

No. 14-71180

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHELLE BARNES, an individual; PATRICK CONRY, an individual;
BLAINE ACKLEY, an individual; JAMES LUBISCHER, an individual;
OREGON AVIATION WATCH, an Oregon non-profit organization,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent,

and

PORT OF PORTLAND,

Intervenor-Respondent

PORT OF PORTLAND'S OPPOSITION BRIEF

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I. INTRODUCTION

This comeback case involves a second challenge to the adequacy of the environmental assessment (“EA”) prepared by the Federal Aviation Administration (“FAA”) under the National Environmental Policy Act (“NEPA”) regarding the construction of a new runway at Hillsboro Airport (“HIO”). HIO is a general aviation airport in Hillsboro, Oregon owned and operated by the Port of Portland (the “Port”). In *Barnes v. U.S. Department of Transportation*, 655 F.3d 1124 (9th Cir. 2011) (“*Barnes I*”), this Court rejected the vast majority of the claims presented by Petitioner Michelle Barnes, et al. (“Barnes”). In a split decision, the Court remanded the case to the FAA to address the single issue of “increased demand resulting from the HIO expansion project, *if any.*” *Id.* at 1139 (emphasis added). Specifically, the Court was troubled by the FAA’s conclusion that the construction of a new runway would not result in increasing growth at the airport because the FAA “do[es] not explain why this is so.” *Id.* at 1137.

On remand, the FAA produced a supplemental EA (“SEA”) that complied with the Court’s order in two different ways. First, the SEA provides the explanation and analysis the Court found missing in *Barnes I*. As detailed below, the FAA reviewed and updated its forecast (called the unconstrained forecast) and explained how that forecast included “any demand that would be attracted to the Airport because of the availability of a new runway,” and that was “likely the best estimate of activity with the availability of a new parallel runway.” ER¹ 35. The

¹ This brief refers to the Excerpts of Record filed by Barnes as “ER,” and the Supplemental Excerpts of Record filed by the FAA as “SER.”

FAA then compared the results of the unconstrained forecast to a forecast of aviation activity if the runway were never built (“the constrained forecast”). The comparison of the two forecasts showed no meaningful difference in foreseeable total operations if the runway were built, thus confirming the FAA’s prior conclusion that the construction of the runway would not induce growth. ER 34. On this basis alone, the FAA fully addressed the concerns identified by this Court in *Barnes I* by explaining “why this is so” and supporting that explanation in the record.

Second, though the FAA concluded that the unconstrained forecast captured any growth that would be induced by the construction of a runway, it went one step further and produced a third forecast (“the Remand forecast”) out of “an abundance of caution.” ER 6, 187. The Remand forecast surveyed local pilots to determine if they would relocate to or use HIO more frequently because of the existence of the new runway. To provide an extra measure of caution, the Remand forecast adds the results of that survey to the unconstrained forecast (though some or all of that growth is already reflected in the unconstrained forecast), and estimates that flight activity could increase (at least temporarily) by approximately 31 operations per day over the projected daily average of about 614 operations (a 5% increase). ER 34-35. In so doing, the FAA not only complied with the remand order, but went above and beyond to conservatively capture all conceivable sources of induced growth under a worst-case scenario.

Despite the Court’s prior rejection of the other arguments raised in her previous appeal and the FAA’s diligence in complying with the Court’s remand

order, Barnes filed this instant petition. Barnes sought injunctive relief from the Court, which this Court rejected. *See* Dkt.Entry 23. Following the Court’s injunction denial, the Port proceeded with construction. *The runway is now built.*

Undeterred, Barnes filed her opening brief (“Barnes Br.”) raising a host of new arguments, focusing primarily on concerns associated with lead emissions – concerns that predate the proposal to construct the runway. But lead emissions were not part of the Court’s remand. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (“In the subsequent appeal, ‘[t]he scope of review is narrowed to the limitations of the remand.’” (brackets in original) (quoting *Adamian v. Lombardi*, 608 F.2d 1224, 1228 (9th Cir. 1979))). The sole issue remanded by the Court concerned the effects of induced growth, if any, caused by the runway project. The FAA concluded on remand that the most “likely” result is that construction and operation of a third runway would not result in induced growth. ER 34-35, 53. The FAA also concluded that the lead emissions that Barnes complains of will actually decrease because the runway project will reduce congestion, delays, and aircraft idling and circling. *Id.*

Remarkably, *Barnes does not challenge that key conclusion.* Instead, Barnes misreads the FAA’s SEA and assumes that the predicted “worst-case” emissions associated with the Remand forecast will occur. In so doing, Barnes leaves unchallenged the FAA’s primary conclusion that whatever induced growth will occur is more accurately reflected in the unconstrained forecast, and that emissions associated with the worst-case Remand forecast will not transpire. ER 35; *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (a court of appeals will only

review “issues which are argued specifically and distinctly in a party’s opening brief”). As a result, it is now undisputed that lead emissions will decrease for the foreseeable future. ER 53. Barnes’ quibbling with the Remand forecast or with emissions associated therewith is legally irrelevant; the FAA has concluded – and Barnes has conceded – that those impacts are not likely to occur.

In any event, Barnes’ arguments are entirely baseless. As discussed in detail below, they are (a) factually incorrect and contradicted by the record; (b) based on comments that were not presented to the FAA in the first instance; (c) legally unsupportable (and expressly rejected in regulation or case law); or (d) all of the above. After a full round of litigation in *Barnes I*, a thoughtful and thorough consideration by the FAA on remand, and a failed request for injunctive relief, Barnes has failed to demonstrate any additional legal infirmities. This petition should therefore be summarily dismissed.

II. STATEMENT OF JURISDICTION

The Port adopts FAA’s statement of jurisdiction.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Port adopts FAA’s statement of issues presented for review.²

IV. STATEMENT OF THE CASE

The legal and factual background underlying this case is provided in the FAA’s Statement of the Case on pages 3-16 of its brief, and the Port adopts that Statement. In addition, the Port adds the following.

² The text of relevant statutes and regulations are reproduced in the addendum to this brief.

Most of Barnes' current arguments relate to current and projected lead emissions. Piston-driven aircraft at HIO (and every airport) use leaded fuel because there is currently no approved fuel substitute that can sufficiently prevent engine failure in these small aircraft. ER 407. All piston-driven aircraft at HIO are required to use a kind of aviation fuel called 100 Octane Low Lead, which has the lowest approved levels of lead available, levels that are only a fraction of those previously used in automobile fuel. *Id.* Nonetheless, the FAA and the Environmental Protection Agency ("EPA") have teamed up to identify and approve a substitute for lead aviation fuel; the agencies anticipate having a lead-free replacement in place by 2018. *Id.*

The Port began planning for the runway project in 2005 when its Master Planning process demonstrated an immediate need to construct a third runway to alleviate the delay and operational inefficiencies that HIO was experiencing. ER 5. This congestion results in wasted fuel and increased emissions (including lead) as planes idle on the ground while waiting to take off, or circle in the air waiting to land. ER 53. Barnes' prior action delayed construction of the runway project for more than four years, thereby ironically preventing a reduction of the very emissions about which she now complains. ER 34-35, 53.³ Following the Court's denial of Barnes' request for an injunction (Dkt. 23), the Port commenced the long-delayed project. Paving was completed on October 13, 2014, and the runway is now built.

³ Although the Court in *Barnes I* did not enjoin the Port, the Port voluntarily decided to delay construction until after it had completed the remand.

V. SUMMARY OF ARGUMENT

The FAA fully complied with the Court's remand by providing a detailed and record-based justification of its conclusion that the HIO project is unlikely to result in any induced growth. The FAA went even further in producing the Remand forecast, which conservatively included additional potential project impacts out of an abundance of caution. Nothing more (and substantially less) was required by the Court's remand order and NEPA.

Without disputing the adequacy of the unconstrained forecast, Barnes raises six ill-conceived challenges to the adequacy of the SEA.

Barnes' first argument is that the FAA was required to, but did not, establish a baseline for lead. This argument fails because Barnes (a) ignores the case law demonstrating that no baseline is required when, as here, the impacts are insignificant; (b) ignores case law rejecting this exact argument when, as here, emissions levels are below EPA-established *de minimis* levels; and (c) ignores that the FAA did, in fact, evaluate impacts against the baseline by adhering to its guidance requiring utilization of EPA's national ambient air quality standards ("NAAQS").

Barnes' second argument is that the FAA's survey for the Remand forecast omitted the single largest operator, Hillsboro Aviation. Not true. Hillsboro Aviation was included in the survey and accounted for in all three forecasts.

