

Legislation and Regulation

Congress amended the Federal Aviation Administration Act in 1968 to direct the FAA to issue aircraft noise abatement regulations. The FAA responded in 1969 by issuing Federal Aviation Rule (FAR) 36. The regulations did not have significant immediate impact, however, as they applied only to future aircraft designs. Amended in 1973 to apply to earlier designed aircraft, their impact on those craft did not take effect until 1977. In 1972 Congress passed the Noise Control Act,¹ which brought the Environmental Protection Agency (EPA) into the field, primary responsibility remaining with the FAA. The Aviation Noise Abatement Policy of 1976, a joint effort of the FAA and EPA, was considerably more stringent than prior FAA regulations; both called for quieter airplanes and set compliance deadlines of January 1, 1983 for two- and three-engine planes and January 1, 1985 for four-engine planes. The methods available for obtaining quieter aircraft included retrofitting engines to make them quieter; replacing engines with new, quieter engines; or substituting new quieter aircraft. The 1976 regulations imposed significant burdens on the airline industry and, in addition to fostering movement toward compliance, sparked a lobbying effort that resulted in the Aviation Safety and Noise Abatement Act of 1979.²

One major impact of that Act was to grant exemptions to the deadlines established by the 1976 FAA regulations, in effect moving the deadline for compliance by three-engine aircraft back two years and for two-engine aircraft back three years. A further exemption moved the deadline back five years for two-engine aircraft with 100 or fewer seats. Once an airline showed that its craft qualified for the exemptions, it could receive the relevant time extension for compliance. As a result, compliance for many aircraft under the 1976 regulations was moved back to at least January 1, 1985.

The Aviation Safety and Noise Abatement Act was also the first federal attempt to reduce the impact of aircraft noise as opposed to reducing the noise itself. The Act provides for voluntary noise compatibility planning by airport operators, and is designed to work in stages. First, the FAA develops a noise measurement system to determine noise impact and compatible land uses for various noise levels. Next, local airport operators develop noise exposure maps showing the noise exposure problems for their airports; then the airport operators are to meet certain requirements to qualify for federal funds to develop a noise compatibility program. In addition to a funding incentive for participation by airport operators, other incentives are provided. For example, data generated in developing the noise exposure maps cannot be used against an operator in litigation, and liability may be limited after development of the noise exposure map.

The Aviation and Safety Noise Act and FAA regulations reflect federal government efforts to reduce aircraft noise by requiring quieter aircraft design and operations. There is a real question, however, whether the noise reduction requirements suffice. For example, preliminary studies at several major airports have shown that significant reductions in noise pollution could be realized by increased use of Stage III aircraft.

The Act takes an important first step toward directing federal efforts to reduce the impact of noise. Unfortunately to achieve a significant impact, appropriations to fund actions under this provision will need to increase. Furthermore, the Act does not sufficiently address the problems faced in local land use planning, such as land acquisition, zoning, and potential conflicts among multiple local governments surrounding airports.

Litigation Developments

Litigation relating to aircraft and airport noise pollution falls into two categories: (1) suits involving damages from aircraft noise pollution, and (2) suits involving government efforts to reduce noise problems by regulating aircraft and airport operations.

A primary cause of action in aircraft noise litigation is inverse condemnation. While federal cases have uniformly limited liability to situations where there was direct overhead flight, some state courts have adopted a more liberal rule that direct overhead flights are not necessary for inverse condemnation of nuisance actions.³ Recent cases have seen the increasingly successful use of nuisance and trespass as causes of action, special advantage relating to the necessary elements for recovery: for trespass it is not necessary to show the location of the airplane over the land, and the noise can be the means of trespass. Nuisance actions have also given rise to recovery of damages for mental and emotional harm.

Damages Issues

The first significant damages litigation for aircraft noise pollution led to the U.S. Supreme Court decision in *United States v. Causby*, upholding a cause of action for the taking of land as an inverse condemnation.⁴ *Causby* involved the diminished value of a chicken farm caused by low level overhead flight. The direct and immediate interference with the use and enjoyment of the property entitled the plaintiffs to compensation.⁵

The next significant case was *Griggs v. Allegheny County*,⁶ where the Supreme Court found the airport operator, a county, exclusively liable for noise pollution damage, since it had chosen the site and layout for the airport. Liability rested neither with the federal government, since it had not chosen the location, nor with the aircraft operators, since they were merely complying with federal requirements in operating the aircraft. The Supreme Court's holding that liability lies with the airport operator has been consistently followed in virtually all cases since *Griggs*.

