BEFORE THE DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

April 15, 1991

Docket No. 26432
Dockets No. 26433

Comments on the
Notice of Proposed Rulemaking 91-8
14 CFR Part 161
Notice and Approval of Airport Noise
and Access Restrictions – NPRM

Notice of Proposed Rulemaking
14 CFR Part 91
Phase Out of Stage II Aircraft NPRM

COMMENTS OF:

THE AIRPORT OPERATORS
COUNCIL INTERNATIONAL (AOCI)

THE AMERICAN ASSOCIATION OF
AIRPORT EXECUTIVES (AAAE)

The Airport Operators Council International (AOCI), which represents the governmental sponsors of U.S. public use airports, and the American Association of Airport Executives (AAAE) which represents airport executives at U.S. public use airports, hereby submit joint comments on issues relating to the phase out of Stage 2 aircraft and the program for reviewing airport noise restrictions on the operations of aircraft.

For further information contact Tom Devine (AOCI) 202/293-8500 or Spencer Dickerson (AAAE) 703/824-2504.
AQC/AAAAE COMMENTS ON FAA'S PROPOSED NOISE RULES

INTRODUCTION

Airports recognize and understand the problems faced by FAA in developing and promulgating these rules. On the local level, airports have long faced the same challenge which now confronts the FAA - to balance, to the extent possible, the legitimate interests of air carriers, air cargo and other aviation users with the equally legitimate interests of those impacted by the resulting noise. Overall, FAA seems to have made a commendable effort to reach this balance. There are, however, areas where the balance seems not to have been achieved. These are the focus of the airports comments. While these may not represent the complete concerns of all airports, they do represent the major issues which must be addressed. Our comments are separated into two sections, corresponding to the two NPRMs.

I. PHASEOUT OF STAGE 2 AIRCRAFT (Docket 26433)

The entire aviation community has come to accept the premise that conversion to an all Stage 3 fleet will have beneficial effects on the impact of noise on airport neighbors. The debate now centers on the appropriate means of reaching that goal, and in particular the appropriate interim requirements for air carriers to meet to ensure an orderly transition to a Stage 3 fleet.

A. Stage 2 operating rights should not be transferrable among carriers.

Transfer of operating rights creates some serious potential problems and may have a negative effect on timely achievement of an all Stage 3 fleet. For example, a large carrier which aggressively converts its fleet in advance of the phase-out requirements would have a large number of operating rights available to sell to other carriers. Potential purchasers would include weak airlines. Such carriers might rely on acquiring operating rights rather converting their fleets in order to meet the interim compliance dates, with the result that their Stage 2 aircraft will remain in the fleet for a longer period of time. A weak carrier having received Stage 2 operating rights from other carriers could easily find itself at the end of December 1999 with less than 85 percent of its fleet converted to Stage 3 because it held extra Stage 2 operating rights. Such a carrier would then likely seek a waiver because they would have no ability to continue operating at previous levels of service without it. Such a waiver would adversely affect achievement of the noise goals of the Airport Noise and Capacity Act of 1990, but there would be tremendous pressure to grant such a waiver at that time. FAA should avoid the problem and encourage the orderly retirement or conversion of Stage 2 aircraft in conformity with the Act by not allowing the transfer of Stage 2 operating rights.

B. Airports are not preempted from establishing rules which would phase out Stage 2 aircraft earlier than the schedule set by Congress.

The Airport Noise and Capacity Act of 1990 contains no language which would limit the authority of airport operators to impose a faster Stage 2 phase out schedule than
mandated by federal law. The Act itself, in Section 9308(a), provides only that no person may operate a Stage 2 aircraft after December 31, 1999, except in the case of waivers provided for in subsection (b). It directs the Secretary to establish a schedule for compliance, but uses no preemptive language. The only limitation in the Act on individual airport Stage 2 restrictions is contained in Section 9304(c) which requires that for Stage 2 restrictions proposed after October 1, 1990, the airport operator must "publish" the proposed restriction and prepare and make available for public comment at least 180 days before the effective date of the restriction the following: (1) an analysis of the anticipated or actual costs and benefits of the proposed noise 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 restriction.

These procedural requirements of publication, notice, analysis and opportunity for comment are the Act's sole preconditions for implementation of Stage 2 restrictions. Thus, the Act makes it clear that in a case of Stage 2 restrictions, unlike Stage 3 restrictions, FAA approval is not required. Further underscoring that there is no unintended federal preemption of airport proprietor's rights, Section 9304(h) specifically provides that except to the extent required by the Act "nothing [contained therein] . . . shall be deemed to eliminate, invalidate or supersede . . . existing law with respect to airport noise or access restrictions by local authorities."

Significantly, shortly after passage of the Act, Congressman James Oberstar, Chairman of the House Subcommittee on Aviation, in a letter to Richard C. Leone, Chairman of the Port Authority of New York and New Jersey, assured the Port Authority that the Stage 2 phase out mandated by the Act "is a national standard, and in no way infringes on local airports' ability to set even more stringent phase out standards if they wish." Additionally, in a Senate floor colloquy between Senator Frank Lautenberg of New Jersey and Senator Wendell Ford, Chairman of the Senate Aviation Subcommittee, on October 27, 1990, Senator Ford specifically agreed when Senator Lautenberg sought clarification of the legislative intent that under the Act "an airport operator would be allowed to impose restrictions on Stage 2 operations without the approval of the FAA and without risking the loss of AIP money." Senator Lautenberg specifically referenced this colloquy in his January 30, 1991 letter to Administrator Busey. Copies of the two letters are attached to this memorandum.

The language on page 21 of the commentary to the NPRM states that:

"It is anticipated that only in exceptional circumstances will airports propose to eliminate or phase out the operation of Stage 2 aircraft in advance of the deadlines established by the federal government. Airports that do propose early phase outs are encouraged to highlight the net benefits of the accelerated local phase out in the public notice and analyses required by the Act . . . It is important that airport
operators demonstrate that the local restrictions are not discriminatory
and do not constitute an undue burden on interstate commerce, or an
undue burden on the national aviation system."

This is inappropriate. Nothing in the Act nor its legislative history justifies a
requirement of "exceptional circumstances" for an accelerated Stage 2 phase out.
Furthermore, the Act, with regard to Stage 2 restrictions, is entirely procedural in nature
and very specific as to what is required by way of analysis. It neither contains any
requirement to show the net benefits of an accelerated local phase out, nor does it require
a specific showing with regard to discrimination, burden on commerce or burden on the
national aviation system. Consequently, such requirements should be eliminated as unduly
burdensome and clearly beyond the scope of the Act.

