


Regulating Annoyance: FAA's North Shore Helicopter Route Final Rule

By Gerald F. Murphy and Steven J. Seiden

On July 12, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision that arguably expands the power of the Federal Aviation Administration (FAA) to regulate noise and leaves unresolved questions as to FAA's obligations to comply with the Administrative Procedure Act (APA)[1] and Regulatory Flexibility Act (RFA)[2] when doing so. As a result of the court's holding in *Helicopter Ass'n International, Inc. v. FAA*,[3] it appears that the mere existence of noise complaints may now be sufficient to support an FAA rule altering air traffic patterns for purpose of noise abatement over residential areas outside of the airport environment.

On July 6, 2012, FAA issued the North Shore Helicopter Route Final Rule (the Rule),[4] requiring civil helicopters operating along the north shore of Long Island to utilize a route located approximately one mile offshore (the Route), the use of which had previously been voluntary. Helicopter operators carrying passengers between New York City and Long Island prefer the Route over other viable options to the south because it is consistently faster and less susceptible to weather delays. The Route was originally established in 2008 following a stakeholder meeting convened by Senator Charles Schumer and Representative Tim Bishop to address noise complaints stemming from helicopter operations along the north shore. As an outgrowth of that meeting, FAA published the then-voluntary Route in the Helicopter Route Chart for New York, effective May 8, 2008.[5]

Two years later, on May 26, 2010, in response to an unspecified number of noise-related complaints from nearby residents that were brought to FAA's attention by elected officials, the agency issued a notice of proposed rulemaking (the NPRM) that would *require* all civil helicopters operating along the north shore of Long Island to utilize the Route, subject to certain limited exceptions.[6]

The NPRM generated over 900 comments from interested individuals and organizations, provoking significant opposition from helicopter operators and trade associations, including the Helicopter Association International (HAI) and its affiliate member, the Eastern Regional Helicopter Council (ERHC); the Aircraft Owners and Pilots Association; the General Aviation Manufacturers Association; the National Air Transportation Association; and the National Business Aviation Association.[7] Chief among their concerns were the unjustified degradation of safety and efficiency in the surrounding airspace and burdensome costs to small businesses that would result from the Rule, as well as FAA's lack of supporting data.[8] Opponents of the proposal were also perplexed by the swiftness with which FAA moved toward rulemaking based exclusively on noise complaints and questioned the need to make the Route mandatory when an estimated 85 percent of operators were already using it voluntarily.[9]

But FAA was determined to move forward. Citing its mission to "protect and enhance public welfare by maximizing utilization of the existing route" and "thereby reduc[e] helicopter overflights and attendant noise disturbance over nearby communities,"[10] the agency finalized the Rule without change, making the Route mandatory for at least two years.[11] While deviations would be permitted when necessary for safety or weather reasons, or when transitioning to or from a point of landing, FAA warned that a "pattern of deviations would indicate that an operator was interested more in cutting short the route rather than any legitimate safety concerns" and that any violation of the Rule may result in a civil penalty or the suspension or revocation of the pilot's airman certificate.[12] The Rule went into effect on August 6, 2012, despite commenters' concerns regarding FAA's justification and methodology, as well as a congressional inquiry into charges of undue political influence on the rulemaking process.[13] FAA also finalized the Rule notwithstanding the agency's own findings that existing noise levels were far below those that would be normally deemed incompatible with residential use, its decision not to adhere to standard noise analysis methodology, its admission of uncertainty as to whether the Rule would have any actual impact on noise levels,[14] and without conducting a regulatory flexibility analysis.[15]

HAI's Petition for Review

On July 31, 2012, HAI petitioned for review of the Rule in the D.C. Circuit,[16] asserting that FAA had exceeded its statutory authority and that the agency's actions were arbitrary and capricious under both

Gerald F. Murphy (gmurphy@crowell.com) is a partner in the Aviation, Corporate, and Administrative & Regulatory Practice Groups in the Washington, D.C., office of Crowell & Moring LLP. Steven J. Seiden (sseiden@crowell.com) is an associate in the Aviation Group in Crowell & Moring's Washington, D.C., office. Crowell & Moring LLP serves as counsel to HAI.

