No. 10-70718

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE BARNES, an individual; PATRICK CONRY, an individual; BLAINE ACKLEY, an individual,
Petitioners
v.
UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, Secretary of Transportation; FEDERAL AVIATION ADMINISTRATION; J. RANDOLPH BABBITT, Administrator, Federal Aviation Administration; DONNA TAYLOR, Regional Administrator, Federal Aviation Administration, Northwest-Mountain Region; CAROL SUOMI, District Manager, Federal Aviation Administration Seattle Airports District; and CAYLA MORGAN, Environmental Specialist, Federal Aviation Administration Seattle Airports District,
Respondents

and

PORT OF PORTLAND,
Intervenor-Respondents

Petitioners' Reply Brief

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I. INTRODUCTION

Federal Respondents Federal Aviation Administration ("the FAA") and Intervenor-Respondent the Port of Portland ("the Port") (collectively "Respondents") submitted their response brief, and Petitioners Michelle Barnes, Patrick Conry, and Blaine Ackley ("Petitioners") submit this reply brief in support of their petition for review.

II. ARGUMENT

As is demonstrated below, the Respondents' briefs are unable to overcome the agency's failure to take a hard look at the effects of constructing a runway that will almost double the ground capacity of Oregon's busiest airport in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*("NEPA"). First, Petitioners will illustrate certain salient, undisputed factual issues pertinent to the case at hand, as well as point this Court to certain contradictory facts presented by the Respondents in their briefs.

Second, the Respondents collectively mount an unsupported attack on the sufficiency of Petitioners' comments during the brief administrative process. It is clear, however, that Petitioners, in practical terms, raised their opposition to the continued expansion of the airport and the associated adverse environmental impacts. The case law does not require that Petitioners be experts in environmental law or airport issues to comment on a project and preserve the

issues for judicial review. The case law is similarly clear that the unrepresented public need not say certain magic words or incantations to preserve their opposition to a significant project that would double the ground capacity at an airport that affects their lives on a daily basis. The impacts to local citizens and their livability have been set aside as the Hillsboro Airport has grown from a small general aviation airport to outpacing the largest commercial airport in the state. The only reason Petitioners came forward with their testimony and comments is because they were concerned about the continued growth of the airport and its concomitant, exponential increase in aircraft operations that adversely affects their livability.

Third, the agency's EA is fatally deficient because it failed to take a hard look at the environmental impacts of the proposed action. The agency categorically denies that any increase in air pollution is reasonably foreseeable as a result of constructing the "most effective capacity-enhancing feature an airfield can provide." ER 53. Defendants do not deny that there is significant demand for the Hillsboro Airport, and similarly do not deny that the project at issue will significantly increase the capacity of the Hillsboro Airport. Yet, somehow the agency proceeds from these premises to the illogical conclusion that construction of the runway "would decrease demand for energy decreasing congestion [sic] and delay at the airport and would not lead to increased activity at HIO compared to the

No Action Alternative." ER 5. Respondents have entirely failed to account for "reasonably foreseeable impacts," as required by NEPA.

The case law is no more availing to Respondents' inadequate arguments. Respondents cite this Court to several cases but fail to disclose that those cases do not entail the construction of a runway, let alone *any* ground capacity-enhancing features. Here, on the other hand, the proposal entails significantly increasing the ground capacity of the Hillsboro Airport. Therefore, the cases cited by Respondents are factually distinguishable, and have no influence over the facts of this case. To the contrary, a host of cases demonstrate that when an airport proposes to increase its ground capacity, the result is always significant, and an Environmental Impact Statement ("EIS") is prepared. Here, the FAA dismissed the significant environmental impacts of the Project and instead prepared a deficient Environmental Assessment.

NEPA requires that the FAA take seriously the potential environmental consequences of the Project by taking "a hard look." *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir.2002). This includes disclosing and analyzing the environmental impacts to the livability of local citizens. The Airport and Airway Improvement Act ("AAIA") requires that members of the public have been afforded an opportunity for a public hearing. *See* 49 U.S.C. §

47106(c)(1)(A)(i). Here, the FAA failed in its duties under NEPA and failed to provide a public hearing.