The most recent damages case of note is *Great Westchester Homeowners Association v. City of Los Angeles*,⁷ where the California Supreme Court held the airport operator solely liable for tort damage by noise pollution because the operator controlled the location of runways and noise control procedures. The court also ruled that the plaintiffs could pursue separate causes of action for inverse condemnation and personal injury from the noise. Significantly, the court ruled that the plaintiffs could collect periodically for continuing personal injury damage from the noise. *Greater Westchester*

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meowners reflects a position that the courts have increasingly adopted since 1979 regarding airport operators' liability under tort theories: since airport operators have the right to control airport operations, they are responsible for the consequences of operations, including damages from noise pollution.

In *Owen v. City of Atlanta*¹⁰ the airport proprietor, the City of Atlanta, was found liable under theories of inverse condemnation, nuisance and trespass based on its expansion of Atlanta Hartsfield International Airport, with no preemption as to the nuisance and trespass causes of action. This recent decision contradicts an earlier case, *Luedtke v. County of Milwaukee*,¹¹ where the Seventh Circuit had held that federal regulation of air traffic preempted local control and therefore relieved the operator of liability under nuisance theory.

An important development in damages litigation is the use of mass small claims actions against airport operators. In one variation, neighbors of San Francisco International Airport filed a series of small claims actions against the airport operator, claiming damage to property values and health. The airport managed to obtain a reversal of judgment for more than \$75,000 in small claims damages in May 1983. As a result of such actions, a bill was passed by the California legislature that would have barred citizens from filing small claims suits over airport noise. The bill was vetoed by Governor Deukmejian as creating too drastic a limitation on access to the courts. The Governor suggested other alternatives such as limiting the number of damage suits in a given year and allowing consolidation of small claims actions.

Local Controls

The second category of litigation involves the ability of states or local governments to regulate airports through noise ordinances, curfews, traffic restrictions or other means. The pivotal decision in this area came in *City of Burbank v. Lockheed Air Terminal, Inc.*¹² In *Burbank* the U.S. Supreme Court struck down ordinances enacted by the City of Burbank, California that established a curfew and prohibited flights into and out of the airport from 11 p.m. to 7 a.m. The Court ruled that the ordinance was unconstitutional because the area had been preempted by federal law and regulations. This was so despite the fact that the municipality might incur liability for damages arising from aircraft noise pollution. Most significant about *Burbank* was that the airport in question was privately owned and operated. In "Footnote 14" of the Court's decision, Justice Douglas indicated that the decision would not necessarily control where the municipality was the airport owner and operator.

The plethora of litigation over regulation of airports has made it clear that the characterization of the airport operator

is an important distinction; the rule is now established that a municipality or special district operating an airport may establish nondiscriminatory restrictions on air traffic such as curfews and noise level limits. But the governmental entities may create the restrictions only in their capacity as operators of the airport, not pursuant to their police power, which is preempted by federal law.

A number of significant decisions involving preemption have issued from California. In *Air Transportation Association v. Crotti*¹³ a three-judge Federal District Court panel ruled that an airport proprietor subject to liability for damages could control the use of the airport on its own initiative or at the direction of the state. It is interesting that the panel in *Crotti* decided that, through its political subdivision the municipality, the state could regulate airport operations. The panel also struck down a single event noise exposure level regulation (SENEL).

Although the basic premise of *Crotti*—that a municipality as airport proprietor may control use of the airport on its own initiative—has been consistently supported, two subsequent decisions by other courts affirmed by the Ninth Circuit have held contrary to *Crotti* on state power and SENEL regulations. For example, in *San Diego Unified Port District v. Giannurco* the court held that the state may not regulate an airport as an operator through a political subdivision.¹⁴ In *Santa Monica Airport Association v. The City of Santa Monica*, the court found that SENEL regulations were not preempted.¹⁵ Both of these cases are clear in their holdings that the airport operator, a political entity in both cases, may impose restrictions on the airport, including curfews, SENEL regulations and other restrictions designed to limit noise.

Another significant case is the "Concorde" decision. In *British Airways Board v. Port Authority of New York and New Jersey*,¹⁶ the final Second Circuit decision established that the Port Authority had the right as an airport operator to set noise regulations, even though the regulations would effectively ban certain types of aircraft, so long as the regulations were neither discriminatory nor arbitrary and capricious. In this particular instance, however, the ban on the Concorde was struck down because the Port Authority had not issued appropriate rules and regulations and the extended ban planned while developing such regulations was found to be unreasonable.

