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## Noise Pollution: Attempted Federal Control of Airplane Noise

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# COMMENTS

## NOISE POLLUTION: ATTEMPTED FEDERAL CONTROL OF AIRPLANE NOISE

But most men, it seems to me, do not care for nature and would sell their share in all beauty, as long as they may live, for a stated sum—many for a glass of rum. Thank God, man cannot as yet fly, and lay waste the sky as well as the earth! We are safe on that side for the present. It is for the very reason that some do not care for those things that we need to continue to protect all from the vandalism of a few.

Henry David Thoreau

If Henry David Thoreau sought to walk tranquilly and unmolested at his beloved Walden today, the vandalism he would undoubtedly encounter would be from the source of his anxiety: the airplane. In this day and age, no matter how remote the destination, a person cannot escape the ubiquitous airplane.

### THE FACTUAL FRAMEWORK

Today, in the United States alone, there are 80 million airplane operations annually, and the Department of Transportation predicts this number will escalate to 430 million by 1985.<sup>1</sup> This is perhaps the most ever-present source of various types of pollution to our natural resources.<sup>2</sup> The pollution from jet by-products is evident: we can see it and smell it. But the deterioration of our silence because of airplanes is just as real, perhaps attacking us in a more subtle manner.<sup>3</sup> The “greatest increase in the urban noise level has been brought about by the introduction of the turbojet engine into commercial airline operation.”<sup>4</sup>

The impact of increasing aircraft noise on the human ear can be shown in the decibel scale below. A decibel (dba) is a measurement unit of sound intensity; measurement begins when the sound is first

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1. Greenwald, *Environmental Backlash—The Urban Paradox, Noise and Transportation*, 7 NAT. RESOURCES LAW. 293, 293-94 (1974).

2. “[According to metropolitan dwellers], it is the noise emitted from aircraft flyovers which represents the most objectional form of noise pollution.” 118 CONG. REC. 35, 884 (1972) (remarks of Sen. Buckley).

3. “[N]oise acts so insidiously that its effects are hard to pin down.” L. KAVALER, *NOISE, THE NEW MENACE* 4 (1975).

4. V. YANNACONE, B. COHEN & S. DAVISON, 2 ENVIRONMENTAL RIGHTS AND REMEDIES 375 (1972).

audible to the human ear,<sup>5</sup> and each decibel increase represents ten times the volume of the preceding decibel:

0 dba	.....	threshold of hearing
10 dba	.....	sound of breathing while reading
20-30 dba	.....	rustle of leaves or cry of bird in wilderness area
60 dba	.....	office noise
80 dba	.....	alarm clock
90-92 dba	.....	rush hour traffic
120 dba	.....	thunder clap or jet at take-off <sup>6</sup>

The effects of these noise levels are shown by the following chart:

- 43 dba – interferes with study
- 45 dba – interferes with recuperation from illness
- 55 dba – interferes with sleep
- 62 dba – interferes with communication
- 75 dba – interferes with health and job performance<sup>7</sup>

As shown, a dba measurement of 75 or more may have an effect on human health, the most severe effect being loss of hearing. It has been theorized that noise also may have an effect on the development of the human fetus, either directly or indirectly by the mother's psychological reaction to it. Excessive noise may also contribute to heart disease, cardiovascular problems, migraine headaches, gastrointestinal disorders, allergies and endocrine and metabolic effects such as hormone-related problems.

Psychologically, noise pollution can be as harmful. Writers in this area have made a distinction between noises that are considered pleasant to a listener (loud classical music) and noise considered unpleasant (loud motorcycles), in determining the subjective psychological effect on a human organism.<sup>8</sup> Other factors, such as the environment in which the noise is produced<sup>9</sup> as well as its intensity, can contribute to consequences which manifest themselves psychologically. Tension-related diseases, such as stomach ulcers, neuroses, mental illness, allergies and cardiovascular and circulatory diseases may result from noisy environments.<sup>10</sup>

Noise can also be the direct cause of damage to buildings and

5. *Id.* at 375 n. 4.

6. "[A] sound level louder than 100 hardly ever occurs in nature. To make such a noise commonplace requires the efforts of man. A jet plane at takeoff equals the thunderclap, as does the din within a discotheque." L. KAVALER, *supra* note 3, at 5.

7. Greenwald, *supra* note 1, at 294.

8. V. YONNACONE, B. COHEN & S. DAVISON, *supra* note 4, at 383.

9. For example, noise may be much more disruptive while one is sleeping or in situations where concentration is required, i.e. work.

