PART 160—TRESPASSING ON COMMISSION PROPERTY

71. Revise the authority citation for part 160 to read as follows:


PART 170—FEES FOR FACILITIES, MATERIALS IMPORT AND EXPORT LICENSES AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

72. Revise the authority citation for part 170 to read as follows:

effect of the rule on water quality, ecological resources, or other aspects of the environment.

The rule fully addresses any safety concerns by beginning the route at a point that minimizes interaction with LaGuardia’s airport traffic, and allowing deviations at the pilot’s discretion for safety and weather concerns.

Since the extra distance traveled is relatively minor to get to and return from the approximately one-mile offshore route, the costs for fuel and extra time would also be minimal. In addition, no new equipment is required. The FAA has noted five circumstances, the combination of which is likely unique to Long Island, that support using our statutory authority to move forward with a final rule.

1. Because Long Island is surrounded by water, it was possible to develop a route that took helicopters a short distance off the shoreline. Thus, the North Shore Helicopter Route does not adversely affect other communities and operators can use the route without significant additional costs.

2. There are disproportionately more multi-engine helicopters flying in Long Island than the national averages (approximately 65% versus 10–15% nationally.) This allows for greater use of the off-shore route.

3. There are visual waypoints along the route that allow pilots to fly along the route with no additional equipment during good weather.

4. The helicopter traffic along the north shore of Long Island is largely homogenous, in that it is primarily point-to-point transit between New York City and the residential communities along the northern and eastern shores of Long Island.

5. The population corridor along the north shore of Long Island is significant, and coupled with the number of airports/heliports on the island, the FAA found it reasonable to develop a route to mitigate noise impacts.

Since a voluntary route already exists, the only available remaining option to further abate this noise problem is to make the route mandatory to the extent consistent with aviation safety. In light of the minimal costs imposed and the substantial number and volume of complaints, the FAA finds that this rule is justified. However, the FAA recognizes that there may already be a high rate of compliance with the voluntary route and that it is imprudent to mandate that all helicopters follow the route under all circumstances. Accordingly, it is possible that the actual rates of compliance may not improve significantly or that noise levels that are currently dispersed may inadvertently be concentrated as a result of the rule. Consequently, the FAA has decided to sunset the rule in 2 years in the event the agency concludes that the rule does not reduce or alleviate noise concerns or is otherwise unjustified. During the time that the rule is in effect, the FAA will continue to review and monitor the implementation of this rule and work with stakeholders to ensure that the rule addresses the problem and is otherwise justified; if not, the FAA will allow the rule to lapse at the end of 2 years. Alternatively, the FAA may amend the rule to implement meaningful changes should they be identified.

II. Background

A. Statement of the Problem

Helicopter traffic between New York City and eastern Long Island has traditionally followed one of three paths. The helicopters fly along the north shore of Long Island and then travel to the south to the intended destination; they travel across the middle of the island along the Long Island Expressway until branching off to the destination; or they travel along the south shore of Long Island and then turn inland to the final destination. Many of the helicopters take off or land in the Hamptons. There are two airports and a helipad that service the Hamptons. Other operators take off or land at one of the many other airports or heliports throughout the island. There are no airports and very few heliports along the north shore of Long Island. Accordingly, one might think that operators would prefer to travel along the south shore or along the Long Island Expressway. In fact, many operators prefer to travel along the north shore of Long Island and then travel inland to the desired landing spot. This is because this is a faster route and because at some locations, most notably the Hamptons, weather delays are common for aircraft approaching from the south.

In October 2007, Senator Charles Schumer and Representative Tim Bishop conducted a meeting with the FAA, local helicopter operators and airport proprietors to specifically address noise complaints stemming from helicopter operations along the north shore of Long Island. As a result of this meeting, the FAA designed a visual flight rules (VFR) helicopter route, the North Shore Helicopter Route, for helicopters to use when transiting the area that would reduce the noise impact of helicopter traffic on populated areas by having these operations offshore.

The FAA published the route on the Helicopter Route Chart for New York, effective May 8, 2008. Subsequently, New York public officials advised the FAA that they continue to receive noise complaints in this area even with the voluntary North Shore Helicopter Route in place. The local FAA Flight Standards District Office has also received similar complaints.

Uniqueness of the Situation

There are a number of unique characteristics that, taken together, made development of an alternative over-water route along the north shore of Long Island appropriate and feasible and consistent with the FAA’s safety mandate. First, because Long Island is surrounded by water, it was possible to develop a route that took helicopters a short distance off the shoreline. Thus, the North Shore Helicopter Route does not negatively impact other communities, and operators can use the route with minimal additional costs. Second, the fleet mix in Long Island consists of significantly more multi-engine helicopters than the national mix, allowing more operators to use the route. There are limits on the distance certain helicopters can prudently operate from shore without being equipped for overwater operation. Unlike fixed wing aircraft, helicopters are not able to glide in the event of total loss of power for any significant distance. Thus, pilots of single-engine rotorcraft not equipped for overwater operation need to operate close to shore so they can land safely in the event of a loss of power. Nationally, the vast majority (roughly between 85 and 90 percent) of helicopters have only one engine. However, the FAA believes that about two-thirds of commercial helicopters flying from New York City to Long Island are multi-engine helicopters, while about one-third of the helicopters being used for this purpose have only one engine. Thus, the need to stay close to land is less of an issue along the North Shore than it would be in other areas of the country where the number of single-engine helicopters is significantly greater. This highly

1 A review of the Registry database indicated that approximately 90 percent of all registered helicopters have a single-engine. A review of the 2010 GA survey indicated that approximately 85 percent of the active helicopter population is single-engine. The discrepancies in the two data sets are a function of filters in the survey that are designed to focus on helicopters that are actively flown.

some communities prefer to concentrate noise over a particular area while others prefer to disperse the flight paths so that individual neighborhoods experience less noise overall. Thus, the FAA’s policy is to respond to requests for noise abatement flight procedural changes from airport sponsors and to encourage the development of such proposals through the FAA’s Airport Noise Compatibility Program established under the Aviation Safety and Noise Abatement Act of 1979.