Published in *The Air & Space Lawyer*, Volume 26, Number 2, 2013.

the APA and the RFA. HAI argued that FAA not only exceeded its authority by modifying air traffic procedures for general noise abatement purposes, but also because the agency did so solely on the basis of noise complaints and without safety justification. Moreover, HAI contended that, even assuming FAA had the underlying authority to adopt such a rule, its action was arbitrary and capricious under the APA because FAA failed to demonstrate that a noise problem actually existed or that the Rule would have the intended effect. Nor, according to HAI, did FAA adequately follow its established procedures for analyzing aircraft noise impacts. HAI also challenged the Rule under the RFA for FAA's failure to conduct a regulatory flexibility analysis, its reliance on incorrect fuel price data, and the agency's calculation as to the number of affected small businesses.

These arguments, however, never found traction with the D.C. Circuit. Giving unusually strong deference to the agency, the court held that FAA had interpreted its authority reasonably, FAA's finding of a noise problem was supported by substantial evidence, the Rule did not effect a change in long-standing agency policy, and FAA's unsupported or incorrect calculations regarding the Rule's impact on small business were insufficient to warrant remand.

FAA's Authority to Regulate Noise

A threshold, but not dispositive, issue in this case was whether FAA has authority to promulgate new air traffic procedures based solely on noise complaints, particularly where the agency concedes from the outset that the noise levels at issue are well below those recognized to have a significant impact under federal noise standards.[17] Relying on its statutory authority to "protect[] individuals and property on the ground" under 49 U.S.C. § 40103(b)(2), and to "relieve and protect the public health and welfare from aircraft noise" through "regulations [the Administrator deems necessary] to control and abate aircraft noise" under 49 U.S.C. § 44715,[18] FAA asserted broad authority to "address noise stemming from aircraft overflights, aircraft operations in the airport environment and [to] set[] aircraft certification standards."[19] HAI, however, argued that FAA overstated its authority because neither statute expressly authorizes the agency to promulgate new air traffic procedures for general noise abatement purposes. The court nonetheless deferred to FAA's expansive characterization of the agency's authority to protect individuals on the ground, finding Section 40103 "broad enough to encompass protection from noise caused by aircraft. . . ."[20] To reach this conclusion, the court focused on the absence of any language prohibiting FAA from regulating noise rather than the lack of any affirmative authorization for it to do so—emphasizing that HAI "pointed to no express limitations on the FAA's general authority to protect individuals on the ground from aircraft, including the noise created by their operation."[21]

The court also cited FAA's reliance on three special air traffic rules issued over a 45-year period to support the agency's interpretation of Section "40103(b)(2) as encompassing protection from aircraft noise [and] reflect[ing] the FAA's long held understanding of its authority":[22] its 1968 special air traffic rule to protect the historic Oberlin College Conservatory of Music, its 1970 designation of a prohibited area near the George Washington home at Mt. Vernon, and its 1997 special flight rule temporarily banning commercial air tours over Rocky Mountain National Park.[23] HAI had argued that none of these agency actions constituted precedent for the Rule, characterizing all three as historical anomalies that occurred in unique circumstances where the agency's asserted authority went unchallenged and, further, that none was based on noise complaints.[24]

Having concluded that FAA acted within its authority under Section 40103 in promulgating the Rule, the court declined to address HAI's contention that FAA had also exceeded its Section 44715 authority.[25] Thus, the extent to which the agency may rely on Section 44715 as an independent source of authority to engage in general noise abatement regulation remains unresolved.