10. V. YONNACONE, B. COHEN & S. DAVISON, *supra* note 4, at 385.

other structures. In an investigation of three deaths in France in the 1960's, the cause of death was linked to a jet's sonic boom which brought down a house in which the three were sitting. And, the future of our national parks has also become uncertain because of the damage done by sonic booms. In 1968, the Federal Aviation Agency installed a device in the ruins of Mesa Verde, Colorado, to measure the shock-waves of sonic booms. The action was taken when damage was shown to have occurred at ruins in the historic sites of the Four Corners region. At the Ute Reservation, ancient walls fell as a result of the abrupt noise, and at Arizona's Canyon de Chelly, actual damage was observed where dust and mortar could be seen on the fresh snow, evidencing recent damage to the ancient walls by sonic booms. Many air routes, in an effort to avoid over-city air paths, will travel over open areas, such as wilderness areas or national parks, but such routing has not absolved the airline from the devastating effects of noise pollution.<sup>1 1</sup>

#### TRADITIONAL LEGAL THEORIES FOR RECOVERY

At common law, a person could recover damages for the decrease in the value of his property due to noise. The legal theory relied on was that such private nuisance was "properly an action for the invasion of a person's interest in . . . land. . . ."<sup>1 2</sup> Damages for personal injury in nuisance cases have rarely been awarded because it is difficult to prove injury from noise.<sup>1 3</sup>

The recent case of *Town of East Haven v. Eastern Airlines, Inc.*,<sup>1 4</sup> is illustrative of the traditional remedies. It was an action by a town and individual homeowners seeking damages from the City of New Haven and various commercial airlines for the diminution in value of their properties caused by the noisy operation of an airport nearby. Plaintiffs also sought recovery for "'emotional damage . . .,' fear, annoyance, inconvenience and interference with their peace and quiet."<sup>1 5</sup> They specifically alleged the noise, fumes, and vibrations as being substantial interference.

Although plaintiffs failed to adequately prove the damages of diminution of their property values, the court sent back that portion of the case, feeling it was unfair not to allow further proof of compensatory damages.<sup>1 6</sup> The injunctive relief sought, either the closing

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11. N.Y. Times, Dec. 1, 1968, at 73, col. 3.

12. 4 RESTATEMENT OF TORTS 220 (1939).

13. Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1377 (1965).

14. 331 F.Supp. 16 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972).

15. *Id.* at 17-18.

16. *Town of East Haven v. Eastern Airlines, Inc.*, 333 F.Supp. 338 (D. Conn. 1971).

of the airport or a forbidding of its use by jets, was denied because the court found that the "right of the public to travel by air by means of modern airplanes far outweighs the disadvantage . . . [to the] plaintiffs."<sup>17</sup>

Perhaps the most intriguing theories the plaintiffs relied on for relief were the "taking" of property under the Fifth and Fourteenth Amendments; trespass; and nuisance. The reasoning behind the "taking" damage claim was that the operation of jets in and out of the airport had impaired the plaintiffs' property values and the defendants should compensate them for that loss. Upon defendants' payment of compensation, defendants would, by "inverse condemnation"<sup>18</sup> be given an easement in the plaintiffs' property and could continue to use the area in their usual manner. The Court explained two significant United States Supreme Court cases<sup>19</sup> which held that an interference with the use of land is considered a taking, and that "the use of land presupposes the use of some of the airspace above it."<sup>20</sup> Otherwise, no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the super-adjacent airspace will often affect "the use of the surface of the land itself."<sup>21</sup>

The limitation of these rulings is that they have been interpreted to imply that an interference is only a *direct* overflight which occurs frequently. Based on this standard, the Court did not allow recovery under the "taking theory" for some of the plaintiffs who could only show an infrequent pass by an airplane nearby.<sup>22</sup> However, those plaintiffs who owned houses in the approach zone of the airport were found to have been more directly affected by the traffic. Although the Court conceded that the planes may not have been directly over the properties, they were sufficiently close, so as to constitute a "taking." The flights were passing over several times a day at an altitude of less than 500 feet,<sup>23</sup> and this was a "sufficiently direct and immediate interference with these plaintiffs' use

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17. *Town of East Haven v. Eastern Airlines, Inc.*, 331 F.Supp. 16, 30 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972).

18. Inverse condemnation is a theory whereby a public entity engages in activities resulting in condemnation and the injured party is entitled to compensation for the "taking."

19. *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

20. *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962).

21. *Id.* at 265.

22. *Town of East Haven v. Eastern Airlines, Inc.*, 331 F.Supp. 16, 33 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972).

23. The 500 foot limit is required as a result of 49 U.S.C. §1304 (1970), which recognizes in any citizen "a public right of freedom of transit through the navigable airspace of the United States." Navigable airspace is defined as "includ[ing] airspace needed to insure

and enjoyment of their land to constitute a taking.”<sup>24</sup> The “taker” of the easement, however, was found to be the City of New Haven, and not the airlines, because they fly according to routes prescribed by federal regulations.

