October 19, 2023

VIA EMAIL TO AG@COAG.GOV AND FEDERAL EXPRESS OVERNIGHT

Attorney General Philip J. Weiser
Office of the Attorney General
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, CO 80203

Dear Attorney General Weiser,

We recently learned that you will be hosting a Colorado Community Listening Session for residents who believe they are impacted by general aviation airports along the Front Range, and we are providing background information about general aviation as well as aspects of Federal Aviation Administration (FAA) and Environmental Protection Agency (EPA) authority that apply to aircraft and airports. We hope this information will be helpful in fostering a productive and informed discussion during the upcoming listening session and ensure that any potential concerns are discussed in the context of applicable laws and regulations.

It's not always understood that public airports contribute significantly to the economic, transportation, and recreational needs of their surrounding region while also serving a national role, as critical components of the National Plan of Integrated Airport Systems. Each public airport is an integral part of its community. Besides the jobs and income directly provided, each airport is instrumental in creating community income through businesses and industries that use general aviation (i.e., non-airline) transportation to facilitate their operations. Each airport also serves as a vital resource to support community needs including medevac and angel flights for medical needs, aerial firefighting, and disaster response.

The aviation community strives to enable airports to coexist harmoniously with the local community. When concerns arise regarding aircraft noise, emissions and flight paths, it's vital to remember that these areas are subject to federal preemption. Our associations strongly support a safe and coordinated nationwide transition to unleaded aviation fuels. We also support FAA policy requiring airport sponsors to protect their airports from incompatible land use development. We urge you to consider these critical factors as you convene the listening session with Colorado residents. It is essential to strike a balance between community concerns and legal safeguards that enable our national aviation infrastructure, including airports across the Front Range, to serve our country's transportation needs. Additional details on these areas, as well as progress towards an unleaded aviation future, are below.

1. **The regulation of airspace and noise at airports**

Congress has long granted the FAA exclusive jurisdiction to regulate the areas of airspace use, management and efficiency; air traffic control; safety; navigational facilities; and aircraft noise at its source. (49 U.S.C. §§ 40103, 44502, and 44701- 44738). This means that any attempt to regulate the airspace by a state or its political subdivision has been preempted. Unless a state can demonstrate that there is an exemption that would allow it to regulate aircraft in flight, it cannot take actions that are calculated to regulate such aircraft for the purpose of limiting noise within U.S. airspace.

> "While the federal government's exclusive statutory responsibility for noise abatement through regulation of flight operations and aircraft design is broad, the noise abatement responsibilities of state and local governments through exercise of their basic police powers are circumscribed." (FAA Aviation Noise Abatement Policy, Nov. 18, 1976, II(B).) "The chief restrictions on state and local police powers arise from the exclusive federal control over the management of airspace. Local authorities long have been preempted by the federal assumption of authority in the area from prohibiting or regulating overflight for any purposes. That principle was found in 1973 to include any exercise of police power relating to aircraft operations *in City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). In the *Burbank* case, the Supreme Court struck down a curfew imposed by the city in the exercise of its police power. The Court's reliance on the legislative history of section 611 and the 1972 amendments to it indicate that other types of police power regulation, such as, restrictions on the type of aircraft using a particular airport, are equally proscribed. The Court, however, specifically excluded consideration of the rights of an airport operator from its decision." (FAA Aviation Noise Abatement Policy, Nov. 18, 1976, II(B).)
>
> "There remains a critical role for local authorities in protecting their citizens from unwanted aircraft noise, principally through their powers of land use control." (FAA Aviation Noise Abatement Policy, Nov. 18, 1976, II(B).)

In *Air Transport Association of America v. Crotti*, 389 F. Supp. 58 (N.D. Cal., 1975), the district court explained that the *Burbank* preemption rule still applied ***"to regulations that actually affect the flight of aircraft. The portion of the California statute struck down by the court provided for criminal sanctions against the operator of an aircraft that exceed a single-event noise standard on takeoff or landing, a clear interference with the FAA's control over flight operations in the navigable airspace."*** (FAA Aviation Noise Abatement Policy, Nov. 18, 1976, ***II***(C), emph. added; see Crotti at p. 65.)

In *Crotti*, the district court further held:

> "We are satisfied and conclude that the SENEL provisions and regulations of noise levels which occur when an aircraft is in direct flight, and for the levying of criminal fines for violation, ***are a per se unlawful exercise of police power*** into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce. ***The thrust of the Single Event Noise Exposure Levels is clear and direct and collides head-on with***

the federal regulatory scheme for aircraft flights delineated by and central to the Burbank decision." (Id. at p. 65, emph. added.)