HAI also argued that the Rule did not meet the "highest degree of safety" standard that applies to agency rulemakings,[26] and made reference to FAA's acknowledgment that "[w]hile the motivation for the final rule was unequivocally the concern about noise levels from helicopter flights, the rule expressly addressed the major safety issues that might result from the special air traffic rule it announced."[27] Yet, despite HAI's claim that making the Route mandatory unnecessarily created and failed to resolve several safety concerns insofar as doing so concentrates aircraft congestion and arguably creates a higher risk of accidents due to use by both eastbound and westbound helicopter traffic,[28] the D.C. Circuit adopted the agency's position that air safety need not be the primary goal of all FAA regulations, and concluded that "[s]o long as the FAA *balances* safety concerns appropriately, as it did here, its rulemaking decisions will not conflict with other statutory safety requirements."[29] The court also declined to address the parties' disagreement regarding the Rule's enforcement consequences. HAI had argued that making the Route mandatory would have the chilling effect of penalizing pilot discretion, whereas FAA had asserted that the agency would not focus on individual deviations but rather on patterns thereof.[30]

Administrative Procedure Act

The thrust of HAI's challenge was that, even assuming FAA had the underlying authority to issue the Rule, the agency had not properly and lawfully exercised any such authority in this instance. The APA

requires a court to "hold unlawful and set aside" agency action that is "arbitrary, capricious or an abuse of discretion."[31] For a rule to survive, an agency must have examined the relevant data and articulated a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."[32] Accordingly, HAI asserted that the Rule was arbitrary and capricious because FAA failed to establish through substantial evidence that a problem exists, based the Rule entirely on noise complaints while disregarding legitimate safety concerns, and departed from well-established policy without reasoned analysis for doing so. Instead, according to HAI, FAA made a subjective determination—based solely on unsubstantiated noise complaints—that helicopter noise on the north shore had become sufficiently disruptive to warrant a formal regulatory response.

HAI further posited that FAA erred by failing to use the agency's expertise and analytical tools to ascertain the true impacts of helicopter operations along the north shore, thereby departing from FAA's standard practice and statutory obligations under the APA. For example, HAI pointed out that rather than collecting the best available data and processing it through the Integrated Noise Model (INM)[33] as the agency does for airspace route modifications in other contexts,[34] the only analysis of local noise levels referenced in the Rule was an environmental study of the Route conducted by the John A. Volpe National Transportation Center (the Volpe Study).[35] Based on the Volpe Study, which modeled noise from approximately 15,600 flight operations over 11 days around Memorial Day and July 4, 2011, FAA concluded that "existing levels of helicopter noise is [sic] below levels at which homes are significantly impacted."[36] HAI argued that this conclusion was especially significant because the measurements occurred on two of the busiest holiday weekends of the year, and thus were not representative of the typically lower flight volumes at most other times. HAI also stressed that, even with those "cherry-picked" measurement periods, the Volpe Study indicated that the noise levels complained of by north shore residents were below day-night level (DNL) 45 decibels, which is less than one-fourth the loudness at which properties normally become eligible for FAA noise-mitigation measures—or one-fourth the sound of normal television volume.[37] However, determined to resolve what it described as the community's "annoyance with helicopters flying over homes in northern Long Island,"[38] FAA concluded that "[w]hen people take the time to complain about helicopter noise to FAA and their elected officials, there is a noise problem."[39]

The court accepted FAA's conclusion as reasonable and found that HAI "had not met its burden to show that the FAA used an incorrect data analysis methodology,"[40] noting that the Rule's preamble explicitly referred to commenters' complaints that "the helicopter noise interferes with sleep, conversation, and outdoor activities."[41] And despite the fact that such claims were fundamentally inconsistent with FAA's own well-established standards for determining significant impacts and compatibility with residential use, the court noted the absence of any statutory or regulatory provision requiring that a minimum noise level must be reached before FAA can regulate the impact of aircraft noise on residential populations.[42] The court was also unmoved by HAI's assertion that the Volpe Study and other data the agency collected actually contradicted the accounts of excessive noise contained in the comments on which FAA primarily relied, reiterating that the agency's decision to make the Route mandatory "was based on its assessment of the numerous complaints it received, not on the study, per se."[43] Nor was the D.C. Circuit swayed by HAI's claim that a disproportionate number of the noise complaints flowed from a small number of households, with 85 percent of the noise complaints generated by only 10 individuals (and half of those from one household), instead adopting FAA's rebuttal that "this [information] 'cannot demonstrate these individuals are the only ones disturbed by the existing noise levels.'"[44]

