



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

Office of the Chief Counsel

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

SEP 29 2014

Mr. Alan Murphy
Airport Director
John Wayne Airport
3160 Airway Avenue
Costa Mesa, CA 92626

RE: John Wayne Airport (JWA) Settlement Agreement Proposed Amendments

Dear Mr. Murphy:

You have asked for advice from the Office of the Chief Counsel, Federal Aviation Administration (FAA), regarding a proposed Ninth Supplemental Stipulation (Ninth Stipulation) that amends prior stipulations that implement the settlement of a dispute between Orange County and the City of Newport Beach, the Airport Working Group, and Stop Polluting Our Newport concerning the development and operation of John Wayne Airport, Orange County (the 1985 Settlement Agreement). You have provided us via electronic mail on September 7, 2014 an undated and unexecuted copy of the Ninth Stipulation that is enclosed herein, and is cited to by "Paragraph" or "Section" number herein.

On December 3, 2002, JWA sought an opinion from FAA on modifications to the 1985 Settlement Agreement that were agreed to by the parties on June 25, 2002, and were intended to take effect in 2003 (the 2003 Amendments). The 2003 Amendments changed certain provisions of the original settlement and extended its term to December 31, 2015. By letter dated December 31, 2002 (copy enclosed), FAA found that the proposed 2003 amendments were exempt from Airport Noise and Capacity Act (ANCA), codified at 49 U.S.C. §§ 47521, et seq., since they would not reduce or limit aircraft operation or affect aircraft safety. FAA also advised that the amendments would not adversely affect future AIP grant applications or applications to impose or collect passenger facility charges (PFC). Letter from James W. Whitlow, Deputy Chief Counsel, FAA, to Alan Murphy, December 31, 2002.

Upon review of the Ninth Stipulation, we understand that it generally authorizes an "increase in permitted operation capacities" at JWA, Paragraph 9(c), and, in particular, implements the following changes:

1. It will impose various flight and Million Annual Passengers ("MAP") limits through December 31, 2030, see, e.g., paragraphs 37 and 39. The Ninth Stipulation also defines a "Project Period" through December 31, 2030, paragraph 29. FAA understands that the current agreements would expire on December 31, 2015.

2. It provides that the existing curfew will remain in effect no less than five years past the end of the Project Period. Paragraph 43. FAA understands that under the current agreements the curfew remains in effect until 2020.
3. It will increase the MAP level served at JWA from 10.8 to 11.8 MAP, beginning on January 1, 2021, through December 31, 2025 (Phase 2), and increase the MAP level served at JWA from 11.8 MAP to 12.2 or 12.5 MAP, beginning on January 1, 2026, through December 31, 2030 (Phase 3). Paragraph 15(b).
4. It will increase the number of regulated flights allocated to "passenger Commercial Carriers" at JWA from 85 Class A average daily departures (ADDs) to 95 Class A ADDs, beginning on January 1, 2021, through December 31, 2030. Paragraph 15(a). Additionally a maximum of 2 of the 4 Commercial Cargo Class A ADDs may be allocated by the County to Commercial Air Carriers for any Plan Year in which the demand for such flights by Commercial Cargo Air Carriers is less than 4 ADDs. Paragraph 38.
5. Beginning January 1, 2021 through December 31, 2030 there shall be no limit on the number of loading bridges in use at JWA. Paragraph 41.

Our advice is limited to these five proposals and does not apply to any additional term, aspect, information, plan or fact, whether expressly contained within, implied by, or referenced by the Ninth Stipulation or otherwise. Circumstances or facts not encompassed above or that have not been disclosed to FAA or that are contrary to assumptions made herein (both express and implied) could either change FAA's opinion or render it inapplicable. This letter expresses no opinion on prior stipulations or current or past California Environmental Quality Act (CEQA) Environmental Impact Statements or Reports. The FAA expresses no opinion on any document referenced by the Ninth Stipulation, including, but not limited to, Orange County resolutions or ordinances and the Phase 2 Commercial Airline Access Plan and Regulation for JWA, as amended or succeeded.

In FAA's opinion letter of December 31, 2002, which examined the 2003 amendments, FAA made certain findings that remain relevant today. These include:

1. Since JWA had a settlement agreement containing noise and access restrictions in place prior to October 1, 1990, the restrictions in the original 1985 Settlement Agreement are "grandfathered" under ANCA.
2. The seven amendments considered by FAA in 2002 and enumerated in the FAA letter of December 31, 2002, constituted "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" and is therefore exempt from ANCA and 14 CFR Part 161. 49 U.S.C. § 47524(d)(4), 14 C.F.R. § 161.7(b)(4).
3. FAA's letter of December 31, 2002 compared the proposed 2003 amendments to the conditions that would exist when the Settlement Agreement would otherwise expire ("baseline"). At the point of expiration, FAA concluded that the restrictions of the Settlement Agreement would remain in effect or, in other words, the baseline would be a "continuation of the status quo." This was as opposed to a situation where all restrictions would be considered expired and baseline operations at JWA would be considered unconstrained. Therefore the principal legal effect of expiration of the Settlement Agreement would be to return to the Orange County Board of Supervisors

the full measure of its normal legislative and proprietary discretion to, at a subsequent time, consider and approve modifications to the air carrier facilities, to the level of permitted commercial operations at JWA, or to any other JWA related restriction which is a subject of the Settlement Agreement, subject to CEQA review.

The FAA reached the decision on the baseline based on a number of factors. First, FAA considered the intent and understanding of the County with regard to the continued regulation of access at JWA. FAA found that the County Board "clearly contemplated and intended that access restrictions at JWA would continue after 2005." Second, FAA noted that the restrictions constituted binding mitigation measures related to the airport's 1985 Master Plan project under CEQA, and were thus an ongoing requirement under state environmental law. Third, the FAA noted that to the extent the Board of Supervisors, at a subsequent time, considered and approved, for example, an increase to the number of ADD and MAP being served at the Airport, then the County would have to comply with CEQA and thus such requirements could not be considered to expire automatically.

Because this rationale still holds today and for purposes of consistency, with regard to the proposed amendments at issue here, the FAA will again consider the baseline to be a continuation of the status quo.

Comparing the proposal to the status quo, FAA believes the amendments imposed by the Ninth Stipulation constitute the same type of "relaxation and extension" of the existing conditions that FAA examined in 2002. In this case, all of the changes enhance operating capacity at JWA. As discussed above, the MAP cap increases from 10.8 to 11.8 in Phase 2 and then either 12.2 or 12.5 in Phase 3. The number of regulated flights allocated to passenger Commercial Carriers will increase from 85 Class A ADDs to 95. And beginning 2021, limitations on the number of passenger loading bridges will be dropped. Thus, because the amendments will not "reduce or limit aircraft operations or affect aircraft safety," the amendments (as we understand them and as listed above) are exempt from ANCA. The adoption of such amendments will not adversely affect future County grant applications under the Airport Improvement Program or applications to impose or collect PFCs under 49 U.S.C. § 40117. The proposed amendments do not currently present an issue of noncompliance under the County's grant assurances.

As in 2003, our advice is based on the unique history and circumstances of noise and access restrictions at JWA. For example, since the late 1960s, the County has regulated the use and operations of JWA by a variety of means in an effort to control and reduce any adverse environmental impacts caused by aircraft operations to and from JWA. The original 1985 Settlement Agreement reflects the fact that the County faced extensive litigation as far back as 1968 by individual property owners, the City of Newport Beach, and citizen groups challenging the expansion and operation of JWA.

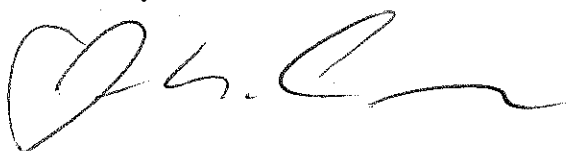
The advice expressed above is not intended to apply to any other airport. Also, there are related issues that are not addressed by this letter, including but not limited to, the County's intended means of allocating Class A ADDs and exempt aircraft operating opportunities within the MAP level agreed to in the Ninth Supplemental Stipulation. This letter is not intended, and should not be construed, as expressing an opinion on the legality under Federal

law, including, but not limited to, the former Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. § 47101, et seq., the County's grant assurances, and the Federal Aviation Act of 1958, as amended and recodified, 49 U.S.C. § 40101, et seq., of the allocation methodology or the resulting air carrier allocations that may be proposed or implemented by the County under the modified, Amended Settlement Agreement.

The advice stated herein is not binding on FAA and does not constitute a final order of the agency. It is based on an informal and expedited review of an unexecuted draft document. Although it has no current intent or reason to do so, as a matter of FAA's inherent discretion and authority, FAA retains right to modify or withdraw this opinion at any time, or take any action as described in Paragraph 58(c), as warranted and within its sole discretion. The FAA also retains the right to review, docket, and adjudicate a formal complaint filed under 14 C.F.R. part 16 alleging that the County's implementation of the amendments to the Settlement Agreement are inconsistent with the County's grant assurances.

The FAA looks forward to continue working with the County to ensure that its access plan amendments and any future allocation of airport capacity fully comply with Federal law.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan W. Cross', written in a cursive style.

