

JOHN WAYNE AIRPORT SETTLEMENT AGREEMENT -  
PAST AND FUTURE

I. SUMMARY OF THE JOHN WAYNE AIRPORT SETTLEMENT AGREEMENT.

The John Wayne Airport Settlement Agreement (“Settlement Agreement”) is the most stringent airport regulation in the United States. It was put in place in 1985 as the product of a settlement of a lawsuit against the County of Orange, proprietor of John Wayne Airport (“County”) by the City of Newport Beach (“City”), the Airport Working Group of Orange County, Inc. (“AWG”) and a local environmental group, Stop Polluting Our Newport (“SPON”).

The Settlement Agreement has survived numerous court decisions which have progressively eroded local operator control of airport operations,<sup>1</sup> as well as the Airport Noise and Capacity Act of 1990, 49 U.S.C. §§ 47521, *et seq.*, which definitively relieved airport proprietors of substantially all power to control airport access, as well as permitted noise levels and mitigation measures. The Settlement Agreement has been able to survive because the Federal Aviation Administration (“FAA”) has repeatedly found its provisions to be reasonable, nonarbitrary, nondiscriminatory (as between types of aircraft), based on the court defined right of airport proprietors (and only airport proprietors) to limit noise levels for the purpose of limiting their own liability. *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998), and not a limitation on access.

The Settlement Agreement was amended and extended in January, 2003, from an expiration of December 31, 2005 to portions expiring on December 31, 2015, while the “curfew” provision expires no earlier than December 31, 2020 as set forth below.

At its fundament, the Settlement Agreement and its Amendment are based on four limitations:

(1) Limitations on Noise Levels - Limits on aircraft noise levels specifying three categories of aircraft, A, AA<sup>2</sup> and E, in descending order of noise, for the purpose of regulating those aircraft that register the most noise at seven monitors at the departure end of the runway in Newport Beach, while rewarding those aircraft that qualify as the least noisy at those monitors with almost unlimited access.

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<sup>1</sup> *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

<sup>2</sup> Originally, there was a second tier of noise classification, Class AA. That classification was eliminated in the Settlement Agreement Amendment because most aircraft currently in use at JWA fall within the noise categories Class A or Class E.

(2) Limitations on Passenger Levels - The least noisy Class E aircraft are almost, but not completely unregulated. They are subject, as are all types of aircraft, to a strict ceiling on the number of passengers that can use JWA in any plan year (from April 1-March 31) [from January 1, 2003 through December 31, 2010 that number may not exceed 10.3 Million Air Passengers (“MAP”) per year. From January 1, 2011 to December 31, 2015 the MAP have increases to 10.8 MAP.]. Therefore, even the least noisy aircraft are limited by the limits on the number of people allowed to fill them.

(3) Limitations on Hours of Operation - JWA has one of the few, if not the only, remaining mandatory curfew in the nation. It stretches from 10:00 p.m. to 7:00 a.m. on week nights for departures (11:00 p.m. for arrivals), and 10:00 p.m. to 8:00 am. Sundays and holidays. The curfew, like the noise limits, is not inflexible, however. It is based on noise levels. Aircraft that can depart at below 86 dB Single Event (“SENEL”) at the most distant of the seven monitors are not bound by the curfew. As many readers can attest, this event is rare, if not unheard of.

(4) Limitations on Gates - In addition to noise, passenger and hour of operation limitations, JWA is subject to gate constraints, *i.e.*, limits on the number of gates from which to embark and disembark aircraft. In some ways, this is most effect constraint of all because it controls the number of aircraft passengers that can use an airport at any one time. Moreover, control of landside constraints like gate limitations are not within FAA’s almost plenary power, and can withstand any challenge to noise or access restrictions.

Because of the broad scope of airport impacts, it is important that the citizens of Newport Beach understand the original agreement, its amendments, the reasons for those amendments, and the attributes that have made the Settlement Agreement successful in order to replicate that success in the future.

