Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 187

Fees for FAA Services for Certain Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of inquiry and request for comments.

SUMMARY: Since August 1, 2000, the FAA has been charging fees, required by law, for air traffic control and related services provided to aircraft that fly in U.S.-controlled airspace but neither take off from, nor land in, the United States. These fees, commonly referred to as ''Overflight Fees,'' were authorized by the Federal Aviation Reauthorization Act of 1996, enacted on October 9, 1996.

The Aviation and transportation Security Act, enacted on November 19, 2001, amended the Overflight Fee authorization in several respects: first, changing the wording of the operative standard by substituting ''reasonably'' for ''directly'' (thereby requiring that fees be ''reasonably related'' to costs, rather than ''directly related'') and substituting ''Administration's costs as determined by the Administrator'' for ''Administration's costs;'' and second, providing that ''the determination of such costs by the Administrator are not subject to judicial review.''

The purpose of this notice of inquiry is to solicit public comment on whether and to what extent, if any, these latest statutory changes require the FAA to modify its Final Rule on Overflight Fees.

EFFECTIVE DATE: The due date for receipt of comments is June 5, 2002. This matter is the subject of ongoing litigation before the United States Court of Appeals for the District of Columbia Circuit (the Court), and the Court has provided 60 days for the FAA to consider the effects of recent statutory changes on its Final Rule. The FAA will therefore be unable to consider any comments received after the due date.

ADDRESSES: Comments should be mailed or delivered, in duplicate, to: U.S. Department of Transportation Dockets, Docket No. FAA–00–7018, 400 Seventh Street, SW., Room Plaza 401, Washington, DC 20590. Comments may be filed and examined in Room Plaza 401 between 10 a.m. and 5 p.m., weekdays, except Federal holidays. Comments may also be sent electronically to the Dockets Management System (DMS) at the following Internet address: *http://dms.dot.gov/* at any time. Commenters who wish to file electronically should follow the instructions on the DMS web site.

FOR FURTHER INFORMATION CONTACT: Randall Fiertz, Office of Cost and Performance Management (APF–2), Federal Aviation Administration, 800 Independence Avenue, SW., Washington DC 20591, (202) 267–7140; or Dr. Harold (Woody) Davis, Office of the Chief Counsel (AGC–200), Federal Aviation Administration, 800 Independence Avenue, SW., Washington DC, 20591, (202) 267–3152.

SUPPLEMENTARY INFORMATION:

History

The Federal Aviation Reauthorization Act of 1996 (the Act) directs the FAA to establish by Interim Final Rule (IFR) a fee schedule and collection process for air traffic control (ATC) and related services provided to aircraft, other than military and civilian aircraft of the U.S. Government or of a foreign government, that transit U.S.-controlled airspace but neither take off from, nor land in, the United States (49 U.S.C. 45301, as amended by Pub. L. 104–264). Such flights are commonly referred to as ''Overflights.'' The Act further directs the FAA to seek public comment after issuing the Interim Final Rule and subsequently to issue a Final Rule.

The Act was substantively amended in November 2001 (see below). As originally enacted, it directed the FAA to ensure that the fees authorized by the Act were ''directly related'' to the FAA's costs of providing the services rendered. The Act further states that ''services for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off from, nor land in, the United States.''

On March 20, 1997, the FAA published an Interim Final Rule (IFR), ''Fees for Air Traffic Services for Certain Flights through U.S.-Controlled Airspace'' (62 FR 13496), which established the Overflight Fees. The FAA invited public comment on the IFR and held a public meeting on May 1, 1997. The effective date of the rule was May 19, 1997, and the comment period closed on July 18, 1997. The FAA also published two additional amendments to the IFR on May 2, 1997 (62 FR 24286) and October 2, 1997 (62 FR 51736).

That rulemaking was subsequently challenged. The Air Transport Association of Canada (ATAC) and seven foreign air carriers petitioned the Court to review the rule. On January 30, 1998, the Court issued its Opinion on the eight consolidated petitions in the case of *Asiana Airlines* v. *FAA*, 134 F.3d 393 (D.C. Cir. 1998). The Court rejected the petitioners' claims that: (a) the FAA acted improperly in employing an expedited procedure before the effective date of the IFR; and (b) the FAA violated the anti-discrimination provisions of various international aviation agreements. The Court, however, concluded that the FAA's methodology of determining cost violated statutory requirements, vacated the IFR fee schedule, and remanded the IFR to the FAA for further proceedings. The FAA subsequently refunded all fees (nearly $40 million) collected under the IFR. On July 24, 1998, the FAA published a Final Rule (63 FR 40000) removing the 1997 IFR.