In considering annoyance and trespass, the Court stated that damages for annoyance have always been taken into account when a court is determining the “taking” damages and have not been allowed as a separate damage claim. Further, the Court determined that the trespass claim would permit a double recovery on top of the “taking” recovery, saying that the “taking” includes any trespass or invasion of the property by overflight.<sup>25</sup> The court also stated that because there was no “taking” found to be done by the airlines, there therefore, was no trespass by the airlines, unless negligence could be shown.

Nuisance damages were denied because there was no evidence that the airport was being operated improperly.

The balancing that the *East Haven* court did between a private interest and public interest is probably the most rational and feasible way of dealing with noise pollution when any relief is sought. However, the absurdity of the Court’s approach to the plaintiffs’ intangible interests of freedom from annoyance, noise and general disruption of everyday life is demonstrated by the following language from an article by Spater:

it can be accepted for purposes of argument that the noise suffered by the two landowners is exactly the same. The difference is that the landowner over whose property the flight path has been laid has lost the use of that airspace. The right to the exclusive use of a definable, although invisible, portion of his property has passed from him to the airport operator just as definitely as if a visible highway, railway, or canal had been laid out on the surface of his property. Although the flight path in the air . . . is not visible, in each case the landlord has been displaced from some part of his property. He can no longer build in the flight path or safely fly kites in it. But, his neighbor

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safety in take-off and landing of aircraft.” 49 U.S.C. §1301(24) (1970). At the time the *Causby* decision was rendered, navigable airspace was defined by statute and regulation as a height more than 500 feet above the ground. 49 U.S.C. §403 (repealed by 72 Stat. 810 (1958)).

24. *Town of East Haven v. Eastern Airlines, Inc.*, 331 F.Supp. 16, 33 (D. Conn. 1971), *aff’d*, 470 F.2d 148 (2d Cir. 1972).

25. Courts will look strictly at the use of the property that is allegedly interfered with by overflights. In *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043 (10th Cir. 1974), the court said that what must be examined is the landowner’s actual use, as distinguished from potential use or just possession. The court said that the traverse is lawful unless it actually causes injury. In this case, the court found that the nearest improvement on the land was 3.4 miles from the boundary and that the land was uninhabited and not used at all.

whose property lies a "fraction of an inch" from the flight path may do whatever building or kite flying he chooses. Moreover, there are added risks of physical damage and injury imposed on the landowner whose property is subject to a flight easement. Thus, despite the assumed equality of the noise level, there is a very different impact on the two landowners. Both have been damaged, but in only one case has property been taken. And the federal constitution, along with half of the state constitutions, provides for compensation only when there has been a taking. Once the taking is established, the landowner may recover for consequential damages to the balance of his property, and this would include the damage from noise of aircraft utilizing the flight path. This principle that a landowner whose property is taken may recover for consequential damages to his remaining property, but that a neighboring landowner may not recover for damage arising from the same objectionable activity, was well established long before noise from airplanes became a problem.<sup>26</sup>

Spater goes on to say that what the courts are really dealing with is a real property interest of the person who can show *actual* interference, and those who are damaged only by the noise and disruption have no right to any damages.<sup>27</sup> In reality, however, each landowner is seeking an abatement of the noise. It is unlikely that damages satisfy the landowner and it is doubtful that it deters the noise producers.

An explicit nuisance theory has been proposed in a note in the Harvard Law Review to help relieve the burden on plaintiffs of having to show flights within plaintiff's zone of possession, that is directly overhead and within a certain altitude, when relying on the Fifth and Fourteenth Amendments "taking" and trespass theories. Nuisance, the note proposed, would be beneficial for the following rationale:

Attention would be focused on the degree of actual interference, rather than on formalistic factors like the relationship of the flight path to a particular zone or column of airspace. Determination of an "unreasonable" degree of interference requires the consideration, inherent in a nuisance analysis, of all relevant interests, including broad national and local commercial interests in the particular aviation activities involved. Finally, noise interference is a substantial annoyance largely because it emanates from frequent but generally

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26. Spater, *supra* note 13, at 1394-95.

