



The View from the Ground: Airport and Community Perspectives on ATC Reform

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The ongoing debate over the feasibility and prudence of privatizing air traffic control (ATC) services in the United States has been dominated by privatization's potential impact on the direct users of the national airspace system (NAS) and their customers. Airports, like their industry partners, are interested in ensuring that any modification to the structure and delivery of ATC services addresses current operational deficiencies without compromising the safety, efficiency, and accessibility of the NAS. However, recent privatization proposals have also



introduced several issues of particular concern to airports and the communities that they serve. Congress must ensure that any modification to the delivery of ATC services addresses—or at least does not imperil—the delicate balance between the legitimate local interests of airport communities and the broader needs and objectives of a modernized NAS.

Compliance with Environmental Statutes

The Federal Aviation Administration's (FAA's) Next Generation Air Transportation System (NextGen) promises to deliver many benefits both in and outside of the NAS. Through potentially enhanced airspace efficiency gained by metroplex—the large-scale redesign of airspace in congested areas—and other performance-based navigation (PBN) initiatives, properly equipped aircraft may be able to significantly improve fuel efficiency and reduce emissions, while simultaneously reducing ATC workload. The high degree of precision in aircraft flight track and altitude facilitated by NextGen initiatives may optimize and provide more flexible routings, reduce the impact of weather events on overall traffic flows, and allow reduced spacing between aircraft in busy terminal

environments. Indeed, many of these benefits have begun to be realized in key metropolitan areas.

As the FAA has implemented various NextGen initiatives, however, the subject of aircraft noise has returned to the forefront of aviation policy.¹ In spite of their significant benefits to users of the NAS, PBN procedures often concentrate aircraft noise in congested, low-altitude terminal airspace over a much narrower area (or, in some cases, entirely different areas) than airport communities have become accustomed to and planned for historically.² As a result, many communities have seen a significant increase in noise complaints and, in some cases, litigation over the FAA's implementation of new flight procedures.³

Despite the impact of such changes on airport communities, few mechanisms exist to ensure that those communities' interests are heard and their environmental well-being is protected. Under the existing legal framework, the FAA's design and implementation of new airspace procedures must comply with a number of environmental statutes.⁴ Under the National Environmental Policy Act (NEPA), the FAA must take a "hard look" at the environmental consequences of a proposed action through the preparation of a categorical exclusion, an environmental assessment (EA), or an environmental impact statement (EIS).⁵ With respect to some PBN procedures, Congress has authorized the FAA to presume that their implementation will not have a "significant effect on the human environment," obviating the need to prepare an EA or EIS, unless "extraordinary circumstances" exist.⁶ NEPA is a procedural statute that "does not mandate particular results, but simply prescribes [a] necessary process."⁷ It "prohibits uninformed—rather than unwise—agency action."⁸

Other applicable statutes prescribe specific limitations on the use of environmentally sensitive resources. Section 4(f) of the U.S. Department of Transportation Act prohibits the FAA's "use" of publicly owned parks, wildlife refuges, and certain historical sites, unless there is "no prudent and feasible alternative."⁹ Aircraft noise that is "inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose" is considered a "use" of that land.¹⁰ Similarly, the National Historic Preservation Act requires the FAA to both study and mitigate the effect of airspace modifications on historic properties that are eligible for listing

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on the National Register.¹¹ Adverse effects include the “[i]ntroduction of . . . audible elements that diminish the integrity of the property’s significant historic features,”¹² such as when historic windows must be replaced to insulate properties from increased sound exposure or when quiet is an attribute of a property’s listing.

Legislative proposals to privatize ATC services have failed to adequately address (or even address at all) whether and to what extent the new entity would be required to comply with these laws. In a recent study conducted by the U.S. Government Accountability Office (GAO), FAA officials agreed that “a key issue [in transitioning ATC services] would be to determine what entity—the ATC entity or the remaining safety regulator—would manage environmental issues and if it were the ATC entity, would it be required to follow federal NEPA requirements.”¹³

Even among experts, there is substantial difference of opinion on this point. Among 13 experts consulted by the GAO, four believed that the FAA, as the safety regulator, should be responsible for compliance with environmental statutes; two believed that the new entity should be; five believed that compliance responsibility should be shared between the FAA and the new entity; and two believed that some other entity entirely should be responsible for environmental compliance.¹⁴ Congress must specify which entity is responsible for compliance with these environmental laws to ensure that these environmental safeguards continue to apply to the new entity’s airspace-related actions. Failure to do so may expedite some measures in the short run, but are likely to prompt a longer-term backlash from affected communities, and further impede airspace modernization.