1. Operations, Not Fleet Mix or Numbers of Aircraft, Determine Noise
Impacts at Individual Airports.

One factor which must be considered regarding the need for airports to
protect themselves from aircraft noise and its attendant liability is the difference between
fleet mix, or numbers of Stage 2 aircraft, and operations of aircraft. The latter, operations,
is the key factor for airports. Stage 2 aircraft may, for instance, comprise only 25 percent
of an air carrier's fleet, but 40, 80 or even 100 percent of its operations at a particular
airport may be with Stage 2 aircraft. This creates a situation where such airport receives
an inordinate amount of aircraft noise from that carrier.

There are a number of reasons this phenomenon may occur. It may be convenient for a
carrier to use Stage 2 aircraft to serve the routes it chooses to fly from that airport. Carriers
may not be able to fly Stage 2 aircraft into certain airports, and other airports in the area
thus become "dumping grounds" for them. The problem may also be exacerbated by the fact
that the short haul nature of many Stage 2 aircraft makes it more likely that the percentage
of operations conducted with those aircraft exceeds the percentage of such aircraft in the
carrier's fleet.

As a result, airports need to be able to protect themselves from receiving a
disproportionate amount of aircraft noise through the operation of Stage 2 aircraft at their
facilities, by limiting such operations. Clearly under the statute, airports have that right, and
there should be no doubt about this in the final regulations. Nor should the regulations
attempt to make it more difficult for airports to impose restrictions on Stage 2 aircraft.
Congress was very explicit that for restrictions on Stage 2 aircraft, the only new requirements
of the act were compliance with the notice and analysis provisions. This has been
acknowledged by FAA Administrator James Busey in the attached letter to Senator Frank
Lautenberg, dated April 1, 1991.

While FAA stated in the federalism section of the preamble to the NPRM that it sought to
impose as small a burden on state and local governmental entities which run airports as
possible, we believe that this has not been reflected in the language of the proposed rule itself. We urge FAA to rethink its approach regarding Stage 2 rules in light of the clear provisions of the statute and the need for airports to retain their rights to protect themselves from disproportionate Stage 2 noise impacts until the final national phaseout is effected.

C. Airports are willing to contemplate adjustments to the compliance schedule.

Airports support the concept of eliminating Stage 2 aircraft and converting to a Stage 3 fleet in an orderly manner. While we are most concerned with the number of Stage 2 operations, as opposed to the number of Stage 2 aircraft, for the reasons noted above, we believe the phaseout schedule for Stage 2 aircraft proposed by FAA is generally reasonable. However, airports would not object to an alternative means of compliance with the national interim phaseout dates based on fleet mix, which was contemplated by many parties when the legislation was being formulated—as long as such an alternative is tied to the unavailability of hushkits to enable a carrier to retrofit its fleet to meet the interim requirements.

Thus, if FAA determined, based on the unavailability of hushkits, that a carrier could not reasonably eliminate 25% of its Stage 2 fleet through hushkitting them to meet Stage 3 standards by December 31, 1994, FAA would allow that carrier to meet an alternative interim requirement based on fleet mix. Similarly, if the carrier could not, through hushkitting, reasonably eliminate the number of Stage 2 planes needed to meet the NPRM's 50% reduction in Stage 2 base by December 31, 1996, FAA would allow the carrier to meet the alternative interim standard of compliance.

We are aware of one alternative compliance proposal which would require 60 percent of a carrier's fleet to be Stage 3 aircraft by December 31, 1994, 70 percent to be Stage 3 by December 31, 1996, and 80 percent to be Stage 3 by December 31, 1998. We would not object if FAA, based on justifications submitted by air carriers, were to determine that such an alternative means of compliance is appropriate—as long as it is linked to the unavailability of hushkits. Even under the alternative compliance approach, we believe that the orderly removal of Stage 2 aircraft must be part of each carrier's program to achieve compliance with the Stage 3 fleet requirement.

D. Lack of Standards for FAA Review of Applications for a waiver of the 1999 Deadline.

Airports are troubled by the lack of standards for the granting of a waiver of the December 31, 1999 phaseout deadline. This is especially troubling given the excessive burdens FAA places on airports which propose local noise restrictions under the companion rule. We believe that airlines must be required to justify the need for a waiver, or else they will establish their fleet conversion schedules to target 85% compliance instead of 100% compliance by 1999, and will expect the granting of a waiver as a matter of course. We believe that, at a minimum, FAA must give airports and other interested parties an opportunity to comment on the application and supporting justifications presented by an
airline seeking a waiver. FAA must also consider, in weighing whether it would be in the public interest to grant the waiver, the public benefits related to noise reduction which would result from not granting the waiver.

II. NOISE AND ACCESS RESTRICTIONS (Docket 26432)

A. Consistent with the Act, nothing in the Rule should require more than notice and analysis for Stage 2 Rules.

Congress, in the text of the Act, made it clear that an airport can propose a new restriction on Stage 2 aircraft, perform the required analysis and give 180 days' notice after which time the proposed rule would take effect. There is no role for FAA in this process. Language in the NPRM and comments at the public hearings on the proposed rules suggest a movement toward FAA review and action on Stage 2 rules. This would be a significant departure from the intent of Congress and would directly conflict with the terms of the Act itself.

B. The same procedure should apply to restrictions on all types of Stage 2 aircraft.

The draft study, "Application of Notice and Analysis Requirements to Operating Noise/Access Restrictions on Subsonic Jets Under 75,000 Pounds", as well as experience at airports around the country, indicates that Stage 2 aircraft under 75,000 pounds should be subject to the same rules as apply to Stage 2 aircraft over 75,000 pounds. At some airports these may be among the noisiest aircraft which operate; at many others, they certainly contribute to the noise problem. As noted in our earlier filing, for reasons of efficiency of the national and local air transportation systems, as well as providing significant noise relief, it is important that airports be able to restrict or regulate for noise reasons the operations of the full range of aircraft, including those which carry few passengers. Thus, the provisions for implementing local restrictions on Stage 2 aircraft after the required notice and analysis should apply to those Stage 2 aircraft under 75,000 pounds as it does to those which are heavier.

C. The Required Notice and Its Costs are Excessive.

In the preamble to the NPRM on noise and access restrictions, FAA identifies the cost of providing the notice required for both Stage 2 and Stage 3 rules as being between $15,000 and $45,000, depending on complexity. This is because the rule itself provides for individual notices to interested parties including "aircraft operators" currently operating at the airport or planning to do so within 180 days. The term "aircraft operator" is so broadly defined as to include general aviation operators as well as air carriers. Notice must also be published in local, national and trade publications. In addition, notice is required to be sent to all governmental entities within the 65 Ldn contour. For some
airports, this will comprise a very large number of entities including school boards, sewer treatment districts, villages and the like—many of whom will have no interest in the proposal.

