BEFORE THE
FEDERAL AVIATION ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of:	)	
Notice of Proposed Rulemaking The New York North Shore Helicopter Route	)	**Docket No. FAA-2010-0302**

Comments of the Eastern Region Helicopter Council

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The Eastern Region Helicopter Council ("ERHC")[1] respectfully submits these comments in opposition to the Federal Aviation Administration's ("FAA") May 26, 2010 Notice of Proposed Rulemaking, entitled "The New York North Shore Helicopter Route" ("NPRM").[2] The NPRM mandates the use of the previously voluntary New York North Shore Helicopter Route ("NSHR") for civil helicopters operating under visual flight rules ("VFR") along the northern shore of Long Island. While the ERHC supports the stated objectives of the NPRM, the proposed rule creates substantially more problems than it solves. More fundamentally, the proposed rule is flatly at odds with the federal government's limited role in addressing aircraft noise, which has the FAA regulating aircraft-generated noise at its source by certificating aircraft and engines and setting noise standards, reviewing local airport sponsor attempts to impose local

[1] The ERHC is a non-profit organization founded in 1977 by New York City helicopter pilots, dedicated to promoting the interests of helicopter users in the New York City metropolitan area. Since its inception, the ERHC has always had an active community outreach program to address the concerns of residents as they relate to helicopter and heliport issues. The ERHC currently represents over 94% of the helicopter operators and businesses supporting helicopters in the New York Tri-State area, the majority of whom will be impacted directly by the proposed rule.

[2] The New York North Shore Helicopter Route, 75 Fed. Reg. 29472 (proposed May 26, 2010) (to be codified at 14 C.F.R. pt. 93) (hereinafter "NPRM" at ____).

use and access restrictions, or funding noise mitigation measures like sound insulation. The FAA should neither become a national clearing-house for local noise complaints, nor regulator in the first instance of local noise abatement procedures.[3]

In addition, the FAA in the NPRM has (i) not demonstrated need or justification; (ii) failed to consider technical and operational implications; (iii) relied on improper authority; (iv) failed to follow proper environmental procedures; (v) indirectly imposed precision navigational systems without any cost-benefit analyses; (vi) circumvented Office of Management and Budget ("OMB") review; (vii) not conducted a proper assessment of its impact on small businesses; and (viii) not afforded sufficient opportunity for interested and affected persons to provide comments. In light of these significant substantive and procedural flaws, the ERHC respectfully urges the FAA to withdraw the NPRM in its entirety. Rather than instituting mandatory procedures that could have far-reaching and unintended consequences, the ERHC suggests that the FAA instead work collaboratively and flexibly with the industry to mitigate any noise concerns as they develop.

ANALYSIS

I. The FAA Has Not Adequately Justified the Proposed Rule.

The FAA cites two reasons for the NPRM: (1) maximizing the "utilization of the existing route flown by helicopter traffic;" and (2) reduction of "the noise impact on nearby

[3] *See, e.g.*, Aircraft Noise Abatement Act, 49 U.S.C. 44715 (1968) (requiring the FAA to develop and enforce safe standards for noise generated by aircraft); Aviation Safety and Noise Abatement Act, 49 U.S.C. §§ 47501 *et. seq.* (1979) (authorizing the FAA to award grants under the Airport Improvement Program for noise mitigation projects); Airport Noise and Capacity Act, 49 U.S.C. § 47528 (1990) (phasing out Stage 2 aircraft and establishing FAA review and approval mechanisms for local noise and access restrictions).

communities."[4] Neither rationale provides adequate justification to impose a rule that will have such far-reaching consequences and costs.[5]

As to the first stated goal, the FAA provides no justification or explanation as to why it is desirable to "maximize utilization" of an existing flight procedure. Nor does it explain why existing procedures are inadequate to accommodate existing operations, which were developed jointly by the ERHC and various public interest groups. Indeed, the NPRM is curiously silent on the present actual utilization of the route in question, which ERHC studies show is already extremely high. Further, concentrating all flight operations of a certain type on a narrow flight path can lead to increased operational issues, for example, due to required minimum separation distances and simultaneous bi-directional operations, which may necessitate controlled airspace. At a minimum, the FAA must explain why "maximum utilization" would not conflict with other operational constraints and airspace management goals.

