



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of Airport Safety and
Standards

800 Independence Ave., S.W.
Washington, D.C. 20591

Oct 2, 2003

Mr. Ralph G. Tonseth
Director of Aviation
City of San Jose
1732 N. First Street, Suite 600
San Jose, CA 95112-4538

Dear Mr. Tonseth:

This letter is in response to letters of January 29, 2003, June 19, 2003, and August 13, 2003 from counsel for the City of San Jose ("City") to the Federal Aviation Administration (FAA) requesting the agency's views concerning the consistency of the City's proposed amendments to the curfew provisions in the 1984 San Jose International Airport ("SJC") Noise Control Program with applicable Federal law, including the City's grant assurances and the Airport Noise and Capacity Act of 1990 ("ANCA"), recodified at 49 U.S.C. §§47521-47533.

The City has accepted grants under the Airport Improvement Program (AIP), 49 U.S.C. § 47101 *et seq.*, and is obligated by the assurances in its grant agreements with the FAA. Obligations under the grant assurances include the obligation to provide access by air carriers on reasonable and not unjustly discriminatory terms. Airports imposing restrictions on Stage 2 aircraft operations proposed after October 1, 1990, and imposing restrictions on Stage 3 aircraft operations that became effective after October 1, 1990, are subject to the provisions of ANCA, and its implementing regulations at 14 C.F.R. Part 161.

As you know, representatives from the FAA and the City have met numerous times over the past year to discuss the City's proposed transition from a weight-based to a noise-based airport restriction at SJC. The FAA appreciates the City's promptness in responding to our requests for information, including the underlying noise analysis and supporting data.

We understand the City's proposal, summarized in the June 19, 2003, letter, to be as follows. The City's current noise control program, adopted in 1984, prohibits transport category aircraft (under the City's ordinance, those weighing more than 75,000 pounds based upon manufacturer-certificated maximum take-off weight) from operating between the hours of 11:30 P.M. and 6:30 A.M. The curfew permits Stage 3 non-transport category aircraft (under the City's ordinance, aircraft weighing less than 75,000 pounds) to operate during curfew hours. The ordinance has been legally challenged by aircraft operators and separately in an informal complaint filed by the Aircraft Owners and Pilots Association (AOPA) with the FAA.

We understand that while the City seeks to operate the airport in compliance with applicable federal requirements, it also wishes to preserve to the maximum extent possible the benefits of its extensive noise compatibility planning and community noise mitigation efforts. The City is proposing to restructure the curfew from a weight-based regulation to a regulation based directly on noise emissions. The City proposes to adopt a maximum average single-event noise level of 89 EPNdB for the amended noise-based regulation, based on FAA advisory circulars. This is the City's preferred noise standard because it would as closely as possible replicate the noise contours currently forecast for 2010.

Counsel for the City has also advised that the City is proposing to assess civil penalties in the amount of \$2,500 for violations of the curfew. Civil penalties appear to be available in legal actions against intentional violators of the existing curfew under the provision of the California Business and Professions Code relating to unfair business practices. See, Letter dated November 4, 1999, from Bob Cohn, Shaw Pittman, to Barry Molar, Manager, FAA Airport Financial Assistance Division, Re: PFC Application No. 99-07-C-00-SJC, Exhibit 1A, Letter dated March 24, 1999 from Michael R. Groves, City Attorney to Harry C. Algar, Executive Vice President Operations, Delta Airlines, page 2.

As we understand it, eligibility for operations during the curfew hours under the replacement noise-based regulation would depend not upon the aircraft's Stage 2/Stage 3 designation or weight, but rather on the average of the three certification values for each type of aircraft based on published FAA noise certification data contained in FAA Advisory Circular 36-1H. Aircraft whose average noise level, calculated using certification values in the Advisory Circular, exceeds 89 EPNdB would be prohibited from operating during the curfew hours. Aircraft generating average noise levels of 89 EPNdB or less would be permitted to operate during the curfew hours.