A. Factual Issues

Petitioners note that certain salient facts are undisputed, or, at least, have not been contested by the Respondents in their respective briefs. First, the Respondents concede that the Hillsboro Airport is the busiest airport in the State of Oregon. Petitioners Opening Brief ("Pet. Op. Br.") at 4; *see also* Port Answering Brief (Port Br.) at 1 ("HIO is Oregon's busiest airport"); FAA Answering Brief (FAA Br.) at 5 (the FAA attempts to avoid this concession by saying that the Hillsboro Airport is the "busiest general aviation airport in Oregon" when it is the busiest airport, including general aviation or commercial). It should be further noted that throughout the brief planning process for the Runway Project, neither the entity responsible for regulating the airport nor the entity responsible for operating the airport realized that the Hillsboro Airport was the busiest airport in Oregon. It was not until Petitioner Barnes raised the issue of significant increased air traffic at the Hillsboro in her comments during the administrative process. ER 11 ("In fact, the Hillsboro Airport has *more* operations than [Portland International Airport]").

Second, Respondents do not contest that the effect of constructing an additional runway would be to increase the ground capacity of the Hillsboro Airport by roughly 100%. *See* Pet. Op. Br. at 4; *see also* ER 7 (figures indicate that the Hillsboro Airport experiences over 6,000 flights more than Portland International Airport). This is an important point in this case because Respondents point this court to several cases that do not increase ground capacity, yet maintain that these cases are somehow controlling. Petitioners address Respondents' unfounded arguments *infra*.

Third, Respondents do not contest that general aviation airports result in greater local impacts to the community because the airplanes, two-thirds of which consist of flight training, hover and circle over the community. Pet. Op. Br. at 4-5; ER 20 ("[l]ocal operations (consisting largely of training activity) currently represent about 68% of total operations at [the Hillsboro Airport]"). When training, pilots linger over areas in the community, engaging in a variety of training maneuvers at relatively low altitude. In addition, a practice called "touch-and-go" is common at the airport, wherein a pilot in training will land and take off without coming to a full stop. ER16. The pilot then circles the airport and repeats this maneuver of landing and taking off. This is in contrast to a commercial airport where planes either arrive or depart. The effect of this lingering and hovering is to increase the amount of criteria pollutants from aircraft activity emitted over the

local community. ER 39 ("Aircraft activity represents the largest source of all criteria pollutants"). At times the Respondents maintain that increasing ground capacity is only significant at commercial airports; though there is simply no factual or legal basis to make this distinction, the contention is further unfounded because it is not typical for airplanes at a commercial airport to hover or linger in the adjacent community as is the practice at the Hillsboro Airport. The Project will allow pilots to practice "touch-and-go" and other training maneuvers simultaneously on two parallel runways, doubling the impacts on the local community.

Respondents also present contradictory facts in their respective briefs. With regard to capacity, the Respondents at one time state that the Hillsboro Airport is operating below capacity and at another time state that the Hillsboro Airport is operating beyond capacity. On one hand, the Port of Portland states that the airport is operating at "98 percent of its capacity," Port Br. at 8, and the FAA states that the airport is "operating at nearly 100 percent capacity," FAA Br. at 7. On the other hand, the Port of Portland states that "the airport is presently operating beyond its ASV." Port Br. at 9. "ASV" refers to "Annual Service Volume," which "is an estimate of an airport's *annual operating capacity, or the number of aircraft operations an airfield could accommodate in the course of a typical year*." ER 37 (emphasis added). It is telling that the airport has reached or is beyond capacity,

and therefore could not accommodate any further aircraft operations according to the agency's own information. The practical effect of reaching capacity is that constructing a new runway makes it reasonably foreseeable that aircraft operations will increase and have a significant environmental impact.

B. Petitioners Sufficiently Raised the Issues

The Respondents argue that Petitioners failed to raise NEPA issues during public comments, and therefore waived the claims presented before this Court. Even a cursory reading of the administrative comments demonstrates that Petitioners have raised their NEPA issues. All three Petitioners raised the issue of increased aircraft traffic and the effect it will have on their livability. This is all that is required, and, as is shown below, Respondents cannot claim to have not been aware of the Petitioners' position. *See Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 763 (2004) (citing 5 U.S.C. § 706(2)(A)) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it … alerts the agency to the [parties'] position and contentions'").

