[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 09-1233

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE CITY OF SANTA MONICA,
Petitioner,
v.
FEDERAL AVIATION ADMINISTRATION,
Respondent

Petition for Review of the Final Agency Decision and Order No. 2009-1 issued by Respondent Federal Aviation Administration, entered on July 8, 2009, modified by Order No. 2009-2 (Sept. 3, 2009)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases: **Page**

---

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

Regulations:

GLOSSARY

AC	Advisory Circular
EMAS	Engineered Materials Arresting System
FAA	Federal Aviation Administration
FAD	Final Agency Decision
LAX	Los Angeles International Airport
RSA	Runway Safety Area
SMO	Santa Monica Airport

JURISDICTIONAL STATEMENT

The Federal Aviation Administration ("FAA") issued its Final Decision and Order on July 8, 2009, pursuant to 49 U.S.C. § 46101(a)(2). The City of Santa Monica filed a timely petition for review on September 1, 2009. The FAA amended its Final Decision and Order on September 3, 2009, and the City amended its petition for review on October 13, 2009. This Court has jurisdiction under 49 U.S.C. § 46110(c).

STATUTORY AND REGULATORY PROVISIONS

Pertinent provisions are reproduced in the addendum to the City's brief and the addendum to this brief.

STATEMENT OF THE ISSUE

The Santa Monica City Council enacted an ordinance banning Category C and D aircraft from operating at the Santa Monica Airport ("SMO"). The question presented is whether the FAA correctly determined that the ordinance is inconsistent with federal aviation safety regulations and with the City's obligation, as a federal grant recipient, to make the airport available for public use on fair and reasonable terms and without unjust discrimination against a type of aircraft.

STATEMENT OF THE CASE

An ordinance enacted by the Santa Monica City Council in March 2008 purported to ban the operation of Category C and D aircraft at the Santa Monica Airport except in emergencies. The banned aircraft are all jet aircraft; as discussed below, the letter-designated categories relate to the speed of an aircraft landing at the aircraft's maximum landing weight. Although Category C and D aircraft have operated without accident at the Santa Monica Airport for more than 20 years, Final Agency Decision ("FAD") 38; R. 5, No. 8, at 13, the City Council concluded that the airport is unsafe for operations by those aircraft because the airport lacks a 1,000-foot "Runway Safety Area." FAD 1; R. 5, No. 8, at 4-6.

The FAA issued an interim cease and desist order to preclude the ban from taking effect during the course of the agency's administrative review of the ordinance. When the City refused to comply, the United States filed enforcement proceedings in the U.S. District Court for the Central District of California. *See United States v. City of Santa Monica*, No. 08-cv-2695 (C.D. Cal.). The district court issued a preliminary injunction barring the City from enforcing the ban while the ordinance was under FAA review. The Ninth Circuit affirmed the preliminary injunction after full briefing and oral argument. *See United States v. City of Santa Monica*, 330 Fed. Appx. 124 (9th Cir. 2009) (unpub.). The Ninth Circuit

concluded that the FAA was likely to succeed on the merits in light of the City's obligation to make its airport available for public use on fair and reasonable terms and without unjust discrimination against particular types of aircraft. *Id*. at 125.

After further administrative proceedings, including an evidentiary hearing, the FAA issued a final decision concluding that the ordinance is contrary to federal law governing aircraft operations and inconsistent with the City's obligation under federal grant assurances to make its airport available for public use without unjust discrimination. R.133, at 7. The FAA determined that the airport is safe for Category C and D operations and, indeed, that these aircraft have better safety records than the Category A and B aircraft unaffected by the City's ban. FAD 35, 38-40. The FAA explained that at federally funded airports like Santa Monica, the airport proprietor is bound by grant assurances it agreed to in exchange for funding, FAD 34-35, and, further, that the City had no separate proprietary powers concerning aviation safety that would permit it to avoid compliance with the grant assurances, FAD 33. Accordingly, the FAA found that the agency fully occupied the field of aviation safety, that no independent proprietor's right exists in this case, and that federal law preempts the City ordinance. FAD 33.

Under 49 U.S.C. § 46110(c), the City had the option to file a petition for review in the Ninth Circuit or this Court. The City elected to file a petition for review in this Court.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

The Federal Aviation Act of 1958, as amended, gives the FAA Administrator plenary authority for the regulation of air commerce in the interests of safety, security, and the development of civil aeronautics. 49 U.S.C. §§ 40101 *et seq*. This authority includes all matters concerning the use and management of navigable airspace, air traffic control, and air navigation facilities. *Ibid*. Aircraft design and operations are governed by strict federal certification rules (14 C.F.R. Parts 23 and 25) and operating rules (14 C.F.R. Parts 91, 121, 125, and 135).

As relevant here, the FAA has established detailed criteria to be used in determining whether an aircraft can land or takeoff at an airport. These criteria are included in FAA-approved flight manuals that are issued for each type of aircraft. They require consideration of a range of factors including runway length and aircraft approach speed, as well as many other factors. FAD 9; R. 61, at 6-11; 14 C.F.R. § 91.103.

The FAA is also charged with responsibility for funding eligible airport development, and it may award federal grants designed to maintain a safe and efficient nationwide system of public-use airports. 49 U.S.C. §§ 47101 *et seq*. Under this authority, the FAA distributes more than $3 billion annually in grants to airports. FAD 5. Federally funded airports like the Santa Monica Airport are governed by additional statutory and regulatory provisions, including grant assurances that are required of recipients of federal funds. *See* 49 U.S.C. §§ 47107, 47122; 14 C.F.R. Part 16. Approval of a grant application is conditioned upon the receipt of written assurances that "the airport will be available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1). Federal law charges the FAA with overseeing compliance with such assurances. *Id*. § 47107.

B. Factual Background

1. The Santa Monica Municipal Airport was established in 1919 and has been operated by the City since 1926, with the exception of World War II, when the Santa Monica Airport was leased to and expanded by the federal government, in part in order to accommodate larger aircraft. FAD 14, 55. The airport is an important "reliever airport," meaning that it serves as an alternative to Los Angeles International Airport ("LAX") for general aviation operations. FAD 16 &

n.27. As such, the Santa Monica Airport plays an important role in the regional and national system of air transportation and air commerce by diverting aircraft from other more heavily used airports in the greater Los Angeles area. FAD 16; R. 5, at 49. The City estimates that there were approximately 9,000 operations of Category C and D aircraft at the airport in 2007 (on average 25 per day), and 7,670 operations in 2008 (on average 21 per day). FAD 17.

The City accepted nearly $10.2 million in Federal airport development assistance between 1985 and 2003. FAD 5. In order to receive these federal grants, the City made the express assurances required by federal law. *See* 49 U.S.C. § 47107(a)(1). As relevant here, the City agreed to make the airport "available as an airport for public use on fair and reasonable terms and without unjust discrimination." R. 5, No. 6, at 40 (Grant Agreement ¶ 22(a)). This grant assurance obligation, by its terms, continues in effect for 20 years and is currently in effect. R. 5, No. 6, at 11 (Grant Agreement ¶ B(1)).[1]

2. Some Santa Monica residents "have long complained to the City over the impact of aircraft noise and demanded that the City take effective action with

[1] Although there is a dispute over whether the grant obligations run until 2015 or 2023, *see* R. 5, at 15, there is no dispute that they are currently in effect.

respect to aircraft noise." R. 4, Ex. 3, at 5. The City has repeatedly attempted to ban certain aircraft operations at the Santa Monica Airport.

In 1979, the Santa Monica City Council enacted several ordinances affecting flight operations that were challenged in private litigation. Although various noise control measures, such as restrictions on night takeoffs and helicopter flight training, were sustained, a "jet ban" was invalidated. The district court rejected the City's asserted safety concerns, explaining that, "[a]s to safety, the evidence is utterly convincing that modern, small, business or executive-type jets of the type that would be able to fly out of this airport with the jet ban lifted, are at least as safe, if not much safer, than the types of piston-engine fixed-wing aircraft which are now allowed to use the airport." *Santa Monica Airport Association v. City of Santa Monica*, 481 F. Supp. 927, 943 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

In 1981, the Santa Monica City Council enacted a resolution calling for the closure of the Santa Monica Airport. R. 5, at 5. Litigation over the measure was resolved through a settlement agreement with the FAA that was executed in 1984. R. 5, at 5-6; R. 4, Ex. 3, at 1. In the 1984 settlement agreement, the City recognized that "exclusive authority is vested in the FAA for the regulation of all aspects of air safety, the management and control of the safe and efficient use of

the navigable airspace, and movement of aircraft through that airspace." R. 4, Ex. 3, at 4. The City agreed (1) to "operate and maintain the Airport as a viable functioning facility without derogation of its role as a general aviation reliever," R. 4 Ex. 3, at 10, (2) that the Santa Monica Airport "is to be open and available to and for public use as an airport on fair and reasonable terms, without unjust discrimination, and without granting any exclusive rights prohibited by law," R. 4 Ex. 3, at 3-4, and (3) to maintain the runway in its current configuration of approximately 5,000 feet in length and 150 feet in width, *id*. at 9.

3. In 2002, the Santa Monica Airport Commission recommended that the City Council ban the operations of Category C and D aircraft, all of which are jet aircraft. FAD 19; R. 71, at 6. The ban would not affect the operations of Category A and B aircraft, *ibid.*, the vast majority of which are propeller-driven, piston-powered aircraft. *See* R. 62, at 3-4.

These letter-designated categories, called Aircraft Approach Categories, relate to the speed of an aircraft landing at its maximum landing weight. FAD 7. For example, if an aircraft's approach speed at its maximum landing weight is between 91 and 120 knots, it is a Category B aircraft; if approach speed at

maximum landing weight is between 121 and 140 knots, the aircraft is in Category C. FAD 7-8.[2]

The City attempted to justify its proposed ban by purported concerns that the airport runways were too short to permit Category C and D aircraft to land and takeoff safely in the absence of standard Runway Safety Areas, as explained below. FAD 1. The ban was not, however, prompted by any accidents or incidents involving any Category C or D aircraft at the Santa Monica Airport. The Airport experienced seven runway overruns and one undershoot between 1981 and 2008. All these occurrences involved Category A or B aircraft, FAD 38, which the City has not proposed to restrict.

The FAA and the City engaged in discussions extending over several years to address the City's stated concerns. FAD 20. Although the FAA concluded that restrictions on Category C and D operations were unjustified, the FAA offered to fund airport improvements that would enhance safety without compromising operations. R. 5, at 7-8; R. 4, Ex. 18, at 1-2; R. 5, No. 113, at 14. The City refused to entertain these offers. FAD 13; R. 5, at 7-8.

[2] Aircraft typically land at much lower than their maximum weights because they will not always have a full load and because they burn off fuel during their flight. At lower weights, aircraft can use a lower approach speed. FAD 8.