Barnes' third argument is that the 2010 Lead Study conducted by the Port failed to comply with EPA guidance. This argument fails for many reasons, not

the least of which is that the Port *did* follow EPA guidance, which Barnes has simply misread.

Barnes' fourth argument is that the FAA should have analyzed effects for a 20-year demand forecast planning period, rather than the 10-year period used in the SEA. Identical arguments have been rejected in at least two circuit court decisions that explain that the FAA properly limited its analysis to the foreseeable future, rather than the standard demand forecast planning period, which is inherently more speculative. Barnes' argument fails for the same reasons.

Barnes' fifth argument is that the FAA failed to consider off-airport impacts to children from air emissions. This argument is baseless. Barnes' arguments reference the wrong section of the SEA. Potential off-airport impacts to children from air emissions were fully addressed in the section in the SEA titled "Children's Health and Safety Risk."

Barnes' sixth argument is that the FAA failed to disclose water quality impacts from increased aviation by improperly relying on a storm water permit. This argument fails, first because Barnes never raised it with the FAA during public comment, and second because the argument otherwise ignores the robust analysis actually included in the SEA.

In addition to the litany of attacks described above, Barnes further argues that the FAA was required to produce a full EIS because of the controversial nature of the project or the so-called uncertainty of the project's effects. These arguments have no merit. The FAA appropriately concluded that the project would have no significant impacts. Barnes' arguments to the contrary ignore the reasoned and

careful analysis contained in the SEA and fail to show that the FAA's conclusions were arbitrary or capricious.

Lastly, Barnes claims that FAA violated certification requirements under the Airport Improvement Act, requiring that the runway project be reasonably consistent with local development plans. This argument is equally baseless because (1) it is raised for the first time in this petition; (2) the project is consistent with local zoning; and (3) Barnes identifies no development plan that is inconsistent with the runway project.

VI. ARGUMENT

A. Standard of Review

The Port adopts the FAA's standard of review.

B. FAA Fully Complied with the Court's Remand in *Barnes I*.

The Ninth Circuit remanded this case to the FAA to consider a single issue: “the environmental impact of increased demand resulting from the HIO expansion project, *if any*, pursuant to 40 C.F.R. § 1508.8(b).” *Barnes I*, 655 F.3d at 1139 (emphasis added). The cited regulation requires federal agencies to consider the “indirect effects” of an action, which “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate.” 40 C.F.R. § 1508.8(b).

The Court in *Barnes I* struggled with FAA's position that “a new runway . . . is unlikely to attract more private aircraft,” because the FAA was “unable to point to anything in the record showing that they in fact considered the possibility” that a new runway would induce growth. *Barnes I*, 655 F.3d at 1134, 1137. And while

the Court recognized that it had endorsed this very same conclusion for other airport related projects because “[w]hen it comes to airport runways, it is not necessarily true that ‘if you build it, they will come,’” the Court concluded that a “case-by-case approach is needed” for projects involving the construction of a new runway. *Id.* at 1137, 1139 (internal quotations omitted) (quoting *Nat’l Parks & Conservation Ass’n v. U.S. Dep’t of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000)).

The FAA completed the “case-by-case” analysis requested by the Court by updating the unconstrained (SEA Appendix B, ER 117-177) and constrained forecasts (SEA Appendix C, ER 179-184), and evaluating whether these forecasts captured any potential induced growth associated with the runway project. Those forecasts provide clear record evidence to support FAA’s conclusion that the conservative unconstrained forecast is “likely the best estimate of activity with the availability of a new parallel runway.” ER 34-35. Indeed, aircraft demand is driven by socioeconomic conditions, not “by virtue of available pavement.” *Id.* The FAA has thus complied with the remand order by re-evaluating its prior analyses, and providing the missing data and reasoned basis for its technical forecasts in the record, thus addressing the Court’s prior concerns. That should end the matter. *Barnes I*, 655 F.3d at 1132 (court will uphold FAA decision “as long as there is a rational connection between the facts found and the conclusions made”).

Barnes’ opening brief does not dispute the FAA’s conclusion that the unconstrained forecast is the best estimate of aircraft demand at HIO. As such, any argument to the contrary is now waived on appeal. *Greenwood*, 28 F.3d at 977

(issue not raised in opening brief is waived). This significant omission seriously undermines most (if not all) of Barnes' arguments because, under the (undisputed) unconstrained forecast, the project *will result in decreased emissions*. As such, the FAA had no further obligation to evaluate the hypothetical and speculative impacts associated with increased lead emissions feared by Barnes. ER 53 (“carbon monoxide emissions would be reduced by 44.3 tons, VOC emissions would be reduced by 3.6 tons, and all other pollutants would be reduced by 1 ton or less”).

But even if Barnes had raised the issue (and she did not), and even if the Court were to find some deficiency in the FAA's standard unconstrained forecasting (and there is none), any such error would be irrelevant, because the FAA *also* produced the Remand forecast “[o]ut of an abundance of caution” to further address the Court's concerns. ER 6, 187. Using the most conservative approach possible, the FAA additionally included potential induced growth using a survey identifying pilots who might use HIO more frequently if the new runway were built, or who might relocate their operations to HIO. ER 192-193. This survey captured the potential for the “if you build it, they will come,” adage, and added those operations to those already included in the unconstrained forecast. The FAA included the Remand forecast, even though the unconstrained forecast *already assumed* that no restrictions otherwise prevented these same pilots from increasing their use of, or relocating to, HIO. Moreover, the FAA carefully evaluated the impacts associated with the Remand forecast and found that any potential increase would be at most 0.1 tons (or 200 pounds). ER 64-65. In short,

the FAA has not only complied with but has gone above and beyond what was required by this Court's remand order.

C. Barnes' Attacks on the Adequacy of the SEA Lack Merit.

Rather than addressing the FAA's conclusions in the unconstrained forecast, Barnes nitpicks the SEA. As discussed in detail below, these various arguments are either precluded (for numerous reasons) or entirely without merit, or both.

1. FAA Was Not Required to Establish a Lead Baseline.

Barnes first claims that FAA failed to take a "hard look" because the SEA did not "disclose the baseline date [sic] for lead dispersion and deposition." Barnes Br. at 22. According to Barnes, the FAA was required to establish a baseline for lead "dispersion and deposition in the soil" from past airport operations, so that FAA could evaluate the cumulative impact of the additional 0.1 tons of lead emissions projected under the Remand forecast. Barnes Br. at 23. This argument should be rejected for any number of reasons.

Initially, Barnes' argument fails because the FAA determined and Barnes concedes that the project emissions under the unconstrained forecast will be *lower* than emissions under the constrained forecast. In addition, there is no obligation to conduct a baseline analysis to satisfy NEPA.

More specifically, there is no statutory or regulatory requirement to establish a "baseline" as part of an EA. *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 n.15 (9th Cir. 1999). Instead, under NEPA, "[t]he no action alternative is meant to 'provide a baseline against which the action alternative[]' is measured. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (citation

omitted; second brackets in original). For that reason, it is well established that there is no need to mechanically produce a “baseline” where the proposed action “has ‘virtually no effect’” on the environment. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1082 (9th Cir. 2011).

Indeed, this issue was squarely addressed in *Northwest Environmental Advocates v. National Marine Fisheries Service*, 460 F.3d 1125, 1140 (9th Cir. 2006). In that case, plaintiffs argued that the agency should have established baseline conditions for salinity intrusion caused by prior dredging projects. *Id.* The Court disagreed, because the “project will have virtually no effect on salinity,” and therefore a “detailed cataloguing of past projects’ impact on salinity would not have ‘informed analysis about alternatives presented for the current project,’ and was unnecessary.” *Id.* (citation omitted).

The same is true here. The SEA includes a comparison of the no action alternative (the constrained forecast) and the action alternative (the unconstrained forecast). It concludes that the most “likely” scenario is that the project will result in *no increase* in lead emissions and would, in fact, *decrease* lead emissions by reducing congestion and delay. ER 53. As was the case in *Northwest Environmental Advocates*, a baseline study in these circumstances “would not have ‘informed analysis about alternatives presented for the current project,’ and was unnecessary.” 460 F.3d at 1140 (citation omitted).

Ignoring the above, Barnes persists with her baseline arguments by mischaracterizing the record. She incorrectly insists that “there *will be* an increase of 200 pounds [of lead] (i.e., 0.1 tons) per year.” Barnes Br. at 24 (emphasis

added). Not so. The FAA concluded that such an increase is unlikely (ER 34-35, 53), and Barnes does not challenge that conclusion.

