and environmental consultants to draft noise restrictions and to prepare analyses which are most likely to satisfy the new regulations and to pass FAA muster. Early coordination among legal and scientific experts and local land use planners can be instrumental in developing a noise or access restriction which is likely to be approved by the FAA and which minimizes the risk of later challenge by the agency or aircraft operators.

Footnotes

[1] Airport Noise and Capacity Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (''Noise Act'').

[2] Transition to an All Stage 3 Fleet Operating in the 48 Contiguous United States and the District of Columbia, 56 Fed. Reg. 48,628 (1991) (to be codified at 14 C.F.R. Part 91); Notice and Approval of Airport Noise and Access Restrictions, 56 Fed. Reg. 48,661 (1991) (to be codified at 14 C.F.R. Part 161).

[3] 14 C.F.R. Part 36.

[4] Id. Part 161.

[5] Id. § 161.5.

[6] Id. Part 150.

[7] 56 Fed. Reg. at 48,673.

[8] 14 C.F.R. § 161.5.

[9] Id. § 161.6.

[10] Id. § 161.11.

[11] ''Noise or access restrictions'' are restrictions that limit or control the operation of Stage 2 or Stage 3 aircraft. See 56 Fed. Reg. at 48,663-664 (analyzes possible interpretations of ''noise or access restriction'' and explains definition adopted in the final regulations).

[12] 14 C.F.R. § 161.103.

[13] Id.

[14] Id. § 161.105.

[15] Noise Act § 9304(h), 49 U.S.C. app. § 2153(h).

[16] Id.

[17] See Western Airlines, Inc. v. Port Auth. of New York and New Jersey, 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988); United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983); Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981); National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976).

[18] Alaska Airlines, Inc. v. City of Long Beach, No. 89-55278, 1991 U.S. App. LEXIS 24918 (9th Cir. Cal. Oct. 24, 1991), amd., 1992 U.S. App. LEXIS 105 (9th Cir. Cal. Jan.9,1992).

[19] See, e.g., Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981) (upholding and striking down portions of a local noise rule).

[20] See cases cited in note 17.

[21] Alaska Airlines, supra note 18.

[22] Noise Act § 9304(c), 49 U.S.C. app. § 2153(c).

[23] There are several exceptions that apply to qualifying airports listed in Section 161.7 of the regulations. In addition, this Subpart does not apply to Stage 2 restrictions contained in an agreement, so long as the restriction does not apply to aircraft operators that were not a party to the agreement. 14 C.F.R. § 161.201(b).

[24] Id. § 161.205.

[25] Id. § 161.203.

[26] An airport operator may opt to use the notice procedures set forth in 14 C.F.R. Part 150 of the FAA regulations instead of the subsection C notice requirements. See id. § 161.211.

[27] Id. § 161.203

[28] Id. § 161.211.

[29] Id. § 161.205.

[30] Id. Part 13.

[31] Id. § 13.5.

[32] Id. See City & County of San Francisco v. Federal Aviation Admin., 942 F.2d 1391 (9th Cir. 1991), cert. filed (Dec. 19, 1991).

[33] See 56 Fed. Reg. at 48,662.

[34] 14 C.F.R. § 161.301(c).

[35] Noise Act § 9304, 49 U.S.C. app. § 2153(d)(2). See 14 C.F.R. § 161.305 (establishes specific requirements to demonstrate that the statutory conditions have been met).

[36] 14 C.F.R. § 161.305.

[37] For example, the final environmental impact statement for a change in departure procedures for Boston's Logan International Airport examines costs and benefits. See FAA, "Final Environmental Impact Statement for Departure Procedures, Runway 22 Right, Logan International Airport," (FAA Doc. No. ANE-500-79-3) (March 1980).

[38] 14 C.F.R. § 161.303.

[39] Id. § 161.321(a).

[40] Id. § 161.307.

Considerations in Adopting Noise and Access Restrictions

The passage of the Noise Act has increased public awareness of airport noise problems and of the opportunities for airports to help in reducing noise impacts on airport neighbors. Consequently, airports will see increasing local pressure to enact noise regulations which demonstrate the proprietor's interest in resolving noise problems locally.

In the past, many airports could rely upon their Part 150 Noise Compatibility Programs to satisfy local pressure for noise compatibility planning. Those efforts may no longer be viewed as adequate as communities come to recognize the value of restrictions on aircraft operations as a complement to effective land use planning.

Airport proprietors should give serious consideration to the benefits and risks of using federal funds for developing Part 150 Noise Compatibility Programs. The FAA has stated that federal funds will be available for conducting the analysis required for enactment of a noise or access restriction so long as the restriction is incorporated into a Part 150 Noise Compatibility Program. Although the availability of federal funds makes it attractive for an airport proprietor to incorporate a noise or access restriction into its Part 150 Program, proprietors should pay careful attention to the risks inherent in incorporating Stage 2 restrictions in Part 150 Programs.

Where it is not advisable to incorporate a noise restriction in a Part 150 Noise Compatibility Program, other creative sources of funding also should be explored. Bond funds, federal planning grant monies, or passenger facility charges might be used to finance the studies necessary to implement either Stage 2 or Stage 3 restrictions.

As discussed earlier, the absence of guidance about actual analytic requirements is likely to cause frustration for the first airport proprietors who decide to restrict airport operations. Only experience will reveal the extent of the requirements.

Proprietors would be well advised to assemble a coordinated team of legal, noise, economic,

Aircraft operators can choose which schedule to follow at each compliance date. An operator is permitted to alternate between the phase-out (Stage 2 fleet reduction) or phase-in (Stage 3 fleet composition) methods, so long as the operator meets the compliance requirements for that schedule at each interim deadline.[59]

Special provisions are included for new entrants who initiate service on or before December 31, 1994. New entrants are not required to maintain a specific percentage of Stage 3 aircraft when service is initiated.[60] They must, however, comply with interim deadlines that require a gradual increase in the percentage of Stage 3 aircraft. As of December 31, 1994, at least 25 percent of the fleet must comply with Stage 3 noise levels. The fleet must include 50 percent Stage 3 aircraft by December 31, 1996 and 75 percent Stage 3 aircraft by December 31, 1998.[61] Like all other operators, new entrants must operate an entirely Stage 3 fleet by December 31, 1999.

The regulations permit an aircraft operator to apply for a waiver of the interim deadlines.[62] Operators may request a waiver when it would be financially onerous, physically impossible, or technologically infeasible to comply with the interim compliance schedule. The FAA also will consider applications for waiver which demonstrate that meeting the requirement would have an adverse effect on competition or service to small communities. An applicant must demonstrate that granting the waiver would be in the public interest and must submit evidence of its good faith efforts to achieve compliance. Requests for a waiver from an interim deadline will be published in the Federal Register and the public will have an opportunity to comment.

In addition to waiver of the interim deadlines, an aircraft operator also can request a waiver of the final 1999 deadline. To qualify for a waiver, an operator's fleet must be composed of 85 percent Stage 3 aircraft by July 1, 1999. Waivers from the December 31, 1999 deadline will be granted if an aircraft operator can demonstrate that it would be in the public interest to permit an extension.[63] The FAA has not provided any guidance on how it will evaluate requests for waiver of the interim or 1999 deadline or on what it will consider to be the "public interest" for the purpose of such waivers.

In order to ensure that aircraft operators cannot purchase additional Stage 2 aircraft while other operators are phasing-out these older aircraft, the regulations include a non-addition rule. The non-addition rule prohibits the operation of any Stage 2 aircraft which was purchased from a non-American entity after November 5, 1990.[64]

[41] Id. § 161.311. The FAA stated that "airport operators are encouraged to take the initiative by proposing alternative measures, including partial implementation of any proposal, with order of preference indicated for consideration in their application." 56 Fed. Reg. at 48,662.

[42] The FAA plans to return incomplete materials to applicants as often as necessary and will only evaluate an application when it is complete. 14 C.F.R. § 161.313.

[43] Noise Act § 9306, 49 U.S.C. app. § 2155.

[44] 14 C.F.R. § 161.313.

[45] Id. § 161.313.

[46] See id. § 161.313 (establishes guidelines that the FAA must follow to approve restrictions).

[47] Id. §§ 161.313, 161.317.

[48] Id. § 161.317.

[49] Requests submitted before two years have elapsed will be addressed on a case-by-case basis. See id. § 161.403(c).

[50] Id. § 161.409(c).

[51] Id. § 161.501(a).

[52] Id. § 161.503.

[53] Id. § 161.505.

[54] Id. § 161.501.

[55] Noise Act § 9308, 49 U.S.C. app. §2157.

[56] This option was included in the proposed regulations and was adopted with minor modifications in the final rule. See 14 C.F.R. § 91.865.

[57] Id. § 91.861(a).

[58] Id.

[59] The FAA stated that "to maximize flexibility, operators are allowed to choose the method that best suits its circumstances at each compliance date." 56 Fed. Reg. at 48,636.

[60] 14 C.F.R. § 91.867(a)(1).

[61] Id. § 91.867(a).

[62] Id. § 91.871.

[63] The Secretary of Transportation will consider the effect of granting a waiver on competition in the air carrier industry, the effect on small community air service, and other relevant information. Id. § 91.873(d).

[64] Id. § 91.855.

The alternative phase-in compliance schedule measures compliance by the percentage of Stage 3 aircraft in an aircraft operator's fleet. The schedule for compliance under both the phase-in and phase-out alternatives is shown in Table 1.

If an aircraft operator currently operates with less than a 60 percent Stage 2 fleet, it probably will choose the phase-in schedule; if it operates with greater than 60 percent Stage 2 aircraft, it probably will use the phase-out schedule.

Currently, the United States domestic fleet is composed of approximately 45 per cent Stage 3 aircraft.

TABLE 1

SCHEDULE OF PHASE-OUT AND PHASE-IN ALTERNATIVES

COMPLIANCE DATE	PHASE-OUT SCHEDULE	PHASE-IN SCHEDULE
	maximum percentage of base level Stage 2 aircraft	**minimum percentage of Stage 3 aircraft**
December 31, 1994	75 percent	55 percent
December 31, 1996	50 percent	65 percent
December 31, 1998	25 percent	75 percent
December 31, 1999	0 percent	100 percent

Phase-out of Stage 2 Aircraft: Amended Part 91 of FAA Regulations

In addition to regulating local restrictions on Stage 2 and Stage 3 aircraft, the Noise Act establishes a national program for the gradual elimination of Stage 2 aircraft from the commercial aircraft fleet in the United States.[55] There has been considerable controversy over how and when Stage 2 aircraft should be phased-out of operation, and what the impact of a phase-out will be on the commercial aviation industry. In drafting regulations to implement this portion of the Noise Act, the FAA attempted to balance the financial needs of the aviation industry with the Congressional mandate to establish a schedule for phasing-out Stage 2 aircraft.

Although the Noise Act speaks only in terms of phase-out of Stage 2 aircraft operations, the FAA determined that aircraft operations would have the option to choose between phase-out of Stage 2 aircraft and phase-in of Stage 3 aircraft. Regardless of whether an aircraft operator chooses to phase-out or phase-in aircraft, the regulations require all operators to use an exclusively Stage 3 fleet by the statutory phase-out deadline of December 31, 1999.

The compliance schedule for phase-out of Stage 2 aircraft requires an aircraft operator to reduce a specific percentage of its Stage 2 fleet by certain deadlines.[56] The compliance schedule is based upon an aircraft operator's base level of aircraft, which is the number of owned or leased Stage 2 aircraft that were listed on the operator's operations specifications on any one day between January 1, 1990 and July 1, 1991.[57] An aircraft operator may select the date it uses to establish its base level of Stage 2 aircraft.[58]

§ 2153. Noise and access restriction reviews

(a) In general

(1) Establishment of program

The national aviation noise policy to be established under this chapter shall require the establishment, by regulation, in accordance with the provisions of this section of a national program for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft. Such program shall provide for adequate public notice and comment opportunities on such restrictions.

(2) Limitations on applicability

(A) Applicability date for Stage 2 aircraft

With respect to Stage 2 aircraft, the requirements set forth in subsection (c) of this section shall apply only to restrictions proposed after October 1, 1990.

(B) Applicability date for stage 3 aircraft

With respect to Stage 3 aircraft, the requirements set forth in subsections (b) and (d) of this section shall apply only to restrictions that first become effective after October 1, 1990.

(C) Specific exemptions

Subsections (b), (c), and (d) of this section shall not apply to—

(i) a local action to enforce a negotiated or executed airport aircraft noise or access agreement between the airport operator and the aircraft operator in effect on November 5, 1990;

(ii) a local action to enforce a negotiated or executed airport aircraft noise or access restriction the airport operator and the aircraft operators agreed to before November 5, 1990;

(iii) an intergovernmental agreement including airport aircraft noise or access restriction in effect on November 5, 1990;

(iv) a subsequent amendment to an airport aircraft noise or access agreement or restriction in effect on November 5, 1990, that does not reduce or limit aircraft operations or affect aircraft safety;

(v)(I) a restriction which was adopted by an airport operator on or before October 1, 1990, and which was stayed as of October 1, 1990, by a court order or as a result of litigation, if such restriction or a part thereof is subsequently allowed by a court to take effect; and

(II) in any case in which a restriction described in subclause (I) is either partially or totally disallowed by a court, any new restriction imposed by an airport operator to replace such disallowed restriction if such new restriction would not prohibit aircraft operations in effect as of November 5, 1990; and

(vi) a local action which represents the adoption of the final portion of a program of a staged airport aircraft noise or access restriction where the initial portion of such program was adopted during calendar year 1988 and was in effect on November 5, 1990.

(D) Additional working group exemptions

Subsections (b) and (d) of this section shall not apply where the Federal Aviation Administration has prior to November 5, 1990, formed a working group (outside the process established by part 150 of title 14 of the Code of Federal Regulations) with a local airport operator to examine the noise impact of air traffic control procedure changes. In any case in which an agreement relating to noise reductions at such airport is entered into

between the airport proprietor and an air carrier or air carrier constituting a majority of the air carrier users of such airport, subsections (b) and (d) of this section shall apply only to local actions to enforce such agreement.

(b) Limitation on stage 3 aircraft restrictions

No airport noise or access restriction on the operation of a Stage 3 aircraft, including but not limited to—

(1) a restriction as to noise levels generated on either a single event or cumulative basis;

(2) a limit, direct or indirect, on the total number of Stage 3 aircraft operations;

(3) a noise budget or noise allocation program which would include Stage 3 aircraft;

(4) a restriction imposing limits on hours of operations; and

(5) any other limit on Stage 3 aircraft;

shall be effective unless it has been agreed to by the airport proprietor and all aircraft operators or has been submitted to and approved by the Secretary pursuant to an airport or aircraft operator's request for approval in accordance with the program established pursuant to this section.

(c) Limitation on stage 2 aircraft restrictions

No airport noise or access restriction shall include a restriction on operations of Stage 2 aircraft, unless the airport operator publishes the proposed noise or access restriction and prepares and makes available for public comment at least 180 days before the effective date of the restriction—

(1) an analysis of the anticipated or actual costs and benefits of the existing or proposed noise or access restriction;

(2) a description of alternative restrictions; and

(3) a description of the alternative measures considered which do not involve aircraft restrictions, and a comparison of the costs and benefits of such alternative measures to the costs and benefits of the proposed noise or access restriction.

(d) Approval of stage 3 aircraft restrictions

(1) In general

Not later than the 180th day after the date on which the Secretary receives an airport or aircraft operator's request for approval of a noise or access restriction on the operation of a Stage 3 aircraft, the Secretary shall approve or disapprove such request.

(2) Required findings

The Secretary shall not approve a noise or access restriction applying to Stage 3 aircraft operations unless the Secretary finds the following conditions to be supported by substantial evidence:

(A) The proposed restriction is reasonable, nonarbitrary, and nondiscriminatory.

(B) The proposed restriction does not create an undue burden on interstate or foreign commerce.

(C) The proposed restriction is not inconsistent with maintaining the safe and efficient utilization of the navigable airspace.

(D) The proposed restriction does not conflict with any existing Federal statute or regulation.

