No. 10-70718

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE BARNES, PATRICK CONRY, AND BLAINE ACKLEY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, Secretary of Transportation; FEDERAL AVIATION ADMINISTRATION; J. RANDOLPH BABBITT, Administrator, Federal Aviation Administration; DONNA TAYLOR, Regional Administrator, Federal Aviation Administration, Northwest-Mountain Region; CAROL SUOMI, District Manager, Federal Aviation Administration Seattle Airports District; AND CAYLA MORGAN, Environmental Specialist, Federal Aviation Administration Seattle Airports District,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL AVIATION ADMINISTRATION

BRIEF FOR THE FEDERAL RESPONDENTS

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JURISDICTIONAL STATEMENT

The FAA agrees with Petitioners' Statement of Jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the FAA's conclusion that adding a runway to Hillsboro Airport would not have significant impacts on the environment and therefore the National Environmental Policy Act did not require the FAA to prepare an environmental impact statement was arbitrary or capricious.

2. Whether the FAA considered a reasonable range of alternatives to the proposed action in its environmental assessment.

3. Whether the Port of Portland, the project's sponsor, provided an adequate opportunity for a public hearing to consider the economic, social, and environmental effects of adding a runway at Hillsboro Airport.

STATEMENT OF THE CASE

The Hillsboro Airport is a general aviation airport just outside of Portland, Oregon. It is currently operating at capacity—the total number of operations in a year equals or exceeds the "annual service volume" for the airport, a figure calculated according to FAA guidelines. In general, the FAA recommends that planning for increased capacity

begin when an airport is operating at 60 to 75 percent of its annual service volume. To estimate the airport's necessary future capacity, the Port of Portland, which owns and operates the airport, extensively studied existing and future demand for the airport, taking into account national and regional aviation trends, local socioeconomic and demographic forecasts, and historical use of the airport. The Port's demand forecast showed that without capacity enhancements by 2025 Hillsboro Airport was likely to be operating at 146 percent of its current annual service volume; that amounts to an average of a six-minute delay for each aircraft operation.

To alleviate that delay and provide the necessary capacity to meet the forecasted demand, the Port proposed to add a parallel runway to the airport. Doing so would require relocating an existing helipad and building new taxiways to access the new runway. Before the project could be undertaken, the FAA had to approve an airport layout plan amendment and potential grants of federal funding, triggering the requirements of the National Environmental Policy Act. The FAA prepared an environmental assessment to analyze the environmental impacts of the proposal. The FAA concluded that adding the runway

and taxiways and relocating the helipad would not have any significant impact on the environment and thus the National Environmental Policy Act did not require it to prepare an environmental impact statement. Michelle Barnes, Patrick Conroy, and Blaine Ackley—three concerned citizens—filed this petition for review of the FAA's finding of no significant impact.

STATUTORY BACKGROUND

A. National Environmental Policy Act: The National Environmental Policy Act ("NEPA") requires federal agencies to consider the environmental impact of any major federal action they undertake. NEPA is a procedural statute that does not mandate any specific substantive result, "but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002) (citations omitted).

NEPA promotes informed decisionmaking and public disclosure by requiring responsible agencies to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality" of the human environment. 42 U.S.C. § 4332(2)(C). An EIS is

not required in every case. An agency may first prepare an environmental assessment ("EA") to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If an agency determines that an EIS is unnecessary, it may issue a finding of no significant impact ("FONSI") to satisfy its obligations under NEPA. 40 C.F.R. §§ 1508.9(a)(1), (2).

B. Airport and Airway Improvement Act: Congress passed the Airport and Airway Improvement Act of 1982 (the "AAIA"), 49 U.S.C. §§ 47101 *et seq.*, to, among other things, fund projects that improve safety and reduce delays at airports by increasing their capacity. 49 U.S.C. § 47101(a)(1)-(9). In particular, the AAIA aims to expand the nation's network of reliever airports, which accommodate local communities' demand for general aviation and accept overflow from nearby commercial airports. *Id.* at §§ 47101(a)(3), 47102(22). Under the AAIA, the FAA may not approve an application for a grant of federal money for an airport development project involving the location of an airport or runway or a major runway extension that has significant environmental impacts on natural resources, unless the agency finds that every

reasonable step has been taken to minimize the adverse effects of the project. *Id.* § 47106(c)(1)(B). It must also receive certification that members of the public have been afforded "an opportunity for a public hearing" on the proposed project. *Id.* § 47106(c)(1)(A)(i).

STATEMENT OF THE FACTS

I. The Hillsboro Airport

The Hillsboro Airport is the busiest general aviation airport in Oregon. In its current configuration, Hillsboro Airport consists of a primary runway, a smaller cross-wind runway, and three taxiways that parallel those runways. SER 155, 156 (map). In addition to those runways, which accommodate fixed-wing aircraft, Hillsboro Airport has three helicopter-takeoff sites. Two of those sites are located at the end of each runway and the third, the Charlie helipad, is located parallel to the primary runway. *Id.*

General aviation is one of the two major categories of civil aviation and includes all civil flights that are not passenger or cargo flights operating on regularly scheduled routes. The FAA has designated the Airport as a general aviation "reliever airport" for Portland International Airport. SER 155. Reliever airports are located in major

metropolitan areas and play a specific role in the National Airspace System: they "provide pilots with attractive alternatives to using congested hub airports" by specializing in high-capacity general aviation. *Id.* As traffic at the Hillsboro Airport increases, with concomitant increases in congestion and delay, the Airport's ability to serve as "an attractive, safe and efficient" reliever airport diminishes. SER 165. The Airport's capacity to meet its demand and serve its function as a reliever airport is therefore an important part of the National Airspace System.

To judge an airport's runway-system capacity, the FAA has developed a formula to derive each airport's "annual service volume." SER 157. An annual service volume is essentially the number of operations—meaning takeoffs and landings (with touch and go operations counting as one takeoff and one landing)—that an airport can accommodate in a year under expected conditions with acceptable levels of service. The FAA generally expects that planning for increased capacity to meet increased demand will begin when an airport is operating at 60 to 75 percent of its annual service volume. *Id.* In 2005 the Port of Portland undertook the Hillsboro Airport Master Plan to

"forecast future aviation demand, and to plan for the timely development of new or expanded facilities that may be required to meet that demand" out to 2025. SER 419-20. The Master Plan calculated the Airport's annual service volume and concluded that the Airport was already operating at nearly 100 percent capacity and therefore needed to expand to accommodate existing use. SER 421-22. By 2007, the Airport was operating at capacity and had average delays of more than one minute per operation.

