CASE NO. 10-70718

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE BARNES et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION et al.,
Respondents,

and

PORT OF PORTLAND,
Intervenor-Respondent

ANSWERING BRIEF FOR THE INTERVENOR-RESPONDENT PORT OF PORTLAND

Beth S. Ginsberg
Rita V. Latsinova
Jason T. Morgan
STOEL RIVES LLP
600 University Street, Ste. 3600
Seattle, WA 98101
Phone: (206) 624-0900
Fax: (206) 386-7500

Attorneys for Intervenor-Respondent

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I. INTRODUCTION

Petitioners challenge the Federal Aviation Administration's ("FAA") decision to approve the proposal to add a new runway at Hillsboro Airport (the "Project"), which is owned and operated by the Port of Portland ("Port"), Intervenor/Respondent. Petitioners contend, *inter alia,* that the new runway will necessarily cause significant growth-induced environmental effects that were not sufficiently evaluated in the National Environmental Policy Act ("NEPA") analysis performed by the FAA.

Hillsboro Airport ("HIO") is a "general aviation" airport that accepts smaller aircraft and serves as a reliever airport for the Portland International Airport ("PDX"). SER[1] 4. HIO is Oregon's busiest airport. *Id*. It is highly congested. HIO operates at 98 percent of its capacity (in FAA terms, airport congestion is expressed as "annual service volume" or "ASV") and is projected to reach 146 percent of ASV by 2025. PER 9, 55; SER 157. When congestion levels increase, aircraft must wait for longer periods of time to take off and land, causing higher air emissions. SER 159-160. In order to maintain an efficient airport system, the FAA instructs that planning to increase capacity should begin when the airport reaches 60-70 percent of ASV. SER 157.

[1] This brief refers to Petitioners' excerpts of record as "ER," the FAA's supplemental excerpts of record as "SER" and the Port's supplemental excerpts of record as "PER."

NEPA prescribes procedures federal agencies must follow to assess the environmental consequences of their proposed actions. As required by NEPA, the FAA evaluated the potential environmental impacts of the Project in a Draft Environmental Assessment ("DEA"), and determined that adding a new runway to increase HIO's capacity was necessary based on the existing level of operations, and would cause no significant environmental impacts. SER 157-58. The DEA concluded that by decreasing congestion and delay, the Project would ***reduce*** air emissions. SER 151. Noise impacts, measured by the 65 DNL contour line, would remain unchanged outside the airport boundary. SER 150, 181, 205. Petitioners participated in the public comment on the DEA but offered no challenge of or comment to these key conclusions. They argued instead that the Project was unnecessary. Petitioners now claim, for the first time and without any evidentiary support, that increasing HIO's capacity will "induce growth" in general aviation, increasing emissions and noise.

"Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 764, 124 S. Ct. 2204 (2004) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553, 98 S. Ct. 1197 (1978)).

Having failed to raise their concerns regarding "induced growth" (or any additional NEPA issues) in their public comments, Petitioners have forfeited any objection to the final EA and a finding of no significant impact ("FONSI") on those grounds on review. *Public Citizen*, 541 U.S. at 764-765 ("because Respondents did not raise these particular objections to the EA, [the agency] was not given the opportunity to examine [them] . . . Respondents have therefore forfeited any objection to the EA on [these] ground[s]").

Even if it had been preserved, Petitioners' late-conceived argument that capacity increases will induce growth is contrary to settled Ninth Circuit case law (which Petitioners simply ignore) that the FAA need not consider the potential for inducing growth when capacity-enhancing projects are designed to address existing demand. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998). Here, the record is clear that capacity enhancements at HIO are long overdue – the two existing runways were originally built in 1942 – and are needed to address the current and expected level of operations, which already exceed HIO's capacity. The FAA (and the Court) therefore has no obligation to entertain the speculation that reducing existing congestion at HIO would prompt more people in the greater Portland area to take up general aviation activity such as pilot training, crop dusting or emergency medical evacuations. In any event, the FAA analyzed the historic growth of traffic at HIO and forecast an increase in operations

regardless of whether the new runway is built. SER 157-161, 373-409. The Project would address this forecast trend by increasing HIO's capacity. SER 148. This will reduce congestion and delay and mitigate air emissions. SER 151. In contrast, under the no-action alternative advocated by the Petitioners, congestion and delay (and the air emissions they cause) will increase. *Id*.

Petitioners' newly-minted theory is not only barred, but is pure speculation. *See C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569, 1575 (11th Cir. 1988) ("[t]he effect caused by the runway extension will be a higher percentage of safe landings, not a higher number of planes landing."). Far from being "arbitrary" or "capricious," the final EA and FONSI are supported by uncontroverted findings that the proposed project will ***reduce*** air emissions at HIO by reducing congestion and delay at both current and forecast traffic levels as compared to the no-action alternative. SER 7. Petitioners point to no contrary evidence in the administrative record. The FAA's approval of the final EA and the FONSI is therefore not "arbitrary" or "capricious" and should be affirmed.

The balance of Petitioners' arguments attempt to second-guess the FAA's technical determinations regarding the need for additional airfield capacity in the face of projected growth, the forecasting of growth, and the benefit of increasing capacity. These technical determinations are uniquely within the FAA's expertise and are entitled to substantial deference. *Airport Communities Coalition v.*

Graves, 280 F. Supp. 2d 1207, 1221 (W.D. Wash. 2003) ("FAA's conclusions that the [runway] Project was necessary to ensure to ensure safety and reduce delays . . . is entitled to great deference"). The FAA's final EA and FONSI comply with NEPA and should be affirmed.

II. JURISDICTION

The Port accepts Petitioners' statement of jurisdiction, except, as discussed *infra* at Section VIII.A, under NEPA, the Court has no jurisdiction to entertain arguments not raised during the public notice and comment process. Under *Public Citizen*, 541 U.S. at 755, such arguments have been "forfeited."

III. ISSUES PRESENTED

1. Whether Petitioners forfeited their NEPA-related arguments by failing to present their specific concerns to the FAA during the public comment process.

2. Whether the FAA complied with 49 U.S.C. §47106(c)(1)(A)(i), when the Port certified to the FAA that it had provided an opportunity for public hearing before the FAA approved the Project.

3. If the Court considers the merits of Petitioners' NEPA claims, whether the FAA reasonably concluded, based on the administrative record, that the Port's planned airport improvement projects at Hillsboro Airport would have no significant environmental impacts.

IV. STATEMENT OF THE CASE

Petitioners, three Hillsboro-area residents opposed to the construction of the third runway at HIO, seek review of the final order of the FAA (the EA and FONSI approving the HIO project) under NEPA. Under 49 U.S.C. §46110(a), such challenges are heard by the United States Courts of Appeal in the Circuit where the Petitioners reside.

V. STATEMENT OF FACTS

A. The Hillsboro Airport and the Hillsboro Master Plan

The federal action at issue concerns the Port of Portland's proposal to address congestion at the Hillsboro airport by constructing a new parallel runway. The modifications would require FAA approval, and would be partially funded by FAA grants.