With respect to the second stated goal, noise reduction, the FAA asserts that the proposed NSHR rule is necessary to address noise complaints from various constituents.[6] But this "justification," based on undisclosed complaints from various New York elected officials and their constituents, lacks any qualitative or quantitative support. Without environmental analysis, it is impossible to determine whether or not such a rule would address the asserted concerns. The FAA should not base such significant airspace changes on subjective citizen complaints without requiring technical data to support the assertion that noise impacts are significant enough to warrant noise mitigation, as it would with any airport sponsors seeking to

[4] NPRM at 29472.

[5] Department of Transportation Order 2100-5 Section 7.e. (May 22, 1980).

[6] NPRM at 29472.

implement a Part 150 Noise Compatibility Program[7] ("NCP") or seeking Airport Improvement Program[8] or Passenger Facility Charge[9] funding.[10] The FAA has not taken this approach in any current special airspace procedures under Part 93 before,[11] and to do so here, without support, would be arbitrary and capricious.

Further, the FAA provides no explanation as to why the proposed rule is applicable only to civil helicopters, when it is reasonable to believe that the stated noise problem stems from a variety of sources, including general aviation, military, or government aircraft, as well as multiple non-aircraft sources. The NPRM would unfairly penalize helicopter operations – but not other aircraft – without any apparent justification.

Ultimately, the majority of flight procedures that are implemented solely to reduce noise are requested by and instituted at the airport's request, and often as part of an approved Part 150 NCP.[12] Part 150 was intended to provide mechanisms to allow airports to reduce aircraft noise in the surrounding area by requesting such changes, but such measures require a valid Noise Exposure Map ("NEM").[13] And, a valid NEM must be developed in accordance with acceptable technical requirements and accepted by the FAA for use with noise mitigation programs.[14] Because of the wide variations in noise exposure at different locations, the FAA has adopted uniform methodology for evaluating noise exposures at airports. "It is essential that a uniform

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[7] 14 C.F.R.§ 150 (1981).

[8] 49 U.S.C. §§ 47107 *et seq.*; Fed. Aviation Admin., Airport Sponsor Assurances (Sept. 1999), *available at* http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

[9] 49 U.S.C. § 47177; 14 C.F.R. pt. 158.

[10] The ERHC is aware that airport noise is subject to a different regulatory structure; however, as with airport noise programs, the ERHC urges the FAA to require quantitative evaluation of noise impacts before instituting a new flight rule based on "noise" concerns.

[11] *See, e.g.*, Flight Restrictions in the Vicinity of Niagara Falls, 68 Fed. Reg. 9792 (Feb. 28, 2003); Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones, 65 Fed. Reg. 17,740 (Apr. 4, 2000).

[12] *See, e.g.*, 14 C.F.R. § 150.33; FAA Advisory Circular 150/5020-1 at p. 30 (Aug. 5, 1983).

[13] 14 C.F.R. § 150.21.

[14] *See, e.g.*, 14 C.F.R. pt. 150, App. A.

methodology be used to evaluate and describe the noise impact. . . [to] ensure consistent and equitable evaluation."[15]

With several major airports and heliports in the New York City region, the airport proprietors (*e.g.*, the City of New York or the Port Authority of New York and New Jersey ("Port Authority")) should be the entities addressing noise complaints consistent with well-established FAA policies for noise abatement. The heliport or airport owner or operator is better suited to quantify and address community needs in this area. Heliport and airport proprietors have a better understanding of the local community's noise impacts, as well as the requirements of the aircraft utilizing the airport.[16] Heliport and airport proprietors retain responsibility to their neighbors for the amount of noise produced at an airport, and in limited circumstances, they can even be held financially responsible for property damage caused by excessive noise from commercial flights.[17] Noise exposure from rotorcraft and aircraft in the affected area is already well-documented by the Port Authority.[18] Based on the NEMs for the surrounding airports, it is highly unlikely that the noise from the helicopters operating in the same area – whether from those airports or other heliports – would have the effect significant enough to warrant new air traffic procedures.[19]

Likewise, if the FAA seeks to implement new airspace procedures based on noise impacts alone, it should apply similarly robust standards when evaluating whether such noise

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[15] Airport Noise Regulatory Process, 41 Fed. Reg. 51522, 51525 (proposed Nov. 22, 1976) (to be codified at 14 C.F.R. pt. 140).

[16] FAA Aviation Noise Abatement Policy (Nov. 18, 1976).

[17] *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (finding that airport was liable for damages resulting from aircraft noise as a result of its failure to acquire sufficient land next to the airport to reduce the impact of aviation noise).

