Navigating the Turbulence of Competing Interests: Principles and Practice of the Federal Aviation Administration

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NAVIGATING THE TURBULENCE OF COMPETING INTERESTS: PRINCIPLES AND PRACTICE OF THE FEDERAL AVIATION ADMINISTRATION

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1 This article presents the views of the authors and does not represent the official position of the FAA.

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I. INTRODUCTION

In 1958, THE FEDERAL Aviation Agency came into existence with the passage of the Federal Aviation Act. It charged the newly minted agency to provide for the "regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense," for the "promotion, encouragement, and development of civil aeronautics," and for "safety in air commerce." With the formation of the U.S. Department of Transportation (DOT) in 1967, the agency became part of a larger transportation effort and gained its current name of the Federal Aviation Administration (FAA).

Fast forward twenty years to the Airline Deregulation Act of 1978. This act, inter alia, ended the FAA's regulation of routes,

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3 Federal Aviation Act of 1958 § 102, 72 Stat. at 740.


fares, and new entrants. It did not end the balancing act of the FAA; if anything, it added another layer because the FAA cannot control where airlines choose to fly, what airlines charge for a ticket, or whether a new entrant seeks to enter the market. It is clear that the Airline Deregulation Act benefited passengers by reducing ticket prices and introducing new routes. These benefits did not come without costs, however. In markets with high demand, growth began to exceed capacity.

In 1996, Congress passed the Federal Aviation Reauthorization Act of 1996, which amended the FAA’s mission by removing the promotion of air commerce. This amendment made the promotion of safety the FAA’s principal interest. Although this change removed the inherent conflict in the FAA’s mission of both promoting the industry and regulating it for safety, the amendment continues to constrain the FAA’s ability to balance the industry’s interests apart from the primary focus on safety. This change in mission also reflects an acknowledgment that the aviation industry has reached maturity and no longer needs the FAA’s protection.

In November 2001, Congress created the Transportation Security Administration (TSA) as part of the DOT in response to the September 11, 2001 terrorist attacks. After the Department of Homeland Security was created in November 2002, the TSA was transferred to that department. As a result of these actions, the FAA ceased to have the responsibility or authority to

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6 Id.; U.S. Gov’t Accountability Office, GAO-06-630, Airline Deregulation: Reregulating the Airline Industry Would Likely Reverse Consumer Benefits and Not Save Airline Pensions 1, 3 (2006) [hereinafter Airline Deregulation].

7 Airline Deregulation, supra note 6, at 9.

8 Id. at 18 (“Airfares have fallen in real terms over time, with round-trip median fares almost 40 percent lower since 1980.”).


10 Id. § 401, 110 Stat. at 3255. In contrast, Congress did not revoke the FAA’s mission to promote commercial space launches and reentries, indicating that the relatively immature industry of commercial space transportation required support from the federal government. 49 U.S.C. § 70103 (2006).


identify and assess security threats. However, the FAA retains the authority to promulgate regulations that respond to security concerns.

In 2003, Congress passed the FAA’s latest reauthorization act, known as Vision 100—A Century of Aviation Reauthorization Act (Vision 100). Vision 100 extended funding for FAA programs until 2007. Currently, the FAA is operating under a temporary extension of the reauthorization. The Act reinforced the FAA’s role in improving airports by continuing to authorize grants through the Airport Improvement Program (AIP), in maintaining and improving the airspace by focusing on the use of new technologies (NextGen), and in enhancing the safety and security of the aviation system.

Today, the FAA has a primary mission to promote safety in air commerce. Additionally, the FAA has exclusive authority over U.S. airspace, also known as the National Airspace System (NAS). In regulating the NAS, the FAA’s mission is to ensure the efficient use of the airspace and the safety of aircraft within it, as well as to ensure “a safe and efficient nationwide system of public-use airports” through grants for airport improvement projects. In carrying out these missions, the FAA promulgates regulations, prosecutes enforcement actions to ensure compliance with those regulations, assigns and manages the use of air-

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17 Id. § 101, 117 Stat. at 2494.
19 Vision 100—Century of Aviation Reauthorization Act §§ 144-66, 710; see also Statement on Signing the Vision 100—Century of Aviation Reauthorization Act, 2 Pub. Papers 1716, 1716 (Dec. 12, 2003) (“The Act is designed to strengthen America’s aviation sector, provide needed authority to the Federal Aviation Administration (FAA), and enhance the safety of the traveling public.”).
20 49 U.S.C. § 40101(d) (1) (2006) (prescribing the matters in the public interest that the Administrator shall consider including “assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce”).
21 49 U.S.C. § 40103(a).
22 Id. § 40103(b).
23 49 U.S.C. § 47104(a); see generally 49 U.S.C. §§ 47101-75 (prescribing the requirements for the Airport Improvement Program (AIP)).
space, and facilitates airport planning and development through its grant program.\textsuperscript{24}

Whenever the FAA acts to carry out its missions, it is faced with an array of competing public priorities, stakeholder interests, and long-term considerations that complicate its actions. These actions also impact multiple stakeholders who often have interests that conflict with other stakeholders. Occasionally, an individual stakeholder may have multiple interests that compete with each other. Also, the FAA must consider how the consequences of today's action will play out five, ten, or twenty years down the road.

Balancing competing interests in an effort to reach a decision that is in the public interest is the proper role of government. However, the process of balancing competing interests is not a precise scientific exercise but can be a complicated and messy affair. The FAA rarely has the opportunity to please all stakeholders. Instead, in most cases, it has to find ways to minimize the burden on each stakeholder while achieving a solution that ultimately it determines is in everyone's best interest.

Over the past decade, the FAA has faced many situations that illustrate this balancing process. The following discussion focuses on four of these situations: (1) managing airspace and improving efficiency through the New York, New Jersey, and Philadelphia Metropolitan Area Airspace Redesign (Airspace Redesign); (2) reducing congestion and delay through managing slots\textsuperscript{25} at LaGuardia (LGA), John F. Kennedy International (JFK), and Newark Liberty International Airports (EWR); (3) protecting national security through the Washington, D.C. Special Flight Rules Area (DC SFRA); and (4) enforcing aviation safety regulations. The DC SFRA is the only issue of the four that is essentially resolved.\textsuperscript{26} The FAA continues to address the competing interests with respect to the Airspace Redesign, and with the rescission of the congestion management final rules on October 9, 2009, the FAA currently is pursuing a long-term solu-


\textsuperscript{25} A slot is "the operational authority assigned by the FAA to a carrier to conduct one scheduled operation or a series of scheduled operations at" LGA, JFK, or EWR "on a particular day(s) of the week during a specific 30-minute period." 14 C.F.R. § 93.36 (2008) (rescinded by 74 Fed. Reg. 52,134 (Oct. 9, 2009)) (defining "slot" for LGA); 14 C.F.R. § 93.162 (2008) (rescinded by 74 Fed. Reg. 52,134 (Oct. 9, 2009)) (defining "slot" for JFK and EWR).

\textsuperscript{26} See infra Part IV.
tion for the New York area. Additionally, because the FAA must balance a variety of competing interests on an individualized basis each time it pursues an enforcement action, this issue is never resolved. Each of these scenarios will address different aspects of how the FAA identifies the stakeholders and their interests, how it faces the challenge of balancing those interests with its primary interests in safety and efficiency, and how it considers the long-term implications of its actions.

II. NEW YORK, NEW JERSEY, AND PHILADELPHIA AIRSPACE REDESIGN

The FAA's Airspace Redesign in the greater New York, New Jersey, and Philadelphia areas is illustrative of the challenges the agency faces when it undertakes large-scale changes to flight paths. This airspace was designed in the 1960s—before the double digit growth of air travel, the emergence of EWR, Philadelphia International Airport (PHL), and Teterboro as major airports, and changes to fleet mix and schedules, to name just a few major developments. The FAA must find a way to update the use of this airspace to ease today's congestion and accommodate future growth. Yet, this growth in air travel has had side effects on communities near the major airports as more flights zoom over homes, businesses, and schools. This is and will continue to be an arena of tension and controversy with local communities' interests pushing up against the national interest of ensuring a safe, efficient, and reliable air system.

A. DELAYED FlIGHTS

A business passenger begins his day by boarding an early flight at Bradley International Airport outside Hartford, Connecticut, on a turboprop aircraft headed into JFK. His connecting flight to Los Angeles International Airport (LAX) has a scheduled departure time of 10:30 a.m., arriving at about 2:00


29 Id.
p.m. PST. This will give the traveler time to prepare for an important meeting the next day.

The morning push of departures from JFK began shortly after 8:00 a.m. There has been the usual level of traffic and some minor weather. By 10:00 a.m., departure delays exceed thirty minutes for points west. As aircraft line up, waiting to taxi out or take off, the airport pavement and gates become saturated, leaving little room for arriving aircraft. En route to JFK, the pilot on our traveler’s flight informs the passengers that they have been placed in a holding pattern. Finally, at approximately 10:00 a.m., forty-five minutes after the scheduled arrival time, his flight lands.30 The traveler rushes to his connecting flight only to find that its departure is delayed by at least another fifty minutes.

Regular travelers through the three major airports servicing New York City know this scenario all too well.31 The point of this scenario is not to evoke angst but to begin a dialogue about the connectivity of actions in the NAS, the impact the airports in the greater New York area have on the NAS, and the role the FAA plays in maintaining a safe and efficient navigable airspace.

B. BACKGROUND

In 2007, 22,816,687 passengers flew in and out of JFK.32 Approximately 15,606,000 passengers flew in and out of PHL the same year.33 All of these passengers, of course, occupy aircraft operating in the airspace. To view this commerce from an air traffic perspective, one must examine the volume of aircraft handled by air traffic control facilities. There are three types of facilities: the Air Traffic Control Tower (Tower), the Terminal Radar Approach Control (TRACON), and the Air Route Traffic Control Center (Center).34 The New York Air Route Traffic

30 At JFK, this pattern repeats itself in the early afternoon as international flights begin to arrive from the Caribbean, Europe, and South America and prepare to leave again for international destinations.
31 Id.
33 Id.
Control Center (ZNY) is one of twenty Centers in the United States.\textsuperscript{35} It controls most aircraft entering, exiting, and overflying the New York region and plays a role in controlling traffic entering and exiting the Philadelphia region.\textsuperscript{36} This Center handled approximately 3,056,000 aircraft in 2007, second only to Atlanta Center.\textsuperscript{37} This level of operation represents a nearly fifty-percent increase in traffic levels as compared to the last decade.\textsuperscript{38} Traffic in this region is expected to continue to grow.\textsuperscript{39} By 2011, it is estimated that fifteen to twenty percent of all air traffic in the United States will move through the greater New York area.\textsuperscript{40}

These statistics demonstrate that the airspace above New York, New Jersey, and Philadelphia is some of the busiest airspace in the country.\textsuperscript{41} These cities also have some of the most complex airspace with five major, sixteen satellite, and numerous general aviation airports vying for space among the growing number of aircraft traversing in and out of the airspace.\textsuperscript{42} This leads to congestion and delays.\textsuperscript{43} The airports in this area are consistently some of the most delayed in the country. In 2007, the year the FAA issued its final agency decision to move forward with the Airspace Redesign,\textsuperscript{44} LGA had the worst on-time arrivals in the country with only fifty-eight percent of its flights arriving within fifteen minutes of scheduled arrival time.\textsuperscript{45} It was fol-