First, a review of the record in this case clearly shows that Petitioners have preserved all claims, including the claim that the EA fails to take a hard look at the reasonably foreseeable indirect effects of increased aircraft operations and the associated increase in pollution as a result of increased aircraft operations stemming from the construction of the additional runway. Second, besides raising

the issues in their comments, Respondents were apprised of Petitioners' position on each of the NEPA issues when, on April 8, 2010, Petitioners submitted a Request for Stay Pending Review with the FAA over three months prior to submitting their opening brief. *See* Addendum at 1-18; see also *Public Citizen*, 541 U.S at 764 (Petitioners need only alert the "'agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration"). Finally, assuming *arguendo* that this Court does not rule that the Petitioners did not sufficiently raise the issues, the issues are "so obvious that there is no need for the commentator to point them out specifically. *Id.* at 764-65.

1. Petitioners sufficiently raised the issues in their comments

A party has participated in a sufficiently meaningful way when it has alerted the agency to its position and claims during the administrative proceeding. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir.2004) (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir.1986)). The waiver doctrine does not demand clairvoyance on the part of interested parties and ultimately it is the agency's responsibility, and not the public's responsibility to ensure that it fully complies with NEPA. *Public Citizen*, 541 U.S. at 765. "Requiring more might unduly burden those who pursue administrative appeals unrepresented by counsel, who may frame their claims in non-legal terms." *Native Ecosystems Council v.*

Dombeck, 304 F.3d 886, 900 (9th Cir. 2002). "The plaintiffs have exhausted their administrative appeals if the appeal, taken as a whole, provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Id*. at 899.

"Claims must be raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met," and courts are to "consider exhaustion arguments on a case-by-case basis." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002); *see also Navajo Nation v. United States Forest Service*, 479 F. 3d 1024, 1048-9 (9th Cir 2007) (finding general comments on an issue are sufficient to raise it for NEPA purposes); *see also Hannon v. Clark*, 2000 U.S. Dist. LEXIS 18647 (D. Colo. Nov. 17, 2000) (an agency must "take a'hard look' at the environmental consequences of proposed actions utilizing public comment and the best available scientific information"). "[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims v. Apfel*, 530 U.S. 103, 109 (2000). When "an administrative proceeding is not adversarial … the reasons for a court to require issue exhaustion are much weaker." *Id*. at 110; s*ee also Sierra Club v. Kimbell*, 2009 WL 274487, *9 (D. Minn. 2009) (*quoting Sims*) (rejecting the USFS' argument that a strict issue

waiver requirement applied to the public comment period). Finally, as noted in *Idaho Sporting Congress*, this Court does not require that Petitioners "incant [certain] magic words … in order to leave the courtroom door open to a challenge …." *Idaho Sporting Congress*, 305 F.3d at 966.

Here, the FAA limited public comments on the environmental analysis to a single comment period, and the Petitioners were unrepresented by counsel at the time they provided their comments to the agency. The FAA then finalized the EA and issued a FONSI without soliciting additional public comment on the final EA. As such, Petitioners had only one opportunity to object to the EA. This Court should interpret Petitioners' comments, which were provided without the guidance of professional counsel, within the context of a very limited public comment period.

The Port argues that "Petitioner Barnes asserted that the third runway was unnecessary because the current level (and the downward trend) of operations did not warrant the increase in HIO's capacity," Port Br. at 18, and then the Port quotes Petitioner Barnes' comments that "'[c]learly, between PDX and Troutdale, there is an excess of capacity in Port of Portland-owned and operated facilities.' SER 58." Port Br. at 18. The Port attempts to skew Petitioner Barnes' comments in arguing that "Petitioners reverse course and claim that the proposed action will induce a higher level of operations and increase emissions and noise." Port Br. at