[18] http://www.boeing.com/commercial/noise/lga2003contour.jpg; http://www.boeing.com/commercial/noise/teb2003contour.jpg; http://www.boeing.com/commercial/noise/ewr2003contour.jpg; http://www.boeing.com/commercial/noise/jfk2003contour.jpg

[19] *Id.*

exposure warrants the agency and industry costs associated with such changes. Basing the NPRM on unquantified noise complaints from residents of New York without requiring any technical justification would potentially open the floodgates on requests by residents in all noise-impacted areas around the United States for flight procedure changes. For example, the FAA is well aware that residents living near airports outside of the 65 DNL[20] often lodge noise complaints at local noise abatement offices, and that – as studies done by the ERHC have shown to be true in this case – a disproportionate number of complaints often flow from a small number of households. Despite these typical occurrences, the heliport or airport proprietor is generally prohibited from expending federal funds to mitigate noise impacts outside of the 65 DNL.[21] Similar uniform standards should be developed and applied to air traffic procedures implemented at the request of the public; if no such standards are used, the FAA will be exposed to countless other politically-motivated requests at and near airports and heliports around the United States.

II. The NPRM Has Far-Reaching Technical and Operational Implications.

The precedent-setting NPRM has numerous far-reaching technical, regulatory, and operational implications for the helicopter industry that the FAA has not adequately evaluated or addressed. First, the proposed rule fails to consider the need to carry charts, navigation requirements, weather criteria, training, and equipage of aircraft. Under the current rules, only the New York Helicopter Route Chart and New York Sectional depict the NSHR, neither of which is required to be carried by airmen operating under VFR. The New York Sectional and

[20] DNL refers to the "day-night level" of noise surrounding an airport and as further described in 14 C.F.R. § 150. The DNL is "the 24-hour average sound level, in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for the periods between midnight and 7 a.m., and between 10 p.m. and midnight, local time. 14 C.F.R. § 150.7.

[21] FAA Airport Improvement Program Handbook Order No. 500.38C at ¶ 810 (b) (June 28, 2005) (stating that projects in areas below DNL 65 dB that are approved in noise compatibility programs must be supported by appropriate documentation to determine whether Federal financial assistance is justified).

New York Terminal Area Chart will need to be updated with the mandatory route and will need to be made mandatory for flight. To implement the rule, the FAA will have to address the charting of the route as well as requirements to carry charts and sectionals, as no such requirements currently exist. Additionally, airmen, controllers, and Flight Standards will need to be trained on the new mandatory route, including the conditions that would permit deviation from the NSHR, defining a task, condition, and standard, specific to the proposed mandatory VFR route.

Second, the NPRM lacks necessary technical information and sufficient definition. It does not include: (1) geographical boundaries of the route; (2) specific waypoints other than the western point and eastern point; or (3) altitude requirements.[22] The FAA should – as it has in other similar rulemakings[23] – provide that information in the NPRM to allow for meaningful comment.

Third, the waypoints identified in the proposed rule cannot be visually located and will require GPS, yet most helicopters and general aviation aircraft generally are not equipped with GPS-based navigation systems in the cockpit. On a voluntary basis, operators do the best they can, but once the NSHR is mandatory, the helicopter operator will need to precisely find the "VPLYD waypoint (situated between Glen Cove and Oyster Bay Cove) and Orient Point (the very tip of North Fork)." The only way to do this will be to operate aircraft with GPS navigation, which will effectively require a retrofit of some of the existing helicopter fleet. Since

[22] New York Helicopter Route Chart lists an altitude of 2,500 feet for the voluntary route but publishing an altitude on a chart does not mandate operation at that altitude.

[23] *See, e.g.*, Flight Restrictions in the Vicinity of Niagara Falls, New York, 67 Fed. Reg. 56,740 (Sept. 4, 2002) (providing dimensions and altitude of flight restricted area).

