

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 77**

[Docket No. 26305; Notice No. 90-19A]

RIN 2120-AA09

**Objects Affecting Navigable Airspace****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Supplemental notice of proposed rulemaking (SNPRM).

**SUMMARY:** This supplemental notice proposes to amend the application of the Federal Aviation Regulations (FAR) part 77 obstruction standards as proposed in a previous Notice of Proposed Rulemaking (NPRM). NPRM 90-18, published August 3, 1990 (subsequently corrected to Notice No. 90-19), stated, in part, that FAA obstruction standards will be applied with reference to an existing airport facility or use as well as a planned facility or use, if a proposal for such a facility or use is on file with the FAA or with the appropriate military service on the date the Notice of proposed Construction or Alteration is filed. The NPRM also stated, in part, that FAA obstruction standards apply to the effect of proposed construction or alteration upon an airport if, at the time of filing of the notice of construction or alteration, that airport is a planned or proposed airport under construction that is the subject of a notice or proposal on file with the FAA. During the fact finding phase of an aeronautical study of a construction or alteration proposal, the FAA may solicit comments from all interested persons. Based on a U.S. Court of Appeals decision (*Greater Orlando Aviation Authority v. F.A.A.*, 939 F.2d 954 (11th Cir. 1991), hereinafter "GOAA"), the FAA is proposing to amend the application of its obstruction standards to include consideration of proposals that are received before the end of the public comment period of the aeronautical study.

**DATES:** Comments must be received on or before November 30, 1995.

**ADDRESSES:** Comments on this proposal may be mailed in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-200), Docket No. 26305, Notice No. 90-19A, 800 Independence Avenue, SW., Washington, DC 20591; or delivered in triplicate to: Federal Aviation Administration, Rules Docket, Room 915-G, 800 Independence Avenue, SW., Washington, DC.

Comments delivered must be marked Docket No. 26305 and Notice No. 90-19A. The official docket may be examined in the Rules docket weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:**

Janet Apple, Air Traffic Rules and Procedures Branch, Airspace-Rules and Aeronautical Information Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8783.

**SUPPLEMENTARY INFORMATION:**

Comments Invited

Interested persons are invited to participate in the proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposals. Comments relating to the overall regulatory, aeronautical, environmental, energy-related, federalism, or economic aspects of the proposals contained in this SNPRM are also invited. Comments should identify the regulatory docket number and notice number and be submitted in triplicate to the address listed above. All comments received on or before the specified closing date for comments will be considered by the administrator before taking action on the proposed amendments. The proposals contained in this SNPRM may be changed in light of comments received. All comments received will be available for examination by interested persons in the Rule Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket. Commenter wishing the FAA to acknowledge receipt of their comments submitted in response to this SNPRM must include a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 26305." The postcard will be date stamped and mailed to the commenter.

**Availability of NPRM's**

Any person may obtain a copy of this SNPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3485. Communications must

identify the notice number of this SNPRM.

Persons interested in being placed on a mailing list for future NPRM's should request from the above office a copy of Advisory Circular (AC) No. 11-2A, "Notice of Proposed Rulemaking Distribution System," which describes the application procedure.

**Background**

The authority and requirements of FAR part 77 are derived, in part, from 49 U.S.C. 44718. Section 44718 pertains to notice of construction or alteration of any structure that may affect the use of navigable airspace.

Section 44718 was amended by Public Law 100-223 (The Airport and Airway Safety and Capacity Expansion Act of 1987). Public Law 100-223 provided for, in part, the consideration of electromagnetic interference (EMI) effects on air navigation facilities and equipment or navigable airspace, and the consideration of the cumulative impact resulting from proposed construction or alteration. Public Law 100-223 emphasized the need to preserve navigable airspace and airport traffic capacity at public use airports. In response to Public Law 100-223, the FAA published a notice of proposed rulemaking (NPRM) in the Federal Register on August 3, 1990, Notice No. 90-18, 55 FR 31722; corrected 55 FR 32999, August 13, 1990; 55FR 35152, August 28, 1990; and 55 FR 37287, September 10, 1990. The proposals contained in Notice No. 90-18, corrected to an hereafter referred to as 90-19, were based primarily on the amendments to section 44718 and recommended changes to part 77 developed by a joint government and industry task group.