Sanctions for Noncompliance

The enforcement of the FAA regulations is based largely upon financial disincentives for violators. If an airport proprietor enacts a noise or access restriction in violation of the Noise Act or the FAA regulations, it could lose its eligibility for federal airport grant funds (under the Airport and Airway Improvement Act) and its authority to impose or collect passenger facility charges.[51]

The FAA has recognized the seriousness of the threat of withholding grant monies or declaring an airport ineligible to levy a passenger facility charge. Because bonds frequently are secured by such revenue, the FAA has acknowledged that liberal use of financial disincentives could produce undesirable effects on the marketability of airport bonds. Consequently, the FAA has established an informal resolution process to investigate possible violations of the regulations.[52] Formal proceedings will be initiated only if the FAA and the proprietor are unable to resolve potential violations through the informal process.[53] If, during either formal or informal proceedings, an airport proprietor commits in writing to rescind or permanently not to enforce a non-complying restriction, the FAA will remove the threat of losing federal funds and passenger facility charge authority.[54]

The sanctions have been designed so that inadvertent violations should not result in loss of federal funds or passenger facility charge authority. Except in unusual situations, the FAA has stated that it expects the informal negotiation process to resolve any potential violations without financial implications for an airport proprietor. The FAA has said that passenger facility charge authority will be endangered in only two situations: if a proprietor enacts (and refuses to rescind) a Stage 3 restriction without approval, or if it implements (and does not rescind) a Stage 2 restriction or negotiated agreement without public notice.

Re-evaluation of Stage 3 Restrictions

Because the noise environment around an airport can change over time, the FAA will entertain requests for re-evaluation of an approved noise or access restriction in limited circumstances. Anyone seeking a re-evaluation of an approved restriction must demonstrate that a revision of the restriction is warranted because there has been a change in the noise environment and that local attempts to revise the access restriction have been unsuccessful.

The FAA will entertain requests for re-evaluation only from aircraft operators. As a result, community groups or local governments are precluded from seeking a formal re-evaluation of Stage 3 restrictions.

The FAA will not consider a request for re-evaluation for at least two years after it approves a Stage 3 restriction.[49]

Requests for re-evaluation must include:

(1) a description of the restriction;

(2) data reflecting the quantified change in the noise environment;

(3) evidence that the restriction no longer meets at least one of the six statutory requirements; and

(4) evidence that the requester unsuccessfully has attempted to resolve the dispute with the airport proprietor.

The FAA will make a preliminary determination of whether re-evaluation is justified. The regulations contain a complicated procedure for notice and consideration of a request for re-evaluation which parallels in most respects the procedure for approval of a Stage 3 restriction in the first instance. The party requesting re-evaluation bears the burden of showing that there is substantial evidence to justify a re-evaluation of the restriction.[50]

(E) There has been an adequate opportunity for public comment with respect to the restriction.

(F) The proposed restriction does not create an undue burden on the national aviation system.

(e) Ineligibility for PFC's and AIP funds

Sponsors of facilities operating under airport aircraft noise or access restrictions on Stage 3 aircraft operations that first became effective after October 1, 1990, shall not be eligible to impose a passenger facility charge under section 1353(e) of this Appendix and shall not be eligible for grants authorized by section 2204 of this Appendix after the 90th day following the date on which the Secretary issues a final rule under section 2153(a) of this Appendix, unless such restrictions have been agreed to by the airport proprietor and aircraft operators or the Secretary has approved the restrictions under this chapter or the restrictions have been rescinded.

(f) Reevaluation

The Secretary may reevaluate any noise restrictions previously agreed to or approved under subsection (d) of this section upon the request of any aircraft operator able to demonstrate to the satisfaction of the Secretary that there has been a change in the noise environment of the affected airport and that a review and reevaluation pursuant to the criteria established under subsection (d) of this section of the previously approved or agreed to noise restriction is therefore justified.

(g) Procedures for reevaluation

The Secretary shall establish by regulation procedures under which reevaluations under subsection (f) of this section are to be accomplished. A reevaluation under subsection (f) of this section of a restriction shall not occur less than 2 years after a determination under subsection (d) of this section has been made with respect to such restriction.

(h) Effect on existing law

Except to the extent required by the application of the provisions of this section, nothing in this chapter shall be deemed to eliminate, invalidate, or supersede—

(1) existing law with respect to airport noise or access restrictions by local authorities;

(2) any proposed airport noise or access regulation at a general aviation airport where the airport proprietor has formally initiated a regulatory or legislative process on or before October 1, 1990; and

(3) the authority of the Secretary to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief.

(Pub.L. 101–508, Title IX, § 9304, Nov. 5, 1990, 104 Stat. 1388–379.)

§ 2154. Determination regarding noise restrictions on certain stage 2 aircraft

The Secretary shall determine by a study the applicability of subsections (a), (b), (c), and (d) of section 2153 of this Appendix to noise restrictions on the operations of Stage 2 aircraft weighing less than 75,000 pounds. In making such determination, the Secretary shall consider—

(1) noise levels produced by such aircraft relative to other aircraft;

(2) the benefits to general aviation and the need for efficiency in the national air transportation system;

(3) the differences in the nature of operations at airports and the areas immediately surrounding such airports;

(4) international standards and accords with respect to aircraft noise; and

(5) such other factors which the Secretary deems necessary.

(Pub.L. 101–508, Title IX, § 9305, Nov. 5, 1990, 104 Stat. 1388–382.)

Historical and Statutory Notes

Legislative History. For legislative history and purpose of Pub.L. 101-508, see 1990 U.S.Code Cong. and Adm.News, p. 2017.

§ 2155. Federal liability for noise damages

In the event that a proposed airport aircraft noise or access restriction is disapproved, the Federal Government shall assume liability for noise damages only to the extent that a taking has occurred as a direct result of such disapproval. Action for the resolution of such a case shall be brought solely in the United States Claims Court.

(Pub.L. 101-508, Title IX, § 9306, Nov. 5, 1990, 104 Stat. 1388-382.)

Historical and Statutory Notes

Legislative History. For legislative history and purpose of Pub.L. 101-508, see 1990 U.S.Code Cong. and Adm.News, p. 2017.

§ 2156. Limitation on Airport Improvement Program Revenue

Under no conditions shall any airport receive revenues under the provisions of the Airport and Airway Improvement Act of 1982 [49 App.U.S.C.A. § 2201 et seq.] or impose or collect a passenger facility charge under section 1353(e) of this Appendix unless the Secretary assures that the airport is not imposing any noise or access restriction not in compliance with this chapter.

(Pub.L. 101-508, Title IX, § 9307, Nov. 5, 1990, 104 Stat. 1388-382.)

Historical and Statutory Notes

References in Text. The Airport and Airway Improvement Act of 1982, referred to in text, is Pub.L. 97-248, Title V, Sept. 3, 1982, 96 Stat. 671, as amended, which is classified principally to chapter 31 (§ 2201 et seq.) of this Appendix. For complete classification of this Act to the Code, see Short Title note set out under section 2201 of this Appendix and Tables.

Legislative History. For legislative history and purpose of Pub.L. 101-508, see 1990 U.S.Code Cong. and Adm.News, p. 2017.

§ 2157. Prohibition on operation of certain aircraft not complying with stage 3 noise levels

(a) General rule

After December 31, 1999, no person may operate to or from an airport in the United States any civil subsonic turbojet aircraft with a maximum weight of more than 75,000 pounds unless such aircraft complies with the Stage 3 noise levels, as determined by the Secretary.

(b) Waiver

(1) Application

If, by July 1, 1999, at least 85 percent of the aircraft used by an air carrier to provide air transportation comply with the Stage 3 noise levels, such carrier may apply for a waiver of the prohibition set forth in subsection (a) of this section for the remaining 15 or less percent of the aircraft used by the carrier to provide air transportation. Such application must be filed with the Secretary no later than January 1, 1999, and must include a plan with firm orders for making all aircraft used by the air carrier to provide air transportation to comply with such noise levels not later than December 31, 2003.

tive to submit a perfunctory proposal which the proprietor knows will be disapproved. The regulations, however, address this situation by providing that the FAA will first determine whether an application is complete.[44] If an application is not complete, the FAA will return it to the proprietor without approval or disapproval. Although the FAA will return an application only twice for substantive revisions,[45] it will return the proposal indefinitely if the proprietor's environmental documentation is incomplete.

In order to minimize its liability, the FAA may be reluctant to disapprove a proposed noise and access restriction in its entirety. Instead, the FAA may either approve only selected elements of a proposal or return an application to the proprietor, claiming that it is incomplete. In both situations, it may be difficult for a litigant to prove damages as a direct result of FAA action.

Once an application is complete, the FAA will publish notice of the proposed restriction in the Federal Register.[46] The public will then be given another opportunity to comment before the FAA renders its decision. The FAA has 180 days in which to approve or disapprove the proposal. That 180-day clock begins to run from the date that the application was completed.[47] The final decision will be published in the Federal Register.

If a proposed restriction affects both Stage 2 and Stage 3 aircraft, the FAA says that it will review only those portions of the proposal which apply to Stage 3 aircraft. But, as discussed above in the context of Part 150 Programs, it appears that the FAA may informally review Stage 2 restrictions which are intertwined with Stage 3 restrictions.

The FAA has provided very little guidance on how it will evaluate proposed Stage 3 restrictions. The Noise Act allows the FAA to approve a proposal only if there is substantial evidence to support each of the six required conditions described above. The FAA has stated that the applicant -- and not the FAA -- has the burden of providing that evidence.[48] Beyond that, however, the agency has offered little insight into how it will review these proposals. A number of important questions will remain unanswered until the agency receives the first proposed noise and access restriction; the FAA has indicated that it is does not plan to issue further guidance discussing its approval process.

procedures set forth in the FAA's Part 150 regulations.[39] An airport proprietor must establish a public docket or similar mechanism for recording public comments on the proposed restriction.[40]

The FAA must approve any Stage 3 restriction, just as it must approve an airport proprietor's Part 150 Noise Compatibility Program. Consequently, most of the arguments against including a Stage 2 restriction in a Part 150 Program do not apply to a Stage 3 restriction. A proprietor can realize both cost and time savings by including a Stage 3 restriction in its Part 150 Program.

An airport proprietor has the option of requesting that the FAA review its proposal either in its entirety or as separable parts.[41] If a proprietor requests approval of only the entire proposal, it runs a risk that the FAA may disapprove the proposed restriction if even only one element is objectionable. Therefore, if a proprietor so requests, the FAA will approve those portions of the proposal which satisfy the regulatory requirements. In order to avoid the potential rejection of all the elements of a restriction because only one element is objectionable, the FAA has encouraged proprietors to seek partial approval of proposed restrictions, to submit alternative proposals, and to prioritize the elements of a proposed restriction in the event that only part of a proposal can be approved.

Within 30 days of receipt of the application materials, the FAA will determine whether the application is complete and will notify the airport proprietor accordingly.[42]

FAA disapproval may expose the federal government to liability for noise damages. If the FAA disapproves a proposed Stage 3 restriction, the Noise Act provides that the federal government will be liable for damages if a nearby property owner can prove that its property has been taken as a direct result of the FAA's disapproval of the proposed restriction.[43] It is likely to be very difficult for a property owner to prove that it has suffered damages as a "direct result" of the FAA's disapproval. Nevertheless, this provision of the Noise Act may make the FAA reluctant to disapprove a proposed Stage 3 restriction in its entirety.

The federal liability provision of the Noise Act has several implications for proprietors considering Stage 3 restrictions. To increase the probability that the federal government -- instead of the airport proprietor -- would be found liable for noise damages, it would appear that airport proprietors have an incen-

(2) Granting of waiver

The Secretary may grant a waiver under this subsection if the Secretary finds that granting such waiver is in the public interest. In making such a finding, the Secretary shall consider the effect of granting such waiver on competition in air carrier industry and on small community air service.

(3) Limitation

A waiver granted under this subsection may not permit the operation of Stage 2 aircraft in the United States after December 31, 2003.

(c) Compliance schedule

The Secretary shall, by regulation, establish a schedule for phased-in compliance with the prohibition set forth in subsection (a) of this section. The period of such phase-in shall begin on November 16, 1990, and end before December 31, 1999. Such regulations shall establish interim compliance dates. Such schedule for phased-in compliance shall be based upon a detailed economic analysis of the impact of the phaseout date for Stage 2 aircraft on competition in the airline industry, including the ability of air carriers to achieve capacity growth consistent with the projected rates of growth for the airline industry, the impact of competition within the airline and air cargo industries, the impact on nonhub and small community air service, and the impact on new entry into the airline industry, and on an analysis of the impact of aircraft noise on persons residing near airports.

(d) Exemption for noncontiguous air service

This section and section 2158 of this Appendix shall not apply to aircraft which are used solely to provide air transportation outside the 48 contiguous States. Any civil subsonic turbojet aircraft with a maximum weight of more than 75,000 pounds which is imported into a noncontiguous State or a territory or possession of the United States on or after November 5, 1990, may not be used to provide air transportation in the 48 contiguous States unless such aircraft complies with the Stage 3 noise levels.

(e) Violations

Violations of this section and section 2158 of this Appendix and regulations issued to carry out such sections shall be subject to the same civil penalties and procedures as are provided by title IX of the Federal Aviation Act of 1958 [49 App.U.S.C.A. § 1471 et seq.] for violations of title VI [49 App.U.S.C.A. § 1421 et seq.].

(f) Judicial review

Actions taken by the Secretary under this section and section 2158 of this Appendix shall be subject to judicial review in accordance with section 1006 of the Federal Aviation Act of 1958 [49 App.U.S.C.A. § 1486].

(g) Reports

Beginning with calendar year 1992, each air carrier shall submit to the Secretary an annual report on the progress such carrier is making toward complying with the requirements of this section (including the regulations issued to carry out this section), and the Secretary shall transmit to Congress an annual report on the progress being made toward such compliance.

(h) Definitions

As used in this section, the following definitions apply:

(1) Air carrier; air transportation; United States

The terms "air carrier", "air transportation", and "United States" have the meanings such terms have under section 101 of the Federal Aviation Act of 1958 [49 App.U.S.C.A. § 1301].

(2) Stage 3 noise levels

The term "Stage 3 noise levels" means the Stage 3 noise levels set forth in part 36 of title 14, Code of Federal Regulations, as in effect on November 5, 1990.

(Pub.L. 101-508, Title IX, § 9308, Nov. 5, 1990, 104 Stat. 1388-382.)

Historical and Statutory Notes

References in Text. The Federal Aviation Act of 1958, referred to in subsecs. (e), (f), and (h), is Pub.L. 85-726, Aug. 23, 1958, 72 Stat. 731, as amended, which is classified generally to chapter 20 (§ 1301 et seq.) of this Appendix.

Legislative History. For legislative history and purpose of Pub.L. 101-508, see 1990 U.S.Code Cong. and Adm.News, p. 2017.

§ 2158. Nonaddition rule

(a) General rule

Except as provided in subsection (b) of this section, no person may operate a civil subsonic turbojet aircraft with a maximum weight of more than 75,000 pounds which is imported into the United States on or after November 5, 1990, unless—

(1) it complies with the Stage 3 noise levels, or

(2) it was purchased by the person who imports the aircraft into the United States under a written contract executed before November 5, 1990.

(b) Exemption for complying modifications

The Secretary may provide an exemption from the requirements of subsection (a) of this section to permit a person to obtain modifications to an aircraft to meet the Stage 3 noise levels.

(c) Limitation on statutory construction

For the purposes of this section, an aircraft shall not be considered to have been imported into the United States if such aircraft—

(1) on November 5, 1990, is owned—

(A) by a corporation, trust, or partnership which is organized under the laws of the United States or any State (including the District of Columbia);

(B) by an individual who is a citizen of the United States; or

(C) by any entity which is owned or controlled by a corporation, trust, partnership, or individual described in this paragraph; and

(2) enters into the United States not later than 6 months after the date of the expiration of a lease agreement (including any extensions thereof) between an owner described in paragraph (1) and a foreign air carrier.

(Pub.L. 101-508, Title IX, § 9309, Nov. 5, 1990, 104 Stat. 1388-384.)

(5) the applicant has provided adequate opportunity for public comment; and

(6) the proposed restriction does not create an undue burden on the national aviation system.[35]

The FAA regulations explain the type of analysis which an airport must complete in order to satisfy the six statutory requirements set forth in the Noise Act.[36]

The foundation for all the analytical requirements is that an airport proprietor can implement a Stage 3 restriction only if the benefits of the restriction outweigh its costs. Measuring costs and benefits in this context is a daunting task. The noise benefits must be decreases in noise exposure above an L_{dn} level of 65 dBA in areas with noise sensitive land uses (e.g., homes, schools, churches, or parks). The FAA has made clear that it will consider a decrease in exposure to be a benefit only under these circumstances. On the opposite side of the cost-benefit equation, the costs that must be considered must be financial.