19. Simply put, the Port misrepresents Petitioners' comments, and ignores numerous comments that raise the issue of increased aircraft operations and resulting impacts. The simple fact that Petitioner Barnes stated that there was excess capacity at *other* Port owned facilities does not mean that she somehow waived her argument that the level of aircraft operations are likely increase at the Hillsboro Airport as a result of constructing a significant capacity enhancing runway. Respondents appear to forget that Petitioner Barnes raised the issue that the Port was the busiest airport in Oregon, and, as a result, there would be an increase in pollution, noise, and a decrease in livability. *See* ER 11 (Petitioner Barnes stating that "[i]n fact, the Hillsboro Airport has *more* operations than [Portland International Airport]"); *see also* SER 4-7 (Petitioner Barnes stating in her comments that "Hillsboro, which is less than one-third the size of PDX in terms of acreage, now logs more annual operations than any other Airport in the entire state"); *see also* SER 65 (Petitioner Barnes stating that "Port forecasting is often embarrassingly inaccurate"); *see also* SER 66 (Petitioner Barnes stating that "[t]he reduction in noise and toxic emissions would be a boon to the environment and livability" if the additional runway was not constructed).

Petitioner Barnes also clearly raised the issue of NEPA significance requiring an Environmental Impact Statement when she stated that:

> It is also troubling that the Port is currently engaged in a scheme to draft an environmental assessment at Hillsboro Airport contending that this facility,

> which logs close to a quarter of a million annual operations has no *significant environmental impact.* This is nothing short of astonishing, especially in light of the fact that there are now more annual operations at Hillsboro than at PDX or at any other Airport in the entire State of Oregon.

SER 66-67 (emphasis added). In addition, all of the exhibits, entitled "Supporting documentation," that Petitioner Barnes submitted to the agency relate to the increase in aircraft operations that affect her livability. *See* SER 86-96. Notably, the agency's response to Petitioner Barnes' comments clearly recognizes that she raised issues under NEPA. Specifically in response to Petitioner Barnes' comments, the agency stated that "[c]onsistent with the requirements of the National Environmental Policy Act (NEPA), the assessment of air quality and noise impacts, which included all operations at HIO, were concluded in accordance with accepted procedures using the best available data, as documented in the EA." SER 77 (response to comment MB-11). The agency goes on to say that

> [i]n all cases, thresholds of significance used in this EA are consistent with federal guidelines. By reducing air congestion and delay the proposed action would *reduce air emissions compared to the No Action Alternative*. By shifting traffic patterns from more densely developed areas to less densely developed areas, the proposed new runway would also reduce noise exposure for the majority of local residents.

SER 77 (response to comment MB-11). The agency clearly recognized the issues of capacity, increased aircraft operations compared to the no action alternative, significance, and much more when it responded to Petitioner Barnes' comments. The Respondents' arguments to the contrary are unsupported by the record.

Petitioner Barnes also raised the issue of "alternatives" when she asked the agency to consider "environmentally sustainable transportation alternatives," SER 72, and "alternative forms of transportation that decrease reliance on foreign energy," SER 72. The FAA responded to her comments stating that "[t]he EA examined the alternative of not providing the proposed new runway and associated facilities at HIO, the No-Build Alternative. The EA determined the No-Build Alternative would not likely result in decreased HIO activity even though congestion and delay increased." SER 75. Thus, Petitioners raised the issue of alternatives, and the agency's failure to analyze environmentally distinguishable action alternatives violates NEPA.

Petitioner Barnes also clearly raised the issue of increased greenhouse gas emissions and increased energy consumption as a result of the new airport. Petitioner Barnes specifically stated that "gas guzzling aviation activities spews a host of pollutants into the environment, including lead, benzene, carbon monoxide and carbon dioxide." SER 67, 83. Clearly, Petitioner Barnes has raised the issue of increased greenhouse gases, as well as other pollutants, in her comments. Respondents' contentions to the contrary are baseless.

Furthermore, Petitioner Conry stated that

> [t]his airport has grown in my opinion much larger than it should [have] been allowed being surrounded by high densely [sic] residential development. Since it seems there is no way the Port [can] manage it[s] noise and growth at Hillsboro. This is [sic] action is driving down property

> values and livability, with the amount [and] large number of jets and aviation flights 24/7. It is time the Port of Portland to assist [sic] the propriety [sic] owners who suffer from this unbearable growth and noise impact of Hillsboro airport.