Barnes' claims fail for two additional reasons. First, Barnes fails to produce any record evidence showing that 200 pounds of lead emitted into the atmosphere over the course of a year (and over a large geographic area) would have any meaningful (or even measurable) impact on lead levels in the soil. As the FAA explained, EPA sets a *de minimis* emission level for lead at 25 tons per year, below which "no further analysis would be required." ER 65. The 200 pounds identified by Barnes is only 0.4% of EPA's *de minimis* threshold. Thus, even if that 200 pound annual emission were to actually occur, such a small fraction of a *de minimis* amount is "virtually insignificant" requiring no further baseline analysis.⁴

Indeed, the court in *Tinicum Township, Pennsylvania v. U.S. Department of Transportation*, 685 F.3d 288, 296 (3d Cir. 2012), found that the FAA need go no further than to evaluate the anticipated emissions against EPA's *de minimis* thresholds. There, the court affirmed the FAA's analysis of construction-related emissions that "compared total project-related emissions against the *de minimis*

⁴ The cases cited by Barnes do not require a different result. The Court in *Northern Plains Resource Council*, 668 F.3d at 1082, agreed with (and cited) the Court in *Northwest Environmental Advocates*, 460 F.3d at 1140, that a baseline was not required if the impacts of the action are insignificant. Barnes' citation to *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, for the proposition that without a baseline, there is "no way to comply with NEPA," 857 F.2d 505, 510 (9th Cir. 1988), is "dicta as the EIS was ultimately upheld," *Gaule v. Meade*, 402 F. Supp. 2d 1078, 1089 (D. Alaska 2005). Likewise the decision in *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012), dealt with misapprehension of the baseline that existed, not the requirement to conduct a baseline analysis in the first instance.

emissions levels.” *Id.* It rejected arguments that “NEPA required the FAA to go further and model the dispersion of these construction period emissions to show how they would affect local ambient concentrations.” *Id.* Likewise, the court affirmed FAA’s evaluation of operational emissions comparing forecasted emissions against no action emissions (precisely as the FAA did here) and then compared those results to EPA’s *de minimis* thresholds. *Id.* at 297. The court then rejected challenges to FAA’s modeling of emissions because “no modeling at all was required” given that “the project’s impact on operational emissions was *de minimis*.” *Id.*

Barnes’ baseline arguments fail for the same reason. As in *Tinicum Township*, once the FAA here concluded that lead emissions fell below EPA’s *de minimis* levels, no further analysis was required.

Second, by comparing aircraft lead emissions under the three forecasts with EPA’s NAAQS to determine significance, FAA *did* address baseline lead emissions. As explained in the SEA, EPA protects human health and the environment from emissions of hazardous air pollutants, including lead, through issuance of its NAAQS. ER 64. The NAAQS provide limits with an adequate margin of safety to protect the most sensitive populations. *Id.* NAAQS further protect against “effects on soils, water, crops, vegetation, . . . animals, wildlife, . . . personal comfort and well-being.” 42 U.S.C. § 7602(h). When EPA revised the NAAQS for lead in 2008, it specifically considered all exposure pathways, including soil deposition resulting in food contamination. 73 Fed. Reg. 66964, 66988 (Nov. 12, 2008). EPA concluded that a level of 0.15 µg/m³ (calendar

quarter average) protected against such exposure with an adequate margin for safety. *Id.*

The SEA looked at the baseline ambient air levels of lead in the vicinity of HIO based on a 2010 study by the Port, which estimated ambient lead levels at 0.06567 µg/m³, based on 240,735 annual operations. ER 64. The SEA explained that this level “is less than 50% of the lead NAAQS,” and thus well below any level that would pose a risk to human health. *Id.* The SEA further explained that “as the proposed project would result in either no increase in lead emissions, or an increase in lead emissions of a *de minimis* amount (0.1 tons) relative to the No Action Alternative when considering the Remand Forecast, no violation of the NAAQS is expected to result from the proposed runway construction.” *Id.*; *see also* FAA Order 5050.4B, Table 7-1 (instructing FAA to consider significance of project based on whether “a project or action exceeds one or more of the National Ambient Air Quality Standards (NAAQS)”). Thus, the FAA fully considered the potential for impacts from lead, and NEPA requires nothing more.

Although Barnes may wish that the FAA had used a soil sampling study to estimate the potential impacts of lead emissions, the choice of methodology employed in a NEPA analysis rests squarely with the agency. *Vill. of Bensenville v. FAA*, 457 F.3d 52, 72 (D.C. Cir. 2006) (“[T]hese judgments regarding the development of the baseline against which alternatives would be assessed are the sorts of expert analytical judgments to which courts typically defer.”). For all these reasons, Barnes’ lead baseline arguments should be rejected.

2. FAA Properly Addressed the Single Largest User.

Barnes next argues that the Port's pilot survey was deficient because "the survey omitted the single largest general aviation operator at HIO, Hillsboro Aviation." Barnes Br. at 24. Barnes complains that Hillsboro Aviation "has expanded significantly, in part, by training foreign pilots," that "the third runway will induce further flight operations by Hillsboro Aviation," and that the FAA failed to account for this induced growth in its Remand forecast. Barnes Br. at 27-28.

These arguments also fail for a number of reasons. *First*, as discussed above, Barnes' attacks on the Remand forecast are irrelevant because she does not dispute FAA's conclusion that the unconstrained forecast is "likely the best estimate." ER 34-35. As the FAA explained, "the Unconstrained Forecast used standard forecasting techniques to estimate the growth in all types of activity, including training," and that forecast appropriately concluded that "[s]ubstantial changes in the proportion of training to total airport activity is not expected." ER 416, 598. The FAA "included a forecast of current user growth over time," including "Hillsboro Aviation, TNG Aviation, Aviation NorthWest, Applebee Aviation, Fly Oregon, and Mary A. Schu Aviation" (ER 597-99), and included a consideration of "key factors affecting future aviation demand such as national and global economic conditions, oil price volatility, and general aviation industry trends" (ER 156). Barnes does not address these factors, does not dispute the adequacy of the unconstrained forecast, and thus has no basis for contending that FAA failed to take a "hard look" at induced growth in flight training.

Second, Barnes’ insistence that the pilot survey “omitted” Hillsboro Aviation is demonstrably false. Hillsboro Aviation was most definitely included in the pilot survey. ER 201 (listing HIO/TTD/PDX contacts as part of survey pool), 244 (listing “Hillsboro Aviation” as one of the HIO/TTD/PDX contacts). And Hillsboro Aviation’s response was used in calculating the Remand forecast. ER 598. Ironically, Barnes contradicts herself elsewhere in asserting precisely the opposite: “Hillsboro Aviation is the only flight training company at HIO included in the General Aviation Survey.” ER 608.⁵ Barnes’ arguments regarding Hillsboro Aviation are baseless.

3. Barnes Has No Basis to Challenge a 2010 Lead Study Conducted by the Port.

In response to Barnes’ claims that the new runway would result in harmful lead emissions, the FAA attached a 2010 Lead Study (discussed above at page 15) that estimated ambient levels of lead in the Hillsboro area. ER 271-296. The study was produced by the Port in response to concerns from the Oregon Department of Environmental Quality (“ODEQ”) that an initial study it produced (using an

⁵ Contrary to Barnes’ allegations, the FAA fully addressed growth plans by Hillsboro Aviation in its unconstrained forecast, and further concluded that “forecasting operations by company would be speculative.” ER 667. Instead, the FAA relied on “overall demand trends for flight training.” *Id.* Barnes insists that one company’s (Hillsboro Aviation’s) growth plans should trump the expert forecasts developed by the FAA. However, Barnes provides no reasoned basis to disagree with the forecasts, and the FAA’s choice of forecasting methodology is entitled to a heightened level of deference by this Court. *St. John’s United Church of Christ v. FAA*, 550 F.3d 1168, 1172 (D.C. Cir. 2008) (“[W]hen the FAA’s determination involves, as here, forecasts of capacity and demand at an airport, even more deference is due.”).

unapproved method) showed the potential for current emissions to exceed the NAAQS. ER 64. The Port conducted its own study using the EPA's approved models (called EDMS and AERMOD) for airports, and concluded, as discussed above, that lead levels were less than 50% of the NAAQS. ER 279. ODEQ subsequently refined its initial study to more accurately reflect airborne sources, and concluded that lead levels were even lower than those predicted by the Port. ER 64.

