ADDENDUM

Case No. 10-70718

Barnes et al., v. U.S. Dept of Transportation et al., And Port of Portland

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Thursday, April 8, 2010

Via First Class Mail
Carol Suomi
U.S. Department of Transportation
Federal Aviation Administration
Northwest Mountain Region
Seattle Airports District Office
1601 Lind Ave, S.W. Suite 250
Renton, WA 98057-3356

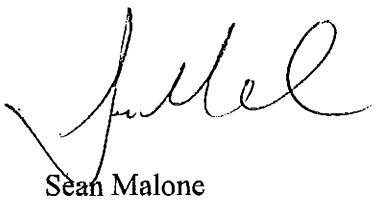
Re: Request for stay pending review in *Barnes v. U.S. DOT*, Case No. 10-70718

Dear Manager Suomi,

Enclosed for your review and consideration please find Petitioners' request for a voluntary stay of the order approving the Final Environmental Analysis and Finding of Non-Significant Impact for the Hillsboro Parallel Runway Project until the Ninth Circuit Court of Appeals has had an opportunity to decide the petition for review on the merits. Petitioners also request a stay of any grant or award of federal funds for the Hillsboro Project pending resolution of the case.

Thank you for your time.

Sincerely



Sean Malone

Enclosures

cc:
Patricia Deem, FAA Counsel
Carla Kelley, Port of Portland Counsel

REQUEST FOR VOLUNTARY STAY

On March 9, 2010, amended on March 19, 2010, Michelle Barnes, Patrick Conry, and Blaine Ackley (collectively, "Petitioners") filed a petition for review before the United States Court of Appeals for the Ninth Circuit of an order of the Federal Aviation Administration ("FAA") approving the Final Environmental Assessment ("Final EA") and Finding of No Significant Impact ("FONSI") for the Hillsboro Airport Parallel Runway Project ("Runway Project") issued January 8, 2010. Notice of the publication of the Final EA and FONSI occurred on January 19, 2010 in the Hillsboro Argus.

Petitioners hereby request the FAA voluntarily stay the order approving the Final EA and FONSI for the Runway Project pending review by the U.S. Court of Appeals for the Ninth Circuit. In addition, Petitioners request that any grant or award of federal funding be stayed pending review by the Ninth Circuit. As shown below, Petitioners meet the requirements for a stay to issue before the Ninth Circuit.

BACKGROUND

The Hillsboro Airport is a general aviation airport, and the primary reliever airport for Portland International Airport, which is a commercial airport. Though the Hillsboro Airport is less than one-third the size of Portland International Airport ("PDX"), the Hillsboro Airport and its adjacent community are subject to over six thousand more flights than the PDX. Final EA at 2-1. In 2008, the Hillsboro Airport logged 259,263 airport operations, and PDX logged 252,572 airport operations. Final EA at 2-1. No other airport in the State of Oregon experiences the same volume of flights as the Hillsboro Airport.

Because Hillsboro Airport is a general aviation airport, it experiences a continual presence of air traffic. At Hillsboro Airport, roughly 100,000 of the flights include flight

training, which requires that the helicopters and fixed-wing aircraft often engage in low-flying exercises, hovering, and continual circling of homes and neighborhoods over the course of a single flight operation. On the other hand, in a commercial airport like PDX the flights are either departure/destination or destination/arrival, and therefore, a single flight operation does not engage in the same lingering activities over the local community as does the general aviation airport in Hillsboro.

The FAA prepared a draft and final EA to analyze the Runway Project. The project consists of three components. First, the Runway Project will construct Runway 12L/30R, which would be 3,600 feet long and 60 feet wide. The Runway Project also includes the construction of a taxiway, four runway exits to the taxiway, the relocation of the existing Charlie Helipad, and associated infrastructure. EA 1-7. With the addition of the proposed runway, Hillsboro Airport would have as many runways as Portland International Airport. The effect of the proposed runway, taxiways, and taxiway exits is to increase aviation capacity for the Hillsboro Airport.

ARGUMENT

Petitioners intend to seek a stay from the U.S. Court of Appeals for the Ninth Circuit if the FAA does not issue a voluntary stay in this matter. In the Court of Appeals, the factors regulating the issuance of a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Fed. Rule App. Proc. 8(a); *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). These factors are instructive for the FAA in determining whether to issue a voluntary stay.

I. Petitioners are Likely to Succeed on the Merits

As shown below, the Petitioners are likely to succeed on the merits in their challenge to the FAA's order authorizing the Runway Project, because the FAA violated the National Environmental Policy Act ("NEPA"), the Administrative Procedures Act, and 49 U.S.C. § 47106.

A. Violations of the National Environmental Policy Act

Simply put, the FAA failed to satisfy its obligations under NEPA. The Final EA and FONSI are legally deficient because the Runway Project may result in significant impacts requiring the preparation of an Environmental Impact Statement ("EIS"). Furthermore, the NEPA analysis is flawed because the FAA failed to adequately analyze the indirect effects of the third runway, failed to adequately analyze cumulative effects, and failed to consider a reasonable range of alternatives. Because of these legal deficiencies, Petitioners are likely to prevail on the merits. Therefore, the FAA should issue a voluntary stay pending review by the Ninth Circuit.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions. Environmental review under NEPA:

> ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). The "larger audience" includes the public, and NEPA documentation provides a guarantee that the agency has "indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97 (1983).

