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REPORT OF THE

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Aircraft Emissions Start Taking Heat

Until recently, greenhouse gas emissions from aircraft largely escaped serious efforts at curtailment from regulatory authorities. As the source of a mere fraction (three percent) of carbon dioxide emissions worldwide, aircraft operations were overlooked by governmental authorities confronted by much greater threats to air quality. A pair of developments significantly changed the regulatory status quo resulting in the first attempts to treat aircraft emissions the same as other forms of greenhouse gases, with the European Union taking the lead. Industry reaction has been uniformly negative. The matter has caught the attention of Congress, and the result could be an international trade war.

1. Aircraft Emissions and EPA "Endangerment Findings"

In a July 2011 ruling, the U.S. District Court for the District of Columbia concluded that the Environmental Protection Agency (EPA) is required to study the effects of aircraft emissions on air pollution. Center For Biological Diversity, et al. v. United States Environmental Protection Agency. Civ. Action 10-00985, (D.D.C. 2011). The case came before the Court after a coalition of environmental groups filed a petition to force the EPA to conduct an "endangerment finding" with respect to aircraft emissions. Under the Clean Air Act, 42 U.S.C. § 7401, *et. seq.*, a finding that a specified source of air pollution "may reasonably be anticipated to endanger public health or welfare" is a necessary predicate to the subsequent issuance of air quality standards.

The petition, which also addressed emissions from marine vessels and other non-road vehicles, was opposed by the EPA which claimed that the study of such emission sources had been left by Congress to the agency's discretion. While the Court accepted the EPA's position with respect to marine vessels, it found that the statutory language specific to aircraft did not allow similar flexibility. Center for Biological Diversity, at 15. According to the Court, the congressional use of compulsory language to create "a comprehensive scheme for the regulation of harmful aircraft emissions" imposed a mandatory duty on the EPA to conduct an endangerment determination. *Id.*, at 16.

Left open by the Court's decision was the question of when the EPA had to act. The relevant statutory language provides only that the EPA must act "from time to time." 42 U.S.C. § 7571(a)(1). While the Biological Diversity court supported the petitioner's view that this standard did not permit unreasonable delay, it did not decide when inaction by the EPA ventured into the impermissible. A different judge for the same U.S. District Court subsequently dismissed the petitioners' claim that the EPA had unreasonably delayed a determination as to

whether aircraft emissions contributed to air pollution. In doing so, however, the court cautioned the EPA that action by the agency could not be put off indefinitely:

> "The Court reminds Defendant EPA that the degree to which it is entitled deference and discretion is neither unlimited nor unchecked; and, although the Court finds that Defendant EPA has not yet unreasonably delayed in making an endangerment determination under section 231 of [the Clean Air Act] regarding emissions from aircraft engines, such a finding does not entitle Defendant EPA to delay unduly in taking the appropriate agency action."

Center for Biological Diversity, 1:10 CV-985, Order, p. 3, n. 1 (D.D.C. 2012). The Biological Diversity rulings send an unmistakable message: sooner or later, the EPA will have to consider the public health effects of aircraft emissions.

2. European Union Action on Aircraft Emissions and the U.S. Response

While the EPA has been hesitant to address the issue of aircraft emissions, the European Union (EU) has shown no such reluctance. In a decision rendered in December 2012, the European Court of Justice upheld the EU's decision to assess fees on airlines for their greenhouse gas emissions. The decision was denounced by airlines and aviation authorities outside the EU and resistance to the proposed fees appears far from over.

The EU directive brings airlines into the existing Emissions Trading System (ETS) effective January 1, 2012.[1] Under the EU system, airlines will be given an "allowance" based on the average level of carbon dioxide emissions from the aviation sector during the base period from 2004 to 2006. For 2012, eighty-five percent of the allowance will be allocated to aircraft owners covered by the system. The allocation will be made to each carrier in proportion to that operator's share of the total amount of passengers and cargo transported to and from the EU in 2010. The remaining fifteen percent of the 2012 allowance will be auctioned by the EU and eligible carriers will be able to purchase additional emission "credits" each representing a ton of carbon dioxide.[2]

Several U.S. carriers and Airlines for America, an industry trade group, filed suit in the High Court of the United Kingdom (U.K.) to block British regulations implementing the EU directive. The U.K. High Court referred the matter to the European Court of Justice, the EU's highest court. The U.S. parties claimed that the EU's application of the ETS to non-EU carriers unlawfully burdened the operating rights conferred on U.S. carriers by the US-EU Air Transport

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[1] EU Directive 2003/87/EC (October 13, 2003), as amended.