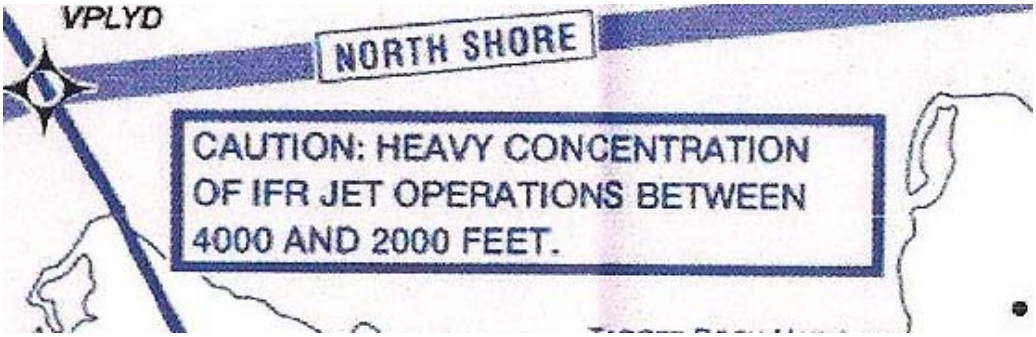
the FAA's proposed rule has broad exceptions[24] that could arguably include operational considerations, if GPS is not mandated, the rule will have no effect. If GPS is mandated, then retrofitting and maintaining them is a significant cost that must be included in the cost-benefit analysis under appropriate rulemaking process requirements.

Fourth, the decision to make the NSHR mandatory poses profound safety concerns unaddressed by the FAA. Because the route is to be used bi-directionally for both eastbound and westbound helicopter traffic, the NPRM concentrates aircraft congestion and imposes a higher risk of incidents for helicopters operating on the mandatory NSHR. From a VFR operational standpoint, converging traffic at the same altitude and on the same route will appear stationary to the pilots of both aircraft. If these helicopters use GPS for navigation, they could be operating a mere three meters from the route centerline, increasing the risk of a mid-air incident. Resolving this safety issue with mandatory separation would require that this uncontrolled airspace be reclassified to controlled airspace, which would in turn require airspace redesign[25] – none of which is contemplated here.

[24] As discussed in Section III, below, the exceptions in the preamble are significantly broader than stated in the proposed rule. The proposed Section 93.103 does not contain an exception for operational limitations.

[25] *See e.g.*, JO 7110.65T.

Fifth, the NPRM inappropriately, and potentially unsafely, mixes VFR and IFR operations by concentrating uncontrolled traffic at an altitude and in a location already rife with commercial jet traffic flying into the major airports in the region. The current chart for the voluntary NSHR contains the following warning to helicopter pilots of heavy aircraft traffic between 2,000 and 4,000 feet (and adjacent to the initial GPS waypoint for the NSHR):



Making the NSHR mandatory without controlled airspace with active ATC for separation would result in mixing ATC-controlled IFR traffic with non-controlled VFR traffic, which raises significant operational and safety concerns. Making the NSHR mandatory for VFR operations based on unquantified noise complaints alone, with no regard for the significant safety concerns at stake, would be imprudent and unjustified.

Finally, the recent proposed airspace changes[26] would lower Class B airspace to 2,500' generally, and 2,000' for the White Plains approach and arrival corridors, both of which are in close proximity to the GPS checkpoint VPLYD. As a result, all traffic operating on the mandatory NSHR would require class B clearance, which would create a higher workload on controllers providing separation of VFR and IFR traffic. Since the controllers have no ability to deny VFR operators clearance, the burden would be higher on the ATC controllers and IFR operators. If the NSHR falls within the redesigned Class B airspace, the VFR helicopter

[26] *See* NY/NJ/PHL Metropolitan Airspace Redesign Project; Overview available at: http://www.faa.gov/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/

operators would further burden ATC controllers as they would be required to get special VFR clearances whenever weather minimums are less than those prescribed by the FAR.[27]

The NPRM fails to consider any of these concerns and should be withdrawn pending full consideration of these significant technical, safety, and operational considerations.

III. The NPRM Suffers From Several Fatal Procedural Defects That Warrant Its Withdrawal.

A. The FAA Relied on Improper Authority to Promulgate the NPRM

The FAA asserts authority deriving from 49 U.S.C. §§ 40103 and 44715 as its source of authority for promulgating the NPRM.[28] While the FAA has broad authority and responsibility under these provisions to regulate the operation of aircraft and the use of the navigable airspace;[29] its reliance on § 44715 is overstated and misapplied. First, § 44715(a) *requires* the FAA to consult with the Administrator of the Environmental Protection Agency ("EPA")[30] prior to prescribing standards and regulations under that section. The FAA has not done so here, and may not rely on § 44715 as its authority until it does. Second, § 44715(a) was intended to authorize the FAA to promulgate regulations to address certification standards – not airspace matters.[31] The Act is specifically limited to aircraft certification,[32] and does not provide authority – implicit or otherwise – for the FAA to rely on § 44715 in promulgating new air traffic procedures to abate noise.