1. Failure to Prepare an Environmental Impact Statement

The Runway Project *may* result in significant impacts to the human environment. "A determination that significant effects on the human environment will in fact occur is not essential." *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982); *see also City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975). "If substantial questions are raised whether a project *may* have a significant effect upon the human environment, an EIS must be prepared." *Foundation for North American Wild Sheep*, 681 F.2d at 1178 (emphasis added); *see also Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th cir. 2001). If there are no potential significant impacts, then the agency must issue a FONSI, 40 C.F.R. §§ 1501.4(e), 1508.9, accompanied by a "convincing statement of reasons to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project*, 161 F.3d at 1212; *Foundation for North American Wild Sheep,* 681 F.2d at 1178 n.29 (explaining that the court must "assess whether the EA . . . is sufficient to establish the reasonableness of [the agency's] decision").

NEPA mandates that an EIS be prepared for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The FAA's order approving the EA and FONSI for the Runway Project without preparing an EIS violates NEPA because its authorization is a major federal action significantly affecting the quality of the human environment. The environmental impacts (including cumulative, direct, and indirect) of the construction of the capacity-enhancing runway, taxiways, infrastructure, and the increased emissions, pollutants, noise, and associated impacts as a result of the increased capacity are significant in terms of both the Runway Project's context and the regulatory factors used to evaluate intensity. 40 C.F.R. § 1508.27. Determining the significance of an action "requires considerations of both context and intensity." 40 C.F.R. § 1508.27. An analysis of a site-

specific action requires that context be assessed in terms of the locale. 40 C.F.R. § 1508.27. The CEQ regulations, at 40 C.F.R. Section 1508.27, list criteria to evaluate intensity:

- "[i]mpacts 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";
- "[t]he degree to which the proposed action affects public health or safety";
- "[u]nique 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";
- "[t]he degree to which the effects on the quality of the human environment are highly uncertain or involve unique or unknown risks";
- "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks";
- "[t]he degree to which the action may establish a precedent for future action with significant effects or represents a decision in principle about a future consideration";
- "[w]hether 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";
- "[t]he 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";
- "[t]he 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";

- and "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."

40 C.F.R. §§ 1508.27(b)(1)-(10). More specifically, the Ninth Circuit concluded in *Public Citizen v. Dept. of Transp.*, that if an agency's action is "environmentally 'significant' according to *any* of these criteria," then the agency erred in failing to prepare an EIS. *Public Citizen*, 316 F.3d 1002, 1023 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004) (emphasis in original).

Here, the FAA failed to consider the significant safety issues, public health issues, and other adverse effects associated with the increase in capacity as a result of the additional runway. The FAA cannot ignore the indirect effects of the additional runway. The analysis does not consider the increase in potential crashes in and around Hillsboro as a result of the increase in capacity and aircraft operations. This project may establish precedent for future projects that do not analyze the increase in capacity as a result of the construction of capacity-enhancing features. The agency maintains that the purpose of the project is to reduce delay, which is an alleged beneficial result, though the agency ignores whether the allegedly beneficial impact is significant. The project directly and indirectly affects 50 acres of prime farmland and over two acres of wetlands. There is also concern that the project may violate state law for failure to obtain a scientific take permit for the Hillsboro Airport, as noted by the Oregon Department of Fish and Wildlife. Lastly, the agency alleges that greenhouse gas ("GHG") emissions are uncertain. This uncertain environmental risk must be assessed in an EIS. The FAA concedes the effects of GHG emissions are unknown. Therefore, these uncertainties, *inter alia*, should be further assessed in an EIS.

2. Failure to Analyze Indirect Effects

The CEQ Regulations for implementing NEPA require that environmental assessments consider the direct and indirect effects of the proposed action. 40 C.F.R § 1508.8; *Id.* at 1508.7. Direct effects are caused by the action and occur at the same time and place as the proposed project. *Id.* at § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. *Id.* at § 1508.8(b). 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. Here, the indirect effects are significant.

The FAA failed to account for the reasonably foreseeable indirect effects of the Runway Project because the agency did not analyze the project's effects of increasing aviation capacity as a result of the addition of a new runway. The case law demonstrates, and FAA has taken the position, that an increase in capacity is the primary result of an additional runway. Taxiways and taxiway exits can also increase airport capacity, but they are not primary factors in the same way as an airport runway. On the other hand, the case law demonstrates, and the FAA has taken the position, that an increase in capacity does not result from constructing a new terminal, moving an existing runway, changing approach or flight patterns, or repairing a runway. Here, the Runway Project will construct a new runway, a new taxiway, and four taxiway exits. Clearly, the Runway Project increases the aviation capacity of the Hillsboro Airport because it *adds* a new runway and other capacity-enhancing features. Therefore, the FAA violated NEPA by not considering the indirect effects of the increase in capacity as a result of the additional runway.

