IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-70718

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

Petitioners' Opening Brief

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JURISDICTION

The petition for review challenges the Environmental Assessment ("EA") and the Finding of No Significant Impact ("FONSI") for the Hillsboro Airport Parallel Runway Project (the "Project"), as issued by the Federal Aviation Administration ("FAA") on January 8, 2010. The FONSI constitutes an order of the FAA Administrator which is subject to review by the Court of Appeals in accordance with the provisions of 49 U.S.C. § 46110. For purposes of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* and the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, the FONSI constitutes final agency action. The petition for review was filed within the 60 days following issuance of the FONSI, as required by 49 U.S.C. § 46110(a).

STATEMENT OF THE ISSUES

1. Is it reasonably foreseeable that increasing the capacity of the State of Oregon's busiest airport by almost 100% will result in increased aircraft operations?
    a. If so, did the FAA take a hard look at the reasonably foreseeable indirect effects of an increase in aircraft operations as a result of the significant increase in capacity?
    b. Does the case law require that the FAA take a hard look at the indirect effects of a significant increase in the capacity of an airport?

2. Was the FAA required to prepare an EIS when increasing the capacity of Oregon's busiest airport by almost 100%?
    a. Are the indirect effects of increasing Oregon's busiest airport by almost 100% significant?
    b. Does the Project present uncertain or unknown risks that must be assessed in an EIS?
    c. Have Petitioners raised serious questions about the health and safety impacts of the Project on the public?
    d. If an EIS is not required, would this Project set a precedent for future projects with significant environmental effects?
3. Did the FAA take a hard look at the cumulative effects of the Project, including local zoning changes and the potential for a new control tower?
4. Did the FAA prepare environmentally distinguishable action alternatives so that it considered a reasonable range of alternatives?

Did the FAA hold an appropriate public hearing with a hearing officer to facilitate a dynamic process between the decision-maker and the public?

STATEMENT OF THE CASE

Simply put, this case is about the FAA's failure to take a hard look at the environmental effects of significantly increasing the capacity of the Hillsboro Airport by constructing a third runway, a taxiway, and four taxiway exits. These

capacity-enhancing developments will almost double the capacity of Oregon's busiest airport. Despite the dramatic increase in the capacity at the Hillsboro Airport, the FAA maintains that there will be no increase in aircraft operations or an increase in the environmental impacts associated with the aircraft operations. Under this Court's case law and these facts, the FAA must take a hard look at the reasonably foreseeable indirect effects of operating the Hillsboro Airport with the significantly increased capacity. Petitioners contend that it is reasonably foreseeable that the busiest airport in Oregon will begin to fill the newly-created capacity, and may entirely fill the capacity. The agency must take a hard look at the environmental effects of the newly-created capacity. Because this project would significantly affect the quality of the human environment, the FAA further erred by not preparing an Environmental Impact Statement ("EIS"). The FAA also failed to take a hard look at the cumulative impacts of the project, and failed to prepare a reasonable range of alternatives because the two action alternatives are environmentally indistinguishable. Finally, the FAA failed to hold an appropriate public hearing as required by statute. The FAA's shortcomings and general avoidance of the most significant environmental effect of the Project can lead to only one conclusion – that the Administrative Record ("the Record") fails to provide a "rational connection between the facts found and the choice made" by

the FAA in approving the project. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 53 (1983).

STATEMENT OF FACTS

The Hillsboro Airport is the busiest airport in Oregon. ER-1. The Hillsboro Airport is a general aviation airport, and it is the primary reliever airport for the Portland International Airport, which is a commercial airport. ER-1. At the time the FONSI issued, the Hillsboro Airport and its adjacent communities were subject to over six thousand more flights than Portland International Airport. ER-7. In 2008, the Hillsboro Airport logged 259,263 airport operations, and the Portland International Airport logged 252,572 airport operations. ER-7. "Aircraft activity represents the largest source of all criteria pollutants." ER-39.

Unlike commercial airports where flights are either departures or arrivals, the Hillsboro Airport is a general aviation airport that is subject to the continual presence of air traffic. ER-14. Hillsboro Airport is heavily utilized for pilot training, which requires that helicopters and fixed-wing aircraft often engage in low-flying exercises, hovering, and continual circling of homes and neighborhoods over the course of a single flight operation. ER-20 ("[l]ocal operations (consisting largely of training activity) currently represent about 68 percent of total operations at [the Hillsboro Airport]"). Flight training also includes a practice of continually landing and taking off, referred to as "touch and go." ER-16. The extraordinary

amount of training is a result of the ever-growing Hillsboro Aviation, which operates out of the Hillsboro Airport.

For the Project, the FAA prepared a Draft EA for the Port of Portland, and then supplemented it with a brief Final EA. The Port of Portland is the sponsor for the Project. ER-14. The Project consists of three components. First, construction of runway 12L/30R (the "Runway"), which would be 3,600 feet long and 60 feet wide. ER-18. A runway is the most effective capacity-enhancing project that an airport can implement. ER-53 (first bullet point) (the "[Hillsboro Airport] is working toward developing a parallel runway, the most effective capacity-enhancing feature an airfield can provide"); *see also* ER-45 ("adding a parallel runway … increases airfield capacity by 146,000 annual operations"). The Project also includes the construction of a taxiway, four taxiway exits, the relocation of the existing Charlie Helipad, and associated infrastructural components. ER-18. Taxiways and Taxiway exits have the potential to modestly increase the capacity of an airport. *See* ER-46-47 ("adding exit taxiways and improving radar coverage would improve airfield capacity by as many as 10,000 annual operations"). The effect of constructing the proposed runway, taxiways, and taxiway exits is to significantly increase the capacity or Annual Service Volume ("ASV") of the Hillsboro Airport. The Respondents describe ASV and its relation to the Hillsboro Airport as follows:

> The 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. Using the methodology defined in FAA AC 5060-5, the annual service volume at [the Hillsboro Airport] could range from 180,000 to 230,000 operations for the existing airfield layout [i.e. two runways], and 260,000 to 355,000 operations for future conditions with approved development [i.e. three runways], such as the high-speed exits on the existing Runway 12/30 and the proposed project (including the parallel runway and relocated Charlie pad), depending upon a number of conditions.

ER-37. Therefore, the increase in capacity is at the most 175,000 aircraft operations per year or a 97% increase in operations[1]. In other words:

> without the proposed runway project, HIO would operate at 117 percent of capacity in 2012 and 123 percent of capacity in 2015. With the proposed project, the demand-capacity would be reduced to 65 percent and 69 percent in 2012 and 2015, respectively.

ER-38. It is undisputed that the project will result in a significant increase in capacity at the Hillsboro Airport.

The alleged purpose of the proposed action "is to reduce congestion and delay at [the Hillsboro Airport] in accordance with planning guidelines established by the FAA." ER-19. The action is allegedly

> needed because the [Hillsboro Airport] is currently operating at close to 100 percent of ASV and current Airport activity levels exceed FAA capacity planning criteria. Forecast activity levels will substantially exceed the ASV of the current airfield in the future with corresponding levels of congestion and delay as demand increases.

ER-19.

[1] 355,000 – 180,000 = 175,000. 175,000 / 180,000 = 97% increase in capacity.

The FAA issued the FONSI for the Project on January 8, 2010. On March 9, 2010, amended on March 19, 2010, Michelle Barnes, Patrick Conry, and Blaine Ackley (collectively, "Petitioners") filed a petition for review before the United States Court of Appeals for the Ninth Circuit of the FAA's decision to issue a FONSI for the Project.

STANDARD OF REVIEW

In reviewing compliance with NEPA, courts apply the arbitrary and capricious standard found in the APA, 5 U.S.C. § 706(2)(A). *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 375-76 (1989). An agency decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. Co.,* 463 U.S. at 43. The Court's determination in a challenge to an administrative action must be made on the basis of the Record before the agency at the time its decision to approve the action was made. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971) ("review is to be based on the full administrative record that was before the Secretary at the time he made his decision….").

SUMMARY OF ARGUMENT

First, the agency failed to take a hard look at the reasonably foreseeable impacts of the Project. The Project will increase the capacity of the busiest airport in Oregon by almost 100%. It is reasonably foreseeable that additional aircraft will begin to utilize the increased capacity created by this Project and eventually fill that capacity. The case law demonstrates that the indirect effects of an increase in capacity at an airport must be considered under NEPA. The FAA has entirely failed to account for this significant environmental effect.

Second, the Project must be assessed in an EIS because it will result in significant effects. The indirect effect of increasing Oregon's busiest airport by almost 100% is significant. The context and intensity of the Project are significant. Specifically, the indirect effects of the project's significant increase in capacity are significant; the Project presents uncertain and unknown risks; Petitioners have raised serious questions about the health and safety impacts of the Project; and the Project may establish precedent for future significant actions.

Third, the FAA failed to take a hard look at the cumulative effects of the project because it failed to disclose or analyze the effects of two projects. One project includes zoning changes that allow the Hillsboro Airport to subject surrounding landowners to pollution and restrictions; and the other is the potential project to construct a new aircraft tower in the future.

Fourth, the FAA failed to provide a reasonable range of alternatives because the two action alternatives are environmentally indistinguishable. At no point throughout the EA does the FAA present any distinguishable environmental characteristics between the two alternatives. The FAA failed to provide for a reasoned choice among alternatives.

Fifth, the agency failed to provide for the statutorily mandated public hearing. A public hearing must have a hearing officer and permit the public to exchange ideas regarding the project. Here, the Petitioners were not allowed to address the public at the hearing. The public was only permitted to speak to a stenographer, and no designated hearing officer was present. The agency's alleged hearing stifled public participation and communication.

ARGUMENT

I. The FAA violated NEPA because the EA is legally deficient.

NEPA is our country's "basic national charter for protection of the environment," establishing an environmental policy, setting goals, providing an interdisciplinary framework for environmental planning by Federal agencies, and containing action-forcing procedures to ensure that the Federal agency decision-makers take environmental factors into account. 40 C.F.R. § 1500.1(a). "NEPA has twin aims: First, it places upon the agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it

ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, *Inc.,* 462 U.S. 87, 97 (1983) (citations omitted). Compliance with NEPA is required "to the fullest extent possible," 42 U.S.C. § 4332(2)(C), a command which the Supreme Court has admonished as "neither accidental nor hyperbolic." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976).

a. The FAA failed to analyze the reasonably foreseeable indirect effects of significantly increasing the capacity of the Hillsboro Airport.

To comply with NEPA, the FAA must consider the direct and indirect effects of the proposed action. Direct effects "are caused by the action and occur at the same time and place as the proposed project." 40 C.F.R. § 1508.8(a). Here, the direct effects of the Project are primarily the actual construction of the runway, taxiway, and taxiway exits. Indirect effects, on the other hand,

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

Id. at § 1508.8(b). Here, the indirect effects of the Project include the operation of additional aircraft at the airport as a result of the increased capacity from the new runway, taxiway, and taxiway exits.

The case law on transportation projects at airports within the Ninth Circuit and other circuit courts demonstrates that a project's reasonably foreseeable indirect effects must be analyzed when the airport's capacity is increased. This holds especially true when constructing a new runway because runways are the primary factor in increasing the capacity of an airport. Here, the FAA failed to analyze the indirect effects of constructing a new runway.