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[27] 14 C.F.R. § 91.155.

[28] NPRM at 29472.

[29] *Id.*

[30] 49 U.S.C. § 44715(a)(2).

[31] Section 44715 has been used by the FAA to promulgate aircraft certification standards – not new air traffic procedures. *See*, *e.g.*, Aircraft Noise Certification Documents for International Operations, Notice of Proposed Rulemaking, 73 FR 63098-01 (Oct. 23, 2008) (proposing to require operators to carry evidence of noise certification compliance); Noise Stringency Increase for Single-Engine Propeller-Driven Small Airplanes, Final Rule, 71 FR 528-01 (Jan. 4, 2006); Harmonization of Noise Certification Standards for Propeller-Driven Small Airplanes, Final Rule, 70 Fed. Reg. 45502-01 (Aug. 5, 2005); Stage 4 Aircraft Noise Standards, Final rule, 70

B. Implementation of the NSHR Is Not Categorically Excluded from NEPA Review.

The NPRM asserts that the NSHR is categorically excluded from review under the National Environmental Policy Act ("NEPA")[33] under FAA Order 1050.1E.[34] Yet, without an adequate description of the proposed route, it is impossible to provide comments on whether the proposed route would be deemed an "extraordinary circumstance" under Paragraph 304 of FAA Order 1050.1E. The ERHC understands that the proposed route is largely over water, but no analysis has been conducted to determine whether increased noise or operations over the water would have an impact on water quality or on the ecological resources of the water.[35] Absent additional information on the proposal itself, the FAA's assertion is arbitrary and capricious.

The FAA asserts, as its basis for the rule, significant noise impacts from existing helicopter traffic patterns. Concentrating all helicopters along one route, however, will simply

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Fed. Reg. 38742-01 (July, 5 2005). While the ERHC is aware of the FAA's attempt to justify at least one procedural change based on § 44715 authority (65 Fed. Reg. 1992-01 (Jan 8, 1997)), this reliance was not consistent with the authority granted by § 44715.

[32] *See* S. Rep. No. 1353 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2688, 2692 (Defining scope of the bill as authorization for the FAA to "establish noise standards and apply them, as appropriate in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by title VI of the Federal Aviation Act."); S. Rep. No. 1353 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2688, 2692 (Noting that feasible measure should be taken to make airplanes less noisy); S. Rep. No. 1353 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2688, 2690 (Noting the importance of ending the "escalation of aircraft noise by imposing standards which require full application of noise reduction technology."); S. Rep. No. 1353 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2688, 2688 ("The purpose of this bill is to authorize and require the Federal Government to establish and apply noise reduction standards to the issuance of certificates under title VI of the Federal Aviation Act, and to prescribe and amend such rules and regulations as are necessary to provide for the control and abatement of aircraft noise."); *see also* FAA Noise Abatement Policy at 30 ("Because of the increasing public concern about aircraft noise that accompanied the introduction of turbojet powered aircraft into commercial service in the 1960s and the constraints such concern posed for the continuing development of civil aeronautics and the air transportation system of the United States, the federal government in 1968 sought -- and Congress granted -- broad authority to regulate aircraft for the purposes of noise abatement. Section [44715], constitutes the basic authority for federal regulation of aircraft noise. In 1972, displaying some dissatisfaction with the FAA's methodical regulatory practice under section 611, the Congress amended that statute . . . . [to add] the Environmental Protection Agency (EPA) to the rulemaking process. Section 611 now requires the FAA to publish EPA proposed regulations as a notice of proposed rulemaking. Within a reasonable time of that publication, if the FAA does not adopt an EPA proposal as a final rule after notice and comment, it is obliged to publish an explanation for not doing so in the *Federal Register*.")

[33] 42 U.S.C. §§ 4321 *et. seq.*

[34] NPRM at 29474.

[35] Environmental Impacts: Policies and Procedures, FAA Order No. 1050.1E (Mar. 20, 2006).

transfer the noise to a different location. While the noise created over water may lessen noise impacts on some communities on the north shore of Long Island, the mandatory route will have the perverse effect of concentrating helicopter traffic near other communities along the route (including Great Neck, North Hempstead, Manhasset, Port Washington, Sea Cliff, Glen Head, Greenvale, Glen Cove, Locust Valley and Oyster Bay in the west and Mattituck and Southold in the East). Under Paragraph 304(f), an impact on noise-sensitive areas that may have a significant effect under 40 C.F.R. § 1508.4[36] may not be categorically excluded from NEPA review.