The Master Plan also undertook an extensive forecast of aviation demand at the Hillsboro Airport. SER 478. Following industry standards, the Port examined the factors that it concluded were most likely to drive demand in the future: "national and regional aviation trends, historical and forecast socioeconomic and demographic information of the area, and historical trends at Hillsboro Airport." SER 480. It did so through a variety of forecasting techniques. First the Port developed a linear trend line based on national general aviation trends. Then it performed a regression analysis based on the population, income, and employment trends of the Portland area (because whether local corporations and individuals are buying and basing airplanes at

Hillsboro Airport is a significant demand indicator). It also examined the share of active aircraft in the United States and in Washington County that have historically been based at Hillsboro Airport, and used that data to predict the future share. And finally it examined the FAA's Terminal Area Forecast. SER 157. The Port ultimately concluded that without a new runway by 2025 annual operations at the airport would increase to 146% of the airport's annual service volume and there would be an average delay of six minutes per operation at the airport. SER 160-61.

II. The Proposed Project and Environmental Assessment

To address Hillsboro Airport's existing capacity limitations and forecasted growth, the Port of Portland proposed to add a new runway to the Airport running parallel to the existing primary runway on the location of the existing Charlie Helipad, to relocate that helipad, and to build associated taxiways. Doing so would require FAA funding and layout plan approvals, so the FAA analyzed the impacts of the project as required by NEPA. Because the FAA's NEPA implementing procedures provide that "[f]ederal financial participation in, or unconditional airport layout plan approval of" new runway construction

projects normally requires preparing an EA, FAA Order 1050.1E ¶ 401k, the FAA analyzed the impacts of the proposed new runway in an EA to determine whether NEPA required it to prepare an EIS.[1]

The EA first outlines the purpose and need of the Project. The FAA concluded that Hillsboro Airport needed a new runway because "the airfield is operating at close to 100 percent of [annual service volume] and current Airport activity levels exceed FAA capacity planning criteria." SER 165. Without the project unacceptable levels of delay would persist and worsen. *Id.* Thus, the primary purpose of the project is to "reduce congestion and delay at Hillsboro Airport in accordance with planning guidelines established by the FAA." *Id.*

The FAA analyzed the proposed project and a slate of seven alternative methods to reduce congestion and delay. SER 167-78. After highlighting factors limiting the range of feasible options like the

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[1] Regulations of the Council on Environmental Quality implementing NEPA allow for environmental assessments to be prepared by applicants for federal action. 40 C.F.R. § 1506.5(b). When an applicant prepares an EA, the agency is required to independently evaluate the information in the EA and be responsible for its accuracy. 40 C.F.R. § 1506.5(a). Moreover, the agency must "make its own evaluation of the environmental issues and take responsibility for the scope and content" of the EA. 40 C.F.R. 1506.5(b). *See also* FAA Order 1050.1E, ¶ 230b; FAA Order 5050.4B, ¶ 707f.

necessary length and configuration of a runway and its separation from the existing runways, SER 169-73, the FAA eliminated five alternatives and focused its review on the other three. SER 172-73. Alternative 1 is the no action alternative and would maintain the status quo. SER 173-76. In both Alternatives 2 and 3, the Airport would gain a new parallel runway and a taxiway; the two options differ in where the Port would move the Charlie Helipad to make way for the new runway. SER 176-79. The FAA analyzed and updated the Master Plan's demand forecasts in determining the level of activity at the airport and the consequences of the Project. SER 373-414. It determined that Alternative 1 would force the airport to operate at an estimated 123 percent of capacity in 2015 and 146 percent of capacity by 2025. SER 408. By contrast, adding a new runway, under Alternative 2 or 3, would allow the airport to function at 69 percent of capacity in 2015 and 81 percent of capacity in 2025. *Id.*

The FAA then evaluated the environmental impacts of the three alternatives. SER 203. It concluded that none of the alternatives would significantly impact the environment. SER 333-34 (chart summarizing impacts). By curbing delay, Alternatives 2 and 3 would actually reduce

air pollution and fuel consumption compared to Alternative 1. SER 259-323. Although a new runway would spread noise impacts modestly, increase stormwater runoff, impact some vegetation and wetlands, affect farmlands, and raise electricity use slightly, none of those impacts would be significant. SER 205-07, 271 (Table 5.8-1), 279, 295, 319, 323.

To limit Alternatives 2 and 3's environmental footprint, the FAA adopted a plan to mitigate impacts to wetlands and minimize other impacts. SER 351-55. It proposed compensating for wetlands damaged by the Project by restoring or enhancing the same acreage of wetlands in a nearby, environmentally sensitive area. SER 351-52. It also provided a plan to reduce air emissions during construction, designed a strategy to absorb excess stormwater runoff, elaborated on measures to protect wildlife and plants, and adopted a protocol for preserving any federally- or state-protected artifacts found during construction. SER 352-55.

The FAA also studied whether any of the Project's incremental effects would rise to a significant level when combined with other past, present or reasonably foreseeable stressors on the local environment.

SER 335-49. After examining potential cumulative impacts in turn, the FAA determined that Alternatives 2 and 3 would have no cumulative, significant impact on the environment with other activities. *Id*. After reviewing the draft EA and incorporating and responding to public comments, including Petitioners' comments, ER 7; SER 75, the FAA concluded the Project posed no significant environmental impacts and that an EIS was unnecessary. ER 6. The FAA therefore adopted the EA, issued a finding of no significant impact, and approved the amendment of the airport layout plan.

SUMMARY OF ARGUMENT

I. The FAA reasonably concluded that providing an additional runway at Hillsboro Airport to relieve existing and forecasted congestion and delay would not have any significant environmental impacts. First, Petitioners have waived most of their arguments by failing to raise them during the administrative process. But even if those arguments are considered, the FAA took a hard look at forecasted demand and reasonably concluded that, with or without the project, demand would increase significantly in the next twenty years. Thus, by funding a new runway, the FAA would relieve that congestion, allowing

Hillsboro Airport to serve its function as a general aviation reliever airport and ultimately reducing air emissions and other effects by reducing delay. That conclusion was reasonable and, because it is based on FAA forecasting, is entitled to significant deference from this Court.

The FAA also fully considered impacts on air pollution and greenhouse gases emissions, noise, and safety and reasonably concluded that adding a runway would not significantly impact any of those concerns. Air pollution and greenhouse gases emissions would actually decrease because of the Project and there would be no significant noise impacts because there are no residential or other noise-sensitive land uses impacted by the project. Finally, the FAA fully considered cumulative impacts and was not required to consider either changes to local zoning laws, because the Project itself has no impacts on local land use, or a hypothetical project to build a new tower at the airport, which the FAA has itself concluded is not necessary.