In *City of Olmstead Falls v. FAA*, 292 F.3d 261 (D.C. Cir. 2002), the action included the relocation of an existing runway and the extension of a parallel runway among other minor

projects. In carrying out their NEPA obligations, the FAA prepared an EIS for the project. The petitioners in that case argued that the FAA failed to account for induced-demand as a result of the improvements – none of which were the addition of a new runway as in the present case. The court determined that "the improvements are to move an *existing* runway, not the addition of a runway, and thus in the FAA's judgment they will not induce demand." *Id.* at 272. The Hillsboro Airport Runway Project, on the other hand, includes the *addition* of a new runway, and the FAA failed to assess the indirect effect of increasing capacity at the airport.

In *City of Los Angeles v. FAA*, 138 F.3d 806 (9th Cir. 1998), the project included the construction of a new terminal. As in *Olmstead Falls*, the FAA prepared an EIS. The petitioners alleged that "had the FAA taken a hard look it could not rationally have concluded that a larger, more convenient terminal will not attract more passengers." *Id.* at 807. The EIS prepared by the FAA determined that the "emplanements per year will grow from 1.7 million in 1990 to 5 million in 2010 whether or not the new terminal is built" because "[d]emand for an airport . . . depends much more on location, runways, and ticket prices than on how nifty the terminal is." *Id.* 807-08. The FAA also argued that:

> [e]ven the number of gates, within limits, has little effect, so long as the planes can land. If they can't park next to the terminal, they park farther away and passengers willingly bus back and forth.

Id. at 808. In a footnote, the court noted that "[r]unway capacity is important, the agency concedes, but not affected by this project." *Id.* at 808, n.3. That project would not result in an increase in capacity because no additional runways, taxiways, or taxiway exits were being constructed. Here, however, the project entails the construction of an additional runway, an additional taxiway, and four taxiway exits.

The petitioners in *City of Los Angeles* relied on several cases but as the court noted, those cases "are not on point" because those cases "all added runways or taxiways, among other improvements." *Id.* at 808. The agency further argued that "it can't accurately predict how big this effect might be, except that it will be modest at most." *Id.* The court noted that "[w]e don't require an agency to quantify all possible effects, particularly not those that are likely to be minor." *Id.* Here, the construction of a third runway will increase the capacity of the airport by at least one-third (or over 100,000 flight operations per year), given that there are currently two runways in place at the airport. Because the airport's capacity will increase as a result of the runway, and because the increase will not be minor, the FAA has not satisfied its NEPA obligations by failing to analyze the reasonably foreseeable increase in capacity at Hillsboro Airport.

In *Seattle Community Council Federation v. FAA*, 961 F.2d 829 (9th Cir. 1992), the FAA prepared an Environmental Assessment to implement a change in flight patterns. The project did not involve any construction of runways, taxiways, or taxiway exits. The petitioners in that case alleged that the FAA "failed to consider" the "expected increase in volume" as an indirect effect. *Id.* at 835. The court acknowledged that the fact that the federal action "will increase the efficiency of the air traffic system and reduce delays will allow the volume to increase." *Id.* The Court determined, however, that this was not a growth-inducing effect or other effect related to induced changes" because it deals with "existing air traffic." *Id.* The court goes on to quote from a relevant excerpt of record that said there is a:

> mistaken impression that the increase in capacity referred to in the Draft Environmental Impact Assessment means an increase in the number aircraft operating to and from Sea-Tac. That is not the case. The proposed procedures are designed, among other things, to expand the FAA's use of existing airspace to more efficiently meet existing air traffic demand at Sea-Tac. The effect of the proposed procedures would be to increase the arrival rate of aircraft that are currently utilizing Sea-Tac, but not reaching the Airport as

> quickly as they could given the restrictions on the FAA's use of airspace under the current procedures. The proposed changes to arrival and departure procedures would simply accommodate the existing demand for landing and departing Sea-Tac more efficiently, thereby reducing delays. *The proposed procedures do not enhance the ground capacity of Sea-Tac. There is no need to do so since there is existing ground capacity that is not fully used.*

Id. at 836 (emphasis added). The court in *Seattle Community* found justification in the FAA's failure to consider the indirect effects of the increase in air traffic because there was no construction on the ground to increase capacity of the airport. The court determined that:

> the Plan merely allows Sea-Tac to handle the existing traffic with greater efficiency. Its implementation is not designed to induce growth but rather to enhance the safety and efficiency of that traffic.