Using extra-record material, Barnes now attacks the Port's study, raising a host of new objections as to whether it complies with EPA's technical guidance referencing documents that are not in the FAA's record. As a threshold matter, this argument fails, first because Barnes failed to raise these issues with the FAA during the public comment process, and second because it is based on extra-record material not presented to the FAA. *See* 49 U.S.C. § 46110(d) (authorizing judicial review of FAA actions "only if the objection was made in the proceeding conducted by the Secretary"); *Barnes I*, 655 F.3d at 1132 (absent specific exception, argument must be made to FAA in the first instance). In any event, it was entirely appropriate for the FAA to respond to Barnes' public comment by including the Port's study. *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990) ("Nothing prohibits the Agency from adding supporting documentation for a final rule in response to public comments."). The FAA's reasonable response does not convert this petition for review into an open record or *de novo* proceeding.⁶

⁶ To the extent Barnes seeks this Court's review of the Port's study, this Court lacks jurisdiction because jurisdiction under 49 U.S.C. § 46110 is limited to
(continued . . .)

In any event, Barnes has no basis to challenge the adequacy of the Port's air modeling, because projected emissions increases are far below EPA's *de minimis* levels, and thus "no modeling at all was required." *Tinicum Twp.*, 685 F.3d at 297. And even if modeling were required, the Port used both the FAA's required model (EDMS) and EPA's recommended air modeling (AERMOD). ER 64, 276. As demonstrated by the FAA, Barnes' taxi-time, cruise-phase, and run-up arguments are premised on a fundamental misreading of the record, and are otherwise baseless. FAA Br. at 34-36. For all these reasons, Barnes' arguments should be rejected.

4. Barnes' Planning Horizon Arguments Have No Merit.

Barnes next argues that FAA should have used the "standard demand planning horizon of 20 years" to estimate project impacts and emissions rather than the 10-year period used in the SEA. Barnes Br. at 32. This argument similarly fails for a host of reasons.

Initially, Barnes simply confuses terminology. The 20-year "standard demand planning horizon" that Barnes points to is for "forecasting" airport growth as part of the FAA's obligation to develop a National Plan of Integrated Airport Systems. *See* FAA Order 5090.3C. These forecasts, and the Master Planning process, assist the FAA in planning for future regional development needs at an

(. . . continued)

the FAA's decision. *See City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 273 (D.C. Cir. 2002) (rejecting collateral attacks on state agency decisions related to FAA approval because "neither NEPA nor any other statute confers jurisdiction on this Court to hear such challenges as part of this proceeding").

airport. These forecasts are “little more than guesses,” *Nat’l Parks & Conservation Ass’n*, 222 F.3d at 680, because “predicting demand for the airport in 15 years is not so much a factual finding as a prognostication and it is due more deference,” *City of Los Angeles v. FAA*, 138 F.3d 806, 807 n.2 (9th Cir. 1998).

By contrast, NEPA requires agencies to disclose the “reasonably foreseeable” impacts of a proposed action. 40 C.F.R. § 1508.8(b). The FAA must study impacts that are “likely to occur, or probable” rather than “merely possible.” ER 31-32, 574. This “typically” means five years. ER 32, 574; *see also* FAA Order 1050.1E (instructing FAA to consider an “appropriate” timeframe, which is “usually . . . 5 to 10 years”). Barnes here has simply confused the standard forecasting timeframes with typical NEPA timeframes, and her argument must therefore be rejected.

Unsurprisingly, at least two courts have already rejected identical efforts to expand a NEPA analysis beyond the typical five-year period based on long-range FAA forecasts. For example, in *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003), the FAA’s forecast projected an increase in traffic of 37% “sometime between 2010 and 2015,” about 10 to 15 years after the project would be complete. But for NEPA purposes, the FAA only modeled “noise effects for five years into the future,” through 2005. *Id.* The petitioners (like Barnes here) argued that the FAA had to look “at least through 2010, and perhaps through 2015” because the FAA’s forecast anticipated increased traffic in that timeframe. *Id.*

The *Cave Creek* court found that petitioners’ argument “lacks merit” and that five years of analysis was sufficient. *Id.* As the court explained: “[i]t becomes

more difficult – as well as increasingly inaccurate – to make projections that stretch even further into the future.” *Id.* As such, it was “perfectly reasonable” to limit the NEPA analysis to five years. *Id.* The court in *Bensenville* reached the exact same result, agreeing with the FAA that predictions beyond five years “would be of questionable reliability” and “would defy the FAA’s NEPA obligation to determine ‘reasonably foreseeable’ impacts” under 40 C.F.R. § 1508.8. *Bensenville*, 457 F.3d at 71 (citation omitted).

Nor is the rationale in these cases limited to decisions by the FAA. In *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), this Court rejected similar arguments levied against the Forest Service. In that case, the Forest Service limited the scope of its effects analysis to three years, even though the agreement under review was for five years, and the record showed “it was apparent that there would be activity beyond the three-year period.” *Id.* at 952. The Court explained that the selection of a temporal scope “is a delicate choice and one that should be entrusted to the . . . deciding agency.” *Id.* at 962. The Court then rejected the challenge to the three-year scope, explaining that the regulatory environment was subject to significant change after three years, and that the Forest Service decision to limit the analysis to three years was not “unreasonable.” *Id.* at 963.

Similarly, in this case, the FAA addressed Barnes’ request to use the 20-year forecast period (2011 to 2031) and explained that “[t]he evaluation of operations or enplanements beyond 2021 would be speculative and not reasonably foreseeable.” ER 575. The FAA further explained that its prior HIO “forecasts done for the

2005 Master Plan have not accurately reflected conditions observed only 7 years later,” and “determined that the period through 2021 is reasonably foreseeable for purposes of NEPA and this Supplemental Environmental Assessment.” *Id.* This limitation is “perfectly reasonable,” supported by the record, and therefore entitled to deference from this Court.

Moreover, it would be simply illogical to use “information related to lead and other emissions from 2021 through 2031” as Barnes insists. Barnes Br. at 33. Even assuming that traffic demand and patterns change in future years (a proposition that FAA itself found “speculative”), the emissions profiles of those aircraft are almost certain to be radically different. *See Cave Creek*, 325 F.3d at 331 (“For example, we do not know what noise levels planes will produce in the future; they are likely to become less, rather than more, noisy.”). Indeed, the FAA and EPA are on track to find a complete replacement for lead-based aviation fuel by 2018. ER 407; Dkt.Entry 21-2 at ¶ 7. Analyzing lead emissions beyond 2021, in a time period when FAA expects there will be *no aircraft lead emissions at all*, “would defy the FAA’s NEPA obligation to determine ‘reasonably foreseeable’ impacts” under 40 C.F.R. § 1508.8. *Bensenville*, 457 F.3d at 71 (citation omitted). For this reason too, Barnes’ arguments should be rejected.

5. FAA Properly Considered Off-Airport Impacts.

In addition to the misdirected arguments discussed above, Barnes falsely accuses the FAA of failing to look at any off-airport impacts, including impacts to children. Barnes Br. at 34-42. As with Barnes’ other arguments, this argument fails because Barnes does not dispute FAA’s conclusion that the new runway will

actually **reduce** air emissions, and that the worst-case 0.1 ton per year increase in lead emissions projected by the Remand forecast is not likely to transpire. ER 34-35.

In any event, Barnes' argument is based on a misreading of the SEA. "The absence of off-airport environmental impacts" discussed in the section misidentified by Barnes "pertains to significant aircraft noise (as defined by the 65 DNL) *not air quality emissions.*" SER 574 (emphasis added).

Far from ignoring the issue, the EPA addressed Barnes' concerns under the section of the SEA titled "Children's Health and Safety Risk." ER 63-64. There, the FAA (1) evaluated off-airport emissions based on the unconstrained and Remand forecasts; (2) compared the anticipated emissions under those forecasts to the EPA's *de minimis* thresholds; and (3) further evaluated total possible emissions against the NAAQS, which "are designed to protect all populations, including children." *Id.* (emphasis added). Based on that comprehensive review, "the FAA concluded that there would be no significant risks to children's health and welfare" under either the Remand or the unconstrained forecast. ER 65. It is patently untrue that the FAA somehow failed to address potential risks to children from lead exposure.

Likewise, the studies provided by Barnes (Barnes Br. at 36-38) do not undermine the FAA's SEA analysis. Indeed, the FAA considered a series of studies submitted by Barnes and others, and found that (1) the NAAQS are intended to protect against such harms, with an adequate margin of safety; (2) "[t]he area around Hillsboro Airport currently meets and is expected to continue to

meet the NAAQS for lead”; (3) the amount of lead attributable to the runway project would be, at most, *de minimis*;⁷ and (4) “there is no industry-accepted information to indicate that residents in the vicinity of Hillsboro Airport have been exposed to concentrations of lead from aircraft that would cause” the kinds of health impacts identified by Barnes. ER 565-567. The FAA has provided “a rational connection between the facts found and the conclusions made,” and nothing more is required under NEPA. *Barnes I*, 655 F.3d at 1132; *see also City of Los Angeles*, 138 F.3d at 807 (in reviewing NEPA decisions, “it doesn’t matter whether we agree with the agency’s conclusions”).