To foster informed public participation, a NEPA analysis must contain a "reasonably thorough" discussion that addresses important issues "up front." *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.,* 586 F.3d 735,750 (9th Cir. 2009). Accordingly, an agency's decision is clearly arbitrary and capricious and must be set aside when the agency has "entirely failed to consider an important aspect of the problem …." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. In other words, if an agency has completely failed to analyze a particular environmental issue, it is entitled to no deference, and its decision must be set aside. *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt*, 531 F.3d 1114, 1142 (9th Cir. 2008). As this Court stated in *Oregon Natural Desert Ass'n*:

> When reviewing questions of methodology and planning strategy, we would certainly accord the [agency] great deference, recognizing that NEPA's requisite "hard look" does not require adherence to a particular analytic protocol. [ ] But no question of methodology is before us. Here, the [agency] used no method to analyze or plan for the management of such values. We cannot defer to a void.

531 F.3d at 1142 (internal citations and quotation marks omitted). Similarly, this Court cannot defer to the FAA's complete failure to assess or take a hard look at the reasonably foreseeable indirect effects of significantly increasing the capacity of the Hillsboro Airport.

Specifically, "[t]he responsible FAA official must clearly identify potential environmental impacts of the proposed action and its alternatives *may* cause." FAA Order 5050.4B, 500b (addendum at 5) (emphasis added). The FAA must ensure that the NEPA process is

> most effectively used as an umbrella or vehicle for giving appropriate consideration to specific environmental concerns by
>
> * * * *
>
> (3) Rigorously analyzing the reasonably foreseeable direct, indirect, and cumulative environmental impacts of the proposed action and alternatives.

FAA Order 1050.1E, CHG 1, 200d(3) (addendum at 13-14).

Here, the Hillsboro Airport is the busiest airport in the state of Oregon, and its capacity will be increased almost twofold. ER-37. Despite this dramatic increase in capacity, the FAA maintains that aircraft operations would not increase[2], that demand for energy would decrease[3], and that air emissions would

[2] ER-5: ("Implementation of either Alternative 2 or Alternative 3 would decrease demand for energy decreasing congestion and delay at the airport and would not lead to increased activity at HIO compared to the No Action Alternative.")
[3] ER-5 ("would not lead to increased activity at HIO compared to the No Action Alternative").

decrease[4]. Under these facts, the failure to take a hard look at the effect of increasing the capacity of the Hillsboro Airport by almost 100% fails to consider a large part of the Project.

i. The indirect effects of constructing a third runway at the busiest airport in Oregon are reasonably foreseeable.

An indirect 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." *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). The agency, however, "need not consider potential effects that are highly speculative or indefinite." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998) ("the remote environmental effects on [a] historic private Clubhouse that might result from the economic impact of competition from the new public clubhouses" deemed not reasonably foreseeable). "Agencies must evaluate all reasonably foreseeable project impacts regardless of whether they are intentional." *Utahns for Better Transp. V. Dep't of Transp.,* 305 F.3d 1152, 1175 (10th Cir. 2002), *modified by* 319 F.3d 1207 (10th Cir. 2003); *see also* 40 C.F.R. §§ 1502.16(b), 1508.8(b). According to this Court, "[w]hile 'foreseeing the unforeseeable' is not required, an agency must use its best efforts to find out all that it reasonably can." *City of Davis v. Coleman,* 521 F.2d 661, 676 (1975). As

[4] ER-4: ("Once constructed, the project alternatives would reduce airfield congestion and aircraft delay compared to the No Action Alternative, resulting in long-term, ongoing emissions reduction.").

noted by the Court in *Scientists' Institute for Public for Information v. A.E.C.,* 481 F.2d 1079, 1092 (D.C. Cir. 1973):

> It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'

See also Mid-States Coalition Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003) (agency's NEPA document was legally deficient because project that approved construction of a railway to access coal mines failed to consider the reasonably foreseeable effects of air pollution from eventually burning the coal); *see also Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983) (river channelization project failed to account for the reasonably foreseeable increase in cargo traffic that the channelization would cause later in time). Here, the FAA attempts to shirk its responsibility to assess the indirect environmental effects associated with a dramatic increase in capacity at the Hillsboro Airport.

ii. The FAA failed to take a hard look at the reasonably foreseeable indirect effects of constructing a new runway.

The FAA failed to take a hard look at the reasonably foreseeable indirect effects of constructing a new runway, a taxiway, and four taxiway exits. Simply put, the FAA fails to account for the fact that an airport with three runways will necessarily allow a greater number of aircraft operations than an airport with two

runways. ER-5 (the construction of the third runway "would not lead to increased activity at HIO compared to the No Action Alterative"). This categorical denial is insufficient under NEPA and this court need not defer to the FAA's "clear error of judgment," *Oregon Natural Res. Council*, 490 U.S. at 378, nor need this court "defer to a void," *Oregon Natural Desert Ass'n*, 531 F.3d at 1142.

The FAA does not contest that the Project will result in a significant increase in capacity. ER-19 (the addition of the runway, taxiway, and taxiway exits are "capacity enhancement,"); ER-38 (the Hillsboro airport would be operating at 146% capacity in 2025 with two runways, and it would be operating at 81% capacity in 2025 with three runways); ER-53 (first bullet point) (the "[Hillsboro Airport] is working toward developing a parallel runway, the most effective capacity-enhancing feature an airfield can provide"). Despite these admissions, the FAA categorically denies that any increase in aircraft operations or the environmental effects associated with aircraft operations would result from increasing the capacity of the busiest airport in Oregon by almost 100%. The FAA attempts to obviate its responsibility to assess the indirect effects by repeatedly stating that the environmental impacts of the Project will be less than under the No Action Alternative:

> Implementation of either Alternative 2 or Alternative 3 would decrease demand for energy decreasing congestion and delay at the airport and would not lead to increased activity at [the Hillsboro Airport] compared to the No Action Alternative. ER-5.

> …
> Total aircraft operations would be the same as under the No Action Alternative. ER-22.
> …
> Alternative 2 would not lead to increased aviation activity compared to the No action Alternative. ER-26.

Even the FAA's own regional counsel felt that this type of analysis missed the mark. ER-62 (comment 1) ("the dismissal of the no action impacts by stating throughout the document that impacts are less under the no action than the 2 alternatives misses the point of the analysis"). The FAA extends their tortured logic to the air pollutants and other environmental impacts[5] that are caused by an increase in capacity and an increase in aircraft operations. For example, the FAA states that

> Construction of either Alternative 2 or Alternative 3 would temporarily increase air emissions due to construction of the proposed runway, taxiways, and the Charlie Helipad. These construction emissions would not be significant. Once constructed, the project alternatives would reduce airfield congestion and aircraft delay compared to the No Action Alternative, resulting in long-term, ongoing emissions reduction. The project alternatives would not cause significant air quality impacts. The project emissions are de-minimis. ER-4.
> …
> Because aircraft operations would not increase as a result of the proposed project, the quantity of pollutants directly associated with aircraft operations such as jet fuel and hydraulic oil would not be altered over the baseline conditions. ER-28.

[5] An increase in aircraft operations will also result in other environmental impacts, including an increase in air pollution emissions from the combustion of fuel, an increase in greenhouse gas emissions, an increase in energy demand caused by an increase in aircraft operations, an increased frequency of noise impacts, an increase in growth-inducing effects, and other indirect effects.

> …
> The analysis documented in Section 5.7 shows that the operation of either Alternative 2 or Alternative 3 would reduce air pollutant emissions compared to Alternative 1, No Action. The operation of either project alternative would decrease the concentration of air pollutants in the [Hillsboro Airport] environs and would therefore improve air quality in the Airport area and would not result in a cumulative adverse air quality impact. ER-35.
> …
> As noted in Section 5.7, either Alternative 2 or Alternative 3 would temporarily increase emissions during construction. ER-36.

The FAA simply ignores its obligations to analyze indirect effects under NEPA based on the notion that the Project will categorically preclude increased aviation activity. Apparently the only increase in emissions the Port is willing to concede is during construction. At no point in the EA does the agency consider the possibility, let alone the likelihood, that aircraft aviation will increase at Oregon's busiest airport when its capacity is roughly doubled "and it is just getting busier". ER-52.

At three points in the record, however, Petitioners located several admissions where the FAA raised the issue of whether the project would result in increased aircraft activity and whether impacts would be significant. These concessions can be found in an email communication, a preliminary EA, and an attachment to an email. First, an FAA official asked whether the FAA "need[s] to assume/consider a worst case scenario for maximum use of the 3rd runway." ER-50. The issue is left unanswered. This, however, is not a worst case scenario, but

rather a reasonably foreseeable indirect effect of the project, and NEPA requires that it be considered.

Second, a preliminary draft of the EA contained a statement conceding that the additional runway may result in increased aviation activity: "it is possible that construction of the third runway would remove a constraint to growth in aircraft activity." ER-51. This demonstrates that it is reasonably foreseeable for increased capacity to lead to increased aviation activity. This concession, however, did not make it into the draft or final EA.

Third, in an attachment to an email regarding the third runway forecast, it states that

> despite all of the above [i.e. constructing the third runway, taxiway, and taxiway exits], by 2015, operational demand will again exceed 60% of annual service volume (ASV), the threshold at which planning should be underway for additional capacity-enhancing improvements; and within 20 years, it will again exceed 80% of ASV, when additional improvements should ideally be in place.

ER-53 (last bullet point). This third point cannot be overstated because it reveals that the FAA is aware that the newly-created capacity will begin to be filled immediately, and it is reasonably foreseeable that new capacity-enhancing features will be needed even after the third runway is constructed because the capacity will likely be filled. Despite these admissions, the agency denies in its EA that there will be an increase in aircraft activity.

The agency also posits, in its EA, that the need of this project is based upon "existing activity levels, not forecast activity levels." ER-15. NEPA, however, requires an analysis of reasonably foreseeable indirect effects, and there is no basis in case law to permit an alleged need of a project to preclude environmental analysis of reasonably foreseeable environmental impacts.

If the FAA is not required to account for these effects with the addition of a new runway, then it is unclear when, if ever, the FAA would have to account for the increase in aircraft activity at the airport. Under every other circumstance that the case law addresses, the FAA has avoided this responsibility under NEPA based upon the argument that the capacity would not increase in the same fashion as if the addition was a new runway. Here, the addition is a new runway as well as a new taxiway and taxiway exits. The issue for this court, therefore, is whether it is reasonably foreseeable that almost doubling the capacity of the busiest airport in the State of Oregon will result in increased aircraft operations.

iii. The case law requires that the FAA take a hard look at the indirect effects of constructing a runway.

The case law demonstrates, and the FAA concedes, that the addition of a new runway at an airport is the primary factor in increasing the capacity of an airport. Other infrastructural additions can increase the capacity at an airport, including taxiways and taxiway exits, but these additions are not primary factors in increasing the capacity of an airport. The case law repeatedly distinguishes

between the significance of constructing a new (or additional) runway, which is the most capacity-enhancing project an airport can implement; and the remainder of airport projects that are not significant because they do not increase (or at the very least, modestly) increase the capacity of an airport. These include (1) the relocation and extension of a runway, (2) the construction of a new terminal, (3) the change in flight patterns or approaches, (4) moving or repairing an existing runway, and (5) adding a taxiway. Interestingly enough, most of the aforementioned projects that do not increase the capacity at an airport are accompanied by an EIS. Here, we have a significant increase in capacity accompanied only by an EA. Because of the increase in capacity as a result of the new runway, the FAA must consider the indirect effects of increasing overall airport activity, such as increased aircraft operations and the pollution and noise associated with aircraft operations.