HIO is located in the city of Hillsboro in Washington County, Oregon, twelve miles west of downtown Portland. SER 181. The Port of Portland assumed ownership of HIO in 1966. HIO has two intersecting runways, originally built in 1942. SER155; PER 4. It is designated as a "reliever airport" for PDX in the FAA's National Plan of Integrated Airport Systems ("NPIAS"). SER 4, 5. Reliever airports are specially designated "general aviation"[2] airports whose

[2] "General aviation" is all noncommercial, nonmilitary aviation. It includes a diverse range of activities such as pilot training, sightseeing, recreational flying, agricultural spraying and seeding, emergency medical services, as well as fractional business jet operations. Nearly 70 percent of the hours flown by general aviation are for business purposes. PER 9.

function is to reduce congestion and delay at large commercial airports, which results when dissimilar aircraft types are mixed at a single airport. PER 6. Reliever airports provide an alternative operating area for smaller and slower aircraft, separate from commercial airline and air cargo activities, reducing congestion and delay. *Id*. The FAA does not anticipate HIO changing from a reliever general aviation airport to a commercial service airport in the future. SER 4.

HIO is the most capable general aviation in the Portland metropolitan area. It has the longest runway of all general aviation airports in the metropolitan area, a cross-wind runway to allow for safe landing and departures in all wind conditions, an airport traffic control tower, and an instrument landing system. PER 11. The length and pavement strength of the runways at Hillsboro Airport allow a mix of aircraft types to regularly operate there, including single and multi-engine propeller aircraft, regional jets, and corporate business jets. PER 22. These capabilities cannot be duplicated at other general aviation airports without significant capital investment. SER 424.

HIO is also Oregon's busiest general aviation airport. SER 10. During the preparation of Hillsboro Master Plan in 2005, its annual service volume, or ASV, [3] was calculated at 169,000 operations. SER 427. This represents the current capacity of HIO's runway system: it can service 169,000 take-offs or landings each year with an average delay of 1.2 seconds. SER 161 (Table 1-1). The mix of aircraft affects the sequencing of traffic and is an important factor in determining airport capacity. Small planes (called Class A or B) take less time to take off and land and require less spacing than larger jet air craft (called Class C). PER 49-50. Accordingly, an airport with a higher percentage of small aircraft will have a higher capacity. Currently 90 percent of aircraft using HIO are Class A and B. However, the Port anticipates that the percentage of Class C aircraft will increase, placing additional constraints on capacity. PER 50.

In 2007, the year selected as a baseline for analysis, HIO operated at 98 percent of its capacity. SER 161 (Table 1-1). Operating at or near capacity level causes delay:

> Delay is the most common descriptor of adverse effects of high annual operations to ASV ratios. As more aircraft attempt to access the airport at the same time, some aircraft operations must be slowed to allow sufficient time and distance between other aircraft

[3] The ASV for each airport is calculated based on a number of factors, including airfield characteristics (*e.g.*, radar availability and coverage, runway configuration and use, and exit taxiways), weather conditions, and aircraft mix and demand. PER 46.

> operating in the vicinity of the airport. This need to ensure adequate separation between aircraft causes delay.

SER160.

Delay, in turn, causes increased air emissions:

> Increasing levels of annual delay create undesirable conditions such as increased air emissions, increased operating costs, and extended aircraft traffic patterns. Increased air emissions are the result of aircraft engines running for longer periods of time. . . . In-flight delays cause extended downwind legs for arriving aircraft, which can lead to aircraft flying larger-than-typical traffic patterns and increased over-flights of residential areas. Such temporary changes to the airport's operating environment makes conformance with voluntary noise abatement more difficult . . .

SER427; *see also* SER 160.

After an exhaustive study of the relevant data including capacity analysis and forecast growth, the 2005 Master Plan concluded that in order to continue serving its existing role as the reliever airport for PDX, HIO required a new runway, parallel to Runway 12-30, in order to segregate small training aircraft operations away from the larger aircraft. The parallel runway would accommodate simultaneous operations under visual flight rules, increasing capacity:

> [T]he airport is presently operating beyond its [annual service volume]. . . . Exceeding the [annual service volume] increases departure and arrival delays to aircraft. At current operational levels, this delay is estimated at an average of 1.9 minutes per operation. As the mix of aircraft operating at the airport continues to shift to include a larger percentage of business aircraft, and as operations increase, this delay figure is projected to increase to over six minutes per aircraft operation on average.

SER 427; *see also* SER 160.

The Port's plan for capacity improvements is consistent with FAA requirements. FAA Order 5090.3C, *Field Formulation of the National Plan of Integrated Airport Systems* ("NPIAS"), states that improvement for airfield capacity purposes should commence when operations exceed 60-75 percent of the estimated ASV.[4] SER 407. Because HIO operates at close to 100 percent of its ASV, the Master Plan concluded that "methods to improve the [annual service volume] should be included in facility planning," with the goal of increasing the annual service volume "to a point where annual operations represent between 60 and 80 percent of annual service volume." PER 52, 55.

The possible methods of increasing HIO's capacity identified in the Master Plan and subsequently analyzed in the DEA included adding radar coverage, adding exit taxiways, and adding a parallel runway. PER 53; SER 172. While adding radar coverage and exit taxiways can increase airfield capacity, "neither improvement alone (or combined) can significantly increase . . . [airport's] capacity . . . to a point where annual operations represent between 60 and 80 percent of the [annual service volume]. This level of improvement at HIO can only be achieved with the development of a runway parallel to Runway 12-30."

[4] At 50 percent of ASV, delay is 12 seconds per aircraft operation. At 70 percent of ASV, delay increases to 18 seconds. At 100 percent of ASV, delay averages one minute per operation. PER 55.

PER 53; *see also* PER 55 ("Airfield capacity increases since a parallel runway provides for simultaneous operations.")

B. The FAA's NEPA Process for the Proposed Action

After the submission of the Hillsboro Master Plan, the Port proposed to construct a new Runway 12L/30R parallel to and 700 feet east of the existing main Runway 12/30, and to construct associated taxiways, relocate the existing helipad, and make associated infrastructure improvements. In response to the Port's request, on October 8, 2009, the FAA published the DEA. As required by NEPA, the DEA stated the purpose and need for the Project, indentified reasonable alternatives, and eliminated alternatives that would not meet the stated purpose and need. SER 165-78.

The DEA then analyzed a wide range of potential impacts, including the direct, indirect, and cumulative impacts related to noise, air quality, and the potential that the Project may induce growth. SER 203-334. It identified no significant direct, indirect, or cumulative effects, and no growth-inducing effects of the proposed project. *Id*. The draft EA concluded that by reducing congestion, the Project would in fact *reduce air emissions* compared to the no-action alternative. SER 267. In contrast, the no action alternative would lead to continued congestion and increased air emissions, which would increase over time as traffic increases. SER 165.