Future Technology

While helicopter noise appears to have recently roused the greatest number of noise complaints, over time helicopters will incorporate better technology and become less noisy. The FAA is developing rules to impose more stringent noise standards for all new rotorcraft models being certificated. As these quieter aircraft are built and incorporated into the fleet, noise levels associated with helicopter operations should correspondingly decrease. However, these standards are not yet in place. Given the existence of a voluntary route that reduces noise to some extent, the only available remaining option to further abate this noise problem is to require utilization of the route to the extent consistent with aviation safety.

B. Summary of the NPRM

On May 26, 2010, the FAA published the NPRM titled “The New York North Shore Helicopter Route” (75 FR 29471). The FAA proposed requiring civil helicopters operating along Long Island, New York’s northern shoreline to utilize the published New York North Shore Helicopter Route between the fixed waypoint Visual Point Lloyd Harbor (VPLYD) and Orient Point. Specifically, the mandatory portion of the route begins at a waypoint 20 miles northeast of LaGuardia in order to minimize interaction of the traffic operating to or from that airport.

Community Involvement

The FAA, airport sponsors, state and local government, aircraft operators, and local communities all have a role to play in reducing aircraft noise. Community noise concerns about aircraft overflights are uniquely local in nature and are best resolved in a voluntary manner, at the local level, and with the participation of all affected parties. In this instance, local participation was crucial to the development of the voluntary route. Based on the number of complaints and public comments to the proposed rule, the local effort, while successful in many regards, has not fully resolved community annoyance with helicopters flying over homes in northern Long Island.

The FAA’s experience with aircraft noise has shown that community flight path preferences vary significantly, some communities prefer to concentrate noise over a particular area while others prefer to disperse the flight paths so that individual neighborhoods experience less noise overall. Thus, the FAA’s policy is to respond to requests for noise abatement flight procedural changes from airport sponsors and to encourage the development of such proposals through the FAA’s Airport Noise Compatibility Program established under the Aviation Safety and Noise Abatement Act of 1979.

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III. Discussion of Public Comments and Final Rule

A. Justification for the Rule

Several commenters alleged that the proposal does not have adequate factual support. Some commenters argued that according to industry measurements, compliance on the voluntary route is very high already and that mandating this route is therefore not necessary. According to data collected by ERHC after the voluntary route was implemented, roughly 85–95 percent of operators observed over multiple holiday weekends comply with the North Shore Helicopter Route. ERHC noted that it believes the noise complaints are coming from a relatively small number of households. While ERHC can demonstrate that relatively few households call its noise hotline, it cannot demonstrate that these individuals are the only ones disturbed by the existing noise levels.

Other commenters stated that the lack of environmental analysis makes it impossible to determine that the rule actually addresses the concerns. ERHC and the Town of East Hampton contended that without such analysis, it is arbitrary and capricious to conclude that the route reduces noise on nearby communities.

As stated earlier, the original reason for establishing the North Shore Helicopter Route was to reduce noise from helicopter flights over communities along the north shore of Long Island by moving those flights offshore and establishing a minimum altitude. Because the route applies only offshore and establishing a minimum altitude. Because the route applies only to VFR flights, the FAA cannot definitively determine its current level of use. Even assuming the level of use is high, as alleged by the commenters, it is neither arbitrary nor capricious for the FAA to conclude, even without a specific noise analysis, that increasing use of the route by making it mandatory will further reduce noise impacts from helicopters operating along the north shore of Long Island. ERHC’s contention that only a small number of households object to the helicopter noise levels is called into question by the hundreds of comments the FAA received supporting the mandatory use of the offshore route and the complaints filed with local government and FAA.

No one contends that pilots are using the route 100 percent of the time, and the FAA cannot determine how long operators fly along the route (either geographically or at the specified altitudes) when they do use it. While the final rule allows operators to deviate from the route for safety (including adverse weather) or to reach their destination, the FAA is unable to determine whether operators are currently deviating for other reasons. However, based on comments to the NPRM and the continued concerns expressed by the residents’ elected officials, the FAA understands that helicopter overflights continue to be a problem for the residents along the north shore of Long Island.

The FAA, with the assistance of the John A. Volpe National Transportation Systems Center (Volpe Center), analyzed data from the Performance Data Analysis and Reporting System (PDARS) to assess the noise of flight operations along the north shore of Long Island. The FAA reviewed helicopter traffic for the Memorial Day and Fourth of July weekends in the summer of 2011. That data indicated that helicopter traffic is greater on the Fridays before the long holiday weekends and on the last day of the holiday weekend than in the interim period. Based on this limited data set, as well as the assertions in the comments that the problem is greater in the summer, it is reasonable to assume that traffic is not evenly distributed throughout the year and on all days of the week. Thus, while overall cumulative noise levels may be low when averaged across the year, helicopter overflights could be more disturbing on certain days when they are experienced several times over a period of several hours or the course of a day. Maximizing the utilization of the existing route by making it mandatory will secure and improve upon the decreased levels of noise that have been voluntarily achieved.