1. Relocating and extending a runway does not increase the capacity of an airport.

The case law demonstrates that relocating and extending a runway does not increase the capacity of an airport. In *City of Olmstead Falls v. FAA*, 292 F.3d 261 (D.C. Cir. 2002), the federal action included the relocation of an existing runway and the extension of a parallel runway among other minor projects. In carrying out their NEPA obligations, the FAA prepared an EIS for the project. The petitioners in that case argued that the FAA failed to account for induced-demand as a result

of the improvements – none of which were the addition of a new runway. The court determined that "the improvements are to move an *existing* runway, *not the addition of a runway*, and thus in the FAA's judgment they will not induce demand." *Id*. at 272 (emphasis added). The Hillsboro Airport Runway Project, on the other hand, entails the *addition* of a runway, a taxiway, and four taxiway exits. Therefore, the FAA is required to assess the indirect effect of increasing the capacity of the Hillsboro Airport by adding a runway, a taxiway, and taxiway exits.

2. Constructing a new terminal does not increase the capacity of an airport.

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

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

Id. at 808. In a footnote, the court noted that "*[r]unway capacity is important*, the agency concedes, but not affected by this project." *Id*. at 808, n.3 (emphasis added). Unlike the case here, the project in *City of Los Angeles* would not result in an increase in capacity because no additional runways, taxiways, or taxiway exits were being constructed.

The petitioners in *City of Los Angeles* relied on several cases but as the court noted, those cases "are not on point" because those cases "all added runways or taxiways, among other improvements." *Id*. at 808. The agency further argued that "it can't accurately predict how big this effect might be [i.e. the effect of constructing a new terminal], except that it will be modest at most." *Id*. In response, the court noted that "[w]e don't require an agency to quantify all possible effects, particularly not those that are likely to be minor." *Id*. Here, the construction of a third runway, taxiway, and taxiway exits will increase the capacity of the airport by almost one-hundred percent, from at least 180,000 aircraft operations to at most 355,000 aircraft operations. This is neither a modest nor minor increase; rather, it is a significant increase. Therefore, the FAA has not satisfied its NEPA obligations by failing to analyze the reasonably foreseeable increase in capacity at Hillsboro Airport.

3. Redesigning flight patterns does not increase the capacity of an airport.

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

> mistaken impression that the increase in capacity referred to in the Draft Environmental Impact Assessment means an increase in the number of aircraft operating to and from Sea-Tac. That is not the case. The proposed procedures are designed, among other things, to expand the FAA's use of existing airspace to more efficiently meet existing air traffic demand at Sea-Tac. The effect of the proposed procedures would be to increase the arrival rate of aircraft that are currently utilizing Sea-Tac, but not reaching the Airport as quickly as they could given the restrictions on the FAA's use of airspace under the current procedures. The proposed changes to arrival and departure procedures would simply accommodate the existing demand for landing and departing Sea-Tac more efficiently, thereby reducing delays. *The proposed procedures do not enhance the ground capacity of Sea-Tac.*

> *There is no need to do so since there is existing ground capacity that is not fully used.*

Id. at 836 (emphasis added). The court in *Seattle Community* found justification in the FAA's failure to consider the indirect effects of the increase in air traffic because there was no construction to "*enhance the ground capacity of [the airport]*." *Id*. (emphasis added). An additional justification was found in the fact that "there is existing ground capacity that is not fully used." *Id*. The court determined that

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

Id. Here, the project will significantly increase ground capacity of the Hillsboro Airport by almost 100% by constructing a runway, a taxiway, and taxiway exits. Furthermore, as is shown below, the FAA concedes that the airport has reached capacity. Therefore, the facts of this case are distinguishable from *Seattle Community.*

A. At the time the FONSI issued, the Hillsboro Airport operated above capacity.

According to the FAA and the Port of Portland, the Hillsboro Airport is operating above capacity. This issue highlights the vague and often contradictory figures in the EA, the FONSI, and the Airport Master Plan for the Project. For example, the EA states that the Hillsboro Airport "is currently operating at close to

100 percent of [ASV]," ER-2. The slideshow presented by the Respondents at the open house[6] for the Project stated the following: "[a]irfield currently at 100% ASV and will substantially exceed ASV in the near future."

The Master Plan, however, presents contradictory information, particularly that "[t]he 2003 total of 180,147 fixed wing and itinerant helicopter operations represents 107% of the annual service volume," ER-43, and the "airport is exceeding its estimated annual capacity by seven percent." ER-45; s*ee also* ER-48 ("Hillsboro Airport currently operates above its annual service volume").

Further contradictory evidence can be found throughout the record. An email from an FAA official bluntly states that the Hillsboro Airport was "already overcapacity back in 2005 and it is just getting busier". ER-52. Airport activity only increased after 2005. In 2007, the Hillsboro Airport experienced 236,885 aircraft operations, and in 2008, the number of aircraft operations jumped to 259, 263, an increase of over 23,000 aircraft operations. ER-7. Further confounding this issue, the EA states that in 2007 the ASV of the Hillsboro Airport was 169,000 and the annual runway operations consisted of 166,033 (i.e. 98% capacity), ER-17; and in 2010, it was projected that the ASV would be 176,000 and the annual runway operations would be 196,600 (i.e. 112% capacity), ER-17.

[6] Though the Respondents presented an open house, the Respondents were required to hold a public hearing pursuant to 49 U.S.C. § 47106(c)(1)(A)(i). *See infra*.

The Master Plan's analysis of delay also indicates that the Hillsboro Airport is operating above capacity. It states:

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

ER-45. The EA states that for 2007, the average delay was 1.2 minutes. ER-19; ER-17. Given the increase of over 22,000 aircraft operations from 2007 to 2008,[7] the average delay would be well-above 1.2 minutes. Thus, the airport is operating far in excess of 100% capacity. In addition, if the airport was operating at 107% capacity in 2003, then the increase to 259,263 airport operations puts the operating capacity far in excess of 107%. Though the Record contains contradictory evidence, the overwhelming weight of the evidence demonstrates that the airport is operating above capacity and has been for many years.

4. Adopting new flight procedures does not increase the capacity of an airport.

In *County of Rockland v. FAA*, 335 Fed. Appx. 52 (D.C. Cir. 2009), the petitioners challenged the indirect effects of reallocating management of sectors for airspace and adopting new flight procedures in the EIS prepared by the FAA.

[7] 2007 resulted in 236,885 aircraft operations, and 2008 resulted in 259,263 aircraft operations. ER-7. This amounts to an increase of 22,378 aircraft operations from 2007 to 2008.

Consistent with the aforementioned cases, the court noted that "[i]n the FAA's experience . . . airspace redesign, which increases throughput but not airport capacity, does not induce significant enough additional demand to warrant modeling." *Id*. at 54. At issue, here, however, is the construction of a new runway among other improvements, not "airspace redesign," and, therefore, the FAA must take a hard look at the indirect effects caused by the significant increase in capacity.

5. Constructing only a new taxiway does not significantly increase the capacity of an airport.

Under a similar purpose and need to reduce delay, in *Town of Winthrop v. FAA,* 535 F.3d 1, 7 (1st Cir. 2008), the FAA proposed to construct a taxiway, which would reduce delay. The FAA argued, as they do here, that there was

> a relationship between delays and adverse environmental effects. Delays cause airplanes to idle needlessly on taxiways, increasing harmful emissions. The preferred alternative would reduce emission and improve ambient air quality, as compared to the no action alternative.

Id. It was argued that the addition of the taxiway would "increase flight activity, thus increasing air pollution." *Id.* The FAA "respond[ed] that *airport capacity is primarily a factor of runway capacity,* not taxiway capacity."[8] *Id.* Unlike the case here, where Respondents concede an increase in capacity, the Respondents in

[8] Here, the record does indicate that there can be a modest increase in capacity with the addition of a taxiway exit: [8] "[A]dding exit taxiways and improving radar coverage would improve airfield capacity by as many as 10,000 annual operations." ER-46-47.

Winthrop maintained that the taxiway would not "independently affect the total number of aircraft operations at Logan." *Id*. Here, the opposite is true. As a result of the addition of a new runway, the Hillsboro Airport's capacity would almost double.

Again, the figures in the record are contradictory. The Port of Portland's Master Plan for the Hillsboro Airport states that "[t]axiways have a significant impact on airfield capacity since the number and location of exits directly determines the occupancy time of an aircraft on the runway." ER-42. It goes on to state that

> [w]hile adding radar coverage and taxiways can increase airfield capacity, neither improvement alone (or combined) can significantly increase an airport's ASV. The goal of airfield capacity improvements is to increase ASV to a point where annual operations represent between 60 and 80 percent of the ASV. *This level of improvement at HIO can only be achieved with the development of a runway parallel to Runway 12-30.*

ER-44 (emphasis added). Regardless of these contradictory figures, there is no dispute that the construction of an additional runway significantly increases the capacity of an airport, especially when combined with a new taxiway and four taxiway exits. The result of these additions is to increase the capacity of the airport by as much as 97%, but the FAA failed to account for the reasonably foreseeable indirect effects of this dramatic increase in capacity.

b. The Project will have significant environmental impacts that must be assessed in an EIS.

The FAA violated the NEPA because it failed to prepare an EIS for a project that will result in significant impacts to the human environment. NEPA mandates that an EIS be prepared for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). An EA is a "concise public document," 40 C.F.R. § 1508.9(a), the purpose of which is to "'briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.'" *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998). "A determination that significant effects on the human environment will in fact occur *is not essential*." *Foundation for N. Am. Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982) (emphasis added); *see also City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975). "If substantial questions are raised whether a project *may* have a significant effect upon the human environment, an EIS must be prepared." *Wild Sheep*, 681 F.2d at 1178 (emphasis added); *see also Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th cir. 2001). If there are no potential significant impacts, then the agency must issue a FONSI, 40 C.F.R. §§ 1501.4(e) and 1508.9, accompanied by a "convincing statement of reasons to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 1212 (1998); *Wild Sheep,* 681 F.2d at 1178 n.29 (explaining that the court must "assess whether the EA . . . is sufficient to establish the reasonableness

of [the agency's] decision"); *see also Sierra Club v. Watkins*, 808 F. Supp. 852, 871 (D.D.C. 1991) ("Were an EA simply a statement that an agency can take an action without filing an EIS, EA's would not fulfill the mandate of NEPA nor provide the decisionmaker or the public with information about the choice"). In an EA, the agency must take a "hard look" at the project and its impacts, "as opposed to bald conclusions, unaided by preliminary investigation," and must "identify the relevant areas of environmental concern." *Maryland-Nat'l Capital Park and Planning Comm'n v. U. S. Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

i. The indirect effects of the project are significant.

The indirect effects of the Project are significant because the Project will significantly increase the capacity of the airport, significantly increase the number of aircraft operations, and significantly increase the environmental impacts of aircraft operations. Petitioners contend that increasing the capacity of the busiest airport in Oregon by almost 100% will result in significant impacts, or at the very least, that Petitioners have raised "substantial questions … as to whether [the] project … may cause significant degradation of some human environmental factor." *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1149 (1998); *see also Blue Mountains,* 161 F.3d at 1212. Here, the FAA's primary failing is that it categorically denies that any increase in aircraft will result with the addition of a new runway. Petitioners contend that this is the most fundamental and significant

factor in this case, and that the FAA did not take a hard look at the indirect effects of the project. The "omission of any meaningful consideration of such fundamental factors precludes the type of informed decision-making mandated by NEPA." *Wild Sheep*, 681 F.2d at 1178.