Jonathan W. Cross
Manager, Airport Law
Airport and Environmental
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Enclosures: Ninth Supplemental Stipulation
Letter from James W. Whitlow, Deputy Chief Counsel,
FAA, to Alan Murphy, December 31, 2002.

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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**

9 COUNTY OF ORANGE,) Case No. CV 85-1542 TJH (MCx)
Plaintiffs,)
10 v.) **NINTH SUPPLEMENTAL**
AIR CALIFORNIA, et al.) **STIPULATION BY THE COUNTY OF**
Respondents.) **ORANGE, CALIFORNIA, THE CITY**
11) **OF NEWPORT BEACH, STOP**
CITY OF NEWPORT BEACH,) **POLLUTING OUR NEWPORT, AND**
12 Counterclaimant,) **THE AIRPORT WORKING GROUP**
v.) **OF ORANGE COUNTY, INC.,**
13) **AMENDING THE TERMS AND**
COUNTY OF ORANGE; ORANGE) **CONDITIONS OF THE PREVIOUS**
14 COUNTY BOARD OF SUPERVISORS,) **STIPULATIONS OF THOSE PARTIES**
and DOES 1 through 1,000, Inclusive,) **AND REQUESTING A**
15 Counterdefendants.) **MODIFICATION OF AN**
16) **EXECUTORY JUDGMENT OF THE**
17) **COURT**
18) **AND**
19) **[PROPOSED] ORDER**
AND RELATED COUNTERCLAIMS.)
20)
21)

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1 **I. BASIS FOR THE "1985 SETTLEMENT AGREEMENT"**

2 1. In November 1985, the County of Orange and the Orange County Board of
3 Supervisors ("Board") (collectively, the "County"), the City of Newport Beach
4 ("City"), Stop Polluting Our Newport ("SPON"), and the Airport Working Group of
5 Orange County, Inc. ("AWG") (City, SPON and AWG are sometimes collectively
6 referred to as "the City"), by their respective counsel of record, entered into a
7 stipulation to implement the settlement of the longstanding dispute between the County
8 and the City concerning the development and operation of John Wayne Airport
9 ("JWA") ("the 1985 Settlement Agreement"). The parties are sometimes collectively
10 referred to in this Ninth Supplemental Stipulation ("Amended Stipulation") as the
11 "Settling Parties."

12 On December 15, 1985, the U.S. District Court entered a final judgment ("the
13 confirming judgment") pursuant to the 1985 Settlement Agreement, which: (1)
14 adjudicated that Environmental Impact Report 508/Environmental Impact Statement
15 ("EIR 508/EIS") was legally adequate for the "EIR 508/EIS Project" (as that term is
16 hereafter defined) under the California Environmental Quality Act ("CEQA"), the
17 National Environmental Policy Act ("NEPA"), and all relevant state and federal
18 implementing regulations; (2) adjudicated that all other claims, controversies and/or
19 counterclaims were dismissed without prejudice; and (3) contained specific provisions
20 for enforcement of the 1985 Settlement Agreement.

1 2. The compromise settlement reached by the Settling Parties reflected, under
2 all of the circumstances, the individual judgments of the Settling Parties regarding an
3 appropriate or acceptable balance between demand for air travel services in Orange
4 County and any adverse environmental effects associated with the operation of JWA.
5 The Settling Parties acknowledge that, without the 1985 Settlement Agreement and
6 confirming judgment, protracted litigation would have continued and created an
7 ongoing risk of impeding or preventing the County's development of JWA, and its
8 ability to create additional access opportunities for commercial operators desiring to
9 use JWA.

10 3. Other provisions of the Settling Parties' agreement included actions that
11 were generally described in, but not implemented directly through, the 1985 Settlement
12 Agreement. Those provisions included actions undertaken by the County in adopting
13 and implementing Resolution Nos. 85-1231, 85-1232 and 85-1233 (all adopted on
14 August 27, 1985) concerning certification of EIR 508/EIS, adoption of additional
15 mitigation measures and additional airport site studies in Orange County, and the
16 parties' dismissal of other litigation concerning JWA.

17 4. In reaching the 1985 Settlement Agreement, the Settling Parties
18 considered operational and other factors applicable to JWA that are not applicable to
19 any other airport. As such, the 1985 Settlement Agreement is site specific to JWA,
20 premised upon its unique history, operational characteristics and limitations.
21 Specifically, the essential character of JWA as an airport facility, both operationally

1 and environmentally, is defined by the significant and substantial physical and
2 environmental constraints affecting public use of the facility, including, but not limited
3 to, the extremely confined airport area that includes a total of approximately five
4 hundred and four (504) acres, less than four hundred (400) acres of which are available
5 for airfield operations, an extensive highway and local street system that surrounds the
6 area, and residential and commercial areas located generally to the southeast, south,
7 west, southwest, and north of the airport area, and commercial areas to the east of the
8 airport area.

9 5. Regularly scheduled commercial service was first initiated at JWA in
10 1967; and, since the late 1960s, the County has regulated the use and operation of JWA
11 by a variety of means in an effort to control and reduce any adverse environmental
12 impacts caused by aircraft operations to and from JWA. These regulations have
13 included such restrictions as: (i) strict noise-based limitations on the type of aircraft that
14 are permitted to use JWA, including both commercial and general aviation aircraft; (ii)
15 a nighttime “curfew” on aircraft operations exceeding certain specified noise levels;
16 and (iii) limitations on the number of average daily commercial departures which can
17 occur at the facility, either directly or through a limit on the permitted number of annual
18 commercial passengers. Even prior to 1985, the controlled nature of the airport’s
19 operation, arising from a wide range of political, environmental, social and economic
20 considerations, had become institutionalized to the extent that the regulated nature of
21 the airport was a definitional component of its character as an air transportation facility.

1 6. The 1985 Settlement Agreement and confirming judgment were not
2 intended to, and did not: (i) create any rights in favor of any persons other than the
3 Settling Parties; or (ii) make the Settling Parties (other than the County) or any other
4 person, parties to, or third party beneficiaries of, any contractual agreement between the
5 County, as airport proprietor of JWA, and the United States of America (or any of its
6 agencies).

7 **II. BASIS OF AMENDMENTS TO THE TERMS AND CONDITIONS**

8 7. Subsequent to execution of the 1985 Settlement Agreement and prior to
9 this Ninth Supplemental Stipulation, the County and other Settling Parties negotiated
10 eight series of amendments to the original agreement, which were filed with this
11 Court. Those eight previous stipulations made various amendments to the provisions of
12 the 1985 Settlement Agreement and reflect a long-standing, collaborative relationship
13 between the County and other Settling Parties. Consistent with historical practice, in
14 January 2012, the County and other Settling Parties initiated discussions regarding the
15 possibility of amending the 1985 Settlement Agreement to extend beyond 2015.

16 8. On April 16, 2013, the Board approved a Memorandum of Understanding
17 (“MOU”)¹ between the County and the Settling Parties pursuant to which the County
18 would act as lead agency (with the City designated a responsible agency) in the

19 ¹ For purposes of evaluating potential amendments to the 1985 Settlement
20 Agreement, the MOU identified a “Proposed Project,” as defined by the operational
21 parameters set forth in Paragraphs 15, 37 through 39, and 41 below, as well as four
alternatives, referred to as the CEQA-mandated No Project Alternative, Alternative A,
Alternative B and Alternative C.

1 preparation of an Environmental Impact Report (“EIR”) that would support County and
2 City approval of an operational scenario evaluated in the EIR regarding amendments to
3 the terms and conditions of the 1985 Settlement Agreement concerning restrictions at
4 JWA. This EIR was designated as EIR 617 and was circulated for public review and
5 comment pursuant to and consistent with CEQA (Pub. Resources Code, §21000 et seq.)
6 and the State CEQA Guidelines (Cal. Code Regs., tit. 14, §15000 et seq.).

7 9. Final EIR 617 was found complete and adequate under CEQA by the
8 Board of Supervisors on September 30, 2014. On that date, the Board:

9 (a) Certified Final EIR 617 as adequate and complete and as containing all
10 information required by CEQA, the State CEQA Guidelines, and the County Local
11 CEQA Procedures Manual;

12 (b) Adopted the statutorily required Findings, Mitigation Monitoring and
13 Reporting Plan and Statement of Overriding Considerations consistent with CEQA and
14 the State CEQA Guidelines;

15 (c) Approved the Proposed Project, thereby authorizing an increase in
16 permitted operational capacities at levels defined in Paragraphs 15, 37 through 39, and
17 41 below; and,

18 (d) Authorized execution of an Amended Stipulation after its approval and
19 execution by the City, SPON and AWG, and subject to the Airport Director receiving a
20 letter from the Federal Aviation Administration (“FAA”) stating that the Amended
21 Stipulation is consistent with federal law.

1 10. Consistent with the MOU's provisions, EIR 617 evaluated proposed
2 modifications to some of the provisions of the 1985 Settlement Agreement, including
3 an increase in permitted operational capacities and an extension of the term of the
4 agreement. In order to permit the Board and the City to determine the final terms of any
5 amendments to the 1985 Settlement Agreement, the "Proposed Project," and four other
6 alternatives (see, supra, footnote 1), were each evaluated in the EIR to an equivalent
7 level of detail that would permit the County and the City to adopt amendments to the
8 1985 Settlement Agreement consistent with all or a portion of either the Proposed
9 Project or the alternatives.