These conclusions were based, in part, on the FAA's independent review of the Master Plan's five- and ten-year forecasts of air traffic at HIO. SER 158. These forecasts project that operations at HIO will grow regardless of the proposed Project. SER 161. Based on its own review, the FAA concluded that the Project was necessary based on conditions resulting from the existing level of operations at HIO. SER 158; *see also* SER 159 (describing "the continued need for airfield capacity enhancement to ***maintain*** acceptable levels of service at HIO") (emphasis added). For purposes of environmental analysis, the DEA used the more conservative Master Plan forecast (which assumes higher traffic levels than the FAA's own Terminal Area Forecast), and concluded that the Project would not affect the total level of operations at HIO. SER 158-59, 178, 256.

The FAA made copies of the DEA available to the public and solicited public comment for 45 days. SER 12. On November 10, 2009, during that comment period, the Port held a public hearing at the Charles D. Cameron Public Services Building (Room 120), 155 N First Avenue, Hillsboro, from 5:30 p.m. to 7:30 p.m. *Id*. The public hearing was held in an open-house format, which included multiple stations with information about the Project, tables with copies of the DEA, and a court reporter for recording oral testimony. SER 13. A Port employee, Laurie L'Amoreaux, was designated as the hearing officer. SER 53. Twice during the hearing, a presentation was made providing an overview of the

project and summarizing the results of the environmental studies. SER 13. Approximately 18 members of the public, including two of the Petitioners, attended the hearing. SER 42-46. Seven members of the public, including all the Petitioners,[5] provided comments. SER 50.

Petitioner Barnes presented both oral testimony and written comments. SER 53-73 and 79-85. Her comments were focused on her concerns that the additional runway was not necessary, and a waste of taxpayer money or that certain activities (such a pilot training) should be banned. SER 53-73.[6] Petitioner Ackley submitted brief comments expressing his opposition "to a third runway at Hillsboro because such development [due to adverse effect of air traffic noise] would adversely affect our property value and our quality of life." SER 109. Petitioner Conry also briefly commented, stating that the HIO "has grown in [his] opinion much larger than it should have been allowed. . . . This action is driving down property values and

[5] (1) Patrick Conry, (2) Miki Barnes, (3) Darwin Engwer, (4) Wayne Vanderzanden, (5) Susan Barnes, (6) Blaine Ackley, and (7) Francis Beebe. SER 50.

[6] Petitioner Barnes' oral and written comments expressed concerns about a broad array of issues ranging from "the way this hearing is being handled" to the perceived "excess of capacity in Port of Portland owned and operated facilities" and the need for a "moratorium on all Airport expansions at all Port of Portland . . . facilities." SER 75-78. Ms. Barnes objected to the "federal government . . . award[ing] [funds] to small airports used mainly by private pilots and globetrotting corporate executives," proposed to lower the landing fees at PDX "to lure flights to PDX" instead of HIO, and advocated a "cash for clunkers program for general aviation." *Id*. Nowhere in her comprehensive comments did Ms. Barnes make the arguments she advances on this review.

livability." SER 51 The Port and the FAA provided detailed responses to each of these comments. SER 52, 75-78, 98-101.

The FAA received no public comments questioning the DEA's conclusion that the total level of operations at HIO would not be affected by the new runway compared to the no-action alternative. Similarly, no public comments challenged the DEA's conclusion that the Project would reduce congestion and delay and also reduce air emissions. Finally, no comments put forward reasonable alternatives that should be considered, challenged the adequacy of the DEA's indirect effects or cumulative effects analysis, or explained that a full EIS was necessary. After minor revisions to the DEA based on public comments it received, the FAA issued the final EA and FONSI. Petitioners brought suit, arguing for the first time that adding a new runway will induce aviation-related commercial growth, and, as a result, increase emissions and noise.

VI. STANDARD OF REVIEW

"An agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Public Citizen*, 541 U.S. at 763 (citing 5 U.S.C.§706 (2)(A)). *See also Morongo Band*, 161 F.3d at 573. The scope of review under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S.

29, 43, 103 S. Ct. 2856 (1983). An agency decision will be upheld as long as there is a "rational connection between the facts found and the choice made." *Id.*

With respect to technical issues that are entrusted to the agency's expertise, the court defers to the agency expertise and presumes the validity of agency actions. *Western Radio Servs. Co., Inc. v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996); *Airport Communities Coalition*, 280 F. Supp. 2d at 1221 ("the FAA's conclusions that the [third runway] was necessary to ensure safety and reduce delays . . . is entitled to great deference").

In conducting the review "the focal point . . . should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241 (1973). The agency decision should not be disturbed unless the record shows no rational basis for the decision, *see Friends of the Earth v. Hintz*, 800 F.2d 822, 830-31 (9th Cir. 1986), or unless "there has been a been a clear error of judgment," *see City of Carmel-by-the-Sea v. U.S. Dept. of Transportation,* 123 F.3d 1142, 1166 (9th Cir. 1997).

In a NEPA appeal, the Court's task is not to "fly speck" the record for "inconsequential, technical deficiencies," *Ass'n of Public Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997), but rather to "ensure that 'the agency has taken a 'hard look' at the potential environmental consequences of the proposed action.'" *Northwest Envt'l Advocates v. Natl'*

Marine Fisheries Service, 460 F.3d at 1125, 1133 (9th Cir. 2006) (citation omitted).

VII. SUMMARY OF ARGUMENT

"Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Public Citizen*, 541 U.S. at 764. Petitioners who fail to do so "forfei[t] any objection to the EA" on the grounds not previously raised unless they are "so obvious that there is no need for a commentator to point them out specifically." *Id*. at 764-65. The majority of Petitioners' NEPA arguments – none of which were "obvious" to Petitioners themselves during the public comment process – fail on that basis.

The only remaining issue is whether the comment process was adequate. The statute does not require the FAA to hold a "public hearing" as Petitioners suggest. Instead, it requires the project sponsor (here, the Port) to certify that it held a public hearing to "consider" the impacts of the project. The Port held such a hearing and certified that hearing to the FAA as documented in the final EA. No more is required.

Even if the Court examines the merits of Petitioners' NEPA claims, the record demonstrates that the FAA took the requisite "hard look" at the impacts of

the proposed action through its detailed draft and final EA. The "hard look" demonstrated that the Project was necessary to accommodate ***existing operations*** and would ***reduce*** congestion and air emissions without inducing growth. Moreover, under this Court's decision in *Morongo Band*, 161 F.3d at 580, which Petitioners completely ignore, analysis of induced growth is not required when, as here, the Project addresses existing demand. The FAA's decision was therefore rational and should be affirmed.

VIII. ARGUMENT

A. Petitioners Have Forfeited All Objections to the EA on Grounds Not Raised During Public Notice and Comment

The Court need not address Petitioners' NEPA-related arguments because Petitioners failed to present "these particular objections to the EA" as part of the public comment process. *Public Citizen*, 541 U.S. at 764. By failing to do so, Petitioners "forfeited any objection to the EA" on those grounds. *Public Citizen,* 541 U.S. at 764-65.