Ensuring Adequate Community Engagement

The environmental statutes referenced above are an important source of the FAA’s obligations, but they are only one component of effective airspace implementation vis-à-vis affected airports and communities. As the FAA’s NextGen Advisory Committee (NAC) has found, PBN implementation initiatives have encountered substantial community opposition where the FAA has failed to perform effective outreach early in its planning efforts and throughout the implementation process.¹⁵ While changes in noise exposure as a result of new airspace procedures are often inevitable, community outreach is a critical information-gathering tool not only to ensure meaningful compliance with environmental laws, but also to secure public acceptance of noise impacts.¹⁶ As the NAC observed, effective “[c]ommunity outreach often needs to include actions that go beyond satisfying applicable legal requirements.”¹⁷

The FAA recently recognized the need to implement these principles and take positive steps to improve its community engagement processes. In response to recommendations issued by the NAC, in 2016 the FAA

overhauled its *Community Involvement Manual* to provide guidance across its lines of business regarding the value of community involvement and effective techniques for ensuring community participation.¹⁸ The FAA has also initiated (but not yet completed) a comprehensive effort to update the scientific basis for the relationship between noise exposure and its impact on communities.¹⁹

Congress has directed other reform efforts, largely in response to instances where the FAA’s community engagement process has failed. Senators John McCain and Jeff Flake included a provision in the 2017 National Defense Authorization Act requiring the FAA to notify and consult with the operator of the airport at which new PBN procedures would be implemented, and “consider consultations or other engagement with the community . . . to inform the public of the procedure.”²⁰ The legislation also required the FAA to reevaluate the environmental impacts of certain previously implemented procedures and, if necessary, consult with the airport to identify mitigation measures, including the use of alternative flight paths.²¹

Congress must ensure that the privatization of ATC services does not undermine progress on environmental issues and rekindle aircraft noise disputes—issues on which airports and the FAA’s Airports Division have made great progress over the last few decades. Absent the public accountability that often checks the activities of public agencies, what incentives would a private entity established to provide ATC services have to comply with community engagement best practices? Indeed, as Congressman Michael Capuano observed, it is difficult to “see how a private entity could possibly care—or should care[—about] the interests of the general public who live underneath [aircraft] flight paths,” where elected officials have traditionally been the most (if not the only) responsive party.²² Even assuming that the entity providing ATC services adopts the FAA’s community engagement policies, Congress must define how much control the entity should have, if any, over their further refinement.

Ambiguity over how the new entity providing ATC services will be overseen by the FAA and Congress compounds this concern. The Aviation Innovation, Reform, and Reauthorization (AIRR) Act of 2016 did not specify whether the FAA would have authority to reject an airspace modification or new procedure for concerns related to aircraft noise. Section 90501 authorized the Secretary to reject an ATC Corporation proposal only if it failed to comply with “performance-based regulations and minimum safety standards for the operation of air traffic services by the Corporation” or was “otherwise [in]consistent with the public interest.”²³ Similarly, where procedures have already been developed, it is not clear whether the FAA could require the ATC entity to modify them in response to *post-implementation* concerns, including unanticipated noise impacts that may arise as a result of regularly authorized deviations from the published procedures.

As Congressman Dan Lipinski noted in an AIRR Act hearing, it is unclear whether the FAA would have the ability to require the ATC entity to modify its procedures in order to ameliorate noise-related concerns.²⁴

Even if the FAA is conferred specific authority to oversee the new entity's compliance with comprehensive aircraft noise policy, it is essential that airports and communities be given adequate procedural means of ensuring such oversight is applied, whether through judicial review or other means. As proposed in the AIRR Act, the Secretary would review and approve an airspace proposal of the ATC Corporation without providing any opportunity for public review and comment.²⁵ The Secretary would be required to issue a determination within 45 days, and the approval of an airspace proposal would only be subject to judicial review for "clear error" or "abuse of discretion."²⁶ This limited review leaves communities with little recourse if the entity providing ATC services fails to comply with environmental procedures and the FAA does not, or cannot, take necessary remedial action.

Liability of the ATC Entity for Noise-Related Impacts

In light of the noise-related impacts that a new ATC entity's actions may have on airport communities, Congress should also address—and, indeed, modernize—the allocation of liability for constitutionally cognizable "takings" that result from aircraft overflight. Even if a new ATC entity would, like the proposed ATC Corporation, be generally civilly and criminally liable,²⁷ it is unlikely that the present legal regime would assign it responsibility for noise-related impacts it causes.