\textsuperscript{35} Id.
\textsuperscript{36} Id. Centers manage all aircraft operating under Instrument Flight Rules (IFR). Id. ch. 1, at 5. Part of the traffic departing and arriving into the Philadelphia region is handled by the Washington Center. Id. ch. 1, at 12.
\textsuperscript{37} FAA, ADMINISTRATOR’S FACT BOOK 9 (2008) [hereinafter ADMINISTRATOR’S FACT BOOK], available at http://www.faa.gov/about/office_org/headquarters_offices/aba/admin_factbook/media/200811.pdf. The numbers in the fact book are rounded, but exact numbers for aircraft handled by the Centers, TRACONS, and towers can be found at www.aspm.faa.gov.
\textsuperscript{38} Final EIS, supra note 34, ch. 1, at 11.
\textsuperscript{39} Id.
\textsuperscript{40} ROD, supra note 28, at 10.
\textsuperscript{41} Id. For a real-time visual representation of traffic in this area, see Airport Monitor 2.0, John F. Kennedy International Airport, http://www4.passur.com/jfk.html. Similar information is available for EWR (http://www4.passur.com/ewr.html), LGA (http://www4.passur.com/lga.html), and PHL (http://www4.passur.com/phl.html).
\textsuperscript{42} Final EIS, supra note 34, ch. 1, at 13–14.
\textsuperscript{43} ROD, supra note 28, at 3.
\textsuperscript{44} Id. at 1.
lowed by EWR, JFK, Chicago O’Hare, and PHL. Delays in these areas have ripple effects as far away as Chicago, Atlanta, and even the West Coast.

In 1998, the FAA began a process to redesign the New York, New Jersey, and Philadelphia airspace. The focus was to identify ways to safely enhance efficiencies in the airspace to accommodate current and future growth. This redesign covers the largest geographic area undertaken to date with over 31,000 square miles. In this project, the FAA takes advantage of new technologies such as satellite-based navigation. This project fully integrates the airspace to reduce complexities in operations and to expand the use of terminal separation rules that allow aircraft to be separated by three nautical miles instead of five.

C. STAKEHOLDERS AND THEIR INTERESTS

The Airspace Redesign is an ideal case study for discussing the various stakeholders, their interests, and the challenges of fulfilling the FAA’s statutory mission among the competing interests. One of the first and most obvious stakeholders in this project is the flying public. Passengers expect and deserve safe, reliable, and dependable air service. Whether traveling for leisure or business, passengers also have an interest in delay reduction. Delays cost money, plain and simple. To the passenger, this occurs primarily because of the costs associated with the additional time it takes to get from point A to point B.

html (last visited Sept. 12, 2010). For 2007, EWR had an on-time arrival rate of 59.45%, JFK had 62.84%, and PHL had 66.54%. Id.

46 Id.
49 FAA Airspace Redesign, supra note 47, at 1.
50 See ROD, supra note 28, at 24.
51 See id. at 3.
52 Id. at 1.
53 Id. at 8.
54 Id.
55 Id. at 10. Enhancing efficiencies is estimated to save airlines, passengers, and businesses seven to nine billion dollars. Id.
56 See id. at 8.
Another stakeholder, although not in the traditional sense, is the environment. The FAA must examine what type of impacts (both positive and negative) its proposed actions will have on noise, air quality, environmental justice populations, and parklands. Overall, New York Airspace Redesign reduces noise to over 600,000 individuals, reduces emissions, and results in a delay savings of up to twenty percent compared with taking no action. With mitigation, when the project is complete, there will be no significant impacts to environmental justice populations, national, state, or local parks, or any other resources.

Local residents, both close-in and those over forty miles away from the major airports, have a keen interest in this project and represent another stakeholder. Most residents focus on noise, perceived safety threats, and air pollution. Some are already bothered by aircraft flying overhead and want to curtail the number of aircraft that fly over their homes. Some complain about noise even though their economic vitality depends on the air service provided by these major metropolitan airports. The interests of these individuals bothered by aircraft noise frequently compete with the interests of maintaining an efficient airspace, something that benefits the overall population.

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57 See FAA, Order 1050.1E, Policies and Procedures for Considering Environmental Impacts, app. a, at A-1 (June 8, 2004) [hereinafter FAA Order 1050.1E] (defining a significant noise increase as an increase of 1.5 decibel (dB) DNL (day-night average sound level) or more over noise sensitive areas within the 65 dB DNL).


60 See 49 U.S.C. § 303b-c (2006). There are other categories of environmental impacts that must be addressed by the FAA but are usually not impacted by changes to the airspace. See FAA Order 1050.1E, supra note 57, app. a, at A-1.

61 ROD, supra note 28, at 1.

62 Id. at 28-32, 38-41.


64 See ROD, supra note 28, at 50-54.

65 Id. at 10.


live within ten to fifteen miles of an airport. Short of halting services or moving the airports, there is not much that can be done to eliminate noise to these residents. Other, far more numerous but less vocal, local residents reap the benefits of living near major metropolitan airports. Those residents are frequent travelers and appreciate the convenience, schedule, and fares that come with living in a region with multiple airports and carriers, or they are business people and employees who benefit from the economic activity brought by the very same airports.

Noise is a challenging impact for the FAA to manage. Here, the Airspace Redesign project results in a net reduction in noise to communities in the 31,000 square miles within the Airspace Redesign. Still, within this net reduction, there are some communities that will receive noise increases of five or more decibels. These increases are all in low noise levels as measured by federal standards. More telling, when Airspace Redesign is complete, there are no “significant” noise increases as measured by the FAA’s standards. Yet, the individuals and communities with noise increases will seize upon this increase, even at low levels, as a means to contest the redesign.

Congested airspace over heavily populated areas adds to the complexity and demonstrates how competing interests can be interrelated. Reducing noise for one population means increasing noise for another. The FAA, as a policy matter, will not

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68 ROD, supra note 28, at 10.
69 This being said, it is interesting to note that aircraft have become quieter over the last two decades as the result of improved technology and the gradual phase-out of Stage 2 aircraft. FAA, Evaluation of Noise Set Aside Portion of the Airport Improvement Program 2–3 (Oct. 1, 2002), available at http://www.faa.gov/airports/aip/guidance-letters/media/PGL_03-02_Attachment_A.doc; ROD, supra note 28, at 2.
70 See, e.g., John Flink, County Chamber Backs O’Hare Plan, CHI. TRIB., Aug. 29, 2001, at L1.
71 Id.
72 ROD, supra note 28, at 24–27.
73 Id. at 25–26.
74 Noise Exposure Tables, FAA, http://www.faa.gov/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/documentation/noise_exposure_tables/media/NewJersey/NJ_Bergen.xls (last visited Dec. 23, 2009). For example, in census block 1008 in Bergen County, New Jersey, 286 residents receive an increase of noise from 36.9 dB DNL to 41.3 dB DNL. Id. Measured against other common sources of noise, 30 decibels is similar to a soft whisper and 45 decibels is similar to distant bird calls.
75 FAA Order 1050.1E, supra note 57, app. a, at A-61; ROD, supra note 28, at 25–27.
76 See ROD, supra note 28, at 10.
shift similar noise levels from one populated area to another solely for noise abatement purposes.\textsuperscript{77} The FAA's primary focus in redesigning airspace and procedures remains operational efficiency and safety.\textsuperscript{78} In this project, the FAA was able to modify certain procedures to mitigate noise while maintaining operational efficiency.\textsuperscript{79} One such modification involves departure procedures at PHL.\textsuperscript{80} The FAA developed departure dispersal headings for the parallel runways.\textsuperscript{81} Multiple departure headings allow more aircraft to depart in a given hour.\textsuperscript{82} The number of departure headings for Runway 9/27 was reduced to mitigate noise and the headings were modified to align more closely with the river, industrial areas, and a major interstate.\textsuperscript{83} This is an example of one way the FAA was able to consider and minimize the impact on some stakeholders.

Similar to the flying public, the airlines are a stakeholder in this project. Delays associated with airspace congestion cost the airlines millions.\textsuperscript{84} Increased efficiencies reduce fuel costs and help make the airlines more profitable.\textsuperscript{85} The costs to airlines are directly and indirectly passed onto the general public.\textsuperscript{86}

Delays cost the American people money.\textsuperscript{87} Congress has an interest in reducing this cost and ensuring that the NAS works safely and efficiently. Congressional representatives of the local communities may have different interests. They are mainly concerned with the well being of their constituents. Many receive numerous noise complaints from their constituents and believe the trade-off for these projects is not worth the noise (even though there is a net noise decrease). For example, residents of New Jersey receive noise from aircraft departing out of PHL and JFK.\textsuperscript{88} The residents may feel this is an unfair burden because the airports are serving other states. Unfortunately, this is the reality of such a densely populated area.\textsuperscript{89}

\textsuperscript{77} \textit{Final EIS}, supra note 34, ch. 1, at 25.
\textsuperscript{78} \textit{ROD}, supra note 28, at 9–10.
\textsuperscript{79} \textit{Id.} at 1.
\textsuperscript{80} \textit{Final EIS}, supra note 34, ch. 5, at 23.
\textsuperscript{81} \textit{Id.} ch. 5, at 23.
\textsuperscript{82} \textit{Id.} ch. 2, at 62.
\textsuperscript{83} \textit{Id.} ch. 5, at 24.
\textsuperscript{84} \textit{ROD}, supra note 28, at 8.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{See} \textit{ROD}, supra note 28, at 2.
\textsuperscript{89} \textit{Id.} at 10.
The airports in the region, another stakeholder, also have an interest in efficiency. Many of the airports in this region are "pavement constrained" and thus have limited options for increasing capacity. If changes to procedures can improve the number of arrivals and departures in an hour, stated as increasing "throughput," then the airports benefit. This region is also faced with a unique challenge that comes from having major airports within close physical proximity, having similar runway configurations, and using common routes over water—routes that help lower noise impacts.

Finally, but not last in importance, state and local governments are key stakeholders. They, like the FAA, may have competing interests. Airports, airlines, and air travelers generate tax revenue, support the local hospitality industry, and create jobs for local residents. Yet, residents complain about the negative impact that air traffic has on their quality of life and claim that it devalues their homes. Aircraft noise may impact their ability to sit in backyards or enjoy a park. On the other hand, close proximity to the airport can increase the value of homes, thus increasing the tax base. This area is highly subjective. How state and local governments and individuals value an airport varies widely.

D. Controversy and Scrutiny

The project is not without controversy. It has been the focus of congressional inquiries, legislative amendments to halt the

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90 Many of the airports are owned directly by the localities or through a specially created airport or port authority.


92 See FAA AIRSPACE REDESIGN, supra note 47, at 79 n.36.

93 See FINAL EIS, supra note 34, ch. 1, at 21–25.

94 Id. pt. ES, at fig.1.


97 Id. at 628.


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project temporarily or permanently, an investigation by the Government Accountability Office (GAO), and litigation. In the summer of 2007, the GAO advised the FAA that it was initiating an investigation of the Airspace Redesign based on a request by Chairman Jerry Costello, Representative Rob Andrews, and Representative Joe Sestak. The GAO continued this investigation even after lawsuits were filed. This was very unusual because the GAO, as a matter of policy, normally does not investigate matters that are the subject of ongoing litigation. On August 29, 2008, the GAO released its final report concluding that “applying these [National Environmental Policy Act (NEPA)] requirements and the APA’s reasonableness standard ... [the] FAA complied with applicable NEPA and related requirements and environmental justice directives.”