10 11. On _____, 20__, the City authorized execution of this Amended
11 Stipulation subject to certain conditions, including receipt of the FAA Chief Counsel
12 opinion letter referenced above. On or about _____, 20__, SPON and AWG each
13 authorized execution of this Amended Stipulation subject to conditions similar to those
14 specified by the City and the County.

15 12. All conditions to the execution of this Amended Stipulation by each of the
16 Settling Parties have been satisfied and, a copy of the FAA's letter to the Airport
17 Director, dated _____, 20__, confirming that the Amended Stipulation is consistent
18 with federal law is attached to this Stipulation as "Exhibit A."

19 13. The goals and objectives of the County, as the lead agency, the project
20 proponent and the airport proprietor, in preparing EIR 617 and entering into this
21 Amended Stipulation, included:

1 (a) Modifying some existing restrictions on aircraft operations at JWA in
2 order to provide increased air transportation opportunities to the air-traveling public
3 using JWA without adversely affecting aircraft safety, recognizing that aviation noise
4 management is crucial to continued increases in JWA's capacity;

5 (b) Reasonably protecting the environmental interests and concerns of persons
6 residing in the vicinity of JWA, including their concerns regarding "quality of life"
7 issues arising from the operation of JWA, including but not limited to noise and traffic;

8 (c) Preserving, protecting, and continuing to implement the important
9 restrictions established by the 1985 Settlement Agreement, which were "grandfathered"
10 under the Airport Noise and Capacity Act of 1990 and reflect and accommodate
11 historical policy decisions of the Board regarding the appropriate point of balance
12 between the competing interests of the air transportation and aviation community and
13 local residents living in the vicinity of JWA;

14 (d) Providing a reasonable level of certainty to the following interests
15 regarding the level of permitted aviation activity at JWA for a defined future period of
16 time: surrounding local communities, Airport users (particularly scheduled commercial
17 users), and, the air-traveling public; and,

18 (e) Considering revisions to the regulatory operational restrictions at JWA in
19 light of the current aviation environment, the current needs of the affected
20 communities, and industry interests represented at JWA.

21

1 These objectives are consistent with a long-standing and adopted policy of the
2 County to operate JWA in a manner that provides the maximum air transportation
3 opportunities at JWA, while ensuring that airport operations do not unreasonably result
4 in adverse environmental effects on surrounding communities.

5 14. Subject to the approval of the Court by entry of a Modified Final Judgment
6 consistent with this Amended Stipulation (“the Modified Final Judgment”), this
7 Amended Stipulation contains all of the obligations of the Settling Parties. The County
8 shall have no obligation to the City, SPON or AWG, nor shall there be any restriction
9 on the discretion of the County in its capacity as airport proprietor of JWA, except as
10 that obligation or restriction is expressly stated in this Amended Stipulation.

11 15. This Amended Stipulation continues the essential terms and conditions of
12 the 1985 Settlement Agreement regarding the County’s development and operation of
13 JWA, with certain capacity enhancing modifications, including:

14 (a) Increasing the number of regulated flights allocated to passenger
15 Commercial Carriers at JWA from eighty-five (85) average daily departures (“ADDs”)
16 to ninety-five (95) ADDs, beginning on January 1, 2021, through December 31, 2030;

17 (b) Increasing the Million Annual Passengers (“MAP”) level served at JWA
18 from 10.8 MAP to 11.8 MAP, beginning on January 1, 2021, through December 31,
19
20
21

1 2025, and increasing the MAP level served at JWA from 11.8 MAP to 12.2 or 12.5
2 MAP,² beginning on January 1, 2026, through December 31, 2030; and,

3 (c) Eliminating the limit on the permitted number of commercial passenger
4 loading bridges at JWA beginning on January 1, 2021.

5 **III. DEFINITIONS**

6 For purposes of this Amended Stipulation and the proposed Modified Final
7 Judgment, the terms below are defined as follows:

8 16. "ADD" means "average daily departure," which is computed on an annual
9 basis from January 1 through December 31 of each calendar year. One ADD authorizes
10 any person requiring ADDs for its operations at JWA to operate 365 (or 366 in any
11 "leap year") authorized departures during each Plan Year, subject to the definitions,
12 provisions, conditions and limitations of this Amended Stipulation and implementing
13 regulations of the County.

14 "ADD" includes all Class A departures, except emergency or mercy flights,
15 departures resulting from mechanical failures, emergency or weather diversions to
16 JWA necessary to reposition an aircraft into its normal scheduling rotation, the
17 repositioning of aircraft to another airport in connection with a published change in the

18 ² The trigger for the capacity increase to 12.5 MAP beginning on January 1, 2026
19 requires that air carriers be within five (5) percent of 11.8 MAP (i.e., 11.21 MAP) in
20 any one calendar year during the January 1, 2021 through December 31, 2025
21 timeframe. If the operational levels are not equal to or greater than 11.21 MAP during
that timeframe, then the MAP level shall only increase to 12.2 MAP beginning on
January 1, 2026.

1 previous schedule of operations of the airline, test or demonstration flights authorized
2 in advance by the airport director, or charter flights by persons not engaged in regularly
3 scheduled commercial service at JWA.

4 17. "Class A Aircraft" means aircraft which: (i) operate at gross takeoff
5 weights at JWA not greater than the maximum permitted gross takeoff weight for the
6 individual aircraft main landing gear configuration, as set forth in the text of Section
7 2.27 of the Plan (defined below), as amended through November 8, 2011; and which
8 (ii) generate actual energy-averaged single event noise exposure levels ("SENEL"),
9 averaged during each Noise Compliance Period, as measured at the Departure
10 Monitoring Stations, which are not greater than the values:

11	NOISE MONITORING STATION	ENERGY AVERAGED DECIBELS
12	NMS1S:	101.8 dB SENEL
13	NMS2S:	101.1 dB SENEL
14	NMS3S:	100.7 dB SENEL
15	NMS4S:	94.1 dB SENEL
16	NMS5S:	94.6 dB SENEL
17	NMS6S:	96.1 dB SENEL
18	NMS7S:	93.0 dB SENEL

19
20 In determining whether an aircraft is a Class A aircraft, its noise performance at
21 the Departure Monitoring Stations shall be determined at each individual station, and

1 the aircraft must meet each of the monitoring station criteria, without “trade-offs,” in
2 order to qualify as a Class A aircraft.

3 18. “Class E Aircraft” means aircraft which: (i) operate at gross takeoff
4 weights at JWA not greater than the maximum permitted gross takeoff weight for the
5 individual aircraft main landing gear configuration, as set forth in the text of Section
6 2.27 of the Plan, as amended through November 8, 2011; and which (ii) generate actual
7 energy averaged SENEL levels, averaged during each Noise Compliance Period, as
8 measured at the Departure Monitoring Stations, which are not greater than the values:

NOISE MONITORING STATION	ENERGY AVERAGED DECIBELS
NMS1S:	93.5 dB SENEL
NMS2S:	93.0 dB SENEL
NMS3S:	89.7 dB SENEL
NMS4S:	86.0 dB SENEL
NMS5S:	86.6 dB SENEL
NMS6S:	86.6 dB SENEL
NMS7S:	86.0 dB SENEL

17
18 In determining whether an aircraft is a Class E Aircraft, its noise performance at
19 the Departure Monitoring Stations shall be determined at each individual noise
20 monitoring station, and the aircraft must meet each of the noise monitoring station
21 criteria, without “trade-offs,” in order to qualify as a Class E Aircraft.

1 19. “Commercial Air Carrier” or “Air Carrier” means any person other than a
2 Commuter Air Carrier or Commuter Cargo Carrier who operates Regularly Scheduled
3 Air Service into and out of JWA for the purpose of carrying passengers, freight, cargo,
4 or for any other commercial purpose. For purposes of the Plan, Commercial Air Carrier
5 includes all Commercial Cargo Carriers.

6 20. “Commercial Cargo Carrier” means any person which is an Air Carrier,
7 but which conducts its operations at JWA solely for the purpose of carrying
8 Commercial Cargo with aircraft, regularly configured with zero (0) passenger seats
9 available to the general public, and which does not offer passenger service to the public
10 in connection with its operations at JWA.

11 21. “Commuter Air Carrier” or “Commuter Carrier” means any person who:
12 (i) operates Regularly Scheduled Air Service into and out of JWA for the purpose of
13 carrying passengers, freight, cargo, or for any other commercial purpose; (ii) with Class
14 E Aircraft regularly configured with not more than seventy (70) passenger seats; and
15 (iii) operating at gross take-off weights of not more than ninety thousand (90,000)
16 pounds. For the purposes of the Plan, Commuter Air Carrier includes all Commuter
17 Cargo Carriers.

18 22. “Commuter Cargo Carrier” means any person which is a Commuter Air
19 Carrier, but which conducts its operations at JWA solely for the purpose of carrying
20 Commercial Cargo with aircraft regularly configured with zero (0) passenger seats
21

1 available to the general public, and which does not offer passenger service to the public
2 in connection with its operations at JWA.