II. The FAA also considered a full range of reasonable alternatives in its environmental assessment. An agency need only consider alternatives that meet the purpose and need for the project, and here the purpose and need is to relieve congestion and delay by adding a new

runway to the airport. Because of the available land and configuration, separation, and length requirements for any runway, the FAA considered action alternatives that would add a runway in a single location. The FAA also fully considered a no action alternative. Petitioners offer no other alternative to meet the purpose and need. The FAA's consideration of alternatives was adequate.

III. The Port of Portland also provided an adequate public hearing. There are no hard-and-fast requirements for a public hearing, and the record shows that Petitioners were given notice, provided the Draft EA, and were present at a hearing where the Port explained the Project and gave interested parties an opportunity to comment. Nothing more is required, but even if it were, any error in conducting the hearing was harmless because Petitioners had a full and fair opportunity to participate in the administrative process and have their views heard, and there is no evidence that the if the case were remanded to hold another public hearing either their participation or the ultimate result would change.

The petition for review should therefore be denied.

ARGUMENT

I. STANDARD OF REVIEW.

This is a NEPA lawsuit, so the district court and this Court review the agency action under the Administrative Procedure Act to determine whether it was arbitrary or capricious. 5 U.S.C. § 706. "NEPA . . . does not impose any substantive requirements on federal agencies—'it exists to ensure a process.'" *Lands Council v. McNair*, 537 F.3d 981, 1000-01 (9th Cir. 2008) (en banc). The reviewing court is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Electric, Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97-98 (1983). That review of the agency's decision must be based on the record the agency presents to the court. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

In reviewing an agency's decision not to prepare an EIS under NEPA, this Court employs an arbitrary and capricious standard that requires it to determine whether the agency has taken a "hard look" at the consequences of its actions, "based [its decision] on a consideration of the relevant factors," and provided a "convincing statement of

reasons to explain why a project's impacts are insignificant." *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1009 (9th Cir. 2006), *quoting Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001).

Parties wishing to challenge agency action must "'structure their participation so that it ... alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553 (1978)). Courts cannot consider alleged violations of NEPA that Petitioners did not raise during the comment period, unless the flaws are "so obvious that there is no need for a commentator to point them out specifically," *Public Citizen*, 541 U.S. at 765, or are procedural, *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). The AAIA similarly bars the court from considering objections to an FAA order not raised first in the administrative proceeding, unless it finds a reasonable ground for the omission. 49 U.S.C. § 46110; *City of Las Vegas v. FAA*, 570 F.3d 1109, 1114 (9th Cir. 2009).

II. THE FAA REASONABLY CONCLUDED THAT NO SIGNIFICANT ENVIRONMENTAL IMPACTS WOULD RESULT FROM THE PROJECT.

The FAA took a hard look at the direct and indirect impacts of building a third runway at Hillsboro Airport and reasonably concluded that none of those impacts would be significant. None of Petitioners' varied objections to that analysis are persuasive. This Court should therefore deny the petition for review.

A. The FAA's analysis of future demand at Hillsboro Airport was sufficient.

Petitioners' primary claim is that adding a runway to Hillsboro Airport will "inevitably" generate new demand for the Airport beyond the increases in demand forecasted in the Master Plan and the FAA failed to analyze the environmental impacts of that increase in demand. But Petitioners never suggested to the FAA in the administrative process that adding a runway would itself increase demand and have therefore waived any such claim. Regardless, they provide no support for the conjecture that adding a runway will itself increase demand, and this Court's cases make clear that the FAA was under no obligation to study that possibility in these circumstances.

1. Petitioners did not argue in the administrative process that adding a new runway would increase demand.

Petitioners' have waived the argument that expanding the Hillsboro Airport's capacity will inevitably increase the demand for its use. Under NEPA, parties cannot attack an EA on grounds not raised in the public comments phase unless the supposed flaws are obvious. *Public Citizen*, 541 U.S. at 765; *Vermont Yankee*, 435 U.S. at 553 (1978). The draft EA made plain the FAA's conclusion that adding a new runway would not increase demand, SER 178, and would in fact reduce congestion and thus reduce, for example, carbon monoxide emissions, SER 165-66. Yet in the forty-five day public comment period for the draft EA, no commenter, let alone any Petitioner, raised the concern that the parallel runway project would accelerate demand to use the airport beyond the demand increases already forecasted. SER 50-122.

Instead, quite the opposite happened. Petitioner Barnes took issue with the Port for being historically overoptimistic about airport traffic. SER 64, 82. She also discussed steep drops in use for Hillsboro Airport and other airports under the Port's management. SER 57, 79. Petitioners thus did not allege a causal relationship between capacity and demand until their request that the FAA self-enjoin any action on

the Project pending resolution of this petition for review, a request made well after the FAA had examined public comments and issued its final EA. Because they did not timely present the argument to the agency, they cannot make it in this Court on a petition for review. The argument is waived.

2. The FAA was not required to examine speculative secondary growth-inducing effects of a new runway.

Even if Petitioners have not waived the argument, the petition for review should be denied. This Court has repeatedly held that the FAA need not analyze potential secondary growth-inducing effects of projects that are "intended to . . . deal with the existing air traffic" because any resulting unintended increases in air traffic are "not considered to be a growth-inducing effect" requiring NEPA analysis. *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 580 (9th Cir. 1998); *Seattle Community Council Federation v. F.A.A.*, 961 F.2d 829, 835 (9th Cir. 1992). In *Morongo Band of Mission Indians*, this Court held that changes to flight arrival paths to Los Angeles International Airport were not "growth-inducing impacts" under 40 C.F.R. § 1508.8 even if it was reasonably foreseeable that they would increase flight traffic by reducing congestion. 161 F.3d at 580. Similarly, in *Seattle Community*

Council, this Court held—even though "FAA acknowledge[d] that traffic into Sea-Tac [airport] is expected to increase" after implementing a revised flight path plan—that any growth would not be an indirect effect the agency had to consider under NEPA because the project "merely allows Sea-Tac to handle *existing traffic* with greater efficiency." 961 F.2d at 835-36; *see also City of Carmel-by-the-Sea v. United States Dep't of Transp.,* 123 F.3d 1142, 1162 (9th Cir.1997) (expanding and re-routing Highway 1 could increase motor vehicle traffic, but project sponsors permissibly determined that other factors would constrain that growth). Thus, when the reason for the project is to improve safety or efficiency of a facility in the face of rising growth, the Court does not require the agency to consider the indirect effects of any additional use that may result. [2]