27. The landowner who is allowed compensation will be allowed consequential damages for the noise or other activity flowing from the taking. The separate claim was not allowed in *Town of East Haven v. Eastern Airlines, Inc.*, 331 F.Supp. 16 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972); *but see* Spater, *supra* note 13, at 1379 n. 31.

unrelated overflights, and the interests of all contributing aircraft must be assessed together. Consideration of such factors is precluded by the strict trespass theory; it focuses narrowly upon a particular flight incident involving only a single aircraft and a single landowner.<sup>28</sup>

As is illustrated, the traditional theories relied on to abate, or at least compensate victims of noise from airplanes, have at best been clumsy. But the focus began to shift to the individual's needs, when Congress enacted the Noise Control Act of 1972.<sup>29</sup> First, however, it will be helpful to look at related provisions of the Federal Aviation Program.<sup>30</sup>

### STATUTORY CONTROL OF AIRPLANE NOISE POLLUTION

#### *Safety Regulation Under the Federal Aviation Program*

Under the section of the Federal Aviation Act entitled "Control and Abatement of Aircraft Noise and Sonic Boom,"<sup>31</sup> the Federal Aviation Administration (FAA), working with the Environmental Protection Agency (EPA), is to "prescribe and amend standards for the measurement of aircraft noise and sonic boom, . . ." to afford "present and future relief to the public health and welfare from . . ." such noise.<sup>32</sup> The practical application of this act is to determine whether a certificate<sup>33</sup> of safety to an interested airline will be issued, modified, revoked or suspended for not being in compliance with the noise standards.

The statute further requires the EPA to draw up proposed regula-

28. Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 HARV. L. REV. 1581, 1583-84 (1961).

29. 42 U.S.C. § 4901-18 (Supp. V 1975).

30. 49 U.S.C. § 1431 (Supp. V 1975).

31. *Id.*

32. 49 U.S.C. § 1431(b)(1). The factors to be considered in proposing regulations and standards are outlined in 49 U.S.C. § 1431(d) (Supp. V 1975) as follows:

- (1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;
- (2) consult with such Federal, State, and interstate agencies as he deems appropriate;
- (3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
- (4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
- (5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

33. For the procedure of issuing certificates, see 49 U.S.C. § 1423 (1970).



tions to protect the public health and welfare by control or abatement of aircraft noise and sonic boom. The FAA is to publish these proposed regulations, and to hold a public hearing at which interested persons can present their views. If the FAA action regarding a regulation is found by the EPA to be detrimental to the public health and welfare, the EPA may require that the FAA submit an Environmental Impact Statement<sup>34</sup> which would explore the environmental effect of the action taken by the FAA.

The noise standards established by the FAA in the Code of Federal Regulations (CFR)<sup>35</sup> are quite extensive and include standards for noise measurement on all types of airplanes, including subsonic, small planes, large airplanes, and jets. These regulations also deal with a system of measurements and determinations for the limitations on measurement under differing conditions, such as rain, temperature, humidity, wind, flat terrain, and periods of take-off and landing.

### *Noise Control Act of 1972*

Perhaps the most progressive step made in the control of aircraft noise is this Act.<sup>36</sup> Unlike the FAA provisions, this act concentrates on the individual's need for an environment free from excessive noise. Enacted under the Public Health and Welfare title of the United States Code, the Act contains a statutory recognition in its statement of policy of the danger that noise causes to the "health and welfare of the Nation's population, particularly in urban areas. . . ."<sup>37</sup> Also recognized are the major sources of noise as being "transportation vehicles and equipment, machinery, appliances, and other products in commerce. . . ."<sup>38</sup>

The statement of policy also contains a declaration that although control of noise is primarily the responsibility of the state and local government, there is a need for federal uniformity of treatment of noise in commerce. Therefore, research and the establishment of standards to control noise in products, and the relaying of noise control information to the public with regard to these products are goals and activities delegated to the federal level.<sup>39</sup>

All federal agencies involved in a noise-producing activity are required to carry out that activity in pursuit of the policy stated above, and must check with the EPA when setting standards or regu-

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34. In accordance with 42 U.S.C. §4332 (1970).

35. 14 C.F.R. §36.1-36.1581 (1977).

36. 42 U.S.C. §4901-18 (Supp. V 1975).

37. *Id.* §4901(a)(1).

38. *Id.* §4901(a)(2).

39. *Id.* §4901(a)(3) & (b).

lations concerning noise. If the EPA believes that the standards or regulations do not promote public health and welfare, then the particular agency may be required to report to the EPA Administrator to revise the standard or regulation so that it will be in concert with the Act's policy. A report is to be published with specific findings respecting the requested revisions.<sup>40</sup>

The Administrator is required under this Act to identify and publish major sources of noise pollution and to propose regulations to limit their emission of noise, taking into account the feasibility of limiting the noise, and considering testing procedures necessary to comply with emission standards. Interested persons must then be given an opportunity to participate in rulemaking "through submission of written data, views, or arguments with or without opportunity for oral presentation."<sup>41</sup>

For the purposes of this article, the important section of the Noise Control Act is that dealing with aircraft noise standards,<sup>42</sup> which supplements and works with the Federal Aviation Program as described. It establishes that, after consulting with federal, state and local agencies and interested persons, the EPA Administrator will study the adequacy of the FAA's standards including the "adequacy of noise emission standards on new and existing aircraft . . ." and make recommendations on retrofitting and phaseout of existing aircraft.<sup>43</sup>

The Administrator is also to study the problem of cumulative noise exposure around airports and possible ways in which airports and airline operators could control aircraft noise. Such a study was reported on to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate. Some of the more pertinent views on noise pollution in the report to the senate committee<sup>44</sup> were as follows:

(1) That the existing flight and operational controls of the FAA are not protecting the public health and welfare adequately. The EPA believes that there are better feasible methods of controlling noise, including control on the number of flights and the time of day they operate, and the location of the injured parties in relationship to the noise.