3 23. "Departure Monitoring Stations" means JWA noise monitoring stations
4 NMS1S, NMS2S, NMS3S, NMS4S, NMS5S, NMS6S and NMS7S.

5 24. "EIR 617 Project" means the flight, passenger and loading bridge
6 increases authorized by this Amended Stipulation together with the mitigation measures
7 adopted by the Board pursuant to Resolution No. __-__, adopted on September 30,
8 2014.

9 25. "MAP" means million annual passengers, consisting of the sum of actual
10 deplaning and enplaning passengers served by all Commercial and Commuter Air
11 Carriers at JWA during each Plan Year, except that it does not include passengers
12 excluded from such calculations under relevant provisions of the Plan.

13 26. "Noise Compliance Period" means each calendar quarter during the
14 Project Period.

15 27. "Plan" means the Phase 2 Commercial Airline Access Plan and Regulation
16 for John Wayne Airport, Orange County, and any successor regulations or amendments
17 to the Plan.

18 28. "Plan Year" means the period from January 1 to December 31 of each
19 calendar year.

20 29. "Project Period" means the period from February 26, 1985 to December
21 31, 2030. Notwithstanding the foregoing, the Settling Parties agree that none of the

1 limits on operations or facilities contained in this Amended Stipulation will expire at
2 the end of the Project Period absent affirmative action by the Board of Supervisors of
3 Orange County, taken in accordance with CEQA and other applicable laws, that is
4 intended to alter the limits.

5 30. "Regularly Scheduled Air Service" means all operations conducted by
6 Regularly Scheduled Commercial Users at JWA.

7 31. "Regularly Scheduled Commercial User" means any person conducting
8 aircraft operations at JWA for the purpose of carrying passengers, freight or cargo
9 where: (i) such operations are operated in support of, advertised, or otherwise made
10 available to members of the public by any means for commercial air transportation
11 purposes, and members of the public may travel or ship Commercial Cargo on the
12 flights; (ii) the flights are scheduled to occur, or are represented as occurring (or
13 available) at specified times and days; and (iii) the person conducts, or proposes to
14 operate, departures at JWA at a frequency greater than two (2) times per week during
15 any consecutive three (3) week period.

16 32. "Regulated ADDs" means average daily departures by Class A aircraft
17 operated by Commercial Air Carriers. Supplemental Class A Authorized Departures, as
18 defined in Section 4.0 of the Plan, are also "Regulated" within the meaning of this
19 section.

20 33. "RON" means any aircraft operated by a Qualified Air Carrier or Qualified
21 Commuter Carrier which "remains overnight" at JWA.

1 **IV. STIPULATION FOR MODIFICATION OF EXISTING JUDGMENT**

2 In recognition and consideration of the foregoing recitals and definitions, the
3 Settling Parties agree to this Amended Stipulation and for a related and conforming
4 Modified Final Judgment of the Court that contains the terms stated below.

5 **A. FLIGHT AND MAP LIMITS**

6 34. Prior to January 1, 2021, there shall be a maximum of eighty-five (85)
7 Commercial Air Carrier Class A ADDS and four (4) Commercial Cargo Air Carrier
8 Class A ADDs serving JWA.

9 35. No aircraft generating noise levels greater than that permitted for Class A
10 aircraft shall be permitted to engage in Regularly Scheduled Air Service at JWA.

11 36. Prior to January 1, 2021, JWA shall serve no more than 10.8 MAP during
12 any Plan Year.

13 37. Beginning January 1, 2021 through December 31, 2030, there shall be a
14 maximum of ninety-nine (99) Class A ADDs allocated to Regularly Scheduled
15 Commercial Air Carriers.

16 38. Four (4) of the ninety-nine (99) Class A ADDs permitted under Paragraph
17 37 above may be allocated to Commercial Cargo Air Carriers. A maximum of two (2)
18 of the four (4) Commercial Cargo Class A ADDs may be allocated by the County to
19 Commercial Air Carriers for any Plan Year in which the demand for such flights by
20 Commercial Cargo Air Carriers is less than four (4) ADDs.

21

1 39. Beginning on January 1, 2021 through December 31, 2025, JWA shall
2 serve no more than 11.8 MAP during any Plan Year. Beginning on January 1, 2026
3 through December 31, 2030, JWA shall serve no more than 12.2 or 12.5 MAP during
4 any Plan Year.³

5 **B. FACILITY CONSTRAINTS**

6 40. Prior to January 1, 2021, there shall be a maximum of twenty (20) loading
7 bridges in use at JWA. Each loading bridge may serve no more than one (1) flight at a
8 time.

9 41. Beginning January 1, 2021 through December 31, 2030, there shall be no
10 limit on the number of loading bridges in use at JWA.

11 42. During the term of this Amended Stipulation (through December 31,
12 2030), all air carrier aircraft regularly configured with ninety (90) or more passenger
13 seats shall load and unload passengers only through the loading bridges in use at JWA,
14 except that:

15 (a) Through December 31, 2030, arriving air carrier aircraft regularly
16 configured with ninety (90) or more passenger seats may unload passengers by stairway
17 or other means not involving the use of loading bridges (hardstands) as (i) the Airport
18 Director or his designee reasonably deems necessary to accommodate arriving
19 commercial aircraft operations, and (ii) only to the extent that the total of the number of
20 arriving, hardstand positions does not exceed two (2) positions;

21 ³ See, supra, footnote 2.

1 (b) Air Carrier aircraft regularly configured with ninety (90) or more
2 passenger seats may load and unload passengers by stairway or other means not
3 involving the use of loading bridges as the Airport Director reasonably deems
4 necessary to accommodate commercial aircraft operations authorized by this Amended
5 Stipulation during periods when construction and maintenance activities at or on the
6 commercial terminal, terminal apron or proximate taxiways temporarily precludes or
7 impairs the use of any loading bridges;

8 (c) Air Carrier aircraft regularly configured with ninety (90) or more
9 passenger seats may load and unload passengers by stairway or other means not
10 involving the use of loading bridges as the Airport Director reasonably deems
11 necessary to accommodate temporarily commercial aircraft operations authorized by
12 this Amended Stipulation during any airport or airfield emergency condition which
13 precludes or impairs the regular use of any loading bridges; and

14 (d) Air Carrier aircraft regularly configured with ninety (90) or more
15 passenger seats may load and unload passengers by stairway or other means not
16 involving the use of loading bridges as the Airport Director reasonably deems
17 necessary to accommodate commercial aircraft operations authorized by this Amended
18 Stipulation during any period where compliance with safety or security directives of
19 any federal agency with lawful jurisdiction over airport operations or activities
20 [including, but not necessarily limited to, the FAA and the Transportation Security
21

1 Agency (“TSA”)] imposes or adopts any safety or security directive or requirement that
2 impairs the full and effective utilization of the loading bridges at JWA.

3 **C. OTHER STIPULATED PROVISIONS**

4 43. The existing curfew regulations and hours of operation for JWA, contained
5 in County Ordinance 3505, and the provisions of paragraph 4, at page 62, of Board of
6 Supervisors’ Resolution 85-255 (February 26, 1985), reducing the curfew exemption
7 threshold to 86.0 dB SENEL, shall remain in effect for no less than five (5) years past
8 the end of the Project Period. Nothing in this paragraph precludes or prevents the JWA
9 Airport Director, his designated representative, or some other person designated by the
10 Board, from exercising reasonable discretion in authorizing a regularly scheduled
11 departure or landing during the curfew hours where: (1) such arrival or departure was
12 scheduled to occur outside of the curfew hours; and (2) the arrival or departure has
13 been delayed because of mechanical problems, weather or air traffic control delays, or
14 other reasons beyond the control of the operator. In addition, this paragraph does not
15 prohibit authorization of bona fide emergency or mercy flights during the curfew hours
16 by aircraft that would otherwise be regulated by the curfew provisions and limitations.

17 44. In mitigation of the EIR 508/EIS Project, and for other reasons, the County
18 adopted a “General Aviation Noise Ordinance” (“GANO”) (County Ordinance 3505).
19 One principal policy objective of the GANO is to exclude from operations at JWA
20 general aviation aircraft that generate noise levels greater than the noise levels
21 permitted for aircraft used by Commercial Air Carriers. During the Project Period, the

1 County shall maintain in effect an ordinance that meets this basic policy objective.
2 Nothing in this Amended Stipulation precludes the County from amending the GANO
3 to enhance or facilitate its reasonable achievement of its principal purpose, or the
4 effective enforcement of its provisions.

5 45. During the Project Period, the City, SPON, AWG, their agents, attorneys,
6 officers, elected officials and employees agree that they will not challenge, impede or
7 contest, by or in connection with litigation, or any adjudicatory administrative
8 proceedings, or other action, the funding, implementation or operation of the EIR 617
9 Project, or any facilities that are reasonably related to implementation of the EIR 617
10 Project at JWA, by the County and the United States; nor will they urge other persons
11 to do so, or cooperate in any such efforts by other parties except as may be expressly
12 required by law. Nothing in this paragraph prohibits the Settling Parties from
13 submitting comments or presenting testimony regarding any future environmental
14 documentation prepared by the County with respect to implementation of the EIR 617
15 Project.

