

The statute requires certain steps to be completed before filing the application and gives the FAA 120 days to complete the review. Given these requirements, the FAA is reluctant to provide specifically for concurrent actions at this time prior to gaining experience in implementing the rule. Therefore, the final rule does not reduce the number of days for the Administrator's decision on an application.

The final rule retains the provision for *Federal Register* notice and opportunity for public comment since this notice is the usual means of advising the public of that opportunity. The FAA will bear the burden of publishing the notice. The requirement that the public agency make a copy of this notice available upon request, should not be unduly burdensome since a copy for inspection at the airport is sufficient. Publication of the notice in a local newspaper is optional with the public agency. As to limiting comments to users of the airport, the statute specifies that any "interested person" have an opportunity to comment, and there is no statutory basis for treating that language as limiting comment to airport users. Moreover, potential "users" of the airport may come from anywhere in the country. Therefore, the final rule does not incorporate either of these suggestions.

The final rule also retains the 30-day FAA comment period proposed in the NPRM. If the comment period matched the total time allowed in the local consultation process, 75 days, the FAA would, in many cases, have insufficient time to complete the review process within the 120 days provided in the statute. Also, the final rule does not require air carriers to submit to the FAA their comments in the local consultation process. Such a requirement would effectively preclude air carriers from responding to a public agency's explanations of its reasons for pursuing an application in light of certifications of disagreement and in doing so would frustrate the purpose and value of the notice and comment requirement.

The final rule also retains the requirement that commenters serve a copy of their comments on the public agency. Principles of fundamental fairness clearly entitle an applicant to be made aware of comments, arguments and evidence being presented in opposition to its application. The burden on commenters proposed in the NPRM—the cost of one additional copy and first class postage—is not unreasonable.

With respect to supplemented applications, the final rule provides that the 120-day review period be restarted with the filing of the supplement. It does not incorporate a commenter's suggestion that the clock be suspended while the supplement is being filed. Because the final rule provides for only one supplement, however, the prospect for extensive delay is largely eliminated.

On a related matter, the final rule does not incorporate a suggestion that notices of substantially complete applications specify any additional information required. This proposal misconstrues the concept of substantially complete applications, which is to assure that applications will be reviewed on their merits, even if not in strict technical compliance with all requirements of the rule. An application will not be considered substantially complete if the FAA considers additional information to be necessary for a decision.

§ 158.29 The Administrator's Decision (Proposed: Review and Approval Process). As proposed, this section sets forth the standards for approval of an application and the contents of the Administrator's notice to the public agency of approval. Under the proposal, the Administrator would have approved an application only after a determination there would be no excessive PFC collections, the project met the objectives and standards of § 158.17, and the application was substantially complete. The NPRM required public agencies to file an application to both impose a PFC and use PFC revenue on a project.

Comments: This provision of the NPRM generated very little comment. A comment from the financial community suggests the rule state that the Administrator's decision be binding and conclusive.

Final Rule: The paragraph of the NPRM dealing with this issue (§ 158.29(g)) has been replaced with a new § 158.29. This reflects the fact that public agencies have the option to seek approval for imposition of PFC's separately from approval to use PFC revenue. Somewhat different standards are provided for each type of approval. Paragraph (a) defines the standards for approval to impose a PFC, and paragraph (b) defines the standards for approval to use PFC revenue. However, when a public agency applies for concurrent approval to impose a PFC and use PFC revenue, the public agency must satisfy the requirements of both paragraphs before the Administrator will approve the application.

Under paragraph (a), the Administrator will approve an application to impose a PFC only upon determining that excess revenue will not be collected, and the preferred project is eligible. In addition, the collection process, including a request to waive the collection requirement for a class of carriers, must be determined by the Administrator to be reasonable, not arbitrary, nondiscriminatory and in accordance with the law. When the public agency has not sought concurrent approval to use PFC revenue, there must be alternative uses for PFC revenue in case the public agency's preferred project is not approved.