## II. LIMITATIONS.

### A. Noise and Passenger Levels.

Under the 2003 Settlement Agreement Amendment, only the Average Daily Departures (“ADD”) of Class A aircraft, the noisiest flights, are explicitly regulated. A Class A aircraft is defined as one which meets the following standard at each individual monitoring station.<sup>3</sup>

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<sup>3</sup> Settlement Agreement, ¶ 19.

| <b>Noise Monitoring Station</b> | <b>Energy Average Decibels</b>  |
|---------------------------------|---------------------------------|
| NMS1S:                          | 101.8 dB SENEL (“Single Event”) |
| NMS2S:                          | 101.1 dB SENEL                  |
| NMS3S:                          | 100.7 dB SENEL                  |
| NMS4S:                          | 94.1 dB SENEL                   |
| NMS5S:                          | 94.6 dB SENEL                   |
| NMS6S:                          | 96.1 dB SENEL                   |
| NMS7S:                          | 93 dB SENEL                     |

The Settlement Agreement Amendment provides for 85 Class A commercial passenger carriers per day. In addition to the 85 Class A ADDs permitted for passenger carriers, there are also a maximum of four commercial cargo Class A ADDs permitted for a combined total maximum of 89 Class A ADDs per day.<sup>4</sup> ¶ 40.

Class E aircraft are defined as those that can meet the following standards:<sup>5</sup>

| <b>Noise Monitoring Station</b> | <b>Energy Average Decibels</b> |
|---------------------------------|--------------------------------|
| NMS1S:                          | 93.5 dB SENEL                  |
| NMS2S:                          | 93 dB SENEL                    |
| NMS3S:                          | 89.7 dB SENEL                  |
| NMS4S:                          | 86 dB SENEL                    |
| NMS5S:                          | 86.6 dB SENEL                  |
| NMS6S:                          | 86.6 dB SENEL                  |
| NMS7S:                          | 86 dB SENEL                    |

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<sup>4</sup> A maximum of two of the four commercial Class A cargo ADDs may be allocated to commercial passenger carriers for any plan year in which the demand for such flights by commercial cargo carriers is less than four ADDs. Settlement Agreement Amendment, ¶ 40.

<sup>5</sup> Settlement Agreement Amendment, ¶ 20.

While there are no specific limits on the number of Class E ADDs, they are subject to the MAP limits which have increased from 8.4 MAP under the original settlement to: (1) 10.3 between December 31, 2003 and December 31, 2010; and (2) 10.8 from January 1, 2011 to December 31, 2015. ¶ 40. In other words, even though departures of Class E aircraft are theoretically unlimited, once the MAP allocation is exhausted, no further Class Es (or Class As) can operate, and, thus, are effectively limited in number.<sup>6</sup>

B. Hours of Operation (Curfew).

The mandatory curfew limits departures between 10:00 p.m. and 7:00 a.m. on weekdays and 10:00 p.m. and 8:00 a.m. on Sundays. Arrivals may occur until 11:00 p.m. on weekdays. The Airport Director is authorized to make an exception from the curfew where: (1) an arrival or departure was scheduled to occur outside of curfew hours; and (2) the arrival or departure has been delayed because of mechanical problems, weather or Air Traffic Control delays, or other reasons beyond the control of the operator. It should be noted that both factors must exist. ¶ 45. In addition, the curfew does not prohibit operations by emergency or mercy flights.

The airport proprietor has also imposed permitted cargo operations hours at JWA which require that staging of Ground Support Equipment (“GSE”) on the ramp shall not commence prior to 3:45 p.m., no cargo arrivals will be allowed prior to 4:00 p.m., no cargo aircraft departures will be allowed later than 7:45 p.m., and all GSE will be returned to the staging areas no later than 7:45 p.m.

While the remainder of the Settlement Agreement’s terms expire in 2015, the curfew will extend at least through 2020. ¶ 45.

C Airport Facilities.