16 46. The Settling Parties recognize that it is in the best interests of each of them
17 and in furtherance of the interests, health, welfare and safety of the citizens of Orange
18 County that any potential disputes, controversies or claims with respect to the growth
19 and expansion of JWA through the Project Period be resolved in accordance with the
20 terms and conditions of this Amended Stipulation and the Modified Final Judgment.
21 This Amended Stipulation does not constitute an admission of the sufficiency or

1 insufficiency of any claims, allegations, assertions, contentions or positions of any
2 other party, or the sufficiency or insufficiency of the defenses of any such claims,
3 allegations, contentions or positions.

4 47. Upon execution of this Amended Stipulation, the Settling Parties, their
5 agents, officers, directors, elected officials and employees each agree to release, acquit
6 and forever discharge each other, their heirs, employees, officials, directors,
7 supervisors, consultants and successors-in-interest from any and all claims, actions,
8 lawsuits, causes of action, liabilities, demands, damages, costs, attorneys' fees and
9 expenses which may arise from or concern the subject matter of this Amended
10 Stipulation, including, but not limited to, the legal adequacy of EIR 617, the legal
11 adequacy of the terms and conditions for the modification of the 1985 Settlement
12 Agreement and confirming judgment, and/or the legal adequacy of any of the
13 amendments to the Plan through the Project Period. Nothing in this release shall limit in
14 any way the ability of any Settling Party to enforce the terms, conditions and provisions
15 of this Amended Stipulation and the Modified Final Judgment.

16 48. All Settling Parties to this Amended Stipulation specifically acknowledge
17 that they have been informed by their legal counsel of the provisions of section 1542 of
18 the California Civil Code, and they expressly waive and relinquish any rights or
19 benefits available to them under this statute, except as provided in this Amended
20 Stipulation. California Civil Code section 1542 provides:

1 A general release does not extend to claims which the creditor does not
2 know or suspect to exist in his or her favor at the time of executing the
3 release, which if known by him or her must have materially affected his or
4 her settlement with the debtor.

5 Notwithstanding section 1542 of the California Civil Code, or any other statute
6 or rule of law of similar effect, this Amended Stipulation shall be given its full force
7 and effect according to each and all of its express terms and provisions, including those
8 related to any unknown or unsuspected claims, liabilities, demands or causes of action.
9 All parties to this Amended Stipulation have been advised specifically by their legal
10 counsel of the effect of this waiver, and they expressly acknowledge that they
11 understand the significance and consequence of this express waiver of California Civil
12 Code section 1542. This waiver is not a mere recital, but rather forms a material part of
13 the consideration for this Amended Stipulation.

14 49. During the Project Period, the Settling Parties agree that they will jointly
15 defend, using their best efforts, any pending or future litigation, administrative
16 investigation, administrative adjudication, or any similar or related enforcement action
17 or claim against the County related to, or arising from, this Amended Stipulation, or the
18 agreement(s) embodied in this Amended Stipulation, the EIR 617 Project at JWA, or
19 the County's regulations or actions in implementation of, or enforcing limitations upon,
20 the Project. If SPON does not have adequate funds to retain legal counsel, SPON shall
21 be deemed to satisfy the requirements of this paragraph if SPON cooperates with the

1 other Settling Parties in the litigation or administrative proceeding if, and to the extent,
2 requested by the other Settling Parties.

3 50. During the Project Period, the City (but not SPON or AWG) agrees that it
4 will, at its own expense, reimburse the County for all reasonable attorneys' fees and
5 costs incurred by the County in defending any pending or future litigation,
6 administrative investigation, administrative adjudication, or any similar or related
7 enforcement action or claim against the County challenging: the legality of this
8 Amended Stipulation or the agreement embodied in this Amended Stipulation, the EIR
9 617 Project, the authority of the County to approve or use any facilities generally
10 consistent with, and reasonably related to, implementation of the EIR 617 Project at
11 JWA, or the County's regulations in implementation of, or enforcing limitations upon,
12 the Project. The City's obligations pursuant to this paragraph do not extend to any
13 litigation or enforcement action initiated against the County by any other Settling Party
14 alleging a breach by the County of this Amended Stipulation. Reasonable costs include,
15 but are not limited to, the costs of retaining experts or consultants to provide legal
16 counsel, the costs of preparing documents for introduction in any litigation,
17 administrative investigation, administrative adjudication, or any similar or related
18 enforcement action or claim, or to assist legal counsel, the costs of reproducing any
19 document, and reasonable expenses such as transportation, meals, lodging and
20 communication incurred in attending meetings or proceedings related to litigation or
21 administrative proceedings. The County shall be obligated to defend, using its best

1 efforts, any litigation, administrative challenge or enforcement proceeding related to
2 this Amended Stipulation. In recognition of the County's obligation to defend using its
3 best efforts, the County shall have full discretion to select counsel, experts or other
4 professionals to represent or advise it in respect of any such matters. The City shall
5 reimburse the County for all reasonable litigation or administrative attorneys' fees or
6 costs within thirty (30) days after an invoice is submitted to the City for reimbursement.
7 The rights and obligations set forth in this paragraph shall survive the termination or
8 expiration of this Amended Stipulation.

9 51. The Settling Parties acknowledge that the County intends, in the near
10 future, to develop amendments to the current Plan and/or other airport regulations
11 relative, among other issues, to the manner in which the County allocates Class A
12 ADDs and exempt aircraft operating opportunities within the MAP level agreed to in
13 this Amended Stipulation. The development and implementation of amendments to the
14 Plan was contemplated by, and is considered an element of, all of the Scenarios
15 evaluated in EIR 617, and the parties agree that no additional or further environmental
16 documentation is required under CEQA or NEPA to allow the County to develop or
17 implement the amendments.

18 52. Any notices given under this Amended Stipulation shall be addressed to
19 the parties as follows:
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FOR THE COUNTY: Paul M. Albarian
Deputy County Counsel
John Wayne Airport
3160 Airway Avenue
Costa Mesa, California 92626

with a copy to: Lori D. Ballance
Danielle K. Morone
Gatzke Dillon & Ballance LLP
2762 Gateway Road
Carlsbad, California 92009

FOR THE CITY: Aaron C. Harp
City Attorney
100 Center Civic Drive
Newport Beach, California 92660

FOR AWG: Barbara Lichman
Buchalter Nemer
18400 Von Karman Avenue, Suite 800
Irvine, California 92612

FOR SPON: Steven M. Taber
Taber Law Group PC
P.O. Box 60036
Irvine, California 92602

Any party may, at any time during the Project Period, change the person designated to receive notices under this Amended Stipulation by giving written notice of the change to the other parties.

V. ENFORCEMENT OF THE JUDGMENT

53. If a dispute arises concerning the interpretation of, or a Settling Party's compliance with, the Modified Final Judgment, and if no exigent circumstances require immediate court proceedings, any Settling Party interested in the interpretation or

1 compliance shall provide written notice of the dispute to the other Settling Parties.
2 Within twenty-one (21) days of the sending of such notice, the parties shall meet in
3 person (or by their authorized representatives) and attempt in good faith to resolve the
4 dispute.

5 54. If a dispute has not been resolved within thirty-five (35) days after the
6 sending of written notice, or if exigent circumstances require immediate court
7 proceedings, any Settling Party may initiate enforcement proceedings in this action. A
8 Settling Party seeking to compel another Settling Party to obey the Modified Final
9 Judgment must file a Motion to Enforce Judgment. The Settling Parties agree not to
10 resort to, request, or initiate proceedings involving the contempt powers of the Court in
11 connection with a Motion to Enforce Judgment.

12 55. If the Court determines that a Settling Party is not complying with the
13 Modified Final Judgment, the Court shall issue an order, in the nature of specific
14 performance of the Modified Final Judgment, requiring the defaulting party to comply
15 with the Modified Final Judgment within a reasonable period of time. If the defaulting
16 party fails to comply with the order, any other Settling Party may then seek
17 enforcement under any authorized processes of the Court.

18 **VI. TERM OF AGREEMENT**

19 56. This Amended Stipulation is contingent upon the Court's entry of the
20 Modified Final Judgment such that the obligations, duties and rights of the parties are
21 only those that are contained within this Amended Stipulation amending the terms and

1 conditions of the 1985 Settlement Agreement. If the Modified Final Judgment is not
2 entered, this Amended Stipulation shall be null and void, and shall not be admissible
3 for any purpose. Unless the Modified Final Judgment is vacated at an earlier date in the
4 manner described in paragraphs 57 through 61, this Amended Stipulation and Modified
5 Final Judgment shall remain in full force and effect during the Project Period.