As the seminal cases of *Burbank* and *Crotti*, and FAA policy lay down, a state cannot regulate an aircraft in flight that is compliant with federal law and regulations, even for noise abatement purposes.

Similarly in *State by Minnesota Public Lobby v. Metropolitan Airports Comm*., 520 N.W.2d 388 (1994), the Minnesota Supreme Court, applying *Burbank*, held that state noise standards were inapplicable to aircraft in flight. Therein, the State of Minnesota promulgated maximum permissible noise limits and divided land into three "Noise Area Classifications" and created limits on noise pollution for each classification." (*Id*. at p. 389.) "Most of the area surrounding the MSP falls within Classification 1, which has the strictest requirements and applies to areas where people have an expectation of peace and quiet in residential areas. The standards set a maximum noise level for daytime and nighttime which may not be exceeded for more than a certain portion of each hour." (*Ibid*.) The Minnesota Supreme Court held, "The [U.S.] Supreme Court has made clear states may not enact noise regulations which impinge on aircraft operations, and that is precisely what the MCPA noise standards do." (*Id*. at p. 393.)

In *U.S. v. City of Blue Ash*, Ohio, 487 F. Supp.135 (S.D. Ohio, 1978), the district court enjoined a city ordinance requiring departing aircraft to make a turn to a given heading prior to reaching a described location because that ordinance was for the purpose of controlling aircraft noise. The district court explained that the purpose of flight direction is noise abatement and acknowledged, "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." (*Id*. at p. 136.) The district court concluded, "It follows that City of Burbank requires a municipal ordinance resting on police power, which manages or dictates action by aircraft in navigable airspace for the purpose of noise control, is invalid under the preemption doctrine." (*Id*. at p. 137.)

Thus, an attempt by a state to regulate or control aircraft flight for noise control purposes is preempted and invalid due to the supremacy of federal law in matters concerning aviation.

2. Regulation of aircraft emissions

Federal law prohibits states from regulating aviation emissions under the Clean Air Act (CAA). Specifically, Section 233 of the CAA preempts states and their political subdivisions from "adopting or attempting to enforce any standard respecting emissions of any air pollution from any aircraft or engine thereof unless such standard is identical to a standard" established by the Environmental Protection Agency (EPA). (42 U.S. Code § 7573 - State standards and controls).

Under Section 231 CAA, the EPA has established emission standards for aviation. Importantly, these standards do not prohibit the use of lead and other fuel additives in aviation gasoline. Instead, the EPA focuses on regulating the emissions that result from the use of these additives. Specifically, 40 CFR (Code of Federal Regulations) Part 87, titled "Control of Air Pollution from Aircraft and Aircraft Engines," sets standards for allowable lead emissions from aircraft engines.

It is crucial to note that the CAA explicitly prevents states and local communities from creating their own emission standards in this context. In essence, the federal government, through the EPA, maintains exclusive authority over regulating aviation emissions, including lead emissions, ensuring consistency and uniformity across the country.

The FAA and industry stakeholders are working to effect a safe and coordinated nationwide transition to unleaded aviation fuel (AvGas) through the Eliminate Aviation Gasoline Lead Emissions ("EAGLE") initiative, but the effort is not at the finish line yet. Currently, there is no unleaded aviation fuel being commercially refined and distributed for sale on a national basis for use in all piston aircraft. 70% of the AvGas sold annually across the nation is purchased by aircraft that have high compression engines that cannot legally or safely use unleaded options currently available in the marketplace (i.e., 94UL). One 100 octane unleaded fuel (GAMI's G100UL) has been approved by the FAA for use in certain aircraft but, at this time, is not approved for use in any rotorcraft, nor is it in commercial production and distribution. For public safety, it is vital to ensure that the sole fuel that many aircraft require to operate safely and legally remain available until a safe and legal 100 octane unleaded fuel supply is available at airports.

We remain committed to working with all stakeholders, including residents, local authorities, and airport operators, to find practical solutions to the challenges that arise. We are confident that by engaging in informed and constructive dialogue, we can ensure the continued prosperity of both the local community and the aviation sector. Thank you for stimulating such dialogue, and for your consideration of the information in this letter.

If you have any questions or require further information, we encourage you to contact the FAA's Office of Airport Compliance.

Sincerely,

Justine A. Harrison
General Counsel
Aircraft Owners and Pilots Association

Alex Burkett
General Counsel
General Aviation Manufacturers Association

Jol A. Silversmith
Counsel for
Helicopter Association International
National Business Aviation Association

Lars H. Liebeler
General Counsel
National Air Transportation Association

Cc: Kevin Willis, FAA Office of Airport Compliance (via email)
Joseph Manges, FAA Office of Chief Counsel (via email)