The cost of such notice is clearly excessive. It might be reasonable to require individual notice to airlines. Some other parties might also reasonably be eligible. The proposed requirement, however, is burdensome and should be more narrowly drawn. It is particularly inappropriate for the individual notice requirement to apply to general aviation operators which may be large in number and extremely difficult for an airport to identify.

The publications which may be used for giving notice also need to be defined. At present, airports have no means to assure compliance with the applicable publication requirement. By setting forth the appropriate publications designed to reach GA users, as well as the public, FAA could eliminate the need for individual notice to such users.

Airports believe that the notice requirements are designed to ensure that interested parties are given an opportunity to review and comment on the proposal, with the airport giving due consideration to comments received. We believe, however, that one provision in the proposal would undercut this intent, namely the requirement that an airport restart the 180 day period for Stage 2 restrictions if it makes "a substantial change" to its proposal. First, the regulation defines "substantial change" much too broadly, to include any change which would result in a more restrictive proposal or alter the way impacts are apportioned among aircraft operators. There is no reason airports should have to wait half a year to implement a restriction which has been modified by any such change, no matter how minor. This would be far more cumbersome than the requirements federal agencies must follow in deciding whether a supplemental notice of proposed rulemaking is needed if they make changes to proposed rules based on comments they receive from interested parties.

A new period of comment should be required only if the airport makes truly significant changes to the proposed restriction. Even then, the new period should not be 180 days. If the airport determines that the changes are significant, perhaps it should have to allow a shorter comment period, such as 30 or 60 days. To restart the entire process just because an airport was responsive to comments it received during the initial comment period would seem to be counterproductive, and could result in a disincentive for airports to change their proposals in response to comments received.

D. Definitions of Noise and Access Restrictions need to be narrowly crafted.

Airports believe that it is important that the definitions of noise and access restrictions not be so broad as to cover those areas outside of noise, which are within the traditional purview of airport operators. An example of a type of access restriction which could be argued as having multiple effects is a perimeter rule. Such a perimeter rule was litigated in the case of Western Airlines v. Port Authority of New York and New Jersey, 817 F.2d 222 (2nd Cir.1987). There the Court held that the rule was intended to reduce congestion passing through the terminal and was justified on the basis of an airport
operators' authority to control congestion, size and impact of activities on its facilities. The rule, of course, has no effect on whether an aircraft operating within the specified perimeter is Stage 2 or Stage 3 and is really not a noise rule. However, in some cases arguments have been made that rules such as this have noise effects such as by requiring smaller aircraft, or lower fuel loads with the resulting reduction in noise as compared to larger or heavier loaded aircraft.

Airports believe that such rules, which are not designed to deal with noise issues, but are rather addressed to other issues, are outside of the scope of the proposed regulation, even if the rule may have some indirect effect on noise or on use of Stage 2 or Stage 3 aircraft.

Airports have the following comments in response to questions in the Preamble to the Noise and Access Restriction NPRM:

The proposed definition of noise or access restrictions is too broad. It is so broad that almost any access restriction can be argued to fall within it, even if that access restriction is not intended to control noise and only has an incidental effect on it. The definition of noise or access restriction should focus on whether the primary effect of the rule is to reduce noise. If such a rule has a minimal or incidental effect on noise and has a major purpose which is outside the scope of noise regulation, such a rule or access restriction should be outside of the scope of this rule.

Means to distinguish whether the restriction is related to noise might include whether the rule in its primary application affects terminal congestion, congestion in gate or ramp areas, passenger handling capacity of existing facilities, or peak hour congestion—as opposed to noise. The key issue is whether the primary function of the rule relates to activities on the ground at the airport, in the terminal area, or on the land side of the terminal area in the parking and access roadways. Such rules, to the extent that they might affect the density of the operations, could have an indirect effect on noise. However, examination of their primary purposes indicates that noise regulation is not their purpose.

A restriction or airport use charge that has an indirect effect on controlling noise should not be subject to this regulation. FAA should focus on the noise effects of rules and whether they are addressed to primarily controlling the noise of Stage 2 or Stage 3 aircraft. That is a sufficiently difficult and complex task. To look beyond the direct effect of rules to indirect effects may lead to inquiries in such great numbers and levels of detail and complexity that it would preclude FAA from doing any effective review of any rules. By the same token, review by FAA under these rules of airport operators' proposed regulations intended to deal with problems other than noise may have a chilling effect on any kind of rules by airports and may make it impossible to deal with complex situations beyond noise. While such chilling effect seems to be intended for noise-based rules, there
is no indication in the statute or the legislative history that the Act was intended to impede airports' ability to address legitimate congestion and other non-noise issues.

This proposed regulation outlines the procedures for notice and review of noise restrictions. Airports can be expected to follow the requirements of the rules where they believe their rules affect noise. Where someone disagrees with the determination of an airport, that matter can be brought to the attention of FAA. FAA may then contact the local airport operator and ask for information in regard to the rule and permit the airport operator an opportunity to provide the FAA with information, explaining whether the restriction falls within or without the regulation.

We also have a specific comment regarding the listing of operational procedures enumerated in section 161.7 which "do not fall within the purview of this part unless they limit the total number of Stage 2 or Stage 3 aircraft operations at an airport or limit the hours of Stage 2 or Stage 3 aircraft operations." Most of the actions listed, such as preferential runway use, noise abatement approach and departure procedures and profiles, flight tracks, and taxiing, are not local restrictions, but rather FAA air traffic control procedures, which the local airport cannot impose unilaterally.

The airport can make recommendations for such procedures to FAA, but FAA may accept or reject the local recommendations or make changes on its own initiative, so such procedures should not fall within the scope of the regulation in any event, since the Act, and its implementing regulations, was intended to cover local restrictions, not FAA actions. We do agree that any operational type restrictions which can be implemented unilaterally by the local airport should not be subject to the regulations unless they limit the number or hours of Stage 2 or Stage 3 aircraft operations.

E. Rules for agreements should be tailored to encourage and facilitate their use.

Under this proposed rulemaking, it is likely to be extremely difficult to obtain agreement among all the parties required to be given notice that a proposed Stage 2 or Stage 3 noise or access restriction should be implemented. However, in concept, the agreement procedure is considerably easier, less costly, and more likely to result in implementation of a rule than is the FAA review and approval procedure. Airports applaud FAA for devising this concept, and urge the agency to modify the rules to expedite and effectuate this process so that it can actually be utilized by the parties. Accordingly, we have specific comments and response to the questions raised by FAA in the Preamble to the NPRM in regard to the agreement process.