Id. Here, the project will construct a runway, a taxiway, and taxiway exits, which will increase capacity at the Hillsboro Airport, unlike the facts in the *Seattle Community.*

Furthermore, in the case at Hillsboro Airport, all of the ground capacity in the airport is fully used. The FAA and the Port of Portland, however, present a moving target on this issue, wherein several contradictory resources demonstrate that the airport is beyond capacity. According to the FONSI and the EA, the Airport is operating at close to capacity. The FONSI states that the Hillsboro Airport "is currently operating at close to 100 percent of Annual Service Volume." FEA 1-2. The EA stated that "in 2007, the airfield operated at almost 100 percent of the ASV." DEA 1-6. The Airport Master Plan, however, demonstrates that the airport has been operating well-above capacity for several years. In 2007, the Hillsboro Airport experienced 236,885 aircraft operations, and in 2008, the number of aircraft operations jumped to 259, 263, an increase of over 23,000 aircraft operations. The Master Plan presents contradictory information, particularly that the 2003 total of 180,147 fixed wing and itinerant helicopter operations represents 107% of the annual service volume," Master Plan 4-9, and the "airport is exceeding its estimated annual capacity by seven percent." Master Plan 4-11. Further

confounding this issue, the EA states that in 2007 the Annual Service Volume (ASV)[1] (i.e. the capacity of the airport) of the Hillsboro Airport was 169,000 and the annual runway operations consisted of 166,033 (i.e. 98 percent capacity); and in 2010, it was projected that the ASV would be 176,000 and the annual runway operations would be 196,000 (i.e. 112 percent capacity). According to the EA, FONSI, and Master Plan, the airport is operating above capacity.

The Master Plan also states:

> As the ratio of annual demand to ASV increases, delay to aircraft arriving and departing the airport increases. At 50 percent of ASV, delay is 12 seconds per aircraft operation. At 70 percent of ASV, delay increases to 18 seconds per aircraft operation. At 90 percent of ASV delay is 36 seconds per aircraft operation, at 100 percnet ASV, the delay averages one minute per aircraft operation.

Master Plan 4-11. The EA states that for 2007, the average delay was 1.2 minutes. Given the increase in operations from 2007 to 2008, the average delay is well above 1.2 minutes. Thus, the airport is operating far in excess of 100 percent capacity. In addition, if the airport was operating at 107 percent capacity in 2003, then the increase to 259,263 airport operations puts the operating capacity at well-over 107 percent.

In *County of Rockland v. FAA*, 335 Fed. Appx. 52 (D.C. Cir. 2009), the petitioners challenged the indirect effects of reallocating management of sectors for airspace and adopting new flight procedures in the EIS prepared by the FAA. Consistent with the aforementioned cases, the court noted that "[i]n the FAA's experience . . . airspace redesign, which increases throughput but not airport capacity, does not induce significant enough additional demand to warrant modeling." *Id.* at 54. Here, the respondents concede that the airport capacity will be increased through the construction of the runway. Therefore, the agency must consider the indirect effects of the increase in traffic. The court in *Town of Wintrhrop v. FAA, 535 F.3d 1* (1st

[1] "The ASV represents the capacity of the Airport' current runway system." EA 1-3.

Cir. 2008), used similar logic when it agreed with the FAA's argument "that airport capacity is primarily a factor of runway capacity, not taxiway capacity." Unlike the case here, where Respondents concede an increase in capacity, the Respondents in *Winthrop* maintained that the taxiway would not "independently affect the total number of aircraft operations at Logan." *Id.* at 7. Here, the opposite is true. The airport will increase capacity through the addition of a runway, a taxiway, and four taxiway exits; and therefore, the indirect effects associated with the increase in traffic must be analyzed in an EIS.

Because the case law demonstrates that the construction of an additional runway (in addition to a taxiway and four taxiway exits) at an airport requires an analysis of the environmental effects associated with the increase in capacity and traffic, the FAA must analyze the indirect effects from the increase in capacity as a result of the additional runway, taxiway, and four taxiway exits. Here, the project proposes to construct an additional runway, a taxiway, and four taxiway exits, but there has been no analysis of the indirect effects, including the increase in traffic, the increase in air pollution, increase greenhouse gas emissions, increase in noise, among others. Therefore, the EA and FONSI violate the NEPA, and the Petitioners are likely to succeed on the merits and a stay should issue.

3. Failure to Consider and Analyze Cumulative Effects

NEPA mandates that agencies consider the direct, indirect, and cumulative effects of a proposed action. Direct effects are caused by the action and occur at the same time and place as the proposed project. *Id.* at § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. *Id.* at § 1508.8(b). Cumulative impacts are the impacts "which result[] from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions." 40 C.F.R. §

1508.7. The FAA failed to analyze the cumulative impacts for the Runway Project. Therefore, the Petitioners are likely to succeed on the merits and a stay should issue.

4. Failure to Consider a Reasonable Range of Alternatives

Federal agencies are required to use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment to the fullest extent possible. 40 C.F.R. § 1500.2(e). The alternatives section is the "heart" of the environmental analysis, and therefore, the Forest Service must rigorously explore and objectively evaluate all reasonable alternatives. 40 C.F.R. §1502.14. Requiring meaningful alternatives ensures that the agency can choose among a range of outcomes and mitigate significant impacts. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002). Here, there is no meaningful distinction between the two action alternatives. The EA for the Runway Project alleges to consider three alternatives: the no action alternative, which is required by NEPA; and the two action alternatives, which are distinguished only by the location of the helipad. The FAA continually states throughout the EA and FONSI that there would be no distinguishable environmental effects from the two action alternatives. Therefore, there is no meaningful distinction between the two action alternatives for NEPA purposes. Furthermore, the relationship between the alternatives is continually mischaracterized by the EA because the analysis does not account for the increase in capacity between the no action alternative and the two environmentally indistinguishable action alternatives. Therefore, the Petitioners are likely to succeed on the merits and a stay should issue.