NEPA requires any person who wants to challenge the adequacy of an EA to "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions in order to allow the agency to give the issue meaningful consideration." *Id*. (citation omitted). The purpose of this requirement is "to allow the administrative agency . . . to exercise its expertise over the subject matter and to permit [it] an opportunity to correct any mistakes that may have occurred during

the proceeding, thus avoiding unnecessary or premature judicial intervention into the administrative process." *Daly-Murphy v. Winston,* 820 F.2d 1470, 1476 (9th Cir. 1987). *See also Vermont Yankee,* 435 U.S. at 553 (a prospective litigant may not lie in wait during the administrative process and turn that process into "a game or forum to engage in unjustified obstructionism.").

Petitioners argue on review that the EA is deficient under NEPA because it did not consider (1) a reasonable range of alternatives to the project; (2) the indirect effects of increasing airport capacity or (3) the cumulative impacts of the project; and because (4) the FAA should have produced an EIS instead of an EA. Petitioners' Br. at 1-2. But none of these arguments appear anywhere in the public comments.[7] SER 48-137. Moreover, Petitioner's central argument on review ***contradicts*** their own public comments. Petitioner Barnes asserted that the third runway was unnecessary because the current level (and the downward trend) of operations did not warrant the increase of HIO's capacity: "Clearly, between PDX and Troutdale, there is an excess of capacity in Port of Portland-owned and operated facilities." SER 58. Now Petitioners reverse course and claim that the

[7] Petitioners hardly mentioned NEPA *at all* in their comments. Only Petitioner Barnes mentioned the DEA at all, and then only to state, without any factual support, that it was "based on inaccurate and misleading data." ER 13. Such vague statements are insufficient to alert the agency of any specific deficiency in the EA and apply its expertise to address it. *Public Citizen*, 541 U.S. at 764.

proposed action will induce a *higher* level of operations and increase air emissions and noise.

Petitioners cannot have it both ways. Under *Public Citizen,* they have "forfeited any objection to the EA on the ground[s]" they had failed to raise, much less an objection contrary to the one they did raise. *Public Citizen*, 541 U.S. at 764-65. Nor can Petitioners salvage their NEPA claims by arguing that they are "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 (holding that exception was not available to Plaintiffs who participated in the public comment process but did not urge the agency to consider alternatives to the proposed action). Clearly, during the comment period their present position was not "obvious" to Petitioners themselves, much less to the FAA.

In *Ilio'Ulaokalani Coalition v. Rumsfeld,* 464 F.3d 1083, 1092 (9th Cir. 2006), this Circuit applied the "so obvious" exception when (1) plaintiffs *did not* participate in the public comment process and (2) when the agency had independent knowledge of the concerns they ultimately presented. Here, Petitioners not only fully participated in the notice and comment, but presented arguments (demand is low and decreasing, additional capacity is unnecessary) *contrary* to the one they now raise (demand is high and will increase if additional capacity is created). But the administrative notice and comment process is not "a

game or forum" that allows such "unjustified obstructionism." *Vermont Yankee,* 435 U.S. at 553. Petitioners were required to inform FAA of their specific concern regarding the theory that the proposed runway would induce growth, and that such growth had not been addressed in the DEA. FAA would then have been able to review its discussion of the forecast traffic growth in light of the theory, and make a judgment as to whether any additional analysis would be appropriate.

Unlike in *Ilio'Ulaokalani,* where the record was "replete with evidence that the [agency] recognized the specific shortfall . . . raised by Plaintiffs," *see id*. 464 F.3d at 1092, here the record shows that the FAA had no independent knowledge of Petitioners' unexpressed concerns. To the contrary, the FAA repeatedly concluded that the proposed action will not increase operations compared to the no action alternative, and that the proposed actions will reduce air emissions by mitigating congestion and delay.[8] *See CARE NOW, Inc. v. FAA*, 844 F.2d 1569, 1574 (11th Cir. 1988) (affirming the EA and FONSI, in which "the FAA considered [the] 'do nothing alternative' . . . [and] concluded that the proposal [to

[8] FAA's preliminary internal comments were limited to other issues, which were reviewed and fully addressed by FAA and the Port staff in the final EA and FONSI:

> "Overall the cumulative analysis is inadequate. The entire chapter needs to be reviewed." ER 61.
>
> "The wetland section is cursory." ER 67.
>
> "This [wetland] section is too cursory. It sounds like there is a potential for a significant impact." *Id*.

None of these internal comments track Petitioners' arguments on review or made them "obvious" to the FAA. *See* PER 106-109, 118-119.

expand a runway] will actually result in a decrease in the severity of the noise level" by allowing aircraft "to take off from a position 1,000 feet farther back" and gain a higher altitude before reaching neighborhoods most affected by noise).

Given the consistent conclusions in the administrative record that ***the only*** impact of increasing HIO's capacity will be to ***reduce*** air emissions, none of the additional NEPA issues identified for the first time in Petitioners' Opening Brief qualify as "obvious," and the Court should decline to entertain them. *See Daly-Murphy,* 820 F.2d at 1476. Accordingly, the only remaining issue in the case is whether the Petitioners were afforded a proper public hearing under 49 U.S.C. §47106(c)(1)(A)(i).

B. Petitioners Were Afforded A Public Hearing.

Petitioners claim "the FAA was required to hold a 'Public Hearing'" and that the FAA's public hearing was deficient because (1) Petitioner Barnes was not allowed to address the public and (2) no hearing officer was present. Petitioners' Br. at 53. Yet, the statute merely specifies that the FAA may not approve an application for an airport expansion project unless "the ***sponsor certifies*** to the Secretary that . . . an opportunity for a public hearing was given to consider the economic, social, and environmental effects of the location and the location's consistency with the objectives of any planning that the community has carried out." 49 U.S.C. §47106(c)(1)(A)(i) (emphasis added). While the FAA has no

statutory obligation to hold a hearing, it may not act on the application until the project's sponsor (here, the Port) certifies that an opportunity for a public hearing was given "to consider" the project's environmental impacts. No more is required.

The Port provided the FAA the required certification, which was included in Appendix A of the final EA. SER 12. This discharges the FAA's statutory obligations with respect to a public hearing and forecloses Petitioners' arguments under 49 U.S.C. §47106(c)(1)(A)(i). Even if the statute required the FAA to examine the adequacy of the Port's public hearing, which it does not, Petitioners' complaints about the hearing's open-house format are misguided. There is no legal requirement to provide a "hearing officer" or a stage for public speaking. *United Farm Workers of Am. v. EPA*, 592 F.3d 1080, 1082 (9th Cir. 2010) (when the statute provides no guidance about the required format, the "public hearing" is construed broadly and is satisfied by notice and an opportunity to submit written comments; "there is no presentation of public argument" requirement). When, as here, notice and opportunity to provide comments (both in person to a court reporter and in writing) was provided, courts may not impose additional procedural requirements on the hearing. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 110 S. Ct. 2668 (1990).

