

Aviation - USA

Second Circuit joins Federal Aviation Administration's pre-emption camp

Contributed by [Katten Muchin Rosenman LLP](#)

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In *Goodspeed Airport LLC v East Haddam Inland Wetlands & Watercourses Commission*⁽¹⁾ the US Court of Appeals for the Second Circuit made clear what it had hinted at two years ago in a similar decision: the federal government has field pre-emption over state regulation of air safety. While the Second Circuit used *Goodspeed Airport* as the platform to rule that the federal government pre-empts the field of aviation safety, the actual facts in *Goodspeed Airport* did not support an ultimate holding of federal pre-emption. The Second Circuit was clearly waiting for an opportunity to join its sister circuits on this federal field pre-emption issue and decided to use *Goodspeed Airport* for that purpose.

At the outset of the decision, the Second Circuit laid out its goal. After a brief, two-sentence summary of the facts, the court stated:

"We write to clarify what to date this Court has suggested only in dicta: that Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field."⁽²⁾

With that mission statement addressed, the court considered the facts. The plaintiff – a small, state-licensed, privately owned airport in Connecticut – sued the defendant – a municipal regulatory body established by a state-level wetlands regulatory act – seeking a court order that it did not need to obtain a permit before cutting down trees abutting the airport runway that happened to be part of protected wetlands. The airport claimed, and the defendant did not contest, that some of the wetland trees it wished to cut would fall under the definition of 'obstructions to air navigation' under the Federal Aviation Administration (FAA) Regulations. The airport argued two theories of pre-emption to support its position that the municipal level permit requirements were pre-empted by federal law:

- under a theory of field pre-emption because Congress (via the Federal Aviation Act of 1958 and the FAA Regulations promulgated thereunder) occupied the entire field of air safety; and
- under a theory of express pre-emption because of language in the Airline Deregulation Act of 1978.

The court then embarked on a two-part analysis to consider:

- whether federal law occupies the field of air safety, and
- if it does, whether the Connecticut state wetland laws and regulations intrude upon that field.

On the first point, the Second Circuit unequivocally laid to rest what it had hinted at in a case two years earlier. In *Air Transport Ass'n of America, Inc v Cuomo*⁽³⁾ the Second Circuit ruled that the New York Passenger Bill of Rights was expressly pre-empted by the Airline Deregulation Act of 1978.⁽⁴⁾ However, the court in *Cuomo* merely observed that several of its sister circuits and several district courts within the Second Circuit had ruled that Congress intended to occupy the entire field of air safety, without formally holding the same. The court in *Goodspeed Airport* took the opportunity presented by plainly ruling: "Today we join our sister circuits."⁽⁵⁾

The court next needed to decide the scope of the federal pre-emption in air safety and whether the Connecticut wetland permit requirements sufficiently interfered with federal regulation. On this point, the Second Circuit agreed with the district court that the Connecticut law and regulation requiring the airport to obtain a permit before cutting wetland trees did not sufficiently interfere with federal law to be pre-empted. The court emphasised that the airport at issue was licensed by Connecticut, not the FAA; it was not federally funded; and no federal agency – most importantly the FAA – approved or

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mandated the removal of the wetland trees. Furthermore, the state laws at issue were environmental laws that did not prevent the trimming or removal of trees that may qualify as obstructions of air navigation. Instead, the state law required only that the airport obtain a permit before removing the trees. The court disagreed with the airport's assertion that the permitting regulation effectively prohibited the removal of the obstructions under the Aviation Act.

An interesting part of *Goodspeed Airport* is the position that the FAA took on the pre-emption issue addressed in the case. At various parts of the opinion, the court noted that the FAA has "limited direct oversight" of the airport as a noteworthy fact in ruling that the Connecticut environmental laws are not pre-empted by federal aviation safety law.

(6) The court further noted that after receiving a formal inquiry from the district court in this case, "the federal government disclaimed any authority to order the trees' removal".

(7) In a footnote, the court stated that "in this case the federal government renounced any intention – indeed, questioned whether it had the authority – to declare the trees hazards and/or to order their removal".(8)

An argument could be made that the FAA did not appear interested in expanding its power into all areas of air safety. As referenced throughout the opinion, the FAA had an opportunity to speak up and state that it believed the state regulation at issue here interfered with the FAA's safety regulations. The FAA chose not to do so, even after receiving a federal district court request for clarification. If the FAA had taken the position that the removal of the trees was required for safety in air navigation, perhaps the outcome of *Goodspeed Airport* would have been different. Whether the FAA's decision to defer was correct under the law is a question beyond the scope of this article, but one interpretation of the FAA's discretion in *Goodspeed Airport* could be that the FAA understands the limits of its regulatory oversight abilities, particularly with respect to smaller, locally owned and regulated airports. Whether the FAA's restraint in this case is symbolic of a more lenient federal aviation policy towards smaller airports or an isolated incident is a question that will certainly be tested in the future.

Endnotes

(1) 634 F 3d 206 (2d Cir 2011).

(2) *Id* at 207-08.

(3) 520 F 3d 218 (2d. Cir. 2008).

(4) For further details on the *Cuomo* decision, please see "[Second Circuit Court of Appeals invalidates New York airline passenger bill of rights](#)".

(5) *Goodspeed Airport* at 210.

(6) *Id* at 212.

(7) *Id* at 211.

(8) *Id* at n 1.

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