Discussions broke down when, in March 2008, the Santa Monica City Council voted to enact the ordinance at issue here, which bans Category C and D aircraft from operating at the Santa Monica Airport except in an emergency. R. 5, No. 8, at 7-8.

C. Ninth Circuit Litigation

By its terms, the ordinance was scheduled to take effect in April 2008. FAD 22. The FAA issued interim cease and desist orders that barred the City from enforcing the ban during FAA administrative proceedings. FAD 22 n.38. The City declared that it would not obey the cease and desist orders, asserting that the ordinance was adopted to "fulfill the most basic of governmental duties — the duty to keep the public safe." R. 5, No. 91, at 13-14.

The United States and the FAA brought enforcement proceedings in the U.S. District Court for the Central District of California. The district court issued a temporary restraining order and, after further briefing and a hearing on the merits, a preliminary injunction barring enforcement of the ordinance during the pendency of the FAA's administrative review. R. 5, No. 98, at 1-2.

The City appealed to the Ninth Circuit. After full briefing and oral argument, the Ninth Circuit affirmed the preliminary injunction. *United States v. City of Santa Monica*, 330 Fed. Appx. 124 (9th Cir. 2009) (unpub.). The Ninth

Circuit concluded that the "FAA is likely to prevail on the merits given Santa Monica's contractual obligation to make its airport (SMO) available for public use on fair and reasonable terms and without unjust discrimination against a particular aircraft," and that the City was "not likely to prevail on its justification." *Ibid*. "Given the safety history of Category C and D aircraft at SMO, the FAA's role in ensuring aviation safety, and the potential disturbance to air traffic around the Los Angeles area," the Ninth Circuit held that the preliminary injunction was in the public interest. *Id*. at 125-126.

D. The FAA Determination Now On Review

Administrative proceedings continued while the City's appeal was pending in the Ninth Circuit. In May 2008, the Acting Director of the FAA's Office of Airport Safety and Standards issued a determination finding that the ordinance was in violation of the City's obligation to make the airport available to all types of aircraft without unjust discrimination. FAD 23; R. 5, at 66.

As provided by FAA rules, the City requested a hearing. Following a four-day evidentiary proceeding, FAD 3, the Hearing Officer issued a written decision, which included 220 findings of fact, concluding that the ordinance unreasonably and unjustly discriminates against Category C and D aircraft. FAD 25; R. 125.

On appeal, the Acting Assistant Administrator for Aviation Policy, Planning, and the Environment affirmed the finding that the ordinance was inconsistent with the City's grant obligation to provide access on fair and reasonable terms and without unjust discrimination. FAD 33-46.[3] She explained that detailed federal regulations determine whether a particular aircraft may takeoff and land safely at a particular airport and that Category C and D aircraft may operate at Santa Monica Airport consistent with these federal safety regulations. FAD 13-14, 30-32, 35-36. The decision noted that the City's ordinance rests on a misunderstanding of the federal airport design standards, FAD 37-38, and rejected the City's contention that its powers as airport proprietor allow it to restrict operations that are permitted under federal law. FAD 32-33.

The Acting Assistant Administrator concluded that the FAA fully occupies the field of aviation safety at federally funded airports, that no proprietor's right exists in this case, and that federal law preempts the City's ordinance. FAD 37-40. She determined that the City's purported safety justification for the ban was

[3] The Associate Administrator for Airports, who has the authority to render a final agency decision in this context, *see* 14 C.F.R. § 16.33 & § 16.241(c), delegated this authority to the Acting Assistant Administrator for Aviation Policy, Planning, and the Environment. FAD 3 n.4.

unsubstantiated, explaining that Category C and D aircraft have better safety records than the aircraft unaffected by the ban. FAD 37-40.[4]

SUMMARY OF ARGUMENT

The FAA correctly determined that the City's ordinance is contrary to federal law and unjustly discriminates against Category C and D aircraft. The premise of the ordinance is that Category C and D aircraft cannot safely takeoff and land at Santa Monica Airport. However, the safety of these aircraft operations is governed by strict federal regulations. FAA-approved flight manuals set out calculations for determining required runway length, taking into account a variety of relevant factors specific to the particular aircraft and airport. Category C and D aircraft have been operating without incident at Santa Monica Airport for more than twenty years in accordance with these federal standards.

The City nonetheless contends that such operations are unsafe because the airport does not have "Runway Safety Areas" meeting FAA specifications. This argument rests on a fundamental misunderstanding of the FAA design standards on which the City relies. Airport design standards applicable to Runway Safety

[4] For procedural reasons, the Acting Assistant Administrator did not decide whether the ordinance independently violates the City's permanent obligations under the Surplus Property Act of 1944 and Instrument of Transfer, *see* FAD 55-56, and the terms of the 1984 Settlement Agreement, *see* FAD 53-54. Accordingly, these issues are not before this Court.

Areas do not determine whether a given aircraft can safely land or take off at a given airport; that is the function of the aircraft certification and operating rules and flight manuals. There are thousands of operations daily at hundreds of airports that lack standard Runway Safety Areas, including LAX, Boston Logan, and Midway Chicago.

Contrary to the City's assertion, its "proprietary powers" do not allow it to override FAA determinations with respect to matters of aviation safety. "'[L]ocal proprietors play an extremely limited role in the regulation of aviation,'" *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213, 1222 (10th Cir. 2001) (quoting *American Airlines, Inc. v. DOT*, 202 F.3d 788, 806 (5th Cir. 2000)), and no court has allowed a local airport owner to make safety determinations at odds with the judgment of the FAA. Moreover, the evidence presented in the administrative hearing confirmed that Category C and D aircraft have even better safety records than the Category A and B aircraft unaffected by the City's ban. The City provides no basis to disturb the FAA's determination that the City's discrimination against Category C and D aircraft is unjustified, and the petition for review should therefore be denied.

STANDARD OF REVIEW

The FAA's decision must be sustained unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Boca Airport, Inc. v. FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004) (compliance with grant assurances). The FAA's findings of fact are conclusive if supported by substantial evidence. 49 U.S.C. § 46110. The agency is accorded particular deference when interpreting its own rules. *Boca Airport*, 389 F.3d at 190; *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 169-70 (1st Cir. 1989) (compliance with grant assurances); *Arapahoe County Public Airport Authority*, 242 F.3d at 1223 (same) .

ARGUMENT

The FAA Correctly Determined That The City's Ordinance Is Contrary To Federal Law And Unjustly Discriminates Against Category C And D Aircraft

The ordinance enacted by the Santa Monica City Council bans Category C and D aircraft from operating at Santa Monica Airport except in an emergency. The stated justification for the ban is safety; the City claims that the operations are unsafe in the absence of a "Runway Safety Area." However, such safety determinations are not the province of the City. Under the statutory scheme and the grant conditions agreed to by the City, the FAA is the final arbiter of safety

determinations of the type at issue here. The FAA correctly determined that the City's ordinance constitutes "unjust discrimination" against Category C and D aircraft and impermissibly bars them from operating at Santa Monica Airport. R. 5, No. 6, at 72 (Grant Assurance 22(a)).

A. Federal Regulations Establish The Standards for Determining The Safety Of Aircraft Takeoff and Landing.

As the Supreme Court has explained, federal control of aircraft operations "'is intensive and exclusive.'" *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (quoting *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303 (1944)). "'Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.'" *Id*. at 633-34. "'The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.'" *Id*. at 634.

FAA-approved flight manuals provide information for determining whether an airplane may operate at a particular airport. FAD 9. The pilot must determine that there will be sufficient runway length to land safely at the destination airport by performing the calculations set out in the flight manual for the particular airplane. *See* FAD 9; 14 C.F.R. § 91.103; R. 56 AAS 34-AAS 52.

The landing distance information furnished in the FAA-approved flight manual includes consideration of a variety of relevant factors. These factors encompass aircraft design features and characteristics, such as aircraft weight, configuration, engine thrust, stopping capability, speeds, and procedures. They also include the physical and atmospheric conditions at the destination airport, including runway length and surface condition, airport elevation, and wind. R. 61 at 11; 14 C.F.R. § 135.23; 14 C.F.R. § 91.1025.

For many Category C and D aircraft using Santa Monica Airport, the operating rules require an additional safety margin beyond that required to be incorporated in the FAA-approved manual. Operations that are part of "fractional ownership" programs under 14 C.F.R. Part 91, Subpart K, and many of the Category C and D aircraft operations under Part 135, must be able to land within 60% of the length of the runway. FAD 35-36. In other words, these aircraft must be able to safely land at Santa Monica Airport within approximately 3,000 feet, leaving the remaining 2,000 feet of runway as a safety margin. FAD 36; 14 C.F.R. § 135.385(c); 14 C.F.R. § 91.1037(b). Other aircraft operations, controlled by 14 C.F.R. § 91.1037(b), must be able to land within 80% of the available runway, leaving nearly 1,000 feet of runway as a safety margin. FAD 36. These rules apply to a large portion of the Category C and D aircraft using the Santa Monica

Airport. *See* FAD 35 (explaining that "almost half" of the operations at the airport are fractional ownership programs and "many" are regulated under Part 135).

An aircraft's approach category (such as Category "B" or "C") does not, taken in isolation, determine whether a particular aircraft can safely land at a particular airport on a particular day. Approach speed is one of the many factors used to determine the landing distance described in the FAA-approved aircraft manual. Whatever the aircraft approach category, if the manual shows a landing distance shorter than the runway length, the landing can be conducted routinely and safely. Also, the approach speed categories are based upon approach speed at maximum landing weight; at lighter weights, the airplane's approach speed will be much lower. FAD 8. As a result, the fact that an airplane falls into Category C or D does not necessarily mean that its actual approach speed on any given landing will exceed that of a particular Category B aircraft. *Ibid*.

Additionally, because of more stringent certification standards and other reasons, airplanes in Categories C and D typically have safety design features that may not be on aircraft in Categories A and B. FAD 14. These design features, which include advanced breaking and anti-skid systems, help an aircraft to slow down and thus provide additional safety benefits during takeoff and landing. *Ibid*. Accordingly, "an airplane in Category C and D may have better stopping

performance — be able to land in a shorter distance — than a Category B airplane, even if the Category C or D airplane's landing approach speed is higher." *Ibid*.

B. Federal Law Establishes The Circumstances In Which An Airport Must Have Runway Safety Areas.

The City claims that the Santa Monica Airport is unsafe for C and D aircraft because it lacks Runway Safety Areas meeting FAA specifications. The argument rests on a basic misunderstanding of the federal standards on which the City relies.