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[2] In contrast, where projects are undertaken to spark demand the agency must analyze the growth inducing effects. *See City of Davis v. Coleman,* 521 F.2d 661, 675 (9th Cir.1975) (requiring analysis of potential traffic increases from building a new highway in part because "[t]he growth-inducing effects of the Kidwell Interchange project are its raison d'etre"); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 869-70 (9th Cir. 2005) (requiring an EIS before the U.S. Army Corps of Engineers could approve a private company's application to extend a pier for docking oil tankers, because the Corps had not shown that the project's goal was to increase safety or efficiency rather than simply expand the facility)

Granted, some new runways, rather than being aimed at accommodating existing demand pressure, could be aimed at attracting new flights or be at an airport where that would be reasonably foreseeable, and those latter runways would require examining the impacts of those new flights. *Cf. Ocean Advocates*, 402 F.3d at 870 (distinguishing *Morongo* and *Seattle* because they dealt with airport arrival and departure routes rather than "ground capacity"). But that is not true here. The Hillsboro Airport is a general aviation airport serving private flights, not commercial airlines. Thus, whereas capacity enhancements at a major hub airport like Chicago O'Hare or Atlanta Hartsfield might enable airlines to schedule an increased number of connecting flights and thus increase demand for the airport, a new runway at a general aviation airport is quite unlikely to create or attract more private aircraft.

Indeed, in the Master Plan, the Port considered but rejected the opportunity to significantly expand Hillsboro Airport or to position it to receive new types of commercial or cargo aircraft. SER 471, 474, 476. Instead, it chose to maintain Hillsboro's role as a general aviation reliever airport for the region. SER 476. The Port made clear, first in

the Master Plan and then in the EA, that the reason for the new runway is to cure mounting inefficiency at Hillsboro. SER 530; ER 19. The Airport operated at near full capacity in 2007, and, without a parallel runway, could exceed capacity by 46 percent in 2025. ER 17. Over that same time span, delay could go up more than sevenfold, from 3,321 hours per year to 24,900. ER 19.

Petitioners do not contest that demand at Hillsboro Airport will increase under all of the alternatives considered in the EA. ER 21-22. In fact, Petitioners point out the airport already "is operating far in excess of capacity." Br. at 26. Nor do they cite any case law supporting their position that the FAA must model and account for secondary growth-inducing effects of a project designed to alleviate current congestion; instead, each case they cite ultimately upheld the agency's decision *not* to analyze an alleged increase in demand caused by the project at issue.[3] Br. at 20-28. Faced with undisputedly rising pressure on

[3] *See City of Olmstead Falls v. FAA*, 292 F.3d 261 (D.C. Cir. 2002) (deferring to FAA's demand forecasts); *City of Los Angeles v. FAA*, 138 F.3d 806 (9th Cir. 1998) (same); *Seattle Community Council Federation*, 961 F.2d at 835; *County of Rockland v. FAA*, 335 Fed. Appx. 52, 53 (D.C. Cir. 2009) (noting that "agency's forecast is entitled to "even more deference" than this court gives "under the highly deferential arbitrary and capricious standard"); *Town of Winthrop v. FAA*, 535 F.3d 1, 12 n.8

Hillsboro's limited resources, the Port sought to add a runway to the airport to address inefficiency and delay. Since the Project's aim is to relieve pressure on Hillsboro Airport's facilities and not to cultivate more flights and change its role in the national integrated system of airports, the EA was not insufficient for failure to examine possible additional growth-inducing effects. Such effects were speculative and not reasonably foreseeable at Hillsboro Airport.

Moreover, even if the FAA was required to consider possible growth-inducing effects of adding a runway to the Airport, the FAA reasonably concluded that adding a runway would "not lead to increased activity at [the Airport] compared to the No Action Alternative." ER 5. The Master Plan forecast growth in demand based on historical operations at the airport and an array of trends in criteria ranging from the socioeconomic character of the region to private aircraft ownership, aggregating them using several different forecasting models. SER 479-522. The EA then analyzed and updated the Master Plan's demand forecasts in determining the level of activity at the airport and the consequences of the Project. SER 373-414. Based on its

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(1st Cir. 2008) (accepting demand forecast in absence of contrary evidence).

review of that data, the FAA concluded that demand will increase at the same rate under all three of the main alternatives it considered. ER 21-22.

The FAA's conclusion that the runway would have little or no impact when compared to the slew of other variables affecting demand discussed in the Master Plan was reasonable and entitled to significant deference. *City of Olmstead Falls*, 292 F.3d at 272 ("The FAA's expertise in forecasting air transportation demand and airfield capacity are areas where courts accord significant deference."); *St. John's United Church of Christ v. FAA*, 550 F.3d 1168, 1172 (D.C.Cir. 2008) (an agency's forecast is entitled to "even more deference" than courts give "under the highly deferential arbitrary and capricious standard"). As the Master Plan notes, forecasting demand is an inexact science because "aviation activity is affected by many external influences, as well as by the types of aircraft used and the nature of the available facilities." SER 479-80. Indeed, this Court has itself recognized that "when it comes to airport runways, it is not necessarily true that 'if you build it, they will come.'" *Nat'l Parks & Conservation Ass'n v. U.S. Dept. of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000). Instead, even when a runway extension or

expansion is proposed precisely to increase demand, "airport demand projections . . . depend on economic conditions . . . and other variables" and could shift independently of an airport's capacity. *Nat'l Parks*, 222 F.3d at 680-81. Adding a new runway to an airport might make it more efficient to operate there, but it does not pay for additional fuel or planes, increase the size and wealth of the local population, or ease certification requirements for pilots. The EA examined the factors impacting demand growth at the airport, and FAA concluded, within its discretion, that the runway would not influence traffic.

Petitioners offer scant evidence to undermine the FAA's conclusion. They point to no evidence, scientific or otherwise, that the FAA failed to consider and that would demonstrate that adding a runway to accommodate forecasted demand at Hillsboro Airport will itself necessarily override or augment all other demand pressures and result in an increase in that demand. Instead, they rely on three isolated statements in the administrative record made by FAA employees during the early stages of the planning process. Both the Supreme Court and this Court have stressed that the sort of preliminary statements by staff relied on by Petitioners are not the

proper focus of a reviewing court; courts must instead focus on the explanation presented in the final decision. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) ("[t]he federal courts ordinarily are empowered to review only an agency's final action, *see* 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious"); *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1122 n.8 (9th Cir. 2000) (upholding agency's decision after rejecting reliance on internal memorandum of agency's former project manager).