Petitioners attempt to manufacture a "hearing officer" requirement by relying on the FAA's internal policy documents. Petitioners' Br. at 51-52. The

FAA's guidance stated that "[a] public hearing is a gathering under the direction of a designated hearing officer for the purpose of allowing interested parties to speak and hear about issues of concern to [them]." *See* FAA Order 5050.4b § 403 (reproduced at Addendum 6). This generalized statement does not set the legal requirements for a public hearing held by a sponsor, let alone impose any specific format on a sponsor holding a hearing under 49 U.S.C. §47106.

Petitioners cannot reasonably dispute that the hearing they attended provided each of them a full opportunity to learn about the Project and present any concerns. The Port representatives, as the event's sponsors, "presided" over "a gathering" that presented the proposed project and invited the public to "speak and hear" about their concerns. SER 12-14. Laurie L'Amoreaux, a Port employee, was designated to serve as the hearing officer for the purposes of receiving public comments; a court reporter was present to transcribe oral comments. SER 53. Two of the Petitioners attended the hearing, heard the presentations, asked questions, and commented on matters of concern, some at the hearing itself, others in subsequent written form. SER 50. No more is required. Thus, even if the internal FAA guidance was binding on the Port as the sponsor, Petitioners' argument concerning the adequacy of the public hearing they attended has no merit.

C. The Port's EA and FONSI are Reasonable and Supported by the Record.

1. The FAA Took a Hard Look at the Impacts of the Runway Project.

If the Court reaches Petitioners' NEPA claims, they should be rejected as meritless. NEPA requires federal agencies to take a "hard look" at the environmental consequences of actions they propose. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*, 387 F. 3d 989, 993 (9th Cir. 2004). It does so by requiring the agency to produce an EA to determine whether any proposed action will have significant impacts which warrant an EIS. *Public Citizen*, 541 U.S. at 757. If the EA reveals no significant impacts, the agency issues a FONSI rather than an EIS. *Id.* 757.

The EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement." 40 C.F.R. §1508.9(a)(1). *See Biodiversity Conservation Alliance, Wyoming Wilderness Ass'n v. Bureau of Land Management*, 404 F. Supp. 2d 212, 221 (D.D.C. 2005) ("EA means a concise public document . . . primarily designed to provide sufficient information to establish that the agency took a 'hard look' at the environmental consequences before concluding they are insignificant") (internal quotation marks and citations omitted). It includes "***brief discussions*** of the need for the proposal, of alternatives as required by section 102(2)(E), of the

environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. §1508.9(b) (emphasis added).

The EA here easily meets these requirements. Far from being "concise," the EA provides a comprehensive study of the Project's environmental impacts that was supported by voluminous technical appendices. It offers far more than a "brief discussion" of the purpose and need for the capacity increases at HIO. SER 165. The EA explains, with supporting data (which Petitioners do not challenge) that HIO currently operates at close to 100 percent of capacity, and shows that HIO will become more congested due to the changing mix of aircraft. *Id*. The EA then explains that an increase of capacity is needed to reduce delays caused by congestion, consistent with FAA guidelines, so that the HIO can continue to operate as an efficient and safe reliever airport. *Id*. In addition to being uncontroverted, these findings are based on FAA's unique technical expertise and are entitled to substantial deference. *Airport Communities Coalition*, 280 F. Supp. 2d at 1221.

The EA considered the total of eight alternatives – including three considered in detail – in light of the Project's purpose and need. The alternatives studied in detail included the no-action alternative and two versions of the preferred alternative with different locations for the relocated helipad. SER 6. For each of these alternatives, the EA discussed its environmental impacts, including the direct,

indirect, and cumulative effects. SER 6-8. The FAA also considered (in less detail) five additional alternatives (among them the use of radar and demand management), but rejected them after discussing why they did not meet the FAA's stated purpose and need. SER 6, 172-173.

The EA concluded that construction of a new runway under either of the two preferred alternatives would have minimal direct effects, and that those effects would be temporary and mitigated. SER 7-8. It concluded that the third runway would not increase air traffic at, or demand for, HIO's general aviation services. SER 267. The level of traffic and the expected rate of growth would remain the same under the no-action and action alternatives. *Id*. SER 7, 255-56. Either of the preferred action alternatives will reduce congestion and delay from 1.9 minutes to 30 seconds, reducing air emissions and potential health risks. SER 176. In contrast, under the no-action alternative, as traffic increases, delay would increase to 6 minutes by 2025, leading to increased air emissions and potential health impacts as planes idle on the runway or circle waiting for their turn to land. SER 165-66.

Based on these findings, the FAA reasonably concluded that the capacity increase at HIO will not have any significant direct, indirect, or cumulative impacts on the environment, and that the Project's only effect will be to reduce congestion and reduce air emissions and noise. SER 6-9. Under NEPA, no more is required.

See C.A.R.E. Now, 844 F.2d at 1575 (the only "effect caused by the runway extension will be a higher percentage of safe landings, not a higher number of planes landing;" "[g]iven the limited effect, direct or indirect, of the proposal," the EA provided the required "hard look" at environmental impacts). The agency action is rational, supported by the record, and complies with NEPA. Petitioners' challenge should therefore be denied.

a) Petitioners' Arguments Find No Support In the Record.

Petitioners combed the record of the FAA's decision in search of internal inconsistency but found nothing to paint the FAA's EA and FONSI to be "arbitrary and capricious," as required by the APA. Instead, they invite the Court to announce a judge-made rule that environmental impacts of a new runway can *never* be addressed in an EA and a FONSI. But NEPA imposes no such general rule, and the record shows that the EA meets all NEPA requirements. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998).

b) The FAA Properly Considered the Indirect Effects.

Petitioners assert that "the FAA failed to analyze the indirect effects of constructing a new runway." Petitioners' Br. at 11. This argument is premised on the assumption that by increasing capacity, the Project will necessarily increase the amount of traffic at the airport, and thereby lead to significant increases in noise, greenhouse gas, and other air emissions, and increased energy consumption. *Id*. at

17; *see also id.* at 14 ("an airport with three runways necessarily allows a greater number of aircraft operations than an airport with two runways."). This Court has rejected the same assumption in *Seattle Community Council Federation v. FAA*, 961 F.2d 829 (9th Cir. 1992), the case Petitioners mention in their own brief. *See id.* at 835 (rejecting the "mistaken impression that the increase in capacity . . . means an increase in aircraft operating. . . . That is not the case. The proposed procedures are designed . . . to expand the FAA's use of existing airspace to more efficiently meet the *existing* air traffic demand. . ."").