There is no accepted standard for comparing noise benefits with financial costs. That comparison always is subjective and thus subject to criticism. Neither the Part 150 nor the Part 161 regulations provide any guidance about these analyses. It is probable that the FAA will require analysis which is more rigorous than found in typical Part 150 studies.

In the absence of guidance on how to compare costs and benefits, the first proprietors will be working in uncharted territory -- much as was the case with the earliest environmental assessments and environmental impact statements. In fact, the analysis in an environmental impact statement for a noise abatement procedure may be the best initial model.[37] Eventually, only the pattern of successes and failures of initial analyses will define what the FAA means by "complete analysis" of costs and benefits.

In addition to collecting exhaustive data on the environmental, economic, and legal costs and benefits of a proposed Stage 3 restriction, an airport proprietor must engage in a detailed public notice and information process.[38] As with Stage 2 restrictions, a proprietor has the choice of using either the notice procedures outlined in the Part 161 regulations or the

Noise or Access Restrictions on Stage 3 Aircraft

While the Noise Act and FAA regulations provide a relatively predictable and straightforward process for enactment of local restrictions on Stage 2 aircraft operations, both the Act and regulations impose substantial impediments to local restrictions on Stage 3 aircraft. No local Stage 3 restriction may become effective unless it has been submitted to, and approved by, the FAA. This is a significant change in the law. The FAA will review only those restrictions proposed by airport proprietors; local governments and community organizations cannot propose such restrictions.[34]

The process for FAA review and approval of proposed restrictions on Stage 3 aircraft has three principal elements:

(1) collecting data and analysis to justify the restriction and to explain its environmental and economic impact;

(2) notifying the public and allowing time for comment on the proposed restriction; and

(3) submission of the restriction for FAA review and approval.

An airport cannot implement a Stage 3 restriction unless it complies with all three elements. First, and most importantly, an airport proprietor must demonstrate that a proposed Stage 3 restriction satisfies six conditions which are set forth in the Noise Act. A proprietor must collect substantial evidence to prove that:

(1) the proposed restriction is reasonable, nonarbitrary and nondiscriminatory;

(2) the proposed restriction would not create an undue burden on interstate or foreign commerce;

(3) the proposed restriction would maintain safe and efficient use of navigable airspace;

(4) the proposed restriction would not conflict with any existing federal statute or regulation;

PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 is revised to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; 49 U.S.C. App. 2157, 2158; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 et. seq.; E.O. 11514; 49 U.S.C. 106(g).

2. Section 91.801 is amended by adding a new paragraph (c) to read as follows:

§ 91.801 Applicability: Relation to part 36.

* * * * *

(c) Sections 91.851 through 91.875 of this subpart prescribe operating noise limits and related requirements that apply to any civil subsonic turbojet airplane with a maximum certificated weight of more than 75,000 pounds operating to or from an airport in the 48 contiguous United States and the District of Columbia under this part, part 121, 125, 129, or 135 of this chapter on and after September 25, 1991.

3. New §§ 91.851, 91.853, 91.855, 91.857, 91.859, 91.861, 91.863, 91.865, 91.867, 91.869, 91.871, 91.873 and 91.875 are added to read as follows:

§ 91.851 Definitions.

For the purposes of § 91.851 through 91.875 of this subpart:

Contiguous United States means the area encompassed by the 48 contiguous United States and the District of Columbia.

Fleet means those civil subsonic turbojet airplanes with a maximum certificated weight of more than 75,000 pounds that are listed on an operator's operations specifications as eligible for operation in the contiguous United States.

Import means a change in ownership of an airplane from a non-U.S. person to a U.S. person when the airplane is brought into the United States for operation.

Operations specifications means an enumeration of airplanes by type, model, series, and serial number operated by the operator or foreign air carrier on a given day, regardless of how or whether such airplanes are formally listed or designated by the operator.

Owner means any person that has indicia of ownership sufficient to register the airplane in the United States pursuant to part 47 of this chapter.

New entrant means an air carrier or foreign air carrier that, on or before November 5, 1990, did not conduct operations under part 121, 125, 129, or 135 of this chapter using an airplane covered by this subpart to or from any airport in the contiguous United States, but that initiates such operation after that date.

Stage 2 noise levels mean the requirements for Stage 2 noise levels as defined in part 36 of this chapter in effect on November 5, 1990.

Stage 3 noise levels mean the requirements for Stage 3 noise levels as defined in part 36 of this chapter in effect on November 5, 1990.

Stage 2 airplane means a civil subsonic turbojet airplane with a maximum certificated weight of 75,000 pounds or more that complies with Stage 2 noise levels as defined in part 36 of this chapter.

Stage 3 airplane means a civil subsonic turbojet airplane with a maximum certificated weight of 75,000 pounds or more that complies with Stage 3 noise levels as defined in part 36 of this chapter.

§ 91.853 Final compliance: Civil subsonic airplanes.

Except as provided in § 91.873, after December 31, 1999, no person shall operate to or from any airport in the contiguous United States any airplane subject to § 91.801(c) of this subpart, unless that airplane has been shown to comply with Stage 3 noise levels.

§ 91.855 Entry and nonaddition rule.

No person may operate any airplane subject to § 91.801(c) of this subpart to or from an airport in the contiguous United States unless one or more of the following apply:

(a) The airplane complies with Stage 3 noise levels.

(b) The airplane complies with Stage 2 noise levels and was owned by a U.S. person on and since November 5, 1990. Stage 2 airplanes that meet these criteria and are leased to foreign airlines are also subject to the return provisions of paragraph (e) of this section.

(c) The airplane complies with Stage 2 noise levels, is owned by a non-U.S. person, and is the subject of a binding lease to a U.S. person effective before and on September 25, 1991. Any such airplane may be operated for the term of the lease in effect on that date, and any extensions thereof provided for in that lease.

(d) The airplane complies with Stage 2 noise levels and is operated by a foreign air carrier.

(e) The airplane complies with Stage 2 noise levels and is operated by a foreign operator other than for the purpose of foreign air commerce.

(f) The airplane complies with Stage 2 noise levels and—

(1) On November 5, 1990, was owned by:

(i) A corporation, trust, or partnership organized under the laws of the United States or any State (including individual States, territories, possessions, and the District of Columbia);

(ii) An individual who is a citizen of the United States; or

(iii) An entity owned or controlled by a corporation, trust partnership, or individual described in paragraph (g)(1)(i) or (ii) of this section; and

(2) Enters into the United States not later than 6 months after the expiration of a lease agreement (including any extensions thereof) between an owner described in paragraph (f)(1) of this section and a foreign airline.

(g) The airplane complies with Stage 2 noise levels and was purchased by the importer under a written contract executed before November 5, 1990.

(h) Any Stage 2 airplane described in this section is eligible for operation in the contiguous United States only as provided under § 91.865 or 91.867.

§ 91.857 Airplanes imported to points outside the contiguous United States.

An operator of a Stage 2 airplane that was imported into a noncontiguous State, territory, or possession of the United States on or after November 5, 1990, shall:

(a) Include in its operations specifications a statement that such airplane may not be used to provide air transportation to or from any airport in the contiguous United States.

(b) Obtain a special flight authorization to operate that airplane into the contiguous United States for the purpose of maintenance. The special flight authorization must include a statement indicating that this regulation is the basis for the authorization.

§ 91.859 Modification to meet Stage 3 noise levels.

For an airplane subject to § 91.801(c) of this subpart and otherwise prohibited from operation to or from an airport in the contiguous United States by § 91.855, any person may apply for a special flight authorization for that airplane to operate in the contiguous United States for the purpose of obtaining modifications to meet Stage 3 noise levels.

§ 91.861 Base level.

(a) U.S. Operators. The base level of a U.S. operator is equal to the number of owned or leased Stage 2 airplanes subject to § 91.801(c) of this subpart that were listed on that operator's operations specifications for operations to or from airports in the contiguous United States

on any one day selected by the operator during the period January 1, 1990, through July 1, 1991, plus or minus adjustments made pursuant to paragraphs (a) (1) and (2).

(1) The base level of a U.S. operator shall be increased by a number equal to the total of the following—

(i) The number of Stage 2 airplanes returned to service in the United States pursuant to § 91.855(f);

(ii) The number of Stage 2 airplanes purchased pursuant to § 91.855(g); and

(iii) Any U.S. operator base level acquired with a Stage 2 airplane transferred from another person under § 91.863.

(2) The base level of a U.S. operator shall be decreased by the amount of U.S. operator base level transferred with the corresponding number of Stage 2 airplanes to another person under § 91.863.

(b) Foreign air carriers. The base level of a foreign air carrier is equal to the number of owned or leased Stage 2 airplanes on U.S. operations specifications on any one day during the period January 1, 1990, through July 1, 1991, plus or minus any adjustments to the base levels made pursuant to paragraphs (b) (1) and (2).

(1) The base level of a foreign air carrier shall be increased by the amount of foreign air carrier base level acquired with a Stage 2 airplane from another person under § 91.863.

(2) The base level of a foreign air carrier shall be decreased by the amount of foreign air carrier base level transferred with a Stage 2 airplane to another person under § 91.863.

(c) New entrants do not have a base level.

§ 91.863 Transfers of Stage 2 airplanes with base level.

(a) Stage 2 airplanes may be transferred with or without the corresponding amount of base level. Base level may not be transferred without the corresponding number of Stage 2 airplanes.

(b) No portion of a U.S. operator's base level established under § 91.861(a) may be used for operations by a foreign air carrier. No portion of a foreign air carrier's base level established under § 91.861(b) may be used for operations by a U.S. operator.

(c) Whenever a transfer of Stage 2 airplanes with base level occurs, the transferring and acquiring parties shall, within 10 days, jointly submit written notification of the transfer to the FAA, Office of Environment and Energy. Such notification shall state:

(1) The names of the transferring and acquiring parties;

(2) The name, address, and telephone number of the individual responsible for submitting the notification on behalf of the transferring and acquiring parties;

(3) The total number of Stage 2 airplanes transferred, listed by airplane type, model, series, and serial number;

(4) The corresponding amount of base level transferred and whether it is U.S. operator or foreign air carrier base level; and

(5) The effective date of the transaction.

(d) If, taken as a whole, a transaction or series of transactions made pursuant to this section does not produce an increase or decrease in the number of Stage 2 airplanes for either the acquiring or transferring operator, such transaction or series of transactions may not be used to establish compliance with the requirements of § 91.865.

§ 91.865 Phased compliance for operators with base level.

Except as provided in paragraph (a) of this section, each operator that operates an airplane under part 91, 121, 125, 129, or 135 of this chapter, regardless of the national registry of the airplane, shall comply with paragraph (b) or (d) of this section at each interim compliance date with regard to its subsonic airplane fleet covered by § 91.80l(c) of this subpart.

(a) This section does not apply to new entrants covered by § 91.867 or to foreign operators not engaged in foreign air commerce.

(b) Each operator that chooses to comply with this paragraph pursuant to any interim compliance requirement shall reduce the number of Stage 2 airplanes it operates that are eligible for operation in the contiguous United States to a maximum of:

(1) After December 31, 1994, 75 percent of the base level held by the operator;

(2) After December 31, 1996, 50 percent of the base level held by the operator;

(3) After December 31, 1998, 25 percent of the base level held by the operator.

(c) Except as provided under § 91.871, the number of Stage 2 airplanes that must be reduced at each compliance date contained in paragraph (b) of this section shall be determined by reference to the amount of base level held by the operator on that compliance date, as calculated under § 91.861.

(d) Each operator that chooses to comply with this paragraph pursuant to any interim compliance requirement shall operate a fleet that consists of:

(1) After December 31, 1994, not less than 55 percent Stage 3 airplanes;

(2) After December 31, 1996, not less than 65 percent Stage 3 airplanes;

(3) After December 31, 1998, not less than 75 percent Stage 3 airplanes.

(e) Calculations resulting in fractions may be rounded to permit the continued operation of the next whole number of Stage 2 airplanes.

§ 91.867 Phased compliance for new entrants.

(a) New entrant U.S. air carriers.

(1) A new entrant initiating operations under part 121, 125, or 135 of this chapter on or before December 31, 1994, may initiate service without regard to the percentage of its fleet composed of Stage 3 airplanes.

(2) After December 31, 1994, at least 25 percent of the fleet of a new entrant must comply with Stage 3 noise levels.

(3) After December 31, 1996, at least 50 percent of the fleet of a new entrant must comply with Stage 3 noise levels.

(4) After December 31, 1998, at least 75 percent of the fleet of a new entrant must comply with Stage 3 noise levels.

(b) New entrant foreign air carriers.

(1) A new entrant foreign air carrier initiating part 129 operations on or before December 31, 1994, may initiate service without regard to the percentage of its fleet composed of Stage 3 airplanes.

(2) After December 31, 1994, at least 25 percent of the fleet on U.S. operations specifications of a new entrant foreign air carrier must comply with Stage 3 noise levels.

(3) After December 31, 1996, at least 50 percent of the fleet on U.S. operations specifications of a new entrant foreign air carrier must comply with Stage 3 noise levels.

(4) After December 31, 1998, at least 75 percent of the fleet on U.S. operations specifications of a new entrant foreign air carrier must comply with Stage 3 noise levels.

(c) Calculations resulting in fractions may be rounded to permit the continued operation of the next whole number of Stage 2 airplanes.

§ 91.869 Carry-forward compliance.

(a) Any operator that exceeds the requirements of paragraph (b) of § 91.865 of this part on or before December 31, 1994, or on or before December 3, 1996, may claim a credit that may be applied at a subsequent interim compliance date.

(b) Any operator that eliminates or modifies more Stage 2 airplanes pursuant to § 91.865(b) than required as of December 31, 1994, or December 31, 1996, may count the number of additional Stage 2 airplanes reduced as a credit toward—

The statutory basis for the FAA's distinction is debatable since the statute does not make such a distinction. The legislative history of the Noise Act is of little help: although the House of Representatives did not intend to draw any distinction between local phase-outs and restrictions, the Senate may have intended such a distinction.[33] Because of the lack of clear legislative history supporting either view, it is likely that the FAA's view will be tested in court.

So long as the FAA insists upon distinguishing between local Stage 2 phase-outs and local Stage 2 restrictions, an airport would minimize its risk of an FAA challenge by developing a restriction which does not seek locally to accelerate the phase-out of Stage 2 aircraft or Stage 2 operations. The FAA is not as likely to object to restrictions which limit only the time and manner of Stage 2 operations.

Under the FAA's complaint procedure, any person can file a complaint with the FAA if he or she believes that an airport proprietor has violated any provision of any statute or regulation administered by the FAA.[31] The FAA is obligated to investigate the complaint and determine whether the allegations are correct. If the FAA finds that a violation has occurred, the FAA may issue whatever order is necessary, including one which would prohibit the airport from receiving federal funds or from collecting a passenger facility charge.[32]

If a proprietor includes a proposed Stage 2 restriction in its Part 150 Program, the FAA may use its review of the Part 150 Program effectively to invite a petition challenging the Stage 2 restriction. FAA officials have encouraged aircraft operators to use the agency's complaint procedure in appropriate circumstances since that procedure will be the principal enforcement tool against Stage 2 restrictions.

The Part 13 complaint procedure potentially could be a powerful tool for the FAA or aircraft operators to pressure a proprietor to rescind a Stage 2 restriction. Although the FAA may not initially review the substance of a proprietor's analysis, once a Part 13 complaint is filed, the agency will be required to determine both whether a proprietor's Stage 2 restriction complies with existing law and whether the proprietor has complied with the procedures set forth in these regulations.

The FAA also may seek to distinguish between local Stage 2 access restrictions and local Stage 2 phase-outs. The former are airport regulations which restrict the time or manner of operating Stage 2 aircraft but do not limit the total number of Stage 2 operations or Stage 2 aircraft which are allowed to use the airport. Phase-outs are regulations which require a decline in the total number of Stage 2 aircraft or operations at the airport. The FAA view apparently is that it is impermissible for an airport proprietor to impose a phase-out of Stage 2 aircraft in a manner which conflicts with the national phase-out of Stage 2 aircraft, as provided in Part 91 of the FAA regulations.

(1) The number of Stage 2 airplanes it would otherwise be required to reduce following a subsequent interim compliance date specified in § 91.865(b); or

(2) The number of Stage 3 airplanes it would otherwise be required to operate in its fleet following a subsequent interim compliance date to meet the percentage requirements specified in § 91.865(d).

§ 91.871 Waivers from interim compliance requirements.

