



ATTORNEYS AT LAW
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389

815-490-4900
815-490-4901 (fax)
www.hinshawlaw.com

October 4, 2012

Mr. Barry D. Cooper
Regional Administrator, Great Lakes Region
Federal Aviation Administration
2300 East Devon Avenue
Des Plaines, IL 60018

Re: Reply to Federal Aviation Administration Response to City of Park Ridge, Illinois Request that FAA Prepare a Supplemental Environmental Impact Statement for the O'Hare Modernization Program

Dear Mr. Cooper:

The City of Park Ridge, Illinois, through its attorneys, Hinshaw & Culbertson LLP, presents this Reply to the document entitled "FAA Response to City of Park Ridge Request Dated October 25, 2011" dated February 23, 2012.

As previously indicated in correspondence with the FAA, the Final Environmental Impact Statement ("EIS") is not as "final" as the title may indicate. The Supreme Court has stated that "[i]t would be incongruous with [NEPA's] approach to environmental protection," however, "for the blinders to adverse environmental effects, once unequivocally removed, to be restored before the completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).

The City of Park Ridge believes that there have been (1) substantial changes to the proposed action that are relevant to environmental concerns and (2) significant new circumstances and information relevant to environmental concerns and bearing on the proposed action and its impacts to warrant a Supplement to the EIS which the FAA prepared almost ten years ago.

1. FAA Orders Require Written Re-Evaluation Every Three Years for Long Term Projects

The FAA attempts to differentiate between their "phased" approach, and the "staged" approach referred to in FAA Order 5050.4B, ¶ 1401(c)(3) and FAA Order 1050.1E, ¶ 514b(2). However, this is just the agency playing with semantics. In one of the seminal NEPA guidance documents issued by the Council on Environmental Quality ("CEQ"), the CEQ equates staged plans or projects, such as the O'Hare Modernization Program, as plans or projects which must go through phases of development. See "Forty Most Asked Questions Concerning CEQ's National

Environmental Policy Act Regulations,” at Question 23.b. [46 Fed. Reg. 18026 (March 16, 1981)].

The different Phases which are established in the full O’Hare Modernization Program are clearly the same as the “stages” to which the FAA Orders refer. FAA Order 5050.4B is very clear in that the “FAA considers a final EA or final EIS valid for 3 years.” ¶ 1401(c). Furthermore, for airport actions which occur in stages, the “responsible FAA official *must* prepare a written re-evaluation if more than 3 years elapse between the date of a final EA or EIS and one of those stages.” ¶ 1401(c)(3) (emphasis added).

In a footnote, the FAA attempts to assert that similar arguments were raised previously in *St. John’s United Church of Christ v. FAA*, 550 F.3d 1168 (D.C. Cir.2008). The *St. John’s United Church of Christ* case, however was not decided on the issue of “phased” versus “staged” development subject to FAA Order 5050.4B, but instead, dealt with whether the authorization of particular funds should be considered arbitrary and capricious. Consequently, this issue has not been addressed in any previous legal proceeding.

It has now been over seven years since issuance of the final EIS, and there are still several more stages or phases of the O’Hare Modernization Program which have yet to be initiated. At an absolute minimum, the FAA is required to perform a “written re-evaluation” to determine if an SEIS is required.

2. Proposed Northeast Cargo Area Improvements

The FAA has proposed substantial changes for the Proposed Northeast Cargo Area Improvements (“PNECAI”), encompassing in excess of 122 acres which were not taken into account in the initial EIS and which are relevant to environmental concerns. Through submittal of a Short Form Environmental Assessment (“SFEA”), the FAA asserts that the environmental impacts of the proposed project are not expected to be significant, and a detailed Environmental Assessment (“EA”) or SEIS is not appropriate.

The information contained in the SFEA dictates otherwise. The SFEA details the substantial proposed improvements for the PNECAI, including:

- The ability to park 18 B747 or A380 sized aircraft while providing five co-located cargo warehouse buildings totalling approximately 1.1 million square feet;
- Development of a three phase consolidated cargo complex that groups multiple cargo warehouses around a shared apron with airfield access, parking/truck docks, and landside access over approximately 122 acres;
 - Phase 1, as proposed, consists of two cargo buildings providing approximately 532,000 square feet of warehouse space, associated apron, and parking/truck dock and landside access facilities. The first of the two cargo buildings is a 200,000 square foot warehouse, and the second is a 332,000 square foot warehouse. Additionally, 4000,000 gallons of Jet A fuel capacity will be

added, including fuel tanks and a fuel containment area on approximately three acres;

- Phase 2, as proposed, consists of two additional cargo buildings, one of 203,000 square feet and the other of 161,000 square feet, as well as associated aircraft parking ramp and taxiway, auto parking, truck docks, and the extension of landside access to Bessie Coleman Drive;
- Phase 3, as proposed, consists of a single 182,000 square foot building and associated aircraft parking ramp, auto parking, and truck docks; and
- The future General Aviation Terminal location will also be relocated from the location shown on the Approved Airport Layout Plan (“ALP”).

The following substantial changes to the Approved ALP are also detailed in the SFEA:

- Changing the alignment of Bessie Coleman Drive;
- Modifying the westerly extension of Zemke Road;
- Demolishing existing Building 850, the Central Field Office;
- Relocating the General Aviation facility;
- Relocating the Bessie Coleman Drive/Lot E North Intersection;
- Changing the layout of long-term public parking;
- Accommodating future commercial vehicle staging in the Commercial Vehicle Holding Area;
- Removing areas identified for future taxi staging and future limousine service center; and
- Changes to assumptions related to collateral development to include more warehousing.