Finally, the increased operational costs will both increase the amount of fuel burned and cause yet-unevaluated environmental impacts to air quality, both of which will also result in a significant impact not eligible for a categorical exclusion.[37] The ERHC estimates that the average helicopter engine burns between 45 and 55 gallons per hour. (For twin engine helicopter, the fuel burn is double.) The ERHC estimates that the mandatory route will increase average flight time by 10 minutes, which will result in an annual increase of fuel burn of 116,875 gallons.[38]

NEPA requires that federal agencies consider whether their actions will affect the "quality of the human environment."[39] While information about the impacts of alteration to

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[36] Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under § 1508.4 shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. 40 C.F.R. § 1508.4.

[37] FAA Order No. 1050.1E at ¶ 304(g).

[38] Total helicopter operations to and from the East End airports have historically been 15,000 annually. On the assumption that NSHR usage is 85% of the total (12,750 operations), adding 10 minutes per flight would equate to 127,500 minutes (2,125 hours). At a rate of 55 gallons per hour, 116,875 gallons of fuel will be consumed.

[39] 42 U.S.C. § 4332(2)(c) (1975).

flight patterns or increased air traffic are generally not excluded from NEPA review, in instances where the impacts may have a significant effect on noise they may not be excluded under paragraph 304(f) of FAA Order 1050.1E.[40] Instead, this information may be included to better quantify the impacts such changes will have. Absent such a review in this case, the NPRM is procedurally deficient and should not proceed.

C. The NPRM Has Not Undergone the Required Regulatory Analysis.

The NPRM was improperly promulgated without full regulatory review as required by Executive Order 12,866 ("E.O. 12,866") [41] and Department of Transportation ("DOT") Order 2100.5,[42] both of which require full evaluation of costs and benefits in agency rulemakings. Under DOT Order 2100.5, the FAA may only avoid cost-benefit analysis if the FAA determines that the cost impact of the proposal is so minimal as to not require full review.[43] Here, the FAA wrongly concluded that the cost impact of the NPRM would be so minimal as to not require full review. In addition to the many technical costs highlighted in Section II, above, the FAA has failed to consider operational costs associated with mandatory compliance.

According to the NPRM: "This proposed action is not expected to result in additional costs . . . because those operators that cannot comply with the route as published due to operational limitations, performance factors, weather conditions or safety considerations are

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[40] *See* FAA Order 1050.1E, ¶ 304; *See also Town of Marshfield v. FAA*, 552 F.3d 1, 2 (1st Cir. 2008) ("[A]n otherwise categorically excluded action could require further environmental analysis, and such circumstances include *inter alia* an impact on noise levels of noise-sensitive areas.") (internal quotations and citations omitted). *See also Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 138 (D.D.C. 2001) (Noting Environmental Impact Statement ("EIS") submitted by U.S. Marine Corps for NEPA review and stating, "the proposed changes to airspace use would slightly increase the amount of noise to which wildlife are exposed to on the Cabeza Prieta NWR, and other portions of the Range").

[41] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), as amended by Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 26, 2002) (establishing principles that federal agencies must adhere to in the rulemaking process, including analysis of the costs and benefits of the rulemaking and consideration of alternatives to rulemaking, including the alternative of not regulating) The Office of Information and Regulatory Affairs ("OIRA") has a preeminent authority and role in the E.O. 12,866 regulatory review process.

[42] NPRM at 29473.

[43] *Id.*

allowed to deviate from the provisions . . . ."[44] But this statement is inconsistent with the actual text of the proposed § 93.103, which permits deviation from the mandatory route only "when required for safety, weather conditions or transitioning to or from a destination or point of landing."[45] As a result, all helicopters flying in this area will now effectively be required to be retrofitted with navigation systems to permit operators to precisely locate the two waypoints identified in the proposed rule – the "VPLYD waypoint" and "Orient Point," as those waypoints are located over water with no land-based geographical reference. The FAA improperly failed to consider the substantial cost of retrofitting aircraft with navigation systems, the significant annual cost of the additional fuel that will be spent traveling the more circuitous route, and the cost to educate operators as to compliance. These costs are not insignificant or "so minimal" as to escape the requirements of a full cost-benefit analysis.