Airports have previously stated their views in regard to the notice requirements in the NPRM. They are, overall, excessive and burdensome. In cases where agreements are negotiated for implementation of a rule, parties to the agreement will have already
received direct notice and therefore need not receive any further notice. All other parties or potential parties should receive sufficient notice through publication. This will provide adequate information to new entrants since the information will be broadly available. New entrants which have serious interest in an airport will have already contacted the airport within sufficient time to be considered for participation in the agreement process. Forty-five days is a reasonable period to reply to published notices. The instant rulemaking, which is quite complex and deals with controversial aircraft noise issues, has a 45-day comment period; many rulemakings provide less time. It is appropriate for FAA to be notified of implementation and termination agreements since the FAA may be called upon to provide information about, or to review a Stage 3 rule after the fact upon a reconsideration request.

It is reasonable for an agreement regarding noise rules to be written and signed. This significantly reduces the chances of dispute, although it will, as FAA has suggested, complicate and delay the agreement process. While this may mean fewer agreements, on balance it will probably not result in any greater workload than having agreements which are not reduced to writing and the resultant disputes about those agreements.

FAA has proposed to require agreement of those aircraft operators currently serving the airport or intending to do so within 180 days from the effective date of the agreement. This is probably unreasonable. A better definition would include operators currently serving the airport or intending to do so within 90 days from the date of the proposed restriction which subsequently may become the subject of the agreement. Since it may take time to negotiate an agreement, to extend the definition of an aircraft operator to include parties who do not anticipate commencing operation until 180 days after the effectiveness of an agreement goes too far. Completion of an agreement may take some time from the time it is proposed. The overbroad scope of required notice results in further delay of the possible implementation of an agreement. Parties beyond the scope of this definition should be subject to constructive notice by publication.

An aircraft operator not covered by the time limits for notice to new entrants must nevertheless be bound by an agreement duly entered into. Any other result has the potential to make the agreement process useless. If the agreement must be renegotiated each time a party who was not in the loop wishes to commence operations at an airport, or if that agreement becomes part of a review and approval process by the FAA merely by the expression of interest of a party outside of the original parties to it, the agreement process will be ignored because it will provide no benefit.

There is no need for an economic analysis and 180 days notice on Stage 2 or Stage 3 restrictions which are subject to agreements, as opposed to having been unilaterally adopted by an airport operator.

F. The detail and complexity of the application is excessive. FAA analysis of the costs of doing the studies required to comply with the analysis requirements of both Stage 2 and Stage 3 rules suggests that the costs of completing the required analyses under
either set of rules may be $200,000 or more. Airports believe that the cost could be considerably higher, particularly where rules are complex and where a substantial number of the studies required by the rules must be done from scratch.

In order to minimize the costs and in response to the questions promulgated by FAA, airport operators suggest:

(1) Analysis for restrictions on Stage 2 aircraft operations should not be required in the same detail as for restrictions on Stage 3 operations. Optional analysis may be permitted, but even such optional analysis should not be placed in an advisory circular, since advisory circulars have a tendency to become mandates. No analysis beyond the requirements of the statute should be provided for since the analysis that is provided for is already intensive, burdensome and oppressive. It would, indeed, be anomalous for FAA to impose on local governmental bodies which operate airports analytical requirements which are far more burdensome than those required for air carriers seeking a waiver to operate Stage 2 aircraft until December 31, 2003. It would also be more than ironic for FAA to impose on such local governmental entities proposing individual airport noise restrictions analytical burdens which far exceed those the FAA has undertaken in order to promulgate the federal regulations which are the subject of the current rulemaking.

(2) The analyses required for restrictions on Stage 2 aircraft are set by the statute. We do not believe that FAA has the authority to add additional requirements. Given the Administration's commitment to federalism concepts, FAA should instead, focus on implementing the legislative intent with as little burden as possible on the local governmental agencies which operate airports. While FAA pays lip service to the federalism concerns at one point in the preamble to the rule, it implies elsewhere in the preamble that it is contemplating grafting all of the rigorous and burdensome requirements for Stage 3 restrictions onto the required analyses for Stage 2 restrictions. It is inconceivable how this can be reconciled with an avowed goal of the Administration to burden local governmental entities no more than is absolutely necessary. The only burdens that are absolutely necessary are those contained in the statute.

It appears that the regulations are intended to make it virtually impossible for an airport to successfully implement a restriction on Stage 3 aircraft. If FAA believes this is the intent of Congress, it should just come out and say so, instead of pretending that it is not trying to burden local governmental entities which propose such restrictions. However, FAA cannot even make a colorable claim it was the intent of Congress to thwart all attempts at restricting Stage 2 aircraft, and FAA should simply abandon any attempts to impose onerous requirements on airports seeking to impose such restrictions.

While FAA claims in the preamble that it is allowing considerable discretion to airports proposing Stage 3 restrictions, the example it cites clearly belies any flexibility at all. It states, on page 33 that "general aviation airports that are not used by scheduled air carriers may not need to consider the economic effect of the proposed restriction on air carriers and
airline passengers." [emphasis added]. This implies that under some circumstances, FAA may require an airport that isn't served by scheduled air carriers to consider the economic effects of the proposed restrictions on air carriers and airline passengers. Given that there would be no airline passengers to be affected, it is unclear how possibly requiring such analysis is an example of "the flexibility envisioned by the proposed rule's guidance."

(3) FAA inquires whether an airport proposing a Stage 2 restriction should be required to explain explicitly why it does not violate various statutory standards. Airports believe that such a requirement would be inappropriate, because it would place the airport in the untenable position of trying to prove a negative. If the FAA believes that a proposed Stage 2 rule which has been developed and implemented in compliance with the terms of the Act and these rules, violates some other federal law, it is free to attempt to demonstrate that in litigation, but there is nothing in the statute which should lead anyone to believe that a requirement of demonstrating these matters in advance is either necessary or appropriate.

(4) AOCI/AAAE are disturbed by the depth, breadth, and detail of airline information required to be analyzed by airports under 305 (h), especially since much of the required information may be proprietary to airlines or at the very least, extremely difficult to obtain. Airports should only be required to make a good faith effort to make such analyses, and if the airports' efforts are not contradicted by information submitted by commenters during the comment period, it should be considered to be accurate.