B. Safety Issues

ERHC objected to the over-water route because it places some helicopters beyond the autorotation performance distance needed to reach land in the event of an engine failure or other emergency. The FAA notes that safety is its highest priority. To the extent a helicopter operator cannot safely fly along the North Shore Helicopter Route, this rule specifically allows for deviation.

The FAA recognizes the varying capabilities of helicopters, and this rule permits pilots to deviate from the rule for safety, weather, or when transitioning to or from a destination or point of landing. Under § 91.3, the pilot in command is directly responsible for and is the final authority as to the operation of that aircraft. Therefore, if flight along this route places a helicopter beyond the autorotation performance distance to the shore and the helicopter is not equipped with flotation devices, such as life jackets or helicopter floats, the pilot is permitted to deviate from the route and altitude.

AOPA stated there is no altitude discrimination between opposite direction helicopter traffic transiting the route. AOPA further stated that the FAA, at a minimum, should provide additional guidance on altitude assignments for opposite direction traffic in order to decrease the risk of a mid-air accident over Long Island.

As an initial matter, the FAA agrees that additional guidance is useful and is developing guidance that will be available before use of the route becomes mandatory. The FAA also acknowledges that opposite direction VFR traffic takes place along this route, but this is not unusual. There already are rules governing rights of way in VFR conditions, and §§ 91.113 and 91.155 are applicable to pilots operating along this route. These rules respectively address right of way rules for converging aircraft, approaching aircraft head on, overtaking aircraft, and the appropriate visibility minimums.

The FAA encourages operators to identify industry best practices and operational procedures for use on the route. The FAA also will develop a voluntary training awareness course for operators, which will include these best practices and emphasize industry’s “fly neighborly” program as described on the New York Helicopter Route Chart. Most importantly, this rule provides pilots with the needed flexibility to
C. Route Location

This action requires helicopter operators to use the currently published North Shore Helicopter Route when flying along the north shore of Long Island. The mandatory portion of the route begins at VPLYD waypoint located approximately 20 miles northeast of LGA, remains approximately one mile offshore, and extends to the eastern end of Long Island, terminating at Orient Point.

Some commenters stated that the definition of the geographical boundaries of the route is insufficient and difficult to identify visually.

The FAA believes the route is sufficiently defined. A VFR route is to be flown under visual conditions. Pilotage, as defined in 14 CFR 1.1, is an acceptable means by which to conduct operations along the route. Most of the route is located just one mile off the shoreline, which provides adequate visual reference for navigation purposes. The route was developed and designed by the FAA in cooperation with local helicopter operators, many of whom according to ERHC, have been flying this route for several years. The FAA meets regularly with local helicopter operators to discuss safety and noise issues. In the four years since this route was published, the FAA is not aware of any concerns regarding navigating the route.

ERHC asserted proposed airspace changes would lower Class B dimensions and impose higher workloads on air traffic controllers and IFR traffic. ERHC further asserted that since the controllers have no ability to deny VFR operators clearance, the burden would be higher on the air traffic controllers (ATC) and IFR operators. ERHC posited that if the North Shore Helicopter Route falls within the redesigned Class B Airspace, the VFR helicopter operators would further burden ATC controllers as they would be required to receive special VFR (SVFR) clearances whenever weather minimums are less than those prescribed in the Code of Federal Regulations.

The FAA noted that while airspace changes for the New York Class B Airspace area have been under discussion for many years, there are no formal proposals under consideration to date. With respect to the ATC workload, controllers provide services on a first come, first serve basis. If necessary, controllers may direct aircraft to remain clear of the Class B airspace or to stand by, or controllers may refuse traffic from other sectors. If weather conditions deteriorate to the point where a pilot requires a SVFR clearance, the same first come first serve basis applies. The FAA notes that fixed wing SVFR operations are currently prohibited in the New York Class B Airspace Area.

Most residents and local government groups supported the over-water location of the route, and moving the helicopter traffic away from their communities by overflying the water. However, numerous commenters expressed opposition to the route, mistakenly believing the route would pass over land and therefore, bring helicopter overflights over their homes and communities. Obviously all helicopter operators planning on landing on Long Island will, at some point, have to fly inland in order to land. Were there no provision to allow operators to leave the route to transit to their destination, the likely impact on a few communities, notably those near VPLYD and Orient Point, would bear the brunt of the noise associated with the majority of helicopters flying over their communities. However, there are nine airports and 16 heliports on Long Island to the east of VPLYD. The noise associated with flying to an airport or other landing site should be dispersed among the affected communities. This is because this final rule allows pilots to deviate from the route for purposes of reaching their destination. The FAA notes that a local news article published during the comment period incorrectly placed the route over land. It is possible that some of the commenters were responding to the incorrect information contained in that news article.

ERHC also objected to the route, stating the route is difficult to navigate, and will require the purchase of helicopter charts and GPS equipment to comply with the regulation. The NPRM did not propose any changes to the current published route, which is over water. This route was the result of many meetings and consultations between the FAA, local helicopter operators, residents, and elected officials. The FAA and the interested parties selected and agreed on the waypoints that are located near, or parallel to easily seen and identified locations along the shore. For example, VPLYD and VPJAY were chosen because of their proximity to two physically prominent locations (Lloyd Point, situated at the northern most spot on Lloyd Neck, and Old Field Point, a lighthouse location near Port Jefferson, respectively). The FAA designed the route to be over water, as it would prevent helicopter traffic from overflying residents. This voluntary route was charted and has been flown by helicopter operators for...
several years. The FAA is not aware of any navigational or safety issues associated with the use of this route.