The Next Steps

The issues arising from aircraft and airport noise pollution remain unsettled, and many new developments are likely within the next few years on a variety of fronts.

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ENVIRONMENTAL LAW is published quarterly by the American Bar Association's Standing Committee on Environmental Law, 1800 M Street, N.W., Washington, D.C. 20036. The views expressed in articles appearing in ENVIRONMENTAL LAW are those of the authors and do not necessarily represent the view of the American Bar Association or of the Standing Committee. Comments and/or articles from our readers are invited.

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Federal deadlines for bringing quieter aircraft into service are fast approaching, and further extensions of the deadlines are doubtful since most craft will indeed be in compliance by then. Charter operations and new airlines using older equipment will face the most serious compliance problems.

But as new, quieter airplanes come into operation, just how much noise pollution will be abated remains in dispute. Some believe that, even with newer planes, significant noise reduction is unlikely to occur, barring unforeseen technological developments. Others, notably the Airport Operators Council, believe that there exists much greater potential for noise reduction. They observe, for example, that the use of Stage II airplanes, smaller yet not significantly quieter than Stage I craft, will actually produce a net effect noisier than the Stage I craft that soon will be prohibited. And some studies using FAA noise measurement models show that noise in affected areas near major airports could be reduced by 40 to 80 percent if only Stage III airplanes, such as the Boeing 757 and 767D, are used.

Airport operators are caught in the middle. While facing growing liability for damages stemming from noise pollution, especially in trespass and nuisance actions, they find their efforts to reduce noise limited partially by federal preemption and constrained by difficulties in land use planning, zoning, land acquisition and other means of reducing noise impact.

Meanwhile, there is no quick relief in sight for the victims of aircraft noise. While their success in collecting damages from airport operators has increased, the victories fail to eliminate the problem.

Federal action accelerating the use of quieter aircraft or otherwise enhancing the reduction of noise impact appears to be the only effective solution to the noise problem. Absent a federal effort, we face the continuing difficulties of increased noise pollution from growing air traffic, and additional damage claims against airport operators who will institute more restrictions on their facilities in order to reduce their liability. This result runs contrary to the greater efforts of the FAA to reduce operator restrictions and keep the air transport system as unencumbered as possible. All of this will transpire in the context of continuing damage to citizens affected by aircraft noise.

The emphasis in the Aviation Safety and Noise Act on reducing noise impact highlights one area where significant gains can be made, but federal initiatives in this area could be stronger, and many problems exist. It is questionable whether significant progress can be made to reduce noise impact without either preemptive federal action or federal financial incentives to encourage the divergent and conflicting local and private interests near airports to reduce noise impact. The need for federal action to reduce noise impact is particularly significant in light of the FAA's negative attitude toward curfews and other restrictions as a solution.

The air transport system is already so heavily regulated by the federal government that additional federal involvement to promote noise abatement should not be viewed as inappropriate federal intervention. Moreover, it is clear that only federal action, through economic assistance or regulation, will ensure the steps necessary to reduce aircraft noise and impact. A political judgment will have to be made as to the importance of reducing the noise and whether the funds and efforts of the federal government will be forthcoming.

Footnotes

1. U.S. Department of Transportation, *Aviation Noise Abatement Policy* 36 (1976).
2. *U.S. v. Causby*, 328 U.S. 256 (1946).
3. 42 USCA Sec. 4901-4918, Sec. 1431.
4. 49 USCA Sec. 2101-2108, 2121-2125.
5. *Thornburg v. Port of Portland*, 233 Or. 178, 376 P. 2d 100 (1962).
6. 328 U.S. 256 (1946).
7. *Id.* at 261.
8. 369 U.S. 84 (1962).
9. 26 Cal. 3d 86, 603 P. 2d 1329, 160 Cal. Rptr. 733 (1979) *cert. denied*, 101 S.Ct. 77 (1980).
10. 277 S.E. 2d 318 (Ga. 1981).
11. 521 F. 2d 387 (7th Circuit 1975).
12. 411 U.S. 624 (1973).
13. 418 F. Supp. 417 (N.D. Cal. 1976).
14. 457 F. Supp. 283 (S.D. Cal. 1978).
15. 481 F. Supp. 927 (C.D. Cal. 1978).
16. 564 F. 2d 1002 (2nd Cir. 1977).
17. 19 ERC 1894 (5-26-83).
18. 19 ERC 1682 (11th Cir. 8-12-83).



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Washington, D.C. 20036

Quarterly Newsletter
of the
STANDING COMMITTEE ON
ENVIRONMENTAL LAW