Even if considered, those three statements neither individually nor collectively demonstrate that adding a runway at Hillsboro Airport will increase demand there. The first two statements were made early in the planning process and merely reflect thorough consideration of the issue. *See* ER-50 ("Do we need to assume/consider a worst case scenario for maximum use of the 3rd runway?"); ER-51 ("the proposed action is expected to reduce aircraft emissions compared to the no action alternative, but it is possible that construction of the third runway

would remove a constraint to growth in aircraft activity"). Properly viewed, those statements simply provide evidence that FAA and the Port determined early on to evaluate whether the project could induce new demand for the airport and, based on that review, concluded the issue was not a concern. The third statement simply demonstrates a point, also made in the EA, ER 21-22, that use of the airport will rise either with the parallel runway or without it. SER 532 (noting that, in line with forecasted demand, even with the new runway the airport's flight volume will rise from just over 60 percent of capacity after the project's completion to 80 percent of capacity twenty years after the runway opens). Thus, none of the statements Petitioners rely on undermine the FAA's conclusion that adding a runway at Hillsboro Airport will not increase demand there.

B. The FAA adequately considered the environmental impacts of the Project and reasonably concluded that they would not be significant.

Several of the impacts that Petitioners claim the FAA failed to adequately analyze in the EA are tied directly to Petitioners' argument that the FAA failed to analyze an increase in demand resulting from the additional runway. *See* Br. at 30-33 (contending FAA failed to analyze

indirect impacts by assuming "that capacity will not be filled"); *id.* at 35-37 (contending FAA did not adequately analyze impacts on greenhouse gases "because it did not consider the indirect effects of" the Project); *id.* at 37-40 (contending FAA did not adequately consider impacts on air pollution and noise given possibility that "newly-created capacity will be filled (or partially filled) and that more aircraft operations may result"). Because those claims are dependent on the claim that the FAA had to analyze a potential increase in demand, and that argument was not presented to the FAA, they are similarly waived. *Public Citizen*, 541 U.S. at 765. Further, if this Court concludes that the FAA reasonably concluded that the new runway would not itself increase demand, then it must also reject those arguments that are based entirely on the impacts from such an increase.

Petitioners also argue that an EIS was required in this case for several other reasons. To the contrary, the FAA's finding of no significant impact was reasonable and well-supported in the record with a "convincing statement of reasons to explain why a project's impacts are insignificant." *Environmental Protection Information Center*, 451 F.3d at 1009.

1. Air pollution and greenhouse gas emissions

Like their other arguments, Petitioners have waived any contention that the FAA failed to adequately analyze impacts to air pollution or greenhouse gas emissions. Petitioners had an opportunity to allege that the Project required an EIS because of possible significant impacts to air pollutants, including greenhouse gas emissions, but they failed to do so before the FAA issued its FONSI. SER 50-122. Petitioner Barnes did note in passing that "gas guzzling aviation activities spews a host of pollutants into the environment, including lead, benzine, carbon monoxide and carbon dioxide" when she criticized the EA, but she did so only in reference to current airport operations. SER 67, 83. That is a different argument than the one Petitioners make in their brief, which is that a new runway would create more air pollution and greenhouse gas emissions than the airport would otherwise. Br. at 38-39. Since no commenter raised the issue, Petitioners cannot ask this Court to set aside the FONSI as arbitrary and capricious on the basis of air pollution and greenhouse gas impacts.

Regardless, the FAA adequately studied air and greenhouse gas emissions impacts from the Project and concluded that they would not

be significant. SER 259-70. It concluded that the Project would temporarily increase pollution during its construction phase but that it would, over the long term, have a net positive effect by limiting emissions from aircraft waiting to take off or land. SER 265-68. Even at their peak, yearly air emissions from the Project would not exceed *de minimis* levels and would account for only one-tenth of one percent of regional emissions. SER 259, 269. Moreover, as the EA further described, all current and projected aviation activity at Hillsboro Airport contributes less than *three-hundredths of one percent* of the total of U.S. greenhouse gas emissions. ER 27. Thus, the FAA concluded that the Project will have no significant impact on air quality or the climate. SER 270. That is a conclusion well within the agency's expertise and thus entitled to substantial deference. *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983); *Marsh v. Oregon Natural Resources Council, Inc.,* 490 U.S. 360, 376-77 (1989); *see also Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (granting "great deference" to agency conclusion of no significant impacts to threatened species despite concerns raised regarding climate change).

Petitioners offer little to contest that finding, apart from the precluded and groundless contention that building a new runway will necessarily boost demand. Br. at 38-39. They contend that the EA does not consider the issue of climate change in the appropriate context, failing to examine the impact of the Project's greenhouse gas emissions at the local level. Br. at 36-37. But Petitioners' objection makes little sense in the case of climate change, a global problem in which emissions from all sources mix generally in the atmosphere. Petitioners fail to explain how greenhouse gas emissions from the Airport could have particularized local impacts apart from their global impacts or how the FAA could possibly quantify any such impact.

Petitioners' argument that the impacts from greenhouse gases are "highly uncertain" and thus require an EIS fairs no better. Br. at 40-44. Agencies may be required to prepare an EIS in some circumstances where their actions have "highly uncertain" environmental effects. *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001), abg'd on other grounds by *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365 (2008). *See also* 40 C.F.R. § 1508.27(b)(5). Thus, agencies cannot speculate about environmental

impacts without first collecting and reviewing available data. *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1240 (9th Cir. 2005). As a result, an EIS is necessary "where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential ... effects." *Id.* (internal quotations omitted). But NEPA does not contemplate agencies preparing EISs "anytime there is *some* uncertainty" regarding impacts, only when the uncertainty is high. *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1011 (9th Cir. 2006).

The Project will not generate greenhouse gases, either directly or indirectly, sufficient to pose a "highly uncertain" risk to the global climate. As we have explained, the FAA permissibly determined that the Project would not induce any new demand to use the airport, and therefore the Project itself is unlikely to contribute more than minimally, if at all, to greenhouse gas emissions. In addition, all current and projected aviation activity at Hillsboro Airport adds less than three-hundredths of one percent of the total of U.S. greenhouse gas emissions. ER 27. The FAA reasonably concluded that the Project poses

virtually no risk, much less a "highly uncertain" risk, of advancing climate change. As such, the FAA reasonably concluded that the Project will have no significant impact on greenhouse gas emissions. ER 25, 27.