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40. *Id.* §4903(c).

41. 5 U.S.C. § 553(c) (1970) (referred to in 42 U.S.C. §4905(c)(2) (Supp. V 1975)).

42. 42 U.S.C. §4906 (Supp. V 1975).

43. *Id.*

44. ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REPORT ON AIRCRAFT-AIRPORT NOISE, 93d Cong., 1st Sess. (1973).

(2) That less noisy airplanes are possible: at least 5-10 decibels lower than the standard in 1972, however, for economic reasons, development of newer airplanes may not be implemented in the near future.

(3) That there is a substantial effect on the human organism by cumulative noise, and the report discusses ways of measuring such noise, costs of potential litigation, and costs of changing existing conditions.

(4) That to limit exposure to noise, airports and local government may take actions to "limit the noise environment generated by operations at the airport" and actions to limit placing people within the airport's noise environment.<sup>4 5</sup>

The Noise Control Act also contains sections which outline prohibited acts and invokes a fine on the violation of \$25,000 per day of violation and/or imprisonment, or both, exhibiting a strong policy for enforcement of the Act. Such violations may include:

(1) Distribution in commerce of a new product not in conformity with a regulation.

(2) Removal of a device for noise control from machinery, which device was incorporated in compliance with regulations under the Act and using the machinery without such device, importation by a person of a product not in compliance with the Act.

Perhaps the section that focuses on the individual's need most clearly is the section<sup>4 6</sup> allowing citizen suits. A civil suit may be brought alleging the United States or any governmental agency<sup>4 7</sup> to be in violation of a noise control requirement.<sup>4 8</sup> A citizen may also bring an action against the Administrator of the EPA if he doesn't perform an act or duty required (unless discretionary) or against the Administrator of the FAA. The jurisdictional grant is directly to the United States district court without regard to the amount in controversy.<sup>4 9</sup> A sixty-day notice must be adhered to before an action can commence, and no action can be brought if the Administrator is "diligently prosecuting a civil action to require compliance with the noise control requirement." However, anyone may intervene in that action.<sup>5 0</sup> Intervention may also be allowed by the Administrator of

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45. *Id.* at 100.

46. 42 U.S.C. §4911 (Supp. V 1975).

47. "[T]o the extent permitted by the eleventh amendment to the Constitution." *Id.* §4911(a)(1).

48. These include some of the violations named previously as well as under other sections of the Noise Control Act and the "Control and Abatement of Aircraft Noise and Sonic Boom" section of 49 U.S.C. §1431. 42 U.S.C. §4911(f) (Supp. V 1975).

49. 42 U.S.C. §4911(a) (Supp. V 1975).

50. *Id.* §4911(c).

the EPA or the Administrator of the FAA. Additionally, a court has the discretion to award attorneys' fees plus reasonable costs to any party.

The citizen suit section specifically states that it does not restrict causes of action under any other statute or under common law theories, thus making this section very important. Not only can a person bring an action against a private entity, but he can bring an action against an agency that may be failing in its duty to protect the public health and welfare by not enforcing or promulgating regulations designed to limit noise pollution. It appears that no longer will an individual be forced to rely on a "property concept" to prove injury and be afforded some compensation, for he may rely on injury to the public health and welfare. This is a more flexible standard, focusing much more on the individual's need and increasing the panorama of defendants.

The other two sections of the Noise Control Act which are relevant for our purposes deal with research objectives and the development of low-noise emission products. The section<sup>51</sup> dealing with research, technical assistance, and public information authorizes the EPA Administrator to conduct research or contract for research on the "psychological and physiological effects of noise on humans . . . domestic animals, wildlife, and property," and of acceptable noise levels based on these effects.<sup>52</sup> The Administrator is also to develop ways of measurement and means of controlling noise emission and aid in training noise-control personnel and selection of noise-abatement equipment. On the local level, the Administrator can help develop model state or local legislation and send out public information regarding "effects of noise, acceptable noise levels, and techniques for noise measurement and control."<sup>53</sup> Finally, the Noise Control Act contains a provision for the certification of products for use by the Federal Government if it is determined that the product falls within the low emission standards.