The first standards reflect statutory requirements. The next standard allows the Administrator to ensure that the public agency has adopted a fair classification system that does not unfairly favor any

carrier or class of carrier. Under this standard, for example, a classification of on-demand Part 135 operators might be approved, whereas a classification of Part 135 operators that had served the airport 5 years or more probably would not. The last requirement regarding alternative projects ensures that approval to impose a PFC does not inexorably commit the FAA to permit the use of PFC revenue on a particular project. The proposed standard that the application comply with the final rule's application requirements has been omitted. Because the Administrator will rule on the merits of all applications after at most one supplement, this standard is no longer necessary.

Section 158.29(a)(2) specifies the Administrator's notice of approval will list projects and alternative uses that may qualify for PFC financing, the PFC to be imposed, total approved PFC revenue, duration of authority and the earliest permissible charge effective date. The FAA considers this information relevant to the approval to impose a PFC. In particular, the specification of the earliest permissible charge effective date allows the Administrator to ensure carriers will be ready to begin collection on the public agency's charge effective date. It is expected that this issue will be discussed during the local consultation process. The Administrator will not specify the exact charge effective date because, under § 158.43, the charge effective date will depend on the date of the public agency's notice to carriers.

Paragraph (b) defines the standards for approval to use PFC revenue on an approved project. The Administrator will approve an application only after the determinations that there will not be excessive collections, that the project meets the statutory standards for use of PFC revenue, and that any project satisfies all applicable requirements with respect to FAA airspace determinations, ALP approvals and compliance with NEPA. The first two standards relate to the standards in the PFC statute. Once a specific project has been identified for PFC financing, it is necessary to assure that the specific project may be financed by PFC revenue under the statute and that PFC revenue will not exceed the allowable costs of that project. The latter standard assures that a public agency does not use PFC funds on a project until all requisite Federal approvals have been obtained. If the Administrator cannot verify that these requirements have been met, the application will be disapproved. Under § 158.29(b)(2), approval to use PFC revenue on any project will be considered approval of that project for purposes of the rule.

Paragraph (c) of this section specifies that the Administrator will give written notice when an application is disapproved. That notice will include the reasons for the decision. While the NPRM included notification of approval, notification of disapproval was inadvertently omitted. If a public agency files a new application following disapproval, it must comply with the consultation and application requirements of the rule since it is likely a new application will involve some changes.

§ 158.31 Duration of Authority to Impose a PFC Following Project Implementation. (Proposed Duration of Authority to Impose a PFC). As proposed, this section would have allowed that a public agency to impose a PFC until it received the total approved PFC revenue, or the Administrator had terminated PFC authority under subpart E, or the public agency was determined to be in violation of relevant provisions of the Airport Noise and Capacity Act of 1990 and terminated the authority to impose a PFC thereunder.

Comments: Some commenters express concern that tying termination to receipt of total approved PFC revenue would be unduly burdensome to public agencies which had underestimated project costs and collected the amount of total approved PFC revenue before a project was completed or fully paid for. These commenters suggest termination be tied to collection of PFC revenue when they equal project costs. Some suggest public agencies be allowed to continue to impose the PFC and apply the PFC revenue to other approved projects.

Final Rule: The proposed provision has been modified in three ways in the final rule. First, the final rule specifies that the public agency may impose a PFC until total PFC revenue plus interest equals the allowable cost of the approved project. This may require a public agency to revise its charge expiration date so revenue collected match allowable costs. This revision addresses the concern raised in the comments. The final rule does not explicitly provide for the continued imposition of a PFC to finance approved backup projects. If backup projects have been approved, under the terms of the rule, the public agency may use PFC revenue to finance these projects, and imposition could continue. However, the public agency must obtain specific approval to use PFC revenue for the backup projects. If authority to use the revenue on specific backup projects has not been obtained, the authority to impose the PFC would expire once the public agency had received sufficient PFC revenue and interest to pay for the costs associated with approved projects.