SER at 51. In response to Petitioner Conry's comment, the agency recognized the issue of increased capacity and stated that "failing to provide the proposed improvements at HIO would not reduce aircraft activity." ER 52. Also in response to Petitioner Conry's comments, the agency stated that "the proposed new runway would reduce air pollution and also reduce noise exposure …." ER 52. The Port countered Petitioner Conry's comments with the same illogical rationale it repeated in its EA, and, therefore, the Respondents were well-aware that these significant NEPA issues, especially that of increased aircraft operations, had been raised.

Finally, and perhaps most on point, Petitioner Ackley, on behalf of himself and his wife, stated, in non-legal terms, the effect of constructing a third runway on his family's life: "[i]ncreased air traffic will affect our quality of life and the value of our property should we wish to sell it." SER 109. To somehow maintain that Petitioners did not raise the issue of increased aircraft operations stretches credulity, and it is merely a collateral attack on Petitioners' NEPA arguments that Respondents cannot overcome. It is, therefore, unequivocal that not only did the Petitioners state their concern about the increase in aircraft activity but also the associated increases in other factors, including pollution and noise.

2. Respondents were apprised of the issues raised in the Petitioners' Request for Stay with the agency.

Respondents were apprised of Petitioners' position on each of the NEPA issues argued in their brief when, on April 8, 2010, Petitioners submitted a Request for Stay Pending Review over three months prior to submitting their opening brief. *See* Addendum at 1-18. Though the Port appears to contend that it would have given "meaningful consideration" had the issues been raised, *see* Port Br. at 16, Petitioners did notify the Respondents in their comments, *see supra*, as well as in their Request for Stay with the FAA. *See* Addendum 1-18. However, the agency took the same position and continued forward with its irrational logic doubling the capacity of Oregon's busiest airport is somehow not reasonably foreseeable to result in increased aircraft operations when there is no more capacity at the airport and demand is already high. Therefore, Petitioners sufficiently raised the issues, and the Respondents have simply failed to take a hard look at the environmental impacts of the proposed action.

3. Assuming *arguendo* that Petitioners did not sufficiently raise the issues, the flaws in the EA were obvious that Petitioners need not have raised them.

Public Citizen also noted that in certain circumstances "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Public Citizen*, 541 U.S. at 765. The Ninth Circuit has interpreted this "so

obvious" standard by holding that "an EIS was inadequate where the agency had independent knowledge of the issues that concerned Plaintiffs." *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (citing *Public Citizen*, 541 U.S. at 765 and *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000)). "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941). Here, Respondents are aware that the airport is beyond capacity, Port Br. at 9 ("the airport is presently operating beyond its ASV"); Respondents are aware that demand is high for the airport, FAA Br. at 6 ("[t]he FAA generally expects that planning for increased capacity to mean increased demand will begin when an airport is operating at 60 to 75 percent capacity of its annual service limit," and, here, the airport is beyond capacity as noted *supra*); Respondents are aware that Hillsboro Airport is the busiest Airport in Oregon, Port Br. at 1; Respondents are aware that constructing a runway is the "most effective capacity-enhancing feature an airfield can provide." ER 53. Therefore, Respondents were well-aware of the issues raised by Petitioners in terms of increased capacity and reasonably foreseeable increase in aircraft operations as a result of constructing the additional runway.

C. Increased air traffic is reasonably foreseeable if the capacity of the busiest airport in Oregon is doubled.

The paramount issue before this Court is whether the FAA failed to assess the reasonably foreseeable indirect effects of doubling the ground capacity of Oregon's busiest airport. Respondents, however, repeatedly mischaracterize Petitioners' argument as saying that an additional runway *will* increase aircraft operations. This is not the issue; rather, the issue is *whether it is reasonably foreseeable that an additional runway will increase airport capacity*. *See* Pet. Op. Br. at 13-14 (discussing what constitutes a reasonably foreseeable effect). With regard to indirect effects, this is all NEPA requires in order to trigger an agency's duty to engage in analysis. *See* 40 C.F.R § 1508.8(b) (indirect effects "are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable").