In addition to the limitations on types of aircraft, numbers of passengers and hours of operation, the Settlement Agreement and its Amendment also contain a limitation on physical facilities at the airport necessary to accommodate the operations of aircraft. Specifically, they limit the number of gates through which passengers can be loaded and unloaded.

Prior to December 31, 2002, a maximum of 14 loading bridges were allowed. Beginning January 1, 2003 through December 31, 2015, the Settlement Agreement Amendment allows a maximum of 20 loading bridges, each of which may serve no more than one flight at a time. ¶ 43.

Technically, only aircraft exceeding 90 passenger seats are restricted to using the loading bridges. ¶ 44. Commuter aircraft, defined as “Class E aircraft regularly configured with not

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<sup>6</sup> A complete discussion of the way in which the limited number of passengers are allocated among airlines is the subject of an article in the next edition of the AWG Newsletter.

more than 70 passenger seats,” and not exceeding 90,000 lbs. are not subject to the same constraint. ¶ 23. That class of aircraft may load and unload from “hard-stand” positions on the apron outside the terminal.

As usual, the limitations are not without exception. An air carrier aircraft exceeding 90 passenger seats may load and unload at a “hard-stand” without a gate so long as: (1) the total number of “arriving” “hard-stand” positions does not exceed two (2); (2) when construction and maintenance activities at or on the terminal, apron or taxiways temporarily precludes or impairs the use of loading bridges; (3) during any airport or airfield emergency condition which precludes or impairs the regular use of loading bridges; and (4) where compliance with safety or security directives of any Federal agency with lawful jurisdiction over airport operations does not allow the full and effective utilization of the loading bridges. ¶ 44. The determination of when these conditions exist rests within the discretion of the Airport Director.

D. General Aviation Noise Ordinance (“GANO”).

In 1985, the County adopted the GANO through County Ordinance 3505. The principal policy objective of the GANO is to exclude from operation at JWA general aviation aircraft that generate noise levels greater than the noise levels permitted for aircraft used by commercial carriers. As it was enacted by ordinance, the County reserves the right to amend the GANO for the purpose of enhancing the achievement of its principal purpose and/or the enforcement of the GANO’s provisions. ¶ 46.

III. ENFORCEMENT.

The Settlement Agreement is self contained with respect to enforcement. In other words, the enforcement comes through the power of contract. The steps that must be taken in enforcement are as follows:

(a) If a dispute arises concerning the interpretation of, or a settling party’s compliance with, the Settlement Agreement, and if no exigent circumstances require immediate court proceedings, any party to the settlement interested in the enforcement, or interpretation of the settlement, must provide written notice of the dispute to the other parties. Within 21 days of the serving of such notice, the parties must meet in person (or by their authorized representative) and attempt in good faith to resolve the dispute;

(b) If a resolution has not been reached within 35 days after the sending of the notice, then any party may initiate enforcement proceedings in the court in which the original challenge resulting in the Settlement Agreement was filed in 1984, the Federal District Court in Los Angeles. A party seeking to compel another party to obey the Settlement Agreement must file a motion to enforce judgment;

(c) If the Court determines that a party is not complying with the Settlement Agreement, the court may issue an order, in the nature of specific performance of the Settlement Agreement, requiring the defaulting party to comply with the Settlement Agreement within a reasonable time. If the defaulting party fails to comply with that order, any other party may then seek enforcement under any other available court procedures.

#### IV. SUMMARY

As with all agreements, the Settlement Agreement and its Amendment are subject to interpretation, and may, ultimately, become the subject of controversy. However, two important points are beyond dispute: (1) the Settlement Agreement and its Amendment are the most restrictive limitations on airport expansion, both physical and operational, anywhere in the nation; and (2) it is because of the constant monitoring by the active signators on the Agreement, the Airport Working Group of Orange County, Inc. and the City of Newport Beach, that the County has been scrupulous in its enforcement thus far. It remains the principal task of the Airport Working Group to ensure the continued existence of the Settlement Agreement and its benefits long beyond the end of the Settlement's current termination date at the end of 2015.