The Airport Noise and Capacity Act (ANCA)

On November 5, 1990, the Congress enacted ANCA to establish a national program for review of airport noise and access restrictions. ANCA, as implemented by 14 C.F.R. Part 161, requires airport proprietors that propose to implement airport noise or access restrictions that affect the operation of Stage 2 aircraft to comply with specific notice, economic cost benefit analysis, and comment requirements. ANCA further requires that airport proprietors proposing to implement noise or access restrictions on Stage 3 aircraft operations provide a detailed economic cost benefit analysis, demonstrate satisfaction of six statutory criteria, and obtain FAA approval prior to implementation of any such restrictions, unless agreement is obtained from all affected aircraft operators.

When ANCA was passed, it permitted airports to implement Stage 2 restrictions that were proposed and Stage 3 restrictions that were in effect before its effective date. These airport noise and access restrictions are "grandfathered" under ANCA. In addition, certain restrictions are exempt from ANCA, including "a subsequent amendment to an airport noise or access agreement or restriction in effect on November 5, 1990, that does

not reduce or limit aircraft operations or affect aircraft safety.” 49 U.S.C. § 47524(d)(4); 14 C.F.R. § 161.7(b)(4).

Since the City had a mandatory, enforceable weight-based curfew in its airport noise control program prior to October 1, 1990, the original curfew at SJC is grandfathered under ANCA. Letter dated November 24, 1999, from Paul L. Galis, Acting Associate Administrator for Airports, FAA to Ralph G. Tonseth, Director of Aviation, City of San Jose. The City’s proposal to amend its curfew to use noise emissions rather than weight as its basis and to allow all aircraft that are currently eligible to operate under the existing weight-based ordinance to continue to operate to the same extent is exempt from ANCA because it would not reduce or limit aircraft operations or affect aircraft safety.

The City represents that any aircraft currently permitted to operate under the weight-based regulation would be permitted to continue to operate under the noise-based regulation, either under the general rule or under a particular waivers or exemption provision in the ordinance. While some aircraft currently operating (*i.e.*, Stage 3 aircraft under 75,000 lb.) would not meet the 89 EPNdB average noise level requirements of the proposed ordinance, the City proposes to exempt those aircraft from the noise level requirement of the amended rule. Assuming the City continues to authorize the operation by aircraft currently permitted to operate during curfew hours, the proposed amendment would not result in any new restriction on use of the airport.

Turning to the proposal to specify civil penalties of \$2,500 for curfew violations, the FAA determined that a proposal by the Port District of San Diego to increase existing civil penalties to secure compliance with airport noise and access restrictions did not trigger ANCA. According to the summary of the City’s proposal in the June 19, 2003 letter and Counsel for the City, the City plans to include appropriate due process opportunities for aircraft operators to present information bearing upon the specific circumstances of any curfew violation and for administrative appeals from determinations of violation. In approving the City’s application to impose and use passenger facility charges, the City documented and the FAA determined that the City has consistently sought compliance with, and enforced, the nighttime curfew, through remedies including court action.

Although there is no evidence that the City availed itself of the remedy of civil penalties in the past, such penalties appear to have been available against intentional violations of the curfew. Given the City’s consistent history of enforcing the curfew, this proposal to specify civil penalties does not appear likely to have any greater operational impact than a proposal by an airport to increase its existing penalties. Neither type of change appears likely to reduce or limit aircraft operations or affect aircraft safety.

Accordingly, we find that the restructured ordinance would not reduce or limit aircraft operations within the meaning of 49 U.S.C. 47524(d)(4) and 14 C.F.R. 161.7(b)(4), and the City is not required to meet the requirements of ANCA and 14 C.F.R. Part 161 for a new airport access restriction.

The Airport Improvement Program Grant Assurances

Whether or not ANCA applies, the airport sponsor has a separate obligation under its AIP grant assurances not to impose the restriction if it is unreasonable or unjustly discriminatory.

As a sponsor of a Federally-obligated airport, the City of San Jose is required under 49 U.S.C. § 47107(a) and related Grant Assurance 22 to make SJC available for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities. The FAA uses a three-part test to determine the reasonableness of a proposed new access restriction under the AIP grant assurances, based on the provisions of 14 C.F.R Part 150 and implementing guidance. The FAA reviews a proposed restriction to determine if it addresses an actual noise problem; if the proposed noise restriction is reasonably effective in addressing that problem; and if the airport sponsor has used an approach to the problem that fairly balances the local and national interests. We applied this test to the City's proposal, but took into account the common sense realities of a situation where an existing restriction must be revised to assure compliance with applicable federal and state laws.