D. Environmental Concerns

Several commenters contended that the FAA has failed to analyze adequately the final rule’s environmental consequences, as required by the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 et seq. ERHC alleged that without an adequate description of the proposed route, it is impossible to provide comments on whether there would be extraordinary circumstances that would preclude use of a categorical exclusion to comply with NEPA. ERHC further noted the lack of analysis to determine whether increased noise and operations over the water would affect water quality or ecological resources. Several commenters asserted that the rule would cause noise to concentrate over some communities.

The FAA’s analysis of its PDAR data indicates that existing levels of helicopter noise are below levels at which homes are significantly impacted.7 Beyond making use of the North Shore Helicopter Route mandatory, the rule does not change the existing route, which has been charted and flown by helicopter operators for several years. The rule allows pilots to deviate from the route when transitioning to or from a destination or point of landing, thus avoiding concentrated operations at any particular entry or exit along the route. Therefore, it is reasonable to assume that those pilots currently complying with the voluntary route will continue to follow the same flight paths to the extent they have been following them in the past, with the same resulting pattern of noise dispersion among underlying communities.

The FAA does not believe that this rule will create a negative impact on the public welfare. It is possible that compliance with the rule by pilots not currently complying with the voluntary route could result in some additional flights over some communities. However, because of the deviation allowed by the rule, the FAA cannot reliably predict the specific flight paths these pilots will follow on their way to or from the route. As a result, any specific noise impacts of such flight paths are not reasonably foreseeable.

In accordance with FAA Order 1050.1E, “Environmental Impacts: Policies and Procedures,” the FAA has determined that the rule is categorically excluded from environmental review under paragraph 312f of the order, which applies to “regulations * * * (excluding those which if implemented may cause a significant impact on the human environment).” There are no significant noise or emissions impacts, which would be the primary concerns. The FAA determined that there are no extraordinary circumstances that would preclude the applicability of this categorical exclusion, and ERHC does not provide any facts supporting the presence of any such circumstances. Moreover, ERHC does not identify any significant effects the rule would have on water quality, ecological resources, or any other aspect of the environment, and the FAA has no reason to believe that any such effects would occur.

Several commenters alleged that the rule would require helicopter operators to fly more miles and therefore burn more fuel, and that this would cause significant environmental impacts. Specifically, ERHC alleged, without supporting documentation,8 that compliance with the rule would increase average flight time by 10 minutes, resulting in the consumption of nearly 117,000 additional gallons of fuel per year.

As stated above, the rule does not mandate entry or exit points, nor does it require operators to fly any specific route to or from the North Shore Helicopter Route. Therefore, it is not possible to reliably determine the amount of any increase in fuel consumption that might occur as a result of the rule. However, assuming ERHC is correct that average flight time would increase by 10 minutes, the commenter’s estimated increase of 117,000 gallons per year would result in air emissions well below levels determined by the U.S. Environmental Protection Agency (EPA) to be de

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7 Long Island North Shore Helicopter Route Environmental Study, John A. Volpe National Transportation Systems Center. The FAA analyzed data from the PDARS. The PDARS supports the collection, archiving, and reporting of flight plan and radar track data from Air Route Traffic Control Centers, Terminal Radar Approach Control facilities, and Air Traffic Control Towers to manage aviation activity within the National Airspace System (NAS). The PDARS data analyzed by the FAA for this rule represents visual flight rule (VFR) aircraft operating in Class E and Class G airspace in the vicinity of the northern shoreline of Long Island, New York. The data represent aircraft using a transponder code indicating VFR operation and altitude. The FAA’s analysis modeled noise from approximately 15,600 flight operations, based on an average of 42.8 operations per day over 11 days around July 4, 2011. The resulting noise levels were below DNL 45 dB. Under federal guidelines, residential land uses are considered compatible with noise levels below DNL 65 dB. 14 CFR part 150, appendix A, Table 1.

8 Presumably those airports and heliports near larger population centers will receive have more take-offs and landings than the airports and heliports near smaller population centers. But this may not actually be true. It is possible that the airports and heliports near relatively small, but more affluent population centers will handle most of the helicopter traffic.

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9 The FAA is unable to validate the assumptions of ERHC because it is impossible to determine where operators would choose to divert from the route to reach their intended destinations. However, the FAA did evaluate what it believes would be one of the worst case scenarios in terms of additional distance by looking at the distance between the initial waypoint at VPLYD and the Alexanders East Heliport, which is the southernmost heliport on the far south shore of Long Island. Assuming a 100 knot groundspeed, the FAA calculated the direct route time as 23.4 minutes (39 nm) and the North Shore route time as 30.6 minutes (51 nm), a difference of 7 minutes.
One commenter stated that aircraft on the North Shore Helicopter Route could impact wildlife. However, the commenter does not provide any information in support of this assertion, and the FAA is not aware of any reasonably foreseeable adverse impacts on wildlife from helicopters flying on the route at or above 2,500 feet MSL.

The Town of East Hampton raised several objections to the FAA’s use of the cited categorical exclusion for the rule. First, the Town asserted that the categorical exclusion is inconsistent with FAA’s intent in proposing the rule. According to the Town, if the rule would not significantly affect the human environment, there is no basis for saying it would reduce noise impact on nearby communities as stated in the NPRM. Second, the Town contended that the FAA mischaracterized the legal standard for a categorical exclusion by limiting the analysis to adverse impacts. Third, the Town claimed that the FAA used the wrong categorical exclusion for the rule.