In the second change, this section of the final rule now explicitly applies only when a public agency has begun implementation of an approved project. New section § 158.33, addresses instances when a public agency has not implemented an approved project in a timely fashion, and is discussed below.

The third change is in paragraph (c), referring to termination for noncompliance with provisions of the Airport Noise and Capacity Act of 1990. The final rule specifies that the authority to impose a PFC will be terminated for non-compliance with that law in accordance with the implementing regulations for that statute.

§ 158.33 Time Limits for Imposition of PFC collection before project implementation. (No corresponding provision in NPRM). This new section in the final rule sets forth the standards and procedure governing the loss of authority to impose a PFC for failure to implement an approved project. The NPRM included a proposal requiring projects begin implementation within 2 years after the public agency's proposed charge effective date, but it did not explicitly provide for the consequences if a project were not implemented.

The final rule provides for such circumstances. The FAA also determined that the final rule should address the duration of authority to impose a PFC before a public agency applies for approval to use PFC revenue and implements a project. This ensures that collections do not continue indefinitely without PFC revenue being put to use as contemplated in the statute. Airport comments are generally critical of the proposed 2-year accumulation period. A number of commenters propose that collection be permitted up to 5 years. Some propose initial authorization of up to 5 years with periodic progress reports to carriers and the FAA. The joint submission recommends initial authorization of 3 years with the possibility of seeking a 2-year extension, and even a 5-year extension. One major airport suggests advance collection should not have a set time limit. This airport would allow the public agency to schedule PFC imposition, accumulation of revenue, and use of PFC revenue to minimize financing costs. One industry trade association proposes an even shorter accumulation period.

The FAA determined that the 2 year accumulation period may be insufficient for major projects when a public agency imposes a PFC during the planning and formulation process. The final rule permits initial accumulation for 3 years before a public agency applies for approval to use PFC revenue. The public agency may seek an extension of up to 2 years following an abbreviated application process, but at the end of 5 years, it must begin project implementation.

The FAA recognizes that the ability to accumulate PFC revenue may ultimately reduce total project financing costs by reducing the amounts public agencies need to borrow. However, advance accumulation by its nature requires passengers to pay for facilities that they may never use. Therefore, a limit on accumulation is appropriate.

The FAA believes that the three-plus-two approach is a reasonable limit. Even if a major project requires 10 years to complete, the public agency should be well along in the planning process by the third year and should have progressed to the point of project implementation by the fifth year. In addition, this approach has broad support in the comments.

Under paragraph (a), a public agency may impose a PFC for up to 2 years after receiving approval to use PFC revenue before it implements a project. However, if it had obtained prior authority to impose a PFC, it must implement the subsequently approved project no later than 5 years after the charge effective date. Thus, a public agency that imposed a PFC and received approval to use a PFC 2 years after imposition could continue to impose a PFC for 2 more years before project implementation—a total of 4 years. In contrast, a public agency that did not receive approval to use PFC revenue until 4 years after it began imposing a PFC could continue to impose the charge for only 1 more year before project implementation—a total of 5 years.

If after 2 years (or 5, when appropriate) when the public agency has project approval and the Administrator believes sufficient progress has not been made toward project implementation, the Administrator will begin termination proceedings under subpart E. The use of subpart E procedures allows the public agency to take corrective action and should reduce, but will not eliminate, bondholders' uncertainties over abrupt termination of a PFC revenue stream.

The FAA anticipates that in virtually all cases arising under paragraph (a), the matter would be resolved through informal resolution. The FAA does not expect that questions of project implementation would progress to the hearing stage.

Paragraph (b) sets forth the time limits for imposition of a PFC before approval to use PFC revenue. The public agency may collect for up to 3 years before an application for approval to spend PFC revenue has been filed or a request for an extension has been filed under § 158.35. If an extension is authorized, the public agency may continue to impose a PFC for only 2 more years unless it obtains approval to use PFC revenue. At the end of 3 years without an extension or project approval or 5 years without project approval and implementation of the project, the authority to impose a PFC will expire automatically.