(5) We are also concerned with the NEPA requirements imposed by section 305(i). A number of airports believe that it is inappropriate to require this at the time of an application. They can be very expensive and are not necessary until FAA renders its approval. We believe that FAA should put information in an advisory circular on how to comply with the environmental requirements at the appropriate time.

(6) Airports are troubled by the fact that, in describing the procedures used to reevaluate a previously approved or agreed to restriction, FAA consistently refers to a rule "in violation" of the statute, statutory conditions "which have been violated," and an "improper restriction." If an airport has complied with the agreement provisions or received FAA approval, it did not violate the statute or impose an improper restriction. If conditions change and a reevaluation determines that the restriction no longer meets the criteria, it does not mean that the airport has violated the Act, merely because it did not unilaterally rescind the restriction prior to the reevaluation.

Airports are particularly sensitive to any mischaracterization of their compliance with the Act because of the severe penalties—termination of AIP and PFCs—which can apply. Once FAA has made a determination that the restriction must be rescinded, an airport will, of course, have to comply with that determination or seek judicial relief, but there should be no implication of wrongdoing on the part of the airport because FAA reaches a different conclusion in the reevaluation than it did in the initial evaluation. Perhaps some may consider this point to be moot because no one will ever be able to get a Stage 3 restriction
approved in the first place, but airports nonetheless believe the tone of the reevaluation process should be modified to avoid unintended consequences.

G. Airport operators should be able to determine when applications are complete and require determination on the merits.

The rules as promulgated permit FAA to reject applications which it believes are incomplete either on the basis of notice or adequacy of studies done (Section 161.313). Airport operators believe that, once a good faith effort has been made by an airport operator to provide the information required, airport operators, after consulting with FAA, should be permitted to advise FAA that they wish to have the proposed rule reviewed on the merits based on the information provided. Airport operators believe that it is inappropriate for FAA to be able to refuse to approve a rule based on its determination that an application is inadequate. This permits FAA to avoid the risk of shifting liability by not having reached the merits of a rule. Airports need protection from potential liability, either through the ability to impose noise rules or the shift of liability to the federal government if such rules are not allowed.

The information and analysis requirements propounded by the rules, particularly the information required for proposed Stage 3 restrictions, are so extensive that it would be possible to find a basis to reject nearly any application since absolute and detailed compliance with the level of studies and information required is probably not possible. FAA, in the preamble, recognizes that flexibility should be encouraged. However, we are concerned that if FAA reserves the right to, in effect, deny proposals without incurring for the federal government the liability mandated by such a denial, this will be an option that is too attractive for FAA to pass up, and will become the rule rather than the exception.

Airport operators believe that FAA can rationally expect from airport operators a good faith compliance with these study requirements, and they must be entitled to complete the studies in what they consider to be an adequate way and submit them to FAA. There should be a point at which airport operators and FAA can agree to disagree about the completeness of the materials. At such point, airport operators are entitled to FAA’s action on the merits. The rule at present contains no means for determining whether an application is complete, no independent review of such determination, and provides for FAA to reject a proposed rule without considering it on the merits or shifting liability. Airport operators believe that this goes well beyond the scope of authority granted by the Act. It also appears to be inconsistent with the intent of Congress.

H. Description of the proposed analysis requirements.

The fact that it takes several pages in the proposed rule just to list the studies and analyses airports are required to performed suggests that such requirements are
burdensome, and we have indicated our concerns regarding that elsewhere in this document. To respond to FAA's specific questions, however, we believe that the final (hopefully pared down) elements of analysis for proposed restrictions on Stage 3 aircraft should be detailed in the rules, rather than in an advisory circular. Examples for means of compliance and types of studies which could be done may be concluded in an advisory circular, however.

To the extent FAA wishes particular costs and benefits to be analyzed, they should be listed in the rules. Applicants should be permitted the greatest possible amount of flexibility in determining what to analyze since different restrictions can be analyzed in different ways. FAA, in discussing the analyses necessary for a reevaluation of an approved restriction, notes that the necessary level of detail and degree of analysis will vary with the complexity of the rule in question. Logic dictates that the same flexibility based on complexity of the rule relating to the requirements for analysis and level of detail should apply to the initial application for approval as well to any re-evaluation.

It may be appropriate to vary the required analysis of a restriction on Stage 3 aircraft depending on the type of airport or the type of restriction. Categories of airports might include high density airports, other large hub airports, mixed general aviation and air carrier airports and general aviation airports. The type of analysis that should be required of a restriction may vary depending upon the extent to which that restriction would preclude operations by a particular class of aircraft. If a restriction may have the effect of limiting noise that could be made by an aircraft without prohibiting its use, that may require much lower level of analysis than if it excluded an aircraft or excluded it during a particularly desirable time period for providing service.

I. Rules for termination of AIP Funds and collection of PFC must incorporate due process consistent with termination of such funding for other reasons.

The primary way in which FAA could ensure that the potential penalties for non-compliance with the provisions of the Act or the regulations do not impair the ability of airports to market PFC backed bonds would be to provide notice and an opportunity to cure within a reasonable period if FAA has reason to believe an airport is not complying with the Act. If FAA is not satisfied that the problem is corrected, it should hold a hearing in which all parties could present evidence; this would maximize the preservation of rights and permit the financial markets to enter into the equation in reviewing the alleged violation.

Great concern has been expressed by the financial markets regarding the circumstances under which PFCs could be suspended or terminated, and we direct FAA's attention to Docket #26385 for a full discussion of such concerns. In light of these concerns, AOCI and AAAE, in our joint comments with ATA on the PFC rulemaking, fleshed out our suggestions for termination/suspension of PFCs with specific proposals, and we have attached a copy of those suggestions for your information.
FAA has indicated in the preamble that the statute does not require nor will FAA consider the possibility of a hearing before terminating an airport's ability to impose a PFC if FAA believes an airport has violated the noise provisions of the act. There is no basis for FAA to categorically exclude the possibility of a hearing. Elsewhere in the same legislation, in the section dealing with PFCs, Congress provided that there be a hearing before PFC authority could be terminated. It would make no sense at all for FAA to posit that a hearing was required before PFC authority can be terminated when FAA is concerned that there may have been a violation of the PFC provisions of the act, but that there would be absolutely no right to a hearing before FAA could terminate PFCs if it is concerned about a possible violation of the noise provisions.

We urge FAA to reconsider the latter position. Strong evidence was presented at the public meeting on the PFC rulemaking on the need for a hearing and a reasonable time to cure before termination of PFC authority, especially in the case of PFCs pledged to back bonds. Otherwise, it may be impossible to market PFC backed bonds. The attached provisions from the joint AOCI/AAAE/ATA comments on the PFC rulemaking filed with FAA set forth a reasonable means of addressing these concerns, and we strongly urge FAA to adopt procedures consistent with that filing to govern the termination of PFCs for any reason.