Petitioners contend that FAA has approved the Project without first understanding its climate change impacts, violating this Court's admonition in *National Parks*, 241 F.3d at 732, against agencies taking unjustified risks of harming the environment before fully exploring the consequences of their actions in the NEPA process. Br. at 41. In *National Parks* this Court concluded that the National Park Service had neglected to study many of the principal environmental hazards of its contemplated action, increasing cruise ship traffic in Glacier Bay National Park. 241 F.3d at 739. The agency simply concluded in its EA that the risks were "unknown," even though it admitted it could have feasibly conducted the studies required to better understand the potential impacts. *Id.* at 732-33. Thus, the Court held that an EIS is required where the agency could reduce uncertainty or limit speculation by further study. *Id.* at 731-32. By contrast, in this case there is virtually no uncertainty, if any, about the Project's negligible climate impacts. Further study could add only limited marginal understanding

of the "quotient of uncertainty" involved. *Center for Biological Diversity v. Kempthorne*, 588 F.3d at 712. The FAA's acknowledgment that further scientific study is ongoing, ER 25; Br. at 42, is not to the contrary, as the FAA's ultimate conclusion was that there would be no significant impact on greenhouse gas emissions was based on the low-level contribution to greenhouse gases the Airport makes and not on any uncertainty about that contribution's effect.

2. Noise

The FAA reasonably concluded that the Project would not have significant noise impacts. Petitioners' concern about noise is addressed at length in the EA, which determines that none of the three principal alternatives would cause significant noise impacts outside of airport property. SER 205-13. The EA's noise evaluation falls squarely within the FAA's expertise, and the FAA's judgment is entitled to deference unless its decision was arbitrary and capricious. *Seattle Community Council*, 961 F.2d at 833-34; *City of Oxford, Ga. v. F.A.A.*, 428 F.3d 1346, 1358 (11th Cir. 2005). Petitioners offer no argument, other than that the runway will increase traffic at Hillsboro Airport, Br. at38-39, to counter the agency's expertise in determining aircraft noise levels. They

thus fail to show that the FAA's determination that the noise impacts of the Project will not be significant was arbitrary or capricious.

3. Safety

Petitioners argue that the EA ignored potential safety problems posed by the airport's control tower, Br. at 39-40, but no commenter lodged an objection on those grounds, or even mentioned the control tower, and the argument is therefore waived. SER 48-137. Nevertheless, the administrative record shows that the FAA considered safety concerns posed by the control tower before finalizing the draft EA and determined they did not require further analysis. SER 561. FAA officials sought to clarify, in an e-mail exchange, that the control tower had sufficient lines of sight to Hillsboro Airport's runways. *Id.* Had that not been the case, one official acknowledged she would have felt "uncomfortable moving forward on an EA." ER 65. The officials subsequently confirmed that the issue had been raised and resolved earlier and that control tower officials had approved the parallel runway project. SER 561. An official noted that "[t]here is a clear view of the new runway even when standing on the ground." ER 65. The administrative process thus revealed that there are no safety issues

related to the control tower. Petitioners once again fail to show that the FAA failed to address any "crucial factors, consideration of which [is] essential to a truly informed decision." *Center for Biological Diversity v. Kempthorne*, 588 F.3d at 711.

Petitioners also allege that safety risks posed by airplane crashes, particularly of pilot training flights, are "inherently" a problem because the new runway will "inevitably lead to a greater number of aircraft operations." Br. 39. Training flights already occur at Hillsboro Airport and will not be increased by the addition of a new runway, and Petitioners argument may be rejected on that basis alone. ER 21-22. Even so, the FAA considered, as one of the five alternatives it discussed but rejected from further consideration, eliminating or diverting local training flights as means of reducing existing demand at the airport. ER 20. It concluded, however, that doing so would not be consistent with the Project's purpose and need. *Id.* The scope of alternatives an agency must consider in an EA is not as great as required in an EIS, and is bounded by the purpose and need for the Project. *Native Ecosystems Council,* 428 F.3d at 1246-47. Agencies have "considerable discretion" in setting the purpose and need of the project. *National*

Parks & Conservation Ass'n v. Bureau of Land Management, 606 F.3d 1058, 1070 (9th Cir. 2010). Maintaining the Airport as a reliever airport is part of the purpose and need. ER 19. As the Port and FAA noted in response to Petitioner Barnes comments, limiting training flights would be inconsistent with the Airport's role as a reliever airport, which is to accommodate general aviation flights that might overcrowd commercial airports. SER 75-76. *See also* 49 U.S.C. § 47102(22).

4. Cumulative Impacts

The FAA's conclusion that the runway would have no significant cumulative impacts on the environment was not arbitrary or capricious. A project's cumulative impact is "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" carried out by any actor. 40 C.F.R. § 1508.7. FAA guidelines require EAs to assess the cumulative impacts of a proposed project. FAA Order 1050.1E ¶ 405f(1)(c). *See generally*, *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1076 (9th Cir. 2002). A cumulative impacts analysis should be based on "some quantified or detailed information." *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). It should account for all past,

present, and future projects and analyze their environmental impacts. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 603 (9th Cir. 2010).

The EA fully analyzed the environmental impacts the parallel runway project could cause in conjunction with other actions. The EA describes in detail past airport improvement projects, changes in local zoning and development, ongoing construction projects, and likely new development at the airport and in the surrounding area. It specifies individually and collectively the possible impacts of the Project on the environment, including noise, air and water quality, local ecosystems, hazardous materials, and farmlands. SER 340-50. After fully examining those impacts, the FAA reasonably concluded that in none of those areas would the environmental impact be significant and require preparation of an EIS. *Id.*

Petitioners argue that the FAA's cumulative-impacts analysis was flawed because it did not account for: (1) proposed changes in local zoning laws that were later held to be unconstitutional takings of property; and (2) what is, in their view, a reasonably foreseeable project to expand the airport's control tower. Br. at 45-46. In addition, they cull

three sentences from the administrative record they allege demonstrate FAA's dissatisfaction with the draft EA's cumulative impacts analysis. Br. at 49. These supposed faults do not undermine the strength of the EA's cumulative impacts discussion and do not reveal an arbitrary and capricious decision not to prepare an EIS.

The FAA was not required to consider the changes in the City of Hillsboro's zoning laws as cumulative impacts. By definition, "cumulative impact" is the "impact on the environment which *results from the incremental impact* of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. In other words, as one would expect, a project must have some impact itself before it can have a "cumulative" impact in combination with some other undertaking.