(a) Any U.S. operator or foreign air carrier subject to the requirements of §§ 91.865 or 91.867 of this subpart may request a waiver from any individual compliance requirement.

(b) Applications must be filed with the Secretary of Transportation at least 120 days prior to the compliance date from which the waiver is requested.

(c) Applicants must show that a grant of waiver would be in the public interest, and must include in its application its plans and activities for modifying its fleet, including evidence of good faith efforts to comply with the requirements of § 91.865 or § 91.867. The application should contain all information the applicant considers relevant, including, as appropriate, the following:

(1) The applicant's balance sheet and cash flow positions;

(2) The composition of the applicant's current fleet; and

(3) The applicant's delivery position with respect to new airplanes or noise abatement equipment.

(d) Waivers will be granted only upon a showing by the applicant that compliance with the requirements of §§ 91.865 or 91.867 at a particular interim compliance date is financially onerous, physically impossible, or technologically infeasible, or that it would have an adverse effect on competition or on service to small communities.

(e) The conditions of any waiver granted under this section shall be determined by the circumstances presented in the application, but in no case may the term extend beyond the next interim compliance date.

(f) A summary of any request for a waiver under this section will be published in the Federal Register, and public comment will be invited. Unless the Secretary finds that circumstances require otherwise, the public comment period will be at least 14 days.

§ 91.873 Waivers from final compliance.

(a) A U.S. air carrier may apply for a waiver from the prohibition contained in § 91.853 for its remaining Stage 2 airplanes, provided that, by July 1, 1999, at least 85 percent of the airplanes used by the carrier to provide service to or from an airport in the contiguous United States will comply with the Stage 3 noise levels.

(b) An application for the waiver described in paragraph (a) of this section must be filed with the Secretary of Transportation no later than January 1, 1999. Such application must include a plan with firm orders for replacing or modifying all airplanes to comply with Stage 3 noise levels at the earliest practicable time.

(c) To be eligible to apply for the waiver under this section, a new entrant U.S. air carrier must initiate service no later than January 1, 1999, and must comply fully with all provisions of that section.

(d) The Secretary may grant a waiver under this section if the Secretary finds that granting such waiver is in the public interest. In making such a finding, the Secretary shall include consideration of the effect of granting such waiver on competition in the air carrier industry and the effect on small community air service, and any other information submitted by the applicant that the Secretary considers relevant.

(e) The term of any waiver granted under this section shall be determined by the circumstances presented in the application, but in no case will the waiver permit the operation of any Stage 2 airplane covered by this subchapter in the contiguous United States after December 31, 2003.

(f) A summary of any request for a waiver under this section will be published in the Federal Register, and public comment will be invited. Unless the secretary finds that circumstances require otherwise, the public comment period will be at least 14 days.

§ 91.875 Annual progress reports.

(a) Each operator subject to § 91.865 or § 91.867 of this chapter shall submit an annual report to the FAA, Office of Environment and Energy, on the progress it has made toward complying with the requirements of that section. Such reports shall be submitted no later than 45 days after the end of a calendar year. All progress reports must provide the information through the end of the calendar year, be certified by the carrier as true and complete (under penalty of 18 U.S.C. 1001), and include the following information:

(1) The name and address of the operator;

(2) The name, title, and telephone number of the person designated by the operator to be responsible for ensuring the accuracy of the information in the report;

(3) The operator's progress during the reporting period toward compliance with the requirements of § 91.863, § 91.865 or § 91.867. For airplanes on U.S. operations specifications, each operator shall identify the airplanes by type, model, series, and serial number.

(i) Each Stage 2 airplane added or removed from operation or U.S. operations specifications (grouped separately by those airplanes acquired with and without base level);

(ii) Each Stage 2 airplane modified to Stage 3 noise levels (identifying the manufacturer and model of noise abatement retrofit equipment;

(iii) Each Stage 3 airplane on U.S. operations specifications as of the last day of the reporting period; and

(iv) For each Stage 2 airplane transferred or acquired, the name and address of the recipient or transferor; and, if base level was transferred, the person to or from whom base level was transferred or acquired pursuant to Section 91.863 along with the effective date of each base level transaction, and the type of base level transferred or acquired.

(b) Each operator subject to § 91.865 or § 91.867 of this chapter shall submit an initial progress report covering the period from January 1, 1990, through December 31, 1991, and provide:

(1) For each operator subject to § 91.865:

(i) The date used to establish its base level pursuant to § 91.861(a); and

(ii) a list of those Stage 2 airplanes (by type, model, series and serial number) in its base level, including adjustments made pursuant to § 91.861 after the date its base level was established.

(2) For each U.S. operator:

(i) A plan to meet the compliance schedules in § 91.865 or § 91.867 and the final compliance date of § 91.853, including the schedule for delivery of replacement Stage 3 airplanes or the installation of noise abatement retrofit equipment; and

(ii) A separate list (by type, model, series, and serial number) of those airplanes included in the operator's base level, pursuant to § 91.861(a)(1) (i) and (ii), under the categories "returned" or "purchased," along with the date each was added to its operations specifications.

(c) Each operator subject to § 91.865 or § 91.867 of this chapter shall submit subsequent annual progress reports covering the calendar year preceding the report and including any changes in the information provided in paragraphs (a) and (b) of this section; including the use

of any carry-forward credits pursuant to § 91.869.

(d) An operator may request, in any report, that specific planning data be considered proprietary.

(e) If an operator's actions during any reporting period cause it to achieve compliance with § 91.853, the report should include a statement to that effect. Further progress reports are not required unless there is any change in the information reported pursuant to paragraph (a) of this section.

(f) For each U.S. operator subject to § 91.865, progress reports submitted for calendar years 1994, 1996, and 1998, shall also state how the operator achieved compliance with the requirements of that section, i.e.—

(1) By reducing the number of Stage 2 airplanes in its fleet to no more than the maximum permitted percentage of its base level under § 91.865(b), or

(2) By operating a fleet that consists of at least the minimum required percentage of Stage 3 airplanes under § 91.865(d).

Issued in Washington, DC on September 19, 1991.

James B. Busey,

Administrator.

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PART 161—NOTICE AND APPROVAL OF AIRPORT NOISE AND ACCESS RESTRICTIONS

Subpart A—General Provisions

Subpart B—Agreements

Subpart C—Notice Requirements for Stage 2 Restrictions

Subpart D—Notice, Review, and Approval Requirements for Stage 3 Restrictions

Subpart E—Reevaluation of Stage 3 Restrictions

Subpart F—Failure to Comply With This Part

Authority: 49 U.S.C. App. 1301, 1305, 1348, 1349(a), 1354, 1421, 1423, and 1486, 49 U.S.C. App. 1655(c), 49 U.S.C. App. 2101, 2102, 2103(a), and 2104 (a) and (b), 49 U.S.C. 2210(a)(5), and 49 U.S.C. App. 2153, 2154, 2155, and 2156.

Subpart A—General Provisions

§ 161.1 Purpose.

This part implements the Airport Noise and Capacity Act of 1990 (49 U.S.C. App. 2153, 2154, 2155, and 2156). It prescribes:

(a) Notice requirements and procedures for airport operators implementing Stage 3 aircraft noise and access restrictions pursuant to agreements between airport operators and aircraft operators;

(b) Analysis and notice requirements for airport operators proposing Stage 2 aircraft noise and access restrictions;

(c) Notice, review, and approval requirements for airport operators proposing Stage 3 aircraft noise and access restrictions; and

(d) Procedures for Federal Aviation Administration reevaluation of agreements containing restrictions on Stage 3 aircraft operations and of aircraft noise and access restrictions affecting Stage 3 aircraft operations imposed by airport operators.

§ 161.3 Applicability.

(a) This part applies to airports imposing restrictions on Stage 2 aircraft operations proposed after October 1, 1990, and to airports imposing restrictions on Stage 3 aircraft operations that became effective after October 1, 1990.

(b) This part also applies to airports enacting amendments to airport noise and access restrictions in effect on October 1, 1990, but amended after that date, where the amendment reduces or limits aircraft operations or affects aircraft safety.

(c) The notice, review, and approval requirements set forth in this part apply to all airports imposing noise or access restrictions as defined in § 161.5 of this part.

§ 161.5 Definitions.

For the purposes of this part, the following definitions apply:

Agreement means a document in writing signed by the airport operator; those aircraft operators currently operating at the airport that would be affected by the noise or access restriction; and all affected new entrants planning to provide new air service within 180 days of the effective date of

The most important new requirement with respect to Stage 2 restrictions is the preparation of analysis on the costs and benefits of the proposed restriction. The regulations require that a proprietor prepare the following analysis of its proposal:

(1) an analysis of the anticipated or actual costs and benefits of the proposed restriction;

(2) a description of alternative restrictions which were considered;

(3) a description of the alternative measures considered that do not involve aircraft restrictions; and

(4) a comparison of the costs and benefits of the alternative measures which were considered.[29]

The FAA does not have the statutory authority to reject a Stage 2 restriction or to prohibit an airport proprietor from implementing such a restriction. Consequently, the FAA generally will not review or approve the substance of the analysis which accompanies a Stage 2 restriction. If, however, a proprietor submits a Stage 2 restriction as part of a Part 150 Noise Compatibility Program, the Part 150 regulations require the FAA to scrutinize carefully that analysis.

Although it will not review or approve local Stage 2 restrictions, the FAA has indicated that the analytical requirements are intended to be nearly identical for Stage 2 or Stage 3 restrictions. The regulations recommend that airport proprietors prepare the same analysis for Stage 2 as for Stage 3 restrictions.

Unless a Stage 2 restriction is included in a Part 150 Noise Compatibility Program, the FAA has stated that it will not review the substance of a proprietor's analysis of a proposed Stage 2 restriction. The FAA will, however, review a proprietor's submission to ensure that it contains the four required categories of analysis described above.

Notwithstanding the FAA's limited authority to review local Stage 2 restrictions, senior FAA officials repeatedly have stressed their opposition to local airport noise restrictions. The former FAA Administrator and his senior staff have indicated that the agency will use all its powers to ensure that any airport access restrictions do not adversely affect the national air transportation system. The principal tool for the agency will be its Part 13 complaint procedure.[30]

Although the FAA has stated that it will neither approve nor disapprove a Stage 2 restriction which is incorporated into a Part 150 Noise Compatibility Program, FAA action on a Part 150 Program could help a potential litigant who intends to challenge an airport's Stage 2 noise or access restriction. If the FAA disapproves a Part 150 Program which incorporates a Stage 2 restriction, the agency will have an opportunity to comment on the validity of the Stage 2 restriction under existing law. In light of statements by the former FAA Administrator that are critical of Stage 2 restrictions generally, it is reasonable to expect the agency to avail itself of that opportunity. Its comments could help a litigant make a case that a Stage 2 restriction is invalid.

A litigant also could use adverse FAA action on a proposed Part 150 Noise Compatibility Program to its advantage if a proprietor later were to enact separately the Stage 2 restriction which was incorporated in the Part 150 Program. Again, FAA disapproval could be used as evidence attacking the validity of the restriction.

The regulations clearly encourage airport proprietors to integrate any Stage 2 restriction into their Part 150 Noise Compatibility Program. Notwithstanding the possible cost- and time-saving value of incorporating a Stage 2 restriction into a Part 150 Noise Compatibility Program, a joint Part 150 Program and Stage 2 restriction could give undesirable leverage to the FAA and potential litigants.

Instead, a proprietor should consider conducting the analysis required for a Stage 2 restriction at the same time that it is preparing its Part 150 Program (thereby avoiding duplication of effort), then adopt the restriction in the desired form but not submitt the Stage 2 restriction as part of the Noise Compatibility Program. The Part 150 Program could treat the Stage 2 restriction as an existing measure at the time the Noise Compatibility Program is submitted for FAA approval.

the restriction that have submitted to the airport operator a plan of operations and notice of agreement to the restriction.

Aircraft operator, for purposes of this part, means any owner of an aircraft that operates the aircraft, i.e., uses, causes to use, or authorizes the use of the aircraft; or in the case of a leased aircraft, any lessee that operates the aircraft pursuant to a lease As used in this part, aircraft operator also means any representative of the aircraft owner, or in the case of a leased aircraft, any representative of the lessee empowered to enter into agreements with the airport operator regarding use of the airport by an aircraft.

Airport means any area of land or water, including any heliport, that is used or intended to be used for the landing and takeoff of aircraft, and any appurtenant areas that are used or intended to be used for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

Airport noise study area means that area surrounding the airport within the noise contour selected by the applicant for study and must include the noise contours required to be developed for noise exposure maps specified in 14 CFR part 150.

Airport operator means the airport proprietor.

Aviation user class means the following categories of aircraft operators: air carriers operating under parts 121 or 129 of this chapter; commuters and other carriers operating under parts 127 and 135 of this chapter; general aviation, military, or government operations.

Day-night average sound level (DNL) means the 24-hour average sound level, in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for the periods between midnight and 7 a.m., and between 10 p.m. and midnight, local time, as defined in 14 CFR part 150. (The scientific notation for DNL is L_{dn}).

Noise or access restrictions means restrictions (including but not limited to provisions of ordinances and leases) affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such as limits on the noise generated on either a single-event or cumulative basis; a limit, direct or indirect, on the total number of Stage 2 or Stage 3 aircraft operations; a noise budget or noise allocation program that includes Stage 2 or Stage 3 aircraft; a restriction imposing limits on hours of operations; a program of airport-use charges that has the direct or indirect effect of controlling airport noise; and any other limit on Stage 2 or Stage 3 aircraft that has the effect of controlling airport noise. This definition does not include peak-period pricing programs where the objective is to align the number of aircraft operations with airport capacity.

Stage 2 aircraft means an aircraft that has been shown to comply with the Stage 2 requirements under 14 CFR part 36.

Stage 3 aircraft means an aircraft that has been shown to comply with the Stage 3 requirements under 14 CFR part 36.

§ 161.7 Limitations.

(a) Aircraft operational procedures that must be submitted for adoption by the FAA, such as preferential runway use, noise abatement approach and departure procedures and profiles, and flight tracks, are not subject to this part. Other noise abatement procedures, such as taxiing and engine runups, are not subject to this part unless the procedures imposed limit the total number of Stage 2 or Stage 3 aircraft operations, or limit the hours of Stage 2 or Stage 3 aircraft operations, at the airport.

(b) The notice, review, and approval requirements set forth in this part do not apply to airports with restrictions as specified in 49 U.S.C. App. 2153(a)(2)(C):

(1) A local action to enforce a negotiated or executed airport aircraft noise or access agreement between the airport operator and the aircraft operator in effect on November 5, 1990.

(2) A local action to enforce a negotiated or executed airport aircraft noise or access restriction the airport operator and the aircraft operators agreed to before November 5, 1990.

(3) An intergovernmental agreement including airport aircraft noise or access restriction in effect on November 5, 1990.

(4) A subsequent amendment to an airport aircraft noise or access agreement or restriction in effect on November 5, 1990, where the amendment does not reduce or limit aircraft operations or affect aircraft safety.

(5) A restriction that was adopted by an airport operator on or before October 1, 1990, and that was stayed as of October 1, 1990, by a court order or as a result of litigation, if such restriction, or a part thereof, is subsequently allowed by a court to take effect.

(6) In any case in which a restriction described in paragraph (b)(5) of this section is either partially or totally disallowed by a court, any new restriction imposed by an airport operator to replace such disallowed restriction, if such new restriction would not prohibit aircraft operations in effect on November 5, 1990.

(7) A local action that represents the adoption of the final portion of a program of a staged airport aircraft noise or access restriction, where the initial portion of such program was adopted during calendar year 1988 and was in effect on November 5, 1990.

(c) The notice, review, and approval requirements of subpart D of this part with regard to Stage 3 aircraft restrictions do not apply if the FAA has, prior to November 5, 1990, formed a working group (outside of the process established by 14 CFR part 150) with a local airport operator to examine the noise impact of air traffic control procedure changes. In any case in which an agreement relating to noise reductions at such airport is then entered into between the airport proprietor and an air carrier or air carrier constituting a majority of the air carrier users of such airport, the requirements of subparts B and D of this part with respect to restrictions on Stage 3 aircraft operations do apply to local actions to enforce such agreements.

(d) Except to the extent required by the application of the provisions of the Act, nothing in this part eliminates, invalidates, or supersedes the following:

(1) Existing law with respect to airport noise or access restrictions by local authorities;

(2) Any proposed airport noise or access regulation at a general aviation airport where the airport proprietor has formally initiated a regulatory or legislative process on or before October 1, 1990; and

(3) The authority of the Secretary of Transportation to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief.