On September 5, 2007, pursuant to 49 U.S.C. § 40103(b), the FAA issued its final agency action approving a full scale redesign and integration of the airspace. This type of agency order is subject to review in the “United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.” Thirteen lawsuits were filed against the project in three judicial circuits and one district court. In all, the lawsuits named seventy-three petitioners and alleged violations of NEPA, the U.S. Department of Transpor-

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100 FAA AIRSPACE REDESIGN, supra note 47, at 2.
101 Id. at 2.
102 Id. at 1.
103 Id.
105 FAA AIRSPACE REDESIGN, supra note 47, at 5.
106 See ROD, supra note 28, at 58 (comprising the final agency decision). The Administrator of the FAA “shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” 49 U.S.C. § 40103(b)(1) (2006).
tation Act Section 4(f), and the Clean Air Act (CAA). Many of the named petitioners were local municipalities or interest groups. On June 10, 2009, the U.S. Court of Appeals for the District of Columbia Circuit issued a favorable opinion that dismissed or otherwise disposed of all claims against the FAA’s Record of Decision (ROD) for the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign Project. The Court held that the FAA’s environmental impact statement (EIS) was “procedurally sound and substantively reasonable.” Two groups petitioned the U.S. Supreme Court for a writ of certiorari. On January 16, 2010, the Supreme Court denied the petitions, thus concluding this litigation.

The FAA is continuing to implement this important yet controversial project:

Anyone who’s driven on a dirt road knows that it’s hard to find a smooth dirt road. No matter where you are, those bumps pop up like a washboard. But one thing is indisputable, though, and that is the more heavily traveled the road, the bigger the bumps.

As you know, this Administration wants to get rid of any bumps on the path to air traffic modernization.

When implementation of this airspace redesign is complete, there will be delay reduction of up to twenty percent—a substantial step towards smoothing out the bumps.

III. CONGESTION MANAGEMENT AT NEW YORK AIRPORTS

As discussed with respect to airspace redesign, the FAA is working to address congestion and delays at the three major New York airports: JFK, EWR, and LGA. The problem at these
airports is simple to state in economic terms: demand exceeds supply. However, the solution is anything but simple because of the variety of stakeholders and their competing interests. The FAA must consider each of these competing interests as it works towards a long-term solution to the problem of airport congestion.

A. BACKGROUND

1. LaGuardia Airport

Because of its proximity to midtown Manhattan and the resulting high demand by travelers to New York City, LGA consistently has been one of the nation's most congested airports.\textsuperscript{119} Exacerbating the high passenger demand, the airspace and airfield capacity of the airport are limited because the airspace is constrained by two other major airports in the area (JFK and EWR),\textsuperscript{120} and there is no place to build an additional runway without extending the airport into Bowery or Flushing Bays, which is cost- and environmental-consequence-prohibitive.\textsuperscript{121}

Beginning in 1969, the FAA managed congestion and delays at LGA through the High Density Rule (HDR).\textsuperscript{122} The HDR restricted take offs and landings at LGA during certain hours by allocating slots.\textsuperscript{123} Prior to the Airline Deregulation Act of 1978, airlines agreed to the reservation allocations made through airline scheduling committees.\textsuperscript{124} Following deregulation, new entrants formed and began operating at LGA, and legacy carriers increased their operations; consequently, the scheduling committees deadlocked as competition for limited resources increased.\textsuperscript{125} Responding to these new problems, the DOT promulgated a new subpart S to part 93 in 1985 to replace the


\textsuperscript{120} See id.

\textsuperscript{121} See id. at 51,363.

\textsuperscript{122} Id. The HDR for LGA was codified in 14 C.F.R. part 93, subpart K; though this subpart and subpart S still exist, they no longer are effective for LGA. See infra notes 127–30 and accompanying text.

\textsuperscript{123} Congestion Management Rule for LaGuardia Airport, 71 Fed. Reg. at 51,363; see also supra note 25 (defining “slot”).


\textsuperscript{125} Id.
scheduling committees with use-or-lose provisions and permission to operate a secondary market for slots.\textsuperscript{126}

In 2000, Congress enacted the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (AIR-21)\textsuperscript{127} to phase out the HDR and terminate it at LGA on January 1, 2007.\textsuperscript{128} AIR-21 also directed the Secretary of Transportation to grant exemptions from the HDR's slot limits to new entrants and operations that served small communities.\textsuperscript{129} Congress recognized that this legislation could increase congestion and delays at the airport and accordingly preserved the FAA's authority for safety and movement of air traffic despite the phase-out of the HDR.\textsuperscript{130}

By the fall of 2000, air carriers were operating over 300 new scheduled flights at LGA and had plans to operate more.\textsuperscript{131} The average delay at the airport increased 144\% from 15.52 minutes in March 2000 to 37.86 minutes in September 2000.\textsuperscript{132} Delays spread across the nation because an aircraft departing late from LGA would affect the schedule for that aircraft by delaying its subsequent flights, and these delays build upon each other.\textsuperscript{133} By September 2000, flight delays at LGA soared to twenty-five percent of the nation's delays from ten percent the previous year.\textsuperscript{134}

To provide relief from the increasing delays, the FAA capped scheduled operations at seventy-five per hour and unscheduled operations at six per hour, and it conducted a lottery to allocate the slot exemptions.\textsuperscript{135} These caps reduced delays at LGA from

\textsuperscript{126} Id. (referencing High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52,180 (Dec. 20, 1985) (to be codified at 14 C.F.R. pts. 11, 13)).


\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} Id. (citing High Density Airports; Notice of Lottery of Slot Exemptions at LaGuardia Airport, 65 Fed. Reg. 75,765 (Dec. 4, 2000)). The lottery was conducted on December 4, 2000, and the operation limitations began on January 31, 2001. Id.
330 aircraft delays daily in October 2000 to ninety-eight daily aircraft delays in April 2001.\footnote{136} 

Based on this empirical data, the FAA determined that simply allowing the HDR to expire, as contemplated by AIR-21, was not an option.\footnote{137} The FAA would have to implement some sort of administrative scheme to address congestion.\footnote{138} The FAA realized that it would not be able to implement a permanent congestion management solution for LGA before the January 1, 2007, expiration of the HDR.\footnote{139} Accordingly, it promulgated a temporary order retaining the caps for scheduled operations at seventy-five per hour and for unscheduled operations at six per hour.\footnote{140} In August 2008, the FAA amended the order by decreasing the cap for unscheduled operations to three per hour.\footnote{141} In January 2009, the FAA amended the order by decreasing the cap for scheduled operations to seventy-one per hour, but all current operations above that cap were grandfathered unless an airline voluntarily surrendered its slot allocation.\footnote{142} This temporary order remains in effect, at least, through October 29, 2011.\footnote{143}

During the summer of 2007, flight delays nationally were the second worst on record.\footnote{144} As a result of the crippling delays, the Secretary of Transportation formed the New York Aviation Rulemaking Committee (NY ARC) to explore options for addressing congestion and delays at the three New York airports

\footnote{136} Id.  
\footnote{139} See id.  
\footnote{140} Id.  
and to obtain input from the major stakeholders. The NY ARC provided its recommendations in December 2007.

The FAA promulgated a final rule in October 2008 with an effective date of December 9, 2008. That rule was rescinded on October 9, 2009, before it became effective. Because only the order is currently in place, the FAA has initiated a rulemaking project to implement a long-term congestion management solution for LGA.

2. John F. Kennedy International Airport

Like LGA, JFK has high passenger demand and constrained airspace and runway capacity. There is no reasonable means of adding a runway because the airport is boxed in by Jamaica Bay and high-density residential areas on all sides. Also, as at LGA, the FAA managed congestion at JFK from 1969 through 2006 through the HDR. In 1994, Congress granted the Secretary of Transportation authority to grant exemptions from the HDR to new entrants. The DOT exercised this authority in 1999 by granting seventy-five slot exemptions to JetBlue Airways (JetBlue), with the condition that JetBlue would operate the majority of its flights outside the slot-controlled hours. AIR-21 set a termination date of January 1, 2007, for the HDR at JFK.

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147 Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 60,574.

148 Congestion Management Rule for LaGuardia Airport, 74 Fed. Reg. 52,132, 52,132 (Oct. 9, 2009) (to be codified at 14 C.F.R. pt. 93). The rule had never become effective because it was stayed by the U.S. Court of Appeals for the District of Columbia Circuit due to pending litigation. Id.


150 See id.


152 Id. (citing 49 U.S.C. § 41714 (2006)).

153 Id.

154 Id.
Historically, JFK operated primarily as an international gateway, with flights concentrated in afternoon and evening arrival and departure banks consisting of international flights and of domestic connecting flights that supported those international flights.\textsuperscript{155} Beginning in the spring of 2006, airlines dramatically increased domestic operations at JFK throughout the day.\textsuperscript{156} Because of this increase in operations during the summer of 2007, demand exceeded airport capacity in many periods of the day, resulting in congestion and delays.\textsuperscript{157} The average daily operations increased twenty-one percent from 2006 to 2007, and the on-time performance metrics precipitously declined.\textsuperscript{158} As for LGA, delays at JFK cascaded throughout the nation.\textsuperscript{159}

In January 2008, the FAA promulgated a temporary order capping scheduled operations at eighty-one per hour to assist with the summer 2008 scheduling season.\textsuperscript{160} The temporary order remains in effect, at least, through October 29, 2011, as the FAA formulates a permanent solution.\textsuperscript{161}

The FAA promulgated a final rule in October 2008 with an effective date of December 9, 2008.\textsuperscript{162} That rule was rescinded on October 9, 2009, before it became effective.\textsuperscript{163} Because only the order is currently in place, the FAA has initiated a rulemaking project to implement a long-term congestion management solution for JFK.