The FAA received over 60 comments on the proposals presented in Notice No. 90-19. This SNPRM does not reopen the proposals contained in Notice No. 90-19 or request further comments on those proposals. The comments to Notice No. 90-19 will not be discussed in this SNPRM but will, along with comments to this SNPRM, be considered in any subsequent final rulemaking action regarding part 77.

Currently, part 77 requires sponsors to submit notice to the FAA at least 30 days before any proposed construction or alteration that exceeds certain notice criteria. The FAA studies the construction or alteration proposal to determine its aeronautical effect on the safe and efficient use of navigable airspace. The study includes the consideration of the proposal's aeronautical effect on any existing or planned public-use or military airports,

air navigation facilities, procedures, or other proposals "on file with the FAA." A proposal submitted to the FAA for consideration is referred to as a plan or notice "on file with the FAA," or "on file with an appropriate military service" if the plan or notice relates to a military airport.

The United States Court of Appeals for the Eleventh Circuit issued a decision that affects the longstanding FAA policy and practice concerning the consideration given to plans on file with the FAA, or on file with an appropriate military service. Currently, FAA obstruction standards are applied with reference to an existing airport facility or use as well as a planned facility or use, if a proposal for such a facility or use is on file with the FAA or with the appropriate military service on the date the Notice of Proposed Construction or Alteration is filed. During the fact finding phase of an aeronautical study, the FAA may solicit comments from all interested persons. Based upon the GOAA decision, the FAA is proposing to amend the application of its obstruction standards to include consideration of any proposal received before the end of the public comment period of the aeronautical study for the construction or alternation. Additionally, this SNPRM addresses those concerns expressed by Guy Gannett Publishing Co.'s Petition for Rulemaking to Docket No. 26305, Notice No. 90-18, based on GOAA.

#### The Proposal

The FAA proposes to amend certain sections of part 77, as proposed in Notice No. 90-19, by considering the effect that proposals received before the end of the public comment period of an aeronautical study for a construction or alteration proposal would have on the subject proposed. The FAA is also proposing to amend the proposed FAR section 77.2, section 77.15 paragraphs (a)(5)(ii) and (a)(6)(ii), section 77.23 paragraphs (a) and (c)(2), section 77.35 paragraph (a)(2), and section 77.36 paragraph (b)(1), by deleting any references regarding "notices or proposals on file with the FAA" (or appropriate military service). These proposed changes are in response to GOAA, where the U.S. Court of Appeals for the Eleventh Circuit held that the FAA must consider any proposal it receives before the end of the public comment period of an aeronautical study of a construction or alteration proposal.

#### Paperwork Reduction Act

Information collection requirements for part 77 have previously been

approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0001. The FAA has determined that the proposals contained in this notice, if adopted, would not significantly affect the information collection reporting requirements of part 77.

#### Regulatory Evaluation Summary

Executive Order 12866 established the requirement that, within the extent permitted by law, a Federal regulatory action may be undertaken only if the potential benefits to society for the regulation outweigh the potential costs to society. In response to this requirement, and in accordance with Department of Transportation policies and procedures, the FAA has estimated the anticipated benefits and costs of this rulemaking action. The results are summarized in this section. For more detailed economic information, see the full regulatory evaluation contained in the docket.

This evaluation examines the costs and benefits of a Supplemental Notice of Proposed Rulemaking (SNPRM) to amend FAR part 77—Objects Affecting Navigable Airspace. Part 77 of the FAR, adopted on December 12, 1962, establishes standards for determining obstructions in navigable airspace; sets forth the requirements for notice to the Administrator of certain proposed construction or alteration; and provides for aeronautical studies of obstructions to air navigation to determine their effect on the safe and efficient use of airspace.