J. In reviewing applications for Stage 3 restrictions, FAA should follow existing law as reflected in the decisions of the Supreme Court and the Circuit Courts of Appeal.

The Act, in Section 9304(h) specifically indicates that except as provided by its terms, existing law remains in effect. This means, for example, that the FAA in analyzing the evidence submitted in the application should determine whether there is an undue burden on interstate commerce under existing law. This existing law is set out in the decisions of the United States Supreme Court and the various Circuit Courts of Appeal. The same is true with regard to a determination of whether a regulation is reasonable, whether it is discriminatory, or whether it conflicts with any provision of existing federal law in violation of the Supremacy Clause of the United States Constitution. All of these are constitutional issues governed by existing law which has not been changed by this Act. As such, FAA should be bound in its analysis by this decisional authority. If FAA chooses not to follow the decisions of the United States Supreme Court and the Circuit Courts of Appeal, it should state in the rulemaking that it is not doing so, specify what analytical framework it is going to use in determining these issues and to indicate why it is not going to follow the decisions of the United States Supreme Court and the Courts of Appeal as it appears the Congress intended it to do, and indicate by what authority it believes that, as an agency of the federal government, it is not bound by the decisions of the Supreme Court.

The matters of analysis which are required to be included in an application to impose a new noise rule are strictly evidentiary. They are facts or elements of fact or analysis which might tend to show an effect on commerce or an effect on airline profits or
competitiveness. Under the existing law, none of these constitute an interference with commerce or violates any other law. In particular, in assessing the possible undue burden on interstate commerce, analysis under constitutional law focuses on whether persons seeking to travel or ship goods are unduly burdened, not whether a particular common carrier may suffer some loss in profitability or ability to serve a particular market. The standards FAA sets out for a commerce clause analysis are thus wholly inappropriate. We urge FAA to conform its standards and analysis to the caselaw as it is has evolved and continues to evolve through the decisions of the Supreme Court.

K. Definition of undue burden on the national air transportation system should focus on national implications of a rule, not inconvenience which a proposed restriction may cause a carrier in serving the particular market.

The new statutory standard, that the proposed restriction does not create an undue burden on the national aviation system, should be defined so as to preclude a restriction which substantially interferes with air commerce on a national basis, but not one which merely causes inconvenience to air carriers or others who wish to serve that particular local market. FAA must balance the burden on the national system against the legitimate local interests which are advanced by the restriction. Even where there is a burden on a national basis, it is not necessarily an undue burden if it advances a legitimate local interest.

L. Airports should have an opportunity to respond to comments.

At various places in the NPRM, various parties are afforded an opportunity to comment on airport activities or studies. Airports should have an equal opportunity to respond to such comments or allegations.

M. FAA should eliminate any references to criteria not contained in the Act for the transfer of liability to the federal government in the event FAA turns down a proposed Stage 3 restriction.

There is nothing in the statute that would condition the transfer of liability to the federal government if FAA disapproves a proposed Stage 3 proposal. While FAA makes no reference to the liability transfer in the text of the proposed rule, the preamble contains language which purports to tie the transfer of liability to land use control measures over which airports typically have no control. While we support efforts at compatible land use, this is often impossible or nearly impossible to effect at established airports. Given the fact that there is no basis in the statute for conditioning the transfer of liability on such efforts, FAA should refrain from making any such references in the final rule or its preamble.

Contrary to the assertion of FAA in the preamble, Congress did alter the historic responsibility and liability of airport operators for noise damage and provided for the shift in liability from such airport operators to the federal government. Moreover, the types of
analysis the FAA posits for determining that liability is limited only for takings that directly result from its disapproval of Stage 3 aircraft are unfounded and have no basis whatsoever in the Act. If the liability would not have arisen if the proposed Stage 3 restriction had been implemented, then such liability is the direct result of the federal disapproval. No further analysis is warranted under the statute nor for reasons of equity.

Conclusion

AOCI and AAAE appreciate the opportunity to comment on this issue which is of great significance to our members. We are available to explain or provide further detail on the positions contained in this comment, if FAA would find that to be useful.
Mr. Richard C. Leone
Chairman
The Port Authority of NY & NJ
One World Trade Center
New York, NY 10048

Dear Mr. Leone:

Thank you for letting me know your views on the aviation noise provisions of Senator Wendell Ford's bill, S. 3094. At the end of the Congress, we passed this legislation, with important modifications that are far more favorable to residents impacted by airport noise than the original Senate bill. Given the speed with which important noise issues were resolved and the significance of the resulting legislation, I want to let you know what was included in the final legislation and why I believe that the bill we passed is a very positive development for people living near airports.

My basic plan had been to wait until the next Congress to develop legislation on aviation noise. Because noise issues are complex and contentious, I felt that legislation should be developed through the usual hearing and deliberative process. Unfortunately, the Senate, after no hearings and minimal debate, passed legislation linking a noise policy to other very much needed aviation legislation. This tactic forced the House of Representatives to confront noise issues in the final ten days of the Congress and to make quick decisions on legislation that will have an impact for years to come. Despite these difficulties, I believe we came up with a very good package, particularly from the standpoint of noise impacted airport neighbors.

Fortunately, before the Senate acted, my Subcommittee had held four days of hearings on aviation noise policy. In those hearings we heard from airport neighbors and citizens' organizations from all over the country. The input from local citizens in those hearings very much shaped my approach to developing a national noise policy.

The product of these negotiations is of course a balance of the concerns of the many interests involved in noise issues, but it is a balance that settles a number of important issues in a way beneficial to airport neighbors. I believe you will agree when you compare where Senator Ford and the airline industry originally wanted to go, as represented by S.3094, with the final product that has now been enacted into law.
To begin, S.3094 left it to the Secretary of Transportation to establish a Stage 3 phase out date. I insisted upon including a provision that each airline will have to phase out its Stage 1 aircraft by the year 2000. The final bill also provides that an airline can receive an exemption until 2003 but only if 85% of their fleet is Stage 3 by July 1, 1999 and they have signed contracts to replace that remaining 15% with Stage 3 aircraft between 1999 and 2003.

The FAA estimates indicate that if there were no federal requirements for phasing out Stage 2 aircraft, there would be at least 500 more of these aircraft in 1999 than there would be under the phaseout requirements imposed by the final bill. It is also important to note that the Stage 3 phaseout will begin well before the year 2000 then because the new law directs Secretary of Transportation to establish interim phaseout milestones.