In line with its acceptance of FAA's reliance on the three aforementioned historical special flight rules as evidence of its authority to issue the Rule, the court also recognized these examples as "three instances where [FAA] promulgated rules altering air traffic patterns for the purposes of reducing noise over particular sites" and rejected HAI's claim that the Rule reversed long-standing agency policy as a result.[45] Taking FAA's examples at face value, the court disregarded the fact that none of these special flight rules involved air traffic over a residential area or noise complaints and, moreover, that two of the rules did not actually alter existing air traffic patterns.[46] The court also pointed to FAA's reliance on a voluntary guidance document referencing Section 40103 as further evidence of its authority to issue the Rule—which HAI argued had neither probative value nor legal weight because it merely encourages voluntary pilot conduct and does not impose noise-based airspace regulations.[47] Ultimately, the court found that FAA "acted in accordance with a long-standing, *if infrequently used*, interpretation of its authority under § 40103."[48]

Regulatory Flexibility Act

HAI also contended that FAA's decision to issue the Rule without preparing a regulatory flexibility analysis to evaluate the Rule's effect on small businesses was arbitrary and capricious. HAI challenged the agency's decision to move forward with the Rule despite HAI's and other commenters' serious concerns regarding unwarranted costs that the Rule would impose on small business aircraft operators and the lack of actual

data to justify the Rule.[49]

By its express terms, the RFA is intended to ensure that the impact of federal regulations on small businesses is considered[50] by requiring agencies to prepare and make available for public comment an initial regulatory analysis of the impact of proposed rules.[51] Rather than preparing a regulatory flexibility analysis, FAA certified that the Rule would not have a significant economic impact on a substantial number of small businesses.[52] HAI argued that the agency's certification was flawed—seizing on FAA's admitted use of incorrect fuel data in determining that a regulatory analysis and assessment were not required.[53] HAI was especially critical of FAA's characterization of this mistake as a harmless error, particularly given the agency's revised calculations showing an increase in operator costs of hundreds of dollars per flight.[54] In response, FAA asserted that it "does not consider these corrections to be material" and that "any increase in cost to the operator would be passed along to, and absorbed by, the customer."[55] According to FAA, this so-called pass-through option supported the agency's decision not to conduct a regulatory flexibility analysis because "those helicopter operators who fly the northern route between Manhattan and the eastern end of Long Island are supplying what is essentially a boutique service for the wealthy."[56]

HAI argued that the agency's pass-through cost justification defeated the fundamental purpose of the RFA, which is "to require agencies to endeavor, 'consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses . . . *subject to regulation*.'"[57] In other words, FAA should not have been allowed to circumvent RFA's intended focus on the small businesses subject to the regulation without knowing whether they could reasonably pass through increased costs or whether those increased costs would place them at a competitive disadvantage.

HAI also argued that FAA underestimated the true number of affected small businesses and attacked its refusal to accept the estimate provided by ERHC.[58] FAA relied instead on unverified information regarding the number of members of ERHC that provide commercial operations, as well as what it described as "common knowledge."[59] In the NPRM, FAA assumed that only five small business entities would be affected by the Rule. But ERHC's comments contended that over 100 small business entities would be affected.[60] When finalizing the Rule, FAA concluded that "ERHC has 35 members who provide commercial operations," without further explanation.[61] HAI argued that this "hunting and picking" of data was arbitrary on its face.