The FAA also determined that the NPRM is not a "significant regulatory action" within the meaning of section 3(f) of E.O. 12,866 (and therefore is exempt from OIRA evaluation), as it is not likely to have an annual effect on the economy of $100 million or more.[46] In focusing on the $100 million threshold, the NPRM ignores other key factors in considering whether the action is a "significant regulatory action," including the high interest surrounding the regulatory action and the potential of the proposed rule to impact a small locality.[47] That criteria is met in this case: at least 381 comments have been posted to the docket as of June 24, 2010 – one day prior to the date comments were due – and the rule potentially impacts a small locality, the north shore of Long Island area. Thus, the NPRM should be properly reviewed by OIRA.

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[44] *Id.*

[45] *Id.* at 29474.

[46] *Id*. at 29473.

[47] *See, e.g*., Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones, 65 Fed. Reg. 17740 (Apr. 4, 2000).

In all cases, E.O. 12,866, Section 6(a)(3)(A) requires the agency to provide OIRA with a list of its planned regulatory actions, including those that the agency has determined to be not significant, so that the Administrator of OIRA may determine independently whether a planned regulatory action is significant under E.O. 12,866. It is unclear whether the FAA submitted the NPRM to OIRA as required; if it did not, the NPRM must be withdrawn and submitted for OIRA's consideration.

D. Regulatory Flexibility Analysis Must Be Conducted

The FAA also promulgated the NPRM without considering its effect on small businesses, in an apparent violation of the requirements of the Regulatory Flexibility Act,[48] which requires the FAA to consider the effect of the proposed regulation on small businesses and to design mechanisms to minimize any adverse consequences. The NPRM should not be finalized and must instead be withdrawn for the purpose of conducting a regulatory flexibility analysis ("RFA").[49]

An RFA is not required if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[50] The FAA wrongly concludes that the NRPM will neither impact a substantial number of small entities nor have a significant economic impact.[51] The FAA concludes that only five small entities – Part 135 sightseeing helicopter tours companies – in the New York market would be impacted by the proposed regulatory changes.[52] The FAA fails to account for the many other

[48] 5 U.S.C. §§ 601, *et seq*.

[49] Section 603(a) provides that an agency required to file a notice of proposed rulemaking shall prepare and make available for public comment an initial RFA, which shall describe the impact of the proposed rule on small entities. With the final rule, the agency must also publish a final RFA. *See Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 173 (D.C. Cir. 2007). 5 U.S.C. § 604(a).

[50] *Id.* at 605(a).

[51] *Id.* at 29473.

[52] *Id.*

small entity users of the route, which the ERHC estimates to be over 100. In reality, the proposed rule applies to all "civil helicopters" operating in the area – this includes Part 135 operators, individual operators, hospital EMS operators, small business operators, corporate aviation operators, and hundreds of others who will be impacted by the rule.

Next, the FAA wrongly concludes that the economic impact will not be significant, because of the ability of operators to deviate for operational considerations.[53] Here, again, the FAA's statement is inconsistent with the proposed rule itself, which provides for deviation from the mandatory route only "when required for safety, weather conditions or transitioning to or from a destination or point of landing,"[54] *not* for "operational limitations of the helicopter" or "performance factors," the additional triggers for permissible deviation from the mandatory route added by the FAA in the preamble. In contrast to that statement in the preamble, helicopter operators *may not* deviate from the mandatory route under the proposed regulations for operational limitations; as a result all helicopters flying in this area will now be effectively required to be retrofitted with navigation systems; the cost of which will be prohibitive to many affected small businesses. As discussed in Section II, above, the FAA also fails to consider the many other costs associated with implementing the rule.

E. The NPRM Violates the Due Process Clause of the Fifth Amendment.

The Due Process clause of the Fifth Amendment to the U.S. Constitution requires that a law – including regulations[55] – put those being regulated on notice of the conduct prescribed or prohibited and the consequences of failure to comply, so as to prevent "arbitrary and

[53] *Id.*

[54] *Id.* at 29474.