Petitioners' assumption is not only wrong but also contrary to the record. As explained in the DEA, airport traffic at HIO is expected to increase and to increase at the same rate – whether the new runway is built or not. SER 176. HIO has been operating at or over capacity for several years. *Id*. At the present level of congestion, given the existing mix of aircraft, planes experience an average delay of 1.9 minutes. Without an increase in capacity, the Port will operate at 146 percent of capacity by 2025, causing an average delay of 6 minutes. SER 165. The FAA determined that while adding the third runway will reduce ***existing*** congestion, it will neither increase nor decrease the anticipated air traffic at HIO. SER 176 ("Although the increased delay would cost the users additional time and operating costs, these costs would not reduce demand at HIO within the forecast

period."); SER 256 (proposed action "would not lead to increased aviation activity").

Petitioners' contrary assertions are nothing but speculation. *Public Citizen*, 541 U.S. at 765 (the connection assumed by the Plaintiff is "tenuous at best"). The EA contains detailed discussions of the forecast growth in traffic, while the Petitioners (without any evidence) simply invite speculation about future users coming to, or abandoning, HIO. The FAA was not required to consider such remote or speculative impacts. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989).

In *Morongo Band,* this Court rejected an identical speculative argument. The FAA had approved a capacity enhancement project for Los Angeles International Airport ("LAX"). As here, the enhancements were necessary because "the volume of arrivals at LAX had increased, and was projected to continue to grow in the future, resulting in the need to revise arrival procedures in order to ensure safety and efficiency." *Id*. at 572. As here, the FAA issued an EA and a FONSI. *Id*. at 573. The EA had no discussion of growth-inducing impacts. Plaintiffs sued, arguing that the project "remove[d] a constraint to growth at LAX," which the FAA "improperly failed to consider." *Id*. at 580. This Court disagreed. It held that the FAA was not required to consider the growth-inducing impacts of the LAX capacity enhancements because "the project was implemented to deal

with existing problems; the fact that it might also facilitate further growth is insufficient to constitute a growth inducing impact." *Id*. at 580.

Here, unlike *Morongo Band*, the FAA discussed growth-inducing impacts of the Project and found none. SER 255-57. But even if the FAA had remained silent on this issue – as it did in *Morongo Band* – Petitioners' claims would still fail because the FAA's record here, as in *Morongo Band*, shows that "the need for the project is based on existing activity level, not the forecast activity levels." SER 158. The FAA protocols require action to increase capacity once the airport reaches 60-75 percent of its capacity. SER 157. Because it is uncontroverted that HIO is already at or over 100 percent of its capacity, under *Morongo Band*, the FAA was not required to consider the growth-inducing impacts. *See also City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (agreeing with DOT's conclusion that construction of a new freeway would not have growth-inducing effects, and explaining that while the "freeway may induce limited additional development, it is the existing development that necessitates the freeway").

Petitioners entirely omit discussion of *Morongo Band*, which is dispositive. Instead, they invite the Court to create a judge-made rule that adding a runway is unique and necessarily induces growth. But such a rule cannot be reconciled with *Morongo Band*, where this Court determined that "the fact that [the project] might

also facilitate further growth is insufficient to constitute a growth-inducing impact." *Morongo Band*, 161 F.3d at 580; *C.A.R.E. Now* , 844 F.2d at 1775 ("the effect caused by the runway extension will be a higher percentage of safe landings, not a higher number of planes landing.").

Petitioners also "fly-speck" the record to identify "three points" where the FAA allegedly admitted that the Project will induce growth. This attempt also fails. Petitioners' Br. at 17-19. Under NEPA, the Court will not set aside the agency action unless there is no rational basis for the action. *Ass'n of Public Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997); *Friends of the Earth v. Hintz*, 800 F.2d 822, 830-31 (9th Cir. 1986). None of the minor "points" Petitioners rely on make the FAA's decision irrational:

(1) A single question by an FAA employee whether the FAA needs to consider a "worst case scenario," Petitioners' Br. at 17, does not suggest that the Project *will* cause an increase in air traffic or undermine the FAA's well-supported conclusion that the Project *will not* induce growth. This comment arose in the review of an early draft and is part of the normal process of developing a well-considered NEPA document;

(2) A sentence in a preliminary draft of the EA, noting that "it is possible that the construction of the third runway would remove a constraint to growth in aircraft activity." Petitioners' Br. at 18. The FAA struck this sentence because it

reasonably concluded that it was incorrect. This in itself is evidence of reasoned decision-making;

(3) A statement in an agency email explaining that traffic at HIO is anticipated to increase. Petitioners' Br. at 18. That much was never in dispute. The relevant NEPA inquiry is not whether the traffic will increase but whether the Project will cause or induce that increase. As explained, the EA forecast that operations at HIO may increase ***regardless of the Project*** and concluded that the Project will not induce growth in operations. SER 178. By reducing existing (and any increased) congestion and delay, the Project will reduce emissions compared to the no-action alternative. Petitioners' argument about induced growth is nothing but speculation. It is contrary to the record and this Court's case law, and should be rejected. *See Morongo Band*, 161 F.3d at 580; *Carmel-by-the-Sea*, 123 F.3d at 1162.

c) FAA Was Not Required to Produce an EIS.

Petitioners argue at great length that the FAA should have produced an EIS for the runway project because it "will result in significant impacts to the human environment." Petitioners' Br. at 29-45. This argument is premised on the assumption that the Project will significantly increase traffic because it increases

capacity. As explained *infra*, that assumption is false.[9] The FAA reasonably concluded that this Project will not induce growth and will not have significant direct effects. Because the Project will not increase traffic, it will also not increase greenhouse gas emissions, contribute to global warming, or increase public safety concerns.

Petitioners try to revive their argument by relying on *Foundation for N. American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172 (9th Cir. 1982), and claiming that they raised "substantial questions." But that case has no application here. In *Wild Sheep*, the plaintiffs raised their "substantial questions" *before the agency,* and those questions "were ignored or, at best, shunted aside." *Id*. at 1179-80. Petitioners here raised no questions related to the growth-inducing

[9] Petitioners invite the Court to create a legal distinction between airport improvements that added runways, and improvements that did not – but even the cases they cite fail to support their argument. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 273 (D.C. Cir. 2002) (holding that the NEPA argument was not properly before the court); *City of Los Angeles v. FAA*, 138 F.3d 806, 808 (9th Cir. 1998) (rejecting the argument that enlarging the terminal will necessarily attract more passengers; "indeed, even in the highway context we haven't always found that a new road would necessarily spur development"); *Seattle Community Council Federation v. FAA*, 961 F.2d 829, 835 (9th Cir. 1992) (rejecting the "mistaken impression that the increase in capacity . . . means an increase in the number of aircraft operations to and from Sea-Tac. This is not the case. The proposed procedures are designed . . . to expand the FAA's use of existing airspace to more efficiently meet the *existing* air traffic demand at Sea-Tac."); *County of Rockland v. FAA*, 335 Fed. Appx. 52, 53 (D.C. Cir. 2009) (FAA's forecast of future traffic is entitled to "even more deference" than this court gives "under the highly deferential arbitrary and capricious standard"); *Town of Winthrop v. FAA*. 535 F. 3d 1, 7 (1st Cir. 2008) ("there is a relationship between delays and adverse environmental effects. Delays cause airplanes to idle needlessly on taxiways, increasing harmful emissions. The preferred alternative would reduce emissions and improve ambient air quality, as compared to the no action alternative.").

impacts of the Project at all, and cannot raise them for the first time on review. *Public Citizen,* 541 U.S. at 764-65.