The law governing this area is nearly as antiquated as the outgoing ATC system itself. Over 70 years ago, the U.S. Supreme Court ruled that flight "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" gave rise to a "taking" under the Fifth Amendment to the U.S. Constitution.²⁸ In 1962, the Court ruled in *Griggs v. Allegheny County* that an airport proprietor's selection of an airport's location and runway configuration ultimately defined low-level aircrafts' flightpaths.²⁹ Therefore, the Court reasoned that the *airport proprietor* was responsible for acquiring any necessary aviation easements in the same way it was responsible for acquiring the land itself for the airport.³⁰ Accordingly, airport proprietors—the overwhelming majority of which are public entities³¹—are also generally liable for a taking resulting from aircraft overflights.

Much has changed since *Griggs* was decided. Many airports that were initially built far from population centers have since been surrounded by expanding urban development with nowhere left to grow. Once built, airport proprietors may have little, if any, control over modifications to terminal procedures that increase the frequency of aircraft noise or place it over new neighborhoods.

Despite these practical realities, courts have been extraordinarily resistant to revisiting this fundamental

presumption of liability on the part of airport proprietors.³² Reallocation of liability for aircraft overflight would serve as a power incentive to ensure due regard for noise-related impacts, and provide a meaningful remedy for aggrieved communities.

Airport and Community Roles in the ATC Entity's Governance

Congress must also ensure that airports and the communities they serve have a meaningful role on the governing board of any new ATC entity, to guarantee both the development of sound environmental policies related to aircraft noise as well as equitable airspace access.

Airport proprietors are accountable not only to airport users but also to local residents who may be adversely impacted by aircraft noise. Frequently they are the only entities capable of liaising between the FAA's technical staff and local residents to ensure their concerns are heard. Correctly or not, new noise impacts are often perceived as *airports'* failure to carry out their responsibilities, which in turn jeopardizes airports' support in their communities. Indeed, concerns regarding aircraft noise are often the most significant obstacle to successfully delivering projects to increase or maintain airfield, terminal, and other capacity. Airport representation on the governance of a new entity is important to ensure due regard for this reality.

Furthermore, under the current legal regime governing liability for aircraft overflight discussed above, the airport proprietor faces potential liability for takings that result from changes in terminal flight procedures. Airport representation on a new ATC entity's governing board is therefore also compelled by principles of basic fairness; otherwise, airports will have little to no influence over the policies and procedures that may ultimately impact their noise-related exposure. Similarly, changes in the frequency and distribution of aircraft noise have an often profound impact on airport communities. It would be a fundamental problem if the new ATC entity were given authority to effect those changes without affected communities having a say, particularly given the dearth of procedural and substantive protections available to them.

Apart from their expertise and interest with respect to environmental issues, airports and airport communities are also uniquely positioned to promote equitable airspace access to all users of the NAS. Unlike any of their nongovernmental industry partners, airports are the only stakeholders with an affirmative obligation to provide services to all members of the public "on reasonable terms and without unjust discrimination."³³ Airports are therefore accustomed to balancing the needs of large, scheduled air carriers alongside those of general aviation, and are keenly aware of the economic significance of each on a national and local level. Neutral airport representation on a new entity's governing board would likely serve as a bulwark against a

“best-equipped, best-served” operating model.

Airports also have an important role in ensuring that a new ATC entity’s policies do not adversely affect small and rural communities. A principal concern among local community leaders and many industry experts is that a private ATC entity’s resources will be focused on serving “high-value” customers, leading to increased operating costs in areas that generate a lower volume of air traffic, unequal distribution of infrastructure investment, and other barriers to maintaining a robust network of domestic air service.³⁴ Such a policy could have devastating effects on small and nonhub airports, which already encounter significant challenges as a result of airline mergers and large hub consolidation.³⁵ Indeed, even relatively minor changes to an airport’s service level can have significant compounding effects. For example, reductions in passenger enplanements generally reduce the amount of grant financing that is available to an airport for funding infrastructure improvements.³⁶ Increased reliance on local revenues may lead to a higher cost per enplaned passenger, which can lead to further reductions in service.

Although most experts agree that airports and airport communities would bring a critical perspective to a new ATC entity’s governance,³⁷ the AIRR Act did not expressly provide for their representation on the ATC Corporation’s board of directors.³⁸ In fact, the AIRR Act effectively prohibited their appointment by precluding all officials and employees of state and local government from service.³⁹ Representative Bob Gibbs’s amendment, which would have given primary airport⁴⁰ operators a seat on the board, was defeated by voice vote. Instead, commercial service airports⁴¹ and “small communities” were given membership on an advisory board, which would enable them merely to make recommendations to the ATC Corporation or engage in other activities that the board deemed appropriate.⁴² No representation on either the board of directors or the advisory board was provided for nonprimary, general aviation airports and their communities. It is critical that airports and the communities they serve have more than a perfunctory role in management of any entity established to provide ATC services.