Here, the FAA concluded that the runway expansion would "have no compatible land use impacts" and "would not affect land use," SER 225-30, 333, a proposition Petitioners do not challenge. Indeed, Petitioners never explain how the Project and the land use changes are connected in any way. Br. at 47-48. Instead, they hint that the local measures themselves could have some unstated environmental impacts.

Id. But since the Project would not itself impact land use, even incrementally, the EA did not need to catalogue the effects of external actions, like changes in local zoning laws. To do so would turn the EA from a focused examination of whether the Project, a federal action, would have significant impacts to a wider probe of the environmental consequences of local government zoning decisions. The FAA properly did not consider whether the Project would cumulatively impact local land use in combination with other projects because the Project does not even incrementally impact land use directly or indirectly.

Petitioners' second argument—that expanding Hillsboro Airport's control tower is a reasonably foreseeable future action—is waived because no commenter brought the issue to the FAA's attention in the administrative proceedings. Regardless, no such project is reasonably foreseeable because the administrative record shows that FAA officials ultimately concluded that Hillsboro Airport was "not in line for a new tower." ER 64. Further, Petitioners also fail to explain or even speculate how building a new control tower would impact the environment, let alone how it could have a significant cumulative impact in concert with the proposed runway.

Finally, general comments Petitioners selected from the administrative record do not show that the EA's cumulative impacts analysis was insufficient. Br. at 49. All three comments Petitioners excerpted were related to preliminary versions of the EA's cumulative impacts section and resulted in substantive edits to an early draft of the EA, which is exactly how the administrative process is supposed to work. This Court does not "interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts . . . or acknowledges information favorable to a party that would prefer a different outcome." *Native Ecosystems Council*, 428 F.3d at 1240 . The comments were part of an iterative drafting process between FAA and the Port. They show that FAA was well aware of its obligation to thoroughly evaluate potential cumulative impacts. The agency ultimately felt confident in approving the draft and final EAs. The EA sufficiently considered potential cumulative impacts from the Project.

5. Precedent

Petitioners also argue that funding the construction of a new runway without first preparing an EIS "may establish precedent for future actions with significant effects" and therefore the FAA must

prepare an EIS. Br. at 44-45. They assert that a new runway will increase capacity and capacity-increasing projects should normally require an EIS. *Id.* But the FAA's NEPA implementing orders provide that an EA is normally the appropriate document to review "[f]ederal financial participation in, or unconditional airport layout approval of," new runway construction projects. FAA Order 1050.1E ¶ 401k. And the Council on Environmental Quality's NEPA Regulations require agencies to use their own implementing guidelines to determine whether an EA or an EIS is needed to analyze a given action's environmental ramifications. 40 C.F.R. §§ 1501.3, 1507.3, 1501.4(a)(1); *see also* 40 C.F.R. § 1501.4(b) (providing that unless an EIS is specifically required or an action is excluded altogether from NEPA review, an agency must prepare an EA as a default). Given that framework, the FAA's decision to first prepare an EA, and its ultimate finding of no significant impact, do not threaten to establish a precedent that EIS's are not required for similar actions that would have a significant impact. *See Town of Cave Creek v. FAA*, 325 F.3d 320, 332 (D.C. Cir. 2003).

III. THE ENVIRONMENTAL ASSESSMENT CONSIDERED A REASONABLE RANGE OF ALTERNATIVES.

The FAA adequately considered alternative courses of action in the EA. An EA must briefly review alternatives to the proposed project, 40 C.F.R. § 1508.9; FAA Order 1050.1E ¶ 405(d), but need not to do so as rigorously as in an EIS. *Native Ecosystems*, 428 F.3d at 1246. Nor must an EA consider any specific number of choices. *Native Ecosystems*, 428 F.3d at 1246 ("In short the regulation does not impose a numerical floor on alternatives to be considered."). *See also* FAA Order 1050.1E ¶ 405(d).

In evaluating the sufficiency of an EA's alternatives discussion, this Court should examine whether it considered "appropriate and reasonable" alternatives. *Native Ecosystems*, 428 F.3d at 1246 (internal quotations omitted). The scope of what is appropriate and reasonable is framed by the purpose of the project, *Native Ecosystems*, 428 F.3d at 1246; FAA Order 5050.4B ¶ 706(d), and any option the EA considers must advance that purpose, *Native Ecosystems*, 428 F.3d at 1246-47. Courts give agencies "considerable discretion" to design purpose and need statements, although agencies cannot define them unreasonably

narrowly. *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010).

The purpose of the project should be based on the federal agency's mandate. *National Parks & Conservation Ass'n*, 606 F.3d at 1070 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)). But, where agency guidelines require it, the project's purpose must also be informed by the goals of the project's non-federal sponsors. *Id.* FAA's NEPA orders require the agency consider both its own goals and those of the project sponsor in crafting a purpose and need statement. FAA Order 5050.4B ¶706b(1) ("The purpose and need should be defined considering the statutory objectives of the proposed Federal actions as well as the sponsor's goals and objectives."). Thus, when "an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The EA's purpose and need statement reconciles both priorities and does so in broad terms. It encompasses the Port's desire to "reduce congestion and delay at HIO" and the FAA's general airport planning criteria, which "recommend[ ] that capacity planning start when

aircraft activity reaches 60 to 75 percent of an airport's capacity," a level of activity Hillsboro Airport has already exceeded. ER 19. It notes that overtaxing the Airport's facilities will impinge on the airport's role as a general aviation relief facility for the surrounding region. *Id.*

To increase Hillsboro Airport's efficiency, the EA initially considered eight alternatives. SER 167. It determined that five of the alternatives failed to meet the purpose and need and describes why the Port and FAA did not pursue each of them in greater depth. SER 172-73. Several of the alternatives were also suggested by Petitioners in comments as substitutes for the Project, including eliminating local training flights, SER 172; SER 72-73, 85, and diverting traffic to other airports, SER172; SER 69, 80, 84.

Petitioners sole contention is that "[a]t no point in the EA does the FAA disclose any environmentally distinguishable alternatives" because both action alternatives would have the same environmental impact. Br. at 50. But the no action alternative is "environmentally distinguishable" from the action alternatives, thus satisfying Petitioners' own criteria. And, regardless, the FAA explained in detail that given the purpose and need for the project—to add a runway to

reduce existing and future congestion and delay—and the available space in which to do so, the runway must be designed as it is in Alternatives 2 and 3 to comply with necessary configuration, separation, and length requirements. SER 168-71.