Federal statutes and regulations explicitly address the circumstances in which an airport must have graded, obstruction-free areas surrounding runways, known as Runway Safety Areas. These Runway Safety Areas provide protection for an airplane in the event that it overruns, undershoots or otherwise leaves the runway. FAD 1; R. 56, AAS-3, at 17. In 2003, Congress directed the FAA to conduct a study of how a Runway Safety Area requirement would affect runway operations. *See* 49 U.S.C. § 44727(b). Subsequently, Congress enacted legislation in 2005 that requires airports certificated for commercial service to improve their Runway Safety Areas to comply with FAA design standards as "required by 14 C.F.R. Part 139" no later than 2015. Pub. L. 109-115, Div. A, Title I (2005), 119 Stat. 2401, *codified at* 49 U.S.C. § 44706 Note. Part 139 certificated airports are in turn required to comply with FAA Advisory Circulars ("ACs"); the Advisory Circular governing airport design requires airports to

establish standard Runway Safety Areas "to the extent practicable." FAD 12; R. 56, AAS-3 at 19, 35, 161 (AC 150/5300-13); *see also* R. 56, AAS-6 at 2-3, 7-8 (Order No. 5200.8). The FAA design standards provide that newly constructed airports shall be designed with standard Runway Safety Areas. *See* R. 56, AAS-3 at 3 (AC 150/5300-13). By contrast, existing general aviation airports such as the Santa Monica Airport are not required to create standard Runway Safety Areas unless they are engaging in other construction projects with federal funds, and then only "to the extent practicable." FAD 12; R. 56, AAS-3 at 8, 10 (FAA Order No. 5200.8). Where it is not practicable to provide a standard Runway Safety Area, the FAA accepts alternative safety enhancements such as the construction of an Engineered Materials Arresting System ("EMAS"). FAD 13 (*discussing* AC 150/5220-22A, Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns ¶ 4). An EMAS is an area of cellular cement blocks at the end of a runway that will crush under the weight of an aircraft, causing it to decelerate rapidly. FAD 13; R. 5, No. 113, at 19-21. An EMAS can stop a plane traveling at up to its design speed (typically 70 knots), and substantially slow a plane traveling faster. FAD 45-46; R.60, at 6.

As the FAA has stressed, the absence of a Runway Safety Area or EMAS "does not mean that a pilot cannot land safely or that the runway is unsafe."

FAD 10-11, 36; R. 60, at 42. "In making the necessary preflight calculations pertaining to the sufficiency of runway length, a pilot does not consider the existence of [a Runway Safety Area]." FAD 36. Aircraft operators conduct thousands of operations daily at hundreds of airports throughout the country that lack standard Runway Safety Areas, including LAX, Boston Logan, and Midway Chicago. *Id*. at 37.

Thus, the City is simply wrong when it declares that "FAA runway design criteria" justify the ban on Category C and D operations. City Br. 4. Airport design standards such as Runway Safety Areas do not determine whether a given aircraft can safely land or take off at a given airport. That is the function of the aircraft certification and aircraft operating rules, including the aircraft flight manuals required and approved by the FAA in accordance with those rules. FAD 9-11, 13-14, 35-38.

The City compounds its error by confusing Airport Reference Codes with Aircraft Approach Categories. *See* City Br. 44-46. Airport Reference Codes incorporate not only the Aircraft Approach Category but also the Airplane Design Group, a separate categorization (Group 1 through Group 6) based on aircraft wingspan and tail height. FAD 9. Airport Reference Codes are not safety standards and have "no bearing on whether it is safe to land a particular aircraft at

an airport." FAD 7; R. 57, at 10. Rather, Airport Reference Codes are a means to identify development needs at an airport for planning purposes, by assigning a code based on the most demanding aircraft with at least 500 annual operations at that airport. FAD 7; No. 60, at 4. They are used for decisions regarding federal funding for airport development so that funds may be efficiently allocated to airports that have substantial numbers of certain types of aircraft. No. 60, at 4.[5]

C. Federally Funded Airport Proprietors Have No Authority To Override Federal Safety Standards For Determining Which Aircraft May Use An Airport.

The City does not dispute that, as a grant recipient, it is obligated to make the Santa Monica Airport "available for public use on fair and reasonable terms and without unjust discrimination, to all types, and classes of aeronautical uses." R. 5, No. 6, at 40 (Grant Agreement ¶ 22(a)). The City nonetheless insists that "airport owners retain the inherent power to adopt safety rules limiting access to their airports," City Br. 24, a proposition at odds with authority and common sense.[6]

[5] Indeed, the language in Order 5190.6B linking airport safety to design standards cited by the City (City Br. 45-46) makes sense only in reference to the dimensional standards of an airport. An aircraft cannot be too fast for an airport if the runway is long enough; if the runway length is longer than the landing or takeoff distance as calculated according to the aircraft manual (which takes aircraft approach speed into account), the operation will meet FAA safety standards.

[6] In the administrative proceedings, the FAA determined that federal law preempts the City's ordinance and the City had no proprietary authority that superceded the City's grant obligations. FAD 33. Although the City challenges that

As the courts of appeals have recognized, "'local proprietors play an extremely limited role in the regulation of aviation.'" *Arapahoe County Public Airport Authority*, 242 F.3d at 1222 (quoting *American Airlines, Inc.*, 202 F.3d at 806; *see also British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002, 1010 (2d Cir. 1977) (same). Only measures aimed at establishing acceptable noise levels, responding to environmental concerns, or managing ground congestion have been sustained as exercises of proprietary power. *See American Airlines*, 202 F.3d at 806 (citing cases). And even noise control measures are "carefully scrutinize[d] ... to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *British Airways Board*, 564 F.2d at 1011. Nor do local "police powers" allow a city to determine which aircraft can take off or land at an airport. *City of Burbank*, 411 U.S. at 638-40 (noise control measures such as a jet ban constitute an unauthorized extension of state police power into the federal domain).

The City nonetheless contends that the exception to the prohibition on unjust discrimination contained in paragraph 22(i) of its grant agreement allows it

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determination, this Court need not reach the preemption issue because this case is clearly controlled by grant conditions to which the City agreed in exchange for millions of dollars in federal funds.

to make its own binding safety determinations. *See* City Br. 24-25; FAD 6. Paragraph 22(i) provides that an airport may "prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." R. 5, No. 6, at 72.

Contrary to the City's assertion, this provision does not yield to a local proprietor the FAA's authority to decide matters of aviation safety. The FAA's 1989 Order setting out its policies and procedures relating to airport compliance specifically addressed this provision, stressing repeatedly that "[i]n all cases the FAA will make the final determination of the reasonableness of the airport owner's restrictions which denied or restricted use of the airport." R. 56, AAS-9, at 24 (FAA Order 5190.6A, ¶ 4-8(a)(1), (2)). As the Tenth Circuit observed, paragraph 22(i) does not give an airport owner "carte blanche" power to take any action it declares "necessary for safety or to satisfy aviation needs." *Arapahoe County Public Airport Authority*, 242 F.3d at 1222-23. That understanding would run afoul of the established principle 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." *Id*. at 1220-21 (quoting *American Airlines, Inc.*, 202 F.3d at 800-01). Indeed, in its 1984

Settlement Agreement with the FAA, the City recognized that the FAA's judgment is controlling with respect to matters of aviation safety. R.4, Ex. 3 at 3.

As FAA Order 5190.6A makes clear, paragraph 22(i) does not contemplate that airports will involve themselves in the fundamental safety questions governed by FAA regulations. The examples of safety restrictions in the FAA Order that may be acceptable, with FAA concurrence, bear no resemblance to the ordinance at issue here. Airports may, for example, prohibit student training, banner towing, or agricultural operations where the airport lacks the facilities to handle the pesticides used — all with FAA concurrence. *See* R.56, AS-9, at 25 (FAA Order 5190.6A). They also can limit sky-diving operations by, among other things, designating "reasonable time periods" and "specific areas" for jumping. *Ibid*. They cannot, however, invoke safety standards in conflict with those established by the FAA in order to ban a class of aircraft from taking off or landing.[7]

The City asserts that a "string" of judicial decisions affirm the power of airport proprietors to restrict operations at their airports for a variety of purposes including "safety regulation." City Br. 29. But most of the cited decisions did not involve issues of aviation safety, and none allowed a proprietor to override the

[7] FAA Order 5190.6A was revised in 2009. The revised version is available at http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b.pdf.

FAA's own safety determinations. For example, although the City cites *Arapahoe County Public Airport Authority v. FAA*, the Tenth Circuit recognized that airport proprietors play only an "extremely limited role in the regulation of aviation," 242 F.3d at 1222, and stressed the deference owed to the FAA's safety determination, *id*. at 1223. The court assumed without deciding that safety fell within the narrow proprietor's exception and then proceeded to confirm that (1) proprietary powers must at all events be exercised in "reasonable, nonarbitrary, and nondiscriminatory" fashion, and (2) the proprietor there failed to establish that its safety determinations met that standard in the face of the FAA's contrary determination. *Id.* at 1223-24.

In another of the City's cases, *Santa Monica Airport Ass'n v. City of Santa Monica*, the district court indicated that the City attempted to justify a jet ban on "noise and safety regulation" but found that "neither justification exists in fact." 481 F.Supp. 927, 943 (C.D. Cal. 1979). The Ninth Circuit affirmed, sustaining certain noise control restrictions but invalidating the jet ban. *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981). In *Western Air Lines v. Port Authority of New York & New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), the district court addressed the role of a proprietor of multiple airports in regulating ground congestion, not

flight operations. The court also qualified its holding by noting a factor not present in this case — the "absence of conflict with FAA regulations." 658 F. Supp. at 958.

No court has held that an airport proprietor may act on its own notions of safety in spite of an FAA determination to the contrary. If each federally funded airport had unfettered authority to decide which aircraft to admit or deny, the national system of airports would cease to function. It is the policy of the United States that "safe operation of the airport and airway system is the highest aviation priority," and that "artificial restrictions on airport capacity are not in the public interest." 49 U.S.C. § 47101(a)(1), (9). Only by means of a single national authority can this policy be effectively implemented, as this case illustrates. Although the City now declares that the burden that its local ordinance would impose on surrounding airports would be "modest," City Br. 57, its own estimates showed that the ban would affect up to 9,000 operations a year, an average of 25 each day. FAD 17.

The City's position boils down to the assertion that it can accept federal funds that are statutorily available only to those airport proprietors that make specified commitments in return, and then decide for itself whether it has fulfilled its commitments. Congress, however, charged the FAA with overseeing

compliance with grant assurances. *See* 49 U.S.C. § 47107; *see also*, *e.g.*, *New England Legal Foundation*, 883 F.2d at 172. The City has sensibly abandoned its Tenth Amendment objection to this scheme, *see* City Br. 55 n.11, implicitly recognizing that it must comply with the conditions on receipt of federal funds. *South Dakota v. Dole*, 483 U.S. 203, 210-12 (1987).