Having set out the provisions of the Act, its application and limitations should be explored. Although the policy of seeking to protect the health and welfare of the public has been the banner of the claimants in the following cases, that result has not been entirely possible. One of the effects of the Act, as the following cases brought under the section of Aircraft Noise Standards demonstrate, is federal pre-emption.<sup>54</sup>

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51. *Id.* §4913.

52. *Id.* §4913(1)(A).

53. *Id.* §4913(3).

54. Federal pre-emption occurs when federal law prevails over state law because of an overriding federal policy in the particular area.

*Federal Pre-Emption of the Federal Aviation Act and the Noise Control Act:*

In *City of Burbank v. Lockheed Air Terminal, Inc.*,<sup>55</sup> a city ordinance limiting jets from taking off from the airport between 11:00 p.m. and 7:00 a.m. was challenged by the operator of the airport who sought to enjoin the enforcement of the ordinance. The lower courts enjoined enforcement, and the United States Supreme Court affirmed. Justice Douglas found that the Federal Aviation Act and the Noise Control Act, although they do not specifically express pre-emption, pre-empt state and local control by an entity who is not an airport proprietor.

In reaching this conclusion, Justice Douglas stated:

Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known. . . . Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." (citations omitted)<sup>56</sup>

Justice Douglas continued to clarify the Federal purpose behind the Acts' creation of uniform airflight regulations:

The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. (citation omitted)<sup>57</sup>

As indicated by Justice Douglas, the implementation of the Noise Control provisions have practical implications: federal uniformity of regulation, and the insistence that local controls not be inconsistent with the noise control provisions. There is also a delicate balance between the private need and the public need. Although the effect of the city ordinance would be to spare the people from airplane noise during the night, a clustering of flights in other hours of the day

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55. 411 U.S. 624 (1973).

56. *Id.* at 638-39.

57. *Id.* at 639.

would be dangerous. Justice Douglas quoted language from *American Airlines, Inc. v. Town of Hempstead* that "the aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wing and tail assembly; to exclude the aircraft noise from the [t]own is to exclude the aircraft. . . ."<sup>58</sup> *City of Burbank* demonstrates that no matter what the private needs are the public needs and a federal scheme for safety will be balanced against the private needs.

Another case decided on federal pre-emption grounds is *Air Transport Association of America v. Crotti*.<sup>59</sup> This involved an action by Air Transport Association for declaratory and injunctive relief on the grounds that California aircraft and aircraft noise standards were invalid under the Supremacy and Commerce clauses of the United States Constitution because of the controlling federal legislation in the area, namely the Noise Control Act and the Federal Aviation Act as amended by the Noise Control Act. The Single Event Noise Exposure Levels regulations of California which were challenged, were to achieve a maximum noise level of 65 decibels by December 31, 1985. Counties were responsible for enforcement of these regulations which were clearly aimed at aircraft noise. The federal district court found that these regulations were unconstitutional because they were an "unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce."<sup>60</sup> The court stated that the impact of the regulations "collides head-on with the federal regulatory scheme for aircraft flights delineated by and central to the *Burbank* decision"<sup>61</sup> which is discussed earlier in this article.

The federal pre-emption aspect of the Noise Control Act also limits possible plaintiffs in a suit to eliminate or lessen noise pollution. In *Village of Bensenville v. City of Chicago*,<sup>62</sup> the Appellate Court of Illinois held that municipalities could not maintain a suit against the City to enjoin the expansion of O'Hare Airport. The court reasoned that the federal government has pre-empted regulations by local or state entities of aircraft noise and air pollution. The court, however, did not preclude other remedies available to the municipalities such as administrative action before the EPA or the

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58. 272 F.Supp. 226, 230 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968).

59. 389 F.Supp. 58 (N.D. Cal. 1975).

60. *Id.* at 65.

61. *Id.*

62. 16 Ill.App.3d 733, 306 N.E.2d 562 (1973).

FAA Administrator, or a proceeding by municipal constituents against the City on the theory of inverse condemnation.

Even though federal pre-emption has been employed as a ground for disallowing enforcement of a local ordinance or statute, where such regulation is consistent with the federal policy, it will be enforceable. Where the regulation is promulgated by a local airport, the federal government is not involved. In *National Aviation v. City of Hayward*,<sup>63</sup> the United States District Court of California, relying on legislative history<sup>64</sup> of the Noise Control Act which appeared in the *Burbank* opinion, stated that the question of whether or not an airport proprietor may establish regulations has not yet been fully addressed by a court, since *Burbank* dealt with city ordinances. The regulation involved here prohibited all aircraft which exceeded a noise level of 75 dba from landing or taking off from the Hayward Air Terminal between 11:00 p.m. and 7:00 a.m. The plaintiffs included an air delivery company and a flight training school, who were seeking to enjoin the enforcement of the airport's regulations.