It is also important to note that indirect effects are not solely those effects that induce growth or have "inducing effects." *Id.* Respondents, however, repeatedly couch the construction of the additional runway in terms of whether it would "induce growth" or "induce demand." *see also* FAA Br. at 32 ("the FAA permissibly determined that the Project would not induce any new demand"); *see also* Port Br. at 11. (EA analyzed "the potential that that the Project may induce growth"). The definition of indirect effects, however, is much broader than simply inducing growth. For example, the definition states that "[i]ndirect effects *may*

include growth inducing effects," but it does not limit indirect effects to "inducing effects" and includes effects that "are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R § 1508.8(b) (emphasis added). Here, increased traffic and air pollution caused by increased traffic as a result of the construction of the additional runway are indirect effects, and it is not necessary that the additional runway solely induce growth.

In *Mid-States Coalition Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), the agency's NEPA document was determined to be legally deficient when the agency approved construction of a railway to access coal mines without accounting for the increase in air pollution that would be caused by eventually burning the coal. 345 F.3d at 540 (noting that "an environmental effect is 'reasonably foreseeable' if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision'"). Here, the FAA failed to account for reasonably foreseeable increase in aircraft operations and pollution associated with that increase in aircraft operations, and a reasonably foreseeable person would conclude that doubling the ground capacity at a State's busiest airport *may* result in increased aircraft operations and increased pollution from the aircraft operations.

Similarly, in *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108 (9th Cir. 2004), *amended by* 402 F.3d 846 (9th Cir. 2005), when BP sought

issuance of a permit and extension to "build an addition to its existing oil refinery dock," this Court determined that "the foreseeable growth in tanker traffic has not been accounted for in any other planning documents." *Ocean Advocates*, 402 F.3d at 854. Here, the foreseeable growth in aircraft operations as a result of doubling the ground capacity of the airport has similarly not been accounted for in the EA. Furthermore, this Court noted that "[b]ecause a 'reasonably close causal relationship' exists between the Corps' issuance of the permit, the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills, the Corps had a duty to explore this relationship further in an EIS." *Id.* at 853. Here, there is a reasonably close causal relationship between the construction of a runway that will double the ground capacity at Oregon's busiest airport and the reasonably foreseeable potential for increased aircraft operations at the airport.

In *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), the Eighth Circuit held that a river channelization project failed to account for the reasonably foreseeable increase in cargo traffic that the channelization would cause later in time. In each of the aforementioned cases, the issue is indirect effects that are caused later in time, not solely inducing effects as urged by Petitioners. Here, indirect effects translate into the reasonably foreseeable increase in aircraft operations and the pollutants emitted from aircraft operations, not growth inducing effects. Respondents' framing of the issue as only contemplating growth inducing

effects is simply a red herring, and it demonstrates that the agency has failed to fully account for indirect effects that occur later in time, as is required under NEPA.

Here, Respondents categorically deny that any indirect effects would result from the construction of an additional runway, and fail to address the potential that it could increase aircraft operations. The fatal fact that Respondents cannot overcome is that an airport with three runways necessarily accommodates more aircraft operations than an airport with two runways, and, therefore, it is reasonably foreseeable that the construction of the additional runway will result in a greater number of aircraft operations. As such, Respondents have not satisfied their obligations under NEPA, and the EA is legally deficient.

Both the FAA and the Port repeatedly cite to four cases, including *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998); *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569 (11th Cir. 1988); *Town of Cave Creek v. FAA*, 325 F.3d 320 (D.C. Cir. 2003); *Seattle Community Council Federation v. FAA*, 961 F.2d 829 (9th Cir. 1992). These cases are distinguishable from the present case by the salient fact that those cases do not entail the construction of a runway and those cases do not entail any increase in ground capacity. Here, the issue is a 100% increase in ground capacity. Respondents generally avoid this fact in their summation of these cases, and doing so misleads this Court. Because those cases

are factually distinguishable from the present facts (in which ground capacity is dramatically increased), they have limited application to the case before this Court. Petitioners will address each case in turn

In *Morongo*, the FAA prepared an environmental assessment "to move one of the three existing arrival routes eight miles south." *Morongo*, 161 F.3d at 572. The facts of *Morongo* have nothing to do with increasing ground capacity enhancement. This distinction was clearly addressed in *Ocean Advocates*. *See Ocean Advocates*, 402 F.3d at 854-55 (distinguishing both *Seattle Community* and *Morongo* because "neither dealt with any change in *ground capacity"*) (emphasis added). The Hillsboro Airport, on the other hand, proposes to double the ground capacity of Oregon's busiest airport. *Morongo* is clearly distinguishable from the present facts, and Respondents' contentions to the contrary are baseless. As such, the FAA must account for the reasonably foreseeable increase in aircraft operations and pollution from aircraft operations.