§ 161.9 Designation of noise description methods.

For purposes of this part, the following requirements apply:

(a) The sound level at an airport and surrounding areas, and the exposure of individuals to noise resulting from operations at an airport, must be established in accordance with the specifications and methods prescribed under appendix A of 14 CFR part 150; and

(b) Use of computer models to create noise contours must be in accordance with the criteria prescribed under appendix A of 14 CFR part 150.

§ 161.11 Identification of land uses in airport noise study area.

For the purposes of this part, uses of land that are normally compatible or

noncompatible with various noise-exposure levels to individuals around airports must be identified in accordance with the criteria prescribed under appendix A of 14 CFR part 150. Determination of land use must be based on professional planning, zoning, and building and site design information and expertise.

Subpart B—Agreements

§ 161.101 Scope.

(a) This subpart applies to an airport operator's noise or access restriction on the operation of Stage 3 aircraft that is implemented pursuant to an agreement between an airport operator and all aircraft operators affected by the proposed restriction that are serving or will be serving such airport within 180 days of the date of the proposed restriction.

(b) For purposes of this subpart, an agreement shall be in writing and signed by:

(1) The airport operator;

(2) Those aircraft operators currently operating at the airport who would be affected by the noise or access restriction; and

(3) All new entrants that have submitted the information required under § 161.105(a) of this part.

(c) This subpart does not apply to restrictions exempted in § 161.7 of this part.

(d) This subpart does not limit the right of an airport operator to enter into an agreement with one or more aircraft operators that restricts the operation of Stage 2 or Stage 3 aircraft as long as the restriction is not enforced against aircraft operators that are not party to the agreement. Such an agreement is not covered by this subpart except that an aircraft operator may apply for sanctions pursuant to subpart F of this part for restrictions the airport operator seeks to impose other than those in the agreement.

§ 161.103 Notice of the proposed restriction.

(a) An airport operator may not implement a Stage 3 restriction pursuant to an agreement with all affected aircraft operators unless there has been public notice and an opportunity for comment as prescribed in this subpart.

(b) In order to establish a restriction in accordance with this subpart, the airport operator shall, at least 45 days before implementing the restriction, publish a notice of the proposed restriction in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport vicinity or airport noise study area, if one has been delineated: post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) Aircraft operators providing scheduled passenger or cargo service at the airport; affected operators of aircraft based at the airport; potential new entrants that are known to be interested in serving the airport; and aircraft operators known to be routinely providing non-scheduled service;

(2) The Federal Aviation Administration;

(3) Each Federal, state, and local agency with land use control jurisdiction within the vicinity of the airport, or the airport noise study area, if one has been delineated;

(4) Fixed-base operators and other airport tenants whose operations may be affected by the proposed restriction; and

(5) Community groups and business organizations that are known to be interested in the proposed restriction.

(c) Each direct notice provided in accordance with paragraph (b) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the proposed restriction, including sanctions for noncompliance and a statement that it will be implemented pursuant to a signed agreement;

(3) A brief discussion of the specific need for and goal of the proposed restriction;

(4) Identification of the operators and the types of aircraft expected to be affected;

(5) The proposed effective date of the restriction and any proposed enforcement mechanism;

(6) An invitation to comment on the proposed restriction, with a minimum 45-day comment period;

(7) Information on how to request copies of the restriction portion of the agreement, including any sanctions for noncompliance;

(8) A notice to potential new entrant aircraft operators that are known to be interested in serving the airport of the requirements set forth in § 161.105 of this part; and

(9) Information on how to submit a new entrant application, comments, and the address for submitting applications and comments to the airport operator, including identification of a contact person at the airport.

(d) The Federal Aviation Administration will publish an announcement of the proposed restriction in the **Federal Register**.

§ 161.105 Requirements for new entrants.

(a) Within 45 days of the publication of the notice of a proposed restriction by the airport operator under § 161.103(b) of this part, any person intending to provide new air service to the airport within 180 days of the proposed date of implementation of the restriction (as evidenced by submission of a plan of operations to the airport operator) must notify the airport operator if it would be affected by the restriction contained in the proposed agreement, and either that it—

(1) Agrees to the restriction; or

(2) Objects to the restriction.

(b) Failure of any person described in § 161.105(a) of this part to notify the airport operator that it objects to the proposed restriction will constitute waiver of the right to claim that it did not consent to the agreement and render that person ineligible to use lack of signature as ground to apply for sanctions under subpart F of this part for two years following the effective date of the restriction. The signature of such a person need not be obtained by the airport operator in order to comply with § 161.107(a) of this part.

(c) All other new entrants are also ineligible to use lack of signature as ground to apply for sanctions under subpart F of this part for two years.

§ 161.107 Implementation of the restriction.

(a) To be eligible to implement a Stage 3 noise or access restriction under this subpart, an airport operator shall have the restriction contained in an agreement as defined in § 161.101(b) of this part.

(b) An airport operator may not implement a restriction pursuant to an agreement until the notice and comment requirements of § 161.103 of this part have been met.

(c) Each airport operator must notify the Federal Aviation Administration of the implementation of a restriction pursuant to an agreement and must include in the notice evidence of compliance with § 161.103 and a copy of the signed agreement.

§ 161.109 Notice of termination of restriction pursuant to an agreement.

An airport operator must notify the FAA within 10 days of the date of termination of a restriction pursuant to an agreement under this subpart.

§ 161.111 Availability of data and comments on a restriction implemented pursuant to an agreement.

The airport operator shall retain all relevant supporting data and all comments relating to a restriction implemented pursuant to an agreement

(5) analyze the proposed restriction; and

(6) invite public comment.

The notice must be published in a general circulation newspaper and certain parties must be notified directly, as described in the previous section. The FAA also will publish the notice in the Federal Register.[27]

The regulations contemplate a close relationship between any Stage 2 restriction and an airport's Part 150 Noise Compatibility Program. First, the FAA has encouraged airport proprietors to use the notice and public review procedures from the Part 150 regulations before implementing any Stage 2 restriction. Second, the FAA has reminded airport proprietors that adoption of a Stage 2 restriction is not a substitute for planning to ensure long term land use compatibility between an airport and its neighbors. The FAA has advised proprietors not to adopt Stage 2 restrictions as a substitute for a Part 150 Noise Compatibility Program.

As one means to encourage proprietors to combine any Stage 2 restriction with a Part 150 Noise Compatibility Program, the FAA will allow airport proprietors to use the notice procedures mandated by Part 150 of the FAA regulations[28] in lieu of those outlined in the Part 161 regulations. As explained above, the FAA also has mandated that the analysis accompanying Stage 2 restrictions use the methodology and noise compatibility thresholds which apply to Part 150 Noise Compatibility Programs.

There are, however, distinct disadvantages to incorporating a proposed Stage 2 restriction into a Noise Compatibility Program. Most importantly, an airport proprietor need only seek FAA approval of a Stage 2 restriction if the restriction is included in its Part 150 Noise Compatibility Program. The regulations explicitly provide that the FAA's approval or disapproval of a proprietor's Part 150 Noise Compatibility Program will not constitute approval or disapproval of a Stage 2 restriction. Nevertheless, the FAA could use its approval authority for a Part 150 Noise Compatibility Program as leverage to pressure an airport proprietor not to enact a Stage 2 restriction.

There is one significant benefit in combining the two processes: since federal funding is available for preparation of Part 150 Noise Compatibility Programs, a proprietor may be able to use federal funds also for preparing the analysis required for a Stage 2 noise or access restriction.

The recent federal appellate court decision in the Long Beach case may make it more difficult for the FAA to argue that a noise or access restriction impairs interstate commerce. In the Ninth Circuit (which includes all the west coast states), an airport proprietor arguably can impose a restriction on Stage 2 aircraft without carefully balancing the effects on the local community against the negative effects on interstate commerce. If a restriction does not discriminate among aircraft based upon where they fly from or to, the restriction need only be reasonable and rational. The Long Beach case simplifies the facts which an airport must prove to sustain a noise or access restriction. Pending possible rehearing or appeal of the case, however, it would be premature to assess its effect nationally.

Although the Noise Act does not change the substance of the law applicable to restrictions on Stage 2 aircraft, the statute does set forth new procedural hurdles as preconditions to a valid Stage 2 restriction. For most airport proprietors, these are the key regulations. The Noise Act allows an airport proprietor to restrict Stage 2 aircraft operations without FAA approval so long as it analyzes the effects of the proposal and publishes notice of its noise or access restriction.[22]

The regulations implementing this provision of the Noise Act apply to all Stage 2 noise and access restrictions proposed after October 1, 1990 and amendments to existing restrictions on Stage 2 aircraft that are to become effective after October 1, 1990.[23] The regulations explain that airport proprietors may impose restrictions on Stage 2 aircraft operations so long as the airport proprietor complies with two conditions. First, the proprietor must prepare an analysis of the anticipated costs and benefits of the proposed restriction.[24] Second, the proprietor must provide proper public notice.[25]

Airport proprietors are required to notify the public and interested parties of a proposed restriction at least 180 days before it is enacted.[26] The notice must

(1) describe the proposed restriction;

(2) discuss the specific need for, and purpose of, the restriction;

(3) identify the aircraft operators and types of aircraft to be affected;

(4) set forth the proposed effective date of the restriction and the method of implementation;

for as long as the restriction is in effect. The airport operator shall make these materials available for inspection upon request by the FAA. The information shall be made available for inspection by any person during the pendency of any petition for reevaluation found justified by the FAA.

§ 161.113 Effect of agreements; limitation on reevaluation.

(a) Except as otherwise provided in this subpart, a restriction implemented by an airport operator pursuant to this subpart shall have the same force and effect as if it had been a restriction implemented in accordance with subpart D of this part.

(b) A restriction implemented by an airport operator pursuant to this subpart may be subject to reevaluation by the FAA under subpart E of this part.

Subpart C—Notice Requirements for Stage 2 Restrictions

§ 161.201 Scope.

(a) This subpart applies to:

(1) An airport imposing a noise or access restriction on the operation of Stage 2 aircraft, but not Stage 3 aircraft, proposed after October 1, 1990.

(2) An airport imposing an amendment to a Stage 2 restriction, if the amendment is proposed after October 1, 1990, and reduces or limits Stage 2 aircraft operations (compared to the restriction that it amends) or affects aircraft safety.

(b) This subpart does not apply to an airport imposing a Stage 2 restriction specifically exempted in § 161.7 or a Stage 2 restriction contained in an agreement as long as the restriction is not enforced against aircraft operators that are not parties to the agreement.

§ 161.203 Notice of proposed restriction.

(a) An airport operator may not implement a Stage 2 restriction within the scope of § 161.201 unless the airport operator provides an analysis of the proposed restriction, prepared in accordance with § 161.205, and a public notice and opportunity for comment as prescribed in this subpart. The notice and analysis required by this subpart shall be completed at least 180 days prior to the effective date of the restriction.

(b) Except as provided in § 161.211, an airport operator must publish a notice of the proposed restriction in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport noise study area; post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) Aircraft operators providing scheduled passenger or cargo service at the airport; operators of aircraft based at the airport; potential new entrants that are known to be interested in serving the airport; and aircraft operators known to be routinely providing nonscheduled service that may be affected by the proposed restriction;

(2) The Federal Aviation Administration;

(3) Each Federal, state, and local agency with land-use control jurisdiction within the airport noise study area;

(4) Fixed-base operators and other airport tenants whose operations may be affected by the proposed restriction; and

(5) Community groups and business organizations that are known to be interested in the proposed restriction.

(c) Each notice provided in accordance with paragraph (b) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the proposed restriction, including a statement that it will be a mandatory Stage 2 restriction, and where the complete text of the restriction, and any sanctions for noncompliance, are available for public inspection;

(3) A brief discussion of the specific need for, and goal of, the restriction;

(4) Identification of the operators and the types of aircraft expected to be affected;

(5) The proposed effective date of the restriction, the proposed method of implementation (e.g., city ordinance, airport rule, lease), and any proposed enforcement mechanism;

(6) An analysis of the proposed restriction, as required by § 161.205 of this subpart, or an announcement of where the analysis is available for public inspection;

(7) An invitation to comment on the proposed restriction and analysis, with a minimum 45-day comment period;

(8) Information on how to request copies of the complete text of the proposed restriction, including any sanctions for noncompliance, and the analysis (if not included with the notice); and

(9) The address for submitting comments to the airport operator, including identification of a contact person at the airport.

(d) At the time of notice, the airport operator shall provide the FAA with a full text of the proposed restriction, including any sanctions for noncompliance.

(e) The Federal Aviation Administration will publish an announcement of the proposed Stage 2 restriction in the **Federal Register**.

§ 161.205 Required analysis of proposed restriction and alternatives.

(a) Each airport operator proposing a noise or access restriction on Stage 2 aircraft operations shall prepare the following and make it available for public comment:

(1) An analysis of the anticipated or actual costs and benefits of the proposed noise or access restriction;

(2) A description of alternative restrictions; and

(3) A description of the alternative measures considered that do not involve aircraft restrictions, and a comparison of the costs and benefits of such alternative measures to costs and benefits of the proposed noise or access restriction.

(b) In preparing the analyses required by this section, the airport operator shall use the noise measurement systems and identify the airport noise study area as specified in §§ 161.9 and 161.11, respectively; shall use currently accepted economic methodology; and shall provide separate detail on the costs and benefits of the proposed restriction with respect to the operations of Stage 2 aircraft weighing less than 75,000 pounds if the restriction applies to this class. The airport operator shall specify the methods used to analyze the costs and benefits of the proposed restriction and the alternatives.

(c) The kinds of information set forth in § 161.305 are useful elements of an adequate analysis of a noise or access restriction on Stage 2 aircraft operations.

§ 161.207 Comment by interested parties.

Each airport operator shall establish a public docket or similar method for receiving and considering comments, and shall make comments available for inspection by interested parties upon request. Comments must be retained as long as the restriction is in effect.

§ 161.209 Requirements for proposal changes.

(a) Each airport operator shall promptly advise interested parties of any changes to a proposed restriction, including changes that affect noncompatible land uses, and make available any changes to the proposed restriction and its analysis. Interested parties include those that received direct notice under § 161.203(b), or those that were required to be consulted in

accordance with the procedures in § 161.211 of this part, and those that have commented on the proposed restriction.

(b) If there are substantial changes to the proposed restriction or the analysis during the 180-day notice period, the airport operator shall initiate new notice following the procedures in § 161.203 or, alternatively, the procedures in § 161.211. A substantial change includes, but is not limited to, a proposal that would increase the burden on any aviation user class.

(c) In addition to the information in § 161.203(c), new notice must indicate that the airport operator is revising a previous notice, provide the reason for making the revision, and provide a new effective date (if any) for the restriction. The effective date of the restriction must be at least 180 days after the date the new notice and revised analysis are made available for public comment.

§ 161.211 Optional use of 14 CFR part 150 procedures.

(a) An airport operator may use the procedures in part 150 of this chapter, instead of the procedures described in §§ 161.203(b) and 161.209(b), as a means of providing an adequate public notice and comment opportunity on a proposed Stage 2 restriction.

(b) If the airport operator elects to use 14 CFR part 150 procedures to comply with this subpart, the operator shall:

(1) Ensure that all parties identified for direct notice under § 161.203(b) are notified that the airport's 14 CFR part 150 program will include a proposed Stage 2 restriction under part 161, and that these parties are offered the opportunity to participate as consulted parties during the development of the 14 CFR part 150 program;

(2) Provide the FAA with a full text of the proposed restriction, including any sanctions for noncompliance, at the time of the notice;

(3) Include the information in § 161.203 (c)(2) through (c)(5) and 161.205 in the analysis of the proposed restriction for the part 14 CFR part 150 program;

(4) Wait 180 days following the availability of the above analysis for review by the consulted parties and compliance with the above notice requirements before implementing the Stage 2 restriction; and

(5) Include in its 14 CFR part 150 submission to the FAA evidence of compliance with paragraphs (b)(1) and (b)(4) of this section, and the analysis in paragraph (b)(3) of this section, together with a clear identification that the 14 CFR part 150 program includes a proposed Stage 2 restriction under part 161.

(c) The FAA determination on the 14 CFR part 150 submission does not constitute approval or disapproval of the proposed Stage 2 restriction under part 161.

(d) An amendment of a restriction may also be processed under 14 CFR part 150 procedures in accordance with this section.