Remarkably, Barnes actually undermines her contention that the FAA did not analyze off-airport impacts at all by also insisting that the FAA’s decision to analyze off-airport impacts through the NAAQS was improper. Barnes Br. at 39-42. These arguments are not even credible. The FAA’s NEPA-implementing regulations instruct it to evaluate the significance of air emissions by determining if emissions from “a project or action exceeds one or more of the National Ambient Air Quality Standards (NAAQS).” FAA Order 5050.4B, Table 7-1. As explained above, the FAA may start and end that inquiry with a finding that

⁷ Contrary to Barnes’ assertions, the FAA made no mistake in using the NAAQS in an effort to satisfy its NEPA obligations because the analysis is fully articulated in the SEA itself and use of the NAAQS did not substitute for – but augmented – a thorough NEPA analysis. ER 63-65, 259-270 (calculation of anticipated emissions under three forecasts); *see Tinicum Twp.*, 685 F.3d at 294 (explaining that the FAA “conducted the air quality analysis at issue to meet the overlapping requirements of NEPA and the Clean Air Act”).

expected project emissions are below EPA's *de minimis* levels. *Tinicum Twp.*, 685 F.3d at 296.⁸

Even if the FAA were not required by its own regulations to use the NAAQS to evaluate emissions impact, the FAA clearly had the discretion to do so.⁹ Although Barnes may have preferred air testing adjacent to HIO (Barnes Br. at 38), the FAA appropriately relied on air modeling conducted by the Port (and confirmed by ODEQ). *Seattle Cmty. Council Fed'n v. FAA*, 961 F.2d 829, 833-34 (9th Cir. 1992) (courts "have uniformly held that it is within an agency's discretion to determine which testing methods are most appropriate").

6. FAA Properly Considered Impacts to Water Quality.

Barnes additionally maintains that the FAA "has not disclosed any impacts to the wetlands and water bodies from pollution, including lead, that will disperse

⁸ For this reason too, Barnes' complaint that the FAA has never taken measurements of lead adjacent to HIO must fail because no further modeling of air emissions was required at all. *Tinicum Twp.*, 685 F.3d at 297. In any event, measurements are not required by FAA's NEPA regulations (ER 568-569), and neither the EPA nor ODEQ has yet to require lead monitoring at Hillsboro because the nature of HIO (including total emissions, meteorology, and proximity to sources) does not create a significant potential for NAAQS violations (ER 800-801).

⁹ Barnes tries to impugn the FAA's reliance on the NAAQS by pointing to an ODEQ regulation that defines "de minimis" and "significant." Barnes Br. at 40-41. This argument fails because Barnes never presented it to the FAA and it is therefore waived. *See* 49 U.S.C. § 46110(d). In any event, Barnes' argument misreads the applicable regulatory framework. Oregon Administrative Rule ("OAR") 340-200-0020(33) and OAR 340-200-0020(133) are triggers for emissions limits for sources *that already have a permit*. But under these regulations, sources could emit *up to 10 tons of lead per year without getting a permit at all*. OAR 340-216-8010, Table 1, B.85. Barnes' reliance on ODEQ regulations to suggest that a speculative 0.1 ton increase is significant is nothing more than a red herring.

and settle on to those water bodies,” and instead has improperly relied on a “non-NEPA document” (Permit 1200-Z) to fulfill its NEPA obligations. Barnes Br. at 42-44. As with Barnes’ other arguments, this argument suffers from a host of fatal flaws.

First, Barnes did not make the argument before the FAA and the argument is therefore waived. *See* 49 U.S.C. § 46110(d). Instead, Barnes’ comments related to Permit 1200-Z were limited to deicing (ER 560). Barnes does not address deicing in her opening brief, and that issue is waived as well. *Greenwood*, 28 F.3d at 977 (issue not raised in opening brief is waived).¹⁰

Second, as demonstrated repeatedly above, Barnes incorrectly asserts that the FAA has “conceded” an increase of 0.1 tons of lead per year. Barnes Br. at 44. Instead, the FAA found that lead emissions would decrease, and that any unlikely increase in emissions (under the conservative Remand forecast) would be *de minimis*. ER 35. Barnes has not challenged that basic premise, and therefore her claim fails for this reason as well.

And third, while Barnes asserts that “the FAA proposes to rely on 2012 1200-Z permit under the Clean Water Act,” Barnes points to no place in the record where the FAA, in fact, relies on that permit to address the impacts from air emissions on water bodies.¹¹ On the contrary, as discussed above, the FAA’s

¹⁰ And the argument would have no merit, because it was fully addressed by the FAA in its response to comments. ER 576.

¹¹ The SEA discusses Permit 1200-Z with respect to deicing and storm water-related concerns. ER 58, 68, 71.

projected air emissions are based on the three forecasts, concluding that lead impacts would be insignificant because emissions would either (1) decrease or (2) at most increase by a *de minimis* 0.1 tons to a level that was still below the NAAQS. *Id.* In setting the NAAQS for lead, EPA considered “discharges to water,” including surface waters and aquatic systems. 73 Fed. Reg. at 67008. The FAA was therefore entirely justified in concluding, as it did here, that there would be no significant impact to water quality or wetlands. Barnes’ arguments accordingly fail.

D. An EIS Was Not Required.

In addition to challenging the adequacy of the SEA, Barnes also alleges that the FAA was required to produce a full EIS for the project. Barnes’ efforts to revive an argument rejected in *Barnes I* must fail, because the remand produced no new evidence of environmental impacts that would change the original analysis. *See* FAA Br. at 43. Although Barnes may be right that the Ninth Circuit left open the issue of whether induced growth impacts would warrant an EIS on remand, the FAA found, based on a comparison of the constrained and unconstrained forecasts, that there would be *no such induced growth*. Barnes does not challenge those forecasts, and therefore has no legal basis to insist that an EIS is required.

Instead, Barnes argues that an EIS is required because of the “context and intensity” of the HIO project (the same factors the Court found were not met in *Barnes I*). Barnes Br. at 45-51. According to Barnes, an EIS is required because (1) the project will result in increased lead emissions and will therefore have significant effects on public health and safety; (2) the runway involves “unique

risks” because of its geography; and (3) the effects of the project are highly controversial. Barnes Br. 44-51. As discussed below, each of these arguments is – like the others dispatched above – simply meritless.

1. Barnes’ Significant Effects Arguments Lack Merit.

Barnes argues that an EIS is required because the “[c]onstruction of the third runway will lead to increased lead emissions . . . which will significantly affect the public health.” Barnes Br. at 46.

This argument fails for all of the reasons previously discussed. The FAA – as an extra measure of caution – evaluated the impact of the small (and unlikely) increase in emissions that could theoretically result from the Remand forecast and found that even under that unlikely scenario, ambient levels would remain well below the NAAQS. The NAAQS are conservatively set with an adequate margin of safety, to protect “the health of ‘sensitive’ populations such as asthmatics, children and the elderly.” ER 315. Accordingly, the FAA concluded that even were these impacts to result, they would not be significant.

Indeed, this Court has rejected the idea that an EIS should be required anytime the EA reveals some level of impact. In *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1240 (9th Cir. 2005), the plaintiffs argued that “any information included in an EA and its supporting NEPA documents that admits impacts on wildlife species and their habitat would trigger the preparation of an EIS.” However, the Court declined “to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts” because “it does not follow that the presence of some negative effects necessarily

risers to the level of demonstrating a significant effect on the environment.” *Id.* Rather, the inquiry is whether the agency took a “hard look” at the environmental consequences. *Id.*; *see also City of Los Angeles*, 138 F.3d at 808 (“We don’t require an agency to quantify all possible effects, particularly not those that are likely to be minor.”).

Here, the FAA clearly met that “hard look” requirement by evaluating both the likely impacts of the action (under the unconstrained forecast), and the more conservative evaluation under the Remand forecast. Under both scenarios, air emissions are expected to be well below the NAAQS (and well below EPA-established *de minimis* levels), and thus well below any level that creates a concern for public health and safety. ER 63-65. NEPA mandates nothing more.

2. Barnes’ “Unique Characteristics” Arguments Lack Merit.

Barnes next argues that the “[u]nique characteristics of the geographic area,” warrant an EIS (as provided in 40 C.F.R. § 1508.27(b)(3)) because “the Project will increase lead pollution immediately adjacent to the City of Hillsboro.” Barnes Br. at 47. Barnes further contends that the risk of lead to children in these areas is also “unique.” Barnes Br. at 48.