In *Wild Sheep*, this Court held that the government, in an EA, "failed to take the requisite 'hard look' at the environmental consequences of its action," noting that the EA "failed to address certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS." 681 F.2d at 1178-1179. The omitted factors in *Wild Sheep* included increased traffic and impacts on bighorn sheep and that "significant questions raised by respondents to the initial draft of the EA were similarly ignored or, at best, shunted aside with mere conclusory statements." *Id*. at 1179-80. Because of these omissions, the Ninth Circuit rejected the EA, *see also Save the Yaak Committee v. Block*, 840 F.2d 714, 719 (9th Cir. 1988) (holding EA inadequate for lack of wildlife discussion), holding that the federal action "may significantly degrade some human environmental factor." *Wild Sheep*, 681 F.2d at 1180 quoting *Columbia Basin Land Protection Ass'n v. Schlesinger,* 643 F.2d 585, 597 (9th Cir. 1981). The court determined that the Service's "conclusion to the contrary was unreasonable." *Wild Sheep*, 681 F.2d at 1180.

Here, the FAA failed to take a hard look at the indirect effect of significantly increasing the capacity of the Hillsboro Airport by constructing a runway, a taxiway, and taxiway exits. *See* ER-45 ("adding a parallel runway … increases airfield capacity by 146,000 annual operations and the ratio of operations to ASV between 57 and 81 percent"). It is not only Petitioners that contend that there is potential for significant impacts. While reviewing the preparation of the EA, the FAA regional counsel noted that the project appears to have significant impacts: "[i]t sounds like there is real potential for a significant impact." ER 67 (comment 32). The Evidence in the record has already been presented *supra* as to the significant increase in capacity as a result of these additions, and will not be repeated here. There is no dispute that constructing a runway, as well as the other improvements, will significantly increase the capacity of the Hillsboro Airport.

Instead of addressing this issue head-on, the agency assumes that the capacity will not be filled based upon conclusory statements lacking an analytical foundation: "[t]otal aircraft operations would be the same as under the No Action Alternative," ER-22; "[a]lternative 2 would not lead to increased aviation activity compared to the No action Alternative, ER-26; and "[b]ecause aircraft operations would not increase as a result of the proposed project, the quantity of pollutants directly associated with aircraft operations such as jet fuel and hydraulic oil would not be altered over baseline conditions." ER-28. The FAA forecloses the

possibility, let alone the likelihood, that the busiest airport in Oregon that "keeps getting busier," ER-52, will fill the newly created capacity. *See also* ER-41 ("The growth in corporate operators comes at a time when fractional aircraft programs are experiencing significant growth"); ER-40 ("The increased security measures placed on commercial flights have increased interest in fractional and corporate aircraft ownership, as well as on-demand charter flights")[9]. "Yet the very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for such speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action." *Wild Sheep*, 681 F.2d at 1179. Because the FAA entirely failed to account for the indirect effects of the project, the significant indirect effects must be assessed in an EIS.

ii. The context and intensity of the Project requires that the FAA prepare an EIS.

Determining the significance of an action "requires considerations of both context and intensity." 40 C.F.R. § 1508.27. An analysis of a site-specific action requires that context be assessed in terms of the locale. 40 C.F.R. § 1508.27(a). The Council on Environmental Quality regulations, at 40 C.F.R. § 1508.27(b)(1)-

[9] "Fractional ownership programs sell 1/8 or greater shares in an aircraft at a fixed cost." ER-41.

(10), list criteria to evaluate intensity[10]. This Court concluded in *Public Citizen v. Dept. of Transp.*, that if an agency's action is "environmentally 'significant' according to *any* of these criteria," then the agency erred in failing to prepare an EIS. *Public Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004) (emphasis in original); *see also Nat'l Parks*, 241 F.3d at 731 (assessing two criteria under intensity and determining that "either of these factors may be sufficient to require preparation of an EIS in

[10] The intensity criteria include (1) "[i]mpacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial"; (2) "[t]he degree to which the proposed action affects public health or safety"; (3) "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas"; (4) "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"; (5) "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks"; (6) "[t]he degree to which the action may establish a precedent for future action with significant effects or represents a decision in principle about a future consideration"; (7) "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts"; (8) "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources"; (9) "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973"; and (10) "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. §§ 1508.27(b)(1)-(10).

appropriate circumstances"). Here, the context and the intensity of the Project demonstrate that it would result in significant environmental impacts.

1. The context of the Project is significant.

NEPA states that

> [t]he significance of an action must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

40 C.F.R. § 1508.27(a). The context of the Project is a general aviation airport that also happens to be the busiest airport in Oregon. The FAA was not even aware that the Hillsboro Airport was the busiest airport in the state of Oregon until Petitioner Barnes raised the issue in her comments: "In fact, the Hillsboro Airport has *more* operations than [Portland International Airport]." ER-11 (emphasis in original). Though the FAA, in its Final EA, conceded that Petitioner Barnes was correct, it still did not consider the significance of increasing the capacity of the busiest airport in Oregon by twofold because it did not consider the indirect effects of constructing the additional runway, the taxiway, and the taxiway exits.

Because this is a site-specific project, the FAA cannot discount or dilute its analysis of environmental impacts because they would be less when averaged out

across the nation or globe[11]. *See Ore. Natural Res. Council Fund. v. Brong*, 492 F.3d 1120, 1130 (2007) (holding unlawful an agency's "attempt to dilute the effects of its proposed activities by averaging … over such a wide area"); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1035-37 (9th cir. 2001) (holding that agency cannot try to minimize the environmental impact of an activity by simply adopting a scale of analysis so broad that it marginalizes the site-level impact of the activity on ecosystem health). Here, the agency failed to disclose the project's greenhouse gas emissions, and dismissed any relevant analysis because "aviation accounts for about 3 percent of total U.S. greenhouse gas emissions from human sources." ER-25. Though the FAA notes that there is a "direct link between fuel combustion and greenhouse gas emissions," ER-25, the FAA's analysis of greenhouse gases[12] consists of a small paragraph that averages out effects over the nation: "Hillsboro Airport, relative to aviation throughout the United States, represents less than 1 percent of U.S. aviation activity" and "greenhouse emissions associated with existing and future

[11] Justice Brandeis cautioned against the potential illogic in averages: "I abhor averages…. A man may have six meals one day and none the next, making an average of three meals per day, but that is not a good way to live." THE WORDS OF JUSTICE BRANDEIS 32 (Solomon Goldman ed., 1953).

[12] The FAA's analysis of greenhouse gases is practically word-for-word from a form that has been copied from a NEPA document for another project and pasted into the NEPA document for the present project with a few fill-in-the-blanks. ER-57-60; *see also* ER-56 ("this text should be used if GHGs need to be addressed in an environmental document"). This analysis is insufficient under NEPA, and it entirely fails to assess effects to the locale.

aviation activity at Hillsboro Airport would be expected to represent less than 0.03 percent of U.S.-based greenhouse gases." ER-27. The FAA entirely fails to assess the impacts of greenhouse gases as it relates to the locale, and instead averages out effects over the nation, thus diluting any potential significance. In addition, the FAA failed to take into account the effect on the local population of doubling the size of the busiest airport in Oregon.

2. The intensity of the project is significant.

The Project is environmentally significant according to several criteria under intensity. *See* 40 C.F.R. §§ 1508.27(b)(1)-(10). Specifically, the Project (1) will result in significant effects – whether they are perceived to be beneficial or adverse; (2) the Project will significantly affect the public health and safety; (3) the Project contains uncertain and unknown risks; (4); and the Project may establish precedent.

A. The Project will result in significant impacts, whether they are adverse or beneficial.

Petitioners contend that the effects of the project are significant, regardless of whether they are adverse or beneficial. 40 C.F.R. § 1508.27(b)(1). Petitioners will not revisit the argument set forth *supra* that it is reasonably foreseeable that a significant increase in capacity will lead to significant adverse environmental effects. From the Respondents' perspective, the Project is significantly beneficial

because the "FAA is responsible for the safe and efficient operation of the National Airspace System," ER-19, and the purpose and need of the project is to "reduce congestion and delay at [the Hillsboro Airport] in accordance with planning guidelines established by the FAA," ER-19. The Project is significant because it attempts to reduce congestion and delay by dramatically increasing the capacity of the airport from at least 180,000 aircraft operations with two runways to at most 355,000 aircraft operations with three runways. Though the FAA's purpose and need may be beneficial from the perspective of safely and efficiently operating airspace, it remains significant and must be assessed in an EIS.

B. Petitioners have raised substantial questions about the Project's effect on the public's health and safety.

Petitioners have raised substantial questions regarding the Project's impacts on the public's health and safety. 40 C.F.R. § 1508.27(b)(2). There is no dispute that the operation of aircraft decreases air quality from the emission of a variety of air pollutants (e.g. carbon monoxide, carbon dioxide, volatile organic compounds, nitrogen oxides, sulfur oxides, particulate matter, greenhouse gases, lead, and benzene among others) by combusting fuel. There is similarly no dispute that noise impacts result from aircraft operations and that air pollution and noise impacts adversely affect the human environment. The only issue, however, is whether the FAA must account for these environmental effects that will result from

the significant increase in capacity at the busiest airport in Oregon. Petitioners contend that the FAA must consider the reasonably foreseeable possibility that the newly-created capacity will be filled (or partially filled) and that more aircraft operations may result from an airport with three runways than an airport with only two runways. At the very least, Petitioners have raised "substantial questions" about whether the "project *may* cause significant [environmental] degradation," and, therefore, an EIS must be prepared. *Blue Mountains,* 161 F.3d at 1216.

Increasing the capacity of an airport inherently contains safety risks because it will inevitably lead to a greater number of aircraft operations. At the Hillsboro Airport, where flight training constitutes almost two-thirds of the aircraft operations, inexperienced pilots pose serious safety risks to the surrounding community where aircraft crashes have occurred. ER-20 ("[l]ocal operations (consisting largely of training activity) currently represent about 68 percent of total operations at [the Hillsboro Airport]"). As Petitioner Barnes noted in her comments: "[n]o community or homeowners should be subjected to inexperienced pilots flying relentlessly over their homes and neighborhoods."

In addition to the inherent safety issue associated with inexperienced flight students, a particular safety issue regarding the Hillsboro Airport's control tower has arisen. Although an FAA official maintained that "an EA has nothing to do with safety," ER-64, this criterion under NEPA suggests otherwise. Other FAA

officials were concerned about safety risks as a result of the fact that the "existing tower does not meet existing height requirements and … does not meet the new downward angle viewing requirements." ER-65 (second to last page); *see also* ER-66 ("the fact that the new [runway] is beyond the limits of the tower [line of sight] and should not be constructed"). The manager of the FAA's Seattle Airports District stated that she was "uncomfortable moving forward on an EA with a preferred alternative that creates a safety issue." ER-65. The issue is never resolved in the Record, and the safety issues associated with constructing a new runway without adequate line of sight from the control tower must be considered in an EIS.

C. The alleged uncertain and unknown risks of the Project must be assessed in an EIS.

The Project contains uncertain and unknown risks that must be assessed in an EIS. "An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain." *Nat'l Parks*, 241 F.3d at 731; *see also Blue Mountains*, 161 F.3d at 1213 ("significant environmental impact" mandating preparation of an EIS where "effects are 'highly uncertain or involve unique or unknown risks'"). Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, *Blue Mountains*, 161 F.3d at 1213-

14, or where the collection of such data may prevent "speculation on potential … effects." *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988).