\textsuperscript{155} Id. at 29,627.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{163} Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 74 Fed. Reg. 52,134, 52,134 (Oct. 9, 2009) (to be codified at 14 C.F.R. pt. 93). The 2008 rule never became effective because it was stayed by the U.S. Court of Appeals for the District of Columbia Circuit due to pending litigation. Id.
3. Newark Liberty International Airport

Like LGA and JFK, EWR has high passenger demand and constrained airspace and runway capacity.\textsuperscript{164} EWR is bound by the Port of Newark and high-density commercial and residential areas, limiting its ability to expand runways.\textsuperscript{165} Also, like the other two major New York airports, EWR had initially been subject to the HDR, but the rule was suspended because it had sufficient capacity to support demand.\textsuperscript{166} However, by 2007, EWR became the second worst airport for on-time performance as demand exceeded capacity.\textsuperscript{167}

In May 2008, the FAA promulgated a temporary order capping scheduled operations at eighty-one per hour.\textsuperscript{168} As operations were capped at LGA and JFK, the airlines could relocate their operations to EWR. Therefore, EWR required caps to balance the overall congestion of the three New York airports. The temporary order remains in effect, at least, through October 29, 2011.\textsuperscript{169}

The FAA promulgated a final rule in October 2008 with an effective date of December 9, 2008.\textsuperscript{170} That rule was rescinded on October 9, 2009, before it became effective.\textsuperscript{171} Because only the order is currently in place, the FAA has initiated a rulemak-

\textsuperscript{164}See P'SHIP FOR N.Y. Cty, supra note 149, at 7.
\textsuperscript{165}See id.
\textsuperscript{167}Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 73 Fed. Reg. 29,626, 29,628 (proposed May 21, 2008) (rescinded by 74 Fed. Reg. 52,134 (Oct. 9, 2009)).
\textsuperscript{171}Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 74 Fed. Reg. 52,134, 52,134-35 (Oct. 9, 2009) (to be codified at 14 C.F.R. pt. 93). The rule had never become effective because it was stayed by the U.S. Court of Appeals for the District of Columbia Circuit due to pending litigation. Id. Following the rescission of the final rules, all cases pending in the Court of Appeals were dismissed by stipulation. Port Auth. of N.Y. & N.J. v. FAA, No. 08-1329, 2009 WL 3568661, at *1 (D.C. Cir. Oct. 14, 2009) (dismissing petition as moot) (consolidated with Nos. 08-1331, 08-1332, 08-1333, 08-1343, 08-1344, 08-1355, and 08-1371).
ing project to implement a long-term congestion management solution for EWR.

B. Stakeholders and Their Interests

Congestion management is a complicated problem that is compounded by the variety of stakeholders and their competing interests. Some of the stakeholders have multiple interests that conflict with each other. The stakeholders include airlines, commercial operators, the traveling public, the airport operator, and other governmental entities.

A major stakeholder in the issue of congestion management is the Secretary of Transportation, who must consider a variety of public interest objectives in addition to airspace efficiency. These objectives include the following:

1. Keeping available a variety of adequate, economic, efficient, and low-priced air services; placing maximum reliance on competitive market forces and on actual and potential competition; avoiding airline industry conditions that would tend to allow at least one air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation; encouraging, developing, and maintaining an air transportation system relying on actual and potential competition; encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry; maintaining a complete and convenient system of scheduled air transportation for small communities; ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service; and acting consistently with obligations of the U.S. Government under international agreements.

The DOT works with the FAA on an ongoing basis to determine whether proposed FAA solutions adequately address these policy concerns.

An airline's principal interest is maximizing profitability. An airline can maximize revenue by flying operations in the largest


\[173\] Id. (citing 49 U.S.C. §§ 40101(a)(4), (6), (10)-(13), (16), 40105(b) (2006)).

\[174\] See, e.g., id. at 51,361-63 (illustrating specific ways in which the DOT had worked with the FAA to address these concerns at LGA).
aircraft that it can fill because the cost to operate a large aircraft is the lowest on a seat per mile basis.\textsuperscript{175} This is why long-haul international flights generally are most profitable.\textsuperscript{176} Although airlines can achieve the lowest per-unit cost by flying a small number of flights with large aircraft, airlines have an equal or greater interest in market presence and schedule utility.\textsuperscript{177} For example, flying one flight in a Boeing 747 per day from New York to Chicago may be the best choice from a purely per-unit cost standpoint, but an airline would not be able consistently to fill that flight because passengers do not want to wait around for that one daily flight. Passengers, especially those on relatively short-haul flights, want to fly when it is convenient for them. Therefore, it is in the airline's interest to run multiple (sometimes hourly) New York-to-Chicago flights. As a result of this pressure to maximize passengers' choices, on April 19, 2005, there were sixteen LaGuardia-to-Baltimore flights, forty-four LaGuardia-to-Raleigh-Durham flights, and twenty LaGuardia-to-Philadelphia flights.\textsuperscript{178} All of these flights were conducted in aircraft with an average seat capacity below sixty.\textsuperscript{179} The large number of small flights decreases the through-put of the airport and leads to congestion and delays.\textsuperscript{180} In economic terms, the market is inefficiently allocating resources.

Airlines also have made significant investments in their current operations at airports based on their existing slots.\textsuperscript{181} For example, some airlines own their own gates at the three major New York airports.\textsuperscript{182} Additionally, airlines have spent unknown amounts of capital establishing their routes and market presence.\textsuperscript{183} They have an interest in protecting these investments

\textsuperscript{176} See id. at 150–53 (discussing which flights are most profitable).
\textsuperscript{177} See, e.g., Congestion Management Rule for LaGuardia Airport, 71 Fed. Reg. at 51,362–63 (demonstrating how, in the absence of restrictions, airlines will increase flights without restraint).
\textsuperscript{178} Id. at 51,364.
\textsuperscript{179} Id. The average seat capacities for Baltimore (large hub) was thirty-eight, for Raleigh-Durham (medium hub) fifty, and for Philadelphia (large hub) fifty-eight. Id.
\textsuperscript{180} See id.
\textsuperscript{182} Id. (discussing ownership of slots).
\textsuperscript{183} Id.
from regulatory action that could decrease market share and from competitors that seek to gain market share.\footnote{See id. at 60,591 (detailing practices that carriers might employ to maintain market share).}

Additionally, airlines have a significant interest in minimizing delays, which is interrelated with their interest in maximizing market presence.\footnote{See Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. 20,846, 20,849 (proposed Apr. 17, 2008) (rescinded by 74 Fed. Reg. 52,132 (Oct. 9, 2009)).} Delays always translate into increased costs or missed revenue opportunities.\footnote{P'SHIP FOR N.Y. Cty, supra note 149, at 7; see, e.g., Annual and Per-Minute Cost of Delays to U.S. Airlines, AIR TRANSP. Ass'N., http://www.airlines.org/Economics/DataAnalysis/Pages/CostofDelays.aspx (last visited Sept. 30, 2010).} Excessive delays also affect customer behavior, which in turn can affect market share.\footnote{See Annika Mengisen, Adjust Your Flight Plan to Avoid Airport Delays, THE STREET (Aug. 22, 2007, 12:00 PM), http://www.thestreet.com/story/10375670/4/adjust-your-flight-plan-to-avoid-airport-delays.html (discussing ways consumers may change their behavior due to recurring delays).} For example, some passengers avoid connections at the three major New York airports to decrease the likelihood that they will suffer delayed or canceled flights.\footnote{See id.} As stated earlier, delays cost airlines millions of dollars every year.\footnote{See sources cited supra note 186.}

Airlines generally support a cap on operations because they understand the consequences of congestion and delay, but they are concerned about any market manipulation by the FAA or the DOT.\footnote{See Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 20,847.} Airlines prefer the grandfathering of slot allocations held below the caps because holding all existing slots allows them to maintain their operations at an airport.\footnote{See id. at 20,854 (discussing benefits of grandfathering slot allocations).} Airlines are nervous about a withdrawal of slots to reach the caps because of its impact on market share.\footnote{See id. at 20,849.} Further, the loss of any slots by existing operators could result in termination of important feeder flights into a hub airport, which may negatively impact service to small markets.\footnote{Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. 60,574, 60,588 (Oct. 10, 2008) (rescinded by 74 Fed. Reg. 52,132 (Oct. 9, 2009)).} Any sort of withdrawal of slots below the caps for reallocation to potential new entrants (i.e., competitors) would run counter to the existing operators' economic interests.\footnote{See id.}
Smaller commercial operators and other general aviation operators have an interest in access to an airport. A slot allocation scheme that shuts out unscheduled operations is unacceptable to these operators. Unlike airlines, which plan their schedules months in advance, unscheduled operators often have no more than an hour or two notice before an operation. If a slot is unavailable at that time, the operator may suffer economic consequences from not conducting the flight. Business aviation and all-cargo operators are most affected because of the nature of their business models. Unscheduled operators and other general aviation operators also do not see the connection between their relatively small utilization of any of the airports and the general congestion and delays at those airports. They believe the large carriers are responsible for the congestion and delay problems, and they contend the same carriers should bear the burden of fixing the problem. These operators often do not have the option to operate from other smaller regional airports (such as Westchester, Islip, Republic, Stewart, Morristown, or Teterboro) because of the operating constraints of the aircraft they use or because they have significant infrastructure investments at larger airports.

Passengers, generally supported by passenger advocacy groups, have interrelated interests like the carriers. Passengers primarily want the lowest fares possible, which is provided

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195 See id. at 60,591–92.
196 See id. at 60,591.
198 Id.
199 Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 60,591; see also Operating Limitations for Unscheduled Operations at John F. Kennedy International Airport and Newark Liberty International Airport, 73 Fed. Reg. at 54,659 ("The National Air Carrier Association (NACA) contends that the proposed order unfairly targets a segment of the industry, unscheduled operations, that does not contribute significantly to the capacity constraints at the airports.").
200 See, e.g., Reservation System for Unscheduled Arrivals at Chicago’s O’Hare International Airport, 70 Fed. Reg. 39,610, 39,610 (July 8, 2005) (to be codified at 14 C.F.R. pt. 93) (summarizing the viewpoints of unscheduled operators at O’Hare in response to a similar ruling).
202 See id. at 60,576, 60,594.
by intense competition between the airlines.\textsuperscript{203} Passengers also want a variety of options so that air travel fits their schedules rather than the other way around.\textsuperscript{204} For example, business travelers prefer to travel early in the morning and in the evening to allow the maximum number of working hours at the destination. Despite this interest in choice, which generates a large number of flights increasing the potential for congestion, passengers want to travel without delays.\textsuperscript{205} Delays for passengers translates into missed business opportunities, unnecessary expense, and lost leisure time.\textsuperscript{206}

Another group of stakeholders includes “[f]ederal, state and local government representatives who [are] concerned the FAA’s proposal, if adopted, would result in specific communities losing direct service” to any or all of the major New York airports.\textsuperscript{207} New York City also has an interest in efficient air service to the city because its local economy is heavily dependent on travelers to the area.\textsuperscript{208} It does not want service cut from communities that feed its engine of commerce.\textsuperscript{209}

The Port Authority of New York and New Jersey (Port Authority), which manages all three major New York airports, has an interest in efficient operations at the airports and in its ability to manage its property.\textsuperscript{210} Its biggest concern about regulatory action is that a regulation would disrupt the operations of airlines at the airports.\textsuperscript{211} Each airport is configured in such a way to support its existing operations.\textsuperscript{212} If there were a major change in those operations (for example, widespread turnover of gate

\begin{footnotesize}
\begin{enumerate}
\item See id. at 20,849 (discussing how airlines use multiple daily flights on smaller aircraft to accommodate market preferences).
\item See Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,331 (June 8, 2010) (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, 399) (discussing importance to passengers of notifications regarding delays).
\item Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 20,847.
\item P'SHIP FOR N.Y. CITY, supra note 149, at 35.
\item Id.
\item See id.
\item See, e.g., Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 20,851 (discussing limitations of LGA’s physical capacity).
\end{enumerate}
\end{footnotesize}
assignments), the Port Authority may not be able to guarantee efficient service at the airports or may have to make a large economic investment to guarantee that service.\textsuperscript{213} Airport operators also have limited resources to address congestion problems alone.\textsuperscript{214} Most airports, and especially the three major New York airports discussed earlier, are constrained from adding additional runways to increase airport capacity.\textsuperscript{215}

C. BALANCING THE INTERESTS

The large number of stakeholders and their interrelated interests complicate the FAA's role in developing a permanent solution to the congestion problem. For example, airlines' interest in maximizing market presence through a large number of flights is interrelated with their interest in minimizing delays. However, the former often works against the latter, and often, as seen during the summer of 2007, with disastrous consequences.\textsuperscript{216} Airlines often do not recognize these interests are interrelated because delays are an externality of airline operations. Delays negatively impact airlines and, to a greater extent, the flying public, but increased market presence benefits only airlines. Regulation by the FAA has the potential to internalize these externalities and encourage airlines to reduce operations to reduce delays.