6 57. The City, SPON and/or AWG may, after consultation with one another,
7 file a Motion to Vacate Judgment if, in any action that they have not initiated:

8 (a) Any trial court enters a final judgment that determines that the limits on
9 the number of: (i) Regulated Class A ADDs; (ii) MAP levels; or (iii) facilities
10 improvements contained in this Amended Stipulation or the curfew provisions of
11 paragraphs 43 and 44 of this Amended Stipulation are unenforceable for any reason,
12 and any of these stipulated limitations are exceeded;

13 (b) Any trial court issues a preliminary injunction that has the effect of
14 precluding implementation or enforcement of the limits on the number of Regulated
15 Class A ADDs, MAP levels or facilities improvements contained in this Amended
16 Stipulation or the curfew provisions of paragraphs 43 and 44 of this Amended
17 Stipulation based upon a finding of a probability of making at trial any of the
18 determinations described in subparagraph (a) above, and such preliminary injunction
19 remains in effect for a period of one (1) year or more, and any of these stipulated
20 limitations are exceeded; or

21

1 (c) Any appellate court issues a decision or order that makes any of the
2 determinations described in subparagraphs (a) or (b) above, or affirms a trial court
3 ruling based upon such a determination, and any of these stipulated limitations are
4 exceeded.

5 58. The County may file a Motion to Vacate Judgment if:

6 (a) The City, SPON or AWG fail to comply with the provisions of paragraph
7 45 of this Amended Stipulation;

8 (b) A trial or appellate court issues an order that has the effect of prohibiting
9 the County from implementing or enforcing any of the operational restrictions or
10 facilities limitations required by this Amended Stipulation; or

11 (c) The FAA, or any successor agency, withholds federal grant funds from the
12 County, or declines to permit the County to impose or use passenger facility charges at
13 JWA based on a determination by the FAA that the adoption or implementation of all
14 or a portion of this Amended Stipulation is illegal or unconstitutional as a matter of
15 federal law, and (i) the FAA has issued an order or other determination to that effect
16 which is subject to judicial review; and (ii) the County has, using reasonable efforts,
17 been unable to secure a judicial order overruling or vacating the FAA order or other
18 determination.

19 This provision shall not apply to activities expressly permitted by paragraph 45
20 of this Amended Stipulation.

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1 59. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Court
2 shall, after consideration of a motion to vacate judgment, enter an order vacating the
3 Modified Final Judgment if the Court determines that any of the conditions described in
4 paragraphs 57 or 58 have occurred. Once vacated, the Modified Final Judgment and
5 this Amended Stipulation shall be null and void, unenforceable and inadmissible for
6 any purpose, and the Settling Parties will, pursuant to paragraph 60, be deemed to be in
7 the same position that they occupied before the Modified Final Judgment and this
8 Amended Stipulation were executed and approved, and the Settling Parties shall have
9 the full scope of their legislative and administrative prerogatives.

10 60. If the Modified Final Judgment is vacated before December 31, 2015, the
11 Settling Parties agree that the original 1985 Settlement Agreement, the original
12 Confirming Judgment and the eight (8) subsequent amendments to the 1985 Settlement
13 Agreement shall remain in full force and effect through December 31, 2015, if, for any
14 reason, all or a portion of this Amended Stipulation is determined to be invalid and the
15 Modified Final Judgment is vacated.

16 61. For the period after December 31, 2015, if any of the events described in
17 paragraphs 57 or 58 occur during the Project Period, this Amended Stipulation and the
18 Modified Final Judgment shall remain in full force and effect with respect to those
19 terms and conditions or portions thereof that are not affected by the event(s) unless the
20 court has granted a motion to vacate judgment pursuant to paragraphs 57 and 58.

21

1 **VII. MODIFICATION**

2 62. The limitations on Regulated Class A ADDs, MAP levels and facilities
3 provided for in this Amended Stipulation, the provisions of paragraphs 43 and 44 of
4 this Amended Stipulation, and the agreements of the City, SPON and AWG not to
5 contest or impede implementation of the EIR 617 Project (paragraph 45 of this
6 Amended Stipulation), are fundamental and essential aspects of this Amended
7 Stipulation, and were agreed upon with full recognition of the possibility that
8 economic, demographic, technological, operational or legal changes not currently
9 contemplated could occur during the Project Period. It was in recognition of these
10 essential aspects of this Amended Stipulation, and the inability to accurately predict
11 certain future conditions that the Settling Parties have agreed to the specific and express
12 provisions of paragraph 57 of this Amended Stipulation. The Settling Parties further
13 acknowledge that this Amended Stipulation provides for the Settling Parties to perform
14 undertakings at different times, and that the performance of certain of the undertakings,
15 once accomplished, could not be undone. Accordingly, except as provided herein, the
16 Settling Parties expressly waive any potential right to seek to modify or vacate the
17 terms of this Amended Stipulation or the Modified Final Judgment, except by written
18 mutual agreement.

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Attorneys for Plaintiff and Counterdefendants, the
County of Orange and the Orange County Board of
Supervisors

Nicholas S. Chrisos
County Counsel, County of Orange

Dated: _____

By: _____
Paul M. Albarian
Deputy County Counsel

Lori D. Ballance
Danielle K. Morone

Dated: _____

By: _____
Lori D. Ballance
Attorneys for Defendant, Counterclaimant and
Crossdefendant, the City of Newport Beach

Aaron C. Harp
City Attorney of Newport Beach

Dated: _____

By: _____
Aaron C. Harp

Attorneys for Defendant, Counterclaimant and
Crossdefendant, Stop Polluting Our Newport
(SPON)

Steven M. Taber

Dated: _____

By: _____
Steven M. Taber

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Attorneys for Defendant, Counterclaimant and
Crossdefendant, Airport Working Group (AWG)

Barbara E. Lichman

Dated: _____

By: _____

Barbara E. Lichman

1 **MODIFIED FINAL JUDGMENT**

2 1. In 1985, the County of Orange, the City of Newport Beach, Stop Polluting
3 Our Newport, and the Airport Working Group (“Settling Parties”) entered into a
4 Stipulation for Entry of Final Judgment by Certain Settling Parties, settling all pending
5 actions and claims related to the 1985 Master Plan of John Wayne Airport (“JWA”) and
6 related actions (“the 1985 Settlement Agreement”). On December 13, 1985, this Court
7 entered Final Judgment on Stipulation for Entry of Judgment by Certain Settling Parties
8 which accepted the stipulation of the Settling Parties and incorporated certain portions
9 of their stipulation into that judgment. The principal terms of the 1985 Settlement
10 Agreement relate to restrictions and limitations on aircraft operations and commercial
11 passenger facilities.

12 2. In the intervening years, by stipulations of the Settling Parties, orders of
13 the Court have been entered to reflect certain modifications in the agreement of the
14 Settling Parties which were contained in stipulations presented to and approved by the
15 Court. None of these modifications further restricted operations or facilities as
16 compared to the 1985 Settlement Agreement.

17 3. The Settling Parties have now presented to the Court a Ninth Supplemental
18 Stipulation by the County of Orange, California, the City of Newport Beach, Stop
19 Polluting Our Newport, and the Airport Working Group of Orange County, Inc.,
20 Amending the Terms and Conditions of the Previous Stipulations of those Parties
21

1 (“Amended Stipulation”) and Requesting a Modification of an Executory Judgment of
2 the Court and [Proposed] Order.

3 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

4 A. The Amended Stipulation contains many of the terms of the 1985
5 Settlement Agreement and the eight (8) previous stipulations of the Settling Parties and
6 for clarity and ease of reference, the Amended Stipulation is deemed to contain all of
7 the agreements and obligations of the Settling Parties.

8 B. The provisions of paragraphs 15 through 44 and 53 through 61 of the
9 Amended Stipulation are hereby incorporated as part of this Modified Final Judgment.

10 C. The Settling Parties shall each bear their own costs and attorneys’ fees in
11 connection with the entry of this Modified Final Judgment.

12 **IT IS SO ORDERED.**

13 Dated: _____ By: _____
14 The Honorable Terry J. Hatter, Jr.
15 United States District Judge
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U.S. Department
of Transportation
**Federal Aviation
Administration**

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

DEC 31 2002

Mr. Alan Murphy
Airport Director
John Wayne Airport
3160 Airway Avenue
Costa Mesa, CA 92626

**Re: John Wayne Airport (JWA) 1985 JWA Settlement Agreement
Proposed Amendments**

Dear Mr. Murphy:

This is in response to your December 3, 2002 letter to David G. Leitch, Chief Counsel, Federal Aviation Administration ("FAA"), on behalf of the County of Orange, California ("County"), in which you request the Office of the Chief Counsel's views concerning the consistency of certain proposed amendments to the 1985 John Wayne Airport ("JWA") Settlement Agreement ("the 1985 Settlement Agreement")¹ with the Airport Noise and Capacity Act of 1990 ("ANCA"), recodified at 49 U.S.C. §§ 47521-47533.²

In this letter, we conclude that the proposed amendments to the 1985 Settlement Agreement ("the proposed amendments" or "the modified Amended Settlement Agreement"), a copy of which was attached to your December 3 letter, are exempt from ANCA since the amendments would not "reduce or limit aircraft operations or affect aircraft safety." 49 U.S.C. § 47524(d)(4). We also advise that the FAA will not act to

¹ The 1985 JWA Settlement Agreement is embodied in a Stipulation For Entry of Judgment by Certain Settling Parties filed with the United States District Court, Central District of California in Case No. CV 85-1542 TJH (MCx) and approved by the Honorable Terry J. Hatter, Jr. on December 12, 1985. The settling parties included the County of Orange, California, the City of Newport Beach, California, the Airport Working Group, and Stop Polluting Our Newport.