These arguments fail for all of the same reasons already discussed. The project is expected to actually decrease lead emissions under the unconstrained forecast, and to yield *de minimis*, insignificant emissions under the Remand forecast. ER 63-65, 573; *see also Cave Creek*, 325 F.3d at 333 (rejecting argument that an EIS was warranted based on uniqueness of area “because the noise levels in Spur Cross Ranch after the Plan’s implementation are insignificant”).

In any event, Barnes fails to provide any factual basis to support her claim that there is something “unique” about a general aviation airport being located near a residential area. *See Cave Creek*, 325 F.3d at 331 (“[T]here is nothing unique about Cave Creek or Carefree. Petitioners concede that they are residential areas.”). In fact, the studies cited by Barnes show exactly the opposite: about 16 million people in the U.S. live within one kilometer of an airport where planes use leaded gas, and three million children attend school within one kilometer of these airports. ER 784.

Nor are the risks associated with lead exposure to children in any way “unique or unknown” (Barnes Br. at 47) as Barnes elsewhere repeatedly concedes. Barnes Br. at 3, 18, 34, 35 (acknowledging that the risks to children are “well established”). The Port agrees that this risks are well established. *See, e.g.*, ER 63-65, 325, 414-416, 419, 431-432. As EPA explained in revising the lead NAAQS:

EPA is revising various elements of the standard to provide increased protection for children and other at-risk populations against an array of adverse health effects, most notably including neurological effects in children, including neurocognitive and neurobehavioral effects.

73 Fed. Reg. at 66965. EPA considered all possible exposure pathways and set the NAAQS level with an “adequate margin of safety” to ensure protection against any “inconclusive scientific and technical information,” as well as “hazards that research has not yet identified.” *Id.* at 66966. The risks identified by Barnes were thus both known by EPA when it set the NAAQS, and carefully considered by the FAA in evaluating the runway project. No mystery remains warranting an EIS.

3. There Is No Controversy as to the Impacts of the HIO Project.

Lastly, Barnes tries to create controversy as to the scope and nature of the runway project by (1) citing an extra-record “Program Update” from the EPA; and (2) citing the results of a preliminary study by ODEQ. Barnes Br. at 48-51. Yet Barnes never presented the “Program Update” document to the FAA during the public comment period and presents no reason why she could not have done so. For this reason alone, any challenge based on Program Update must fail.¹² See 49 U.S.C. § 46110(d).

In any event, Barnes’ arguments are again misguided. The Program Update provides the results of EPA-required lead monitoring at 17 airports where aircraft use leaded fuel, showing that 15 of the 17 airports meet the NAAQS (0.15 µg/m³). The list does not include HIO because EPA did not identify HIO as an airport likely to produce “lead concentrations that approach or exceed the NAAQS.” ER 806.¹³

Barnes’ argument misunderstands the ambient air measurements that make up the NAAQS. Ambient levels of lead include inputs from all sources, such as

¹² Barnes’ opening brief on page 48 cites to “Exhibits B and D” of the Declaration of Sean Malone (Dkt.Entry 25-2). Barnes Br. at 48. There is no Exhibit D to that declaration. Exhibit B is the Program Update. The Port has separately opposed Barnes’ request for judicial notice of Exhibit B. See Dkt.Entry 31.

¹³ Barnes’ attempt to foment controversy by comparing HIO’s lead emissions to those calculated at San Carlos airport is ill-conceived. ER 588; 73 Fed. Reg. at 66971 (“Lead is emitted into the air from many sources encompassing a wide variety of stationary and mobile source types.”). Ambient levels can even be driven by “predominant use of one runway due to wind patterns.” Malone Decl. Ex. B. at 1.

ore and metal processing operations, not just a single source. ER 588; 73 Fed. Reg. at 66971 (“Lead is emitted into the air from many sources encompassing a wide variety of stationary and mobile source types.”). Ambient levels are also impacted by weather patterns and geography. ER 811; *see also* ER 282 (“Representative meteorological data is required to complete the necessary air dispersion modeling.”). Indeed, given the factors that influence ambient air standards, it should be unsurprising that ambient lead levels in a particular area are not solely tied to inputs from an airport in that area.

The results of the Program Update bear this out, with the largest lead-emitting airport identified by EPA (Deer Valley at 1.32 tons per year (ER 801)) registering low ambient concentrations of lead ($0.04 \mu\text{g}/\text{m}^3$) – far below the modeled emissions for HIO and far below many other airports (like San Carlos) that emit significantly less lead each year. At the same time, other airports with total emissions similar to HIO (*e.g.*, Gillespie Field at 0.9 tons (ER 801)) registered ambient levels very similar to the modeled levels at HIO ($0.07 \mu\text{g}/\text{m}^3$). This broad range of results is entirely expected given local conditions, in no way creates controversy with the results of the Port’s 2010 Lead Study, and provides no basis for conducting a full EIS.

This Court in *Native Ecosystems Council* cautioned against similar efforts to create a controversy where none exists. As the Court explained, “[s]imply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial or highly uncertain.” *Native Ecosystems Council*, 428 F.3d at 1240. Similarly, Barnes’

effort to cherry pick information in the EPA's Program Update – a document that is not even in the “administrative record” – should be summarily rejected.

Likewise, Barnes' efforts to create controversy from ODEQ's initial lead modeling fail. As explained in the SEA, ODEQ conducted an *initial* study of lead emissions around Hillsboro using the CALPUFF atmospheric distribution model, a model that is typically applied to stationary sources. ER 315. That model is not approved by the FAA or the EPA for modeling airport emissions. ER 64. That initial CALPUFF study assumed that all air emissions occurred at ground level, and at HIO itself, and thus unsurprisingly concluded that ambient levels at HIO and the immediate vicinity could exceed the NAAQS. *Id.*

But ODEQ subsequently revised that initial assessment “by adjusting the emission release parameters to more accurately simulate emissions from actual flight operations.” *Id.* In other words, ODEQ adjusted its model so that it no longer (incorrectly) assumed that all HIO aircraft emissions occurred at ground level. ODEQ's “refined model showed a maximum predicted concentration of 0.00331 $\mu\text{g}/\text{m}^3$ at ‘receptor’ level (ground level), well below the NAAQS of 0.15 $\mu\text{g}/\text{m}^3$.” *Id.*

Barnes cannot create controversy by “cherry pick[ing]” the initial results of the ODEQ modeling before it was significantly revised to conform to established EPA protocol. The initial results were based on unsupportable assumptions about the location of emissions solely at HIO, assumptions that Barnes elsewhere argues are untenable. *See Barnes Br.* at 35 (erroneously accusing the FAA of “taking the position that all lead pollution . . . apparently disperse and settle solely on the

airport”). The final results of the ODEQ study produce results consistent with (but lower than) the Port’s study and well below the NAAQS. ER 64. Because there simply is no controversy, the FAA was not required to produce an EIS.

E. Barnes’ Airport Improvement Act Claims Have No Merit.

Barnes’ final argument is that FAA’s certification under 49 U.S.C. § 47106(a)(1) is improper because it discusses zoning changes implemented by the City of Hillsboro that were invalidated, in part. Barnes Br. at 51-53. This argument is precluded because Barnes failed to raise the issue with the FAA during the public comment process. *See* 49 U.S.C. § 46110(d). Barnes was fully aware of the fact that a portion of the City of Hillsboro’s zoning code was invalidated in a land use decision, as she was the petitioner in that case. *See Barnes v. City of Hillsboro*, 243 P.3d 139 (Or. Ct. App. 2010). If Barnes believed that the invalidation of portions of the City’s zoning ordinance precluded certification under 49 U.S.C. § 47106(a)(1), she should have raised the issue during public comment.

Even if not precluded, Barnes’ arguments misapprehend the certification requirement. The FAA was required to determine whether the Port’s project is reasonably “consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport.” 49 U.S.C. § 47106(a)(1); *Tinicum Twp.*, 685 F.3d at 299 (concluding that 49 U.S.C. § 47106(a)(1) only requires reasonable consistency). As the FAA explained, the funding for this project was approved in 2010, and those land use regulations were “existing” at

that time. ER 736. Further, the FAA explained that the zoning ordinance at issue was largely upheld. While certain deficiencies were remanded to the City of Hillsboro, the City is in the process of addressing them through updates to the County code. ER 422, 737. For these reasons, the FAA appropriately concluded that the proposed project “is not in conflict with any local planning goals or laws.” ER 12.