The 89 EPNdB Limit. First, the FAA does not question that the weight based restriction, which is grandfathered under ANCA, addresses a significant noise problem at San Jose. The City's Part 150 noise exposure map update indicates that approximately 8,000 residents are exposed to noise at or above CNEL 65 dB, the federally designated threshold for incompatible residential land uses. Without the curfew ordinance, that number could be considerably higher. The proposed emission-based curfew addresses the same problem and achieves the same mitigation benefits as the existing ordinance. The City must preserve substantially comparable noise mitigation benefits because under California law, airports like SJC that have CNEL 65 dB noise contours over incompatible land uses must diligently pursue reasonable noise mitigation measures to the greatest extent reasonably possible and obtain variances from the State to continue operating. California Code of Regulations, Title 21, §§5012, 5050, 5053.

On the second point, the noise curfew measures adopted by the City under the existing ordinance, and the measures proposed in the new ordinance, both achieve the limitation of noise impact to a specifically defined area near the airport and are necessary to achieve that goal. The proposed new ordinance substantially replicates the noise benefits afforded under the existing rule. The proposed ordinance does draw a line, and operators with aircraft emitting noise just above that line will be excluded from curfew hour operations. In this case, the reasonableness of that line depends on whether it is no more restrictive than necessary to achieve the same noise mitigation obtained by the current noise curfew. We have concluded that it is no more restrictive than necessary.

The FAA's Integrated Noise Model (INM) predicts the areas and numbers of residents subject to cumulative aircraft noise impact at an airport. INM results under the proposed ordinance were compared with the airport's current Part 150 noise exposure map contours. That comparison indicated that the selected noise emission limit of 89 dB

produces a CNEL 65 dB contour in 2010 very close to the 2010 CNEL 65 dB contour under the existing ordinance.

Finally, the City used an approach in its transition from its current noise curfew ordinance to a proposed replacement ordinance that fairly balances local and national interests. The City implemented appropriate non-restrictive land use measures under 14 C.F.R. Part 150 as part of its efforts to mitigate noise and has continued to update its noise exposure maps and mitigation plans on a regular basis. For example, the City has purchased land and aviation easements for noise mitigation purposes and implemented FAA-approved noise abatement procedures. Moreover, real estate disclosure is in effect within the CNEL 65 dB in accordance with California law. Additionally, the City has actively used its own resources to mitigate impacts, including the Acoustical Treatment (ACT) Program, a program to install noise insulation in more than 1,400 homes in the communities near the airport. The City's approach preserves the long-standing mitigation of significant nighttime noise for the community, substitutes a noise-based standard to control nighttime noise for a weight-based standard in a nighttime curfew that otherwise is grandfathered by Congress in ANCA, and provides slightly greater airport access during the curfew hours by allowing additional operators and grandfathering existing operators.

As noted above, the City of San Jose is constrained by state law to preserve the noise benefits of its airport noise control and mitigation program, including its existing curfew. However, the City is also constrained to address FAA's concerns that the lack of a relationship between aircraft weight and noise would render the curfew improper under federal grant requirements. In determining the reasonableness of a proposed amendment in these circumstances, the FAA does not require an airport to consider alternative restrictions by taking a "clean-slate" approach. Rather, under the test of reasonableness an airport may consider practical and feasible alternatives and has the discretion to structure the amendment to its existing restriction in a manner that preserves the grandfathered status of its restriction under ANCA. An airport may, but is not required to propose a more stringent restriction that would trigger a lengthy process of notice, comment, analysis, and approval by the FAA.

For the above reasons, the FAA considers the 89 EPNdb limit to be reasonable and not unjustly discriminatory.