² We understand, from JWA's August 15, 2002 letter, that the proposed amendments to the 1985 Settlement Agreement will be implemented through amendments to the John Wayne Airport Phase 2 Commercial Airline Access Plan and Regulation ("the Phase 2 Access Plan"). To the extent that the proposed amendments to the 1985 Settlement Agreement also apply to the Phase 2 Access Plan, this letter applies to both documents.

prevent adoption and approval of the terms of the modified Amended Settlement Agreement, either under any transfer or grant agreements, or under the Federal Aviation Act of 1958, as amended ("FAA Act"), and that adoption and approval itself will not adversely affect future County grant applications under the Airport and Airway Improvement Act of 1982, as amended ("AAIA") or applications to impose or collect passenger facility charges under 49 U.S.C. § 40117.

The County's December 3, 2002, letter, and prior letters of August 15, 2002, September 6, 2002, September 26, 2002, and November 18, 2002, have provided helpful information concerning the nature and history of noise and access regulations at JWA, the type and extent of aviation facilities and operations at JWA, and the 1985 JWA Settlement Agreement and Phase 2 Access Plan as well as prior and proposed amendments. These letters also point out how the airport is unique in many respects among commercial airports in the United States and describe the terms and conditions of the seven prior amendments³ of the 1985 Settlement Agreement and the proposed amendments.

The proposed amendments and amended court stipulation, as described in the documents you have provided, would continue the essential terms and conditions of the 1985 Settlement Agreement regarding the County's development and operation of JWA, with certain capacity enhancing modifications, including:

- Defining all regulated passenger flights as Class A flights and eliminating the Class AA Aircraft definition/distinction, effective upon execution of a modified final judgment by the court. The definition/distinction for Class E Aircraft is preserved unaffected in the Amended Stipulation;
- Increasing the number of regulated flights allocated to passenger commercial carriers at JWA from 73 average daily departures (ADDs) to 85 ADDs, beginning on January 1, 2003, through December 31, 2015;
- Increasing the level in millions of annual passengers ("MAP") served at the Airport from 8.4 MAP to 10.3 MAP, beginning on January 1, 2003, through December 31,

³ The prior seven amendments to the settlement agreement were implemented for three different categories of changes: all-cargo operations (to increase in average daily departures ("ADDs") to accommodate cargo flights), FAA Advisory Circular AC-91-53A (to increase the safety of departure procedures at JWA), and noise monitoring system upgrades (due to physical relocation of some monitors and improved technology). Most of the seven amendments relate to an extension of the cargo operating capacity since these operations required approval on an annual or bi-annual basis.

2010, and increasing the MAP level served at the Airport from 10.3 MAP to 10.8 MAP, beginning on January 1, 2011, through December 31, 2015;

- Continuing to allow the permitted number of operations by Class E Aircraft to be unlimited, except that the combined number of passengers served by commuter aircraft, Class E Aircraft and Class A Aircraft in regularly scheduled commercial service will not exceed 10.3 MAP, beginning on January 1, 2003, through December 31, 2010, and 10.8 MAP, beginning January 1, 2011, through December 31, 2015;
- Increasing the number of cargo flights from JWA from two Class A ADD cargo flights to a total of four Class A ADD cargo flights, for a total of 89 Class A ADD flights, beginning on January 1, 2003, through December 31, 2015;
- Providing the passenger commercial carriers with the opportunity to use up to two of the Class A ADD cargo flights if there is no demand for these cargo flights by cargo air carriers; and
- Increasing the permitted number of commercial passenger loading bridges at JWA from 14 loading bridges to 20 loading bridges, through December 31, 2015, and providing up to two hardstand positions⁴ for aircraft arriving at the Airport.

We understand that none of these changes would reduce or limit aircraft operations from the airport's current levels or affect aircraft safety.

Under Federal law, sponsors of federally-funded airports like the County must comply with the national program for review of airport noise and access restrictions under ANCA before implementing restrictions on operations by Stage 2 and Stage 3 aircraft. Airport noise and access restrictions on operations by Stage 2 aircraft that were proposed on or before October 1, 1990, and by Stage 3 aircraft that were in effect on or before October 1, 1990 are "grandfathered" under ANCA and are therefore not subject to its requirements. 49 U.S.C. §§ 47524(b), 47524(c)(1); 14 C.F.R. § 161.3(a). In addition, certain restrictions are exempt from ANCA, including "a subsequent amendment⁵ 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 JWA had a settlement agreement containing noise and access restrictions in place prior to October 1, 1990, the restrictions in the original 1985 Settlement Agreement and Phase 2 Access Plan are grandfathered under ANCA. 49 U.S.C. §§ 47524(b), 47524(c)(1); 14 C.F.R. § 161.3(a). Additionally, each of the seven prior amendments to the 1985 Settlement Agreement was "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" and is therefore exempt from ANCA and Part 161. 49 U.S.C. § 47524(d)(4); 14 C.F.R. § 161.7(b)(4).

⁴ *i.e.*, stair-loading an aircraft on the tarmac when a gate and jetway are not available.

⁵ Although the plain language of §47524(d)(4) states "a" subsequent amendment (and this could be read to authorize only one amendment per airport), we interpret "a" to mean "any." See *Black's Law Dictionary* 1 (6th ed. 1999), "[t]he word 'a' has varying meanings and uses. 'A' means 'one' or 'any'"

The proposed amendments would extend the terms of the 1985 Settlement Agreement by ten years to December 31, 2015. Both the 1985 Settlement Agreement and the Phase 2 Access Plan note that the limitations on operations and terminal size, among other limitations, "shall end on December 31, 2005," or are in effect for "the period from February 26, 1985 to December 31, 2005." See Resolution Nos. 85-1233, 85-255, 90-1161; Settlement Agreement ¶¶ 20, 27, 29-36, 38. The proposed amendments would extend this expiration date to December 31, 2015. Compared to the current restrictions, the proposed amendments would liberalize air carrier access to JWA.

To determine whether ANCA applies to Orange County's proposal to both relax and extend existing restrictions requires interpretation of 49 U.S.C. § 47524(d)(4). The first inquiry in statutory interpretation is whether a statute speaks clearly and unambiguously to a subject. If so, then the clearly-expressed intent of Congress must be given effect. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Section 47524(d)(4) does not explicitly address restrictions in local agreements that have termination clauses and that will continue as part of ongoing mitigation programs under existing state environmental laws as new agreements are developed. Moreover, since ANCA was adopted as part of omnibus Federal budget legislation, its legislative history is sparse and does not provide clear congressional guidance on how restrictions that include expiration dates should be interpreted. Under these circumstances, the FAA has discretion to "fill[] the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" *Lopez v. Davis*, 531 U.S. 230, 242 (2001). As the FAA is the administrative agency charged to administer ANCA, its interpretation of the statute will be accorded deference, provided the interpretation is "based on a permissible construction of the statute." *Yellow Transportation, Inc. v. Michigan*, 123 S. Ct. 371, 377 (2002), quoting *Chevron, supra*, 467 U.S. at 843. Under the present circumstances, including contemporaneous evidence reflecting the intent and understanding of the County about continued regulation of access at JWA, it is reasonable for the FAA to conclude that the proposed amendments to the 1985 Settlement Agreement to extend the expiration date and relax the existing restrictions on air carrier access do not "reduce or limit aircraft operations" within the meaning of 49 U.S.C. § 47524(d)(4).

For the past 11 years, the FAA has consistently interpreted ANCA to require airports seeking to qualify for exemption under the intergovernmental agreement provisions of ANCA, 49 U.S.C. § 47524(d)(3), to provide evidence that the sought-after restrictions were in effect, in existence, or contemplated at the time of the intergovernmental agreement. Our interpretation of § 47524(d)(4) in these circumstances is consistent with this prior interpretation of a comparable exemption. This is a reasonable interpretation of the statutory language that the FAA was delegated to administer.

As explained in detail below, the County adopted the current airport noise and access restrictions in the Phase 2 Access Plan as binding mitigation measures for the 1985 Master Plan project pursuant to the California Environmental Quality Act ("CEQA"). The County is proposing to extend and relax the current restrictions on air carrier access

at JWA. Where, as here, airport noise and access restrictions fulfill ongoing requirements under state environmental law, it is reasonable to determine the applicability of ANCA to proposed amendments in comparison to continuation of the status quo.

To discern the intent and understanding of the Orange County Board of Supervisors ("County Board" or "Board") regarding the effect of the current expiration date on continuing access regulation at JWA after 2005, we examined the contemporaneous legislative history of noise and access restrictions at JWA, as reflected in various County resolutions and other documents provided to the FAA by representatives of the County. We also reviewed the County's letters to the FAA and the relevant law and regulations.

The following statement in the County Board's resolution certifying the EIR for the 1985 Master Plan project is pertinent in our examination of the history of the settlement agreement:

Any project proposed for JWA must be evaluated in the context of the airport's unique regulatory character and history. JWA is, and has been for many years, a 'controlled' airport facility where operations levels (particularly by commercial operators) are determined not by the available physical facilities, nor the level of 'market demand' for air carrier service, but by the number of ADDs permitted by the County. Based not only on the EIR itself, but on the years of controversy, public hearings, staff reports and other information presented both to this Board and prior Boards on airport related issues, we find that any planning or policy evaluation of JWA which ignores its unique history and operational characteristics must inevitably be misleading.