This proposed rule would amend the application of part 77 obstruction standards to include consideration of any proposal that is received before the end of the public comment period for an aeronautical study of a proposed construction or alteration. Presently, part 77 obstruction standards apply to existing or planned public-use or military airports, alterations of public-use or military airports, aeronautical facilities, procedures, and other proposals on file with the FAA (or with the appropriate military service if the proposal relates to a military airport) on or before the date the FAA receives notice of a construction or alteration proposal that is the subject of an aeronautical study. Therefore, the proposed rule has the potential for increasing the scope and complexity of certain aeronautical studies conducted by the agency. However, the proposed rule would not result in any changes to FAA notice criteria. Consequently, the total number of notices received by the

FAA, pursuant to notice criteria under this part, would not be affected by this proposed rule.

In the Regulatory Evaluation Summary contained in the preamble of Notice No. 90-19, and the Draft Regulatory Evaluation, Initial Regulatory Flexibility Analysis, and Trade Impact Assessment (a copy of which is available for review under Docket No. 26305), the FAA determined that the costs associated with the requirements of part 77 are comprised of: (1) the cost to proponents associated with submitting notice to the FAA on Form 7460-1, Notice of Proposed Construction or Alteration; and (2) FAA administrative costs associated with evaluating notices of proposed construction and alteration.

This proposed rule would not impose additional costs on proponents for submitting notice on Form 7460-1 because part 77 notice criteria would be unaffected by this proposed rule. In addition, the available staff resources appear to be sufficient to handle any increase in the scope and complexity of some studies. The potential increase in workload would be regarded as routine. Therefore, the FAA has determined that the costs that can be directly attributed to this proposed rule would be negligible.

The primary benefit which results from this proposed rule would be the consideration given to other proposals received during the comment period of an aeronautical study of proposed construction or alteration. This should enhance the safe and efficient utilization of the navigable airspace.

Although the FAA is unable to quantify the benefits and costs of this proposal, the potential benefits to society are expected to outweigh the costs.

#### International Trade Impact Statement

This proposal would not impose a competitive disadvantage to either U.S. air carriers doing business abroad or foreign air carriers doing business in the United States because it would have no impact on either U.S. or foreign air carriers. This proposal would have no effect on the sale of foreign aviation products or services in the United States, nor would it affect the sale of United States aviation products or services in foreign countries.

#### Federalism Implications

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the

various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

International Civil Aviation Organization and Joint Aviation Regulations

In keeping with the U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with ICAO Standards and Practices (SARP) to the maximum extent practicable. For this notice, the FAA has determined that this proposal, if adopted, would not present any differences.

Conclusion

For the reasons discussed above, the FAA has determined that this proposed regulation is not a "significant regulatory action" under Executive Order 12866 and is not considered "significant" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, the FAA certifies that this proposal, if adopted, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. An initial regulatory evaluation of the proposal, including a Regulatory Flexibility Determination, has been placed in the docket. A copy may be obtained from the individual listed under FOR FURTHER INFORMATION CONTACT.

List of Subjects in 14 CFR Part 77

Administrative practice and procedure, Airports, Airspace, Aviation safety, Federal Aviation Administration, Navigation (air), Reporting and recordkeeping requirements.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the FAA proposes to amend part 77 of the Federal Aviation Regulations (14 CFR part 77) as proposed to be revised in the Federal Register of August 3, 1990 (55 FR 31722) as follows:

PART 77—OBJECTS AFFECTING NAVIGABLE AIRSPACE

1. The authority citation for part 77 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40114, 44502, 44701, 44718, 46101, 46102, 46104.

2. Proposed § 77.2 is amended by removing the definition of "Planned or proposed airport for which notice is on

file" and adding a new definition in alphabetical order to read as follows:

§ 77.2 Definition of terms.