B. Violation of the Administrative Procedure Act

Petitioners claim that the FAA violated the Administrative Procedure Act ("APA") because the order approving the Final EA and FONSI is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Federal agencies run afoul of the APA when they fail to state a rational connection between the facts found and the decision made." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1065 (9th Cir. 2004). To determine whether this is achieved, judicial review must be "searching and careful." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 858 (9th Cir. 2005). Here, legal deficiencies in the agencies NEPA documents violate the APA.

C. Violation of 49 U.S.C. § 47106 – Failure to Provide a Hearing

When the FAA approves the construction of a new runway, the public must be afforded an opportunity for a hearing. *See* 49 U.S.C. § 47106(c)(1)(A)(i). The FAA has a community involvement policy that recognizes community involvement as an essential part of the FAA programs and decisions. *See* FAA-EE-90-03, August 1990. A public hearing is defined as 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. In approving the Runway project at Hillsboro Airport, the FAA failed to provide for a public hearing that meets the requirements of 49 U.S.C. § 47106.

Though it was advertised that the agency would hold an open house/hearing in November 2009, the definition of "hearing" was not satisfied. No hearings officer heard the concerns of the public and the public was not permitted to express its concerns to other members of the public. Public input was facilitated not by a hearings officer but a stenographer. The alleged hearing only allowed the Port of Portland and the FAA to present the project to the public. The members

of the public that live and reside in and around Hillsboro and who are most affected by the Runway Project were not given this same opportunity. The alleged hearing was a one-way avenue, in which public was not afforded its statutorily mandated participation. The public was simply shut out of this project. Therefore, the Petitioners are likely to succeed on the merits and a stay should issue.

II. Petitioners will be Irreparably Injured Absent a Stay

Petitioners are residents of the neighborhoods surrounding the Hillsboro Airport. The continual noise, air pollution, and disturbance resulting from the construction and increased capacity of the Hillsboro Airport after the completion of the Runway Project will irreparably harm the Petitioners. These injuries would be permanent. *See Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration *i.e.* irreparable.") Absent a stay in this matter, construction contracts and implementation of the project will proceed during the proceedings before the U.S. Court of Appeals for the Ninth Circuit. Therefore, a stay must issue to preserve the status quo so that the Ninth Circuit may properly review the FAA's order.

III. Issuance of the Stay Will Not Substantially Injure Other Parties Interested in the Proceeding

The issuance of a stay will not substantially injure any other parties. Briefing in the Ninth Circuit will be completed by mid-2010, and a decision on the petition for review will be forthcoming after the close of briefing. Counsel for Respondents is free to request an expedited briefing schedule from the Court of Appeals. Petitioners assert that at most, project

implementation could be delayed up to six months while the Ninth Circuit reviews the FAA order. This is a small amount of time to ensure the FAA's environmental analysis complies with federal law.

IV. Issuance of a Stay is in the Public Interest

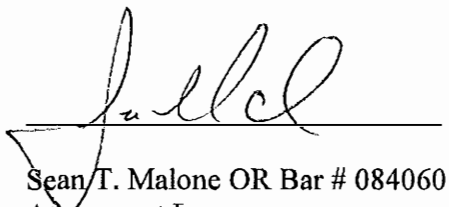
The Hillsboro Airport Runway Project will impact a significant number of people, including residents in the surrounding neighborhoods, those adversely affected by increased noise, air pollution, and other environmental effects. Because it is a highly controversial and a high profile decision, the FAA's approval of Runway Project deserves the strictest review so that the public interest in the proper administration of the nation's air transportation system and environmental law is upheld.

CONCLUSION

Petitioners demonstrate that they are entitled to a stay. The FAA should issue a voluntary stay of the order approving the Final EA and FONSI for the Runway Project. Should the FAA reject this request for a stay, Petitioners shall immediately file a motion for stay before the Ninth circuit.

Respectfully submitted this 9th day of April 2010.

On behalf of Petitioners:



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July 23, 2010

Mr. Sean Malone
Attorney at Law
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RE: Request for Stay of Agency Order: Barnes v. U.S. DOT,
Ninth Circuit Docket No. 10-70718

Dear Mr. Malone:

This responds to your letter dated April 8, 2010, requesting a voluntary stay by the Federal Aviation Administration (FAA) pending review by the U.S. Court of Appeals for the Ninth Circuit of the agency order approving the Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) for the Hillsboro Parallel Runway Project. You have also requested a stay of any grant or award of federal funds for the Hillsboro project pending resolution of the case. The FAA has carefully considered your request. For the reasons explained below, the FAA declines to issue a stay.