The FAA could walk away from trying to manage congestion and delays at these airports and allow the airlines to manage their schedules.\textsuperscript{217} Under this strategy, the FAA could ensure safety despite increased air traffic through its "[a]ir traffic control procedures and traffic management initiatives such as ground delay programs, miles-in-trail restrictions, and aircraft re-routing."\textsuperscript{218} However, unfettered growth at the airports and the resulting congestion and delays detrimentally impacts the rest of the NAS.\textsuperscript{219} Moreover, the FAA has responsibility for the efficient utilization of airspace, which means that the FAA must address local congestion and delays that affect the entire sys-

\textsuperscript{213} See id. at 20,850–51.
\textsuperscript{214} See, e.g., discussion supra Part III.A.
\textsuperscript{215} CAPACITY NEEDS IN THE NATIONAL AIRSPACE SYSTEM, supra note 91, at 6.
\textsuperscript{216} See Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 20,847.
\textsuperscript{218} Id. at 51,363.
\textsuperscript{219} Id.
The FAA also has an interest in developing a long-term solution that provides certainty in the market and flexibility to deal with increased capacity gained from long-term projects, such as the Airspace Redesign or NextGen.\textsuperscript{221} The FAA’s primary goal is to manage congestion and delays by limiting the number of permitted operations at the three New York airports.\textsuperscript{222} However, the FAA is looking for a solution that does not stifle service to small communities or eliminate opportunities for new entrants.\textsuperscript{223} New entrants may be necessary to maintain competition at an airport.\textsuperscript{224} The FAA wants to encourage airlines to use the scarce number of slots in the most efficient way.\textsuperscript{225} Ultimately, the FAA must find a balance between (1) promoting competition and permitting access to new entrants and (2) recognizing historical investments in the airport and the need to provide continuity. It is not the role of the Government either to dictate particular business models or to constrain a market and provide no means for others to enter that limited market.\textsuperscript{226}

Finding this balance is particularly challenging for the FAA because it must contend with competing political viewpoints on the role of government, and the decisions with respect to these broad policies determine the FAA’s ultimate solution.\textsuperscript{227} One of these viewpoints is that nurturing new entrants is in the public interest and justifies market engineering.\textsuperscript{228} This viewpoint could lead to the agency seeking reallocation of slots in some fashion to facilitate new entrants or to reshape otherwise the competitive landscape at a slot-controlled airport.\textsuperscript{229} Another viewpoint is that government should merely enable and facilitate the operation of the market.\textsuperscript{230} This viewpoint would tend

\begin{itemize}
\item \textsuperscript{220} See 49 U.S.C. § 40103(b)(1) (2006).
\item \textsuperscript{221} See ROD, supra note 28, at 1 (describing the long-term gain to be achieved from the Airspace Redesign Project).
\item \textsuperscript{222} See Operating Limitations at New York LaGuardia Airport; Notice of Order, 71 Fed. Reg. 77,854, 77,854 (Dec. 27, 2006).
\item \textsuperscript{223} See id. at 77,858–59.
\item \textsuperscript{225} See id. at 20,846.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} See, e.g., id. at 20,851 (discussing competing interests posed by two airlines’ viewpoints).
\item \textsuperscript{228} See id. at 20,852.
\item \textsuperscript{229} See id. at 20,850–51.
\item \textsuperscript{230} See id. at 20,847, 20,850–51.
\end{itemize}
to focus on establishing an efficient market for slots with government oversight largely limited to maintaining a cap on operations, which would allow competitors to preserve and manage the valuation of their assets.\(^{231}\)

The FAA recognizes that one method of allocating slots would be to withdraw all currently-held slots and then reallocate them using some method that guarantees fairness and transparency.\(^{232}\) However, that method ignores the significant investments airlines have made in their existing slot allocations.\(^{233}\) Therefore, if the FAA were to move in that direction, it should consider some allocation method that grandfathers some portion of those slot allocations while still meeting its other policy goals. Grandfathering could "preserve service to communities" presently served by an airport and "minimizes disruption at the airport and to the traveling public."\(^{234}\) The FAA faces a challenge of determining where to draw the line and which interest (either the expectation of incumbency or the need for slot mobility) should be given a higher priority in rulemaking.\(^{235}\) There is a delicate balance between a withdrawal of slots so large that it stifles investment in service at the airport and a reallocation so small that it shuts out new entrants from the airport.\(^{236}\) Any withdrawal of slots also should be done over a period of time to minimize impact on airport operations.

The FAA recognizes a robust secondary market for slots is a good way for the market to allocate a scarce resource.\(^{237}\) A robust secondary market ensures that a traded slot ends up with the airline that values it most.\(^{238}\) A new entrant wishing to provide service at an airport could acquire slots on this market, as could airlines seeking to expand service.\(^{239}\) Airlines seeking to reduce service could use the market to recover some investment

\(^{231}\) See id.


\(^{233}\) See id. at 60,555-56 (discussing the FAA's regard for investments and its desire to respect them).


\(^{235}\) See id. (describing different aspects of the rule that highlight this challenge).

\(^{236}\) See id. (demonstrating the FAA's sensitivity to this balance).


\(^{238}\) Id. at 60,577, 60,587.

\(^{239}\) See id. at 60,580.
costs. A robust secondary market can be undermined when slot allocations are made outside of that market.

The FAA previously proposed a two-part bulletin board auction where the first round was blind and limited to a cash offer, followed by a second round that allowed the direct negotiation between known parties over non-cash assets.\footnote{Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. 20,846, 20,857 (proposed Apr. 17, 2008) (rescinded by 74 Fed. Reg. 52,132 (Oct. 9, 2009)).} The FAA determined that this type of auction would ensure fairness and efficiency because it would allow all potential bidders to participate.\footnote{See id. at 20,856–57.} Following an auction, the FAA proposed a requirement for the parties to submit a detailed report of the accepted bid and all rejected bids to the DOT to ensure that the parties did not engage in anticompetitive behavior.\footnote{Id. at 20,857.} Portions of this information could be publicly disclosed, thereby allowing all airlines to value accurately slots for that market.\footnote{Id.}

Any permanent solution also should consider strict use-or-lose requirements, which encourage an airline either to maximize usage of its slot allocations or to dispose of those slots on the secondary market.\footnote{Id. at 20,858.} High utilization could be achieved by setting a high usage requirement, such as eighty or ninety percent over a sixty- or ninety-day period, or by a requirement that a slot allocation be tied to a specific scheduled operation.\footnote{See id.} Under the current orders, an airline can report flight cancellations under multiple slot allocations to meet the usage requirements.\footnote{Id.} “For example, four flights could be distributed over five [slots] and each [slot] would meet the eighty percent usage requirement.”\footnote{Id. at 20,857.} Regardless of whether this action is taken for anticompetitive reasons, underutilizing slot allocations prevents the most efficient usage of an airport.\footnote{See id. at 20,849.}

Any permanent solution should consider unscheduled operations and include those operations in the total operational limits.\footnote{See id. at 20,857.} However, the caps should not stifle all unscheduled
operations at the airport nor sacrifice scheduled service, which provides greater throughput of passengers.

A permanent solution also should treat all New York airports as one system. If similar actions are not taken at all airports, then operators will relocate their operations to get around congestion management requirements.\textsuperscript{250} This permanent solution also may require investigating unscheduled operations at smaller New York area airports, like Westchester, Islip, Republic, Stewart, Morristown, and Teterboro, because all of these airports share the same congested airspace.

Finally, a permanent solution should consider the long-term implications of rulemaking. The FAA currently is undertaking general initiatives to increase airspace efficiency, such as the Airspace Redesign and NextGen.\textsuperscript{251} Additionally, accurate estimates of future demand are speculative because of the large number of variables.\textsuperscript{252} Accordingly, any permanent solution should be flexible enough to adapt to changed circumstances without returning to the problems of the past or future underutilization of capacity.

As the FAA works toward a solution to the congestion management problem at the three major New York airports, it should consider and balance these competing interests. Ultimately, the long-term solution should operate in the public's best interest, but getting to that solution is a complicated undertaking.

IV. WASHINGTON, D.C. SPECIAL FLIGHT RULES AREA

The Washington, D.C. Special Flight Rules Area (DC SFRA) final rule and other rulemaking activities leading up to it provide an excellent example of the FAA balancing its special priority of safety and the government's general priority of security with the stakeholder's interest in freedom of transit in the airspace. The FAA considered the interests of, and frequent opposition from, various stakeholders affected by its rulemakings.\textsuperscript{253} The FAA labored for more than seven years to craft a perma-


\textsuperscript{251} See supra notes 48–52 and accompanying text.

\textsuperscript{252} See, e.g., Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. at 20,851 (describing how previous caps have made future demand hard to judge).

\textsuperscript{253} See infra Part IV.B.
nent solution that considered these competing interests and attempted to impose minimal burdens on all stakeholders while achieving the critical priority of security.\textsuperscript{254}

A. BACKGROUND

Before September 11, 2001, the majority of airspace in the Washington, D.C. National Capital Region (NCR) was open to all aircraft under the General Operating and Flight Rules under 14 C.F.R. part 91.\textsuperscript{255} Because of the volume of traffic and the number of airports in the NCR, a portion of the area was designated as Class B airspace, which requires clearance from air traffic control before operating an aircraft within the airspace.\textsuperscript{256} Additionally, for national security purposes, the FAA designated prohibited areas for aircraft operations under 14 C.F.R. part 73 around the White House, the U.S. Capitol building, and the U.S. Naval Observatory (the office and residence of the Vice President).\textsuperscript{257}


\textsuperscript{255} Id. at 76,196.

\textsuperscript{256} Id.; see generally 14 C.F.R. § 91.131 (2010) (prescribing operating rules for Class B airspace).

\textsuperscript{257} Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. at 76,196.


\textsuperscript{259} Nat’l Comm’n on Terrorist Attacks Upon the U.S., supra note 258, at 8. All fifty-six passengers, nine crewmembers, and an unknown number of people in the building were killed instantly. Id. The building subsequently collapsed, causing additional loss of life. Fed. Emergency Mgmt., supra note 258, ch. 1, at 4.