Exemptions For Certain Operators. Given that the FAA accepts the validity of the 89 dB limit to preserve and continue the City's longstanding noise mitigation goals, the remaining issues of reasonableness and discrimination relate to the City's proposal to exempt certain operators from that requirement. The City proposes to permit aircraft currently allowed to operate during curfew hours to continue to operate under the amended curfew, even if those aircraft do not meet the 89 dB limit. These aircraft are all Stage 3 aircraft under 75,000 lb. The number of operations by these aircraft is not large; in a recent 12-month period, the City counted about 150 curfew operations by the aircraft types that would be exempted under the amended curfew. Even though the number of operations by the "grandfathered" aircraft types is small, the issue of reasonableness and

discrimination could be raised by the operator of an aircraft that exceeds the 89 dB limit but is quieter than one or more of the “grandfathered” aircraft types.

In this case, we find that any discriminatory effect is a result of San Jose’s effort to modify a grandfathered restriction to comply with its grant assurance obligations without either increasing the level of significant community noise by setting a higher noise limit or diminishing the level of airport access provided in the grandfathered restriction by eliminating currently permitted operators, and would thus be justified in these circumstances. For these same reasons, the proposal to exempt existing operators is reasonable.

In this case a requirement that the City eliminate all discriminatory effects in a new curfew would present the City with a Hobson’s choice: either propose and apply for FAA approval to implement a more stringent curfew that would eliminate 150 general aviation operations a year, or increase the curfew noise limit from 89 EPNdB to the highest level of any currently operating aircraft, which would significantly expand the number of residents exposed to noise above CNEL 65 dB (and potentially violate state law). The City cannot retain its current ordinance. It must make one of the above choices, or exempt some current Stage 3 operators as it proposes to do.

Accordingly, we find that the City’s proposal to grandfather the Stage 3 general aviation operations permitted under the current rule is reasonable and is not unjustly discriminatory toward other operators.

Conclusion

For the above reasons, the FAA finds that the proposal by the City of San Jose to restructure the City’s curfew from a weight-based to a noise-emission-based curfew, as summarized in the June 19, 2003, letter and revised according to Counsel for the City, would not trigger the requirements of ANCA. We further find that it is reasonable and not unjustly discriminatory, within the meaning of Grant Assurance No. 22, for the City to adopt an alternate noise mitigation rule that achieves the same noise mitigation benefits as the rule replaced.

We are satisfied, based on available information and the results of the forecast noise modeling conducted by the City that the single-event noise limit proposed for adoption by the City would achieve a level of noise mitigation substantially identical to the existing rule. Finally, under the circumstances of the City’s transition from a weight-based rule to a rule based directly on noise emissions, we find that the exemption from the restructured curfew of aircraft currently allowed to operate during curfew hours would not unjustly discriminate against other operators. While the FAA makes no representation about and does not reach issues that may arise from the implementation of the amended restriction and its application to individual cases, the agency finds that the City’s plan to restructure the curfew from a weight-based regulation to a noise-based curfew does not present a current issue of noncompliance under ANCA or the City’s grant assurances.

This opinion is based on the particular circumstances at San Jose International Airport, including the facts that the community surrounding the airport has several thousand residents exposed to noise at a significant level; that the City has a longstanding noise ordinance that has been considered the status quo in master planning and in state environmental reviews; that the City is actively moving to adopt a revised noise ordinance to replace a problematical weight based rule to be consistent with applicable Federal law; and that no operators currently permitted to use the airport during curfew hours will be adversely affected by the proposed amended rule. The findings and opinions in this letter should not be taken as general policy on airport access that would apply to any other airport access rules or proposed rules, even if similar to the ordinance in effect at San Jose.

As you know, AOPA filed an informal complaint on January 31, 2000, and a follow-up letter of March 27, 2000, alleging that the City's weight-based curfew is unlawful because it unjustly discriminates against certain aircraft based solely upon their weight. The City responded on March 1, 2000, asserting that AOPA's position was without merit and misinterpreted the law. Pending City action on the proposed ordinance, the FAA will address AOPA's allegations in a separate letter to AOPA.

This is not a final appealable order of the Administrator within the meaning of 49 U.S.C. §46110.

The FAA looks forward to continue working with the City of San Jose. Again, I appreciate the considerable time and effort that representatives of the City have spent in meeting with representatives of the FAA and responding to our questions.

Sincerely,

/s/ James White for

David L. Bennett
Director, Airport Safety
and Standards