[2] Questions and Answers on the benchmark for free allocation to airlines and on the inclusion of aviation in the EU's Emission Trading System (EU ETS) Memo/11/631 (Sept. 26, 2011).

Agreement and the Convention on International Civil Aviation.[3] They also challenged the extraterritorial application of the ETS to all segments of a flight beginning or ending in the EU, including those portions of a route outside of EU airspace.[4]

Following an advisory opinion from the EU advocate general that the EU directive is compatible with the relevant international agreements, the European Court of Justice upheld the inclusion of aircraft emissions in the ETS system.[5] The ruling clears the way for the EU to implement its cap-and-trade approach for pollutants from aircraft. The reaction of the United States was typical of countries outside the EU, with Secretary of State Clinton and Secretary of Transportation LaHood warning the EU in a joint letter that the U.S. would be "compelled to take appropriate action" if non-EU airlines are subjected to the ETS system.[6] Congress weighed in first by including a resolution in the Federal Aviation Administration reauthorization act urging the Obama administration to use all "political, legal and diplomatic tools" at its disposal to prevent the application of the EU directive to U.S. airlines.[7] Subsequently, the Senate passed a bill prohibiting any U.S. aircraft operator from participating in the EU aircraft emissions trading system should the Secretary of Transportation determine that such prohibition is in the public interest.[8]

Other nations have made more explicit threats of retaliation in response to the EU's unilateral approach to the regulation of greenhouse gases from aircraft. Although all sides to the dispute continue to seek a resolution, the battle over aircraft emissions is likely to intensify over the coming year.

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[3] 61Stat. 1180, TIAS 1591, 15 U.N.T.S. 295.

[4] Airlines for America estimated that on a flight San Francisco to London's Heathrow airport, twenty-nine percent of the total emissions take place in U.S. airspace, thirty-seven percent occurs in Canadian airspace, twenty-five percent over international waters and approximately nine percent over the EU. The EU would nevertheless count the emissions from the entire flight against an airline's greenhouse gas allowance.

[5] Case C-366/10, Air Transport Association of America, et al. v. Secretary of State for Energy and Climate Change [2011].

[6] Letter dated December 16, 2011 to European Commission from Secretary of State Hilary Clinton and Secretary of Transportation Raymond LaHood.

[7] FAA Modernization and Reform Act of 2012, P.L. No. 112-95, § 509 (2012).

[8] S. 1956, 112th Cong. § 2 (2012).

D.C Circuit Upholds Airline Advertising Regulations

The regulation of aviation rarely involves limits on the right to free speech but that is precisely the issue recently considered by the D.C. Circuit Court of Appeals. In Spirit Airlines v. U.S. Department of Transportation, ___ F.3d ____, (D.C.Cir. 2012), the court heard several challenges to new federal rules regarding airline advertising, deciding in each case to uphold the Government's position.

The Department of Transportation ("DOT") has long had the authority to regulate "unfair and deceptive practices" in the airline industry. 49 U.S.C. § 41712(a). In April 2011, DOT relied on this authority to issue a new set of rules entitled "Enhancing Airline Passenger Protections" 76 Fed. Reg. 23,110 (April 25, 2011). Among the regulations that DOT implemented were several that were subsequently challenged in court: (1) the requirement that the most prominent figure displayed in print advertisements and websites be the total price, inclusive of taxes ; (2) the requirement that airlines allow consumers who purchase their tickets more than a week in advance the option of canceling their reservations without penalty within twenty-four hours following purchase and (3) the prohibition against increasing the price of transportation and baggage fees after consumers purchase their tickets. All of these rules were challenged as arbitrary and capricious; the fare advertising rule also was attacked as a violation of the First Amendment.