Although the 1997 IFR had been removed, the statutory requirement that FAA establish Overflight Fees by IFR remained in effect. Therefore, in 1998 the FAA began developing a new IFR on Overflight Fees using a different methodology. The fees this time were to be derived from cost data produced by the agency's new Cost Accounting System (CAS), then under development. On June 6, 2000, the FAA published a new IFR with a request for comments and notice of another public meeting (65 FR 36002, June 6, 2000). The FAA held the public meeting on June 29, 2000, and 12 individuals representing 10 different organizations made

presentations. A discussion of the comments made at the public meeting can be found in the docket of this rulemaking (Docket No. FAA–00–7018). (This may be found on the Internet by going to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (*http://dms.dot.gov/search*), typing in the last four digits of the Docket number (7018), and clicking on ''search.'') The FAA began charging fees under the new IFR on August 1, 2000. The FAA twice extended the comment period; first on October 6, 2000 (65 FR 59713), and again on October 27, 2000 (65 FR 64401), closing it finally on December 26, 2000.

On November 1, 2000, the Congress enacted the National Transportation Safety Board Amendments Act of 2000 (Public Law 106–424). Section 16 of that Act deemed the Interim Final Rule, published on June 6, 2000, to have been issued in accordance with the procedural requirements of the Act.

Just before the August 1, 2000, effective date of the fees, the ATAC and seven foreign air carriers again petitioned the Court to review the new IFR. The petitions were again consolidated into a single case. Issues raised by the petitioners included some of the same process and procedure questions raised in the previous litigation, as well as new issues regarding the adequacy of information provided by the FAA to support the fees and whether the fees met the statutory requirement (subsequently amended; see below) of being ''directly related'' to the FAA's costs of providing the services. The Court heard oral arguments on May 14, 2001. On July 13, 2001, the Court issued an Opinion, finding that the FAA had failed to provide an explanation for one assumption in its fee setting methodology (*i.e.,* that the costs, on a per-mile basis, of providing ATC and related services to Overflights are the same as the costs of providing such services to flights that take off and/or land in the United States). Because the FAA had failed to address this assumption, the Opinion directed that the IFR be vacated. At the time the Opinion was issued, the FAA was in the final stages of Executive Branch review of a Final Rule on Overflight Fees, which contained a detailed explanation of the assumption in question. Because the Court faulted only FAA's failure to provide an explanation of an assumption in support of the IFR, and not the substance of the IFR itself, the FAA decided to proceed with issuance of the Final Rule in order to both meet the requirements of the Act and address the concerns of the Court. This was done within the 45-day period between the issuance of the Court's Opinion and the issuance of its Mandate making the Opinion effective.

The Final Rule was published in the **Federal Register** on August 20, 2001. It reduced the fees established under the IFR by approximately 15%, effective immediately, back to the original date of imposition (*i.e.*, August 1, 2000). The same group of eight petitioners who had sought judicial review of the most recent IFR again sought such review of the Final Rule. That litigation is ongoing.

Following the August 20, 2001 publication of the Final Rule, the FAA petitioned the Court on August 24, 2001 to reconsider the remedy (vacating of the IFR) it had imposed in its Opinion of July 13, 2001. On December 28, 2001, the Court granted the FAA's request, modifying its July 13 Opinion and issuing a Mandate that did not vacate the IFR.

Legislative Action

On November 19, 2001, additional legislation was enacted regarding Overflight Fees. The Aviation and Transportation Security Act (ATSA), Public Law 107–71, contained the following amendment (Section 119(d)):

> (d) AMENDMENT OF GENERAL FEE SCHEDULE PROVISION.—Section 45301(b)(1)(B) of title 49, United States Code, is amended—(1) by striking ''directly'' and inserting ''reasonably''; (2) by striking ''Administration's costs'' and inserting ''Administration's costs, as determined by the Administrator,''; and (3) by adding at the end ''The Determination of such costs by the Administrator is not subject to judicial review.''

Thus, the statutory authorization for FAA's Overflight Fees (49 U.S.C. 45301(b)(1)(B)) now provides that ''the Administrator shall ensure that each of the fees * * * is reasonably related to the Administration's costs, as determined by the Administrator, of providing the service rendered'' to overflights.

The accompanying Conference Committee Managers' Report on the ATSA addressed the amendment of the ''Overflight Fee'' language, as follows:

> The Conference substitute amends section 45301(b) of title 49, United States Code, with respect to limitations on overflight fees to (1) to make the language consistent with the new security fee language of this Act, and (2) to clarify Congressional intent with respect to the FAA costs upon which the fees can be based. Specifically, the conference substitute replaces the word ''directly'' with ''reasonably,'' since the word ''directly'' has been a source of much confusion and narrow interpretation, and has been a primary cause of recurring litigation which has frustrated and delayed the FAA's imposition of the overflight fees for a number of years. Additionally, this amendment specifies that the FAA's costs upon which the fees are based are to be determined solely by the Administrator. This is to clarify that the Administrator has full authority to determine costs by appropriate means. This amendment is not intended to require revision of the fees recently promulgated by the FAA (66 FR 43680, Aug. 20, 2001) but rather, to clarify longstanding Congressional intent that the FAA expeditiously and continuously collect the fees authorized under section 45301(a) of title 49.

The enactment of these statutory changes raises the question of what specific further rulemaking action, if any, is required by the FAA.