The FAA does not agree that the cited categorical exclusion, paragraph 312f of FAA Order 1050.1E, is inconsistent with the purpose of the rule. As stated above, the purpose of the rule is to maximize use of the North Shore Helicopter Route and reduce the noise impact of helicopter flights over nearby communities. Categorical exclusion of the rule from further environmental review under NEPA is fully consistent with that purpose and is based on the FAA’s analysis of the environmental effects of the rule. The FAA also disagrees with the Town’s contention that the agency erred in basing its application of the categorical exclusion on the absence of significant adverse environmental impacts. The agency is not aware of any controlling authority that precludes application of a categorical exclusion to an action because the action has an environmental benefit. Finally, the cited categorical exclusion specifically applies to regulations and therefore is appropriate for this rule.

E. Procedural/Miscellaneous

ERHC argued the FAA has not cited the proper authority for this rule and that reliance on section 44715 is “overstated and misapplied.” ERHC further commented that the FAA failed to consult with the Administrator of the EPA prior to prescribing standards and regulations under section 44715(a), as required. It also contended that § 44715(a) was intended to authorize the FAA to promulgate regulations addressing certification standards, not airspace matters.

NATA, UTC/UTFlight, and AOPA commented that this is the first action by the FAA to mandate the use of a noise abatement procedure without providing some form of operational or environmental analysis. They argued that, historically, the FAA addresses noise abatement action areas initiated by an airport sponsor, as it applies to takeoffs and landings, not to the enroute operation of the aircraft.

In response to the procedural comment, the FAA did consult with the Administrator of the EPA prior to issuing the NPRM, in accordance with the requirements of section 44715(a). That communication and the EPA’s response have been placed in the docket for this proceeding. In promulgating this rule, the FAA cites to sections 40103(b)(2) and 44715 to articulate the breadth of its authority to address noise stemming from aircraft overflights, aircraft operations in the airport environment and setting aircraft certification standards. Contrary to the commenters’ assertion, the FAA possesses and has exercised its authority in the past to address noise issues associated with aircraft overflights.11 The FAA continues to believe that noise generated by aircraft overflights generally is best addressed locally and with voluntary measures as the primary consideration. However, the FAA is within its authority to address the issue by regulatory action.

UTC/UTFlight argued that the appropriate regulatory structure already exists in 14 CFR 91.119, which provides for minimum safe altitudes. UTC/UTFlight contended that this mandatory route redefines minimum safe altitudes.

The FAA disagrees with UTC/UTFlight that compliance with § 91.119 adequately addresses this issue. Section 91.119 provides the minimum safe altitudes for aircraft and helicopters and is not intended to address aircraft noise. Pilots must follow this provision, unless an altitude is otherwise specified for certain operations. Part 93 in 14 CFR sets forth specific rules for aircraft operations that are necessary for designated airports or defined areas.

GAMA, ERHC, and AOPA contended that the 30-day comment period was too compressed to provide the needed analysis and response to a proposal that raises significant technical, safety, environmental, and operational concerns. A number of the commenters requested that the FAA withdraw the NPRM and some commenters further requested that the FAA instead engage in a series of public meetings and a process to establish routes that would produce effective noise mitigation and provide safety and operational enhancements.

The Administrative Procedure Act12 does not specify a minimum period for comment. The FAA finds 30 days is not an unreasonable amount of time to comment on the use of a route that has been in place since 2008 and, according to ERHC, has a high rate of use. The FAA also notes that within the 30-day comment period, approximately 900 comments were filed, some of which were extensive. Furthermore, FAA regulations governing rulemaking provide that late filed comments will be considered to the extent possible only if they do not significantly delay the rulemaking process. (See 14 CFR 11.45(b)) The Agency notes that some commenters submitted late comments, and they were considered by this agency.

ERHC also commented the FAA did not perform the required full regulatory evaluation under Executive Order 12866 and Department of Transportation Order 2100.5. ERHC argued that the FAA incorrectly concluded that the cost of the NPRM was “not a significant regulatory action” and therefore exempt from

See Long Island North Shore Helicopter Route Environmental Study, John A. Volpe National Transportation Systems Center, The North Shore Helicopter Route is located entirely within Suffolk County, New York, which has been designated under the Clean Air Act as a nonattainment area for particulate matter (PM–2.5) and a moderate nonattainment area for ozone. See U.S. Environmental Protection Agency (EPA), “Currently Designated Nonattainment Areas for All Criteria Pollutants,” available at http://www.epa.gov/oasps001/greenbk/ancl.html. In addition, the state of New York is within the Ozone Transport Region established in section 184(a) of the Clean Air Act, 42 U.S.C. 7511(a). EPA has determined that for such nonattainment areas, emissions of less than 50 tons per day of volatile organic compounds and 100 tons per year of nitrogen oxides, PM–2.5, or sulfur dioxide are de minimis. 40 CFR 93.153(b)(1). Using conservative assumptions, an analysis by the FAA (A copy of which has been placed in the docket for this rulemaking), indicates that emissions of these pollutants from combustion of an additional 117,000 gallons of fuel would be well below these de minimis levels.

See: 33 FR 11748; August 20, 1968 (final rule designating special air traffic rule for Lorain County Regional Airport, Lorain, Ohio to route low altitude terminal traffic away from Oberlin College Conservatory of Music to avoid audible disturbances; 35 FR 5466; April 2, 1970 (final rule designating Prohibited Airspace (P–66) Mount Vernon, VA based on a concern over the danger to irreplaceable historic structures and the noise nuisance caused by the low flying aircraft, including helicopters, over Mount Vernon grounds); 62 FR 11972 (final rule too far north of Rocky Mountain National Park in order to prevent any potential adverse noise impact from these sightseeing aircraft).
review of the Office of Management and Budget (OMB).