In *Nat'l Parks,* this Court determined that the uncertainty and "absence of information about the practical effect of increased traffic on [Glacier] Bay and its inhabitants" required the preparation of an EIS. 241 F.3d at 732. There, the Parks Service proposed a

> park research and monitoring program to fill information needs, and understand the effects of vessel traffic on air quality, marine mammals [and] birds … to assist in the prediction, assessment, and management of potential effects on the human, marine, and coastal environments of Glacier Bay resulting from human use of the environment with particular emphasis on traffic.

Id at 733. This Court dismissed the Parks Service's reasoning because "[t]hat is precisely the information and understanding that is required *before* a decision that may have a significant adverse impact on the environment is made, and precisely why an EIS must be prepared in this case." *Id*. "The Parks Service proposes to increase the risk of harm to the environment and then perform its studies," and the court determined that "[t]his approach has the process exactly backwards" because "[b]efore one brings about the a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." *Id.* at 733.

A similar case is at hand with the FAA's lack of analysis for greenhouse gases. The agency acknowledges that an issue "[o]f growing concern is the impact

of proposed projects on climate change"; that "[r]esearch has shown that there is a direct link between fuel combustion and greenhouse gas emissions"; and that "[a]ccording to most international reviews, aviation emissions comprise a small but potentially important percentage of anthropogenic (human-made) greenhouse gases and other emissions that contribute to global warming." ER-25. Despite these acknowledgements, the FAA dedicates a paltry five lines of text in the EA to assess the Project's greenhouse gas effects. This is a result of the alleged uncertainty that the agency generally says surrounds greenhouse gases, which allegedly requires more analysis:

> The scientific community is developing areas of further study to enable them to more precisely estimate aviation's effects on the global atmosphere. The FAA is currently leading or participating in several efforts intended to clarify the role that commercial aviation plays in greenhouse gases and climate change. The most comprehensive and multi-year program geared towards quantifying climate change effects of aviation is the Aviation Climate Change Research Initiative (ACCRI) funded by FAA and NASA. ACCRI will reduce key scientific uncertainties in quantifying aviation-related climate impacts and provide timely scientific input to inform policy-making decisions.

ER-25.

First, it should be noted that the above quoted language was taken almost word-for-word from the Sitka Rocky Gutierrez Airport Draft EIS from 2008[13] - the

[13] It is revealing that though the Sitka Rocky Gutierrez Airport does not construct a runway, an EIS was nonetheless prepared. *See* http://www.sitkaeis.com/assets/Sitka_Airport_EIS_ROD_Signed_lowres.pdf. Here, a runway is being constructed and only an EA was prepared.

only variation occurring at fill-in-the-blanks. ER-57-60. This means that the FAA has not engaged in any greenhouse gas related assessment specifically for the Hillsboro Airport, which defeats the purpose of a site-specific NEPA analysis.

Second, the FAA has not updated its greenhouse gas analysis over the span of two years despite the seminal case on greenhouse gases in *Massachusetts v. Environmental Protection Agency ("EPA"),* 549 U.S. 497 (2007) (holding that the EPA has the statutory authority to regulate greenhouse gases from new motor vehicles under the Clean Air Act and noting the effects of greenhouse gases) and the EPA's subsequent endangerment finding on greenhouse gases. *Wildlife Sheep,* 681 F.2d at 1181. ("NEPA expresses a Congressional determination that procrastination on environmental concerns is no longer acceptable"). The FAA must present actual analysis for the Hillsboro Airport, not a form letter with fill-in-the-blanks.

Third, it is readily apparent that the FAA is proposing to do exactly what the Parks Service did in *Nat'l Parks*, which is to increase the risk of harm to the environment and then study it. As this Court noted, "this approach has the process exactly backwards." *Nat'l Parks*, 241 F.3d at 733. Therefore, delaying environmental analysis until after the environmental impact has occurred based on an alleged uncertainty is antithetical to the tenets of NEPA.

Finally, the passage from the EA illustrates the legally deficient attempt to side-step environmental analysis under NEPA. The FAA does not point to a specific component or effect of greenhouse gases that it believes is uncertain. To the contrary, there is little known controversy around the effects and understanding of climate change. The FAA's vague excuse cannot obviate actual analysis under NEPA. Therefore, an EIS must be prepared to fully analyze the impacts of greenhouse gases from the dramatic increase in capacity at the Hillsboro Airport.

D. An EIS must be prepared because constructing a runway without preparing an EIS will establish precedent

An EIS must be prepared because the Project "may establish precedent for future actions with significant effects." 40 C.F.R. § 1508.27(b)(6). Throughout the case law, Petitioners have not found a single instance of the FAA preparing an EA when increasing (or significantly increasing) the capacity of an airport, especially when that pertains to the construction of an additional runway, taxiway, and taxiway exits. As a general rule throughout the case law, an EIS is prepared when there is the potential for a modest increase in capacity. The potential for a very modest increase in capacity is typically the result of constructing a taxiway, rearranging flight patterns or approaches, relocating a runway, or constructing a new terminal. *See Town of Winthrop v. FAA,* 535 F.3d 1, 7 (1st Cir. 2008) (FAA prepared EIS for new taxiway); *City of Olmstead Falls v. FAA*, 292 F.3d 261 (D.C.

Cir. 2002) (FAA prepared an EIS to relocate and extend a runway that did not increase capacity); *City of Los Angeles v. FAA*, 138 F.3d 806 (9th Cir. 1998) (FAA prepared an EIS when constructing a new terminal); *Seattle Community Council Federation v. FAA*, 961 F.2d 829 (9th Cir. 1992) (FAA prepared an EA when implementing a change to flight patterns); *County of Rockland v. FAA*, 335 Fed. Appx. 52 (D.C. Cir. 2009) (FAA prepared an EIS when adopting new flight procedures). Here, the airport project consists of the construction of taxiways, taxiway exits, *and a new runway*. There is no dispute that this Project will significantly increase the capacity of the Hillsboro Airport. The FAA is in the anomalous position of having prepared only an EA for a project that significantly increases the capacity of the Hillsboro Airport. In the event this Court upholds the FAA's decision not to prepare an EIS, it would likely establish the precedent that an additional runway can be constructed at an airport (and consequently significantly increasing the capacity of the airport) without preparing an EIS. Therefore, an EIS must be required before the Project can move forward.

c. The EA failed to adequately assess the cumulative effects of the Project.

The EA fails to take a hard look at the cumulative effects of the project because the cumulative effects analysis omits any mention of two projects. First, the FAA failed to assess two controversial zoning changes north of the airport that were recently determined to be unconstitutional; and second, the cumulative effects

analysis omits any mention of the reasonably foreseeable project of constructing a new control tower. A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* This Court requires that "an EA fully address cumulative environmental effects or 'cumulative impacts.'" *See, e.g., Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) ("Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully"). In a cumulative impact analysis,

> [a]n agency must take a 'hard look' at all actions. An EA's analysis of cumulative impacts 'must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects are thought to have impacted the environment.'

Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior, No. 07-16336, slip op. at 9000-9001 (9th Cir. 2010) quoting *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005). Here, the FAA failed to take a hard look at all of the present and reasonably foreseeable actions.

The Hillsboro Airport has incrementally grown over the years to become the busiest airport in Oregon. The EA notes that "[s]ince assuming ownership of the

Airport on February 1, 1966, the Port [of Portland], with federal assistance, has made *extensive improvements* including the construction of two runways, an air traffic control tower, and terminal buildings as well as installation of a precision instrument landing system (ILS)." ER-32 (emphasis added). All of these "extensive improvements" occurred without the aid of an EIS. Now, several projects, including a zoning change and the reasonably foreseeable construction of a control tower were not analyzed in the Project's cumulative effects section.

Several controversial zoning changes were promulgated by the City of Hillsboro, including "an Airport Use Zone and an Airport Safety and Compatibility Overlay Zone." ER-23-24. The Airport Safety Compatibility Overlay Zone and the Airport Use Zone were both recently determined to be unconstitutional before Oregon's Land Use Board of Appeals. *See Barnes v. City of Hillsboro,* LUBA No. 2010-011 (June 30, 2010)[14]. In terms of environmental impacts, the Airport Safety Compatibility Overlay Zone is the most significant. It was "intended to be applied to property within 6,000 feet of the airport, and imposes various limitations on uses and new development within six subzones, depending on proximity to the airport and its runways." *Id.* at 3. Development in the Airport Safety Compatibility Overlay Zone would require an "'avigation easement' to the Port [of Portland] prior to recording land division plats or issuing certificates of occupancy." *Id.* The

[14] Available at http://www.oregon.gov/LUBA/docs/Opinions/2010/06-10/10011.pdf.

avigation easement would permit a "right-of-way for free and unobstructed passage of aircraft through the airspace over the property," a "right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity," and a "right to prohibit the erection or growth of any structure, tree, or other object," among other restrictions. *Id*. Though the EA gave passing mention to this overlay zone, it did not consider it in the cumulative impacts analysis. The zoning change is a present action by the local government that would have had environmental effects for the area adjacent to the airport had it not been deemed an unconstitutional taking of property. The FAA's omission, therefore, is fatal to the EA's analysis of cumulative impacts.

The FAA also failed to include the reasonably foreseeable construction of a new control tower in their cumulative effects analysis. The EA does not disclose this project, but the Record contains many references to it. As noted *supra*, safety issues arose as to whether the control tower had the appropriate line of sight for the proposed runway. *See* ER-64-66. Though this issue was never resolved, the FAA official indicated that it could get a new tower: "[t]his may be a backdoor way to get a new tower paid for by AIP." ER-64. These are the very officials preparing the NEPA documents, and yet they failed to include the potential for a new tower in their cumulative effects analysis. *See* ER-34 (future projects catalogue has no

mention of the potential for obtaining a new control tower). This omission should have been considered, and it is fatal to the legal adequacy of the EA.

It should also be noted that while reviewing the cumulative effects analysis during the preparation of the EA, the FAA's regional counsel noted numerous deficiencies in the cumulative effects section as well as the potential for significant effects: "[i]t sounds like there is real potential for a significant impact, Record ER-67 (comment 37); "[o]verall the cumulative analysis is inadequate," ER-61 (comment 30); and "delete [the word] 'adverse,'" ER-68 (comment 34). It appears that the FAA concedes the potential for significant impacts, and at times, it appears the agency is deleting terms that would characterize the Project as having adverse impacts. Therefore, the FAA's omission of certain actions violates NEPA.

d. The EA failed to present a reasonable range of alternatives

The EA fails to present a reasonable range of alternatives because the EA does not disclose any environmentally distinguishable effects between the two action alternatives. The alternatives section is the "heart" of the environmental analysis, and therefore, the FAA must rigorously explore and objectively evaluate all reasonable alternatives. 40 C.F.R. §1502.14. Requiring meaningful alternatives ensures that the agency can choose among a range of outcomes and mitigate significant impacts. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002). Here, there is no meaningful distinction between the

two action alternatives. The goal of NEPA's alternatives requirement is to "provid[e] a clear basis for choice among options" by identifying the pros and cons of different alternatives. 40 C.F.R. § 1502.14. The range of alternatives considered is not sufficient if each alternative has the same end result. *State of California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (holding that an inadequate range of alternatives was considered where the end result of all eight alternatives evaluated was development of a substantial portion of wilderness).