Contrary to the City's contention, the FAA's administrative decision in *Millard Refrigerated Services v. Omaha Airport Authority*, FAA Docket No. 13-93-19 (8/4/1995), provides no support for the City's assertion of unilateral authority to address matters of aviation safety. In that case, the proprietor took action with respect to safety only in consultation with the FAA and only with FAA approval. The proprietor there operated two airports in close proximity, sought federal funding for a runway project at one airport, and rather than meet costly new runway standards at that airport, it decided to accommodate the few large aircraft operations displaced by its decision at its other larger (air carrier) airport located 12 miles away. *See* City Addendum, at 130-131, 134. The FAA determined that under the circumstances the proprietor's actions were "consistent with federal requirements." *Id*. at 134. Like the proprietor in *Millard*, the City was free to bring perceived safety problems to the FAA's attention and, as noted, talks between the City and the FAA continued over a period of years. Having

failed to persuade the FAA of the validity of its concerns, the City had no police or proprietary power to restrict aircraft operations unilaterally.

D. The Evidence Presented In The Administrative Hearing Confirmed That The City's Discrimination Against Category C And D Aircraft Is Unjustified.

As discussed above, the City's purported justification for its ordinance — that the absence of Runway Safety Areas makes the airport unsafe for Category C and D operations — is inconsistent with federal aviation safety standards. Thus, the FAA correctly determined that the discrimination against Category C and D aircraft is unjustified even without regard to the technical evidence presented at the administrative hearing. In any event, that evidence confirmed that the ordinance unjustly discriminates against Category C and D aircraft.

The evidence showed that the Category C and D aircraft that the City would ban, all of which are jets, have better safety records than the Category A and B aircraft that the City would allow, the vast majority of which are propeller-driven, piston-powered aircraft. R. 71, at 6; FAD 39-40. Data collected by the National Transportation Safety Board show that jets have an accident rate 8 times lower than single-engine piston aircraft, 5.75 times lower than twin-engine piston aircraft, and 4.6 times lower than twin-engine turboprops. FAD 39. At the Santa Monica Airport itself, there have been 23 accidents in the last 21 years, all

involving Category A and B airplanes. *Ibid*; R. 61, at 12. The evidence thus shows that airplanes in Categories C and D "have the superior safety record" and that it is "unjustly discriminatory to prohibit airplanes in Categories C and D from operating at [Santa Monica Airport]." FAD 39-40. In this respect, the current ban on Category C and D aircraft mirrors the City's earlier jet ban, which was invalidated because the evidence was "utterly convincing that modern, small, business or executive-type jets of the type that would be able to fly out of this airport with the jet ban lifted, are at least as safe, if not much safer, than the types of piston-engine fixed-wing aircraft which are now allowed to use the airport." *Santa Monica Airport Association v. City of Santa Monica*, 481 F. Supp. 927, 943 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981). The City has failed to produce any evidence, much less convincing evidence, that circumstances involving Category C and D aircraft at the Santa Monica Airport have changed in the thirty years since the district court's opinion that warrants barring these aircraft now.

The City provided no basis for disregarding the overall safety record of Category C and D aircraft and for focusing solely on the possibility of a runway overrun. Moreover, even with respect to the risk of an overrun, the evidence showed that the probability of a defect leading to an overrun is much higher in a

Category A or B aircraft than in a Category C or D aircraft. FAD 40. While the FAA receives a large number of reports of overruns by airplanes in Categories A and B nationwide each day, reports pertaining to overruns by airplanes in Categories C or D are "incredibly rare." *Id*. at 38-39. At the Santa Monica Airport, there were seven overruns and one undershoot between 1981 and 2008, all involving Category A or B aircraft. *Id*. at 38. Even if the approach speed of a Category C or D airplane is greater than the approach speed of a Category B airplane, the Category C or D airplane may be able to land in a shorter distance because of its better stopping performance. *Id*. at 44. And, in reality, the approach speeds of an airplane in Category C may be less than some aircraft in Category B, depending on the flap setting and the operating weight of the aircraft. *Ibid*. Thus, there is no justification for a ban that discriminates against airplanes in Categories C and D. *Ibid*.

The City's position also reflects a basic misunderstanding of the physics of an overrun. In the unlikely event of an overrun of a Category C or D aircraft, the harm that Santa Monica seeks to avoid — a collision between the airplane and the surrounding homes, R. 5, No. 8, at 1-2 — would be more unlikely still. *See* FAD 42-43. Unrebutted testimony from the FAA's engineer explained that the geography provides protection to the surrounding homes. FAD 41; R. 60, at 7. Unless it were flying, an airplane traveling over the edge of the plateau would

travel in a simple ballistic arc and, like any other falling object, land close to the bottom of the plateau. FAD 40-41.

The City cites the testimony of its Acting Airport Manager that an airplane could collide with the homes if its wings were developing "lift." City Br. 52. However, the City failed to introduce any evidence to show that a Category C or D aircraft would have sufficient lift to fly if it overran the runway at 70 knots, the speed below which 90% of all overruns occur. FAD 43 & n.57. The FAA's Runway Safety Area specifications reflect its determination that further protection against the remote possibility of a faster overrun is not warranted, even at new airports. FAD 44. Moreover, if an airplane did have lift enough to fly, the result would be a continuing flight or a crash, not an overrun, and a Runway Safety Area would be ineffective. *Id*. at 43 & n.56.

In short, the technical evidence plainly supports the FAA's determination that the City's discrimination against Category C and D aircraft is unjustified. FAD 46; *see also Nuclear Energy Institute, Inc. v. Environmental Protection*

Agency, 373 F.3d 1251, 1289 (D.C. Cir. 2004) (stressing the deference owed to an agency's assessment of the technical risk data).[8]

As the Acting Associate Administrator also explained, there are other permissible means for the City to enhance safety without restricting operations. For example, the FAA offered Santa Monica federal funding for enhancements such as the construction of a 70-knot EMAS system at the end of the runway used in 95% of the City's operations. FAD 45. Such a system would stop a plane traveling at up to 70 knots and slow a plane traveling at a faster speed, FAD 45-46; R. 60, at 6, and would exceed the performance of the EMAS systems in place at busy commercial airports lacking standard Runway Safety Areas, such as Boston Logan and Chicago Midway. FAD 37; R.5, at 24.

The City protests that such an EMAS system would provide "less than the full level of protection" from the possibility of an overrun. City Br. 53. But as the FAA observed, there is likewise "no guarantee" that pilots of Category A and B airplanes will not overrun the runway, and the City has not banned those operations. FAD 46. Aviation has inherent risks and the only way to reduce risk to zero would be to close airports completely. That is not the balance struck by

[8] Inexplicably, the City declares that the Acting Associate Administrator failed to consider whether the ordinance is reasonable and does not unjustly discriminate against Category C and D aircraft. City Br. 37-38. The FAD expressly addressed this issue. *See, e.g.*, FAD 46 (concluding that the ordinance involves unjust discrimination because it bans C and D aircraft, even though they can use the airport safely and have a better safety record, while allowing A and B aircraft to operate).

Congress, and it is at odds with the City's commitment to make its airport available for public use on reasonable terms and without unjust discrimination.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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June 11, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,011 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X4 in size 14 Times New Roman font.

/s/ Dana Kaersvang

Dana Kaersvang

CERTIFICATE OF SERVICE

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ADDENDUM

TABLE OF CONTENTS

Page

Effective: October 9, 1996

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart III. Safety (Refs & Annos)
Chapter 447. Safety Regulation (Refs & Annos)
§ 44706. Airport operating certificates

(a) General.--The Administrator of the Federal Aviation Administration shall issue an airport operating certificate to a person desiring to operate an airport--

(1) that serves an air carrier operating aircraft designed for at least 31 passenger seats;

(2) that is not located in the State of Alaska and serves any scheduled passenger operation of an air carrier operating aircraft designed for more than 9 passenger seats but less than 31 passenger seats; and

(3) that the Administrator requires to have a certificate;

if the Administrator finds, after investigation, that the person properly and adequately is equipped and able to operate safely under this part and regulations and standards prescribed under this part.

(b) Terms.--An airport operating certificate issued under this section shall contain terms necessary to ensure safety in air transportation. Unless the Administrator decides that it is not in the public interest, the terms shall include conditions related to--

(1) operating and maintaining adequate safety equipment, including firefighting and rescue equipment capable of rapid access to any part of the airport used for landing, takeoff, or surface maneuvering of an aircraft; and

(2) friction treatment for primary and secondary runways that the Secretary of Transportation decides is necessary.

(c) Exemptions.--The Administrator may exempt from the requirements of this section, related to firefighting and rescue equipment, an operator of an airport described in subsection (a) of this section having less than .25 percent of the total number of passenger boardings each year at all airports described in subsection (a) when the Administrator decides that the requirements are or would be unreasonably costly, burdensome, or impractical.

(d) Commuter airports.--In developing the terms required by subsection (b) for airports covered by subsection (a)(2), the Administrator shall identify and consider a reasonable number of regulatory alternatives and select from such alternatives the least costly, most cost-effective or the least burdensome alternative that will provide comparable safety at airports described in subsections (a)(1) and (a)(2).

(e) Effective date.--Any regulation establishing the terms required by subsection (b) for airports covered by subsection (a)(2) shall not take effect until such regulation, and a report on the economic impact of the regulation on air service to the airports covered by the rule, has been submitted to Congress and 120 days have elapsed following the date of such submission.

(f) Limitation on statutory construction.--Nothing in this title may be construed as requiring a person to obtain an airport operating certificate if such person does not desire to operate an airport described in subsection (a).

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1189, and amended Pub.L. 104-264, Title IV, § 404, Oct. 9, 1996, 110 Stat. 3256.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

***

Airport Runway Safety

Pub.L. 109-115, Div. A, Title I, Nov. 30, 2005, 119 Stat. 2401, provided in part: “That not later than December 31, 2015, the owner or operator of an airport certificated under 49 U.S.C. 44706 [this section] shall improve the airport's runway safety areas to comply with the Federal Aviation Administration design

standards required by 14 CFR part 139: *Provided further*, That the Federal Aviation Administration shall report annually to the Congress on the agency's progress toward improving the runway safety areas at 49 U.S.C. 44706 airports."

Effective: December 12, 2003

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart III. Safety (Refs & Annos)
Chapter 447. Safety Regulation (Refs & Annos)
§ 44727. Runway safety areas

(a) Airports in Alaska.--An airport owner or operator in the State of Alaska shall not be required to reduce the length of a runway or declare the length of a runway to be less than the actual pavement length in order to meet standards of the Federal Aviation Administration applicable to runway safety areas.

(b) Study.--

(1) In general.--The Secretary shall conduct a study of runways at airports in States other than Alaska to determine which airports are affected by standards of the Federal Aviation Administration applicable to runway safety areas and to assess how operations at those airports would be affected if the owner or operator of the airport is required to reduce the length of a runway or declare the length of a runway to be less than the actual pavement length in order to meet such standards.

(2) Report.--Not later than 9 months after the date of enactment of this section, the Secretary shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report containing the results of the study.