As further discussed in the section addressing economic concerns, at the NPRM stage and now, the action was—and is—not expected to result in more than minimal additional costs on the affected helicopter operators. Consequently, the FAA properly determined that the proposal was not a significant regulatory action, as defined under Executive Order 12866, was not significant in accordance with DOT’s policy, and did not require a full regulatory evaluation under either document. Upon OMB appraisal of the NPRM, it agreed with FAA that it was non-significant.

ERHC commented that the regulatory text is “unconstitutionally vague” and that the “NPRM’s lack of clarity would almost certainly result in inadvertent violations and inconsistent enforcement of the rule,” which violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The FAA notes that ERHC was instrumental in working with the FAA to develop the North Shore Helicopter Route. Since this route was charted in 2008, the FAA is not aware of complaints from any operator about inability to navigate along the route, or any concern with the route as designed and charted. Unlike a route designed for IFR use, a VFR route does not have lateral dimension. The mandatory portion of the route follows the northern shoreline of Long Island from the VPLYD way point to the northern tip of Long Island at Orient Point. As stated previously, the FAA chose waypoints that were based on the proximity to easily identifiable visual landmarks. The FAA believes that the route was developed using visual references that pilots can easily identify. We do not conclude that the requirements of this rule are vague and will result in inconsistent enforcement.

As with any other rule, the FAA will enforce this rule to the best of its capabilities. Reports of violations will be investigated to determine if the operator deviated for reasons of safety, weather, or to transit to its destination. While operators will be given the maximum latitude for deviations related to safety, a pattern of deviations would indicate that an operator was interested more in cutting short the route rather than any legitimate safety concerns. Any violation of this rule may result in a civil penalty or the suspension or revocation of the pilot’s airman certificate.

F. Economic Evaluation

The FAA received several comments on our regulatory evaluation and the small business impact. These commenters included ERHC, GAMA, HAI, NATA, and NBAA, who stated the potential economic impact of the proposed regulatory changes, particularly on small businesses, is significant. The commenters believed the rulemaking’s cost is significant because the change in flight procedures would drive longer flight paths for rotorcraft operating in the North Shore airspace. This in turn would have an impact on fuel consumed. They also believed that the final rule would force costs for additional avionics equipment. ERHC asserted that mandating use of the North Shore Helicopter Route, as proposed, would increase the average flight of operations not currently using the route by 10 minutes. It estimated that 15 percent of current operations (approximately 2,250 operations) do not follow the voluntary route. Based on these assumptions, ERHC argued (assuming an 85 percent compliance rate) that the rule would result in the additional consumption of slightly less than 177,000 gallons of fuel per year.

ERHC’s numbers, the FAA calculated the cost associated with the use of the additional fuel. The nominal fuel price per gallon from the latest FAA fuel price forecast for the second half of 2012 through the first half of 2014 is $3.17.13 Multiplying the average fuel price by ERHC’s estimated annual fuel burn, over 2 years, that nominal cost equals $745,875, or $714,569 at a 7 percent discount rate. Applying the nominal value on a per flight basis, the nominal increase in fuel costs on a per flight basis is approximately $150. However, as noted in footnote 12, the FAA calculated the increase in travel time from the VPLYD and Alexanders East Heliport, which the FAA believes represents the worst case in terms of additional travel time, and found that the increase in time should be approximately 7 minutes. Assuming ERHC’s estimate of the amount of fuel burned per minute of flight time is correct, then with an increase in flight time of 7 minutes there would be an increase in fuel cost of $105 for that flight. Since an operation between these two points represents the worst case, the average of all affected flights would be somewhat lower. Thus the total discounted cost over a 2-year period would be significantly lower than $714,569.

The FAA has determined that this action is not expected to result in more than minimal additional costs on the affected helicopters. Operators that cannot comply with the route as published due to operational limitations, performance factors, weather conditions, or safety considerations are allowed to deviate from the provisions of Subpart H.

G. Sunset Provision

As discussed above, it is both impractical and imprudent to require all helicopters to fly along the entire North Shore Helicopter Route. Operators must land at some point, and will have to deviate from the route for that reason. Additionally, safety considerations make use of the route imprudent under some circumstances and for some aircraft. As has also been noted above, the FAA does not know what the current rate of compliance with the route is or the circumstances surrounding decisions not to use it. ERHC contends that the current rate of compliance is already very high. There is no reason to retain this rule if the FAA determines that it is not actually improving the noise situation along the north shore of Long Island.

The FAA has decided to sunset this rule in 2 years if we determine there is no meaningful improvement in the effects of helicopter noise on quality of life or that the rule is otherwise unjustified. Should there be such an improvement, the FAA may, after appropriate notice and opportunity for comment, decide to make the rule permanent. Likewise, should the FAA determine that reasonable modifications could be made to the route to better address noise concerns (and any other relevant concerns), we may choose to modify the rule after notice and comment.

The FAA recognizes that we did not contemplate a sunset provision when we published the NPRM. The FAA has decided to finalize this provision without providing an additional opportunity to comment because we have determined that providing such a comment period is unnecessary. The FAA has already received hundreds of comments on the advisability of finalizing this rule. Commenters fall squarely into three camps: those who oppose the rule as burdensome and unnecessary, those who oppose the rule because they believe it does not go far enough, and those who support the rule.

13 http://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_forecasts/aerospace_forecasts/2012–2012/
The FAA does not anticipate that providing an opportunity to comment on a sunset provision will generate any discussion beyond that which has already been provided in the comments received on the NPRM. The FAA does note that any decision to extend the rule beyond 2 years or to modify the existing route will be subject to notice and an opportunity to comment.

IV. Regulatory Notices and Analyses
A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA’s analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows.