The dilemma the court faced was whether regulations promulgated by an airport, rather than a local or state entity, should be enforceable since the legislative history of the Noise Control Act indicated that the federal government should not interfere with an airport's regulations. The court noted the danger of upholding the regulations by blanket approval simply because they were promulgated by a private entity "since a municipality that owns an airport would be free to exercise police powers in the field of airport noise regulation which powers, if identically exercised by a different municipality or state, would unlawfully intrude into an area said to have been preempted by Congress."<sup>65</sup>

63. 418 F.Supp. 417 (N.D. Cal. 1976). Although there are other areas of interest in this case, only the federal pre-emption area will be discussed.

64. [T]he proposed legislation [would] not affect the rights of a state or local public agency, as the proprietor of an airport, from issuing regulations, or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is non-discriminatory. . . . The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. . . . [T]he Federal Government should not substitute its judgment for that of states or . . . local government. . . . The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

Letter from Secretary of Transportation to Aviation Subcommittee on Commerce, quoted in *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 635-36 n. 14 and 649 (1973).

65. *National Aviation v. City of Hayward*, 418 F.Supp. 417, 423 (N.D. Cal. 1976).

The court then looked to the *Burbank* opinion for guidance on this point,<sup>66</sup> and found that the *Burbank* majority recognized the clear Congressional intent that private airport proprietors be allowed to deny the use of the airports by aircraft that exceed their own noise regulations, as long as the denial was nondiscriminatory. The court felt it could not undermine *Burbank*,<sup>67</sup> but at the same time could not undercut the proprietor exception which it implied. This was felt especially in light of the requirement, upheld in previous cases,<sup>68</sup> that airport proprietors obtain noise easements from persons over whom they were flying. It would be inconsistent to impose such and then take any control over noise away from the airports. The court decided ultimately that because Congress was silent in this area and the legislative history showed an intention for it to remain so, the regulation was not pre-empted by federal legislation, and therefore, the airport could continue to enforce its noise regulations.

### *Status of Airplane Noise Today: The Concorde and Noise*

Perhaps the most publicized case involving aircraft noise has been *British Airways Board v. Port Authority*.<sup>69</sup> This was the fight over the landing of the renowned Concorde in the United States, and is significant in the law of noise pollution, because the major complaints about the Concorde landing in New York centered around its noise.

This case began when the Port Authority of New York and New Jersey refused to allow demonstration flights into John F. Kennedy International Airport. The Port Authority also refused to promulgate an acceptable noise rule for supersonic aircraft in order to allow the landing at Kennedy. The United States Court of Appeals for the 2nd Circuit decided the legality of this ban and of the delay in allowing the Concorde to land in New York. The Port Authority was enjoined from banning the airplane's landing in the District Court and they appealed.<sup>70</sup>

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66. The majority in *Burbank* stated that it was not considering "what limits, if any, apply to a municipality as a proprietor." *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 635-36 n. 14 (1973).

67. The *Burbank* decision held that a non-airport proprietor local or state regulation would be invalid because the federal legislation pre-empted such regulation. See *id.* at 634 & 640.

68. *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

69. 564 F.2d 1002 (2d Cir. 1977).

70. In "Concorde I" (*British Airways Bd. v. Port Authority*, 558 F.2d 75 (2d Cir. 1977)), the Port Authority was urged to "conclude its study and fix reasonable noise standards. . . ." The lower court was also to determine whether the 13 month delay by the Port Authority in coming up with noise standards "was so excessive as to constitute unfair discrimination and an undue burden on commerce." *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1004 (2d Cir. 1977).



In 1958, the Port Authority had promulgated a maximum permissible noise limit for Kennedy landings of 112 PNdB (perceived noise in decibels). It was decided by former Secretary of Transportation Coleman that there would be two Concorde flights daily into Kennedy provided they not travel at supersonic speeds over land areas and not fly between 10:00 p.m. and 7:00 a.m.<sup>71</sup> All flights were to immediately cease if they were deemed harmful to the "health, welfare or safety of the American people."<sup>72</sup>

The basic dispute centered around a "deep rumble" the plane made which caused minor structural shaking, rattling dishes and "other non-stationary objects within homes."<sup>73</sup> Former Secretary Coleman concluded, however, that the structural and subjective effect would be minimal, and that the only way to test the effect would be to have actual runs over the area landing at Kennedy. The reaction by the New York officials to the testing plan was unanimously negative: the Governor disapproved, and the New York Legislature passed a bill banning the Concorde from landing at Kennedy. The Port Authority then banned the Concorde from landing at Kennedy for a period of six months while observing tests at Dulles, Charles de Gaulle and Heathrow Airports.