Effective: December 12, 2003

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart IV. Enforcement and Penalties (Refs & Annos)
Chapter 461. Investigations and Proceedings
§ 46110. Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in

the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

Effective: April 5, 2000

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part B. Airport Development and Noise
Chapter 471. Airport Development
Subchapter I. Airport Improvement (Refs & Annos)
§ 47101. Policies

(a) General.--It is the policy of the United States--

(1) that the safe operation of the airport and airway system is the highest aviation priority;

(2) that aviation facilities be constructed and operated to minimize current and projected noise impact on nearby communities;

(3) to give special emphasis to developing reliever airports;

(4) that appropriate provisions should be made to make the development and enhancement of cargo hub airports easier;

(5) to encourage the development of intermodal connections on airport property between aeronautical and other transportation modes and systems to serve air transportation passengers and cargo efficiently and effectively and promote economic development;

(6) that airport development projects under this subchapter provide for the protection and enhancement of natural resources and the quality of the environment of the United States;

(7) that airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease;

(8) to ensure that nonaviation usage of the navigable airspace be accommodated but not allowed to

decrease the safety and capacity of the airspace and airport system;

(9) that artificial restrictions on airport capacity--

(A) are not in the public interest;

(B) should be imposed to alleviate air traffic delays only after other reasonably available and less burdensome alternatives have been tried; and

(C) should not discriminate unjustly between categories and classes of aircraft;

(10) that special emphasis should be placed on converting appropriate former military air bases to civil use and identifying and improving additional joint-use facilities;

(11) that the airport improvement program should be administered to encourage projects that employ innovative technology (including integrated in-pavement lighting systems for runways and taxiways and other runway and taxiway incursion prevention devices), concepts, and approaches that will promote safety, capacity, and efficiency improvements in the construction of airports and in the air transportation system (including the development and use of innovative concrete and other materials in the construction of airport facilities to minimize initial laydown costs, minimize time out of service, and maximize lifecycle durability) and to encourage and solicit innovative technology proposals and activities in the expenditure of funding pursuant to this subchapter;

(12) that airport fees, rates, and charges must be reasonable and may only be used for purposes not prohibited by this subchapter; and

(13) that airports should be as self-sustaining as possible under the circumstances existing at each particular airport and in establishing new fees, rates, and charges, and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenues may be spent under section 47107(b)(1) of this title, including reasonable reserves and other funds to facilitate financing and cover contingencies.

(b) National transportation policy.--(1) It is a goal of the United States to develop a national intermodal

transportation system that transports passengers and property in an efficient manner. The future economic direction of the United States depends on its ability to confront directly the enormous challenges of the global economy, declining productivity growth, energy vulnerability, air pollution, and the need to rebuild the infrastructure of the United States.

(2) United States leadership in the world economy, the expanding wealth of the United States, the competitiveness of the industry of the United States, the standard of living, and the quality of life are at stake.

(3) A national intermodal transportation system is a coordinated, flexible network of diverse but complementary forms of transportation that transports passengers and property in the most efficient manner. By reducing transportation costs, these intermodal systems will enhance the ability of the industry of the United States to compete in the global marketplace.

(4) All forms of transportation, including aviation and other transportation systems of the future, will be full partners in the effort to reduce energy consumption and air pollution while promoting economic development.

(5) An intermodal transportation system consists of transportation hubs that connect different forms of appropriate transportation and provides users with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States, as well as providing links to other forms of transportation and to intercity connections.

(6) Intermodality and flexibility are paramount issues in the process of developing an integrated system that will obtain the optimum yield of United States resources.

(7) The United States transportation infrastructure must be reshaped to provide the economic underpinnings for the United States to compete in the 21st century global economy. The United States can no longer rely on the sheer size of its economy to dominate international economic rivals and must recognize fully that its economy is no longer a separate entity but is part of the global marketplace. The future economic prosperity of the United States depends on its ability to compete in an international marketplace that is teeming with competitors but in which a full one-quarter of the economic activity of the United States takes place.

(8) The United States must make a national commitment to rebuild its infrastructure through development of a national intermodal transportation system. The United States must provide the foundation for its industries to improve productivity and their ability to compete in the global economy with a system that will

transport passengers and property in an efficient manner.

(c) Capacity expansion and noise abatement.--It is in the public interest to recognize the effects of airport capacity expansion projects on aircraft noise. Efforts to increase capacity through any means can have an impact on surrounding communities. Noncompatible land uses around airports must be reduced and efforts to mitigate noise must be given a high priority.

(d) Consistency with air commerce and safety policies.--Each airport and airway program should be carried out consistently with section 40101(a), (b), (d), and (f) of this title to foster competition, prevent unfair methods of competition in air transportation, maintain essential air transportation, and prevent unjust and discriminatory practices, including as the practices may be applied between categories and classes of aircraft.

(e) Adequacy of navigation aids and airport facilities.--This subchapter should be carried out to provide adequate navigation aids and airport facilities for places at which scheduled commercial air service is provided. The facilities provided may include--

(1) reliever airports; and

(2) heliports designated by the Secretary of Transportation to relieve congestion at commercial service airports by diverting aircraft passengers from fixed-wing aircraft to helicopter carriers.

(f) Maximum use of safety facilities.--This subchapter should be carried out consistently with a comprehensive airspace system plan, giving highest priority to commercial service airports, to maximize the use of safety facilities, including installing, operating, and maintaining, to the extent possible with available money and considering other safety needs--

(1) electronic or visual vertical guidance on each runway;

(2) grooving or friction treatment of each primary and secondary runway;

(3) distance-to-go signs for each primary and secondary runway;

(4) a precision approach system, a vertical visual guidance system, and a full approach light system for each primary runway;

(5) a nonprecision instrument approach for each secondary runway;

(6) runway end identifier lights on each runway that does not have an approach light system;

(7) a surface movement radar system at each category III airport;

(8) a taxiway lighting and sign system;

(9) runway edge lighting and marking;

(10) radar approach coverage for each airport terminal area; and

(11) runway and taxiway incursion prevention devices, including integrated in-pavement lighting systems for runways and taxiways.

(g) Intermodal planning.--To carry out the policy of subsection (a)(5) of this section, the Secretary of Transportation shall take each of the following actions:

(1) Coordination in development of airport plans and programs.--Cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs. The airport plans and programs shall be developed in coordination with other transportation planning and considering comprehensive long-range land-use plans and overall social, economic, environmental, system performance, and energy conservation objectives. The process of developing airport plans and programs shall be continuing, cooperative, and comprehensive to the degree appropriate to the complexity of the transportation problems.

(2) Goals for airport master and system plans.--Encourage airport sponsors and State and local officials to develop airport master plans and airport system plans that--

(A) foster effective coordination between aviation planning and metropolitan planning;

(B) include an evaluation of aviation needs within the context of multimodal planning; and

(C) are integrated with metropolitan plans to ensure that airport development proposals include adequate consideration of land use and ground transportation access.

(3) Representation of airport operators on MPO'S.--Encourage metropolitan planning organizations, particularly in areas with populations greater than 200,000, to establish membership positions for airport operators.

(h) Consultation.--To carry out the policy of subsection (a)(6) of this section, the Secretary of Transportation shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency about any project included in a project grant application involving the location of an airport or runway, or a major runway extension, that may have a significant effect on--

(1) natural resources, including fish and wildlife;

(2) natural, scenic, and recreation assets;

(3) water and air quality; or

(4) another factor affecting the environment.

Effective:[See Notes]

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part B. Airport Development and Noise
Chapter 471. Airport Development
Subchapter I. Airport Improvement (Refs & Annos)

§ 47107. Project grant application approval conditioned on assurances about airport operations

(a) General written assurances.--The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that--

(1) the airport will be available for public use on reasonable conditions and without unjust discrimination;

(2) air carriers making similar use of the airport will be subject to substantially comparable charges--

(A) for facilities directly and substantially related to providing air transportation; and

(B) regulations and conditions, except for differences based on reasonable classifications, such as between--

(i) tenants and nontenants; and

(ii) signatory and nonsignatory carriers;

(3) the airport operator will not withhold unreasonably the classification or status of tenant or signatory from an air carrier that assumes obligations substantially similar to those already imposed on air carriers of that classification or status;

(4) a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport, with a right given to only one fixed-base operator to provide services at an airport deemed not to be an exclusive right if--

(A) the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and

(B) allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator;

(5) fixed-base operators similarly using the airport will be subject to the same charges;

(6) an air carrier using the airport may service itself or use any fixed-base operator allowed by the airport operator to service any carrier at the airport;

(7) the airport and facilities on or connected with the airport will be operated and maintained suitably, with consideration given to climatic and flood conditions;

(8) a proposal to close the airport temporarily for a nonaeronautical purpose must first be approved by the Secretary;

(9) appropriate action will be taken to ensure that terminal airspace required to protect instrument and visual operations to the airport (including operations at established minimum flight altitudes) will be cleared and protected by mitigating existing, and preventing future, airport hazards;

(10) appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations;

(11) each of the airport's facilities developed with financial assistance from the United States Government and each of the airport's facilities usable for the landing and taking off of aircraft always will be available

without charge for use by Government aircraft in common with other aircraft, except that if the use is substantial, the Government may be charged a reasonable share, proportionate to the use, of the cost of operating and maintaining the facility used;

(12) the airport owner or operator will provide, without charge to the Government, property interests of the sponsor in land or water areas or buildings that the Secretary decides are desirable for, and that will be used for, constructing at Government expense, facilities for carrying out activities related to air traffic control or navigation;

(13) the airport owner or operator will maintain a schedule of charges for use of facilities and services at the airport--

(A) that will make the airport as self-sustaining as possible under the circumstances existing at the airport, including volume of traffic and economy of collection; and

(B) without including in the rate base used for the charges the Government's share of costs for any project for which a grant is made under this subchapter or was made under the Federal Airport Act or the Airport and Airway Development Act of 1970;

(14) the project accounts and records will be kept using a standard system of accounting that the Secretary, after consulting with appropriate public agencies, prescribes;

(15) the airport owner or operator will submit any annual or special airport financial and operations reports to the Secretary that the Secretary reasonably requests and make such reports available to the public;

(16) the airport owner or operator will maintain a current layout plan of the airport that meets the following requirements:

(A) the plan will be in a form the Secretary prescribes;

(B) the Secretary will approve the plan and any revision or modification before the plan, revision, or modification takes effect;

(C) the owner or operator will not make or allow any alteration in the airport or any of its facilities if the alteration does not comply with the plan the Secretary approves, and the Secretary is of the opinion that the alteration may affect adversely the safety, utility, or efficiency of the airport; and

(D) when an alteration in the airport or its facility is made that does not conform to the approved plan and that the Secretary decides adversely affects the safety, utility, or efficiency of any property on or off the airport that is owned, leased, or financed by the Government, the owner or operator, if requested by the Secretary, will--

(i) eliminate the adverse effect in a way the Secretary approves; or

(ii) bear all cost of relocating the property or its replacement to a site acceptable to the Secretary and of restoring the property or its replacement to the level of safety, utility, efficiency, and cost of operation that existed before the alteration was made;

(17) each contract and subcontract for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, engineering, surveying, mapping, and related services will be awarded in the same way that a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent qualifications-based requirement prescribed for or by the sponsor;

(18) the airport and each airport record will be available for inspection by the Secretary on reasonable request, and a report of the airport budget will be available to the public at reasonable times and places;

(19) the airport owner or operator will submit to the Secretary and make available to the public an annual report listing in detail--

(A) all amounts paid by the airport to any other unit of government and the purposes for which each such payment was made; and

(B) all services and property provided to other units of government and the amount of compensation received for provision of each such service and property;

(20) the airport owner or operator will permit, to the maximum extent practicable, intercity buses or other

modes of transportation to have access to the airport, but the sponsor does not have any obligation under this paragraph, or because of it, to fund special facilities for intercity bus service or for other modes of transportation; and

(21) if the airport owner or operator and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long-term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.