Resolution No. 85-255 at 8-9.

The legislative history of noise and access restrictions at JWA demonstrates that when the County Board approved the 1985 Master Plan project and adopted the access plans (including the Phase 2 Access Plan) to implement the two phases of the Master Plan (in accordance with the 1985 Settlement Agreement), the County Board clearly contemplated and intended that access restrictions at JWA would continue after 2005. The Board also understood that any further relaxation of these restrictions would require action by the Board, including compliance with CEQA (as the County Board has done for the proposed amendments in Environmental Impact Report ("EIR") 582). Based on information provided by representatives of the County, including the letters dated September 6 and September 26, 2002, we understand that the County Board has an ongoing obligation under CEQA to mitigate the significant adverse impacts of the 1985 Master Plan project, and that this obligation is not affected by the expiration date in the 1985 Settlement Agreement and the Phase 2 Access Plan. In the resolution adopting the Phase 2 Access Plan, the County Board stated that the restrictions in that plan (and its predecessor access plan for Phase 1 of the 1985 Master Plan project) constitute "the single most significant operational mitigation measure" for the project. Resolution No. 90-1161 at 3.

In certifying the final EIR for the 1985 Master Plan project (EIR 508), the Board addressed public comments contending that the project would "inevitably" lead to further future increases in authorized levels of ADDs because of "substantial pressure" on the Board—or future Boards—to increase operations because of a continuing growth of unmet air-traffic demand in Orange County." Resolution No. 85-255 at 10. The County Board responded to these comments as follows:

We cannot speculate on what future Boards of Supervisors may do if they consider future projects of [sic] JWA. Certainly, they will have to comply with CEQA as it then exists. It is, however, by no means clear to us that further increases in ADDs before or after 2005 will even be considered, let alone approved by future Boards.

Id. In the Phase 2 Access Plan, the County Board made clear its intent to amend the Plan "when and as necessary (in the sole and exclusive exercise of the Board's legislative discretion) to effect or maintain the regulatory, environmental and service level goals, policies and objectives of the County in its management and operation of JWA." Phase 2 Access Plan, ¶ 1.7. Evidence of these "goals, policies and objectives" includes the following:

- In certifying the final EIR for the 1985 Master Plan project, the County Board stated that implementation of the project, as mitigated, was "essential to adequately serve the existing and future air traveling public at JWA, and to strike an appropriate, responsible and desirable balance between the community's need for reasonable air transportation services, and the consequences or potential consequences of related airport operations." Resolution No. 85-255 at 5.
- When the Board adopted the Access Plan for the first phase of the 1985 Master Plan project, it "reaffirm[ed] again its consistent and long-standing policies, goals and intent to strike a reasonable balance between the air transportation needs of the citizens of Orange County, and the need to impose reasonable restraints and regulations on the operation of JWA." Resolution No. 85-259 at 4-5.
- In the resolution approving the Phase 2 Access Plan, the Board stated that "the County's ability to continue to effectively regulate the development and use of JWA within the environmental parameters previously established by this Board necessitate the immediate adoption of the [sic] this Phase 2 Access Plan in order to protect the best interests of the County, its constituents and the air travelling public . . ." Resolution No. 90-1161 at 5-6.

The County legislative history shows that the expiration dates in access plans were not intended to discontinue regulation of access; expired plans at JWA have consistently been

either extended or replaced by subsequent plans, up to and including the current Phase 2 Access Plan. *See, e.g.*, Resolution Nos. 85-259, pp. 1-3, and 90-1161 at 3. As part of the 1985 Settlement Agreement, the County Board agreed to lower the maximum MAP in Phase 2 of the Master Plan project to 8.4 MAP and reduce the number of Class A ADDs. In doing so, the County Board found that a reduction in the planned expansion of the terminal and related facilities was "appropriate and economically prudent to create a facility designed to serve the ultimate maximum project service level of 8.4 MAP, *and no more . . .*" Resolution No. 85-1233 at 5 (emphasis added); *see also id.* at 7 (stating that Phase 2 "refers to the increase in authorized Class A ADD to 73 occurring upon completion of the new facilities, approximately in the year 1990"). Similarly, in adopting the Phase 2 Access Plan the County Board stated:

[T]he 1985 Master Plan and the associated EIR 508/EIS also contemplated as part of the master plan project an increase in the maximum number of permitted commercial flights by regularly scheduled commercial air carriers *in order to support the increased passenger handling capacity improvements contemplated by the 1985 Master Plan . . .*

Resolution No. 90-1161 at 2 (emphasis added). Thus, the County Board consciously tied the permitted number of commercial flights at JWA in Phase 2 of the 1985 Master Plan project to the approved capacity of the terminal facilities, showing that the Board did not contemplate unrestricted access to the airport after 2005 without a commensurate expansion of terminal capacity.

The 1985 Settlement Agreement provides additional support for this position. It allows any party to move to vacate it and the restrictions it contains if it is held unenforceable for any reason. 1985 Settlement Agreement, ¶ 50. It further specifies that "the parties will be deemed to be in the same situation that they occupied" prior to its execution. *Id.* at ¶ 52. Perhaps the strongest point is that the agreement allows the parties to modify its terms "by mutual agreement." *Id.* at ¶ 53. The modified Amended Settlement Agreement that extends and relaxes restrictions until 2015 is "by mutual agreement" of the parties.

In light of the above analysis, we conclude that the proposed extension of the 2005 expiration date in the 1985 Settlement Agreement to 2015 would not "reduce or limit aircraft operations" for purposes of §47524(d)(4), and that the proposed amendments are exempt from ANCA under that section. We base this conclusion on the unique history and circumstances of noise and access regulation at JWA, as reflected in the documentation provided by the County. For example, the County has continually regulated and enforced maximum permitted noise levels, permitted hours of operation, and maximum number of commercial operations since the inception of commercial service at JWA in 1967. This history supports our finding that the County did not intend for airport restrictions to terminate at the end of the period provided for in 1990. The increased limits introduced by Phase 2 in 1990 were in fact tied to the completion of a terminal expansion project. In addition, the County rejected the alternative of meeting all

passenger and traffic demands in 2005 (*i.e.*, eliminating all restraints at JWA when it adopted the access plan).

As you know, airport access restrictions are also subject to other applicable Federal law in addition to ANCA, including the Airport Improvement Program ("AIP") grant assurances prescribed by 49 U.S.C. §47101, *et seq.* Compliance with the provisions of ANCA does not ensure compliance with other Federal law.

Note that our decision, as indicated above, not to prevent the adoption or approval of the modified Amended Settlement Agreement is based in part on the fact that throughout the process of developing the settlement amendments, the County conducted a significant public process that encouraged and facilitated input from airport users and the public, including the local community and commercial airlines serving JWA, and those desiring to do so, on issues relating to the new capacity authorized by the June 25, 2002 agreement between the County Board, the City of Newport Beach ("City"), Stop Polluting Our Newport ("SPON") and the Airport Working Group ("AWG").

Our decision is also based on the unique history and circumstances of noise and access regulation at JWA. The original 1985 Settlement Agreement reflects the fact that the County faced extensive litigation as far back as 1968 by individual property owners (including noise damage lawsuits by residents of Santa Ana Heights and Newport Beach), the City, and citizen groups challenging the expansion and operation of JWA. During the 1980's as well, the County had also been a defendant in federal court in various suits initiated by air carriers concerning the County's noise and access restrictions. In order to avoid potentially inconsistent and conflicting rulings and obligations, the County initiated an action in federal court resulting in the 1985 Settlement Agreement.

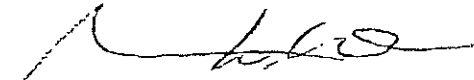
Concerning the application of 49 U.S.C. § 47526, the FAA can also advise that it is satisfied that JWA is not imposing an airport noise or access restriction not in compliance with ANCA or Part 161. As a result, JWA may receive money under the AIP grant program, and impose a passenger facility charge under 49 U.S.C. § 40117. In addition, the FAA will not act to prevent the County's adoption and approval of the proposed amendments as they do not currently present an issue of noncompliance under the County's grant assurances. Thus, that adoption and approval itself would also not adversely affect any applications for AIP grant funds submitted in the future by the County.

The opinions expressed above are not intended, and should not be construed, to apply to any other airport. Also, there are related issues that are not addressed by this letter, in particular the County's intended means of allocating the new capacity authorized by the modified Amended Settlement Agreement. This letter is not intended, and should not be construed, as expressing an opinion on the legality under Federal law, including the AATA and the County's grant assurances, and the FAA Act, of the allocation methodology or the resulting air carrier allocations that may be proposed or implemented by the County under the modified Amended Settlement Agreement. The FAA looks

forward to continue working with the County to ensure that Phase 2 Access Plan amendments and any future allocation of airport capacity fully comply with Federal law.

I appreciate the considerable time and effort that representatives of the County have spent in meeting with representatives of the FAA and responding to our inquiries.

Sincerely,



James W. Whitlow
Deputy Chief Counsel
Office of the Chief Counsel