Ultimately rejecting HAI's arguments, the court stated at the outset that its RFA review is "highly deferential [to the agency], 'particularly . . . with regard to an agency's predictive judgments about the likely economic effects of a rule.'"[62] With the tone set accordingly, the court accepted as "reasonable" FAA's pass-through justification that "the increase would be passed on to paying customers, based on the high value they place on their time," and described FAA's initial miscalculation of the fuel costs as "not significant in relation to the total cost of a helicopter flight, especially when compared with the cost of travel by rail or by car."[63] Likewise, the court gave short shrift to HAI's argument that FAA used an incorrect estimate of the number of small entities that would be affected by the Rule, focusing instead on the lack of evidence ERHC provided to support its figure.[64]

Conclusion

The D.C. Circuit's decision in this case will likely have far-reaching consequences for the helicopter industry and FAA, as well as for aircraft operations proximate to residential areas removed from the airport environment throughout the country. By endorsing FAA's statutory authority to alter air traffic patterns based solely on noise complaints—and holding that the agency may do so without performing rigorous scientific and safety analysis or adhering to its own well-established noise standards, the court may have expanded FAA's portfolio. While the agency has shown little, if any, historical appetite to engage in this type of general noise abatement regulation, it hinted at its willingness to do so in a policy statement issued just weeks after the Final Rule.[65] In any event, this decision may very well lead to a dramatic increase in requests from communities around the country—and their elected officials—for FAA to fix their self-identified noise problems.

One region in particular that may be affected in the near term is Southern California. Helicopter noise in the greater Los Angeles region has already prompted members of the California congressional delegation to ask the secretary of transportation to have FAA address concerns about helicopter flights over homes, businesses, and landmarks.[66] But in contrast to the approach the agency took with respect to Long Island, FAA issued a report on May 31, 2013, recommending a voluntary approach to reduce the noise and safety risks of low-flying helicopters over neighborhoods across the Los Angeles basin, rather than government regulation.[67] It remains unclear how, if at all, the D.C. Circuit's decision in *Helicopter Ass'n International, Inc. v. FAA* might influence FAA's initial determination not to institute a rulemaking to address helicopter noise over Los Angeles. While the decision could potentially serve as a road map for the agency in the event it reverses course and decides to pursue a regulatory solution, it is more likely to have the effect of galvanizing community groups and their elected representatives in pushing FAA to take action.

If the effect of *Helicopter Ass'n International, Inc.*

v. FAA is that FAA need only "rel[y] on a host of externally generated complaints from elected officials and commercial and private residents"[68] to justify general noise abatement regulations, the decision is likely to present FAA with some difficult questions. To the extent the Long Island example inspires other similarly situated communities to seek FAA action to address aircraft noise, how will the agency decide which projects to take on? What is the noise threshold FAA will use in determining whether a problem actually exists? Is the agency even required to conduct a noise analysis? Conversely, will the court's decision provide the aviation industry with an enhanced ability to challenge locally imposed noise restrictions on federal preemption grounds?[69] If the evolution of the Rule is any indication, these questions will be driven by politics, not science. FAA's recent acknowledgment of the "public pressures"[70] placed on the agency's noise mitigation efforts is especially noteworthy, as it foreshadows the possibility that FAA may soon be facing an "annoyance" of its own making.

Endnotes

1. 5 U.S.C. §§ 551 et seq.

2. Id. §§ 604 et seq.

3. No. 12-1335 (D.C. Cir. July 12, 2013) (D.C. Circuit Decision).

4. The New York North Shore Helicopter Route, Final Rule, 77 Fed. Reg. 39,911 (July 6, 2012) (Final Rule).

5. Id. at 39,912.

6. The New York North Shore Helicopter Route, Notice of Proposed Rulemaking, 75 Fed. Reg. 29,471 (May 26, 2010) (Proposed Rule).

7. See Docket, New York North Shore Helicopter Route, FAA-2010-0302-0857, http://www.regulations.gov/#!docketDetail;D=FAA-2010-0302.

8. See, e.g., Comments of ERHC, FAA-2010-0302-0857 (June 25, 2010).

9. Several trade associations requested extensions of the 30-day comment period but were denied. Final Rule, 77 Fed. Reg. at 39,917.