§ 161.213 Notification of a decision not to implement a restriction.

If a proposed restriction has been through the procedures prescribed in this subpart and the restriction is not subsequently implemented, the airport operator shall so advise the interested parties. Interested parties are described in § 161.209(a).

Subpart D—Notice, Review, and Approval Requirements for Stage 3 Restrictions

§ 161.301 Scope.

(a) This subpart applies to:

(1) An airport imposing a noise or access restriction on the operation of Stage 3 aircraft that first became effective after October 1, 1990.

(2) An airport imposing an amendment to a Stage 3 restriction, if the amendment becomes effective after October 1, 1990, and reduces or limits Stage 3 aircraft operations (compared to the restriction that it amends) or affects aircraft safety.

(b) This subpart does not apply to an airport imposing a Stage 3 restriction specifically exempted in § 161.7, or an agreement complying with subpart B of this part.

(c) A Stage 3 restriction within the scope of this subpart may not become effective unless it has been submitted to and approved by the FAA. The FAA will review only those Stage 3 restrictions that are proposed by, or on behalf of, an entity empowered to implement the restriction.

§ 161.303 Notice of proposed restrictions.

(a) Each airport operator or aircraft operator (hereinafter referred to as applicant) proposing a Stage 3 restriction shall provide public notice and an opportunity for public comment, as prescribed in this subpart, before submitting the restriction to the FAA for review and approval.

(b) Except as provided in § 161.321, an applicant shall publish a notice of the proposed restriction in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport noise study area; post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) Aircraft operators providing scheduled passenger or cargo service at the airport; operators of aircraft based at the airport; potential new entrants that are known to be interested in serving the airport; and aircraft operators known to be routinely providing nonscheduled service that may be affected by the proposed restriction;

(2) The Federal Aviation Administration;

(3) Each Federal, state, and local agency with land-use control jurisdiction within the airport noise study area;

(4) Fixed-base operators and other airport tenants whose operations may be affected by the proposed restriction; and

(5) Community groups and business organizations that are known to be interested in the proposed restriction.

(c) Each notice provided in accordance with paragraph (b) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the proposed restriction (and any alternatives, in order of preference), including a statement that it will be a mandatory Stage 3 restriction; and where the complete text of the restriction, and any sanctions for noncompliance, are available for public inspection;

(3) A brief discussion of the specific need for, and goal of, the restriction;

(4) Identification of the operators and types of aircraft expected to be affected;

(5) The proposed effective date of the restriction, the proposed method of implementation (e.g., city ordinance, airport rule, lease, or other document), and any proposed enforcement mechanism;

(6) An analysis of the proposed restriction, in accordance with § 161.305 of this part, or an announcement regarding where the analysis is available for public inspection;

(7) An invitation to comment on the proposed restriction and the analysis, with a minimum 45-day comment period;

(8) Information on how to request a copy of the complete text of the restriction, including any sanctions for noncompliance, and the analysis (if not included with the notice); and

(9) The address for submitting comments to the airport operator or aircraft operator proposing the restriction, including identification of a contact person.

(d) Applicants may propose alternative restrictions, including partial

Noise or Access Restrictions on Stage 2 Aircraft

The Noise Act was not intended to change the law concerning when it is permissible for an airport to impose noise restrictions on Stage 2 aircraft.[15] The Noise Act did not grant airport proprietors any authority which they did not have before the Noise Act was enacted.[16] For this reason, it is useful to review briefly the law governing local restrictions on airport use or access.

Prior to enactment of the Noise Act, the courts had defined clearly the standards for an acceptable noise restriction.[17] An airport's noise restriction is legal if it is

(1) reasonable in the circumstances of the particular airport;

(2) carefully tailored to the local needs and to community expectations;

(3) based upon data which support the need and rationale for the restriction; and

(4) not unduly restrictive of interstate commerce.[18]

The FAA frequently has maintained that local airport noise or access restrictions are unduly restrictive of interstate commerce. While the agency occasionally has been successful in challenging such restrictions in court,[19] many local noise or access restrictions have been upheld.[20] In a very recent case involving a noise restriction at the Long Beach, California airport, the United States Court of Appeals for the Ninth Circuit confirmed these principles of law and observed that a local airport restriction will not be unduly restrictive of interstate commerce so long as its burdens do not grossly outweigh its benefits and so long as it is neither unreasonable nor irrational.[21]

aircraft operators at the airport. It is not enough, however, that a proprietor reach an agreement with all existing aircraft operators. So-called new entrants must be given an opportunity to object to an agreement.[14]

A new entrant is considered to be any entity which intends to provide air service to the airport within 180 days of the proposed effective date of the agreement. An agreement cannot go into effect if a new entrant objects within 45 days of publication of notice of the proposed agreement. New entrants effectively have veto power to prevent implementation of agreements. Although a new entrant can veto an agreement between an airport and existing aircraft operators, there is no requirement that the new entrant actually begin service within 180 days. All that is required is that the new entrant state its intent to provide air service and provide the proprietor with a plan of operations.

Although the FAA has stated that it encourages proprietors and aircraft operators voluntarily to agree on noise and access restrictions, the procedures for entering into an agreement are cumbersome. Particularly at large air carrier airports, it may be difficult to achieve unanimity not only from existing affected operators but also from new entrants.

Although the regulations do not state that a new entrant must be affected by the proposed agreement in order to exercise veto power, it appears probable that the FAA will interpret the regulations to allow a veto only by a new entrant who could be affected by the agreement.

implementation of any proposal, and indicate an order of preference. If alternative restriction proposals are submitted, the requirements listed in paragraphs (c)(2) through (c)(6) of this section should address the alternative proposals where appropriate.

§ 161.305 Required analysis and conditions for approval of proposed restrictions.

Each applicant proposing a noise or access restriction on Stage 3 operations shall prepare and make available for public comment an analysis that supports, by substantial evidence, that the six statutory conditions for approval have been met for each restriction and any alternatives submitted. The statutory conditions are set forth in 49 U.S.C. App. 2153(d)(2) and paragraph (e) of this section. Any proposed restriction (including alternatives) on Stage 3 aircraft operations that also affects the operation of Stage 2 aircraft must include analysis of the proposals in a manner that permits the proposal to be understood in its entirety. (Nothing in this section is intended to add a requirement for the issuance of restrictions on Stage 2 aircraft to those of subpart C of this part.) The applicant shall provide:

(a) The complete text of the proposed restriction and any submitted alternatives, including the proposed wording in a city ordinance, airport rule, lease, or other document, and any sanctions for noncompliance;

(b) Maps denoting the airport geographic boundary, and the geographic boundaries and names of each jurisdiction that controls land use within the airport noise study area;

(c) An adequate environmental assessment of the proposed restriction or adequate information supporting a categorical exclusion in accordance with FAA orders and procedures regarding compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321);

(d) A summary of the evidence in the submission supporting the six statutory conditions for approval; and

(e) An analysis of the restriction, demonstrating by substantial evidence that the statutory conditions are met. The analysis must:

(1) Be sufficiently detailed to allow the FAA to evaluate the merits of the proposed restriction; and

(2) Contain the following essential elements needed to provide substantial evidence supporting each condition for approval:

(i) *Condition 1: The restriction is reasonable, nonarbitrary, and nondiscriminatory.* (A) Essential information needed to demonstrate this condition includes the following:

(*1*) Evidence that a current or projected noise or access problem exists, and that the proposed action(s) could relieve the problem, including:

(*i*) A detailed description of the problem precipitating the proposed restriction with relevant background information on factors contributing to the proposal and any court-ordered action or estimated liability concerns; a description of any noise agreements or noise or access restrictions currently in effect at the airport; and measures taken to achieve land-use compatibility, such as controls or restrictions on land use in the vicinity of the airport and measures carried out in response to 14 CFR part 150; and actions taken to comply with grant assurances requiring that:

(*A*) Airport development projects be reasonably consistent with plans of public agencies that are authorized to plan for the development of the area around the airport; and

(*B*) The sponsor give fair consideration to the interests of communities in or near where the project may be located; take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land near the airport to activities and purposes compatible with normal airport operations; and not cause or permit any change in land use, within its jurisdiction, that will reduce the compatibility (with respect to the airport) of any noise compatibility program measures upon which federal funds have been expended.

(*ii*) An analysis of the estimated noise impact of aircraft operations with and without the proposed restriction for the year the restriction is expected to be implemented, for a forecast timeframe after implementation, and for any other years critical to understanding the noise impact of the proposed restriction. The analysis of noise impact with and without the proposed restriction including:

(*A*) Maps of the airport noise study area overlaid with noise contours as specified in §§ 161.9 and 161.11 of this part;

(*B*) The number of people and the noncompatible land uses within the airport noise study area with and without the proposed restriction for each year the noise restriction is analyzed;

(*C*) Technical data supporting the noise impact analysis, including the classes of aircraft, fleet mix, runway use percentage, and day/night breakout of operations; and

(*D*) Data on current and projected airport activity that would exist in the absence of the proposed restriction.

(*2*) Evidence that other available remedies are infeasible or would be less cost-effective, including descriptions of any alternative aircraft restrictions that have been considered and rejected, and the reasons for the rejection; and of any land use or other nonaircraft controls or restrictions that have been considered and rejected, including those proposed under 14 CFR part 150 and not implemented, and the reasons for the rejection or failure to implement.

(*3*) Evidence that the noise or access standards are the same for all aviation user classes or that the differences are justified, such as:

(*i*) A description of the relationship of the effect of the proposed restriction on airport users (by aviation user class); and

(*ii*) The noise attributable to these users in the absence of the proposed restriction.

(B) At the applicant's discretion, information may also be submitted as follows:

(*1*) Evidence not submitted under paragraph (e)(2)(ii)(A) of this section (Condition 2) that there is a reasonable chance that expected benefits will equal or exceed expected cost; for example, comparative economic analyses of the costs and benefits of the proposed restriction and aircraft and nonaircraft alternative measures. For detailed elements of analysis, see paragraph (e)(2)(ii)(A) of this section.

(*2*) Evidence not submitted under paragraph (e)(2)(ii)(A) of this section that the level of any noise-based fees that may be imposed reflects the cost of mitigating noise impacts produced by the aircraft, or that the fees are reasonably related to the intended level of noise impact mitigation.

(ii) *Condition 2: The restriction does not create an undue burden on interstate or foreign commerce.* (A) Essential information needed to demonstrate this statutory condition includes:

(*1*) Evidence, based on a cost-benefit analysis, that the estimated potential benefits of the restriction have a reasonable chance to exceed the estimated potential cost of the adverse effects on interstate and foreign commerce. In preparing the economic analysis required by this section, the applicant shall use currently accepted economic methodology, specify the methods used and assumptions underlying the analysis, and consider:

(*i*) The effect of the proposed restriction on operations of aircraft by aviation user class (and for air carriers,

the number of operations of aircraft by carrier), and on the volume of passengers and cargo for the year the restriction is expected to be implemented and for the forecast timeframe.

(*ii*) The estimated costs of the proposed restriction and alternative nonaircraft restrictions including the following, as appropriate:

(*A*) Any additional cost of continuing aircraft operations under the restriction, including reasonably available information concerning any net capital costs of acquiring or retrofitting aircraft (net of salvage value and operating efficiencies) by aviation user class; and any incremental recurring costs;

(*B*) Costs associated with altered or discontinued aircraft operations, such as reasonably available information concerning loss to carriers of operating profits; decreases in passenger and shipper consumer surplus by aviation user class; loss in profits associated with other airport services or other entities: and/or any significant economic effect on parties other than aviation users.

(*C*) Costs associated with implementing nonaircraft restrictions or nonaircraft components of restrictions, such as reasonably available information concerning estimates of capital costs for real property, including redevelopment, soundproofing, noise easements, and purchase of property interests; and estimates of associated incremental recurring costs; or an explanation of the legal or other impediments to implementing such restrictions.

(*D*) Estimated benefits of the proposed restriction and alternative restrictions that consider, as appropriate, anticipated increase in real estate values and future construction cost (such as sound insulation) savings; anticipated increase in airport revenues; quantification of the noise benefits, such as number of people removed from noise contours and improved work force and/or educational productivity, if any; valuation of positive safety effects, if any; and/or other qualitative benefits, including improvements in quality of life.

(B) At the applicant's discretion, information may also be submitted as follows:

(*1*) Evidence that the affected carriers have a reasonable chance to continue service at the airport or at other points in the national airport system.

(*2*) Evidence that other air carriers are able to provide adequate service to the airport and other points in the system without diminishing competition.

(*3*) Evidence that comparable services or facilities are available at another airport controlled by the airport operator in the market area, including services available at other airports.

(*4*) Evidence that alternative transportation service can be attained through other means of transportation.

(*5*) Information on the absence of adverse evidence or adverse comments with respect to undue burden in the notice process required in § 161.303, or alternatively in § 161.321, of this part as evidence that there is no undue burden.

(iii) *Condition 3: The proposed restriction maintains safe and efficient use of the navigable airspace.* Essential information needed to demonstrate this statutory condition includes evidence that the proposed restriction maintains safe and efficient use of the navigable airspace based upon:

(A) Identification of airspace and obstacles to navigation in the vicinity of the airport; and

(B) An analysis of the effects of the proposed restriction with respect to use of airspace in the vicinity of the airport, substantiating that the restriction maintains or enhances safe and efficient use of the navigable airspace. The analysis shall include a description of the methods and data used.

(iv) *Condition 4: The proposed restriction does not conflict with any existing Federal statute or regulation.* Essential information needed to demonstrate this condition includes evidence demonstrating that no conflict is presented between the proposed restriction and any existing Federal statute or regulation, including those governing:

(A) Exclusive rights;

(B) Control of aircraft operations; and

(C) Existing Federal grant agreements.

(v) *Condition 5: The applicant has provided adequate opportunity for public comment on the proposed restriction.* Essential information needed to demonstrate this condition includes evidence that there has been adequate opportunity for public comment on the restriction as specified in § 161.303 or § 161.321 of this part.

(vi) *Condition 6: The proposed restriction does not create an undue burden on the national aviation system.* Essential information needed to demonstrate this condition includes evidence that the proposed restriction does not create an undue burden on the national aviation system such as:

(A) An analysis demonstrating that the proposed restriction does not have a substantial adverse effect on existing or planned airport system capacity, on observed or forecast airport system congestion and aircraft delay, and on airspace system capacity or workload;

(B) An analysis demonstrating that nonaircraft alternative measures to achieve the same goals as the proposed subject restrictions are inappropriate;

(C) The absence of comments with respect to imposition of an undue burden on the national aviation system in response to the notice required in § 161.303 or § 161.321.

§ 161.307 Comment by interested parties.

(a) Each applicant proposing a restriction shall establish a public docket or similar method for receiving and considering comments, and shall make comments available for inspection by interested parties upon request. Comments must be retained as long as the restriction is in effect.

(b) Each applicant shall submit to the FAA a summary of any comments received. Upon request by the FAA, the applicant shall submit copies of the comments.

§ 161.309 Requirements for proposal changes.

(a) Each applicant shall promptly advise interested parties of any changes to a proposed restriction or alternative restriction that are not encompassed in the proposals submitted, including changes that affect noncompatible land uses or that take place before the effective date of the restriction, and make available these changes to the proposed restriction and its analysis. For the purpose of this paragraph, interested parties include those who received direct notice under § 161.303(b) of this part, or those who were required to be consulted in accordance with the procedures in § 161.321 of this part, and those who commented on the proposed restriction.

(b) If there are substantial changes to a proposed restriction or the analysis made available prior to the effective date of the restriction, the applicant proposing the restriction shall initiate new notice in accordance with the procedures in § 161.303 or, alternatively, the procedures in § 161.321. These requirements apply to substantial changes that are not encompassed in submitted alternative restriction proposals and their analyses. A substantial change to a restriction includes, but is not limited to, any proposal that would increase the burden on any aviation user class.

(c) In addition to the information in § 161.303(c), a new notice must indicate that the applicant is revising a previous notice, provide the reason for making the revision, and provide a new effective date (if any) for the restriction.

Negotiated Proprietor-Aircraft Operator Agreements

The first part of the Part 161 regulations addresses any noise or access restriction on Stage 3 aircraft which results from an agreement between an airport proprietor and aircraft operators. The regulations set forth the procedures which must be followed before an airport proprietor and aircraft operators can agree upon a noise or access restriction, including:

(1) notice requirements to inform interested parties and those likely to be affected by the outcome of an agreement;

(2) provisions to protect and limit the rights of aircraft operators not currently using the airport;

(3) requirements for implementing an agreement;

(4) procedures for terminating an agreement;

(5) provisions to ensure that relevant information is available for public review; and

(6) limitations on FAA review of such agreements.