The first of these regulations concerns the advertising of airfares in print and electronic media. Since 1984, DOT has required that any advertised price for air transportation disclose "the entire price to be paid to the air carrier." 49 Fed. Reg. 49,440 (Dec. 20, 1984). Until recently, DOT allowed airlines to advertise the airfare exclusive of fees and taxes provided that any advertisement clearly disclosed the amount of any taxes. The new rules depart from this former policy. Airlines are now required to state the final price for any airfare, inclusive of applicable fees and taxes, in a manner more conspicuous than any other fare quotation. Airlines are still allowed to provide an itemized breakdown of taxes and other charges, but they may not display such components "prominently" or "in the same or larger size as the total price." 76 Fed. Reg. at 23,166. In practice, this means that the advertised total fare must be the first price quoted in any print or website advertisement, and that any breakdown of fees and charges must be in a smaller font size or viewable through a link.

The second challenged provision clarifies the rules regarding the refund of passenger monies following the cancellation of an airline reservation. DOT found that airline policies for the cancellation of reservations without penalty were vague and confusing, making it difficult for consumers to know what to expect. The refund rule in the new regulations is clear and straightforward: it directs airlines to allow passengers to cancel reservations without penalty for twenty-four hours provided "the reservation is made one week or more prior to a flight's departure." 76 Fed. Reg. at 23, 156.

The final rule reviewed by the D.C. Circuit prohibits airlines from raising the price of a seat, the price for carriage of a passenger's baggage or a fuel surcharge imposed by the carrier "after the air transportation has been purchased by the consumer." *Id.* at 23,167. Increases in government fees or taxes are exempted from the rule's effect.

Several air carriers and airline industry associations petitioned for review of the three DOT regulations. Included among the petitioners were some of the airlines who have been most prolific in charging passengers separate fees for services that airfares traditionally included. The petitioners attacked the Department's conclusion that the practices targeted by DOT were "unfair and deceptive" requiring additional protections for consumers in the form of the new regulations.

1. The Airfare Advertising Rule and the First Amendment

The petitioners were particularly aggressive in their attack on the airfare advertising rule. The airlines argued that there is nothing inherently deceptive in listing taxes and fees separately from base airfares in airline advertisements and that in fact DOT had allowed them to do so for years. Moreover, the airlines pointed out that the listing of prices exclusive of taxes is the general norm among businesses in the U.S. Citing other provisions of the new regulations requiring carriers to disclose airline-imposed fees, the petitioners complained that DOT was trying to "bury in fine print the taxes and fees that the Government itself imposes on air transportation." Brief of Southwest Airlines, pp. 28-29.

The most intriguing contention of the airlines was the argument that the airfare advertising rule violates the First Amendment. According to the petitioners, they had a First Amendment right to inform their customers as to "the huge burden that the federal government imposes on air travel." The prominent display of taxes in airfare advertisements, the airlines maintained, was meant not only to inform customers of government taxes on airfares but also to make a political point. As political speech, the petitioners claimed that the display of taxes could not be regulated absent a compelling state interest, the justification for which would be subject to review applying a standard of strict scrutiny.

The court disagreed. The D.C. Circuit first examined the Supreme Court precedents applying the First Amendment to business advertising and found three separate standards of review: (1) strict scrutiny, applied to laws burdening political speech by businesses; (2) intermediate scrutiny, applied to laws regulating commercial speech and (3)reasonableness review, applied to laws requiring "purely factual disclosure." Spirit Airlines, at pp. 10-11.

The court held that the airfare advertising rule was aimed at practices that are "quintessentially commercial" in nature – the advertising of prices for air transportation. As commercial speech, it was therefore fundamentally different from the political speech at issue in Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530 (1980),

where the Supreme Court invalidated a rule prohibiting utilities from including pro-nuclear energy statements in their invoice envelopes.

The D.C. Circuit then had to decide whether the airfare advertising rule was to be reviewed under an intermediate scrutiny or reasonableness standard. Because the airfare advertising rule imposed a disclosure requirement rather than a prohibition on speech, the court concluded that it should be reviewed under the reasonableness standard articulated by the Supreme Court in Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985). Based on this analysis, the D.C. Circuit upheld the DOT regulation after concluding that the disclosure requirements of the airline advertising rule are "reasonably related to the [government's] interest in preventing deception of consumers." Spirit Airlines, at 15 (quoting Zauderer, 471 U.S. at 651. In reaching its decision, the court found that "[t]he rule aims to prevent consumer confusion about the total price they have to pay, and it goes without saying that requiring the total price to be the most prominent number is reasonably related to that interest." Id. [9]