Background

The FAA's FEA/FONSI was the culmination of an environmental review process conducted in accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the Council on Environmental Quality regulations (40 C.F.R. Parts 1500-1508), all other applicable environmental laws, and FAA Orders 1050.1E, Chg. 1 and 5050.4B.

Hillsboro Airport (HIO) is the busiest general aviation (GA) airport in the State of Oregon and, relative to total aircraft operations, is the second busiest airport in the state after Portland International Airport (PDX). The Port of Portland is the sponsor of HIO, a designated reliever airport for PDX. The Port prepared the 2005 Hillsboro Master Plan, a planning document, which identified facility improvements to enable HIO to continue serving as an effective GA reliever even as activity levels rose. The improvements recommended in the Master Plan included a new runway parallel to the existing primary runway, which would be used by small, primarily single-engine propeller planes. This new runway would require the relocation of an existing helipad used for helicopter training flights. These recommended improvements also included new taxiways for access.

Following the Hillsboro Master Plan submission, the Port of Portland proposed construction of Runway 12L/30R and associated taxiways, the relocation of the existing Charlie Helicopter Landing and Take-Off Pad, and associated infrastructure improvements. Specifically the Port

of Portland has requested that the FAA approve these projects as shown on the Airport Layout Plan and approve Airport Improvement Program grant funding to pay for the projects. Such actions by the FAA are considered major Federal actions under NEPA. The agency determined that an Environmental Assessment was the appropriate level of analysis in light of FAA Order 1050.1E, Chg 1, Paragraph 401k(2), which states that new runways normally require an environmental assessment.

The FAA had a draft EA prepared and released it to the public for review and comment from October 8, 2009, through November 20, 2009. An open house and public hearing was held on November 10, 2009, from 5:30pm to 7:30pm to allow further public participation. Following the closure of the public comment period, the FAA considered the comments made by the public and responded to all comments in the Final Environmental Assessment (FEA). This FEA and a Finding of No Significant Impact (FONSI) were signed on January 8, 2010.

The FEA indicated that there would be no significant environmental impacts from the proposed action. For example, even with the development of this new parallel runway, the 65 DNL and greater noise contours all remain on airport property. With regard to air quality, the project would reduce airfield congestion and aircraft delay compared to the No Action Alternative, resulting in long-term, ongoing emissions reductions. The FEA did find that the project would result in the loss of 2.22 acres of scattered wetlands and conversion of approximately 6.3 acres of Vegetated Corridor that is regulated by the Washington County Clean Water Services agency. However, these impacts will be mitigated through restoration of 2.22 acres of wetlands and approximately 6.3 acres of vegetated buffer at the nearby Jackson Bottom Wetland Preserve. The FAA concluded that as a result of its environmental review the proposed procedure would not have any significant environmental impacts.

In your request for a stay you assert that the FAA failed to comply with NEPA, the Administrative Procedure Act, and 49 U.S.C. § 47106. After summarizing the applicable standard for a stay, we address each part of your request below.

Standard for Stay

In the Ninth Circuit, the standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). In this circuit, there are two interrelated legal tests to apply. These tests are not separate but "represent the outer reaches of a single continuum." *Id.* (internal quotation marks omitted). "Petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor." *Abbassi v. Immigration & Naturalization Service*, 143 F.3d 513, 514 (9th Cir. 1998); see also *Lands Council v. Martin,* 479 F.3d 636, 639 (9th Cir. 2007) (quoting *Clear Channel Outdoor Inc. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir. 2003)); *Golden Gate Restaurant Association v. San Francisco*, 512 F.3d 1112, 1115-1116 (9th Cir. 2008). The Supreme Court has repudiated the notion that injunctive relief may be granted where there are merely serious questions on the merits, *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008), or only the "possibility" of harm. *Winter v. Natural Resource Defense Council,* 129 S. Ct. 365, 375, 172 L.Ed.2d 249 (2008).

Analysis

I. Likelihood of Success on the Merits/Existence of Serious Legal Questions

In support of your request for a stay, you assert that the Petitioners are likely to succeed on the merits of their claims that the FAA violated NEPA, the Administrative Procedure Act, and 49 U.S.C. § 47106. As a threshold matter, because the Petitioners failed to raise the NEPA and Administrative Procedure Act issues during the NEPA process, they have waived their rights to raise these issues now. Even in the absence of such a waiver, for the reasons set forth below your request for a stay fails to demonstrate a likelihood of success on the merits or the existence of a serious legal question.

A. NEPA

(1) The FAA Properly Determined That an EA Was Appropriate.

Petitioners contend that the FAA should have prepared an Environmental Impact Statement (EIS) instead of an EA. According to the Council on Environmental Quality's NEPA regulations, an EA is a concise document used to describe a proposed action's anticipated environmental impacts. 40 C.F.R. § 1508.9. As stated above, FAA Order 1050.1E, Chg. 1, which further applies the CEQ regulations to the FAA, clearly states that an EA is normally prepared for a new runway. The Order outlines the "actions [that] are examples of actions that normally require an EA" and then goes on to list as one of these examples:

> Federal financial participation in, or unconditional airport layout plan approval of, the following categories of airport actions:
>
> (1) Airport location
> (2) New runway
> (3) Major runway extension

FAA Order 1050.1E, paragraph 401k.