The Port Authority did not apply the 112 PNdB standard to the Concorde noise, because of the unique vibrations produced by the airplane said not to be "reflected" in the current noise standard. The Port Authority also questioned if testing at JFK was in the "public interest," and began its own study of the problem. Yet when its expert formulated "vibration rattle index," it was found that the index of irritation to residents could not be measured unless the airline was actually tested.

Various FAA tests were subsequently released which established that the Concorde could meet the 112 PNdB measurement. Meanwhile tests run at Dulles showed that the Concorde was less noisy than anticipated and that in fact, the vibrations were no greater than those emitted by the B-747 and the DC-10.

After various extensions of the deadline, exceeding a year, the airlines brought suit. In the first suit of *British Airways Board v. Port Authority*<sup>74</sup> the court held that the federal law "contemplated a limited role for airport proprietors. . . . [T]heir task was to promul-

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71. When commercial service commenced, these conditions were not to be effective beyond sixteen months from that commencement.

72. *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1006 (2d Cir. 1977).

73. *Id.* at 1007.

74. 431 F.Supp. 1216 (S.D.N.Y. 1977).

gate reasonable rules to abate noise in the airport and its environs.” (emphasis added)<sup>75</sup>

In the latest appeal to the United States Court of Appeals, Second Circuit, the Port Authority was admonished for the unwarranted delay, and its action was termed “illegal” and an “abdication of responsibility.”<sup>76</sup> The court noted that

[t]he task of protecting the local population from airport noise . . . has fallen to the agency, usually of local government, that owns and operates the airfield. [citing *Crotti* and *Hayward, supra*.]

It seemed fair to assume that the proprietor’s intimate knowledge of local conditions, as well as his ability to acquire property and air easements and assure compatible land use, [citing *Griggs, supra*] would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme, and both the Supreme Court and executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions. (citations omitted)<sup>77</sup>

Having said this, the court stated that while the proprietor is exercising that power, he must be nonarbitrary and nondiscriminatory and not burden interstate commerce or hinder the attainment of “legitimate national goals.”<sup>78</sup> The delay the Port Authority claimed at the time of this decision, i.e., that it was waiting for federal compilation of data, was discounted by the court in light of the fact that President Carter had given approval to Concorde landings in thirteen American cities, and the federal government showed little interest in studying the problem further.

The court ruled that the ban should be dissolved and the Port Authority was not denied the power to adopt a “new, uniform and reasonable noise standard in the future . . . [if the] 112 PNdB rule . . . is deemed inadequate.”<sup>79</sup>

The Concorde began flying into Kennedy on November 22, 1977. The noise recorded that day on entry was 98 PNdB and at take-off it was 108.1 to 108.5 PNdB, because of a cloud-cover which held the sound in.<sup>80</sup> But a few weeks later, the Port Authority voted to enact more stringent regulations, the effect of which would be extinction

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75. *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1009 (2d Cir. 1977).

76. *Id.* at 1010.

77. *Id.* at 1010-11.

78. *Id.* at 1011.

79. *Id.* at 1013.

80. *N.Y. Times*, Nov. 23, 1977, §2, at 16, col. 1 and Nov. 24, 1977, §4, at 9, col. 4.

of the existing fleet of sixteen Concorde by 1985.<sup>81</sup> There is still dissent regarding the Concorde by many people, and the problem is by no means resolved.

### CONCLUSION

As can be observed by the data shown above, the maximum noise level prescribed by Kennedy and the noise of the Concorde is still above the decibel measure of 75 which interferes with health and job performance. Noise is and will continue to be a growing problem to society. This problem is compounded by the difficulty of using regulations and enforcement procedures because of federal pre-emption or the balancing of economic considerations, foreign relations, and inconsistent land uses which a decision-maker must address.

The danger in not having stringent enforcement procedure is that our growing metropolitan areas will turn into monopolies on noise. This is especially true in rapidly growing cities because of poor planning or ignorance about the effects of noise. Fortunately, citizens' groups have become more aware of various types of pollution, including noise pollution, and the Citizen Suit Provision of the Noise Control Act may enable them to bring grievances forward.

The dangers we face can be seen in the excessive noise problems Japan has had recently. The problem is so extreme in the city of Tokyo that it is necessary to have a flashing sign over intersections measuring decibels of noise from traffic, and people have banded together as victims of noise to protest the excessiveness. Recently, the new airport of Narita was severely damaged by farmers and students who opposed the environmental impact the airport would have on the area.<sup>82</sup>

With proper planning, strong enforceable regulations and citizen-awareness of the noise problem, the subtle pollutant may be conquered; if not, we will have an ever-present, dangerous irritation: noise.

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81. N.Y. Times, Dec. 15, 1977, §2, at 16, col. 3.

82. See L. KAVALER, *supra* note 3, at 93-109.