The D.C. Circuit opinion on the airfare advertising rule was accompanied by a vigorous dissent. Senior Circuit Judge Randolph endorsed the petitioner's view that DOT's prohibition on the display of government fees and taxes more prominently than base airfares was an impermissible burden on the First Amendment rights of airlines. He rejected the majority's position justifying the airfare advertising rule under a reasonableness standard, as in his view the fact that airline fare displays involve advertising of prices does not strip them of the First Amendment protection extended to political speech. Spirit Airlines, dissenting opinion of Randolph, J. at 3. Judge Randolph also opined that even if the majority was correct in classifying the advertising of airfares as commercial speech, the government had failed to support its claim that the practices the DOT rule is aimed at would necessarily result in consumer confusion: "the government has presented not a shred of evidence to support its tax and fee rule, and it has offered no reasoning to explain why a significant number of consumers would be confused without the rule." Id., at 8.

2. The Passenger Advance Purchase Refund Rule

Although the D.C. Circuit split over the airfare advertising rule, it reached a unanimous result upholding both the rule addressing refunds to passengers and the prohibition on price increases following the purchase of a ticket. The court dismissed the claim of Spirit Airlines that the rule on passenger refunds violated the Airline Deregulation Act, which prohibits the

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[9] The D.C. Circuit noted that the intermediate First Amendment analysis developed by the Supreme Court applied to instances where a law or regulation attempted to prohibit commercial speech, such as ethics rules that prohibited attorneys from advertising their practice areas in terms other than those prescribed by the State Supreme Court and from announcing the courts in which they were admitted to practice. The Supreme Court overturned such restrictions as violations of the First Amendment because there was no reason – in common sense or experience – to suggest that the prohibited advertisements were likely to mislead consumers. In re R.M.J., 455 U.S. 191 (1982).

regulation of fares, finding that the rule deals not with airfares but cancellation policies. Spirit Airlines, at 18. It also addressed the industry view that cancellation penalties are necessary to keep airplanes full by discouraging last-minute changes in passenger itineraries resulting in empty seats. The court noted that the 24-hour refund rule imposed by DOT is limited in its application to tickets purchased a week or more in advance, allowing airlines at least that much time to re-book.

3. The Post-Purchase Price Increase Rule

In its final determination, the D.C. Circuit sustained DOT's prohibition on price increases on air transportation or baggage fees following the purchase of a ticket. According to the court, there was substantial evidence supporting DOT's conclusion that increasing the price a consumer pays for airfare or baggage fees after a ticket is purchased constitutes an unfair and deceptive practice. The court reached this result only after DOT clarified that for the purposes of the petition for review the rule regarding price increases applied only to airfares and baggage fees, and not to other ancillary charges such as inflight beverages. DOT advised the court that it would institute a new notice-and-comment procedure before extending the rule to other airline services. The issue of post-purchase price increases by airlines could therefore be back before the courts if DOT engages in another round of consumer protection regulation.

FAA Considers Expanded Use of Electronic Devices Onboard Aircraft

In late August the Federal Aviation Administration ("FAA") issued a request for comments regarding current policy and procedures governing the use of electronic devices onboard aircraft. 77 Fed. Reg. 53159 (August 31, 2012). In what may come as a surprise to many, present FAA regulations confer a wide latitude of discretion on air carriers as to which electronic devices may be operated inside the aircraft cabin and during what phases of a flight. The FAA is seeking input from the aviation community regarding the effect, if any, of electronic devices on aircraft communication and navigation equipment and whether advances in technology might allow more extensive use of portable electronic devices (PEDs) during flight.

The FAA first regulated the use of PEDs in 1966 after conducting studies showing that portable frequency modulation (FM) radio receivers caused interference to aircraft navigation systems. The FAA's concern was heightened by the subsequent introduction of fly-by-wire flight controls and electronic cockpit displays, and the potential susceptibility of these aircraft systems to spurious radio frequency emissions from PEDs. Id.