(b) Written assurances on use of revenue.--(1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that local taxes on aviation fuel (except taxes in effect on December 30, 1987) and the revenues generated by a public airport will be expended for the capital or operating costs of--

(A) the airport;

(B) the local airport system; or

(C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.

(2) Paragraph (1) of this subsection does not apply if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator, or a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.

(3) This subsection does not prevent the use of a State tax on aviation fuel to support a State aviation program or the use of airport revenue on or off the airport for a noise mitigation purpose.

(c) Written assurances on acquiring land.--(1) In this subsection, land is needed for an airport purpose (except a noise compatibility purpose) if--

(A)(i) the land may be needed for an aeronautical purpose (including runway protection zone) or serves as noise buffer land; and

(ii) revenue from interim uses of the land contributes to the financial self-sufficiency of the airport; and

(B) for land purchased with a grant the owner or operator received not later than December 30, 1987, the Secretary of Transportation or the department, agency, or instrumentality of the Government that made the grant was notified by the owner or operator of the use of the land and did not object to the use and the land is still being used for that purpose.

(2) The Secretary of Transportation may approve an application under this subchapter for an airport development project grant only if the Secretary receives written assurances, satisfactory to the Secretary, that if an airport owner or operator has received or will receive a grant for acquiring land and--

(A) if the land was or will be acquired for a noise compatibility purpose--

(i) the owner or operator will dispose of the land at fair market value at the earliest practicable time after the land no longer is needed for a noise compatibility purpose;

(ii) the disposition will be subject to retaining or reserving an interest in the land necessary to ensure that the land will be used in a way that is compatible with noise levels associated with operating the airport; and

(iii) the part of the proceeds from disposing of the land that is proportional to the Government's share of the cost of acquiring the land will be paid to the Secretary for deposit in the Airport and Airway Trust Fund established under section 9502 of the Internal Revenue Code of 1986 (26 U.S.C. 9502) or, as the Secretary prescribes, reinvested in an approved noise compatibility project, including the purchase of nonresidential buildings or property in the vicinity of residential buildings or property previously purchased by the airport as part of a noise compatibility program; or

(B) if the land was or will be acquired for an airport purpose (except a noise compatibility purpose)--

(i) the owner or operator, when the land no longer is needed for an airport purpose, will dispose of the land at fair market value or make available to the Secretary an amount equal to the Government's

proportional share of the fair market value;

(ii) the disposition will be subject to retaining or reserving an interest in the land necessary to ensure that the land will be used in a way that is compatible with noise levels associated with operating the airport; and

(iii) the part of the proceeds from disposing of the land that is proportional to the Government's share of the cost of acquiring the land will be reinvested, on application to the Secretary, in another eligible airport development project the Secretary approves under this subchapter or paid to the Secretary for deposit in the Fund if another eligible project does not exist.

(3) Proceeds referred to in paragraph (2)(A)(iii) and (B)(iii) of this subsection and deposited in the Airport and Airway Trust Fund are available as provided in subsection (f) of this section.

(d) Assurances of continuation as public-use airport.--The Secretary of Transportation may approve an application under this subchapter for an airport development project grant for a privately owned public-use airport only if the Secretary receives appropriate assurances that the airport will continue to function as a public-use airport during the economic life (that must be at least 10 years) of any facility at the airport that was developed with Government financial assistance under this subchapter.

(e) Written assurances of opportunities for small business concerns.--(1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in section 47113(a) of this title) or qualified HUBZone small business concerns (as defined in section 3(p) of the Small Business Act).

(2) An airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including any business operated through a management contract or subcontract. The dollar amount of a management contract or subcontract with a disadvantaged business enterprise shall be added to the total participation by disadvantaged business enterprises in airport concessions and to the base from which the airport's percentage goal is calculated. The dollar amount of a management contract or subcontract with a non-disadvantaged business enterprise and the gross revenue of business activities to which the management contract or subcontract pertains may not be added to this base.

(3) Except as provided in paragraph (4) of this subsection, an airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including the purchase from disadvantaged business enterprises of goods and services used in businesses conducted at the airport, but the owner or operator and the businesses conducted at the airport shall make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises.

(4)(A) In complying with paragraph (1) of this subsection, an airport owner or operator shall include the revenues of car rental firms at the airport in the base from which the percentage goal in paragraph (1) is calculated.

(B) An airport owner or operator may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a disadvantaged business enterprise. If an owner or operator requires such a purchase or lease, a car rental firm shall be permitted to meet the requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern owned and controlled by a socially and economically disadvantaged individual or as a qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act).

(C) This subsection does not require a car rental firm to change its corporate structure to provide for direct ownership arrangements to meet the requirements of this subsection.

(5) This subsection does not preempt--

(A) a State or local law, regulation, or policy enacted by the governing body of an airport owner or operator; or

(B) the authority of a State or local government or airport owner or operator to adopt or enforce a law, regulation, or policy related to disadvantaged business enterprises.

(6) An airport owner or operator may provide opportunities for a small business concern owned and controlled by a socially and economically disadvantaged individual or a qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act) to participate through direct contractual agreement with that concern.

(7) An air carrier that provides passenger or property-carrying services or another business that conducts

aeronautical activities at an airport may not be included in the percentage goal of paragraph (1) of this subsection for participation of small business concerns at the airport.

(8) Not later than April 29, 1993, the Secretary of Transportation shall prescribe regulations to carry out this subsection.

(f) Availability of amounts.--An amount deposited in the Airport and Airway Trust Fund under--

(1) subsection (c)(2)(A)(iii) of this section is available to the Secretary of Transportation to make a grant for airport development or airport planning under section 47104 of this title;

(2) subsection (c)(2)(B)(iii) of this section is available to the Secretary--

(A) to make a grant for a purpose described in section 47115(b) of this title; and

(B) for use under section 47114(d)(2) of this title at another airport in the State in which the land was disposed of under subsection (c)(2)(B)(ii) of this section; and

(3) subsection (c)(2)(B)(iii) of this section is in addition to an amount made available to the Secretary under section 48103 of this title and not subject to apportionment under section 47114 of this title.

(g) Ensuring compliance.--(1) To ensure compliance with this section, the Secretary of Transportation--

(A) shall prescribe requirements for sponsors that the Secretary considers necessary; and

(B) may make a contract with a public agency.

(2) The Secretary of Transportation may approve an application for a project grant only if the Secretary is satisfied that the requirements prescribed under paragraph (1)(A) of this subsection have been or will be met.

(h) Modifying assurances and requiring compliance with additional assurances.--

(1) In general.--Subject to paragraph (2), before modifying an assurance required of a person receiving a grant under this subchapter and in effect after December 29, 1987, or to require compliance with an additional assurance from the person, the Secretary of Transportation must--

(A) publish notice of the proposed modification in the Federal Register; and

(B) provide an opportunity for comment on the proposal.

(2) Public notice before waiver of aeronautical land-use assurance.--Before modifying an assurance under subsection (c)(2)(B) that requires any property to be used for an aeronautical purpose, the Secretary must provide notice to the public not less than 30 days before making such modification.

(i) Relief from obligation to provide free space.--When a sponsor provides a property interest in a land or water area or a building that the Secretary of Transportation uses to construct a facility at Government expense, the Secretary may relieve the sponsor from an obligation in a contract made under this chapter, the Airport and Airway Development Act of 1970, or the Federal Airport Act to provide free space to the Government in an airport building, to the extent the Secretary finds that the free space no longer is needed to carry out activities related to air traffic control or navigation.

(j) Use of revenue in Hawaii.--(1) In this subsection--

(A) "duty-free merchandise" and "duty-free sales enterprise" have the same meanings given those terms in section 555(b)(8) of the Tariff Act of 1930 (19 U.S.C. 1555(b)(8)).

(B) "highway" and "Federal-aid system" have the same meanings given those terms in section 101(a) of title 23.

(2) Notwithstanding subsection (b)(1) of this section, Hawaii may use, for a project for construction or reconstruction of a highway on a Federal-aid system that is not more than 10 miles by road from an airport and that will facilitate access to the airport, revenue from the sales at off-airport locations in Hawaii of duty-free merchandise under a contract between Hawaii and a duty-free sales enterprise. However, the revenue resulting during a Hawaiian fiscal year may be used only if the amount of the revenue, plus amounts Hawaii receives in the fiscal year from all other sources for costs Hawaii incurs for operating all airports it

operates and for debt service related to capital projects for the airports (including interest and amortization of principal costs), is more than 150 percent of the projected costs for the fiscal year.

(3)(A) Revenue from sales referred to in paragraph (2) of this subsection in a Hawaiian fiscal year that Hawaii may use may not be more than the amount that is greater than 150 percent as determined under paragraph (2).

(B) The maximum amount of revenue Hawaii may use under paragraph (2) of this subsection is $250,000,000.

(4) If a fee imposed or collected for rent, landing, or service from an aircraft operator by an airport operated by Hawaii is increased during the period from May 4, 1990, through December 31, 1994, by more than the percentage change in the Consumer Price Index of All Urban Consumers for Honolulu, Hawaii, that the Secretary of Labor publishes during that period and if revenue derived from the fee increases because the fee increased, the amount under paragraph (3)(B) of this subsection shall be reduced by the amount of the projected revenue increase in the period less the part of the increase attributable to changes in the Index in the period.

(5) Hawaii shall determine costs, revenue, and projected revenue increases referred to in this subsection and shall submit the determinations to the Secretary of Transportation. A determination is approved unless the Secretary disapproves it not later than 30 days after it is submitted.

(6) Hawaii is not eligible for a grant under section 47115 of this title in a fiscal year in which Hawaii uses under paragraph (2) of this subsection revenue from sales referred to in paragraph (2). Hawaii shall repay amounts it receives in a fiscal year under a grant it is not eligible to receive because of this paragraph to the Secretary of Transportation for deposit in the discretionary fund established under section 47115.