Tellingly, Barnes identifies no “plan for the development of the area surrounding the airport” that is inconsistent with the Port’s runway project. Nor could she. The City of Hillsboro strongly supports the project. SER 1-2. HIO is located within M-2 Industrial and MP Industrial park zones, the same zones that HIO has been in since the current zoning code was adopted in 1964. ER 736-737. The FAA therefore correctly concluded that the project was reasonably consistent with applicable local plans, and nothing more is required for FAA approval under 49 U.S.C. § 47106(a)(1).

VII. CONCLUSION

The FAA thoroughly and completely addressed the one error identified by the Court in *Barnes I*. Barnes’ complaints are outside the scope of the remand and otherwise devoid of merit. For these reasons, Barnes’ petition should be denied and her case dismissed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
 - this brief contains 9,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
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STOEL RIVES LLP

By: s/ Beth S. Ginsberg
Beth S. Ginsberg

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Port states that it is not aware of any related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, I electronically filed the *PORT OF PORTLAND'S OPPOSITION BRIEF* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All the participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/Beth S. Ginsberg _____
Beth S. Ginsberg

Addendum

ADDENDUM

Barnes, et al. v. FAA

No. 14-71180

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42 U.S.C. § 46110, Judicial Review

(a) Filing and Venue.— Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial Procedures.— When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of Court.— When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for Prior Objection.— In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court Review.— A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

49 U.S.C. § 47106(a), Project grant application approval conditioned on satisfaction of project requirements

(a) Project Grant Application Approval.— The Secretary of Transportation may approve an application under this subchapter for a project grant only if the Secretary is satisfied that—

(1) the project is consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport;

(2) the project will contribute to carrying out this subchapter;

(3) enough money is available to pay the project costs that will not be paid by the United States Government under this subchapter;

(4) the project will be completed without unreasonable delay;

(5) the sponsor has authority to carry out the project as proposed; and

(6) if the project is for an airport that has an airport master plan, the master plan addresses issues relating to solid waste recycling at the airport, including—

(A) the feasibility of solid waste recycling at the airport;

(B) minimizing the generation of solid waste at the airport;

(C) operation and maintenance requirements;

(D) the review of waste management contracts; and

(E) the potential for cost savings or the generation of revenue.

* * * *

40 C.F.R. § 1508.8, Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.27, Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a sites-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

1050.1E

06/08/04

CHAPTER 1. GENERAL

- 1. PURPOSE.** This order provides Federal Aviation Administration (FAA) policy and procedures to ensure agency compliance with the requirements set forth in the Council on Environmental Quality (CEQ) regulations for implementing the provisions of the National Environmental Policy Act of 1969 (NEPA), 40 Code of Federal Regulations (CFR) parts 1500-1508; Department of Transportation Order DOT 5610.1C, Procedures for Considering Environmental Impacts; and other related statutes and directives.
- 2. DISTRIBUTION.** Notice of promulgation and availability of this order is distributed to the assistant/associate administrators and their office and service directors, the Chief Operating Officer and vice-presidents of the Air Traffic Organization, and the Chairs of the Environmental Network. The order should be forwarded to all division managers, facility managers, and NEPA practitioners. The order is available in electronic form only. The order will be initially located for viewing and downloading at <http://www.aee.faa.gov>. If the public does not have access to the internet, they may obtain a computer disk containing the order by contacting the Office of Environment & Energy, 800 Independence Avenue S.W., Washington D.C. 20591. If the public is not able to use an electronic version, they may obtain a photocopy of the order, for a fee, by contacting the FAA's rulemaking docket at Federal Aviation Administration, Office of the Chief Council, Attn: Rules Docket (AGC-200) - Docket No. 29797, 800 Independence Avenue SW, Washington DC 20591.
- 3. CANCELLATION.** Order 1050.1D, Policies and Procedures for Considering Environmental Impacts, dated December 5, 1986, is cancelled.
- 4. BACKGROUND.** NEPA and its implementing regulations, promulgated by CEQ in accordance with Executive Order (E.O.) 11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended by E.O. 11991 (sections 2(g) and 3(h)), May 24, 1977, establish a broad national policy to protect and enhance the quality of the human environment, and develop programs and measures to meet national environmental goals. Section 101 of NEPA sets forth Federal policies and goals to encourage productive harmony between people and their environment. Section 102(2) provides specific direction to Federal agencies, sometimes called "action-forcing" provisions (40 CFR 1500.1(a), 1500.3, and 1507) on how to implement the goals of NEPA. The major provisions include the requirement to use a systematic, interdisciplinary approach (section 102(2)(A)) and develop implementing methods and procedures (section 102(2)(B)). Section 102(2)(C) requires detailed analysis for proposed major Federal actions significantly affecting the quality of the human environment, providing authority to prepare environmental impact statements (EIS).
- 5. SYNOPSIS OF MAJOR CHANGES.** This revision:

 - 5a.** Reorganizes to consolidate all categorical exclusions, including new and modified categorical exclusions for all FAA programs, into chapter 3 while eliminating the separate appendices and their respective categorical exclusions for each program.

1050.1E

06/08/04

14.4f. Noise monitoring data may be included in an EA or EIS at the discretion of the responsible FAA official. Noise monitoring is not required and should not be used to calibrate the noise model.

14.4g. DNL contours, grid point, and/or change-of-exposure analysis will be prepared for the following:

(1) Current conditions; and

(2) Future conditions both with and without (no action) the proposal and each reasonable alternative. Comparisons should be done for appropriate timeframes. Timeframes usually selected are the year of anticipated project implementation and 5 to 10 years after implementation. Additional timeframes may be desirable for particular projects.

14.4h. If the above comparisons show a DNL 1.5 dB or greater increase over a noise sensitive area exposed to DNL 65 dB or greater as a result of the proposed project or any of its reasonable alternatives (except no action), a level of significant noise impact has been reached.

14.4i. The following information will be disclosed in the EIS for each modeling scenario that is analyzed:

(1) The number of people living or residences within each noise contour at or above DNL 65 dB, including the net increase or decrease in the number of people or residences exposed to that level of noise. (Use of maps that depict locations within a community of noise sensitive areas is recommended.)

(2) The location and number of noise sensitive uses (e.g., schools, churches, hospitals, parks, recreation areas) exposed to DNL 65 dB or greater.

(3) Mitigation measures in effect or proposed and their relationship to the proposal.

14.4j. When a proposed FAA action would result in a significant noise increase and is highly controversial on this basis, the EIS should include information on the human response to noise that is appropriate for the proposal under analysis. Inclusion of data on background or ambient noise may be helpful.

14.5 SUPPLEMENTAL NOISE ANALYSIS.

14.5a. The Federal Interagency Committee on Noise (FICON) report, "Federal Agency Review of Selected Airport Noise Analysis Issues," dated August 1992, concluded that the Day-Night Average Sound Level (DNL) is the recommended metric and should continue to be used as the primary metric for aircraft noise exposure. However, DNL analysis may optionally be supplemented on a case-by-case basis to characterize specific noise effects. Because of the diversity of situations, the variety of supplemental metrics available, and the limitations of



ORDER
5050.4B

**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION**

**NATIONAL ENVIRONMENTAL POLICY ACT
(NEPA) IMPLEMENTING INSTRUCTIONS
FOR AIRPORT ACTIONS**

Effective Date: April 28, 2006

Initiated by: APP-1

TABLE 7-1. SIGNIFICANCE THRESHOLDS		
RESOURCE CATEGORY	ORDER 1050.1E THRESHOLD	FACTORS TO CONSIDER FOR AIRPORT ACTIONS
Air quality.	When a project or action exceeds one or more of the National Ambient Air Quality Standards (NAAQS).	<p>For NEPA purposes: The responsible FAA official must determine if air quality impacts of a reasonable alternative would exceed a National Ambient Air Quality Standard for the time periods analyzed.</p> <p>For General Conformity requirements under the Clean Air Act, as amended. Analyze only the proposed or preferred alternative.</p>
Coastal Barriers.	None established.	<p>FAA Order 1050.1E, Appendix A, Section 3 does not provide a threshold for these resources. After consulting with the jurisdictional U.S. Fish and Wildlife Service or Federal Emergency Management Agency office, the responsible FAA official should determine if the proposed action would cause either of the following conditions.</p> <ul style="list-style-type: none"> • An unacceptable risks to human safety or property. • Adverse effects to the barrier’s environmental resources that could not be satisfactorily mitigated.
Coastal Zone.	None established.	<p>FAA Order 1050.1E, Appendix A, Section 3, does not provide a threshold for these resources. Because of the number of airports in coastal areas or that could affect coastal resources, ARP suggests the responsible FAA official consider the following factors, while addressing effects on coastal zone resources.</p> <ul style="list-style-type: none"> • Did the CZM agency object to the sponsor’s consistency certification? • If yes, has the sponsor changed the project so it is consistent with the applicable coastal zone management plan(s)? • If not, has the sponsor successfully appealed the CZM agency’s consistency objection to the NOAA Assistant Administrator? • If the airport action includes facilities FAA will install, did the