The EA presents 3 alternatives: the No Action Alternative and Action Alternatives 2 and 3. Alternatives 2 and 3, however, are environmentally indistinguishable. Throughout the EA, the FAA consistently assesses the effects to Alternative 2, but the analysis of Alternative 3 generally repeats that the effects will be the same as Alternative 2. At no point in the EA does the FAA disclose any environmentally distinguishable alternatives. For example, section 3.2.2 of the EA, at ER-21, discusses Alternative 2, and section 3.2.3, at ER-22, discusses Alternative 3 and states: "Alternative 3 differs from Alternative 2 only in the location of the proposed Charlie Helipad. In this alternative, the proposed location of the new helipad would be approximately 450 feet to the northeast of the relocated helipad shown in Alternative 2." As noted in Exhibits 5.10-1 and 5.10-2, only wetland B would be impacted by the relocation of the Charlie Helipad, and it would be similarly affected by both Alternative 2 and 3. ER-29-30. Alternative 3

"differs from Alternative 2 only in the location of the proposed Charlie Helipad." ER-31. The construction impacts are "anticipated to be the same as for Alternative 2." ER-31. The operational impacts "would be the same as for Alternative 2." ER-31. The same is true for farmlands, as well as the other effects analyzed in the EA. Simply put, these alternatives are illusory, and cannot support a reasonable range of alternatives or provide for a reasoned choice among alternatives. Because the FAA has failed to present a meaningful distinction between Alternatives 2 and 3, the EA is legally deficient because it failed to present a reasonable range of alternatives.

II. The FAA failed to provide for a hearing consistent with 49 U.S.C. § 47106.

When the FAA approves the construction of a new runway, the FAA must provide "an opportunity for a public hearing … 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); *see also* FAA Order 5050.4B 402 (addendum at 1) ("The sponsor must certify to the Secretary of Transportation that it has provided the public an opportunity for a public hearing to consider the economic, social, and environmental effects of its actions"). The FAA defines a "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) (addendum at 2). In their preparation of the EA, the FAA concedes as much when it states that "[a]t a minimum, the public outreach program shall include the conduct of a scoping session for the EA (although not required by FAA guidance) and a Public Hearing upon release of the Draft EA," ER-49. Furthermore, the "consultant will coordinate with the Port Public Affairs staff about the logistics of a public hearing but will be responsible for securing a location, hearing officer, court stenographer, etc," ER-54.

Though it was advertised that the agency would hold an open house/hearing in November of 2009, the definition of a "hearing" was not satisfied. No hearing officer heard the concerns of the public and the public was not permitted to express its concerns to other members of the public. Public input was not facilitated by a hearing officer, but rather a stenographer. The FAA did present a slideshow, which referred to the gathering as an "open house." ER-9. The alleged hearing only allowed the Port of Portland and the FAA to present the project to the public. Members of the public that live day-in-and-day-out with the environmental effects of the busiest airport in Oregon were not given the same opportunity to address the public. The alleged hearing was a one-way street, in which the public was not afforded its statutorily mandated participation. The public was simply shut out of the process, and the FAA's FONSI was a foregone conclusion as illustrated by an email from an FAA official several months prior to finishing the EA: "[m]y only

comment is (and I made this at the beginning of the project) that there has to be FONSI by Jan. 15, 2010 ….” ER-63; *see also* ER-63 (“We spoke with TJ about the possibility of having a FONSI by early December”). It is, therefore, readily apparent from the Record that the FAA would get a FONSI before the environmental effects of the project were even evaluated, and a corollary of this was to refuse the public its statutorily mandated hearing.

Similar circumstances occurred in *City of S. Pasadena v. Slater*, 56 F.Supp.2d 1106, 1131-1132 (C. D. Cal.1999), where an agency was required to provide for a public hearing pursuant to 23 C.F.R. § 771.111; *Id.* at § 771.111(h)(2)(i) (“Public hearing procedures must provide for … coordination of public involvement activities and public hearings with the entire NEPA process”). There, the plaintiffs argued that “the defendants failed to hold an appropriate public hearing.” *Pasadena,* 56 F.Supp.2d at 1132. One of the arguments put forth by the defendants was that they held an “open house.” *Id.* Though the court determined that “the parties have not adequately briefed this issue for the Court to determine whether a public hearing was required in the first instance,” it did state that “in the event that a hearing was required, the plaintiffs have raised serious questions about whether the format of an open house is the equivalent of a public hearing.” *Id.* Of particular concern to Petitioners here, the court stated that

> [p]ublic hearings provide the community and the decisionmakers a forum for the free and contemporaneous exchange of ideas. It is a dynamic process

> which has at its core the idea that it is only through a public meeting that details and intricacies of controversies can be best explored and understood.

Id. Therefore, a public hearing is not simply a forum for an agency to tell the public what will happen; rather, it is meant to be a dynamic process that facilitates and solicits the free and contemporaneous exchange of ideas. Nothing of this nature occurred on November 10, 2009 at the alleged hearing.

Petitioner Barnes went to the hearing because it was billed as a "public hearing." Consistent with her experience at other public hearings, Petitioner Barnes expected to engage in a dynamic process and provide testimony to other members of the public regarding the legal deficiencies of the NEPA document. Instead, Petitioner Barnes was only permitted to provide comments to a stenographer, and not permitted to address the public. There was no hearing officer to facilitate discussion or public comments. As Petitioner Barnes stated to the stenographer at the alleged hearing:

> I would like to state my opposition to the way this hearing is being handled. Every other time where I have been informed there is going to be a hearing there was an opportunity to go before the public and speak, and the people present had the decency to sit and listen. The fact that the Port and the City of Hillsboro and other people involved seem to be making an effort to shut down public comment and dialogue within the community is an affront to the very process of democracy.

ER-13. Petitioner Barnes was then interrupted by the agency's slideshow presentation, required to halt her comments, and sit in silence as the slideshow progressed:

> Even so, 5 to 10 minutes into my testimony, the Port began a slideshow/presentation on the environmental assessment just a few yards from the stenographer's table. This, in turn, made it completely impossible for the recorder to hear me. She then suggested that we wait until after [the] Port presentation was completed before resuming.

ER-12. Throughout the record, the FAA does not point to an individual that was designated as a hearing officer; rather, it simply maintained that the alleged hearing was "similar in both setting and format to several other public events regarding [the Hillsboro Airport's] proposed third runway and the environmental issue resolved." ER-70; *see also* ER-69 (response to comment MB-1)(same). This is an insufficient justification because regardless of whether it was similar to other "public events," the FAA was required to hold a "public hearing." Thus the FAA failed to satisfy its statutory obligations, and, therefore, the FAA violated 49 U.S.C. § 47106(c)(1)(A)(i).

III. CONCLUSION

The FAA's EA for the Project is legally deficient for several reasons. First, the EA failed to account for the indirect effects of the significant increase in capacity at the Hillsboro Airport. Second, an EIS is the appropriate NEPA document because the Project will result in significant impacts to the human environment. Third, the cumulative impacts of the Project were not adequately analyzed. Fourth, the EA's action alternatives are environmentally indistinguishable. Finally, the FAA failed to appropriately provide for a public

hearing. Therefore, this Court should find the EA legally deficient, and require the FAA to prepare an EIS.

Dated: July 12, 2010

Respectfully submitted,

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ADDENDUM

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CHAPTER 4. PUBLIC PARTICIPATION

400. PUBLIC PARTICIPATION. Like many infrastructure projects, most airport development triggers public interest, especially in those areas that would sustain development-related environmental impacts. It is through this public participation that Federal agencies disclose information about the proposed action, reasonable alternatives, and expected environmental effects. This participation also provides the Federal decision maker with information about issues most important to the public that the proposed action and its reasonable alternative(s) would affect.

401. FAA'S COMMUNITY INVOLVEMENT POLICY. FAA has a community involvement policy (FAA-EE-90-03, August 1990). That policy recognizes community involvement as an essential part of FAA programs and decisions. ARP, like each FAA office, must incorporate open, effective community involvement to achieve the following goals and tasks.

a. Provide active, early, and continuous public involvement and reasonable public access to information that accurately describes a proposed project and its environmental effects.

b. Ask for and consider public input on plans, proposals, alternatives, impacts, and mitigation.

c. Use public involvement techniques designed to meet the needs of different interest groups and individuals.

d. Promote an active public role to lessen potentially adverse community reaction to agency actions needed for safe, efficient aviation.

402. PUBLIC PARTICIPATION UNDER THE AIRPORT IMPROVEMENT PROGRAM (AIP). An airport sponsor submitting an application for AIP funding to build one of the airport projects listed in paragraphs 402.a – c must afford the public with an opportunity for a hearing under 49 USC 47106(c)(1)(A)(i). The sponsor must certify to the Secretary of Transportation that it has provided the public an opportunity for a public hearing to consider the economic, social and environmental effects of its actions (see paragraph 404.b). The responsible FAA official should ensure an environmental document prepared for the actions listed below discusses the airport sponsor's steps to comply with section 47106(c)(1)(A)(i).

a. A new airport.

b. A new runway. or

c. A major runway extension.

To streamline the public involvement activities, ARP uses its NEPA public involvement process as "framework" to comply with this requirement.

403. PUBLIC PARTICIPATION REQUIREMENTS UNDER NEPA AND SPECIAL PURPOSE LAWS. CEQ gives Federal agencies instructions on NEPA's public involvement process at 40 CFR 1506.6. In addition, many special purpose laws applicable to airport projects (see paragraph 9.t of this Order) require notice and opportunity for public involvement. One way to effectively meet public participation requirements is to conduct a public hearing (see paragraph 404).

a. Factors to consider when deciding if a public hearing is warranted for NEPA purposes. A public hearing is a gathering under the direction of a designated hearing officer for the purpose of allowing interested parties to speak and hear about issues of concern to interested parties. Title 40 CFR 1506.6(c), states that public hearings should be held whenever appropriate or to meet statutory requirements applicable to an agency. To determine if a public hearing is warranted under NEPA, the responsible FAA official or airport sponsor should consider these following factors:

(1) Is their substantial environmental controversy concerning the proposed action or is there substantial interest in holding the hearing (CEQ 1506.6(c)(1))?

(2) Has another agency with jurisdiction over the action requested a public hearing, and has that agency supported its request with reasons a hearing would be helpful (CEQ 1506.6(c)(2))?

b. Public participation and hearings for special purpose laws. In addition to NEPA, airport projects may trigger other public participation requirements of various special purpose laws. For example, Executive Orders on Floodplains and Wetlands, 11988 and 11990, respectively, and regulations addressing National Register-listed or eligible historic properties at 36 CFR Part 800 require an opportunity for public review of actions that could affect those resources. Often, ARP uses its NEPA public involvement process as the "framework" to coordinate the various public involvement requirements of these special purpose laws. In addition, the sponsor or responsible FAA official may conduct a hearing during State, local, or Tribal review processes that paragraphs 302 and 303 discuss. If those processes occur before the hearing occurs, the airport sponsor or the responsible FAA official should make the comments they received from State or local agencies, or Tribes available at the hearing.

404. NOTICE OF OPPORTUNITY FOR A PUBLIC HEARING. When a sponsor provides an opportunity for a public hearing to comply with 49 USC 47106(c)(1)(A)(i) the following must occur:

a. Publish notice. The airport sponsor must publish a "Notice of Opportunity for a Public Hearing." The notice must appear in an area-wide or local newspaper having general circulation. The notice should contain the following information:

(1) A statement of the sponsor's intent to undertake the proposed action.