In *Seattle Community*, the FAA prepared an environmental assessment when it "changed the flight patterns of turbine-powered aircraft using the Seattle-Tacoma International Airport." *Seattle Community*, 961 F.2d at 831. The facts of *Seattle Community* have nothing to do with ground capacity enhancement. In fact, this Court specifically distinguished the facts in *Seattle Community* because "[t]he proposed procedures do not enhance the ground capacity of Sea-Tac." *Id.* at 836.

In addition, this court noted that "[t]here is no need to [assess indirect effects] since there is existing ground capacity that is not fully used." *Id*.; *see also Ocean Advocates*, 402 F.3d 846 (distinguishing both *Seattle Community* and *Morongo* because neither dealt with increasing *ground capacity*). Here, as noted by the Port in its brief, as well as in Petitioners' brief, "the airport is presently operating beyond its [annual service volume][1]." Port Br. at 9; *see also* FAA Br. at 1 ("[The Hillsboro Airport] is currently operating at capacity – the total number of operations in a year equals or exceeds the "annual service volume" for the airport"). Therefore, another distinguishing factor between the present facts and *Seattle Community* is that here there airport is beyond its capacity, and it is reasonably foreseeable that capacity-enhancing projects, especially one that increases ground capacity by 100%, will result in increased aircraft operations and increased air pollution.

In *Town of Cave Creek*, the FAA prepared an environmental assessment for a project that "predominantly involves changes to high-altitude arrival and departure procedures." *Town of Cave Creek*, 325 F.3d at 323. Again, the facts of *Town of Cave Creek* have nothing to do with ground capacity enhancement, whereas the Hillsboro Airport entails increasing the ground capacity of the busiest

[1] "Annual service volume is an estimate of an airport's annual operating capacity, or the number of aircraft operations an airfield could accommodate in the course of a typical year". ER 37 (emphasis added)

airport in Oregon by 100%. Respondents' citation is clearly distinguishable from the present facts.

In *C.A.R.E.*, the FAA approved a "runway extension." C.A.R.E., 844 F.2d 1569 (1988). At issue in that case was safety: "the primary consequences of the runway extension will be enhanced safety for the types of aircraft which currently use [the airport]." Here, on the other hand, the issue is a significant increase in ground capacity, not safety. In *C.A.R.E.*, the court specifically noted that "[b]ecasue the runway extension will not be the cause of the increase in airport capacity, the extension will not have a significant impact on air quality." *Id.* at 1573. Here, the Port and the FAA have consistently conceded that the additional runway will cause a significantly increase in ground capacity at the Hillsboro Airport. FAA Br. at 2 ("To … provide the necessary capacity to meet the forecasted demand, the Port proposed to add a parallel runway to the airport"); *see also* Port Br. at 2 ("adding a new runway to increase HIO's capacity was necessary"); *see also* Pet. Op. Br. at 5-6 (discussing increase in capacity as a result adding another runway). As with the other cases, *C.A.R.E.* is factually distinguishable from the present facts.

The FAA also cites this Court to *Ocean Advocates,* where Ocean Advocates challenged the "issuance and extension of a permit allowing BP to build an addition to its existing oil refinery dock in Cherry Point, Washington. 361 F.3d

1114-15. The FAA performs Petitioners' work in citing this case because it distinguishes *Morongo* and *Seattle* from the present facts, as noted above. In addition, when the FAA cited *Ocean Advocates*, it included a parenthetical that read: "(distinguishing *Morongo* and *Seattle* because they dealt with airport arrival and departure routes *rather than* "*ground capacity*"). FAA Br. at 21 (emphasis added). The FAA has effectively distinguished those cases based on an increase in ground capacity, the same way that Petitioners have *supra*. *Ocean Advocates* goes on to state that

> *Morongo* and *Seattle Community Council Federation* are also distinguishable because *neither case dealt with any change in ground capacity*. In both cases, the increased flight volume was a function of new routes into the same airport terminal, whereas in this case whatever increase in tanker traffic may occur results from the expansion of the pier itself.