(7)(A) This subsection applies only to revenue from sales referred to in paragraph (2) of this subsection from May 5, 1990, through December 30, 1994, and to amounts in the Airport Revenue Fund of Hawaii that are attributable to revenue before May 4, 1990, on sales referred to in paragraph (2).

(B) Revenue from sales referred to in paragraph (2) of this subsection from May 5, 1990, through December 30, 1994, may be used under paragraph (2) in any Hawaiian fiscal year, including a Hawaiian fiscal year beginning after December 31, 1994.

(k) Annual summaries of financial reports.--The Secretary shall provide to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives an annual summary of the reports submitted to the Secretary under subsection (a)(19) of this section and under section 111(b) of the Federal Aviation Administration Authorization Act of 1994.

(l) Policies and procedures to ensure enforcement against illegal diversion of airport revenue.--

(1) In general.--Not later than 90 days after August 23, 1994, the Secretary of Transportation shall establish policies and procedures that will assure the prompt and effective enforcement of subsections (a)(13) and (b) of this section and grant assurances made under such subsections. Such policies and procedures shall recognize the exemption provision in subsection (b)(2) of this section and shall respond to the information contained in the reports of the Inspector General of the Department of Transportation on airport revenue diversion and such other relevant information as the Secretary may by law consider.

(2) Revenue diversion.--Policies and procedures to be established pursuant to paragraph (1) of this subsection shall prohibit, at a minimum, the diversion of airport revenues (except as authorized under subsection (b) of this section) through--

(A) direct payments or indirect payments, other than payments reflecting the value of services and facilities provided to the airport;

(B) use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems;

(C) payments in lieu of taxes or other assessments that exceed the value of services provided; or

(D) payments to compensate nonsponsoring governmental bodies for lost tax revenues exceeding stated tax rates.

(3) Efforts to be self-sustaining.--With respect to subsection (a)(13) of this section, policies and procedures to be established pursuant to paragraph (1) of this subsection shall take into account, at a minimum, whether owners and operators of airports, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, have undertaken reasonable efforts to make their particular airports as self-sustaining as possible under the circumstances existing at such airports.

(4) Administrative safeguards.--Policies and procedures to be established pursuant to paragraph (1) shall mandate internal controls, auditing requirements, and increased levels of Department of Transportation personnel sufficient to respond fully and promptly to complaints received regarding possible violations of subsections (a)(13) and (b) of this section and grant assurances made under such subsections and to alert the Secretary to such possible violations.

(5) Statute of limitations.--In addition to the statute of limitations specified in subsection (n)(7), with respect to project grants made under this chapter--

(A) any request by a sponsor or any other governmental entity to any airport for additional payments for services conducted off of the airport or for reimbursement for capital contributions or operating expenses shall be filed not later than 6 years after the date on which the expense is incurred; and

(B) any amount of airport funds that are used to make a payment or reimbursement as described in subparagraph (A) after the date specified in that subparagraph shall be considered to be an illegal diversion of airport revenues that is subject to subsection (n).

(m) Audit certification.--

(1) In general.--The Secretary of Transportation, acting through the Administrator of the Federal Aviation Administration, shall include a provision in the compliance supplement provisions to require a recipient of a project grant (or any other recipient of Federal financial assistance that is provided for an airport) to include as part of an annual audit conducted under sections 7501 through 7505 of title 31, a review concerning the funding activities with respect to an airport that is the subject of the project grant (or other Federal financial assistance) and the sponsors, owners, or operators (or other recipients) involved.

(2) Content of review.--A review conducted under paragraph (1) shall provide reasonable assurances that funds paid or transferred to sponsors are paid or transferred in a manner consistent with the applicable requirements of this chapter and any other applicable provision of law (including regulations promulgated by the Secretary or the Administrator).

(n) Recovery of illegally diverted funds.--

(1) In general.--Not later than 180 days after the issuance of an audit or any other report that identifies an illegal diversion of airport revenues (as determined under subsections (b) and (l) and section 47133), the Secretary, acting through the Administrator, shall--

(A) review the audit or report;

(B) perform appropriate factfinding; and

(C) conduct a hearing and render a final determination concerning whether the illegal diversion of airport revenues asserted in the audit or report occurred.

(2) Notification.--Upon making such a finding, the Secretary, acting through the Administrator, shall provide written notification to the sponsor and the airport of--

(A) the finding; and

(B) the obligations of the sponsor to reimburse the airport involved under this paragraph.

(3) Administrative action.--The Secretary may withhold any amount from funds that would otherwise be made available to the sponsor, including funds that would otherwise be made available to a State, municipality, or political subdivision thereof (including any multimodal transportation agency or transit authority of which the sponsor is a member entity) as part of an apportionment or grant made available pursuant to this title, if the sponsor--

(A) receives notification that the sponsor is required to reimburse an airport; and

(B) has had an opportunity to reimburse the airport, but has failed to do so.

(4) Civil action.--If a sponsor fails to pay an amount specified under paragraph (3) during the 180-day period beginning on the date of notification and the Secretary is unable to withhold a sufficient amount under paragraph (3), the Secretary, acting through the Administrator, may initiate a civil action under which the sponsor shall be liable for civil penalty in an amount equal to the illegal diversion in question plus interest (as determined under subsection (o)).

(5) Disposition of penalties.--

(A) Amounts withheld.--The Secretary or the Administrator shall transfer any amounts withheld under paragraph (3) to the Airport and Airway Trust Fund.

(B) Civil penalties.--With respect to any amount collected by a court in a civil action under paragraph (4), the court shall cause to be transferred to the Airport and Airway Trust Fund any amount collected as a civil penalty under paragraph (4).

(6) Reimbursement.--The Secretary, acting through the Administrator, shall, as soon as practicable after any amount is collected from a sponsor under paragraph (4), cause to be transferred from the Airport and Airway Trust Fund to an airport affected by a diversion that is the subject of a civil action under paragraph (4), reimbursement in an amount equal to the amount that has been collected from the sponsor under paragraph (4) (including any amount of interest calculated under subsection (o)).

(7) Statute of limitations.--No person may bring an action for the recovery of funds illegally diverted in violation of this section (as determined under subsections (b) and (l)) or section 47133 after the date that is 6 years after the date on which the diversion occurred.

(o) Interest.--

(1) In general.--Except as provided in paragraph (2), the Secretary, acting through the Administrator, shall charge a minimum annual rate of interest on the amount of any illegal diversion of revenues referred to in subsection (n) in an amount equal to the average investment interest rate for tax and loan accounts of the Department of the Treasury (as determined by the Secretary of the Treasury) for the applicable calendar year, rounded to the nearest whole percentage point.

(2) Adjustment of interest rates.--If, with respect to a calendar quarter, the average investment interest rate for tax and loan accounts of the Department of the Treasury exceeds the average investment interest rate for the immediately preceding calendar quarter, rounded to the nearest whole percentage point, the Secretary of the Treasury may adjust the interest rate charged under this subsection in a manner that reflects that change.

(3) Accrual.--Interest assessed under subsection (n) shall accrue from the date of the actual illegal diversion of revenues referred to in subsection (n).

(4) Determination of applicable rate.--The applicable rate of interest charged under paragraph (1) shall--

(A) be the rate in effect on the date on which interest begins to accrue under paragraph (3); and

(B) remain at a rate fixed under subparagraph (A) during the duration of the indebtedness.

(p) Payment by airport to sponsor.--If, in the course of an audit or other review conducted under this section, the Secretary or the Administrator determines that an airport owes a sponsor funds as a result of activities conducted by the sponsor or expenditures by the sponsor for the benefit of the airport, interest on that amount shall be determined in the same manner as provided in paragraphs (1) through (4) of subsection (o), except that the amount of any interest assessed under this subsection shall be determined from the date on which the Secretary or the Administrator makes that determination.

(q) Notwithstanding any written assurances prescribed in subsections (a) through (p), a general aviation airport with more than 300,000 annual operations may be exempt from having to accept scheduled passenger air carrier service, provided that the following conditions are met:

(1) No scheduled passenger air carrier has provided service at the airport within 5 years prior to January 1, 2002.

(2) The airport is located within or underneath the Class B airspace of an airport that maintains an airport operating certificate pursuant to section 44706 of title 49.

(3) The certificated airport operating under section 44706 of title 49 does not contribute to significant passenger delays as defined by DOT/FAA in the "Airport Capacity Benchmark Report 2001".

(r) An airport that meets the conditions of subsections (q)(1) through (3) is not subject to section 47524 of title 49 with respect to a prohibition on all scheduled passenger service.

(s) Competition disclosure requirement.--

(1) In general.--The Secretary of Transportation may approve an application under this subchapter for an airport development project grant for a large hub airport or a medium hub airport only if the Secretary receives assurances that the airport sponsor will provide the information required by paragraph (2) at such time and in such form as the Secretary may require.

(2) Competitive access.--On February 1 and August 1 of each year, an airport that during the previous 6-month period has been unable to accommodate one or more requests by an air carrier for access to gates or other facilities at that airport in order to provide service to the airport or to expand service at the airport shall transmit a report to the Secretary that--

(A) describes the requests;

(B) provides an explanation as to why the requests could not be accommodated; and

(C) provides a time frame within which, if any, the airport will be able to accommodate the requests.

(3) Sunset provision.--This subsection shall cease to be effective beginning July 4, 2010.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part B. Airport Development and Noise
Chapter 471. Airport Development
Subchapter I. Airport Improvement (Refs & Annos)
§ 47122. Administrative

(a) General.--The Secretary of Transportation may take action the Secretary considers necessary to carry out this subchapter, including conducting investigations and public hearings, prescribing regulations and procedures, and issuing orders.

(b) Conducting investigations and public hearings.--In conducting an investigation or public hearing under this subchapter, the Secretary has the same authority the Secretary has under section 46104 of this title. An action of the Secretary in exercising that authority is governed by the procedures specified in section 46104 and shall be enforced as provided in section 46104.

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 14. Aeronautics and Space
Chapter I. Federal Aviation Administration, Department of Transportation
Subchapter F. Air Traffic and General Operating Rules
Part 91. General Operating and Flight Rules (Refs & Annos)
Subpart K. Fractional Ownership Operations (Refs & Annos)
Program Management

§ 91.1025 Program operating manual contents.

