Federal Aviation Administration

Memorandum

Date: MAR -5 2013

To: Ed W. Lucke, Director, Flight Inspection Services, AJW-3

From: Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation and Regulations

Prepared by: Dean E. Griffith, Attorney, Regulations Division

Subject: Legal Interpretation on the Acceptable Use of Operational Funds for Emergency Medical Services (EMS) Copter Support

This memorandum is in response to your request for legal interpretation regarding whether the FAA may use operations funds for development of emergency medical service (EMS) helicopter routes and departure procedures. As discussed below, the answer to your question is that expenditures from operations funds for helicopter route and departure procedure development are permitted under the FAA's current statutory authority.

The FAA Modernization and Reform Act of 2012 ["2012 Reauthorization Act"], has replaced much of the language formerly codified at 49 U.S.C. § 106(k)(2) regarding the FAA's authorized expenditures.[1] The 2012 Reauthorization Act implemented authority to use operations funding for the "development and maintenance of helicopter approach procedures" under 49 U.S.C. §106(k)(2)(C).[2] Congress identified the particular purposes codified at 49 U.S.C. § 106(k)(2) as "authorized expenditures" or "set asides."[3] The set aside language does not identify particular dollar amounts, ceilings or minimum amounts required to be spent. Nor is there language in the FAA's Appropriations Act identifying dollar amounts for any of these flight procedure activities. Finally, in order to accomplish its mission the FAA must spend appropriated money on many

[1] Pub. L No. 112-95, § 103, 126 STAT. 11, at 16 (2012), *available at* http://testimony.ost.dot.gov/compilation/2012-Compilation_of_Aviation_Laws.pdf. The former authorizing language, codified at 49 U.S.C. § 106(k)(2)(A) and (B), included broad authority to use "such sums as may be necessary" within operations funds to "support infrastructure systems development for both general aviation and the vertical flight industry" and to "establish helicopter approach procedures . . . to support all-weather, emergency medical service for trauma patients." *See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century*, Pub. L. No. 106-181, § 103(a)(2), 114 STAT. 61, at 66 (2000), *as renumbered by Vision 100: Century of Aviation Reauthorization Act*, Pub. L. No. 108-176, § 103(b), 117 STAT. 2490, at 2496 (2003).

[2] Pub. L. No. 112-95, 126 STAT. 11, at 61 (2012).

[3] The House language "amends and streamlines the Operations account set asides in section 106(k)(2) by striking authorized expenditures ...." *See* H. R. Rep. No. 112-29, pt. 1, at 95 (2011). These set asides function as reminders, without the identified dollar amounts included for traditional "earmarks." *See Principles of Appropriations Law [GAO Red Book]*, pp. 6-26 to 6-33.

things in addition to the three listed purposes in section106(k); hence the FAA is not required to exhaust the entire 2012 operations funding of $9,653,395,000, identified in the FAA's corresponding Appropriations Act, on the authorized expenditures listed in section 106(k)(2).[4]

Under appropriations law, a set aside for one purpose does not exclude use of remaining funds for other lawful purposes. Instead, the "necessary expense" doctrine provides that an agency may use appropriated funds for purposes in support of its mission.[5] The FAA's mission includes regulating the safety of aircraft and efficient use of airspace.[6]

As explained above, a budgetary "set aside" for the "development and maintenance of helicopter approach procedures" is not meant to exclude the FAA from using operations funds for other helicopter flight procedure activities supporting its mission. Likewise, Congress' updating its list of set asides in the new section 106(k)(2) does not serve as a prohibition on spending for any set aside purposes in the prior section 106(k) list because the FAA could have spent operations funds on those various types of helicopter approach procedure activities whether or not they were ever listed in section 106(k). Thus, the FAA may use operations funds for "the development of emergency medical service (EMS) helicopter routes and departure procedures." Accordingly, operations funds may be used for the development of helicopter routes and departure procedures.

This memorandum was prepared in conjunction with the Acquisition and Fiscal Law Division of the office of the Chief Counsel and coordinated with the Air Transportation Division and Flight Technology and Procedures Division of Flight Standards Service. For questions specific to the use of appropriated funds, please contact the Acquisition and Fiscal Law Division of the Office of the Chief Counsel, AGC-500. For other questions, please contact us at (202) 267-3073 if we can be of further assistance.

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[4] *Consolidated and Further Continuing Appropriations Act, 2012*, Pub. L. No. 112-55 (2011).

[5] *See generally GAO Red Book*, pp. 4-19 to 4-35.

[6] Under Title 49 of the United States Code (USC) § 40103(a)(1), the United States Government possesses exclusive sovereignty of the airspace. In addition, the Federal Aviation Administration (FAA) has broad authority to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1).