohibition on considering the beneficial effects of a proposed measure on individuals exposed to any specific noise level.[6] The FAA incorporated the locally-based standard of Part 150 into the Part 161 process for a very specific reason. As explained in the FAA's Preamble to Part 161, the FAA knowingly rejected proposals that the study of potential access restrictions performed under Part 161 be based only upon cumulative noise exposure in excess of DNL 65 dB. Instead, the FAA opted to maintain the flexibility provided to an airport operator under Part 150 which "makes more explicit the latitude

[6] The FAA publishes a brochure entitled: "Aircraft Noise: How We Measure It and Assess Its Impact" (Exhibit 17). In that brochure, the FAA explains both the use and the limitations of the DNL 65 dB guideline: "Any compatibility guideline, such as a DNL of 65 dB, must represent a balance between that level which is most desirable to protect communities and that which can be achieved with cost-effective mitigation measures and available technology. There is no single criterion that can fit all airports and all communities. ***Local communities*** may choose to mitigate impacts ***below a DNL of 65 dB***." (emphasis added)

allowed airports in selecting noise contours for study, as long as certain required contours are addressed." Id. at 48,672. This view was echoed in the FAA's Draft Noise Abatement Policy 2000: "Based upon local factors, local jurisdictions may take a more comprehensive approach to aviation noise below DNL 65. Some communities are more sensitive than others are. Part 150 guidelines recognize local discretion to define noise sensitivity." 65 Fed. Reg. 43,800, 43,810 (July 14, 2000) (Exhibit 17).[7]

Part 161 explicitly authorizes consideration of areas exposed to noise less than DNL 65 dB. Any access restriction must be designed to reduce noise within the "Noise Study Area." Under Part 161, the airport proprietor defines that area and may include areas exposed to noise less than DNL 65 dB. See 14 C.F.R. § 161.5 ("Airport noise study area means that area surrounding the airport within the noise contour ***selected by the applicant*** for study and must include the noise contours required to be developed for noise exposure maps specified in 14 CFR part 150." (emphasis added)). See also 56 Fed. Reg. at 48,673. ("[T]here is no need to limit the boundaries of the airport study area so long as the area encompasses the noise contours required to be developed for noise exposure maps as specified in 14 CFR part 150. For these reasons, the applicant may select the airport noise study area.").

Contrary to the FAA's assertions, ANCA, Part 161, and the AAIA do not require an airport operator to identify the "reasonable circumstances" for including within the Airport Noise Study Area areas exposed to cumulative noise less than DNL 65 dB. Nevertheless, the Authority has detailed the reasonable circumstances in the Supplemental Analysis (Exhibit 15) at 6-34.[8]

In this case, the FAA approved (in its Record of Approval on the Authority's 1996 Noise Compatibility Program) the recommended land use measures calling for limits on residential development in areas exposed to noise greater than DNL 60 dB. The FAA cannot plausibly

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[7] In the June 1991 report required under 49 U.S.C. § 47525, the Secretary of Transportation reported that each community is different, that small airports, because they are typically not associated with commercial development (such as warehouses, offices and manufacturing facilities) common at larger airports, often have homes much closer than their bigger counterparts, and that local communities are in the best position to decide what levels of noise are tolerable. Study (Exhibit 17) at 5, 10-12. Indeed, noting that small airports often have distinctly lower ambient noise levels, "making disturbances from individual flights more noticeable," the Secretary explained that "[w]hile the FAA does not generally designate such areas as formally noise impacted under Part 150 or other programs, no determination has ***ever*** been made that residents in areas immediately adjacent to general aviation airports should be deprived of the benefits of appropriate local action." Id. at 12 (emphasis added).

[8] The Authority exhaustively has detailed the bases for its consideration of the beneficial effects of the Stage 2 Ban and its alternatives to individuals residing in areas exposed to noise between DNL 60 dB and 65 dB, and we direct your attention to the Supplemental Analysis (Exhibit 15), Memorandum in Support of Defendant's Motion for Summary Judgment (Exhibit 17), Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Exhibit 18), and Expert Report of Sanford Fidell (Exhibit 21).

argue that imposing land use controls to address noise in areas above DNL 60 dB is reasonable but that taking other actions to address noise in the same area is unreasonable.

The FAA repeatedly has questioned the actions and policies of the City of Naples and Collier County regarding residential land use within the DNL 60 dB contour. First, the Authority cannot control the actions of independent government entities like the City and County, and the 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.

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, and not by mere mechanical adherence to a local standard promulgated by a different governmental body.