Each program operating manual must have the date of the last revision on each revised page. Unless otherwise authorized by the Administrator, the manual must include the following:

(a) Procedures for ensuring compliance with aircraft weight and balance limitations;

(b) Copies of the program manager's management specifications or appropriate extracted information, including area of operations authorized, category and class of aircraft authorized, crew complements, and types of operations authorized;

(c) Procedures for complying with accident notification requirements;

(d) Procedures for ensuring that the pilot in command knows that required airworthiness inspections have been made and that the aircraft has been approved for return to service in compliance with applicable maintenance requirements;

(e) Procedures for reporting and recording mechanical irregularities that come to the attention of the pilot in command before, during, and after completion of a flight;

(f) Procedures to be followed by the pilot in command for determining that mechanical irregularities or defects reported for previous flights have been corrected or that correction of certain mechanical irregularities or defects have been deferred;

(g) Procedures to be followed by the pilot in command to obtain maintenance, preventive maintenance, and servicing of the aircraft at a place where previous arrangements have not been made by the program manager or owner, when the pilot is authorized to so act for the operator;

(h) Procedures under § 91.213 for the release of, and continuation of flight if any item of equipment required for the particular type of operation becomes inoperative or unserviceable en route;

(i) Procedures for refueling aircraft, eliminating fuel contamination, protecting from fire (including electrostatic protection), and supervising and protecting passengers during refueling;

(j) Procedures to be followed by the pilot in command in the briefing under § 91.1035.

(k) Procedures for ensuring compliance with emergency procedures, including a list of the functions assigned each category of required crewmembers in connection with an emergency and emergency evacuation duties;

(l) The approved aircraft inspection program, when applicable;

(m) Procedures for the evacuation of persons who may need the assistance of another person to move expeditiously to an exit if an emergency occurs;

(n) Procedures for performance planning that take into account take off, landing and en route conditions;

(o) An approved Destination Airport Analysis, when required by § 91.1037(c), that includes the following elements, supported by aircraft performance data supplied by the aircraft manufacturer for the appropriate runway conditions--

(1) Pilot qualifications and experience;

(2) Aircraft performance data to include normal, abnormal and emergency procedures as supplied by the aircraft manufacturer;

(3) Airport facilities and topography;

(4) Runway conditions (including contamination);

(5) Airport or area weather reporting;

(6) Appropriate additional runway safety margins, if required;

(7) Airplane inoperative equipment;

(8) Environmental conditions; and

(9) Other criteria that affect aircraft performance.

(p) A suitable system (which may include a coded or electronic system) that provides for preservation and retrieval of maintenance recordkeeping information required by § 91.1113 in a manner acceptable to the Administrator that provides--

(1) A description (or reference to date acceptable to the Administrator) of the work performed:

(2) The name of the person performing the work if the work is performed by a person outside the organization of the program manager; and

(3) The name or other positive identification of the individual approving the work.

(q) Flight locating and scheduling procedures; and

(r) Other procedures and policy instructions regarding program operations that are issued by the program manager or required by the Administrator.

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 14. Aeronautics and Space
Chapter I. Federal Aviation Administration, Department of Transportation
Subchapter F. Air Traffic and General Operating Rules
Part 91. General Operating and Flight Rules (Refs & Annos)
Subpart K. Fractional Ownership Operations (Refs & Annos)
Program Management

§ 91.1037 Large transport category airplanes: Turbine engine powered; Limitations; Destination and alternate airports.

(a) No program manager or any other person may permit a turbine engine powered large transport category airplane on a program flight to take off that airplane at a weight that (allowing for normal consumption of fuel and oil in flight to the destination or alternate airport) the weight of the airplane on arrival would exceed the landing weight in the Airplane Flight Manual for the elevation of the destination or alternate airport and the ambient temperature expected at the time of landing.

(b) Except as provided in paragraph (c) of this section, no program manager or any other person may permit a turbine engine powered large transport category airplane on a program flight to take off that airplane unless its weight on arrival, allowing for normal consumption of fuel and oil in flight (in accordance with the landing distance in the Airplane Flight Manual for the elevation of the destination airport and the wind conditions expected there at the time of landing), would allow a full stop landing at the intended destination airport within 60 percent of the effective length of each runway described below from a point 50 feet above the intersection of the obstruction clearance plane and the runway. For the purpose of determining the allowable landing weight at the destination airport, the following is assumed:

(1) The airplane is landed on the most favorable runway and in the most favorable direction, in still air.

(2) The airplane is landed on the most suitable runway considering the probable wind velocity and direction and the ground handling characteristics of that airplane, and considering other conditions such as landing aids and terrain.

(c) A program manager or other person flying a turbine engine powered large transport category airplane on

a program flight may permit that airplane to take off at a weight in excess of that allowed by paragraph (b) of this section if all of the following conditions exist:

(1) The operation is conducted in accordance with an approved Destination Airport Analysis in that person's program operating manual that contains the elements listed in § 91.1025(o).

(2) The airplane's weight on arrival, allowing for normal consumption of fuel and oil in flight (in accordance with the landing distance in the Airplane Flight Manual for the elevation of the destination airport and the wind conditions expected there at the time of landing), would allow a full stop landing at the intended destination airport within 80 percent of the effective length of each runway described below from a point 50 feet above the intersection of the obstruction clearance plane and the runway. For the purpose of determining the allowable landing weight at the destination airport, the following is assumed:

(i) The airplane is landed on the most favorable runway and in the most favorable direction, in still air.

(ii) The airplane is landed on the most suitable runway considering the probable wind velocity and direction and the ground handling characteristics of that airplane, and considering other conditions such as landing aids and terrain.

(3) The operation is authorized by management specifications.

(d) No program manager or other person may select an airport as an alternate airport for a turbine engine powered large transport category airplane unless (based on the assumptions in paragraph (b) of this section) that airplane, at the weight expected at the time of arrival, can be brought to a full stop landing within 80 percent of the effective length of the runway from a point 50 feet above the intersection of the obstruction clearance plane and the runway.

(e) Unless, based on a showing of actual operating landing techniques on wet runways, a shorter landing distance (but never less than that required by paragraph (b) or (c) of this section) has been approved for a specific type and model airplane and included in the Airplane Flight Manual, no person may take off a turbojet airplane when the appropriate weather reports or forecasts, or any combination of them, indicate that the runways at the destination or alternate airport may be wet or slippery at the estimated time of arrival unless the effective runway length at the destination airport is at least 115 percent of the runway length required under paragraph (b) or (c) of this section.

Effective: November 7, 2005

Code of Federal Regulations Currentness
Title 14. Aeronautics and Space
Chapter I. Federal Aviation Administration, Department of Transportation
Subchapter G. Air Carriers and Operators for Compensation or Hire: Certification and Operations
Part 135. Operating Requirements: Commuter and on Demand Operations and Rules Governing Persons on Board Such Aircraft (Refs & Annos)
Subpart A. General

§ 135.23 Manual contents.

Each manual shall have the date of the last revision on each revised page. The manual must include--

(a) The name of each management person required under § 119.69(a) of this chapter who is authorized to act for the certificate holder, the person's assigned area of responsibility, the person's duties, responsibilities, and authority, and the name and title of each person authorized to exercise operational control under § 135.77;

(b) Procedures for ensuring compliance with aircraft weight and balance limitations and, for multiengine aircraft, for determining compliance with § 135.185;

(c) Copies of the certificate holder's operations specifications or appropriate extracted information, including area of operations authorized, category and class of aircraft authorized, crew complements, and types of operations authorized;

(d) Procedures for complying with accident notification requirements;

(e) Procedures for ensuring that the pilot in command knows that required airworthiness inspections have been made and that the aircraft has been approved for return to service in compliance with applicable maintenance requirements;

(f) Procedures for reporting and recording mechanical irregularities that come to the attention of the pilot

in command before, during, and after completion of a flight;

(g) Procedures to be followed by the pilot in command for determining that mechanical irregularities or defects reported for previous flights have been corrected or that correction has been deferred;

(h) Procedures to be followed by the pilot in command to obtain maintenance, preventive maintenance, and servicing of the aircraft at a place where previous arrangements have not been made by the operator, when the pilot is authorized to so act for the operator;

(i) Procedures under § 135.179 for the release for, or continuation of, flight if any item of equipment required for the particular type of operation becomes inoperative or unserviceable en route;

(j) Procedures for refueling aircraft, eliminating fuel contamination, protecting from fire (including electrostatic protection), and supervising and protecting passengers during refueling;

(k) Procedures to be followed by the pilot in command in the briefing under § 135.117;

(l) Flight locating procedures, when applicable;

(m) Procedures for ensuring compliance with emergency procedures, including a list of the functions assigned each category of required crewmembers in connection with an emergency and emergency evacuation duties under § 135.123;

(n) En route qualification procedures for pilots, when applicable;

(o) The approved aircraft inspection program, when applicable;

(p)(1) Procedures and information, as described in paragraph (p)(2) of this section, to assist each crewmember and person performing or directly supervising the following job functions involving items for transport on an aircraft:

(i) Acceptance;

(ii) Rejection;

(iii) Handling;

(iv) Storage incidental to transport;

(v) Packaging of company material; or

(vi) Loading.

(2) Ensure that the procedures and information described in this paragraph are sufficient to assist a person in identifying packages that are marked or labeled as containing hazardous materials or that show signs of containing undeclared hazardous materials. The procedures and information must include:

(i) Procedures for rejecting packages that do not conform to the Hazardous Materials Regulations in 49 CFR parts 171 through 180 or that appear to contain undeclared hazardous materials;

(ii) Procedures for complying with the hazardous materials incident reporting requirements of 49 CFR 171.15 and 171.16 and discrepancy reporting requirements of 49 CFR 175.31.

(iii) The certificate holder's hazmat policies and whether the certificate holder is authorized to carry, or is prohibited from carrying, hazardous materials; and

(iv) If the certificate holder's operations specifications permit the transport of hazardous materials, procedures and information to ensure the following:

(A) That packages containing hazardous materials are properly offered and accepted in compliance with 49 CFR parts 171 through 180;

(B) That packages containing hazardous materials are properly handled, stored, packaged, loaded

and carried on board an aircraft in compliance with 49 CFR parts 171 through 180;

(C) That the requirements for Notice to the Pilot in Command (49 CFR 175.33) are complied with; and

(D) That aircraft replacement parts, consumable materials or other items regulated by 49 CFR parts 171 through 180 are properly handled, packaged, and transported.

(q) Procedures for the evacuation of persons who may need the assistance of another person to move expeditiously to an exit if an emergency occurs; and

(r) If required by § 135.385, an approved Destination Airport Analysis establishing runway safety margins at destination airports, taking into account the following factors as supported by published aircraft performance data supplied by the aircraft manufacturer for the appropriate runway conditions--

(1) Pilot qualifications and experience;

(2) Aircraft performance data to include normal, abnormal and emergency procedures as supplied by the aircraft manufacturer;

(3) Airport facilities and topography;

(4) Runway conditions (including contamination);

(5) Airport or area weather reporting;

(6) Appropriate additional runway safety margins, if required;

(7) Airplane inoperative equipment;

(8) Environmental conditions; and

(9) Other criteria affecting aircraft performance.

(s) Other procedures and policy instructions regarding the certificate holder's operations issued by the certificate holder.