Petitioners also misrepresent the record by asserting that "the FAA regional counsel noted that the Project appears to have significant impacts." Petitioners' Br. at 32. Petitioners cite to internal agency comments on one of the draft EAs, which states "[A]gain this section is too cursory. It sounds like there is a real potential for a significant impact." ER 67. This comment addresses *the clarity of drafting* and expresses no opinion as to whether the Project will generate any significant impacts. In any case, the section was modified to address FAA's concerns. PER 106-109, 118-119.

Petitioners also contend, in various ways, that an EIS is necessary "to fully analyze the impacts of greenhouse gases from the dramatic increase in capacity at the Hillsboro Airport." Petitioners' Br. at 36-37, 41-44. As previously noted, this argument is premised on the erroneous belief that an increase in capacity will result in an increase in traffic. It will not. To the extent that the Project will have any impact on greenhouse gases, it will be to reduce emissions by reducing congestion and delay. That analysis is fully provided in the draft EA. SER 188-90. There are simply no additional effects to analyze in an EIS.[10]

[10] Much of Petitioners' discussion on why an EIS should be prepared for greenhouse gas emissions appears to argue that the EA's discussion of greenhouse gases as written is deficient.
(continued . . .)

Finally, Petitioners argue that the FAA must produce an EIS because the FAA's decision here "would likely establish the precedent that an additional runway would be constructed at an airport . . . without preparing an EIS." Petitioners' Br. at 44-45. The D.C. Circuit has rejected identical arguments against the FAA as "completely without merit." *Town of Cave Creek v. FAA*, 325 F.3d 320, 332 (D.C. Cir. 2003). In *Cave Creek*, petitioners alleged that the FAA should have produced an EIS for an airport restructuring plan at a Phoenix airport because 'this action creates a clear precedent for other [airport restructuring] projects not to use EISs in the future." *Id.* The court summarily rejected such arguments because the EA was developed in response to "the particular circumstances and problems encountered in and around" Phoenix and "creates no binding precedent which will control the FAA's future use of EISs for" such projects. *Id.*

(. . . continued)
However, Petitioners do not directly address greenhouse gas emissions in the sections of their brief addressing the adequacy of the EA itself (Petitioners' Br. Sections I.a, I.c-d). To the extent Petitioners have preserved a direct attack on the adequacy of the EA's green house gas analysis, the Port provides this response. The EA reasonably concluded that since the proposed project will reduce air emissions, and given that aviation activity at the HIO represents a very small amount of domestic and global emissions, it was not reasonably foreseeable that the construction of the new runway would lead to any significant global climate change impacts, especially when the current state of the science on this issue is in flux and inadequate to conclude otherwise. ER 25, 27. Petitioners suggest that the EA's treatment of greenhouse gas emissions was somehow insufficient because it employed an effects methodology that has been used in other NEPA analyses for other FAA projects. Petitioners' Br. at 41-44. Yet, in light of the global nature of the problem posed by greenhouse gas emissions, the FAA's decision to address these effects in a consistent manner throughout the country in no way undermines the quality and sufficiency of its response to these issues in this EA. Thus, to the extent that Petitioners have preserved an argument on the sufficiency of the EA, that argument should be rejected.

Here, too, Petitioners' claims are "completely without merit." *See id*. Whether an EIS is required is a fact-specific inquiry. The decision to produce an EA for HIO was developed in response to the particular circumstances creating congestion at that airport, and creates no binding precedent about the use of an EIS at future airport projects.

d) The FAA Properly Considered the Cumulative Impacts of the Project.

Petitioners next contend that the EA failed to properly consider the cumulative impact of the runway project. Specifically, Petitioners claim that the EA (1) "failed to assess two controversial zoning changes north of the airport that were recently determined to be unconstitutional;" and (2) failed to discuss "the reasonably foreseeable project of constructing a new control tower." Petitioners' Br. at 46. Neither contention has merit.

Petitioners' zoning changes arguments should be rejected for two reasons. *First*, as Petitioners explain, those zoning changes were subsequently invalidated as unconstitutional. Accordingly, to the extent that the FAA failed to consider the environmental impact of zoning changes that are unconstitutional and no longer exist, that error was harmless. *See* 5 U.S.C. §706 ("due account shall be taken of the rule of prejudicial error").

Second, even if the zoning changes were still in effect, Petitioners fail to identify any environmental impact stemming from those zoning changes. Nor

could they. The now invalidated "controversial zoning changes" would simply have converted the airport's zoning status from "nonconforming" to a formally recognized zone – the ***use*** of HIO as an airport would have continued unchanged – and the new Airport Safety and Compatibility Overlay (ASCO) zone designation over certain properties merely prohibited tall structures in the flight path. These new zones were designed to recognize the current use and ***prevent*** health and safety impacts, not ***create*** them. Because there are no identifiable impacts from these zoning changes, there was simply nothing for the FAA to analyze.

Petitioners' arguments with respect to the so-called "new" airport tower are similarly specious. There is no such "new" airport tower project. The record demonstrates that the Port has no plans to construct a new control tower and the FAA has no concerns about the safety of the Airport in the absence therewith. PER 128-130. Petitioners' own excerpts could not make this more clear:

> "So are they getting new tower in the near future?" ER 65.
> "No, they are not in line for a new tower." ER 64.

Given that the Port is "not in line for a new tower," the FAA was not required to consider the cumulative impact of the non-existent tower project. *See* 40 C.F.R. §1508.7 (agency must consider "reasonably foreseeable" cumulative impacts).

Petitioners simply cannot create a "reasonably foreseeable" project by relying on idle speculation or selectively "nitpicking" their way through the record.[11]

e) The EA Considered a Reasonable Range of Alternatives.

Petitioners also half-heartedly contend that the EA fails to present a reasonable range of alternatives because it "does not disclose any environmentally distinguishable effects between the two action alternatives." Petitioners' Br. at 49. This argument ignores both the record and directly contrary case law in this Circuit.

This Court's decision in *Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005), is directly on point. In that case, plaintiffs sued the Forest Service claiming that the Forest Service's EA was deficient because it only considered two alternatives in detail: the no-action alternative and the proposed action. *Id*. at 1245. Plaintiffs contended that such an EA failed to consider a "reasonable" or "appropriate" range of alternatives as required by NEPA and its regulations. *Id*.