First, airport proprietors must provide the public with notice and an opportunity to comment on all proposed agreements.[12] The notice must describe the proposed agreement, and the need for, and purpose of the proposed restriction. In addition to publishing notice in general circulation newspapers and posting the proposed restriction in a prominent location at the airport, an airport proprietor must notify numerous parties in writing, including air carriers serving the airport, affected local governments, interested community groups, and airport tenants who might be affected by the restriction. The FAA will publish an announcement of the proposed agreement in the Federal Register.[13]

An agreement can be enforced against non-parties only if it is signed by all affected

An airport proprietor must use the L_{dn} metric for measuring noise impacts. It should base a noise or access restriction on noise impacts which occur within the L_{dn} contour of 65 dBA unless local land use restrictions are more stringent than the Part 150 guidelines. The same is true for evaluating land use compatibility: the FAA considers most land uses to be compatible with L_{dn} noise levels of less than 65 dBA.

While a proprietor is not prohibited from using other metrics (such as those which measure single noise events) and other thresholds of compatibility, an airport proprietor should deviate from the Part 150 guidelines only if another level has been adopted by the local jurisdiction.

airport lease which has the indirect effect of controlling airport noise is a ''noise or access restriction.'' A ''noise or access restriction'' does not include, however, operational procedures which are designed to promote noise abatement. The FAA has explained that operational restrictions (such as displaced thresholds, preferential runway systems, noise abatement flight tracks and the like) are exempted from the rule because they are not expected to limit the total number or hours of aircraft operations.

The definition means that any airport-imposed restriction affecting the number or times of aircraft operations – except capacity-based restrictions – probably will be considered to be a noise or access restriction under the regulations. Airport proprietors should assume that the FAA will interpret the term broadly.

''Noise or access restriction'' is another key term defined in the regulations.[11] The FAA has adopted a broad definition of the term to include any restriction -- including airport lease provisions -- which affects the operation of aircraft and which has the effect of controlling noise. The FAA rejected suggestions from commenters that the term be limited to restrictions which have the purpose of limiting aircraft noise. As a result, for example, even a fee schedule in an

The regulations distinguish among three types of noise and access restrictions: negotiated agreements, restrictions on the operation of Stage 2 aircraft, and restrictions on the operation of Stage 3 aircraft. The procedures for enacting each type, and the FAA's scrutiny of each, are different.

(d) If substantial changes requiring a new notice are made during the FAA's 180-day review of the proposed restriction, the applicant submitting the proposed restriction shall notify the FAA in writing that it is withdrawing its proposal from the review process until it has completed additional analysis, public review, and documentation of the public review. Resubmission to the FAA will restart the 180-day review.

§ 161.311 Application procedure for approval of proposed restriction.

Each applicant proposing a Stage 3 restriction shall submit to the FAA the following information for each restriction and alternative restriction submitted, with a request that the FAA review and approve the proposed Stage 3 noise or access restriction:

(a) A summary of evidence of the fulfillment of conditions for approval, as specified in § 161.305;

(b) An analysis as specified in § 161.305, as appropriate to the proposed restriction;

(c) A statement that the entity submitting the proposal is the party empowered to implement the restriction, or is submitting the proposal on behalf of such party; and

(d) A statement as to whether the airport requests, in the event of disapproval of the proposed restriction or any alternatives, that the FAA approve any portion of the restriction or any alternative that meets the statutory requirements for approval. An applicant requesting partial approval of any proposal should indicate its priorities as to portions of the proposal to be approved.

§ 161.313 Review of application.

(a) *Determination of completeness.* The FAA, within 30 days of receipt of an application, will determine whether the application is complete in accordance with § 161.311. Determinations of completeness will be made on all proposed restrictions and alternatives. This completeness determination is not an approval or disapproval of the proposed restriction.

(b) *Process for complete application.* When the FAA determines that a complete application has been submitted, the following procedures apply:

(1) The FAA notifies the applicant that it intends to act on the proposed restriction and publishes notice of the proposed restriction in the **Federal Register** in accordance with § 161.315. The 180-day period for approving or disapproving the proposed restriction will start on the date of original FAA receipt of the application.

(2) Following review of the application, public comments, and any other information obtained under § 161.317(b), the FAA will issue a decision approving or disapproving the proposed restriction. This decision is a final decision of the Administrator for purpose of judicial review.

(c) *Process for incomplete application.* If the FAA determines that an application is not complete with respect to any submitted restriction or alternative restriction, the following procedures apply:

(1) The FAA shall notify the applicant in writing, returning the application and setting forth the type of information and analysis needed to complete the application in accordance with § 161.311.

(2) Within 30 days after the receipt of this notice, the applicant shall advise the FAA in writing whether or not it intends to resubmit and supplement its application.

(3) If the applicant does not respond in 30 days, or advises the FAA that it does not intend to resubmit and/or supplement the application, the application will be denied. This closes the matter without prejudice to later application and does not constitute disapproval of the proposed restriction.

(4) If the applicant chooses to resubmit and supplement the application, the following procedures apply:

(i) Upon receipt of the resubmitted application, the FAA determines whether the application, as supplemented, is complete as set forth in paragraph (a) of this section.

(ii) If the application is complete, the procedures set forth in § 161.315 shall be followed. The 180-day review period starts on the date of receipt of the last supplement to the application.

(iii) If the application is still not complete with respect to the proposed restriction or at least one submitted alternative, the FAA so advises the applicant as set forth in paragraph (c)(1) of this section and provides the applicant with an additional opportunity to supplement the application as set forth in paragraph (c)(2) of this section.

(iv) If the environmental documentation (either an environmental assessment or information supporting a categorical exclusion) is incomplete, the FAA will so notify the applicant in writing, returning the application and setting forth the types of information and analysis needed to complete the documentation. The FAA will continue to return an application until adequate environmental documentation is provided. When the application is determined to be complete, including the environmental documentation, the 180-day period for approval or disapproval will begin upon receipt of the last supplement to the application.

(v) Following review of the application and its supplements, public comments, and any other information obtained under § 161.317(b), the FAA will issue a decision approving or disapproving the application. This decision is a final decision of the Administrator for the purpose of judicial review.

(5) The FAA will deny the application and return it to the applicant if:

(i) None of the proposals submitted are found to be complete;

(ii) The application has been returned twice to the applicant for reasons other than completion of the environmental documentation; and

(iii) The applicant declines to complete the application. This closes the matter without prejudice to later application, and does not constitute disapproval of the proposed restriction.

§ 161.315 Receipt of complete application.

(a) When a complete application has been received, the FAA will notify the applicant by letter that the FAA intends to act on the application.

(b) The FAA will publish notice of the proposed restriction in the **Federal Register**, inviting interested parties to file comments on the application within 30 days after publication of the **Federal Register** notice.

§ 161.317 Approval or disapproval of proposed restriction.

(a) Upon determination that an application is complete with respect to at least one of the proposals submitted by the applicant, the FAA will act upon the complete proposals in the application. The FAA will not act on any proposal for which the applicant has declined to submit additional necessary information.

(b) The FAA will review the applicant's proposals in the preference order specified by the applicant. The FAA may request additional information from aircraft operators, or any other party, and may convene an informal meeting to gather facts relevant to its determination.

(c) The FAA will evaluate the proposal and issue an order approving or disapproving the proposed restriction and any submitted alternatives, in whole or in part, in the order of preference indicated by the applicant. Once the FAA approves a proposed restriction, the FAA will not consider any proposals of lower applicant-stated

preference. Approval or disapproval will be given by the FAA within 180 days after receipt of the application or last supplement thereto under § 161.313. The FAA will publish its decision in the **Federal Register** and notify the applicant in writing.

(d) The applicant's failure to provide substantial evidence supporting the statutory conditions for approval of a particular proposal is grounds for disapproval of that proposed restriction.

(e) The FAA will approve or disapprove only the Stage 3 aspects of a restriction if the restriction applies to both Stage 2 and Stage 3 aircraft operations.

(f) An order approving a restriction may be subject to requirements that the applicant:

(1) Comply with factual representations and commitments in support of the restriction; and

(2) Ensure that any environmental mitigation actions or commitments by any party that are set forth in the environmental documentation provided in support of the restriction are implemented.

§ 161.319 Withdrawal or revision of restriction.

(a) The applicant may withdraw or revise a proposed restriction at any time prior to FAA approval or disapproval, and must do so if substantial changes are made as described in § 161.309. The applicant shall notify the FAA in writing of a decision to withdraw the proposed restriction for any reason. The FAA will publish a notice in the **Federal Register** that it has terminated its review without prejudice to resubmission. A resubmission will be considered a new application.

(b) A subsequent amendment to a Stage 3 restriction that was in effect after October 1, 1990, or an amendment to a Stage 3 restriction previously approved by the FAA, is subject to the procedures in this subpart if the amendment will further reduce or limit aircraft operations or affect aircraft safety. The applicant may, at its option, revise or amend a restriction previously disapproved by the FAA and resubmit it for approval. Amendments are subject to the same requirements and procedures as initial submissions.

§ 161.321 Optional use of 14 CFR part 150 procedures.

(a) An airport operator may use the procedures in part 150 of this chapter, instead of the procedures described in §§ 161.303(b) and 161.309(b) of this part, as a means of providing an adequate public notice and opportunity to comment on proposed Stage 3 restrictions, including submitted alternatives.

(b) If the airport operator elects to use 14 CFR part 150 procedures to comply with this subpart, the operator shall:

(1) Ensure that all parties identified for direct notice under § 161.303(b) are notified that the airport's 14 CFR part 150 program submission will include a proposed Stage 3 restriction under part 161, and that these parties are offered the opportunity to participate as consulted parties during the development of the 14 CFR part 150 program;

(2) Include the information required in § 161.303(c) (2) through (5) and § 161.305 in the analysis of the proposed restriction in the 14 CFR part 150 program submission; and

(3) Include in its 14 CFR part 150 submission to the FAA evidence of compliance with the notice requirements in paragraph (b)(1) of this section and include the information required for a part 161 application in § 161.311, together with a clear identification that the 14 CFR part 150 submission includes a proposed Stage 3 restriction for FAA review and approval under §§ 161.313, 161.315, and 161.317.

(c) The FAA will evaluate the proposed part 161 restriction on Stage 3 aircraft operations included in the 14 CFR part 150 submission in accordance with the procedures and standards of this part, and will review the total 14 CFR part 150 submission in accordance with the procedures and standards of 14 CFR part 150.

(d) An amendment of a restriction, as specified in § 161.319(b) of this part, may also be processed under 14 CFR part 150 procedures.

§ 161.323 Notification of a decision not to implement a restriction.

If a Stage 3 restriction has been approved by the FAA and the restriction is not subsequently implemented, the applicant shall so advise the interested parties specified in § 161.309(a) of this part.

§ 161.325 Availability of data and comments on an implemented restriction.

The applicant shall retain all relevant supporting data and all comments relating to an approved restriction for as long as the restriction is in effect and shall make these materials available for inspection upon request by the FAA. This information shall be made available for inspection by any person during the pendency of any petition for reevaluation found justified by the FAA.

Subpart E—Reevaluation of Stage 3 Restrictions

§ 161.401 Scope.

This subpart applies to an airport imposing a noise or access restriction on the operation of Stage 3 aircraft that first became effective after October 1, 1990, and had either been agreed to in compliance with the procedures in Subpart B of this part or approved by the FAA in accordance with the procedures in subpart D of this part. This subpart does not apply to Stage 2 restrictions imposed by airports. This subpart does not apply to Stage 3 restrictions specifically exempted in § 161.7.

§ 161.403 Criteria for reevaluation.

(a) A request for reevaluation must be submitted by an aircraft operator.

(b) An aircraft operator must demonstrate to the satisfaction of the FAA that there has been a change in the noise environment of the affected airport and that a review and reevaluation pursuant to the criteria in § 161.305 is therefore justified.

(1) A change in the noise environment sufficient to justify reevaluation is either a DNL change of 1.5 dB or greater (from the restriction's anticipated target noise level result) over noncompatible land uses, or a change of 17 percent or greater in the noncompatible land uses, within an airport noise study area. For approved restrictions, calculation of change shall be based on the divergence of actual noise impact of the restriction from the estimated noise impact of the restriction predicted in the analysis required in § 161.305(e)(2)(i)(A)(*1*)(*ii*). The change in the noise environment or in the noncompatible land uses may be either an increase or decrease in noise or in noncompatible land uses. An aircraft operator may submit to the FAA reasons why a change that does not fall within either of these parameters justifies reevaluation, and the FAA will consider such arguments on a case-by-case basis.

(2) A change in the noise environment justifies reevaluation if the change is likely to result in the restriction not meeting one or more of the conditions for approval set forth in § 161.305 of this part for approval. The aircraft operator must demonstrate that such a result is likely to occur.

(c) A reevaluation may not occur less than 2 years after the date of the FAA approval. The FAA will normally apply the same 2-year requirement to agreements under subpart B of this part that affect Stage 3 aircraft operations. An aircraft operator may submit to the FAA reasons why an agreement under

General Provisions of the Part 161 Regulations

Part 161 of the FAA regulations sets forth definitions of several key terms which determine the scope of the regulations.[5] In this connection, the FAA adopted in Part 161 two significant elements of its Part 150[6] noise compatibility planning program: the principal noise measurement methodology and the land use compatibility guidelines. Part 150 of the FAA's regulations sets forth a voluntary program for airports to engage in planning to ensure that land uses in the vicinity of airports are compatible with airport operations. Airports that participate in the FAA's Part 150 program are entitled to apply for federal funding to implement land use compatibility programs.

First, Part 161 requires that airport proprietors examine the impacts of a proposed noise or access restriction within an "airport noise study area." That area must include all property which lies within the noise contours which represent an L_{dn} of 65 dBA.[7] That L_{dn} contour is the standard noise contour used in the Part 150 noise compatibility planning program to determine those land uses which ordinarily are compatible with airport operations.[8] The FAA also has directed that noise levels in the vicinity of an airport must be measured using the noise metrics and methodology outlined in its Part 150 regulations.[9]

Second, in determining whether land use around an airport is compatible with airport noise, an airport proprietor must use the land use compatibility guidelines which appear in Appendix A to the Part 150 regulations.[10] While those guidelines set forth the noise levels (measured using the L_{dn} metric) which generally are considered to be compatible with specified land uses, a local government can establish land use restrictions which are more stringent than the Part 150 guidelines. The FAA has stated that it adopted the Part 150 methodology and guidelines for these regulations because those guidelines allow airport proprietors flexibility but help ensure a uniform national standard for measuring airport noise impacts.

not reflect actual experience under the new regulations.

Airport proprietors always have been allowed to restrict the aircraft which are permitted to use their facility, so long as such restrictions have met certain important legal requirements. In the past, such restrictions have included measures which regulate airport use but which do not prevent any particular aircraft from using an airport (such as preferential runway systems, displaced thresholds, and departure profiles) as well as measures which limit the number or time of operations or the noise levels of aircraft permitted to use the airport (such as noise budgets, nighttime curfews, or single-event noise limits).

In the Noise Act, Congress expressly sought to balance local needs for airport noise abatement against the needs of the national air transportation industry. To that end, the Noise Act sets forth criteria and standards that are intended to ensure that an airport cannot upset this balance by imposing a local restriction whose negative effect on the national air transportation system outweighs any local benefits which a restriction is designed to produce.

Both the Noise Act and the FAA's regulations draw an important distinction between Stage 2 and Stage 3 aircraft, as set forth in Part 36 of the FAA regulations. Common Stage 2 aircraft include the unretrofitted models of the Boeing 727, some models of the 737 and the Douglas DC-9; common Stage 3 aircraft include the Boeing 757, 767, and McDonnell Douglas MD-80 and MD-11.[3]

As a general rule, Stage 2 air carrier aircraft are noisier than Stage 3 aircraft. That is not always true, however, because Stage 3 aircraft can be noisier on landing than Stage 2 aircraft. Further, Stage 3 aircraft are not equally quiet. For example, retrofitted Boeing 727's may be Stage 3 aircraft, but they are only slightly quieter than unretrofitted 727's. They also are much noisier than new-technology aircraft such as Boeing 757's.

A local phase-out or restriction on Stage 2 aircraft, therefore, will not inherently improve the noise environment for all airport neighbors.