This action is not expected to result in more than minimal additional costs on the affected helicopter operators because many of the existing operators already comply with the final rule requirements. Further, no new systems are required. Thus, the rule imposes no more than minimal cost. However, given the number of comments submitted in response to the NPRM, this final rule has been designated as significant under Executive Orders 12866 and 13563.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives and other applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

ERHC has 35 members who provide commercial operations. According to ERHC’s comments to the NPRM, the majority of these operators fly over Long Island and could be impacted in some way by this final rule. The FAA presumes that all 35 commercial operators have fewer than 1,500 employees. However, assuming ERHC’s estimates of current compliance are correct, somewhere between zero and fifteen percent of total operations are likely to be directly affected by this rule.

As noted above, the FAA believes those changes would result in an estimated increase in costs of $105 to $150 dollars per affected flight. The costs of commercial operations between Manhattan and the east end of Long Island generally range between $3,500 and $9,500 per trip, depending on the number of passengers and available seats. The FAA believes that the vast majority of operators conduct operations on behalf of paying customers because of the cost associated with owning and maintaining a helicopter for personal use. Accordingly, we base our determination that the impact on small entities will not be significant on the additional cost associated with flying along the North Shore Helicopter Route. At an additional $150, the increase per affected operation would range between 4 and 1.5 percent. At an additional $105, the increase per affected operation would range between 3 and 1.1 percent. The FAA also believes that, given the cost of the overall operation to a paying customer, much of that cost is likely to simply be passed on to the customer. To the extent private operators incur the additional fuel cost, the FAA believes those costs the operators will turn to additional forms of transportation only if they determine the additional cost in fuel justifies the longer times required to reach their destination by other forms of transportation. Given the cost between commercial helicopter rates and the cost to take a train or drive, the FAA believes private operators will likely absorb the additional cost because they value their time at a rate that already far exceeds the existing cost difference between helicopter travel and other forms of transportation. The rule does not require the purchase of additional equipment and allows pilots to deviate from the provisions if necessary, due to operational limitations of the helicopter, performance factors, weather conditions, or safety considerations. Therefore, the rule imposes only minimal operating costs.

The FAA received several comments from the private sector and industry based on our regulatory evaluation and the small business impact. ERHC, GAMA, HAI, NATA, and NBAA commented that the potential economic impact of the regulatory changes, particularly on small businesses, is significant. These commenters believed the rulemaking’s cost is significant because the change in flight procedures will drive longer flight paths for helicopters operating in the North Shore airspace, which will have an impact on fuel consumed. They also believed that the final rule would force costs for additional avionics equipment.

The FAA notes that numerous small business helicopter charter operators commented that they were already in compliance with the final rule. The FAA further notes that operators that cannot comply with the route as published due to safety, weather conditions, or transitioning to or from a destination or point of landings are allowed to deviate from the provisions of Subpart H. Therefore, this action is
not expected to result in more than minimal additional costs on the affected
helicopters because those operators are
allowed to deviate from the provisions
of the final rule.

Therefore, as the acting FAA
Administrator, I certify that this rule
will not have a significant economic
impact on a substantial number of small
entities.

C. Unfunded Mandates Assessment

Title II of the Unfunded Mandates
Reform Act of 1995 (Pub. L. 104–4)
requires each Federal agency to prepare
a written statement assessing the effects
of any Federal mandate in a proposed or
final agency rule that may result in an
expenditure of $100 million or more (in
1995 dollars) in any one year by State,
local, and tribal governments, in the
aggregate, or by the private sector; such
a mandate is deemed to be a “significant
regulatory action.” The FAA currently
uses an inflation-adjusted value of
$143.1 million in lieu of $100 million.
This final rule does not contain such a
mandate; therefore, the requirements of
Title II of the Act do not apply.

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995
(44 U.S.C. 3507(d)) requires that the
FAA consider the impact of paperwork
and other information collection burdens imposed on the public. The
FAA has determined that there is no
current or new requirement for
information collection associated with
this amendment.

E. International Compatibility

In keeping with U.S. obligations
under the Convention on International
Civil Aviation, it is FAA policy to
conform to International Civil Aviation
Organization (ICAO) Standards and
Recommended Practices to the
maximum extent practicable. The FAA
has determined that there are no ICAO
Standards and Recommended Practices that correspond to these regulations.

F. Environmental Analysis

Under regulations issued by the
Council on Environmental Quality,
Federal agencies are required to
establish procedures that, among other
things, identify agency actions that are
categorically excluded from the
requirement for an environmental
assessment or environmental impact
statement under the National
Environmental Policy Act of 1969
because they do not have a significant
effect on the human environment. See
40 CFR 1507.3(b)(2)(ii), 1508.4. The
required agency procedures must also
“provide for extraordinary
circumstances in which a normally
excluded action may have a significant
environmental effect.” See 40 CFR
1508.4. For FAA actions, these
“categorical exclusions” and
“extraordinary circumstances” are
listed in Chapter 3 of FAA Order 1050.1E,
“Environmental Impacts: Policies and
Procedures.”