Notwithstanding these contentions, the Authority has worked with the City and County for several years to promote compatible land use. In actions approved by the FAA, the City and County have declared that residential land use within the DNL 60 dB contour may be incompatible with Airport operations and have taken affirmative steps to control residential development in this area. The actions of the City and County were reviewed comprehensively in the Supplemental Analysis (Exhibit 15). The Stage 2 Ban is consistent with the City's and County's efforts.

8. The Authority is not Required to Establish Liability As a Justification for Adopting the Stage 2 Ban

The FAA has questioned whether the Authority has a "proprietary interest" that would allow it to use the proprietor exception to impose the Stage 2 Ban and, in particular, whether the Authority is exposed to noise-related liability.

First and foremost, as outlined above, the restriction at issue in this matter is one imposed pursuant to ANCA, specifically 49 U.S.C. § 47524(b). There simply is nothing in that statute 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. Once again, imposing such an unstated requirement through 49 U.S.C. § 47107 would fly in the face of Congressional intent and the division of authority inherent in the statutory scheme carefully constructed by Congress.

Even if 49 U.S.C. § 47524(b) did not exist and the Authority had imposed the Stage 2 Ban pursuant to 49 U.S.C. § 41713(b)(3), the conclusion would be the same. Although some courts have referred to potential liability as a basis for upholding proprietor-imposed access

restrictions, no court – or FAA regulation – has required that an airport proprietor ***prove*** liability to justify such a restriction. Conversely, numerous courts, including those in Florida, which would govern liability against the Authority, have outlined the parameters for liability against an airport proprietor without any reference to specific DNL contours as some type of prerequisite to a finding of liability. See Part 161 Study (Exhibit 15) at 10-16.

As the courts have recognized, the power to restrict access to one's airport derives from more than a fear of liability. Such authority is inherent in the right to balance the given locality's need and desire for air transportation versus the willingness of that locality to endure the inevitable noise and other impacts associated with air transportation. See, e.g., British Airways, 558 F.2d at 83 (finding that federal law allows a local operator to restrict access to its airport both because it may be liable for injury flowing from the operation of that airport and "perhaps more important, however, that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access."); Alaska Airlines, 951 F.2d at 982 ("The rationale for the [proprietor] exemption extends beyond purely financial concerns . . . [and allows the proprietor] to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability ***or enhance the City's human environment***.") (emphasis added); Santa Monica, 659 F.2d at 104, n.5.

Notwithstanding the lack of any need to establish potential liability, the Authority's liability exposure in this case is not simply hypothetical. A landowner in the DNL 60 dB contour has stated an intent to sue the Authority, as discussed in the Supplemental Analysis (Exhibit 15) at 13.

The Notice of Investigation implies that the Authority must establish a more concrete and detailed description of liability. This is tantamount to a requirement that an airport proprietor disclose confidential information about its litigation risks and strategies and, more troubling, essentially admit liability before taking the action necessary to avoid such liability. No such requirement exists under any interpretation of applicable law.

9. Applying the Same Reasonableness/Nondiscrimination Standard, the FAA Approved the Ban of Stage 1 Aircraft at Naples Airport

In its 1998 Part 150 Study Update (Exhibit 30), the Authority recommended and the FAA approved an outright ban on the operation of all Stage 1 aircraft under 75,000 pounds at the Airport. In approving this ban on a whole class of aircraft, the FAA specifically addressed assertions that the ban on Stage 1 aircraft was unreasonable, discriminatory and preempted by federal law. In FAA's official Record of Approval of the Authority's Noise Compatibility Program, the Agency responded to the objections made to the Stage 1 ban as follows:

> [T]he ban is reasonable because there are no Stage 1 aircraft based at the Airport and less than two operations per day affected by the ban. . . . For those [operators] who do not own alternative aircraft, the impact will be minimal because there are two other airports located within 30 miles of the city of Naples that can accommodate the affected aircraft.

> As a matter of policy, FAA does not consider the use of aircraft stage designations to be unjustly discriminatory per se. Moreover, the ban is not unjustly discriminatory because Stage 1 aircraft are the loudest type of aircraft operating at Naples. * * * The ban on operations by Stage 1 aircraft weighing less than 75,000 pounds is not federally preempted because the scheme of federal regulation on Stage 1 aircraft is not so pervasive as to make reasonable the inference that FAA left no room for airport proprietors to supplement it. The FAA's interest in Stage 1 aircraft is not so dominant that the federal system should be assumed to preclude enforcement of local rules on the same subject, and because the goals of FAA regulation and obligations imposed by FAA do not reveal any purpose to preclude the exercise of State authority.

Part 150 Study Update (Exhibit 31) at 2.