10. Id. at 39,911.

11. The Rule is subject to a two-year sunset date, at which point it will be amended or allowed to lapse if FAA determines it does not adequately address the problem. Id. at 39,912.

12. Id. at 39,918.

13. See Letter from Rep. John L. Mica, Chair, House Comm. on Transp. & Infrastructure, and Rep. Thomas E. Petri, Chair, House Subcomm. on Aviation, to Michael Huerta, FAA Acting Admin. (July 30, 2012) (on file with author).

14. See Final Rule, 77 Fed. Reg. at 39,916.

15. See id. at 39,919.

16. Petition for Review, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. July 31, 2012).

17. See Final Rule, 77 Fed. Reg. at 39,916.

18. See id. at 39,911.

19. Id. at 39,917.

20. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 6 (D.C. Cir. July 12, 2013) (noting that FAA prescribed new air traffic regulations in response to the noise complaints and that "[n]oise, at certain levels, has long been considered an actionable nuisance because of its impediment to the use and enjoyment of property").

21. Id. The court applied its traditional two-step analysis in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether FAA's statutory construction was permissible, citing the Supreme Court's recent decision in City of Arlington, Texas v. FCC, 133 S. Ct. 1863 (2013), for the proposition that the court's "deference . . . extends to the agency's interpretation of statutory ambiguity that concerns the scope of the agency's jurisdiction." D.C. Circuit Decision at 5–6.

22. D.C. Circuit Decision at 8. See also Final Rule, 77 Fed. Reg. at 39,917, n.11.

23. Final Rule, 77 Fed. Reg. at 39,917, n.11.

24. The Oberlin College example involved a small, rural airport that had yet to become operational. For Rocky Mountain National Park, there were no air tours overflying the park at that time, so the ban did not modify airspace routes or pose any safety issues. The Mt. Vernon special flight rule, meanwhile, involved an airport in an area of unique historical significance and did not appear to implicate any safety concerns. Final Reply Brief for Petitioner at 17–18, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. Feb. 4, 2013) (citations omitted) (HAI Reply Br.).

25. HAI had argued that while Section 44715 permits the agency to promulgate regulations to address noise, it does so only in the context of aircraft certification standards and the agency's existing regulations support that interpretation.

26. See HAI Reply Br., supra note 24, at 12 (citing City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)).

27. Brief of the Fed. Aviation Admin. at 40, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. Feb. 4, 2013) (FAA Br.). HAI also highlighted that pilots are now recommended to fly the Route with a one-quarter-mile right offset in order to avoid oncoming traffic along a route that has no geographic boundaries even though much of the helicopter fleet is not equipped with navigation equipment capable of such precision. Final Opening Brief for Petitioner at 28–29, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. Feb. 4, 2013) (citing Comments of the ERHC, supra note 8, at 7).

28. Final Rule, 77 Fed. Reg. at 39,915.

29. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 7 (D.C. Cir. July 12, 2013) (emphasis in original).

30. FAA Br., supra note 27, at 43.

31. 5 U.S.C. § 706(2)(A).

32. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

33. See Integrated Noise Model (INM), FAA (May 31, 2013), http://www.faa.gov/about/office_org/headquarters_offices/apl/research/models/inm_model/. The court summarily dismissed HAI's criticism of FAA for failing to use the INM, stating simply that "HAI ventures unsuccessfully

into areas of agency expertise."

34. See 14 C.F.R. pts. 150, 161.

35. The New York North Shore Helicopter Route, Final Rule, 77 Fed. Reg. 39,911, 39,914 (July 6, 2012).

36. Id. at 39,916. Under federal guidelines, residential land uses are considered compatible with noise levels below day-night level (DNL) 65 dB. Id. at 39,916, n.7.

37. See id. (citing John A. Volpe Nat'l Transp. Sys. Ctr., Long Island North Shore Helicopter Route Environmental Study [3] n.1 (internal citations omitted)).