On January 25, 2002, the FAA sought from the Court a limited remand of the record in the Final Rule case. As stated in the agency motion:

> The purpose of the requested remand would be to permit the FAA, on its own initiative, to conduct a limited reconsideration of the final rule in light of the new legislation. More specifically, the agency would conduct such reconsideration solely to determine the extent, if any, to which the change in the operative statutory standard requires the FAA to modify its final rule. If the agency determines that no such modification is required by the changes in the statute from ''directly related'' to ''reasonably related,'' and the substitution of ''Administration's costs, as determined by the Administrator'' for ''Administration's costs,'' the agency would continue with the final rule that it has already adopted. This is because the FAA seeks to determine only whether Congress has required the agency to make changes in its final rule, and does not contemplate making any discretionary changes at this time.

On April 22, 2002, the Court ordered the Final Rule record returned to FAA ''so that it may conduct proceedings, for no more than 60 days from the date of this order, to determine to what extent, if any, the Aviation and Transportation Security Act, Public Law 107–71, Section 119(d) (November 19, 2001), requires the agency to modify its final rule, ''Fees for [F]AA Services for Certain Flights.'' 66 FR 46380 (Aug. 20, 2001).''

Request for Comments

Given the demonstrated significant interest of a large number of parties in matters relating to FAA's Overflight Fees, and consistent with the Court's order, the FAA seeks public comment regarding the extent, if any, to which the change in the ATSA requires the FAA to modify its Final Rule. Under the terms of the remand granted by the Court, the FAA must complete its reconsideration within 60 days from the

date of the remand. The Court granted the remand on April 22, 2002; therefore, the 60-day deadline for completion of all action on this matter by the FAA is June 21, 2002.

The FAA believes that providing an opportunity for public comment on this matter is very much in the public interest. It should also serve the interest of both judicial economy and efficient agency administration since this proceeding will permit the FAA, in advance of judicial review of its Final Rule, to consider any possible impact of the ATSA amendment, which was enacted after the Final Rule had been issued and the petitions for review of that rule had been filed with the Court.

Accordingly, before making its decision as to whether the statutory change requires modification of the Final Rule, the FAA is allowing 30 days (within the 60 days stipulated by the Court) during which interested parties may address and provide comments on this matter.

Dated: April 30, 2002.

Chris Bertram,

Assistant Administrator for Financial Services and Chief Financial Officer.

[FR Doc. 02–11109 Filed 5–1–02; 3:45 pm]

BILLING CODE 4910–13–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–094–FOR]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are reopening the public comment period on the effectiveness of a recently approved amendment to the West Virginia surface mining regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) to satisfy the Federal requirements regarding an alternative bonding system (ABS).

We are reopening the comment period to provide an opportunity to review and comment on a proposed regulatory change by the State. The proposed amendment concerns water quality enhancement, and deletes regulatory language that limits expenditures from the State's Fund for water quality enhancement projects to 25 percent of the Fund's gross annual revenue. The amendment is intended to satisfy the required program amendment codified in the Federal regulations at 30 CFR 948.16(jjj). The proposed amendment is part of the State's efforts to fully resolve all ABS deficiencies and to satisfy the required program amendment at 30 CFR 948.16(lll).

This document gives the times and locations that the amendment is available for your inspection, and the comment period during which you may submit written comments.

DATES: We will accept written comments until 4:30 p.m. (local time), on May 21, 2002.

ADDRESSES: You may mail or hand-deliver written comments to Mr. Roger W. Calhoun, Director, Charleston Field Office at the address listed below.

You may review copies of the West Virginia program, this amendment, all written comments received in response to this document at the addresses below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Charleston Field Office.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301, Telephone: (304) 347–7158. E-mail: *chfo@osmre.gov.*

West Virginia Department of Environmental Protection, 10 McJunkin Road, Nitro, West Virginia 25143, Telephone: (304) 759–0510. The approved amendment is posted at the Division of Mining and Reclamation's Internet web page: *http://www.dep.state.wv.us/mr.*

In addition, you may review copies of the amendment and all written comments received in response to this document during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291–4004. (By Appointment Only)

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 313 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255–5265.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office; Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, '' * * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Description of the Proposed Amendment

By letter dated April 9, 2002 (Administrative Record Number WV–1296A), West Virginia sent us a proposed amendment to its program under SMCRA. The amendment that we are seeking comment on concerns the water quality enhancement provisions at Code of State Regulations (CSR) 38–2–12.5. The amendment to CSR 38–2–12.5. was submitted as part of a larger program amendment authorized by Enrolled Committee Substitute for House Bill 4163 that was passed by the Legislature on March 9, 2002, and signed into law by the Governor on April 3, 2002 (Administrative Record Number WV–1293).

We are seeking your comments on the deletion, at CSR 38–2–12.5.d., of the 25-percent limitation on expenditures from the Fund for water quality enhancement projects. The specific language that the State proposed to delete at subsection 12.5.d. is as follows:

> Expenditures from the special reclamation fund for water quality enhancement projects shall not exceed twenty-five percent (25%) of the funds gross annual revenue as provided in subsection g, section 11 of the [West Virginia] Act.