\textsuperscript{260} Nat’l Comm’n on Terrorist Attacks Upon the U.S., supra note 258, at 10. All fifty-eight passengers, six crewmembers, and several people on the ground at the Pentagon were killed, and a significant portion of the Pentagon was damaged. Id.
Pennsylvania.\textsuperscript{261} It is widely believed that either the U.S. Capitol or White House in Washington, D.C. was the target of the terrorists who gained control of Flight 93.\textsuperscript{262} This was the first time terrorists had used a hijacked U.S. aircraft as a weapon of attack.\textsuperscript{263} Because of this novel form of attack and the risks to high-value targets in the NCR, the U.S. government scrambled to protect these targets from future attack.\textsuperscript{264}

Immediately following the terrorist attacks on September 11, 2001, the FAA took steps to ensure that the NAS was secure from immediate terrorist attacks.\textsuperscript{265} It implemented a temporary prohibition on all aircraft operations within the United States, which was lifted in part on September 13, 2001.\textsuperscript{266} After the system-wide restrictions were lifted, the FAA maintained temporary restrictions on high-value target areas, including the NCR.\textsuperscript{267} Using the U.S. Notices to Airmen (NOTAM) System,\textsuperscript{268} the FAA issued a Temporary Flight Restriction (TFR) prohibiting all aircraft operations within a twenty-five-nautical-mile radius of the Washington, DC Very High Frequency Omnidirectional Range / Distance Measuring Equipment (DCA VOR/DME), which encompassed all of Washington, D.C. and the surrounding areas in Maryland and Virginia.\textsuperscript{269} This prohi-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{261} Id. at 14.
\item \textsuperscript{262} Id.
\item \textsuperscript{263} See id. at 17.
\item \textsuperscript{264} See id. at 41.
\item \textsuperscript{268} Id. The FAA uses NOTAMs to notify pilots of airspace restrictions among other important aviation information. Id. at 41,587 n.1.
\end{enumerate}
\end{footnotesize}
bition effectively closed Ronald Reagan Washington National Airport (DCA). 270

On October 4, 2001, DCA was reopened to limited air carrier operations subject to various security restrictions. 271 These restrictions were eased over the next several years as the security vetting of the operators was judged to minimize the risks of future attacks; however, general aviation operations remained essentially non-existent at the airport because of the security vetting requirements. 272 After the TSA was created in November 2001, it assumed civil aviation security functions including responsibility for the security of operations at DCA. 273 In July 2005, the TSA issued an interim final rule to allow general aviation operators to fly to and from DCA if those operators were vetted by the TSA and if the aircraft flew from specified “gateway” airports where inspections could be conducted. 274

In December 2001, the TFR area around Washington, D.C. was reduced to a fifteen-nautical-mile radius around the DCA VOR/DME. 275 In February 2003, the FAA issued a NOTAM establishing the Washington, D.C. Metropolitan Area Air Defense Identification Zone (DC ADIZ) and redesignating the previously identified fifteen-nautical-mile TFR area as the Washington, D.C. Metropolitan Area Flight Restricted Zone (FRZ). 276 Within the DC ADIZ, the FAA prescribed flight plan filing requirements as well as the use of radio communication with air traffic control and the transmission of a discreet transponder code (commonly known as “squawk and talk”) for operations under VFR. 277

These temporary restrictions remained in place for the next several years, and no major terrorist attacks occurred. 278 Various government agencies used this intervening time to investigate a long-term solution for this airspace, including possibly

271 Id.
272 Id.
273 Id. at 41,588.
274 Id.
276 Id. at 76,197.
277 Id.
lifting the flight restrictions. Because Washington, D.C. is the seat of the federal government, the home to many foreign embassies, and the location of many significant national monuments, and because military and security agencies continued to intercept intelligence regarding potential attacks, the FAA sought to make airspace restrictions permanent to ensure security in this area. In August 2005, at the request of the Departments of Homeland Security and Defense, the FAA proposed a rulemaking to formalize the DC ADIZ and FRZ. The FAA received more than 21,000 written comments and many oral comments submitted during four public meetings—most opposed the proposal. A final rule was issued on December 16, 2008, and became effective in February 2009.

Under the final rule, the FRZ is essentially a circle with a fifteen-mile radius around the DCA VOR/DME, which encompasses all of Washington, D.C., the Pentagon, and the immediate surrounding areas in Virginia and Maryland. No aircraft operations are permitted within this area except for military, law enforcement, essential services, and FAA-approved Part 121 operations. The DC SFRA is essentially a circle with a thirty-mile radius around the DCA VOR/DME. Aircraft operations within this area must have filed flight plans for the operation, must squawk a discreet code from a transponder, and must be in contact with air traffic control.

B. Stakeholders and Their Interests

Because of the issues involved with restricting airspace in the NCR, which is a heavily-trafficked area, there are a variety of stakeholders whose interests must be considered. These stakeholders include other government agencies, pilots and commercial aviation operators, small airport operators, the traveling

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279 See id.
280 Id.
281 Id. at 42,252.
283 Id. at 76,195.
284 14 C.F.R. § 93.335.
285 Id. § 93.341.
286 Id. § 93.335.
287 Id. § 93.339.
public, and the Metropolitan Washington Airports Authority (MWAA).

Other government agencies are also major stakeholders regarding matters of national security. As discussed earlier, the TSA assumed the responsibility for identifying and assessing security threats with respect to aviation, but the FAA retains authority to promulgate regulations responding to security concerns.289 On June 20, 2006, then-President George W. Bush issued National Security Presidential Directive-16, Aviation Security Policy, which linked the DHS, the DOD, the DOT, the Department of Justice (DOJ), the Department of State, the Department of Energy, and the Office of the Director of National Intelligence for the protection and security of the aviation system.290 This interagency coordination provides a forum for the FAA to prioritize and balance the security interests as they apply to the NAS.291 The FAA also works closely with the DHS, the DOJ, and the Secretary of Defense (as well as the U.S. Northern Command and the North American Aerospace Defense Command) to identify and evaluate aviation-related threats and to facilitate a response to those threats.292 These agencies’ primary interest is to secure the airspace around the NCR to prevent aviation-related terrorist attacks.293 The most effective means to achieve this goal is to prohibit all air traffic in an area large enough to allow countermeasures if a potentially hostile aircraft entered that airspace.294

Another major stakeholder is the diverse group of general aviation pilots, business and commercial pilots, commercial operators, and air carriers.295 These stakeholders are burdened by the procedures for operating within the DC SFRA and FRZ.296 Commercial operators and carriers also suffer economic burdens as they try to service their customers that desire to fly to and from

289 See supra notes 12-15 and accompanying text.
291 Id.
292 Id.
294 Id. at 45,252.
296 See id.
They must equip aircraft to meet the requirements for operating in the DC SFRA and often encounter delays when operating there. Often, they also must take actions to meet the requirements of flying to or from their desired airport because of the security requirements for that airport. Indirectly, the customers of these operators have an interest in the airspace regulation in the NCR because their ability to access the NCR easily is impacted by any flight restrictions. The customers may be limited in their choice of airports, which can add delays to the overall trip because of additional commuting time. Additionally, these stakeholders have another interest that is more interrelated with the security interests of the federal government than they realize: a future terrorist attack could cause even greater damage to their businesses and quality of life in the region.

Many commenters to the proposed DC SFRA rule, primarily representing general aviation pilots in the Washington, D.C. area, were concerned that the rule unfairly restricted their freedom of movement and right of transit in the airspace without an adequate security justification; some went so far as to claim that the restrictions "let the terrorists win." This argument was supplemented by the argument that general aviation pilots pose little threat to security and that most aircraft used in general aviation are not large enough to pose a threat.

In the initial period following September 11, 2011, the MWAA, which operates DCA, was a major stakeholder because it

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298 See id. at 41,590–91.
299 See, e.g., id. (detailing the additional requirements operators must meet to obtain flight approval into DCA).
300 See, e.g., id. at 41,588 (requiring passengers to fly into DCA from certain TSA approved airports).
301 See id.
had been closed due to airspace restrictions. As its operations were gradually restored with additional security requirements, its interest in ongoing rulemakings decreased, provided that these rulemakings did not re-impose strict prohibitions. In the intervening eight years, the airport has absorbed the costs related to increased burdens into its normal operations.

Under the original temporary restrictions, there were a significant number of airports on the edge of the proposed DC SFRA (commonly known as "fringe airports"). Those airports had an interest in a regulation that did not stifle their aviation traffic because a pilot would be more likely to fly from an airport not subject to the additional DC SFRA requirements than from one subject to them. In addition to the airports in the DC SFRA, there are three airports within the FRZ: College Park Airport, Potomac Airfield, and Washington Executive/Hyde Field Airport (collectively, "the Maryland Three"). Under the NOTAMs issued immediately after September 11, 2001, all operations were prohibited at these airports. This prohibition caused major economic hardships on the airports, which previously had about 89,000 operations per year before the restrictions, effectively driving them out of business. SFAR 94, issued in 2002, allowed some operations at the Maryland Three to ameliorate the economic burdens. However, they had a continuing interest that any final rule regulating this area did not overly burden the airports or their operations.

307 See id.
308 14 C.F.R. § 93.335 (2009). “Fringe airports” are airports located just within the outer boundary of the DC SFRA, including Barnes (MD47), Flying M Farms (MD77), Mountain Road (MD43), Robinson (MD14), and Skyview (51VA). Id.
309 See Washington, DC Metropolitan Area Special Flight Rules Area, 70 Fed. Reg. 45,250, 45,255 (proposed Aug. 4, 2005) (to be codified at 14 C.F.R. pt. 93) (noting that pilots are more likely to use fringe airports because they are not subject to the additional restrictions).
311 Id.
312 Id.
313 Id.
314 See id.
C. Balancing the Interests

During the rulemaking process, it was widely assumed that other federal agencies had forced the FAA to make airspace decisions that it otherwise would not have made.315 The FAA is obligated to regulate airspace in the interest of national security and consult with the Secretary of Defense when promulgating security regulations.316 This statutory mandate, along with other federal initiatives, encourages coordination between federal agencies on national security but leaves the final airspace decision to the FAA.317 The FAA coordinated with other federal agencies but ultimately issued a final rule based upon its reasoned judgment.318 Additionally, the FAA continues to work with these agencies to determine when and what sort of action must be taken on a temporary or permanent basis to address security risks.319

In the rulemaking process, the FAA had to place top priority on security issues, provided safety was not sacrificed, because the stakes were too high to risk another terrorist attack.320 Therefore, the interests of the flying public and the business interests of general aviation airport operators were subordinated.321

Nevertheless, the FAA considered the interests of individuals operating within the airspace and attempted to ease the burden of those stakeholders.322 The FAA coordinated with the DOD and DHS to ensure that the restricted areas (SFRA and FRZ) were large enough to provide sufficient time to conduct countermeasures to ensure the security of high-value targets if a potentially hostile aircraft entered the airspace but not so large as to burden needlessly the public.323 The resulting DC SFRA was reduced in size from that which was initially proposed.324 The FAA had reduced the size of the SFRA (then ADIZ) by NOTAM in August 2007 to its current thirty-nautical-mile radius and

315 Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. 76,195, 76,198 (Dec. 16, 2008) (to be codified at 14 C.F.R. pts. 1, 93). That assumption was refuted by the FAA in the preamble to the final rule. Id.
318 Id. at 76,198.
319 Id. at 76,202.
320 See id. at 76,201.
321 Id.
322 Id. at 76,198.
323 Id.
324 Id.
changed the shape to a circle. \textsuperscript{325} The modifications to the shape of the SFRA were intended to make it easier for pilots to navigate around the SFRA boundaries, thus reducing the likelihood of inadvertent encroachments. \textsuperscript{326} The reduced size also facilitates pilots who wish to fly around the SFRA to avoid the additional requirements. \textsuperscript{327} Additionally, the reduction in size decreased the number of airports affected by flight restrictions and increased the unrestricted airspace available for aircraft operations. \textsuperscript{328}