\* \* \* \* \*

Planned or proposed airport means an airport that is the subject of any of the following documents received by the FAA—

- (1) Airport proposals submitted pursuant to the provisions of part 157 of this chapter;
(2) Airport Improvement Program requests for aid;
(3) Notices of existing airports where prior notice of the airport construction or alteration was not provided as required by part 157 of this chapter;
(4) Airport layout plans, including consideration of the effect of structures which may restrict control tower line-of-sight capability and effects upon electronic and visual aids to air navigation;
(5) Military proposals for military airports used only by the armed forces;
(6) Military proposals on joint-use (civil-military) airports;
(7) Proposed designation of precision instrument landing runways; and
(8) Completed airports site selection feasibility studies and recommendations.

\* \* \* \* \*

3. Proposed § 77.15 is amended by revising paragraphs (a)(5)(ii) introductory text and (a)(6)(ii) to read as follows:

§ 77.15 Construction or alteration requiring notice.

\* \* \* \* \*

- (a) \* \* \*
(5) \* \* \*
(ii) An airport under construction, and—
\* \* \* \* \*
(6) \* \* \*
(ii) When available information indicates the construction or alteration might exceed a standard of subpart C of this part for an airport available for public use; or
\* \* \* \* \*

4. Proposed § 77.23 is amended by revising paragraph (a), the introductory text of paragraph (c), and paragraph (c)(2) to read as follows:

§ 77.23 Scope.

(a) This subpart establishes standards for determining obstructions to air navigation relative to the safe and efficient utilization of navigable airspace by aircraft along with the operation of planned or existing air navigation facilities to include air navigation aids, airports, Federal Airways, instrument approach or

departure procedures, and approved off-airway routes. Objects that are identified as obstructions under the standards described in this subpart are presumed to be hazards to air navigation unless an aeronautical study, made in accordance with Subpart D of this part, determines otherwise. Once an aeronautical study has been initiated, the standards listed in appendix A of this part, in addition to those listed in this subpart, shall be used to determine if the object being studied would constitute a hazard to air navigation. The standards in this subpart apply to existing and proposed manmade objects as well as to objects of natural growth and terrain. These standards will be applied with reference to an existing airport facility or use, and proposals received by the FAA, or the appropriate military service, before the end of the public comment period of an aeronautical study of a construction or alteration proposal.

\* \* \* \* \*

(c) The standards in this subpart apply to the effect of a construction or alteration proposal upon an airport (including heliports, vertiports, and seaplane bases) if, before the end of the public comment period of an aeronautical study of that proposed construction or alteration, that airport is:

\* \* \* \* \*

(2) A planned or proposed airport or an airport under construction, of which the FAA has received actual notice, and with the exception of military airports, where there is a clear indication the airport will be available for public use; or

\* \* \* \* \*

5. Proposed § 77.35 is amended by revising paragraph (a)(2) to read as follows:

§ 77.35 Evaluating aeronautical effect.

- (a) \* \* \*
(2) In reference to the airport capacity of existing public-use airports and public-use airport development plans received before the end of the public comment period of an aeronautical study of a construction or alteration proposal;

\* \* \* \* \*

6. Proposed § 77.36 is amended by revising paragraph (b)(1) to read as follows:

§ 77.36 Determinations.

\* \* \* \* \*

- (b) \* \* \*
(1) Identify the effects of the proposed structure on VFR/IFR aeronautical departure/arrival operations, procedures, minimum flight altitudes,

and existing or proposed public-use airports, of which the FAA has received actual notice of, before the end of the public comment period on an aeronautical study of that proposed construction or alteration, and the extent of the physical and/or EMI effect on the operation of existing or proposed air navigation facilities or communication aids, including an explanation of whether the effect is substantial. The cumulative adverse effects that would result from the proposed construction or alteration will be considered in determining whether a substantial adverse effect is created. A finding of substantial adverse effect will result in the issuance of a determination of hazard to air navigation;

\* \* \* \* \*

Issued in Washington, D.C. on October 6, 1995.

Harold W. Becker,

*Acting Program Director, Air Traffic Rules and Procedures.*

[FR Doc. 95-25404 Filed 10-13-95; 8:45 am]

**BILLING CODE 4910-13-M**