If the EA finds that there are significant impacts on the human environment from the proposed action, then an EIS must be prepared. The EIS is to provide "full and fair discussion of significant environmental impacts…" 40 C.F.R. § 1502.1. If, however, as here, there are no significant environmental impacts, the agency may conclude the environmental assessment process with a Finding of No Significant Impact, pursuant to 40 C.F.R. § 1508.13.

At the time the decision was made to proceed with an EA, there was no evidence that demonstrated that there may be a significant impact to the human environment resulting from this project. The FEA supports this initial evaluation and clearly demonstrates that the project would not result in any significant impacts that would trigger the need for an EIS.

Further, in your request for a stay you argue that an EIS is needed because this is a capacity project that would have associated significant impacts. Capacity projects do not, in and of themselves, give rise to significant impacts. The FEA and the FONSI clearly state that the purpose of this action is to reduce congestion and delay at HIO in accordance with FAA

planning guidelines. This would, in fact, decrease any impacts that were the result of increased congestion and delay.

Finally, the FEA examined all nineteen impact categories found in FAA Order 1050.1E, Chg. 1, Appendix A, p. A-1, and none rose to the level of significance from this project. For example, in your request for a stay you claim that 50 acres of prime farmland are directly or indirectly impacted by the project. However, coordination with the U.S. Department of Agriculture Natural Resource Conservation Service (NRCS) resulted in a Farmland Conversion Impact Rating Score of 107. This is well below the threshold of significance of 200 established by NRCS. For all impact areas, either directly or through mitigation, there are no significant impacts that would trigger the requirement to prepare an EIS.

(2) The FAA Fully and Completely Analyzed All Impacts of the Proposed Project, Including Indirect Effects.

In your request for a stay, you claim that the FAA failed to account for the reasonably foreseeable indirect effects of the project because the FAA did not analyze the indirect effects of increasing the airport's capacity by adding a new runway. Although your request contains considerable discussion of past court decisions dealing with the FAA and airport capacity, those decisions do not demonstrate any failure of the FAA in this instance to do an adequate analysis. The FAA has fully disclosed the full extent of the project including the addition of a new runway and the attendant impacts.

Your request also states that there has been no analysis of the project's indirect effects of increasing traffic, air pollution, greenhouse gas emissions, or noise. Yet all of these impact categories have been fully analyzed in the FEA and the results show that there are no significant impacts. In some instances, the project would actually result in an environmental improvement. For example, the analysis shows that air quality will actually improve over time due to reduced congestion and delay.

(3) The FAA Considered and Analyzed the Cumulative Effects of This Project.

Petitioners claim that the FAA failed to analyze the cumulative impacts of this project. Section 6.2 of the FEA provides an extensive listing of past, present, and reasonably foreseeable projects that were used to conduct a cumulative impacts analysis as required by NEPA. These projects include other projects by the Port of Portland and City of Hillsboro and Washington County projects. The analysis takes these projects in combination with the proposed project and evaluates the combined impact in every impact category. For example, the analysis discusses the resulting increase of impervious surfaces from these projects and the cumulative impact upon Floodplains, Wetlands, and Water Quality. The analysis showed no resulting significant impacts. The overall analysis shows that there is no significant impact in any category.

(4) The FAA Considered a Reasonable Range of Alternatives.

Petitioners claim that the FAA failed to consider a reasonable range of alternatives. This argument focuses on the fact that the agency narrowed its full analysis down to the No Action alternative and two build alternatives. This discussion fails to acknowledge that the agency

began with a very extensive list of alternatives including elimination of local training flights, diversion of traffic to other airports, use of technologies, and variations on the location of build alternatives. As required by NEPA, the FAA "rigorously explore[d] and objectively evaluate[d] all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss[ed] the reasons for their having been eliminated." 40 CFR § 1502.14(a).

The FAA explained in the EA why various alternatives did not meet the purpose and need of the action and thus were not carried throughout the EA for a full analysis. It is a common occurrence to have a limited number of alternatives that fit the purpose and need of an airport project when dealing with an existing airport's footprint. There simply are limited options for placing a new runway. NEPA does not require a certain number of alternatives to be considered, only that all reasonable alternatives be considered. 40 C.F.R. § 1502.14.

B. Administrative Procedure Act

Your request for a stay claims that the FAA violated the Administrative Procedure Act (APA) because the FAA failed to state any rational connection between the facts found and the decision made. You did not provide any support for this allegation, however, and thus have neither demonstrated a high probability of success on the merits nor raised a serious legal question. As described above and documented in the EA/FONSI, the FAA carefully followed all NEPA requirements, provided an opportunity for public review and comment, and made decisions that are neither arbitrary nor capricious.