The FAA has determined that this
final rule qualifies for the categorical
exclusion identified in paragraph 312f
of FAA Order 1050.1E. That categorical
exclusion applies to “[r]egulations,
standards, and exemptions (excluding
those which if implemented may cause
a significant impact on the human
environment).” The existing New York
North Shore Helicopter Route is a VFR
route, use of which is voluntary.
Additionally, the route is located
entirely over water and away from
noise-sensitive locations. Furthermore,
the number of helicopter operations
along the north shore of Long Island is
not high enough for this rule to have
any potential to result in significant
noise impacts. An analysis of emissions
based on an overly conservative fuel
burn estimate shows that the resulting
air emissions would be well below
levels determined by the EPA to be de
minimis. 14

Therefore, implementation of this
final rule is not expected to result in
significant adverse impacts to the
human environment. Moreover,
implementation of the final rule will not
involve any of the extraordinary
circumstances listed in Section 304 of
FAA Order 1050.1E.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule
under the principles and criteria of
Executive Order 13132, Federalism. The
agency determined that this action will
not have a substantial direct effect on
the States, or the relationship between
the Federal Government and the States,
or on the distribution of power and
responsibilities among the various
levels of government, and, therefore,
does not have Federalism implications.

B. Executive Order 13211, Regulations
That Significantly Affect Energy Supply,
Distribution, or Use

The FAA analyzed this final rule
under Executive Order 13211, Actions
Concerning Regulations that
Significantly Affect Energy Supply,
Distribution, or Use (May 18, 2001). The
agency has determined that it is not a
“significant energy action” under the
executive order and it is not likely to
have a significant adverse effect on the
supply, distribution, or use of energy.

VI. How To Obtain Additional
Information

A. Rulemaking Documents

An electronic copy of a rulemaking
document may be obtained by using the Internet—
1. Search the Federal eRulemaking
Portal (http://www.regulations.gov);
2. Visit the FAA’s Regulations and
Policies Web page at http://
www.faa.gov/regulations_policies/ or
3. Access the Government Printing
Office’s Web page at http://
www.fdsys.gov.
Copies may also be obtained by
sending a request (identified by notice,
amendment, or docket number of this
rulemaking) to the Federal Aviation
Administration, Office of Rulemaking,
ARM–1, 800 Independence Avenue
SW., Washington, DC 20591, or by
calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by
going to http://www.regulations.gov and
following the online instructions to
search the docket number for this
action. Anyone is able to search the
electronic form of all comments
received into any of the FAA’s dockets
by the name of the individual
submitting the comment (or signing the
comment, if submitted on behalf of an
association, business, labor union, etc.).

C. Small Business Regulatory
Enforcement Fairness Act

The Small Business Regulatory
Enforcement Fairness Act (SBREFA) of
1996 requires FAA to comply with
small entity requests for information or
advice about compliance with statutes
and regulations within its jurisdiction.
A small entity with questions regarding
this document, may contact its local
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 74

[Docket No. FDA–2011–C–0050]

D&C Red No. 6 and D&C Red No. 7; Change in Specification

AGENCY: Food and Drug Administration, HHHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is revising its requirements for D&C Red No. 6 and D&C Red No. 7 by replacing the current specification for “Ether-soluble matter” with a maximum limit of 0.015 percent for the recently identified impurity 1-[(4-methylphenyl)azo]-2-naphthalenol. This action is in response to a petition filed by Sun Chemical Corp.

DATES: This rule is effective August 7, 2012, except as to any provisions that may be stayed by the filing of proper objections. Submit either electronic or written objections and requests for a hearing by August 6, 2012. See section XI of this document for information on the filing of objections.

ADDRESSES: You may submit objections and requests for a hearing, identified by Docket No. FDA–2011–C–0050, by any of the following methods:

Electronic Submissions: Submit electronic objections in the following way:

• Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Written Submissions: Submit written objections in the following ways:

• Fax: 301–827–6670.

• Mail/Hand delivery/Courier (for paper or CD-ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2011–C–0050 for this rulemaking. All objections received may be posted without change to http://www.regulations.gov, including any personal information provided. For detailed instructions on submitting objections, see section XI of this document.

Docket: For access to the docket to read background documents and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.


SUPPLEMENTARY INFORMATION:

I. Background

In a notice published in the Federal Register of April 14, 2011 (76 FR 200992), FDA announced that Sun Chemical Corp., 5020 Spring Grove Ave., Cincinnati, OH 45232, had filed a color additive petition (CAP 1C0290) requesting that FDA amend its regulations for D&C Red No. 6 and D&C Red No. 7 by replacing the current specification for “Ether-soluble matter” with a maximum limit of 0.015 percent for the recently identified impurity 1-[(4-methylphenyl)azo]-2-naphthalenol. As part of CAP 1C0290, Sun Chemical Corp. also requested that FDA remove Appendix A in part 74 (21 CFR part 74), which pertains to the ether-soluble matter specification.

D&C Red No. 6 and D&C Red No. 7 are principally monosulfo monoazo dyes prepared by the coupling of diazotized 2-amino-5-methylbenzenesulfonic acid with 3-hydroxy-2-naphthalene-carboxylic acid in alkaline medium. D&C Red No. 6 is produced as the disodium salt, whereas D&C Red No. 7 is the corresponding monocalcium salt. D&C Red No. 6 is listed in §74.1306 for use in coloring drugs and in §74.2306 for use in coloring cosmetics. D&C Red No. 7 is listed in §74.1307 for use in coloring drugs and in §74.2307 for use in coloring cosmetics. The identity and specifications in §§74.1306 and 74.1307 are referenced by §§74.2306 and 74.2307. Both color additives are required to be batch certified by FDA before they may legally be used in drugs and cosmetics marketed in the United States.

II. Regulatory History

In the Federal Register of December 28, 1982 (47 FR 57681), FDA published a final rule that permanently listed D&C Red No. 6 and D&C Red No. 7 for use in coloring drugs and cosmetics. The final rule described how D&C Red Nos. 6 and 7 contained ether-soluble matter for which the proponents of the color additives were not able to determine the chemical identity. FDA’s final rule established a specification for ether-