This Stage 3 phaseout schedule which I insisted upon as part of a noise package is very aggressive. Testimony from airlines at our hearings indicated that they wanted a phase out schedule that would have carried us far beyond the turn of the century. If we had left this issue to DOT, I believe the phaseout dates would likely have been far less stringent.

Finally, I must note that this Stage 3 phaseout is a national standard, and in no way infringes upon local airports' ability to set even more stringent phaseout standards if they wish.

Another important feature of this noise legislation that I insisted upon was a Stage 3 "non-addition rule." S.3094 had no such concept. The testimony at the hearings indicated that the European Community was moving toward regulations barring further additions of Stage 2 aircraft to their airlines' fleets and that there was a serious threat of Stage 2 aircraft being dumped in the U.S., as European fleets were modernized. The new law prevents this by forbidding the importation of Stage 2 aircraft after the enactment of this law. The new law means that the number of U.S. Stage 2 aircraft is presently at its peak, and there will be no absolute increase in airlines' fleets even if such an increase would be in compliance with the Stage 3 phaseout schedule. This non-addition rule will bring significant improvements in the lives of those affected by aircraft noise.

Finally, we added provisions to the bill directing the Secretary of Transportation to make further recommendations on noise policy issues which the legislation did not directly address. Among these are the need for changes in Federal Aviation Administration procedures on air route changes so that environmental effects will be taken into account, and the need for better land use planning around airports. These recommendations hold great potential for improving local citizen input into specific policies that may have noise impacts.
In addition to the changes made in S.3094 at our insistence, you should also be aware that S.3094 was significantly modified on the floor of the Senate.

As introduced, S.3094 envisioned a near total presumption of local airport and local government regulation of aircraft operations to reduce the impact of noise. In fact, the original version of S.3094 would have required a review and approval of all existing local noise restrictions.

What finally passed the Senate was significantly modified from what was introduced. The Senate established a process whereby only future local restrictions on Stage 3 aircraft would have to be approved by the Secretary of Transportation. The House agreed to this approval process as part of a broader noise package with a significant clarification on federal liability for noise damages.

While this approval process certainly does dilute the authority of local airport operators to impose restrictions on the least noisy aircraft, this provision will provide some certainty to the airline industry that their future investment in Stage 3 aircraft to replace the noisier Stage 2 aircraft will not be encumbered by further local restrictions. Knowing that their new Stage 3 investment can be effectively utilized, airlines will be encouraged to replace noisy Stage 2 aircraft with the quieter Stage 3 aircraft. Any replacement of a Stage 2 aircraft with Stage 3 will be of benefit to noise-impacted citizens.

It should also be noted that this new approval process does not restrict a local airport's rights and authority to regulate the noisier Stage 3 aircraft, so long as any airport gives 180 days advance notice of future restrictions. Nor does the provision call into question any Stage 2 or Stage 3 restriction currently in effect. The only restrictions subjected to the new DOT approval process are new local restrictions on Stage 3 aircraft. I believe this is a quite limited restriction of local authority. While it does restrict local authority's ability to act unilaterally, it will have a general benefit in accelerating the shift to quieter aircraft.

With respect to Federal liability, the bill passed by the Senate left it unclear who would be liable for damages to property owners when the Federal government disapproves a restriction which an airport operator wanted to impose on Stage 3 aircraft. In the Conference, the House was successful in persuading the Senate to add a provision that the Federal government will assume liability for noise damages if it disapproves a local airport's noise restrictions. Since the Federal government will generally not want to be liable for damages, this liability assumption will serve as a brake on disapprovals of local restrictions that are reasonable.
In sum, I believe that we passed a comprehensive noise bill, one which will provide relief from noise to millions of people. We were successful in obtaining modifications to S.3094 so that homeowners, as well as airlines, will be the beneficiaries of a "National Noise Policy."

Again, thank you for letting me know of your thoughts on S.3094. Citizen input was very important to me as we shaped the final legislative package on aviation noise.

Sincerely,

JAMES L. OBERSTAR
Chairman
Subcommittee on Aviation
Honorable James B. Busey
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Administrator Busey:

We are writing to express our concerns about your apparent interpretation of the Airport Noise and Capacity Act of 1990 ("Airport Noise Act").

Based on our review of statements you made in a recent letter to New Jersey State Senator Walter Rand, we believe that you have misconstrued the law, which Congress drafted with the specific intention of permitting local or state initiatives to combat airport noise.

While the Airport Noise Act mandates that the FAA phase out Stage 2 aircraft by 2003, it specifically permits local authorities to act sooner. The law protected local initiatives already underway as of the date of enactment, and it permitted new Stage 2 initiatives, subject to procedural requirements. These include the provision of 180 days notice for public comment, and the consideration and preparation of an impact statement.

As Members of the New Jersey Congressional delegation, we were intensely interested in assuring that contemplated noise initiatives would be permitted under the legislation. Our constituents had this noise thrust upon them by the FAA's alteration of air traffic routes. They have sought relief from the FAA and at the local level. We were committed to assuring their ability to get relief under the terms of the noise legislation before us.

The clear meaning and intent of the legislation was discussed in debate between Senator Lautenberg, chairman of the Senate Transportation Appropriations Subcommittee, and Senator Wendell Ford, chairman of the Senate Aviation Subcommittee and sponsor of the legislation. In this discussion, Senator Ford stated that the conference agreement on the legislation did not restrict the ability of local airport operators to regulate the use of Stage 2 aircraft at their facilities. The debate included, in part, the following colloquy:

REPLY TO:

717 MADISON AVENUE
NEW YORK, NY 10021
(212) 582-2000

GATES HALL
1000 GIDEON PATH
SOUTH FLUSHING, NY 11358
(718) 391-5600

BARRINGTON COMMONS
203 WHITE HALL ROAD
BARRINGTON, IL 60010-1238
(847) 787-4320

January 30, 1991
Senator Lautenberg: "With regard to the modified proposal, I ask the Senator from Kentucky if he would confirm these points to be true: First, this agreement would not affect noise control programs now in effect, such as those that have been adopted by the Port Authority of New York and New Jersey. Second, that, under this proposal, an airport operator would be allowed to impose restrictions on stage 2 operations, without the approval of the FAA, and without risking the loss of AIP money. This is particularly important, as reducing the number of stage 2 planes serving Newark International is a critical part of our efforts to reduce noise in New Jersey. Third, that the FAA or airport operator would not be prevented from working out operational changes, such as random vectoring, variation in runway use, or altitude requirements, that are designed to reduce noise impacts. And, an airport operator could impose restrictions on the use of stage 3 planes, by barring certain types, for example, or limiting them to certain hours of operation, subject to review and approval by the FAA."