Although airport and community representation is important, it would be insufficient to fully represent the wide range of airport and community interests or prevent actions that would cause harm to airport development interests, community concerns, and noise-related liability. Accordingly, legal protections are needed to guarantee that noise and other community concerns are adequately addressed. Further, legislation should shift any noise liability resulting from new airspace decisions from airport proprietors to the new private or semi-private ATC entity to ensure the proper alignment between authority and liability.

Impacts of Funding on Other FAA Programs

Airports are also among the stakeholders most affected by privatization’s ancillary impact on other FAA programs. Next to ATC services, the Airport Improvement Program (AIP) is the FAA’s most significant cost center, comprising just over 20 percent of the FAA’s \$16 billion annual budget. In removing ATC services from the vagaries of annual appropriations and the legislative process, Congress must ensure that the AIP’s funding structure remains stable.

Presently, all FAA functions are funded through congressional appropriations from either the Airport and Airway Trust Fund (AATF) or the U.S. General Fund.⁴³ The AATF is funded through a variety of excise taxes, including those on airline tickets, aviation fuel, and the use of international arrival and departure facilities.⁴⁴ In FY 2016, the AATF took in approximately \$14.4 billion in revenues, over \$10 billion of which was appropriated for the FAA’s operations, facilities, and equipment accounts.⁴⁵ Congress appropriated an additional \$2 billion from the General Fund for these purposes.⁴⁶ By contrast, Congress has allocated approximately \$3.35 billion from the AATF annually for FYs 2012 through 2017 for the AIP.⁴⁷

The privatization of ATC services and shift to a user-funded model would therefore eliminate a significant portion of the activities to which AATF revenue is directed. To date, however, Congress has not put forward a proposal for rebalancing the AATF’s revenue streams to ensure that the AIP program remains adequately funded. Moreover, there has been no indication in existing proposals that user fees generated by the new ATC entity would be redirected in part to the AATF.

It is critical that airports retain a self-sustaining source of funds for infrastructure improvements. Over the next five years, the FAA has estimated over \$30 billion in AIP-eligible, unmet capital development needs⁴⁸—a significant portion of the \$100 billion total that must be invested in U.S. airports over the same time period.⁴⁹ In an increasingly volatile legislative climate, the integrity of airport infrastructure throughout the United States would be jeopardized were airports forced to compete for general funds as a result of privatization.

Finally, like responsibility for environmental compliance discussed above, it is important for Congress to consider whether responsibility for administering the AIP and determining funding priorities will remain entirely with the FAA post-privatization. While none of the experts surveyed by the GAO felt that the new ATC entity should assume such responsibility, nearly half suggested that some organization other than the safety regulator should.⁵⁰ The separation of ATC services and associated infrastructure investment from the entity administering the AIP program will likely require enhanced coordination to optimize federal investment in airports.