As detailed above, like the Stage 1 ban approved by the FAA, the Stage 2 Ban: (a) affects 2-3 operations per day; (b) allows for those operators to use the same two (actually there are 3) airports within thirty miles that can accommodate the Stage 1 aircraft; (c) applies to the "loudest type of aircraft operating at Naples," and (d) is based on a classification of aircraft that the FAA does not consider to be unjustly discriminatory. Moreover, that ban was approved by the FAA without regard to potential liability from Stage 1 operations and without any requirement as to the costs and benefits of the ban. Accordingly, under the FAA's own standards as applied at Naples Airport, the Stage 2 Ban must be deemed to be reasonable and nondiscriminatory.

G. The FAA is Bound or Otherwise Restricted by the Decision of the United States District Court for the Middle District of Florida

Notwithstanding all of the substantive reasons discussed above, the FAA is precluded from addressing most or all of the issues raised in the Notice of Investigation by virtue of the decision of the Federal District Court for the Middle District of Florida. Like any entity, the FAA is subject to the doctrines of res judicata, collateral estoppel, issue preclusion, and comity.

The Notice of Investigation clearly includes issues raised and addressed by the District Court. Even where the FAA's claims are seemingly distinct, they are in essence the same, particularly since there is no meaningful difference between the reasonableness/nondiscrimination standard used to determine whether an aircraft operating restriction is constitutional and whether it is consistent with Grant Assurance 22.

Although not a party to the District Court proceeding, the FAA is in privity with plaintiffs in that action because the FAA's interests expressly were represented in the judicial proceeding. See NLRB v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31 (1st Cir. 1987); NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976). Equitable considerations also militate for barring the FAA's present inquiry since 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.

H. The FAA Has The Burden Of Proof

The FAA has the burden of proof to establish that the Authority has violated its grant assurance obligations, 49 U.S.C. § 40103(e) (prohibiting grants of an exclusive right), and 49 U.S.C. § 41713 (proprietor exception). 14 C.F.R. § 16.229(a). The Authority's contentions that the Stage 2 Ban is reasonable, nonarbitrary and not unjustly discriminatory, does not confer an exclusive right, and is not preempted, do not constitute affirmative defenses and therefore do not shift the burden of proof. See 14 C.F.R. § 16.229(c).

An affirmative defense encompasses two types of pleadings: one that admits the allegations of the complaint but suggests some other reason why there is no right of recover, and one that concerns allegations outside of the plaintiff's prima facie case that the defendant therefore cannot raise by a simple denial in the answer. Evergreen Media Corp. v. Radio & Television Broadcast Engineers, 983 F. Supp. 731, 737 (N.D. Ill. 1997). The Authority does not admit any of the allegations in the Notice of Investigation. Except with regard to some limited issues noted above (e.g., res judicata and issue preclusion), the Authority is not responding to the FAA through the use of allegations outside of the issues raised in the Notice of Investigation. Accordingly, the FAA retains the burden of proof to establish that the Authority has violated the standards identified in the Notice of Investigation.

I. The Notice of Investigation Fails to Include Sufficient Facts Required for the Authority to Adequately Respond to the Allegations

The Notice of Investigation implies that the Authority has not presented adequate factual support to establish the reasonableness of the Stage 2 Ban. For example, the Notice implies that more data or investigation should be presented on the benefits of sound insulation as an alternative to the Stage 2 Ban, on the costs and benefits of the Stage 2 Ban, and on the impacts of the Stage 2 operations within the DNL 60 dB contour, and implies that complaint data is insufficient. Yet, the FAA presents essentially no data or other information that supports the view that the Authority's conclusions are incorrect. Indeed, the FAA presents essentially no data whatsoever.

Under the applicable regulatory process, the Agency may not, at this point in the process, simply assert that more investigation or data is necessary without supplying contrary data or at least contrary conclusions supported by its own factual determinations. This is particularly true where the Agency already has determined that the Authority has adequately completed the study and analysis required under Part 161. Absent such contrary information from the Agency, the Authority may not adequately respond to the Notice of Investigation in accordance with notions of due process and administrative law.

CONCLUSION

For the foregoing reasons, the Authority denies any allegation, assertion, or suggestion that the Authority has denied public use of the Airport in violation of 49 U.S.C. § 47107(a)(1)-(6), granted an exclusive right to use the Airport in violation of 49 U.S.C. § 40103(e) and 47107(a)(4), and/or enacted a restriction that is preempted by federal law. The Authority

recommends that FAA take no further action and dismiss the Notice of Investigation with prejudice.

Respectfully submitted this 3rd day of December, 2001, on behalf of Respondent City of Naples Airport Authority by the undersigned attorneys:

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