(2) A concise description of the proposed action.

(3) A concise statement that the hearing's purpose is to address the proposed actions, potential economic, social, and environmental and the project's consistency with the goals and objectives of each affected area's land use or planning strategy.

(4) The locations and times where the draft environmental assessment (EA) or draft environmental impact statement (DEIS) will be available for public review to allow the public to prepare for the public hearing. The draft documents must be available for review at least 30 days before the hearing occurs.

(a) Environmental assessment (EA). When an airport sponsor is preparing an (EA), the sponsor should file a draft EA with FAA for review before a public hearing occurs. After changing the EA to reflect FAA's concerns, the sponsor must make the draft available for public review before the public hearing occurs. This ensures that the EA the public will review accurately reflects FAA policy and concerns.

(b) Environmental impact statement. The responsible FAA official should ensure the DEIS FAA prepares for an action meets the requirements of this order and other applicable Federal environmental requirements. This ensures the EIS accurately reflects FAA policy and concerns. and

(5) A statement that anyone interested in the project has up to 15 days from the date the Notice of Opportunity for a Public Hearing is issued to request a hearing.

b. Hearing opportunity to meet NEPA or special purpose law public involvement requirements. The responsible FAA official or airport sponsor should follow the procedures in paragraph 404.a if a public hearing or meeting will be held to meet public involvement requirements. If the sponsor or the responsible FAA official provides an offer for public hearing for an action but no one requests a hearing the sponsor or FAA official should follow the instructions in paragraph 405.

405. WHEN THERE IS NO REQUEST FOR A HEARING. Sometimes, the airport sponsor or the responsible FAA official provides an opportunity for public hearing, but no one requests a hearing.

a. When the sponsor offers the meeting to comply with 49 USC 47106(c)(1)(A)(i). The sponsor must certify to the responsible FAA official in its grant application that it published a "Notice of Opportunity for a Public Hearing." The responsible FAA official should place the certification in the project's Administrative Record.

b. When the FAA or airport sponsor offered the opportunity for a public hearing to meet NEPA or special purpose law requirement. The responsible FAA

official should include in the Administrative Record a copy of the hearing notice and the reasons the hearing was not held.

406. RESPONSIBILITIES WHEN A PUBLIC HEARING WILL OCCUR.

a. Benefits of public hearings. During a public hearing or meeting, agencies, the public, or Tribes having an interest in a proposed Federal action gather information about a proposed action and other issues related to the action. For example, a hearing or meeting provides those parties with a forum to discuss preliminary information concerning an action's potential economic, social, and environmental effects. Hearings or meetings also provide occasions to consult with a Metropolitan Planning Organization and discuss an action's reasonable consistency with the affected community's completed or proposed planning objectives.

b. Notice of Public Hearing. When, a public hearing is deemed appropriate, the deciding party should publish a "Notice of Public Hearing." This notice informs the public that a hearing will occur. This notice must appear in the same newspaper(s) that published the "Notice of Opportunity for a Public Hearing" and must appear at least 30 days before the date the hearing will occur. The "Notice of Public Hearing" must include all of the following:

(1) The information discussed in paragraphs 404.a(1) – (4).

(2) The hearing's date, time, and location. If, for some reason, the Notice of Public Hearing does not contain this information, the sponsor or FAA must publish this scheduling information at least 15 days before the date the hearing will occur.

(3) Based on information in the draft EA or EIS available for public review (see paragraph 404.a(4), a list of potentially affected environmental resources.

(4) A statement that interested parties should send written comments to the sponsor or FAA within the 10-day period following the date the hearing occurs or by the end of the NEPA document comment period, whichever is later.

c. Hearing transcripts and comments. Decision makers need accurate information about major public concerns made during public hearings. Public hearing transcripts are ways to provide that information. Therefore, the airport sponsor must place a copy of the hearing transcript in the project record. The airport sponsor must provide FAA a copy of the transcript when asked to do so. If FAA conducts a public hearing, FAA will provide the sponsor a copy of the meeting transcript. The responsible FAA official should file the transcript in the project's Administrative Record.

d. Summarize issues. An appendix accompanying the final version of an EA or EIS should include a detailed summary of issues raised during the public hearing and responses to those issues. Neither document needs to contain a hearing transcript.

407. - 499. RESERVED.

CHAPTER 5. AIRPORT PLANNING AND NEPA

500. AIRPORT ACTIONS SUBJECT TO NEPA.

a. General. Paragraphs 9.g(1) – (11) of this Order lists those airport activities that are Federal actions. Before making a decision on these actions, the Office of Airports (ARP) must complete the NEPA process. This process is an independent, Federal decision making process requiring public disclosure of critical planning and environmental information regarding the proposed action and its reasonable alternatives. The approving FAA official uses this information and considers public concerns when making decisions about a proposed airport action.

b. NEPA document choices. The responsible FAA official must clearly identify potential environmental impacts the proposed action and its alternatives may cause. Based on the proposed airport project and its environmental effects, the responsible FAA official decides if the Federal action qualifies as a categorical exclusion or if an environmental assessment (EA) or an environmental impact statement (EIS) is required.[1]

501. PROJECT PLANNING AND NEPA. To achieve NEPA's intent, 40 CFR 1501.2 states:

> "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head-off potential conflicts."

a. Environmental factors and planning. Conflicts noted in the regulation could range from community concerns about aircraft noise to an action that poses a legal barrier to ARP approval, such as a Jeopardy Opinion for a Federally-listed endangered species. Since airport planners are responsible for planning projects at their airports, it is critical that they note the requirements of 40 CFR 1501.2. Doing so promotes intensive, scrutiny of reasonable alternatives meeting airport needs while avoiding or reducing potential environmental impacts and conflicts those alternatives could cause (see paragraph 504.d).

b. Early FAA contact is critical. ARP experience shows that delays in the NEPA process may occur when airport planning is not properly conducted. Therefore, during early project planning, it is critical that the airport sponsor critically analyze a project's goal, the data supporting that goal, reasonable ways to achieve the goal, and the environmental issues surrounding the alternatives considered to achieve that goal.

(1) Chapter 5 (Environmental Considerations) of FAA's Advisory Circular (AC) 150/5070-6, *Airport Master Plans*, urges sponsors to work with FAA airport planners and environmental specialists early in project planning. Environmental specialists have knowledge

[1] Chapters 6, 7, and 9 of this Order, respectively, discuss these NEPA documents in detail.

about environmental impacts associated with airport projects and the environmental concerns resource agencies, Tribes, and the public normally present about those projects.

(2) This early contact is intended to identify potential major environmental impacts and concerns early in planning, especially when an airport sponsor proposes a complex or controversial airport action. This step often reduces the probability that airport planning efforts or the subsequent environmental analyses and NEPA document will require time-consuming changes to address planning or environmental issues or concerns not clearly identified early in airport planning.

c. **Interdisciplinary approach.** To complete this interdisciplinary effort, planners, engineers, and environmental specialists should review maps, aerial photographs, existing permit application records, or other environmental documents containing information on the airport's locale. ARP's Best Practices website[2] and the AC provide more details on coordinating early airport planning and the environmental process. This early, interdisciplinary approach discussed above should make airport planning and NEPA processes more efficient because it:

(1) Promotes the coordinated consideration of reasonable alternatives under FAA's or the sponsor's authority when the widest range of alternatives exists.

(2) Promotes awareness of environmentally sensitive resources and the special analyses or coordination needed to resolve adverse effects on those resources.

(3) Provides planners and designers with opportunities to change facility plans or develop alternatives that reduce the need for later costly, complex, or delay-inducing changes in project design necessary to protect environmentally sensitive resources. and

(4) Helps ARP and the airport sponsor identify planning and financial issues.

Note: Although this chapter discusses the critical relationship of a master plan and the NEPA process, it is not a substitute for FAA AC, 150/5070-6. The AC provides greater detail on airport planning principles.

502. WHY PLANNING INFORMATION IS IMPORTANT TO THE NEPA PROCESS. Airport planning information is the backbone of a proposed airport action. As noted earlier, it is critical to complete the NEPA process efficiently and effectively. ARP airport planners are responsible for reviewing the sponsor's proposed actions and alternatives for consistency with FAA's airport planning and design standards. Those planners approve only projects meeting those standards, unless they determine the projects warrant modifications to those standards. The Purpose and Need is developed during the NEPA process after considering FAA's statutory mission and the sponsor's goals and objectives. Among other uses, planning information helps the sponsor or ARP during the NEPA process to:

[2]http://www.faa.gov/airports_airtraffic/airports/environmental/eis_best_practices/

a. Define the airport sponsor's proposed project.

b. Describe the purpose and need and identify reasonable alternatives to address the purpose and need.

c. Provide analyses of potential environmental impacts the proposed project and its reasonable alternatives could cause. and

d. Develop the full scope of reasonably foreseeable airport development that is critical to the Federal action's cumulative impact analysis.

503. AIRPORT PLANNING INFORMATION CRITICAL TO THE NEPA PROCESS.

a. Important airport planning data. Because they influence impact analyses, some of the most important planning data for NEPA purposes include:

(1) An inventory of existing conditions and facilities.

(2) An airport layout plan (ALP) showing proposed development.

(3) Planned project linkages versus independent utility.

(4) Aircraft operation and enplanement (boarding passengers) forecasts.[3]

(5) The design aircraft and fleet mix to accommodate those forecasts.

(6) The airport's existing capacity to accommodate those forecasts.

(7) Facility requirements needed to accommodate those forecasts.

(8) Timing and phasing of the projected necessary airport development.

(9) Runway utilization and flight tracks. and

(10) An airspace analysis.

b. The need for current, technical information. Current, technically acceptable planning information is critical to airport planning and accurate, efficient environmental analyses and document preparation. Failure to provide this information causes the problems listed in paragraph 503.(b)(1) – (3). Airport sponsors, ARP, and consultants must ensure that planning information is technically valid, based on accepted assumptions and methods, and current

[3] Refer to paragraph 504.b for acceptable deviation limits between a sponsor's forecasts and FAA's Terminal Area Forecasts.

operational and/or passenger forecasts. This helps the sponsor and ARP determine that proposed facilities, their costs, and their potential environmental effects are warranted, and that they are based on accurate airport operation or enplanement forecasts. Paragraph 504.b discusses this further.

(1) If data are not current or technically acceptable, the proposed project and reasonable alternatives or the analyses related to them will need to be modified.

(2) Updating these data so they accurately reflect an airport's needs often requires repeating earlier, costly environmental analyses that were based on outdated or technically insufficient information.

(3) This duplication and the lost time it requires delay FAA's decision making process, the airport sponsor's schedule, and the airport's ability to efficiently meet air projected transportation needs.

c. Noise. Noise from airport projects is often the public's primary concern. Therefore, a master plan addressing proposed airport development should consider whether the proposed project would increase noise impacts over noise sensitive land uses around the airport (see paragraph 9.n of this Order). If so, then the master plan should highlight these potential impacts.[4] (See paragraph 706.g(3) for information about incorporating Part 150 noise mitigation in a proposed action).

d. Evaluate and adjust planning as needed. Proposed Federal actions should be evaluated and adjusted continually as planners and environmental specialists collect more information during the planning process. This will promote the accuracy, efficiency, and effectiveness of the subsequent NEPA process.