Endnotes

1. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-131, AIR TRAFFIC CONTROL: EXPERTS' AND STAKEHOLDERS' VIEWS ON KEY ISSUES TO CONSIDER IN A POTENTIAL RESTRUCTURING 16 n.41 (2016) [hereinafter GAO REPORT GAO-17-131].
2. NEXTGEN ADVISORY COMM., PBN BLUEPRINT COMMUNITY OUTREACH TASK GROUP 3 (2016) [hereinafter PBN BLUEPRINT].
3. See, e.g., *City of Phoenix v. Huerta*, No. 15-1158 (D.C. Cir. filed June 1, 2015); *Lyons v. FAA*, No. 14-72991 (9th Cir. filed Sept. 26, 2014); Sarah D. Wire, *Like a "Stab in Your Brain"—Complaints from Bay Area Residents in Noisy Flight Path Spike 2,706%*, L.A. TIMES, Nov. 17, 2015, <http://www.latimes.com/politics/la-pol-ca-california-noise-faa-html-20151117-htmlstory.html>.
4. See Performance Based Navigation Implementation Process, FAA Order No. 7100.41A (Apr. 29, 2016); Environmental Impacts: Policies and Procedures, FAA Order No. 1050.1F (July 16, 2015).
5. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).
6. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 213(c), 126 Stat. 11, 49–50.
7. *Robertson*, 490 U.S. at 350.
8. *Id.* at 351.
9. 49 U.S.C. § 303(c).
10. *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).
11. 54 U.S.C. §§ 300101 *et seq.*
12. 36 C.F.R. § 800.5(a)(2)(v).
13. GAO REPORT GAO-17-131, *supra* note 1, at 16.
14. *Id.* at 61. New York Senators Chuck Schumer and Kirsten Gillibrand introduced legislation to transfer oversight of aircraft noise issues to the Environmental Protection Agency. Quiet Communities Act of 2016, S. 3197, 114th Cong. (2016).
15. PBN BLUEPRINT, *supra* note 2, at 5–6.
16. *Id.*
17. *Id.*
18. FAA, COMMUNITY INVOLVEMENT MANUAL (2016), https://www.faa.gov/about/office_org/headquarters_offices/apl/environ_policy_guidance/guidance/media/faa_cim.pdf.
19. Press Release, FAA, FAA to Re-Evaluate Method for Measuring Effects of Aircraft Noise (May 7, 2015), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=18774.
20. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 341(b), 130 Stat. 2000 (2016).
21. *Id.*
22. *Review of Air Traffic Control Reform Proposals: Hearing Before the H. Comm. on Transp. & Infrastructure*, 104th Cong. 39–40 (2016).
23. Aviation Innovation, Reform, and Reauthorization Act of 2016, H.R. 4441, 114th Cong. § 211(a) (2016) (proposed 49 U.S.C. § 90501).
24. *Review of Air Traffic Control Reform Proposals*, *supra* note 22, at 46.
25. H.R. 4441, § 211(a) (proposed 49 U.S.C. § 90501(c)).
26. *Id.* (proposed 49 U.S.C. § 90501(c)–(d)).
27. *Id.* (proposed 49 U.S.C. § 90310(a)(6)).
28. *United States v. Causby*, 328 U.S. 256, 266 (1946).
29. 369 U.S. 84 (1962).
30. *Id.* at 89.
31. FAA, U.S. DEP'T OF TRANSP., REPORT TO CONGRESS: NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (NPIAS) 2017–2021, at 3 (2016).
32. See W. Eric Pilsk, *Airport Noise Litigation in the 21st Century: A Survey of Current Issues*, 11 ISSUES AVIATION L. & POL'Y 371 (2012).
33. FAA, AIRPORT IMPROVEMENT PROGRAM GRANT ASSURANCES FOR AIRPORT SPONSORS 10 (2014), https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip.pdf.
34. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-386R, FEDERAL AVIATION ADMINISTRATION: PRELIMINARY OBSERVATIONS OF POTENTIAL AIR TRAFFIC CONTROL RESTRUCTURING TRANSITION ISSUES 8 (2016); William Garvey et al., *U.S. Mayors Concerned about ATC Privatization*, AVIATION WK. (Mar. 28, 2017), <http://aviationweek.com/bca/us-mayors-concerned-about-atc-privatization>.
35. See generally WILLIAM SPITZ ET AL., AIRPORT COOP. RESEARCH PROGRAM, ACRP REPORT 142, EFFECTS OF AIRLINE INDUSTRY CHANGES ON SMALL- AND NON-HUB AIRPORTS (2015).
36. 49 U.S.C. § 47114.
37. Of the 28 experts consulted by the GAO, 23 agreed that airports should be on the governing board of any entity established to provide ATC services. GAO REPORT GAO-17-131, *supra* note 1, at 68.
38. H.R. 4441, 114th Cong. § 211(a) (2016) (proposed 49 U.S.C. § 90306).
39. *Id.* (proposed 49 U.S.C. § 90306(e)).
40. A “primary airport” is a commercial service airport, *infra* note 41, with at least 10,000 passenger boardings each year. 49 U.S.C. § 47102(16).
41. A “commercial service airport” is a public airport with at least 2,500 passenger boardings each year and which receives scheduled passenger aircraft service. 49 U.S.C. § 47102(7).
42. H.R. 4441, § 211(a) (proposed 49 U.S.C. § 90308).
43. *Airport and Airway Trust Fund (AATF) Fact Sheet*, FAA 6 (2017), https://www.faa.gov/about/budget/aatf/media/AATF_Fact_Sheet.pdf [hereinafter *AATF Fact Sheet*].
44. *Id.* at 4; see also 26 U.S.C. § 9502(b).
45. *AATF Fact Sheet*, *supra* note 43, at 5.
46. *Id.*
47. *Id.*; 49 U.S.C. § 48103(a).
48. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-504T, AIRPORT FUNDING: FAA'S AND INDUSTRY'S COST ESTIMATES FOR AIRPORT DEVELOPMENT 4 (2017).
49. AIRPORTS COUNCIL INT'L—N. AM., AIRPORT INFRASTRUCTURE NEEDS 2017–2021 (2017).
50. GAO REPORT GAO-17-131, *supra* note 1, at 61.