Ocean Advocates, 402 F.3d at 854. Under the present facts, whatever increase in aircraft capacity may occur will result from construction of the additional runway at the Hillsboro Airport. Here, the FAA did not even entertain the possibility that aircraft operations could increase; rather, the FAA categorically denied that any such indirect effects would occur as a result of increasing the ground capacity of the airport by 100%.

D. Respondents failed to take a hard look at greenhouse gas emissions

As noted above, the Petitioners clearly raised the issue of increased greenhouse gas emissions as a result of the construction of the third runway. *See*

ER 67, 83 (Petitioner Barnes stating that increased air traffic will release a "host of pollutants into the environment, including lead, benzene, carbon monoxide and carbon dioxide"). Respondents, however, attempt to rationalize the wholesale practice of copying-and-pasting from other EAs on different projects and simply filling in the blanks for the new project. Port Br. at 34-35, n. 10; Pet. Br. at 42-44 (noting numerous failures in the practice of copy-and-past employed by the FAA). This practice is unacceptable and cannot satisfy NEPA's 'hard look' requirement. Furthermore, the practice of copy-and-paste entirely precludes any specific quantitative analysis for the Hillsboro Airport runway project. This is especially troublesome, as here, when the issue of increased aircraft operations and increased air pollution is reasonably foreseeable. Therefore, the Respondents practice of copy-and-paste is legally deficient under the NEPA.

E. Respondents did not hold a public hearing

The Respondents failed to hold a public hearing as required by the AAIA, 49 U.S.C. § 47106(c)(1)(A)(i), and FAA guidance implementing the AAIA and defining "public hearing" 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*." FAA Order 5050.4B ¶ 403(a) (emph. added).

In its response to the Petitioners' stay request, the FAA conceded that *no hearings officer was present* at the event held by the Port of Portland: "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." *See* Addendum at 24. The Respondents charge that the FAA guideline requiring a "designated hearings officer" and the ability of members of the public to "speak and hear about issues of concern to interested parties" are not requirements and cite to this Court's decisions on *other* statutory requirements for public hearings. FAA Br. at 48-52. However, the issue is whether the AAIA and the FAA's guideline implementing the AAIA have been fulfilled. Based on the record and the FAA's own admission, it has not.

Second, there was no public hearing as required by statute and regulations because members of the public were not permitted to address and listen to the rest of the public. This is a crucial point because the public only had a single opportunity to comment and object to the Project's EA. Without the benefit of listening to alternative viewpoints about the Runway Project, including comments made by Petitioners, the public was deprived of important information not disclosed in the draft EA.

Lastly, as the record shows, Petitioner Barnes was interrupted at least once by the Port of Portland's presentation during the open house. SER 61 (Break for

public address."). Not only was Petitioner Barnes denied the ability to address members of the public directly, without the direction of a designated hearings officer, she was cut-off by the domineering presence of the Port of Portland's officials and their presentation. It is hard to imagine how this display qualifies as a public hearing.

III. CONCLUSION

The FAA failed to comply with NEPA in disclosing and analyzing the environmental impacts of the runway construction project. Petitioners clearly raised significant issues in their administrative comments before the agency. Though Petitioners may not have used the precise legal terms, their comments and the agency's response to their comments demonstrates that the disputed NEPA issues were raised and the agency was well aware of the objections to the Project. Respondents fail to overcome Petitioners' arguments under NEPA, especially those of indirect effects. Respondents point this Court to cases that are clearly distinguishable and even, at times, make Petitioners' arguments by citing to *Ocean Advocates*. Here, Respondents have completely failed to account for any reasonably foreseeable increase in aircraft operations as a result of doubling the ground capacity at Oregon's busiest airport. Finally, the FAA failed to provide for a meaningful public hearing in which the public could voice its opinion of the project to other members of the public. Petitioners, therefore, request that this

Court declare that the EA and FONSI for the Project violate NEPA and the AAIA, and enjoin the FAA's disbursal of funds for the Project pending the agency's compliance with the law.

Dated: September 27, 2010

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I certify that the foregoing Reply Brief of Petitioners complies with the type-volume limitations set foth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,542 words. I relied on my word processing software to obtain this word count.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 27, 2010.

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

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