This Court rejected those arguments for two reasons. First, the Court explained that NEPA "does not impose a numerical floor on alternatives to be considered." *Id*. at 1246. Second, in determining whether the number of

[11] Petitioners also cite to an internal FAA lawyers' concerns about the treatment of cumulative effects in an early draft EA. Petitioners' Brief at 45. The record, however, makes clear that those concerns were fully addressed by FAA and Port staff prior to the issuance of the final EA and FONSI. *See* PER 106-109, 118-119.

alternatives considered in an EA is appropriate under the circumstances, the Court must look also to the alternatives that were eliminated from detailed consideration. *Id*. The agency's obligation to explore such alternatives "under an EA is a lesser one than under an EIS," and the agency may reject alternatives based on "brief discussions" of the project's purpose. *Id*. at 1246. In addition to the two alternatives discussed in detail, the plaintiffs had overlooked the fact that the agency's EA had addressed and rejected five other alternatives. Accordingly, the Court rejected plaintiffs' arguments and found that the agency properly considered an appropriate range of alternatives.

Petitioners' arguments here fail for the same reason. Principally, as with the plaintiffs in *Native Ecosystems Council,* Petitioners overlook the fact that the EA considered, but rejected, at least five other alternatives. Specifically, the FAA considered: (1) elimination of local training flights; (2) diversion of traffic to other airports; (3) demand management; (4) radar coverage; and (5) use of new technologies and procedures. SER 172-73. The FAA determined that none of these alternatives would fully address the Airport's capacity problem in the timeframe necessary to ensure that HIO remained a fully functioning GA reliever airport, and thus reasonably eliminated those alternatives from detailed consideration. SER 172-73. As this Court has explained, NEPA's alternative analysis requires nothing more. *Native Ecosystems Council,* 428 F.3d at 1246.

As was the case in *Native Ecosystems Council,* Petitioners' failure to even address these other alternatives is entirely fatal to their claims. But in any event, Petitioners' contention that an alternative is deficient if it is "environmentally indistinguishable" finds no legal support in NEPA or the case law. As this Court has explained, NEPA's regulations instruct agencies to identify reasonable alternative *actions* and then briefly describe "'the environmental impacts of the proposed action and alternatives'." *Native Ecosystems Council,* 428 F.3d at 1245 (quoting 40 C.F.R. §1508.9(b)). The fact that two different alternative actions ultimately are found to have the same or similar environmental effects does not inform whether or not the alternative was viable or reasonable in the first place. That determination is based on the agency's statement of purpose and need. *Id*. Nor should it be surprising that two alternatives to a proposed action have similar environmental impacts especially when, as here, *neither has any significant impact at all*. It would frustrate NEPA's rule of reason to force the FAA to seek out and discuss more environmentally damaging alternatives under these circumstances.

Petitioners' cited case, *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982), provides no support for this backwards argument. In that case, the plaintiffs challenged a plan governing 62 million acres of National Forest. The EIS in that case considered several alternatives, but every one of those alternatives (including the no-action alternative) would allow some destruction of wilderness in varying

degrees. *Id*. at 767. The Court found that the EIS was deficient. In so doing, the Court *did not* conclude that the effects of all the alternatives were indistinguishable as Petitioners suggest (and indeed the effects were quite distinguishable). *See id*. at 765, Table 1. Rather, the Court found that the EIS should have considered an alternative whereby none of the wilderness was destroyed. *Id*. at 767.

Block simply has no application here. The FAA has considered multiple alternatives whereby no runway is built: the no-action alternative, the elimination of local training flights, the diversion of traffic to other airports, demand management, radar coverage, and new technologies and procedures. SER 172-73. Thus, unlike *Block*, the FAA's EA considered a reasonable range of alternatives.[12]

In sum, Petitioners overlook the record showing that the FAA considered at least five alternatives. Under controlling case law, this easily satisfies NEPA's requirements for an EA.

[12] *Block* is also distinguishable in two important ways. First, *Block* involved an EIS rather than an EA, and this Court has explained that the agency's obligation to explore such alternatives "under an EA is a lesser one than under an EIS," *Native Ecosystems Council*, 428 F.3d at 1246. Second, unlike the plaintiffs in *Block*, Petitioners here never identify what the alternative is that the agency should have considered. That failure too is fatal. *See Morongo Band*, 161 F.3d at 576 (plaintiff must offer "a specific, detailed counterproposal that had a chance of success.") (internal quotations omitted). Instead, their argument rests on the assumption that two alternatives is necessarily not enough. This presumption also is fatally flawed. As explained above, NEPA "does not impose a numerical floor on alternatives to be considered." *Id*. at 1246.

D. This Court Should Decline to Review Any of Petitioners' Standing Exhibits in Assessing the Adequacy of the FAA's EA and FONSI Assertions.

Petitioners submitted more information in support of their standing assertions than they included in their excerpts of record on the merits of the case itself. In addition to their standing declarations, Petitioners submitted studies, correspondence, and news releases. While these exhibits may theoretically have some relevance to the Petitioners' standing, these materials are extra-record and have no relevance to the FAA's NEPA decision. As such, the Court should review these materials, if at all, only for standing purposes.

IX. CONCLUSION

For all of these reasons, the Petition should be denied and the decision of the FAA should be upheld.

Dated: September 13, 2010. Respectfully submitted,

/s/ *Beth S. Ginsberg*
Beth S. Ginsberg (WSBA No. 18523)
bsginsberg@stoel.com
Rita V. Latsinova, WSBA No. 24447
rvlatsinova@stoel.com
Jason T. Morgan (WSBA No. 38346)
jtmorgan@stoel.com

STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

Attorneys for Intervenor-Respondent,
The Port of Portland

STATEMENT OF RELATED CASES

Counsel for Intervenor-Respondent is not aware of any related cases pending in this Court, as defined by Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

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Dated: September 13, 2010.

By: *Beth S. Ginsberg* _____
Beth S. Ginsberg, WSBA No. 18523

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 13 September 2010, I electronically filed the **Answering Brief for the Intervenor-Respondent Port of Portland** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system with the **Answering Brief for the Intervenor-Respondent Port of Portland**.

I also certify that pursuant to Fed. R. App. P.25(d)(2), I caused to be filed, First Class, Certified Mail, with the Clerk of the Court at San Francisco, California**, Intervenor-Appellee's Supplemental Excerpts of Record (4 copies)** addressed as follows:

Molly Dwyer
Office of the Clerk
United States Court of Appeals, Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

I further certify that I caused to be mailed a copy of**, Intervenor-Appellee's Supplemental Excerpts of Record** by First Class, Certified Mail, postage prepaid, to the following counsel of record:

Andrew Orahoske
Andrew John Orahoske
259 East 5th Ave, Suite 200-G
Eugene, OR 97401

Michael Thomas Gray
DOJ - U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
P.O. Box 23795, L'Enfant Plaza Station
Washington, DC 20026-3795

Sean Malone
624 W. 24th Ave.
Eugene, OR 97405

Dated: September 13, 2010.

/s/Beth S. Ginsberg
Beth S. Ginsberg