		<p>responsible FAA organization provide proof that it will install the necessary aviation facilities in a manner consistent with the approved coastal zone management plan to the maximum extent practicable?</p> <ul style="list-style-type: none"> • Did the CZM agency agree or disagree with FAA’s finding? • If not, has FAA changed the proposed installation to meet CZM plan?
Compatible land use.	See significance threshold for noise.	<p>The responsible FAA official determine if any alternative would have land use consequences such as:</p> <ul style="list-style-type: none"> • community disruption; • business relocations; • induced socioeconomic impacts; • wetland, or floodplain impacts; or • critical habitat alterations. <p>Use the information from the factors addressing these specific issues to determine the severity of compatible land use effects.</p>
Construction impacts.	See significance threshold for the resource(s) construction would affect.	Use the information for each applicable resource.
Section 4(f).	When the action’s physical use would be more than minimal or its constructive use substantially impairs the 4(f) property. In either case, mitigation is not enough to sustain the resource’s designated use.	<p>Determine if the proposed action or a reasonable alternative would eliminate or severely degrade the intended use of the Section 4(f) resource. That is would the proposed action or alternative physically or constructively use (i.e., substantially impair the use) that resource? The responsible FAA official should determine if mitigation is satisfactory to the agency having jurisdiction over the protected resource. If mitigation is unsatisfactory, more detailed, impact analysis is likely needed.</p>

Farmlands.	When the total combined score on Form AD-1006 ranges between 200 and 260. Impact severity increases as the total score approaches 260.	
Fish, Wildlife and Plants.	<p>For Federally-listed species: When the U.S. Fish and Wildlife Service or the National Marine Fisheries Service determines a proposed action would likely jeopardize a species' continued existence or destroy or adversely affect a species' critical habitat.</p> <p>For non-listed species: Consider scientific literature on and information from agencies having expertise addressing on the affected species. Consider information on: project effects on population dynamics; sustainability; reproduction rates; natural and artificial mortality (aircraft strikes); and the minimum population size needed to maintain the affected population.</p>	<p>The responsible FAA official should consider the following factors in consultation with organizations having jurisdiction or special expertise concerning the protection and/or management of the affected species. The official should complete the added analysis for each reasonable alternative that would cause long-term (i.e., greater than 1 year) habitat impacts.</p> <ul style="list-style-type: none"> • Consult with the appropriate agency(ies) to determine if an area sufficient to sustain species commonly found in the affected area would remain if the alternative were implemented. • Determine if the alternative would affect habitat supporting floral or faunal species not commonly occurring in the project area. If yes, In consultation with the appropriate agency(ies), determine if the alternative would affect a small tract of sensitive habitat needed for the survival or well-being of flora or fauna. Consider the locations of other nesting and breeding areas relative to the project's affected area and if resource agency(ies) indicate those areas could sustain the disturbed species.
Floodplains.	When notable adverse impacts on natural and beneficial floodplain values would occur.	<p>The a responsible FAA official must decide if a "significant floodplain encroachment" would occur. To do so, the official must decide if the action's or reasonable alternative's floodplain encroachment would cause any of the following:</p> <ul style="list-style-type: none"> • A considerable probability of loss of human life; • Future, extensive damage that would interrupt airport service or use of the proposed runway or other proposed airport facility. • A notable, adverse effect on the affected floodplain's natural and beneficial values. <p>It is critical to note that an alternative causing a significant</p>

		<p>encroachment does not necessarily trigger a significant impact for NEPA purposes. That level of impact would occur only when an action would cause notable adverse impacts on the affected floodplain's natural and beneficial values.</p> <p>In those instances when no significant effect under NEPA would occur, the responsible FAA official must ensure the environmental document discloses action-induced effects on human life, NAVAIDS, and transportation facilities. In this case, the official should ensure the document clearly states those effects do not trigger a significant impact under NEPA.</p>
Hazardous materials.	<p>When an action involves a property on or eligible for the National Priority List (NPL). Uncontaminated properties within a NPL site's boundary do not always trigger this significant threshold.</p>	
Historical, architectural, archaeological, and cultural.	<p>When an action adversely affects a protected property and the responsible FAA official determines that information from the State and/or Tribal Historic Preservation Officer addressing alternatives to avoid adverse effects and mitigation warrants further study.</p>	
Light emissions and visual effects.	<p>For light emissions: When an action's light emissions create annoyance to interfere with normal activities.</p> <p>For visual effects: When consultation with Federal, State, or local agencies, tribes, or the public shows these effects contrast with existing environments and the agencies state the effect is objectionable.</p>	
Natural resources and energy supply.	<p>When an action's construction, operation, or maintenance would cause demands that would exceed available or future (project year) natural resource or energy supplies.</p>	

<p style="text-align: center;">Noise.</p>	<p>For most areas: When an action, compared to the no action alternative for the same timeframe, would cause noise sensitive areas located at or above DNL 65 dB to experience a noise increase of at least DNL 1.5 dB. An increase from DNL 63.5 dB to DNL 65 dB is a significant impact.</p> <p>For national parks, national wildlife refuges and historic sites, including traditional cultural properties: FAA must give special consideration to these areas. The DNL 65 dB threshold may not adequately address noise effects on visitors to these areas. Consult the jurisdictional agency for more information to determine a significant noise impact.</p>	<p>ARP reminds the responsible FAA official that disclosing impacts having a DNL 3.0-dBA increase over noise-sensitive areas located between the DNL 60 and 65-dBA contours is for information purposes only. For NEPA purposes, those 3-dBA impacts do <u>not</u> cause significant adverse noise impacts below the DNL 65 dBA contour, except as noted in the 2nd column regarding national parks, etc.</p>
<p style="text-align: center;">Socioeconomic Environmental Justice, and Children’s Health and Safety Risks.</p>	<p>For Socioeconomic issues: When an action would cause:</p> <ul style="list-style-type: none"> • extensive relocation, but sufficient replacement housing is unavailable; • extensive relocation of community businesses that would cause severe economic hardship for affected communities; • disruption of local traffic patterns that substantially reduce the Levels of Service of roads serving the airport and its surrounding communities; • a substantial loss in community tax base. <p>For Environmental justice issues: When an action would cause disproportionately high and adverse human health or environmental effects on minority and low-income populations, a significant impact may occur.</p> <p>For Children’s Health & Safety Risks: An action causing disproportionate health and safety risks to children, may indicate a significant impact.</p>	

<p align="center">Solid waste.</p>	<p>None established.</p>	<p>ARP suggests that the responsible FAA official also determine if a reasonable alternative would cause one of the following conditions:</p> <ul style="list-style-type: none"> • Airport-generated solid waste would exceed available landfill or incineration capacities or require extraordinary effort to meet applicable solid waste permit conditions or regulations. • Local, State or Federal agencies determine that substantial, unresolved waste disposal issues exist and may require more analysis.
<p align="center">Water Quality.</p>	<p>When an action would not meet water quality standards. Potential difficulty in obtaining a permit or authorization may indicate a significant impact.</p>	<p>The responsible FAA official also consider if a proposed action or a reasonable alternative would threaten a public drinking water supply, sole source aquifer, or waters of national significance (e.g., Wild and Scenic Rivers, national refuges, etc.).</p>
<p align="center">Wetlands, jurisdictional or non-jurisdictional.</p>	<p>When an action would:</p> <ul style="list-style-type: none"> • Adversely affect a wetland's function to a protect the quality or quantity of a municipal water supply, including sole source aquifers and a potable water aquifer. • Substantially alter the hydrology needed to sustain the affected wetland's values and functions or those of a wetland to which it is connected. • Substantially reduce the affected wetlands' ability to retain floodwaters or storm runoff, thereby threatening public health, safety or welfare. The last term includes cultural, recreational, and scientific public resources or property. • Adversely affect the maintenance of natural systems supporting wildlife and fish habitat or economically-important timber, food, or fiber 	

	<p>resources of the affected or surrounding wetlands.</p> <ul style="list-style-type: none"> • Promote development that causes any of the above impacts. • Be inconsistent with applicable State wetland strategies. 	
<p>Wild and scenic rivers.</p>	<p>None established.</p>	