Subject to a broad qualifier, current FAA regulations generally prohibit the use of all PEDs on commercial airliners with the exception of portable voice recorders, hearing aids, heart pacemakers and electric shavers. 14 C.F.R. § 121.306. However, the FAA concluded during the

early stages of PED regulation that it would place excessive burdens on the agency's resources if it were placed in the position of testing every PED that came on the market to determine whether or not a particular device had an adverse effect on the navigation or communication equipment of individual aircraft. The FAA decided that aircraft operators were in the best position to determine which PEDs had the potential to cause interference with the aircraft in their fleets. As a result, under current regulations airlines are given broad discretion to authorize the inflight use of whatever PEDs "the certificate holder [commercial airline] has determined will not cause interference with the navigation or communication system of the aircraft on which it is to be used." 14 C.F.R. § 121.306(b)(5). As stated by the FAA in its request for comments: "[t]he Agency stresses that the existing regulations allow the operator to authorize the use of PEDs, and that no specific FAA approval is required." 77 Fed. Reg. at 53160.

Although airlines may in fact possess such flexibility, very few elect to use it preferring instead to follow technical guidance on PED usage which the FAA has provided over the years. The FAA's current guidance to air carriers recommends that operators only allow passenger use of PEDs during non-critical phases of flight and prohibit PED use during takeoff and landing. FAA Advisory Circular 91-21-1B. While these recommendations are non-binding, in practice most airlines allow the use of PEDs in-flight after the aircraft has reached a certain altitude, and continue to permit PED usage until near the end of a flight.

The FAA's decision to seek comments on PED usage in-flight may have been prompted by Congressional pressure. The FAA Modernization and Reform Act of 2012, re-authorizing funding for the FAA for four years, included a provision mandating a study on the impact of cell phones for voice communications during passenger flights. The resulting Study on the Use of Cell Phones on Passenger Aircraft, prepared by the Aviation Safety Branch of the FAA, was issued this past July. The Study noted that Federal Communications Commission ("FCC") regulations currently prohibit the use of cell phones on aircraft. 47 C.F.R. § 22.295. Pursuant to guidance provided by Congress, the Study reviewed the results from a survey conducted of foreign civil aviation authorities to determine their experience with the following: the use of cell phones during flight, the extent to which passengers use cell phones for voice communications while in the air, the impact of cell phone use on flight safety, and the reactions of passengers and flight attendants to the use of cell phones by others.

Interestingly, the Study reported that among the foreign civil aviation authorities surveyed, there were "no reported occurrences of cell phones affecting flight safety on aircraft with on-board cellular telephone base stations." Study on the Use of Cell Phones on Passenger Aircraft, p. 1 (July 2012). Notwithstanding this finding, the Study stated that many non-US aviation authorities ban the use of cell phones onboard an aircraft below 10,000 feet. The extent of cell phone usage among passengers averaged between two- and ten-percent on any given flight. The number of test messages outnumbered voice communications by a ratio of approximately ten-to-one, primarily because of the high cost for voice services. While there

were passenger complaints about the reliability and cost of on-board cellular service, there were no documented cases of passenger interference with crewmembers relating to the use of cell phones onboard. The Study was only authorized to report on practices outside the U.S.; it did not make any recommendations regarding changes in the current FCC prohibition on inflight cell phone use.

Although the FAA's request for comments on the use of PEDs may eventually lead to new rules allowing the use of some devices during all phases of an aircraft's flight, larger PEDs will still be subject to FAA regulations requiring that personal belongings be stowed for take-off, runway approach and landing, to reduce the risk of injury from projectiles in the cabin and to facilitate emergency evacuations of the aircraft. Nevertheless, if the FAA concludes that some PEDs are compatible with aircraft systems at all times during a flight, passengers may soon be able to connect with their smartphones, digital tablets and e-readers even while taking off and landing.

FAA Finds No Hazard To Aviation From Wind Farm Off Nantucket

The FAA's responsibility for airspace management involves the agency in a host of matters very much connected to the land. The siting of building, cell towers and power lines often turns on the FAA's determination regarding the potential danger posed by such constructs to air traffic. The FAA's jurisdiction over such matters also extends to the sea. In a recent decision, the FAA ruled that the construction of a wind farm in Nantucket Sound could proceed, notwithstanding the threat perceived by some to aviation safety.

Cape Wind Associates is proposing to build 130 wind turbines, each 440 feet tall, in a twenty-five square mile area of Nantucket Sound. Due to the height of the turbines, Cape Wind was required to notify the FAA of the proposed construction. As a result, the Cape Wind project – opposed by many on aesthetic grounds – became the subject of a bruising battle involving the FAA.