C. 49 U.S.C. § 47106

You claim that the FAA failed to provide for a public hearing that met the requirements of 49 U.S.C. § 47106. As required by 49 U.S.C. § 47106(c)(1)(A)(i), the airport sponsor, the Port of Portland, provided an opportunity for a hearing. On November 10, 2009, an Open House and Public Hearing was held. As required by the statute, an opportunity was given to consider the economic, social, and environmental effects of the location of the new runway. The public hearing was held in an open-house format, which included multiple stations with information about the project, tables with copies of the Draft EA for reviewing the document, and a court reporter for recording oral testimony. At two times during the hearing, a brief presentation providing an overview of the project and summarizing the results of the environmental studies performed was provided. There were five stations set up at the hearing: 1) Sign In; 2) General Project Information- Proposed Action; 3) Noise Study Results; 4) Wetlands Study Results; and 5) Other Environmental Study Results.

Approximately eighteen members of the public attended the hearing. One written comment was submitted at the hearing and one person submitted oral testimony. Four additional public and agency comments were received via email and regular mail. All of these comments, including the oral testimony, were considered and responded to by the agency decision makers.

You argue, without citation to any legal authority, that a public hearing is solely defined as "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." Request for Voluntary Stay, p. 14. The term hearing in a legal process "identifies elements essential in

any fair proceeding – notice be given of a decision to be made and presentation to the decision maker of the positions of those to be effected by the decision." *United Farm Workers of America v. Administrator, Environmental Protection Agency,* 592 F.3d 1080, 1082 (9th Cir. 2010). A hearing can include situations where there is no presentation of public argument. *Id.* Here Petitioners had notice that a decision was to be made and were afforded the opportunity to present their concerns.

Even if 49 U.S.C. § 47106(c)(1)(A)(i) were construed to require the elements you describe in your request (i.e., a hearing officer and an opportunity for members of the public to express their concerns to other members of the public), the lack of those elements at the Hillsboro hearing and open house would be an insubstantial error in that it did not affect the integrity of the FAA's decision making process or the public's opportunity to comment.

In a NEPA case before the Ninth Circuit where the Department of Interior did not follow two regulations relating to the timing of EIS preparation but all parties received notice and had an opportunity to respond, the court stated that these violations of the regulations were insignificant and likened the "trivial error" to the "general rule that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside." *County of Del Norte v. U.S.,* 732 F.2d 1462, 1464-67 (9th Cir. 1984) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)(*"single alleged oversight on a peripheral issue…must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding"); *Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission,* 606 F.2d 323, 328-29 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980)(agency decision will not be overturned based on technical error if the agency would have reached the same decision absent the error).

The fact that the open house and public hearing was not conducted by a hearing officer and did not allow members of the public to address other members of the public did not change the decision ultimately made. The public had full opportunity to comment on the economic, social, and environmental effects of the location of the new runway. The FAA fully reviewed and responded to all comments presented regarding the Hillsboro project. Thus any perceived failures of the hearing process are technical errors that do not render the decision invalid and do not support a stay.

II. Petitioners Will Not Be Irreparably Injured Absent a Stay

The stay request states that all petitioners are residents of the neighborhoods surrounding HIO. At least one of the petitioners, Ms. Barnes, is a resident of Banks, Oregon which is a substantial distance from the airport. The stay request also alleges that the petitioners will suffer harm from "continual noise, air pollution, and disturbance resulting from the construction and increased capacity" of HIO. The FEA clearly demonstrates that there will not be any off-airport increased noise and air pollution will be reduced over time. No information is presented that any injury will actually be sustained before the appeal is over. In addition, it is not likely that the new runway would even be operational before the appeal process is over.

Without additional information to support petitioners' contentions, the FAA is unable to determine if petitioners would in fact suffer irreparable harm without a stay. Your request

argues that the status quo must be preserved by a stay until the Ninth Circuit can properly review the FAA's order. However, simply "[m]aintaining the status quo is not a talisman" that by itself justifies a stay. *Golden Gate Restaurant Association*, 512 F.3d at 1116.

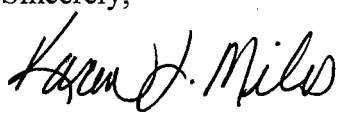
III. The Balance of Hardships Does Not Tip in Petitioners' Favor

Here, substantial harm would come to the public if a stay is granted and construction is prevented from beginning. Potential funding for this project is now available and the FAA is programming a grant for potential issuance by July 30th. If the grant is issued, the Port of Portland intends to begin construction. The current level of activity and the mix of aircraft types at HIO exceed FAA planning criteria, which creates undesirable levels of delay. Forecasted growth will further increase congestion and delay. A stay would also delay the reduction in air emissions that will result from the project. Clearly the balance of hardships weighs heavily in favor of the public. While Petitioners maintain that the issuance of a stay is in the public interest because this is a highly controversial and a high profile decision, the agency only received six comments. With no significant environmental impacts and limited opposition expressed, there is no evidence that a stay is in the public interest.

Conclusion

I have fully and carefully considered the process, the FEA/FONSI, Petitioners' administrative stay request, the appropriate legal standards, and all relevant information. For the reasons set forth above, I therefore respectfully decline to grant the requested stay.

Sincerely,



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