Senator Ford: "The Senator is correct on each of those points ... we have taken the steps in this legislation to protect the efforts that he has been making to reduce aviation noise in New Jersey."

(October 27, 1990 Congressional Record, page S17543)

The continuing authority of local airport operators to regulate Stage 2 operations was further clarified in a November 28, 1990 letter from Congressman James Oberstar, chairman of the House Aviation Subcommittee, and the lead negotiator for the House of Representatives in finalizing this legislation. In this correspondence to Port Authority of New York and New Jersey chairman Richard Leone, Congressman Oberstar made two statements of particular interest: first, that,

"... I must note that this Stage 2 phaseout is a national standard, and in no way infringes upon local airports' ability to set even more stringent phaseout standards if they wish."

Second, he wrote that,

"It should also be noted that this new approval process does not restrict a local airport's rights and authority to regulate the noisier Stage 2 aircraft, so long as any airport gives 180 days advance notice of future restriction. Nor does the provision call into question any Stage 2 or Stage 3 restriction currently in effect. The only restrictions subject to the new DOT approval process are new local restrictions on Stage 3 aircraft."
In spite of clear Congressional intent, your letter insinuates that restrictions on Stage 2 aircraft operations at our region’s airports would be contrary to Federal law, and even threatens the potential loss of Federal funds if such measures are enacted.

This is of concern not only because of the impact that such a position could have on programs in place or under consideration for Port Authority airports, but also in light of the FAA’s development of regulations to implement the Airport Noise Act. Those regulations could govern Federal policy on noise control for years to come. If the FAA persists in its mistaken positions as reflected in your letter, the regulations could have impacts on local communities never intended by the Congress.

For some time, we have been working with the Port Authority to see tougher, more effective noise control measures implemented. Enactment of the Airport Noise and Capacity Act did not preclude such efforts, and any assertion to the contrary is incorrect and counterproductive.

We strongly urge you to reconsider your position, and clarify any misunderstandings that may exist as a result of your letter. We further request that you work to see that regulations being developed by the FAA accurately reflect Congressional intent, and do not restrict the ability of local airport operators to impose restrictions on Stage 2 operations.

Sincerely,

Frank R. Lautenberg, Chairman
Senate Appropriations
Subcommittee on Transportation & Related Agencies

Bill Bradley
Dick Zimmer

Robert A. Roe, Chairman
House Committee on Public Works & Transportation

Frank Pallone, Jr.
Robert Torricelli
April 1, 1991

The Honorable Frank R. Lautenberg
Chairman, Subcommittee on
Transportation and Related Agencies
Senate Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter, cosigned by members of the New Jersey Delegation, concerning the effect of the Airport Noise and Capacity Act of 1990 (Act) on proposed New Jersey legislation. We are in complete agreement with your concern that the new Act be applied to afford meaningful noise relief to communities affected by aircraft noise.

We also agree that, except for the specific responsibilities imposed on airport proprietors by the Act, that legislation did not change previous substantive legal requirements affecting the authority of airport proprietors to limit Stage 2 aircraft operations to control noise. This is consistent with the legislative history set forth in your letter. My letter of January 15, 1991, to the New Jersey and New York leadership did not question this aspect of the Act, nor did it address the limitations that would apply to the Port Authority of New York and New Jersey, as airport proprietor, if it proposes to limit Stage 2 operations.

Instead, my letter stressed the lack of authority in the State of New Jersey to control airport access by regulating the Port Authority. Bill No. 4386 asserts the power of the State to ban aircraft operations at airports owned by the Port Authority. The courts have made it clear, however, that the airport owner is the only non-Federal authority that may control airport access for noise purposes. The courts have stated that the otherwise total Federal preemption of airport access matters — including aircraft noise abatement — is essential to the maintenance of a unified and coordinated national air transportation system.
It is well-settled that the pervasive nature of Federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that state and local regulation in air commerce has been preempted. Courts have created the limited proprietary exception to total Federal preemption because airport authorities, as the owners of airports, remain liable for noise damages. Even though New Jersey has important responsibilities with respect to its relationship to the Authority, that does not confer airport proprietor status on the State itself with respect to aircraft noise liability.

Action by the State to restrict aircraft access to the Port Authority’s airports by regulating the Port Authority would therefore be inconsistent with the well-established doctrine of Federal preemption in the field of aircraft noise regulation. This is true even where a State attempts to control aircraft operations through regulation of an airport proprietor that is a political subdivision of the State. Only the Port Authority itself is the proprietor under the controlling case law.

This critical distinction between the authority of airport proprietors and that of other non-Federal authorities is a fundamental aspect of "existing law with respect to airport noise or access restrictions by local government;" and was not changed by the Airport Act (Section 9104(b)(3)).

The bill also ignores long-established duties resting on the Port Authority, as proprietor, to determine the need for, and the impacts of, any denial of access to air commerce. The discharge of these duties requires that the Port Authority have the discretion to establish the necessary basis for proposed aircraft noise regulations, and justify them in accordance with standards recognized by the courts. With respect to the reasonableness of the Port Authority’s regulations, it is important that they be based on substantial evidence demonstrating that the proposed use would not jeopardize the health, safety, or welfare of the public. The bill shortcut this entire process of justification. In addition, by mandating specific regulation of Stage 2 aircraft, it mandates the decision to ban such aircraft before the Port Authority could comply with its duties under the Act, including the extensive public notice and review process. This result would be inconsistent with the express provisions of the Act.
The Port Authority is also required to consider the international implications of airport use restrictions, since equal, nondiscriminatory treatment of domestic and foreign air commerce is an important aspect of the complex network of international air transportation agreements of which the United States is a major beneficiary. Bill No. 4386 removes all discretion from the Port Authority to reserve decision concerning airport access control while international implications are considered.

Finally, the bill ties the hands of the Port Authority with respect to its continuing compliance with its airport development grant agreements, which require that its airports be open to air commerce under fair, reasonable, and nondiscriminatory conditions. These obligations are imposed pursuant to applicable airport grant legislation and are an important aspect of the limitations on an airport sponsor’s authority to control airport access.

In summary, I believe that the concerns expressed in my letter regarding any attempt by the State of New Jersey to deny access to John F. Kennedy International Airport, Newark International Airport, and LaGuardia Airport for noise purposes, by regulating the Port Authority, are consistent with the Act and properly reflect the controlling case law.

Identical letters have been sent to the other signatories of your letter.

Sincerely,

[Signature]

[Administrator]