Federal regulations require the FAA to decide whether the Cape Wind project will obstruct navigable airspace or interfere with air navigation facilities and equipment. 49 U.S.C. § 44718(b). As a threshold inquiry in such cases, the FAA must determine whether a proposed structure (1) exceeds certain obstruction standards and/or (2) would have a physical or electromagnetic radiation effect on the operation of air navigation facilities. If the FAA concludes that a structure will meet one or both of the above criteria, it must determine if the result will be a substantial adverse effect on air navigation or facilities. A structure found by the FAA to have a substantial adverse effect is deemed to be an unacceptable hazard to air navigation. Determination of No Hazard to Air Navigation, FAA Aeronautical Study, 2012-WTE-322-OE (August 15, 2012).

The FAA initially determined that the wind farm project off Nantucket was not such a hazard, after first requiring Cape Wind to implement a number of measures to mitigate the turbines adverse impact on nearby radar facilities. The town of Barnstable, Massachusetts, located in the southern end of Cape Cod, and an alliance of private citizens and other organizations, petitioned for review of the FAA's determination by the U.S. Circuit Court of Appeals for the D.C. Circuit.

The FAA responded to the petitioner's challenge by first attacking their standing to sue. According to the FAA, the petitioners lacked standing because they could not show either causation or redressability, i.e., an outcome in their favor against the FAA would not redress their injuries. The FAA argued that it was the Department of Interior, as lessor of the Cape Wind project area, which has the final say as to whether the wind farm receives federal government approval, rather than the FAA. The court also noted that Interior had mandated that any lease with Cape Wind include any mitigation measures imposed by the FAA. The court brushed this argument aside, citing Interior's requirement that Cape Wind could not begin construction without a "no hazard" determination by the FAA. The court then agreed with petitioners that in reaching its "no hazard" result the FAA had not complied with its own internal guidelines for making such determinations. Town of Barnstable, Massachusetts v. Federal Aviation Administration, 659 F.2d 28 (D.C.Cir. 2011). The case was remanded to the FAA for further consideration.

The petitioners' objections to the FAA's initial ruling proceeded on two grounds. First, the frequent fog in the area where the wind turbines are to be built would force aircraft to fly lower than 900 feet, violating the requirement to maintain a distance of at least 500 feet between an aircraft and any structure on the surface. 14 C.F.R. § 91.119. Second, aircraft would be required to go around the wind farm, producing greater congestion on nearby traffic routes with a consequent increase in the potential for an accident.

On remand, after re-examining the effect of the Cape Wind project on air traffic and navigation facilities, the FAA again reached a "no hazard" determination. Determination of No Hazard to Air Navigation, at 3. The FAA reviewed the effect of the proposed wind turbines and found that at 441 feet, they would not exceed any of the obstruction standards specified in the FAA's regulations, which apply to all structures of 500 feet or more in height. The FAA then analyzed whether the proposed wind farm would have an adverse effect on nearby radar facilities used for air navigation. Although the FAA found that the wind turbines were likely to have some impact on local radar equipment, radar detection of aircraft would not drop below acceptable levels. The FAA therefore concluded that the Cape Wind project would not have a physical or electromagnetic effect on the surrounding air navigation facilities.

Although not a factor in reaching its decision, the effect of the proposed wind turbines on air traffic routes also was analyzed by the FAA, due to the attention given that subject by the

D.C. Circuit. The FAA pointed out that the wind farm would be sufficiently far from the mainland so as not to interfere with the landing approach to any of the three local airports. The wind turbines therefore could only be considered obstacles if they interfered with en route aircraft operations. As each of the wind turbines would have a height of less than 500 feet, the factual record would not support any conclusion other than a "does not exceed" determination, necessitating the conclusion that the Cape Wind project does not have a substantial effect on air navigation. Id. at 6.

The FAA's decision regarding the Cape Wind turbines does not constitute final approval for the project but it does remove a major stumbling block. Opponents of the project will now have to argue some ground other than aviation safety to forestall the go-ahead. The FAA's role in the dispute – though not pivotal – nevertheless demonstrates the far-reaching effects of its responsibility for managing the nation's airspace.