The FAA also implemented a flight plan filing requirement in the DC SFRA to get information on who was flying in the area. \textsuperscript{329} By balancing the burdens, the FAA determined that requiring the filing of flight plans was the least intrusive method of collecting this information. \textsuperscript{330} This also allowed the DC SFRA, which generally is open to all air traffic subject to the squawk and talk requirements, essentially to constitute a buffer zone around the high-value targets to provide additional response time in the event of a terrorist attack. \textsuperscript{331} This flight plan requirement, and resulting buffer zone, is less burdensome than creating a larger FRZ, which was an option on the table. \textsuperscript{332} Other alternatives considered and supported by various stakeholders were: establishing a fifty-five-nautical-mile outer ring and fifteen-nautical-mile inner ring; establishing a thirty-nautical-mile FRZ around the NCR; and establishing outer rings as large as 110 nautical miles. \textsuperscript{333} The stakeholders who advocated these options heavily emphasized security, but the FAA determined they were not in the public interest when less restrictive means were available. \textsuperscript{334}

The FAA attempted to accommodate the fringe airports as well as the pilots operating to and from those airports. The FAA developed specific egress-only procedures to allow aircraft to

\textsuperscript{325} Id. The August 2007 NOTAMs essentially maintained the dimensions of the FRZ, except for some minor boundary modifications. \textit{Id.}
\textsuperscript{326} See \textit{id.}
\textsuperscript{327} See \textit{id.} at 76,206.
\textsuperscript{328} \textit{Id.}
\textsuperscript{329} \textit{Id.} at 76,202.
\textsuperscript{330} \textit{Id.} at 76,203.
\textsuperscript{331} \textit{Id.}
\textsuperscript{332} \textit{Id.} at 76,203–04.
\textsuperscript{333} \textit{Id.}
take off at an airport on the edge of the SFRA, enter the SFRA on takeoff, and quickly exit the SFRA without violating the rules.\textsuperscript{335} This accommodated fringe airports and allowed general aviation pilots to continue to have a variety of airport options within the NCR.\textsuperscript{336} The FAA also implemented special flight procedures for the Maryland Three to allow traffic to continue at those airports, and operators can continue to use those airports if they first are vetted by TSA.\textsuperscript{337} Although those special procedures are heavy burdens, the FAA chose those burdens over totally prohibiting traffic at the airports, which had been an option.\textsuperscript{338}

The FAA also engaged in extensive educational outreach, including a free online course, to inform pilots of the boundaries of the FRZ and SFRA, the rules for operating within this airspace, and the consequences of violating those rules.\textsuperscript{339} Completion of this training is required for all pilots prior to operating aircraft under VFR within a sixty-nautical-mile radius of the DCA VOR/DME.\textsuperscript{340} The goal of this outreach was to minimize the incidence of unintentional encroachments and their attendant consequences.\textsuperscript{341}

These concessions to the various stakeholders had to be balanced against the FAA's primary mission of ensuring aviation safety.\textsuperscript{342} Because of this large carve-out of airspace, the FAA assumed that many aircraft operators would choose to circumnavigate the SFRA.\textsuperscript{343} This circumnavigation could increase congestion at the edges of the SFRA, increasing the potential for an accident or incident.\textsuperscript{344} However, the FAA determined that the volume of traffic should not create a safety issue.\textsuperscript{345} The

\begin{itemize}
\item \textsuperscript{335} 14 C.F.R. § 93.345 (2009).
\item \textsuperscript{336} See Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. at 76,202.
\item \textsuperscript{337} 14 C.F.R. § 93.343.
\item \textsuperscript{338} See Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. at 76,203–04.
\item \textsuperscript{339} Id. at 76,204.
\item \textsuperscript{340} 14 C.F.R. § 91.61(a).
\item \textsuperscript{341} See Washington, DC Metropolitan Area Special Flight Rules Area, 70 Fed. Reg. 45,250, 45,253 (proposed Aug. 4, 2005) (to be codified at 14 C.F.R. pt. 93); see also Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. at 76,204.
\item \textsuperscript{342} Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. at 76,198, 76,201.
\item \textsuperscript{343} Id. at 76,209.
\item \textsuperscript{344} Id. at 76,204.
\item \textsuperscript{345} Id.
\end{itemize}
FAA did take several actions to ensure safety within and around the DC SFRA. It changed some air traffic control procedures within the area to mitigate air traffic controller workload and facilitate air traffic separation in the area. The FAA also established gates for entry and exit of the DC SFRA to reduce the safety implications of too many aircraft congregating around fixes waiting for the assignment of a discreet transponder code, which is required for operating in the SFRA.

In the final rule, the FAA acknowledged that it could not satisfy every stakeholder, but it formulated a rule that best struck a balance between the competing interests. The FAA believes that the DC SFRA final rule achieves the agency's objectives using the least burdensome means.

V. ENFORCING SAFETY REGULATIONS

A robust compliance and enforcement program is vital to the FAA's ability to carry out its central mission to promote safety in civil aviation. The process of enforcing the FAA’s safety rules is not immune to the complexities and challenges presented by different stakeholder interests. As with rulemaking and airspace management, the FAA must consider a number of different interests each time it pursues an enforcement action.

There are several key objectives for the agency's compliance and enforcement program: (1) protect the public; (2) promote safety and compliance with statutory and regulatory requirements; (3) correct ongoing noncompliance; (4) deter future noncompliance; (5) punish aberrant behavior; and (6) take remedial action when necessary. The FAA has broad statutory authority to carry out these objectives as they relate to its responsibilities and powers concerning safety in air commerce. This authority has equipped the FAA with a wide range of options for addressing noncompliance with safety rules, including administrative action, civil penalties, certificate suspensions for a fixed period of time, indefinite certificate suspensions pending com-
pliance or demonstration of qualifications, and certificate revocations.  The FAA must take the action most appropriate to promote safety and compliance with the regulations and must do so in a manner that is fair and reasonable. A number of different factors must be considered and weighed in making this determination.

Using the following scenario as a guide, this section will discuss the FAA’s attempts to balance its mission to promote aviation safety with competing public priorities and stakeholder interests in carrying out its compliance and enforcement program.

The FAA discovers an unsafe condition on a specific model of aircraft. The agency issues an Airworthiness Directive (AD) requiring the air carriers that use that model of aircraft to perform immediate corrective maintenance to remedy the condition. An AD has the force and effect of a regulation.

One air carrier that uses the aircraft referenced in the AD decides to delay compliance and, instead of immediately carrying out the corrective maintenance as required, continues to operate revenue flights.

A. Stakeholders and Their Interests

In the scenario presented above, air carriers form the group with the most obvious interest in the FAA’s compliance and enforcement policy and process. But they are not the only group with interests that the FAA must consider and attempt to balance when taking enforcement action. The traveling public, air carrier employees, airports, and other governmental entities all have an interest in how the FAA enforces its regulations. These interests, although varied, can be separated into two main categories: safety interests and economic interests.

Like the FAA, each of these stakeholder groups places a priority on safety. Passengers expect that the FAA will vigorously

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354 See, e.g., 49 U.S.C. § 40113(a) (2006) (authorizing the issuance of orders); § 44709(b) (authorizing orders modifying, amending, suspending, or revoking certificates); § 46301(a)(1) (authorizing the imposition of civil penalties); see also FAA Order 2150.3B, supra note 351, ch. 2, at 1–3.
355 FAA Order 2150.3B, supra note 351, ch. 2, at 1, 3.
356 See id. ch. 7, at 4–9.
358 Each of the primary industry advocacy groups lists safety as a top priority or as a key component of its mission statement. See, e.g., About ATA, Air Transp. Ass’n, http://www.airlines.org/About/AboutATA/Pages/aboutata.aspx (last vis-
enforce its regulations to keep them safe when they fly. Carriers expect that the FAA will provide the guidance necessary for them to understand the regulations they are subject to and their responsibilities under those regulations. They have an interest in compliance, not only to avoid penalties imposed by the agency, but also to protect their assets—employees and equipment—and their customers. Carrier employees expect that the FAA will focus its enforcement efforts on those regulations designed to keep them safe while they work so that they, in turn, can provide safe transportation for their passengers. Airports expect that the FAA will actively enforce the regulations that are designed to ensure safe and smooth operations. Other governmental entities, including Congress, the White House, and state and local governments expect that the agency will promote compliance and accountability through its enforcement program to maximize safety and prevent incidents and accidents.

Although the enhancement of aviation safety is of paramount importance for all stakeholders, there are significant economic interests that the FAA must consider in its enforcement decision-making. For passengers, these economic interests can be summed up in three words: accessibility, cost, and choice. Passengers want continued access to air transportation and


360 See id. at 26–29 (discussing the AD process and the FAA’s attempt to address stakeholders’ concerns regarding that process by forming a compliance review team to evaluate the process and recommend ways in which to improve it); see generally AD COMPLIANCE REVIEW TEAM, PROCESS REVIEW TECHNICAL REPORT (Jul. 8, 2009) (discussing the compliance review team’s evaluation of the AD process and its recommendations for improvements).


364 AIRLINE DEREGULATION, supra note 6, at 5.
have, perhaps, an even greater interest in being able to choose among multiple carriers to reduce the cost of travel.\textsuperscript{365} Airports have similar interests in accessibility and choice among carriers to remain competitive and maintain revenue. Carriers have an interest in minimizing costs, maximizing profits for their shareholders, and maintaining a competitive advantage over their peers.\textsuperscript{366} Air transportation is a multi-billion dollar industry.\textsuperscript{367} Air carriers employ thousands of people and are a significant source of tax revenue.\textsuperscript{368} While carrier employees have a personal economic interest in the financial health of the industry, which provides them with income and continued employment, other branches of government have a substantial interest in the economic viability of the industry as it relates to the national and local economies.

B. BALANCING THE INTERESTS

How does the FAA find the appropriate balance between safety and economic interests in its enforcement process? "The initial priority" in any FAA enforcement action "is to correct ongoing noncompliance."\textsuperscript{369} The ongoing noncompliance to be addressed in the scenario presented above is the carrier's failure to perform corrective maintenance in accordance with an AD. The FAA must determine the type of enforcement action that is most appropriate to correct the carrier's noncompliance, promote safety, and encourage future compliance with the regulations.\textsuperscript{370}

Unlike its rulemaking process, the FAA's enforcement process does not attempt to balance each and every one of the individual stakeholder interests discussed above. Rather, it seeks to find the most appropriate way to address safety concerns, while

\textsuperscript{365}See id.

\textsuperscript{366}See, e.g., U.S. Gov't Accountability Office, GAO 04-836, Commercial Aviation: Legacy Airlines Must Further Reduce Costs to Restore Profitability 2-6 (2004).

\textsuperscript{367}See Administrator's Fact Book, supra note 37, at 21.


\textsuperscript{369}FAA Order 2150.3B, supra note 351, ch. 2, at 1.