[55] *See Bence v. Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974); *Vorbeck v. Schnicker*, 660 F.2d 1260, 1262 (8th Cir. 1981).

discriminatory enforcement."[56] Here proposed § 93.103 – consisting of only two lines[57] – is unconstitutionally vague on its face.[58]

The NPRM provides that the NSHR is to be used, "as published [on the New York Helicopter Route Chart]," but fails to provide sufficient information for a helicopter operator to understand how the chart is to be used. The geographical boundaries of the NSHR are not defined in the NPRM – no specific waypoints are provided other than the western and eastern points and no dimensions are prescribed. The ordinary helicopter operator without a GPS is unable to precisely identify the VPLYD waypoint and Orient Point as those points are located over water with no land-based geographical reference. No meaningful way to comply exists.

Further, helicopter operators may deviate from the mandatory route for several reasons; in fact, the FAA refers no less than four times to the permitted deviation in the NPRM.[59] Even assuming the deviations would be permitted even though they are not included in the proposed § 93.103, no guidelines are provided to assist helicopters in determining the circumstances that give rise to the permitted deviation. The NPRM offers no absolute or unambiguous prescription of conduct as required.[60]

The NPRM does not clearly prescribe or prohibit conduct. Given these ambiguities and technical limitations that make VFR compliance very difficult to monitor and enforce, the

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[56] *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (U.S. 1982).

[57] NPRM at 29474.

[58] *See Vandehoef v. Nat'l Transp. Safety Bd.*, 850 F.2d 629, 630 (10th Cir. 1988); *Throckmorton v. Nat'l Transp. Safety Bd.*, 963 F.2d 441, 444-445 (D.C. Cir. 1992). The test of whether an administrative regulation is so vague that it violates due process is "whether the regulation delineated its reach in words of common understanding."

[59] NPRM at 29472-73 (justifying lack of cost-benefit analysis); NPRM at 29473 (justifying lack of regulatory flexibility analysis); NPRM at 29474 (justifying lack of cost-benefit analysis).

[60] *C.f. Throckmorton*, 963 F.2d at 445 (In finding no constitutional vagueness in regulations under which a pilot had been charged in *Throckmorton v. NTSB*, the D.C. Circuit stated: "We do not understand Throckmorton's challenge to reach Regulation 91.75(a) which absolutely and unambiguously prohibits deviation from an ATC clearance.")

NPRM's lack of clarity will almost certainly result in inadvertent violations and inconsistent enforcement of the rule, exactly what the principle of due process aims to prevent.[61]

F. The NPRM's Extremely Compressed Comment Period Is Insufficient.

Finally, the NPRM's comment period of thirty days is not sufficient to afford interested parties a meaningful opportunity to participate, as required by § 553 of the Administrative Procedure Act ("APA"),[62] E.O. 12,866, and FAA regulations and standard practice. Sixty days is the minimum period of time in which airspace issues, which require highly technical and complex analysis, can be effectively analyzed. The public, especially the industry, must be afforded at least that amount of time in order to offer valuable analysis and insight.

Section 553 of the APA and E.O. 12,866 require that federal agencies provide notice of a proposed rule and an opportunity to comment.[63] Such notice must afford a reasonable time for those interested to make their appearance.[64] Meaningful participation entails a meaningful opportunity to comment on any proposed regulation, "which in most cases should include a comment period of not less than 60 days."[65] The FAA's own regulations set comment periods generally at sixty days.[66] In practice, the comment period in Part 93 rulemakings is typically at least 60 days.[67] Here, thirty days is inadequate to fully respond to an NPRM that presents significant technical, safety, environmental, and operational concerns.

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[61] *See supra* note 23.

[62] 5 U.S.C. §§ 551, *et seq.*

[63] Section 553's third requirement, an explanation of the rule ultimately adopted, is not yet relevant at this stage of the proceedings. 5 U.S.C. § 553; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[64] *Roller v. Holly*, 176 U.S. 398, 409-410 (1900).

[65] Exec. Order No. 12,866, 58 Fed. Reg. 190.

[66] 14 C.F.R. § 11.31.

[67] *See, e.g.*, Notice of Proposed Rulemaking, Congestion Management Rule for John F. Kennedy International Airport and

IV. Conclusion

For the foregoing reasons, the ERHC respectfully requests that the NPRM be withdrawn in its entirety.

Respectfully submitted,

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Newark Liberty International Airport, 73 Fed. Reg. 29626 (Aug. 29, 2006) (comment period of 60 days); Notice of Proposed Rulemaking, Congestion Management Rule for LaGuardia Airport, 71 Fed. Reg. 51360 (Aug. 29, 2006) (comment period of 60 days).