Finally, Petitioners do not allege that there are any reasonable and appropriate alternatives that the FAA should have considered, failing to show what the agency could have done differently while still meeting the purpose and need of the Project. This Court has already made clear that the number of options the agency considers is immaterial as "long as 'all reasonable alternatives' have been considered and appropriate explanation is provided as to why an alternative has been eliminated." *Native Ecosystems*, 428 F.3d at 1246. While Petitioners attack the range of choices FAA approved, they fail to suggest any reasonable alternative that the FAA should have considered or explain why the FAA's decision to exclude other alternatives given the purpose and need of the project and the space constraints at the airport was arbitrary or capricious.

IV. PETITIONERS WERE GIVEN AN OPPORTUNITY TO VOICE THEIR CONCERNS WITH THE DRAFT ENVIRONMENTAL ASSESSMENT IN A PUBLIC HEARING.

The Port provided an opportunity for a public hearing on the draft EA, in which the Petitioners participated. The AAIA specifies that project sponsors must certify that they provided "an opportunity for a public hearing . . . to consider the economic, social, and environmental effects of the location" of a new runway before FAA may approve an application for funding. 49 U.S.C. § 47106(c)(1)(A)(i). The House committee report accompanying the AAIA public hearing provision noted that the Secretary of Transportation has "ample authority" to determine how to carry out the requirement. H.R. Rep. No. 91-601, *reproduced in* 1970 U.S.C.C.A.N. 3047, 3069-70.

FAA guidelines suggest that a public hearing is "a gathering under the direction of a designated hearing officer for the purpose of allowing interested parties to speak and hear about issues of concern to interested parties." FAA Order 5050.4B ¶ 403(a). But the FAA, in publishing that guideline in the Federal Register, declined to further define what the guideline requires. National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions, 71 Fed. Reg.

29014, 29032 (2006) ("ARP declines for the first time in this final Order to define the term public hearing for purposes of 49 U.S.C. 47106(c)(1)(A)(i) and NEPA."). It noted that the "most important aspects of a *traditional, formal* hearing are that a designated hearing officer controls the gathering and there is an accurate record of the major public concerns stated during the gathering." *Id.* (emphasis added). It left open, though, the question of "whether a public hearing may take forms other than the traditional one." *Id.*

This Court has narrowly defined what constitutes an adequate "public hearing." *United Farm Workers of America v. E.P.A.*, 592 F.3d 1080, 1082 (9th Cir. 2010). In *United Farm Workers* this Court held that a "hearing" requires only that "notice be given of a decision to be made and presentation to the decisionmaker of the positions of those to be affected by the decision." *Id.* This Court has made clear that hearing does not necessarily mean an opportunity to speak directly to other members of the public. *Id.* As the Court noted in the context of Section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, even adding the word "public" before "hearing," does not always extend the right to air views orally. *Id.* at 1083.

On November 10, 2009, the Port provided a public hearing that fulfilled the limited requirements of the AAIA. SER 12, 16. It came near the end of a 45-day public comment period that started after the draft EA's release. SER 12. Before the meeting, the public had access to electronic and hard copies of the draft EA at several locations in the region and could also order it free of charge. *Id*. The Port advertised the hearing in local newspapers, Hillsboro's e-newsletter, and in two large banners placed on airport property. SER 13. The event lasted two hours and contained two presentations by officials explaining the parallel runway project and the draft EA's findings. SER 12-13. Event participants also had the opportunity to speak directly with Project team members and their fellow community attendees, SER 566, as well as to submit formal oral testimony to a stenographer, which facilitates the statutory requirement that a certification of the hearing be provided to the Secretary. 49 U.S.C. § 47106(c)(1)(A). SER 566.

Approximately eighteen members of the public attended. SER 13, but only one person, Petitioner Barnes, gave oral comments, SER 13, 53. According to a hearing organizer, Petitioner Barnes delivered approximately fifteen minutes of testimony before pausing to allow the

organizers' slide show presentations to begin. SER 563. She was able to continue her speech afterward and fully recorded her concerns. SER 563; SER 53. She was also allowed to submit a written copy of her testimony with a series of explanatory exhibits. SER 563; SER 79. In fact, her testimony appears no less than three times in the administrative record. SER 53, 79, 113. While the format may have upset Petitioner Barnes's expectations from her "experience at other public hearings," Br. at 54, the AAIA does not require more.

Petitioners also complain that the hearing was insufficient because "throughout the record, the FAA does not point to an individual that was designated as a hearing officer" as the FAA's guidelines contemplate. Br. at 55. To the contrary, the record clearly designates at the beginning of Petitioner Barnes's recorded testimony the following: "Hearings officer: Laurie L'Amoreaux." SER 53. But even if Ms. L'Amoreaux was, contrary to the record, not a hearing officer at the hearing, there is no statutory requirement for a hearing officer, only for a "public hearing," and there is no question that the hearing in this case satisfied that requirement.

Moreover, any such failure to have a hearing officer would be harmless error and no ground to set aside an otherwise adequate EA. *See* 5 U.S.C. § 706 (in reviewing agency action "due account shall be taken of the rule of prejudicial error"). The hearing in this case clearly satisfies the intent behind the requirement for a public hearing, and this Court has been reluctant in other contexts to set aside agency action when the public had sufficient opportunity to participate in the agency action. *See California Trout v. F.E.R.C.*, 572 F.3d 1003, 1017 (9th Cir. 2009) (noting that while the Ninth Circuit has set aside EAs when the agency failed notify or involve the public in any way, it also has held that making the draft EA available to the public is not always required under NEPA); *Paulsen v. Daniels*, 413 F.3d 999, 1007 (9th Cir. 2005)(holding procedural violations by an agency of notice and comment rulemaking are harmless errors if the agency still gave commenters "some notice that sufficiently enabled them to participate in the rulemaking process before [it] adopted the rule"). Petitioners do not explain how a more formal hearing could have improved their opportunity to participate in the administrative process or led to any different result. A remand in this case to hold another

public hearing "would serve the plaintiffs' interest in delaying the [Project], but no other interest, for it is plain what" the result must be. *Cronin v. USDA*, 919 F.2d 439, 442-43 (7th Cir. 1990); *see also National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (remand would "be meaningless" because "there is not the slightest uncertainty as to the outcome"); *National Min. Ass'n v. U.S. Dept. of Interior*, 251 F.3d 1007, 1014 (D.C. Cir. 2001) ("reversal and remand . . . is necessary only when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result").

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Respectfully submitted,

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September 13, 2010
90-13-1-13103

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 10,297 words.

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STATEMENT OF RELATED CASES

Respondents are aware of no related cases currently pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will accomplished by the appellate CM/ECF system.

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