504. KEY MASTER PLAN STEPS THAT AID THE NEPA PROCESS. An airport sponsor developing a master plan that accurately reflects needed airport improvements should focus on the following steps.

a. Meet with ARP regional or district office personnel. Early in a project's planning phase, the airport sponsor and its planners should meet with the appropriate ARP regional or district office's planners and environmental specialists. As noted in paragraph 501, this early coordination allows ARP staff to view the initial, conceptual plan and highlight potential environmental issues airport planners need to consider. Information exchanged among the sponsor, planning consultants, and environmental specialists fosters effective, efficient airport planning. It also promotes completing the subsequent NEPA process in a timely, efficient manner.

[4] Noise exposure maps and noise compatibility plans prepared under 14 CFR Part 150 provide valuable information about an airport's present and future noise levels and land uses exposed to those levels in the airport vicinity.

b. Develop good aviation forecasts. The sponsor's airport planners should establish valid aviation forecasts and the forecasts' resulting airfield demands to aid in efficient environmental analyses. As noted in paragraph 503, accurate, current aviation forecasts are the "backbones" to efficient, accurate environmental analyses. Forecasts that are too high or too low will jeopardize the NEPA and decision making processes by affecting environmental and funding decisions. Planners should prepare aviation forecasts that use FAA-accepted methods supported by available data, and that are consistent with FAA's Terminal Area Forecast (TAF). Forecasts should be within 10 percent of the TAF for the 5-year analytical period and within 15 percent for the 10-year analytical period.[5] Forecasts not meeting these criteria require consultation with planners at regional or district Airports offices and perhaps, forecast specialists at FAA headquarters. This consultation is necessary to determine if another forecast is needed for airport planning and NEPA purposes.

c. Conduct a facility inventory. Planners should conduct a facility inventory and determine if existing facilities can meet forecast airside and/or landside demands. If they cannot, the airport sponsor may need to enhance or expand present facilities or build new ones. Reviewing ALPs and forecast activity data is an efficient way to complete this inventory.

d. Develop alternatives. Reasonable alternatives are feasible ways to achieve a project's purpose (FAA Order 1050.1E, paragraph 506e). As noted below, the range of reasonable alternatives during an airport sponsor's master planning process is different than the range of alternatives needed for the NEPA process.

(1) During the airport master planning process. Airport sponsors and their planners consider various ways of solving an airport's problems before FAA begins its formal NEPA process. According to Chapter 5 of AC 150/5070-6B, the sponsor, its planners, and FAA airport planners, during project master planning, should consider safe, efficient alternatives within the airport sponsor's or FAA's jurisdiction. When developing these alternatives, FAA environmental specialists should advise the sponsor and the planners about obvious, sensitive environmental resources in the airport vicinity. This step highlights the need for the sponsor and planners to consider alternative project layouts or designs that could eliminate or reduce environmental impacts when the widest range of layout or design options exists.

(2) During the NEPA purposes. When developing reasonable alternatives for NEPA purposes, the scope of alternatives must include the alternatives noted above and those reasonable alternatives *outside* the airport sponsor's and FAA's jurisdiction (40 CFR 1502.14(c). Consequently, these alternatives, "...include those [alternatives] that are practical or feasible ways from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."[6]

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[5]December 23, 2004, memorandum from the Director, Airport Planning and Programming, entitled *Revision to Guidance on Review and Approval of Aviation Forecasts.*

[6]CEQ's *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,* Question 2a.

e. Identity a proposed action. Sometimes a sponsor selects a reasonable alternative as the "proposed action" early in project planning. Early identification of the proposed action depends on the problem the sponsor is trying to solve and the problem's complexity. If the airport has inadequate apron space or an emergency vehicle building is needed, the sponsor may have little difficulty identifying the proposed action. Conversely, if the airport lacks sufficient runway capacity or a new airport is necessary, the range of reasonable alternatives may be varied and complex. Here, the sponsor may not be able to identify a proposed action during the planning process.

505. ARP RESPONSIBILITES. Close coordination among the airport sponsor, its planning consultant, and FAA encourages thoughtful, responsible airport planning. ARP airport planners, engineers, and environmental specialists should work closely with the sponsor's airport planners early in project planning. This effort will help planners prepare well-developed airport projects that consider environmental factors in project planning. Such projects enhance ARP's ability to later meet substantive Federal environmental requirements applicable to a proposed action and its reasonable alternatives.

506. FAA'S ENVIRONMENTAL REVIEW PROCESS. The responsible FAA official should determine the environmental review the proposed action requires. The official should do so after working with the airport sponsor's planners to use the interdisciplinary approach discussed in this chapter.

a. Categorical exclusion. The responsible FAA official may categorically exclude an airport action when the official finds:

(1) The proposed action is listed in FAA Order 1050.1E, paragraphs 307 through 312 (or Chapter 6, Tables 6-1 and 6-2 of this Order). and

(2) Extraordinary circumstances in paragraph 304 of that order (or Chapter 6, Table 6-3 of this Order) do not require an EA or EIS.

b. Environmental assessment (EA). The responsible FAA official should inform the airport sponsor to prepare an EA when:

(1) The official determines that extraordinary circumstances applicable to a normally categorically excluded action suggest an EA is needed. or

(2) The action is not listed in Chapter 6, Tables 6-1 or 6-2 and, therefore, normally requires an EA at a minimum.

c. Environmental impact statement (EIS). The responsible FAA official should begin preparing an EIS when:

(1) The proposed action normally requires an EIS (see paragraph 903).

(2) An EA indicates that the approving FAA official cannot issue a Finding of No Significant Impact (FONSI) because the proposed action is likely to cause significant environmental effects that cannot be mitigated below significance thresholds. or

(3) ARP experience shows an action addressed in an EA would cause significant environmental impacts.

507. – 599. RESERVED.

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
National Policy

ORDER 1050.1E, CHG 1

Effective Date:
March 20, 2006

SUBJ: Environmental Impacts: Policies and Procedures

This order updates the FAA agency-wide policies and procedures for compliance with the National Environmental Policy Act (NEPA) and implementing regulations issued by the Council on Environmental Quality (40 CFR parts 1500-1508). The provisions of this order and the CEQ regulations apply to actions directly undertaken by the FAA and where the FAA has sufficient control and responsibility to condition the license or project approval of a non-Federal entity. The requirements in this order apply to, but are not limited to, the following: all grants, loans, contracts, leases, construction, research activities, rulemaking and regulatory actions, certifications, licensing, permits, plans submitted to the FAA by state and local agencies which require FAA approval, and legislation proposed by the FAA. The order was last revised in 2004.

The draft order was published in the Federal Register for public comment. The final order incorporates changes resulting from comments received from the public and during the internal FAA clearance procedure. The changes are annotated in the text with a bold line to the left of the paragraph containing the changed language. The change page can be found at the end of this document. The final order was published in the Federal Register and is available on the Internet at http://www.faa.gov/regulations_policies/orders_notices/.

Marion C. Blakey
Administrator
Federal Aviation Administration

CHAPTER 2. NEPA PLANNING AND INTEGRATION

200. INTRODUCTION.

200a. This chapter guides the responsible FAA official, approving official, and decisionmaker in the NEPA process by determining the following:

(1) Whether an action is advisory (not subject to NEPA procedures), categorically excluded, or whether it requires an EA or an EIS.

(2) Whether the FAA is the lead Federal agency for the NEPA process.

(3) Which FAA office is responsible for NEPA compliance, including preparing environmental analyses and documents, ensuring public involvement, and completing interagency and intergovernmental coordination and consultation.

200b. FAA's primary mission is to assure aviation safety, security, and efficiency. NEPA compliance and other environmental responsibilities are integral components of that mission. NEPA assures informed decisionmaking. NEPA provides a means for assuring that environmental concerns and interests of the public, Federal, State, or local agencies, and Tribes are appropriately considered as part of the decisionmaking process. NEPA also provides a means for efficiently complying with related statutes, orders, and regulations. Effective, efficient, and timely environmental analyses, public involvement, and interagency and intergovernmental coordination depend upon determining the appropriate level of review early in planning, budgeting, and scheduling.

200c. In accordance with NEPA, environmental issues shall be identified and considered early in an action's planning process. Agencies shall use a systematic, interdisciplinary approach. As appropriate, agencies shall also involve local communities and coordinate with agencies and governmental organizations. Environmental permits and other forms of approval, concurrence, or consultation may be required, often from other agencies. Awareness of any applicable permit application and other review process requirements should be included in the planning process to ensure that necessary information is collected and provided to the permitting or reviewing agencies in a timely manner. This is especially true if applicable laws, regulations, or executive orders specify timeframes for these processes. Project proponents should prepare a list noting all obvious environmental resources the sponsor's proposed action and alternatives it proposes would affect, include specially protected resources. Proponents should complete these tasks at the earliest possible time during project planning to ensure full consideration of all environmental resources and facilitate FAA's NEPA process.

200d. The responsible FAA official can use the NEPA process most effectively as an umbrella or vehicle for giving appropriate consideration to specific environmental concerns by:

(1) Describing the agency's underlying purpose and need for taking action;

(2) Identifying reasonable alternatives to the proposed action (must include the no action alternative);

(3) Rigorously analyzing the reasonably foreseeable direct, indirect, and cumulative environmental impacts of the proposed action and alternatives

(4) Providing for public disclosure and comment and a mechanism for responding to public comments;

(5) Providing the basis for informed selection of the preferred alternative.

(6) Identifying and evaluating measures to mitigate adverse effects of the preferred alternative and ensuring that appropriate measures are implemented.

(7) Facilitating compliance with applicable environmental laws, regulations, and executive orders.

200e. Applicability of NEPA Procedures to FAA Actions.

(1) Advisory Actions. Some Federal actions are of an advisory nature. Actions of this type are not considered major Federal actions under NEPA, and categorical exclusions, EA's or EIS's are not required as a condition for taking the action. See paragraph 301 for further information on advisory action.

(2) Emergency Actions (other than those that fall under paragraph 307a). Section 1506.11 of Title 40 of the CFR allows CEQ to grant alternative arrangements for, but not eliminate, NEPA compliance where a national emergency, disaster, or similar great urgency makes it necessary to take actions with significant environmental impacts without observing other provisions of CEQ regulations. See paragraph 302 for further information on emergency actions.

(3) FAA Actions Subject to NEPA Review (categorical exclusions; environmental assessments; environmental impact statements). Unless otherwise excepted by CEQ regulations, all formal actions taken by FAA officials are subject to NEPA review unless statutory law applicable to the FAA's operations expressly prohibits or makes compliance impossible. Actions covered by NEPA review include grants, loans, contracts, leases, construction, research activities, rulemaking and regulatory actions, certifications, licensing, permits, plans submitted to the FAA which require FAA approval, and legislation proposed by the FAA.

(4) FAA Actions Not Subject to NEPA Review.

(a) judicial or administrative civil enforcement actions (i.e., Investigative and Enforcement Procedures under 14 CFR part 13, and other administrative actions pursuant to: 14 CFR part 14, Rules Implementing the Equal Access to Justice Act of 1980; 14 CFR part 15, Administrative Claims Under Federal Tort Claims Act; 14 CFR part 16, Rules of Practice for

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

I certify that the foregoing Opening Brief of Petitioners complies with the type-volume limitations set foth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 13,816 words. I relied on my word processing software to obtain this word count.

Dated: July 12, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petitioners' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by use the appellate CM/ECF system on July 12, 2010.

Pursuant to Fed. R. App. P. 31-1, I will defer submission of one original and seven copies pending a directive from the Clerk to do so.

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.

Dated: July 12, 2010

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