\textsuperscript{370}\textit{Id}.
minimizing the adverse economic impact on the public.\textsuperscript{371} The first step in this balancing act is to identify and evaluate the conduct involved.\textsuperscript{372} Which rules were violated? What is the risk to aviation safety? Does the carrier's conduct demonstrate a lack of qualification or competence to hold an operating certificate? Are the aircraft involved in a safe condition for operation? In the above scenario, the carrier has failed to comply with an AD. The danger presented by that conduct is high: failure to correct the unsafe condition identified in an AD could lead to the failure of an aircraft system or component that is critical to safe flight. Continued operation of the aircraft presents a serious risk to passengers, crew, and persons on the ground.

The second step in the analysis is to determine the most appropriate enforcement action based on what safety and the public interest require.\textsuperscript{373} Most enforcement actions against air carriers are civil penalty actions, due in large part to the economic consequences and adverse impact on the public that would result from the suspension or revocation of an air carrier's operating certificate and the cessation of that carrier's operations.\textsuperscript{374} Delays and disruptions cost money. Cessation of air carrier operations, whether temporary or permanent, causes significant disruption to passengers and, ultimately, can result in significant job losses and the loss of air transportation service to a particular airport or geographic area. There are also corresponding losses in revenue to airports and other governmental entities. Nevertheless, if the carrier's conduct demonstrates a lack of qualification or competence to hold an operating certificate, the FAA will not hesitate to take enforcement actions to suspend or revoke that certificate for remedial purposes.\textsuperscript{375} The FAA will also take the more moderate action to "ground" aircraft operated by an air carrier if there is reason to believe that they are not in a safe condition for operation.\textsuperscript{376}

Generally, the FAA does not take punitive certificate action (a suspension for a fixed period of time) and civil penalty action

\textsuperscript{371} See id. ch. 7, at 1.
\textsuperscript{372} See id. ch. 7, at 4–5.
\textsuperscript{373} The FAA has created a table of recommended sanctions to assist in this process. Id. app. B.
\textsuperscript{374} See id. ch. 7, at 1, 8.
\textsuperscript{375} Id. ch. 7, at 1–4.
\textsuperscript{376} See 49 U.S.C. § 44709(b) (2006) (authorizing the suspension or revocation of airworthiness certificates issued under § 44704); see also MANAGING RISKS, supra note 359, at 28–29 (recommending that the FAA retain the authority to ground any aircraft for non-compliance with an AD).
against a certificate holder for the same conduct. The FAA will, however, take remedial certificate action and punitive actions in the same case when warranted. In the scenario mentioned above, the FAA could engage in a two-part approach involving remedial certificate action and civil penalty action. First, to correct the ongoing noncompliance quickly, the FAA could issue an emergency order to immediately suspend the airworthiness certificates of the aircraft involved and ground those aircraft until the carrier demonstrates compliance with the AD. Second, to address the objectives of punishment and deterrence, among others, the FAA could impose a civil penalty for the carrier’s operation of the aircraft at issue while those aircraft were in an unsafe condition.

When the FAA elects to impose a civil penalty, there are a number of different factors that must be considered. A civil penalty must reflect the severity of the violation, provide a sufficient measure of punishment for the conduct, and serve to deter the carrier from violating the regulations in the future. It should also be used to ensure a level economic playing field for similarly situated air carriers. Civil penalties must be substantial enough to remove any profit incentive for noncompliance, and the amount must not be mitigated based on corrective action that merely brings the carrier into compliance. To do so would create an economic disadvantage for those carriers that have expended the resources necessary to maintain compliance. For example, an air carrier could decide to delay compliance with an AD that affects all, or a substantial portion, of its fleet because it is too costly to remove aircraft from service to complete the required maintenance. The FAA must act to address this noncompliance, not only for safety and accident avoidance purposes, but also to ensure that noncompliant carriers are not permitted to undermine the economic viability of

377 FAA ORDER 2150.3B, supra note 351, ch. 7, at 10.
378 Id.
379 49 U.S.C. § 44709(e)(2) (authorizing the issuance of emergency orders when the FAA Administrator determines that an emergency exists and that safety in air transportation requires that the order be effective immediately).
381 Id. ch. 7, at 4–9.
382 Id. ch. 7, at 4–6.
383 Id. ch. 7, at 8.
384 Id.
385 See id.
those carriers that do comply with the regulations.\textsuperscript{386} To remain compliant, all carriers subject to the regulation must incur the cost of the regulation.\textsuperscript{387}

When the agency promulgates a regulation, it establishes the minimum standard.\textsuperscript{388} The FAA must consider the economic impact of the rule and attempt to use the least burdensome means to achieve that minimum level of safety.\textsuperscript{389} The FAA also strives to achieve relative consistency in the sanctions imposed.\textsuperscript{390} It "pursues this objective to assure fairness and so the sanction's impact has an equivalent degree of deterrent or disciplinary value to others similarly situated."\textsuperscript{391}

Although the primary focus of the FAA's enforcement decision-making process is to maximize safety, the FAA does consider individual interests and circumstances to some extent in determining the amount of a civil penalty.\textsuperscript{392} For example, the maximum civil penalties for large and small business concerns authorized under 49 U.S.C. § 46301 are different.\textsuperscript{393} This allows the FAA to consider the size and financial strength of an air carrier in determining the appropriate sanction amount.\textsuperscript{394} The FAA also considers the effect that a civil penalty will have on a carrier's ability to continue business.\textsuperscript{395} The prospect of putting a carrier out of business, however, does not outweigh the FAA's obligation to take the enforcement action that safety requires.

Other factors that the FAA may consider in determining the sanction amount are the carrier's level of experience, violation history, whether the violation was intentional or deliberate, and

\footnotesize{\textsuperscript{386} See id.}
\footnotesize{\textsuperscript{387} See id.}
\footnotesize{\textsuperscript{388} 49 U.S.C. § 44701 (2006).}
\footnotesize{\textsuperscript{389} DEP'T OF TRANSP., REVISED DEPARTMENTAL GUIDANCE: TREATMENT OF THE VALUE OF PREVENTING FATALITIES AND INJURIES IN PREPARING ECONOMIC ANALYSES 1 (Feb. 2008), available at http://www.faa.gov/regulations_policies/policy_guidance/benefit_cost/media/Revised%20Value%20Of%20Life%20Guidance%20February%202008.pdf. Part of determining the economic impact is determining the value of a life saved by a regulation. Currently, the DOT uses $5.8 million as the value of a statistical life saved when assessing the value of preventing fatalities. Id.}
\footnotesize{\textsuperscript{390} FAA ORDER 2150.3B, supra note 351, ch. 7, at 8.}
\footnotesize{\textsuperscript{391} Id.}
\footnotesize{\textsuperscript{392} Id.}
\footnotesize{\textsuperscript{393} 49 U.S.C. § 46301(a) (setting the maximum penalty for a large business at $25,000 and for a small business at either $1,100 or $11,000 (adjusted for inflation), depending on the regulation violated).}
\footnotesize{\textsuperscript{394} FAA ORDER 2150.3B, supra note 351, ch. 7, at 8.}
\footnotesize{\textsuperscript{395} Id.}
whether the violation was reported voluntarily.\textsuperscript{396} Carriers engaged in air transportation are held to the highest level of safety.\textsuperscript{397} Intentional or deliberate violations can justify aggravating the sanction amount up to the statutory maximum.\textsuperscript{398} A violation history can justify aggravating the sanction amount and can also justify the imposition of a punitive suspension of the carrier's operating certificate, or if the pattern of violations reflects a lack of qualification, revocation of the carrier's operating certificate.\textsuperscript{399} On the other hand, even outside the agency's formal voluntary disclosure programs, the FAA may mitigate the sanction for a carrier that reports a violation voluntarily before the FAA discovers it, takes immediate action to correct the non-compliance, and works with the FAA to prevent future violations.\textsuperscript{400}

In deciding whether to take enforcement action, the FAA must attempt to balance its primary safety interest with the economic interests of the public at large. Although the focus of the FAA's enforcement policy and process is not the balancing of each and every individual stakeholder interest, there are several factors that the FAA considers in determining the appropriate enforcement action and the resulting sanction for regulatory violations. Ideally, appropriate and careful consideration of these factors will result in an enforcement action and sanction that satisfies the goals and objectives of the compliance and enforcement program and will enable the FAA to fulfill its obligation to do what safety and the public interest require.

\section*{VI. CONCLUSION}

In 2008, the FAA celebrated its fiftieth anniversary during the safest period in aviation history. After World War II, there were

\begin{itemize}
\item \textsuperscript{396} Id. ch. 7, at 5, 7-8.
\item \textsuperscript{397} Id. at 7.
\item \textsuperscript{398} Id. ch. 7, at 5; see also id. ch. 7, at 9-10 (regarding the use of the sanctions table).
\item \textsuperscript{399} Id. ch. 7, at 7.
\item \textsuperscript{400} Id. ch. 7, at 8. The FAA has developed and implemented voluntary disclosure programs “to improve compliance and increase safety by offering incentives to regulated persons to disclose their own violations, other safety discrepancies, and general safety information to the FAA and take corrective action to preclude future safety problems, if appropriate.” Id. ch. 2, at 6; see also MANAGING RISKS, supra note 359, at 29-35 (discussing voluntary disclosure programs and recommending that the FAA retain such programs as “vitally important to the future of aviation safety” because they provide a vehicle for identifying and mitigating risks).
\end{itemize}
more than 1,300 fatalities per one hundred million passengers.\textsuperscript{401} From 2003 to 2007, the average rate of fatalities was 2.5 per one hundred million passengers.\textsuperscript{402} This dramatic improvement in safety is a credit to the FAA's commitment to its mission. Today's aviation transportation system is a safe and efficient system. However, the FAA has not lost sight of its mission and continues to implement ways to enhance safety and efficiency.\textsuperscript{403} The FAA recognizes that the low-hanging fruit has been plucked, and that the incremental enhancements often result in substantial costs and burdens to stakeholders.

The next fifty years will bring many changes to aviation, and the FAA is prepared for them. If enacted, the Reauthorization Bill currently before Congress will set a number of new priorities for the agency.\textsuperscript{404} Recently, Congress separated several key safety initiatives from the Reauthorization Bill and passed them as part of an authorization extension.\textsuperscript{405} The FAA is working to address these initiatives expeditiously in addition to its other safety priorities. The FAA is laboring to make a giant leap forward in air traffic management with the implementation of NextGen over the coming decade.\textsuperscript{406} The FAA also has opportunities to address new areas of development in unmanned aerial systems\textsuperscript{407} and commercial space transportation.\textsuperscript{408} The FAA will continue to address today's challenges, including reducing congestion on the ground and in the airspace and improving

\textsuperscript{401} Managing Risks, \textit{supra} note 359, at 13.
\textsuperscript{402} Id.
\textsuperscript{404} Aviation Safety and Investment Act of 2010, H.R. 1586, 111th Cong. (House Amendment to Senate Amendment, Mar. 25, 2010).
\textsuperscript{405} Airline Safety and Federal Aviation Administration Extension Act of 2010, Pub. L. No. 111-216, 124 Stat. 2348. These safety initiatives include flight crewmember mentoring, flight crewmember and dispatcher training, mitigating pilot fatigue, safety management systems for air carriers, and improving airline transport pilot certification. See id.
safety for the traveling public. Each of these initiatives will involve a variety of competing interests and long-term consequences that the FAA must consider. New rulemaking activities also will increase the responsibilities for the agency to enforce those rules and consider the consequences of those enforcement actions. The FAA is ready to navigate the turbulence of this next frontier.