38. Id. at 39,913.

39. FAA Br., supra note 27, at 34. HAI responded that it is FAA's burden to justify the Rule by substantial evidence, not a commenter's duty to refute it. See HAI Reply Br., supra note 24, at 5 (citing Safe Extensions, Inc. v. FAA, 509 F.3d 593, 600–01 (D.C. Cir. 2007)).

40. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 12 (D.C. Cir. July 12, 2013).

41. Id. at 10 (quoting Final Rule, 77 Fed. Reg. at 39,913). The court found that "FAA could reasonably accept these comments from individual members of the public, which are different than [an] unsubstantiated factual statement of the agency employee in Safe Extensions, 509 F.3d at 595, as empirical data of a noise problem." Id.

42. Id. at 11.

43. Id. at 12–13.

44. Id. (quoting Final Rule, 77 Fed. Reg. at 39,914).

45. Id. at 13.

46. See id.; supra note 24.

47. Compare Letter from Edward Himmelfarb, Att'y for Respondent FAA, to Mark J. Langer, Clerk, D.C. Circuit, Helicopter Ass'n Int'l, Inc., No. 12-1335 (D.C. Cir. May 13, 2013) (citing 49 U.S.C. § 40103 and enclosing FAA Advisory Circular, AC No. 91-36D, Visual Flight Rules (VFR) Flight Near Noise-Sensitive Areas (Sept. 17, 2004)), with Letter from J. Michael Klise, Counsel for Petitioner HAI, to Mark J. Langer, Clerk, D.C. Circuit, Helicopter Ass'n Int'l, Inc., No. 12-1335 (D.C. Cir. May 20, 2013).

48. D.C. Circuit Decision at 15 (emphasis added).

49. See The New York North Shore Helicopter Route, Notice of Proposed Rulemaking, 75 Fed. Reg. 29,471, 29,473 (May 26, 2010); Final Rule, 77 Fed. Reg. at 39,919–20.

50. 5 U.S.C. § 601 note.

51. Id. § 603.

52. Proposed Rule, 75 Fed. Reg. at 29,473; Final Rule, 77 Fed. Reg. at 39,919–20.

53. FAA Br., supra note 27, at 47–48 & n.15 (acknowledging that the fuel prices used by the agency were understated by more than 50 percent).

54. Id. at 46.

55. Id. at 13, n.1.

56. Id. at 46.

57. Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 342 (D.C. Cir. 1985) (quoting the Regulatory Flexibility Act, Pub. L. No. 96-354, § 2, 94 Stat. 1164, 1165)) (emphasis added by court).

58. See The New York North Shore Helicopter Route, Final Rule, 77 Fed. Reg. 39,911, 39,919 (July 6, 2012).

59. FAA Br., supra note 27, at 44.

60. Comments of the ERHC, supra note 8, at 16.

61. Final Rule, 77 Fed. Reg. at 39,919.

62. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 14 (D.C. Cir. July 12, 2013) (quoting Nat'l Tel. Coop. Ass'n v. FCC, 563 F.3d 536, 541 (D.C. Cir. 2009)).

63. Id. at 15.

64. Id. at 16.

65. Aviation Environmental and Energy Policy Statement, 77 Fed. Reg. 43,137, 43,138–39 (July 23, 2012). FAA stated that additional research is needed to "gain[] a more nuanced and multifaceted understanding of noise impacts, given community concerns with aircraft noise and public pressures to mitigate noise at levels lower than current Federal guidelines." Id.

66. See Letter from Rep. Henry A. Waxman et al. to Ray LaHood, Sec'y, U.S. Dep't of Transp. (May 23, 2012), http://waxman.house.gov/sites/waxman.house.gov/files/Letter_LaHood_05.23.12.pdf.

67. See FAA, Report on the Los Angeles Helicopter Noise Initiative (May 31, 2013). The report notes that "the Long Island rule has been challenged" and that the case is "pending for decision." Id.

68. D.C. Circuit Decision at 9–10.

69. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

70. Aviation Environmental and Energy Policy Statement, 77 Fed. Reg. at 43,138–39.