The FAA promulgated the new Part 161 regulations to implement the review and approval procedures required by the Noise Act.[4] Each of the principal provisions of the rule is discussed below.

The FAA also amended Part 91 of its regulations to implement the nationwide phase-out of Stage 2 aircraft and phase-in of Stage 3 aircraft. These regulations also are discussed briefly.

subpart B of this part should be reevaluated in less than 2 years, and the FAA will consider such arguments on a case-by-case basis.

(d) An aircraft operator must demonstrate that it has made a good faith attempt to resolve locally any dispute over a restriction with the affected parties, including the airport operator, before requestng reevaluation by the FAA. Such demonstration and certification shall document all attempts of local dispute resolution.

§ 161.405 Request for reevaluation.

(a) A request for reevaluation submitted to the FAA by an aircraft operator must include the following information:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the restriction and any sanctions for noncompliance, whether the restriction was approved by the FAA or agreed to by the airport operator and aircraft operators, the date of the approval or agreement, and a copy of the restriction as incorporated in a local ordinance, airport rule, lease, or other document;

(3) The quantified change in the noise environment using methodology specified in this part;

(4) Evidence of the relationship between this change and the likelihood that the restriction does not meet one or more of the conditions in § 161.305;

(5) The aircraft operator's status under the restriction (e.g., currently affected operator, potential new entrant) and an explanation of the aircraft operator's specific objection; and

(6) A description and evidence of the aircraft operator's attempt to resolve the dispute locally with the affected parties, including the airport operator.

(b) The FAA will evaluate the aircraft operator's submission and determine whether or not a reevaluation is justified. The FAA may request additional information from the airport operator or any other party and may convene an informal meeting to gather facts relevant to its determination.

(c) The FAA will notify the aircraft operator in writing, with a copy to the affected airport operator, of its determination.

(1) If the FAA determines that a reevaluation is not justified, it will indicate the reasons for this decision.

(2) If the FAA determines that a reevaluation is justified, the aircraft operator will be notified to complete its analysis and to begin the public notice procedure, as set forth in this subpart.

§ 161.407 Notice of reevaluation

(a) After receiving an FAA determination that a reevaluation is justified, an aircraft operator desiring continuation of the reevaluation process shall publish a notice of request for reevaluation in an areawide newspaper or newspapers that either singly or together has general circulation throughout the airport noise study area (or the airport vicinity for agreements where an airport noise study area has not been delineated); post a notice in the airport in a prominent location accessible to airport users and the public; and directly notify in writing the following parties:

(1) The airport operator, other aircraft operators providing scheduled passenger or cargo service at the airport, operators of aircraft based at the airport, potential new entrants that are known to be interested in serving the airport, and aircraft operators known to be routinely providing nonscheduled service;

(2) The Federal Aviation Administration;

(3) Each Federal, State and local agency with land-use control jurisdiction within the airport noise study area (or the airport vicinity for agreements where an airport noise study area has not been delineated);

(4) Fixed-base operators and other airport tenants whose operations may be affected by the agreement or the restriction;

(5) Community groups and business organizations that are known to be interested in the restriction; and

(6) Any other party that commented on the original restriction.

(b) Each notice provided in accordance with paragraph (a) of this section shall include:

(1) The name of the airport and associated cities and states;

(2) A clear, concise description of the restriction, including whether the restriction was approved by the FAA or agreed to by the airport operator and aircraft operators, and the date of the approval or agreement;

(3) The name of the aircraft operator requesting a reevaluation, and a statement that a reevaluation has been requested and that the FAA has determined that a reevaluation is justified;

(4) A brief discussion of the reasons why a reevaluation is justified;

(5) An analysis prepared in accordance with § 161.409 of this part supporting the aircraft operator's reevaluation request, or an announcement of where the analysis is available for public inspection;

(6) An invitation to comment on the analysis supporting the proposed reevaluation, with a minimum 45-day comment period;

(7) Information on how to request a copy of the analysis (if not in the notice); and

(8) The address for submitting comments to the aircraft operator, including identification of a contact person.

§ 161.409 Required analysis by reevaluation petitioner.

(a) An aircraft operator that has petitioned the FAA to reevaluate a restriction shall assume the burden of analysis for the reevaluation.

(b) The aircraft operator's analysis shall be made available for public review under the procedures in § 161.407 and shall include the following:

(1) A copy of the restriction or the language of the agreement as incorporated in a local ordinance, airport rule, lease, or other document;

(2) The aircraft operator's status under the restriction (e.g., currently affected operator, potential new entrant) and an explanation of the aircraft operator's specific objection to the restriction;

(3) The quantified change in the noise environment using methodology specified in this part;

(4) Evidence of the relationship between this change and the likelihood that the restriction does not meet one or more of the conditions in § 161.305; and

(5) Sufficient data and analysis selected from § 161.305, as applicable to the restriction at issue, to support the contention made in paragraph (b)(4) of this section. This is to include either an adequate environmental assessment of the impacts of discontinuing all or part of a restriction in accordance with the aircraft operator's petition, or adequate information supporting a categorical exclusion under FAA orders implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

(c) The amount of analysis may vary with the complexity of the restriction, the number and nature of the conditions in § 161.305 that are alleged to be unsupported, and the amount of previous analysis developed in support of the restriction. The aircraft operator may incorporate analysis previously developed in support of the restriction, including previous environmental documentation to the extent applicable. The applicant is responsible for providing substantial evidence, as described in § 161.305, that one or more of the conditions are not supported.

§ 161.411 Comment by interested parties.

(a) Each aircraft operator requesting a reevaluation shall establish a docket or similar method for receiving and considering comments and shall make comments available for inspection to interested parties specified in paragraph (b) of this section upon request. Comments must be retained for two years.

(b) Each aircraft operator shall promptly notify interested parties if it makes a substantial change in its analysis that affects either the costs or benefits analyzed, or the criteria in § 161.305, differently from the analysis made available for comment in accordance with § 161.407. Interested parties include those who received direct notice under paragraph (a) of § 161.407 and those who have commented on the reevaluation. If an aircraft operator revises its analysis, it shall make the revised analysis available to an interested party upon request and shall extend the comment period at least 45 days from the date the revised analysis is made available.

§ 161.413 Reevaluation procedure.

(a) Each aircraft operator requesting a reevaluation shall submit to the FAA:

(1) The analysis described in § 161.409;

(2) Evidence that the public review process was carried out in accordance with §§ 161.407 and 161.411, including the aircraft operator's summary of the comments received; and

(3) A request that the FAA complete a reevaluation of the restriction and issue findings.

(b) Following confirmation by the FAA that the aircraft operator's documentation is complete according to the requirements of this subpart, the FAA will publish a notice of reevaluation in the **Federal Register** and provide for a 45-day comment period during which interested parties may submit comments to the FAA. The FAA will specifically solicit comments from the affected airport operator and affected local governments. A submission that is not complete will be returned to the aircraft operator with a letter indicating the deficiency, and no notice will be published. No further action will be taken by the FAA until a complete submission is received.

(c) The FAA will review all submitted documentation and comments pursuant to the conditions of § 161.305. To the extent necessary, the FAA may request additional information from the aircraft operator, airport operator, and others known to have information material to the reevaluation, and may convene an informal meeting to gather facts relevant to a reevaluation finding.

§ 161.415 Reevaluation action.

(a) Upon completing the reevaluation, the FAA will issue appropriate orders regarding whether or not there is substantial evidence that the restriction meets the criteria in § 161.305 of this part.

(b) If the FAA's reevaluation confirms that the restriction meets the criteria, the restriction may remain as previously agreed to or approved. If the FAA's reevaluation concludes that the restriction does not meet the criteria, the FAA will withdraw a previous approval of the restriction issued under subpart D of this part to the extent necessary to bring the restriction into compliance with this part or, with respect to a restriction agreed to under subpart B of this part, the FAA will specify which criteria are not met.

(c) The FAA will publish a notice of its reevaluation findings in the **Federal Register** and notify in writing the aircraft operator that petitioned the FAA for reevaluation and the affected airport operator.

§ 161.417 Notification of status of restrictions and agreements not meeting conditions-of-approval criteria.

If the FAA has withdrawn all or part of a previous approval made under subpart D of this part, the relevant portion of the Stage 3 restriction must be rescinded. The operator of the affected airport shall notify the FAA of the operator's action with regard to a restriction affecting Stage 3 aircraft operations that has been found not to meet the criteria of § 161.305. Restrictions in agreements determined by the FAA not to meet conditions for approval may not be enforced with respect to Stage 3 aircraft operations.

Subpart F—Failure to Comply With This Part

§ 161.501 Scope.

(a) This subpart describes the procedures to terminate eligibility for airport grant funds and authority to impose or collect passenger facility charges for an airport operator's failure to comply with the Airport Noise and Capacity Act of 1990 (49 U.S.C. App. 2151 *et seq.*) or this part. These procedures may be used with or in addition to any judicial proceedings initiated by the FAA to protect the national aviation system and related Federal interests.

(b) Under no conditions shall any airport operator receive revenues under the provisions of the Airport and Airway Improvement Act of 1982 or impose or collect a passenger facility charge under section 1113(e) of the Federal Aviation Act of 1958 if the FAA determines that the airport is imposing any noise or access restriction not in compliance with the Airport Noise and Capacity Act of 1990 or this part. Recission of, or a commitment in writing signed by an authorized official of the airport operator to rescind or permanently not enforce, a noncomplying restriction will be treated by the FAA as action restoring compliance with the Airport Noise and Capacity Act of 1990 or this part with respect to that restriction.

§ 161.503 Informal resolution; notice of apparent violation.

Prior to the initiation of formal action to terminate eligibility for airport grant funds or authority to impose or collect passenger facility charges under this subpart, the FAA shall undertake informal resolution with the airport operator to assure compliance with the Airport Noise and Capacity Act of 1990 or this part upon receipt of a complaint or other evidence that an airport operator has taken action to impose a noise or access restriction that appears to be in violation. This shall not preclude a FAA application for expedited judicial action for other than termination of airport grants and passenger facility charges to protect the national aviation system and violated federal interests. If informal resolution is not successful, the FAA will notify the airport operator in writing of the apparent violation. The airport operator shall respond to the notice in writing not later than 20 days after receipt of the notice, and also state whether the airport operator will agree to defer implementation or enforcement of its noise or access restriction until completion of the process under this subpart to determine compliance.

§ 161.505 Notice of proposed termination of airport grant funds and passenger facility charges.

(a) The FAA begins proceedings under this section to terminate an airport operator's eligibility for airport grant funds and authority to impose or collect passenger facility charges only if the FAA determines that informal resolution is not successful.

(b) The following procedures shall apply if an airport operator agrees in writing, within 20 days of receipt of the FAA's notice of apparent violation under § 161.503, to defer implementation or enforcement of a noise or access restriction until completion of the process under this subpart to determine compliance.

Introduction

In recent years, airport proprietors increasingly have recognized the importance of improving the noise environment in the vicinity of their facilities. Effectively recognizing that it has become impossible to expand the capacity of the national aviation system without reducing the adverse noise impacts of airports on their neighbors, Congress in November 1990 enacted the Airport Noise and Capacity Act of 1990[1] ("Noise Act").

The Noise Act directed the Federal Aviation Administration ("FAA") to establish a national program to review noise and access restrictions on aircraft operations imposed by airport proprietors. The Noise Act also directed the FAA to phase-out the operation of all Stage 2 aircraft by December 31, 1999. The FAA published its final regulations implementing the Noise Act on September 25, 1991.[2]

The law firm of Cutler & Stanfield and the noise consulting firm of Harris Miller Miller & Hanson Inc. have prepared this guide to explain the FAA regulations and to review how the regulations will affect airports which desire to enact their own noise or access restrictions. Both firms have been involved in the drafting of airport noise and access restrictions both before and after the Noise Act became law and have built national reputations for developing creative solutions to airport noise problems.

Where appropriate, this guide interprets the regulations and comments on their likely application. These interpretations and comments are based upon our review of statements by FAA officials in the weeks since the regulations were issued or our forecast of how the FAA will implement the regulations. Since this document is intended only as a general guide to the regulations, airport proprietors should consult with their legal counsel and noise consultants prior to considering enactment of any noise or access restriction at their specific airport.

Readers of this guide should bear in mind that the FAA has not issued any official guidance interpreting the Noise Act or its regulations. No airport proprietor yet has enacted a noise or access restriction which would be regulated by the Noise Act, though several airport proprietors are considering such measures. Consequently, the comments and interpretations in the guide necessarily are preliminary and do

(1) The FAA will issue a notice of proposed termination to the airport operator and publish notice of the proposed action in the **Federal Register.**This notice will state the scope of the proposed termination, the basis for the proposed action, and the date for filing written comments or objections by all interested parties. This notice will also identify any corrective action the airport operator can take to avoid further proceedings. The due date for comments and corrective action by the airport operator shall be specified in the notice of proposed termination and shall not be less than 60 days after publication of the notice.

(2) The FAA will review the comments, statements, and data supplied by the airport operator, and any other available information, to determine if the airport operator has provided satisfactory evidence of compliance or has taken satisfactory corrective action. The FAA will consult with the airport operator to attempt resolution and may request additional information from other parties to determine compliance. The review and consultation process shall take not less than 30 days. If the FAA finds satisfactory evidence of compliance, the FAA will notify the airport operator in writing and publish notice of compliance in the **Federal Register.**

(3) If the FAA determines that the airport operator has taken action to impose a noise or access restriction in violation of the Airport Noise and Capacity Act of 1990 or this part, the FAA will notify the airport operator in writing of such determination. Where appropriate, the FAA may prescribe corrective action, including corrective action the airport operator may still need to take. Within 10 days of receipt of the FAA's determination, the airport operator shall—

(i) Advise the FAA in writing that it will complete any corrective action prescribed by the FAA within 30 days; or

(ii) Provide the FAA with a list of the domestic air carriers and foreign air carriers operating at the airport and all other issuing carriers, as defined in § 158.3 of this chapter, that have remitted passenger facility charge revenue to the airport in the preceding 12 months.

(4) If the FAA finds that the airport operator has taken satisfactory corrective action, the FAA will notify the airport operator in writing and publish notice of compliance in the **Federal Register.** If the FAA has determined that the airport operator has imposed a noise or access restriction in violation of the Airport Noise and Capacity Act of 1990 or this part and satisfactory corrective action has not been taken, the FAA will issue an order that—

(i) Terminates eligibility for new airport grant agreements and discontinues payments of airport grant funds, including payments of costs incurred prior to the notice; and

(ii) Terminates authority to impose or collect a passenger facility charge or, if the airport operator has not received approval to impose a passenger facility charge, advises the airport operator that future applications for such approval will be denied in accordance with § 158.29(a)(1)(v) of this chapter.

(5) The FAA will publish notice of the order in the **Federal Register** and notify air carriers of the FAA's order and actions to be taken to terminate or modify collection of passenger facility charges in accordance with § 158.65(f) of this chapter.

(c) The following procedures shall apply if an airport operator does not agree in writing, within 20 days of receipt of the FAA's notice of apparent violation under § 161.503, to defer implementation or enforcement of its noise or access restriction until completion of the process under this subpart to determine compliance.

(1) The FAA will issue a notice of proposed termination to the airport operator and publish notice of the proposed action in the **Federal Register.** This notice will state the scope of the proposed termination, the basis for the proposed action, and the date for filing written comments or objections by all interested parties. This notice will also identify any corrective action the airport operator can take to avoid further proceedings. The due date for comments and corrective action by the airport operator shall be specified in the notice of proposed termination and shall not be less than 30 days after publication of the notice.

(2) The FAA will review the comments, statements, and data supplied by the airport operator, and any other available information, to determine if the airport operator has provided satisfactory evidence of compliance or has taken satisfactory corrective action. If the FAA finds satisfactory evidence of compliance, the FAA will notify the airport operator in writing and publish notice of compliance in the **Federal Register.**

(3) If the FAA determines that the airport operator has taken action to impose a noise or access restriction in violation of the Airport Noise and Capacity Act of 1990 or this part, the procedures in paragraphs (b)(3) through (b)(5) of this section will be followed.

Issued in Washington, DC on September 19, 1991.

James B. Busey,

Administrator.

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CUTLER & STANFIELD is an environmental and land use law firm. The firm represents public sector entities in major environmental projects and frequently advises public and private clients on high-visibility public policy matters. The firm's clients include scores of airport proprietors, community organizations, and local governments involved in airport projects in major cities throughout the country. The firm has been involved in drafting many noise rules.

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