Furthermore, while the SFEA repeatedly indicates that the number of aircraft operations, the time of operation, and the runway use would remain the same as that assumed in the EIS, Section 5 of the SFEA, Proposed Development Action, indicates that the proposed improvements include the ability to park 18 B747 or A380 sized aircraft not accounted for previously. In addition, Section 6 of the SFEA, Purpose and Need for the Project, indicates that newer, larger, and wider wingspan aircraft are anticipated after the expansion. Even if these aircraft will not be flying overhead, they will create noise and environmental impact which was not accounted for in the EIS. Airplanes engines run whether they are airborne or not, and with the PNECAI located very

close to the border of the City of Park Ridge, citizens of Park Ridge are likely to be adversely affected in a manner not accounted for in the EIS.

The potential impacts on water quality associated with construction and operation of the PNECAI is another significant environmental issue which has not been adequately addressed. The PNECAI would result in an additional impervious area of approximately 60 acres, which will substantially increase the volume and velocity of storm water runoff as well as the concentration of pollutants carried in that runoff to area surface waters. Unquestionably, the use of salt and other chemicals to melt ice on the paved areas and the use of chemicals for deicing of the additional aircraft utilizing the PNECAI were not even considered in the EIS.

The increase in construction activities have not been addressed by the EIS either. In the EIS, as evaluated, construction activities in the area were to commence in May 2007 and be completed by April 2009. Under the proposed plan, which was not taken into account in the EIS, construction was to begin in 2008 and continue through 2018. These construction schedules and impacts are clearly not comparable and justify preparation of an SEIS.

By the FAA's own description, the SFEA is only appropriate where the project involves extraordinary circumstances and where the sponsor demonstrates that involvement with, or impacts to, the extraordinary circumstances are not notable in number or degree of impact, and that any significant impacts can be mitigated below threshold levels. This is not the case for the PNECAI project. As such, the SFEA is inappropriate for this project, and an SEIS should be prepared.

3. FAA Should Exercise Its Discretion and Prepare an SEIS in Order to Further the Purposes of NEPA

NEPA was enacted to ensure that information on the environmental impacts of any Federal action is available to public officials and citizens before actions are taken. It also established the Council on Environmental Quality to formulate and recommend national policies which ensure that the programs of the Federal government promote improvement of the quality of the environment.

The only reason that the FAA gives for not exercising its discretion and agreeing to prepare an SEIS is that the FAA provided extensive opportunities for the public to comment on the O'Hare Modernization throughout the EIS process. However, soliciting and considering public comment is not equivalent to conducting scientific, reproducible analyses of the potential environmental and human health impacts associated with a planned federal action. Moreover, the public review and comment process concluded almost 10 years ago, and by FAA's own admission, there have been many changes to the EPA rules and regulations with respect to criteria pollutants and green house gasses – not to mention additional studies which address detrimental effects on human health inherent to working, living, and learning near airport facilities. Even if these changes are not "significant new circumstances or information" for the purposes of an SEIS being mandatory, surely they are new circumstances and information which warrant exercise of FAA discretion.

Furthermore, FAA's discussion of the process implemented to finalize the EIS is not pertinent to whether an SEIS should now be performed. The City of Park Ridge is not asserting that FAA was not comprehensive in its preparation or defense of the EIS. The City of Park Ridge is asserting that, considering the new information that has come to light in the past 10 years, and the new rules and regulations that have been passed in that time in order to properly protect human health and the environment, the FAA should exercise its discretion in order to further the stated purposes of NEPA.

Surely, the decision to perform an SEIS would serve to ensure that information on the environmental impacts of the O'Hare Modernization Program is available to public officials and citizens before further phases are implemented. In addition, performing an SEIS will help to ensure that the programs of the Federal government promote improvement of the quality of the environment, as the stated purpose of NEPA requires.

4. Questions Lingering Over Noise Contours Justify Re-Evaluation

The FAA performed initial noise studies in their EIS which utilized FAA methodologies that have been in place, without modification, since 1992. Over the past twenty years, and particularly in the past ten years, since the EIS was prepared, many studies have conclusively found that the impacts from exposure to noise from aircraft is more significant than previously accounted for. The FAA should be required to perform an SEIS in order to take into account this new research, which has the potential to affect many of the children living, and learning, in Park Ridge.

The FAA ignores the impacts that the noise created from the O'Hare Modernization Project will have on the education of children in Park Ridge. The FAA has an internal threshold for noise in schools of 60dB, which has been exceeded on many occasions during school hours at Main South High School. The FAA also chose to ignore the recommendations of the World Health Organization, which indicate that there should be a maximum allowable level of Leq 35 dBA in learning environments.

Noises from aircraft still disrupt classrooms, even with the "soundproofing" that has been installed. Teachers have to pause in the middle of class to wait for aircraft to fly overhead, thus losing their own train of thought and student's attention. The FAA also neglected to address that while the two-week test period at Main South High School there were an average of 154 flights per day from all of the runways at O'Hare, after the completion of the project, however, the school will have an average of 350 flights per day, from one runway alone, flying overhead.

As we pointed out last October, researchers at Queen Mary, University of London carried out a large study (Road Traffic and Aircraft Noise Exposure and Children's Cognition and Health (RANCH), published in The Lancet on June 4, 2005), likely the largest of its kind, on the effects of long-term exposure to noise on children's health, examining almost 3,000 children living in the UK, Spain and the Netherlands over a period of three years. The study determined that long term aircraft noise exposure impairs children's reading and has discernible impacts on the cognitive development of children, and that schools which are exposed to high levels of aircraft noise are not healthy educational environments.

Furthermore, a follow up study to the RANCH study indicates that aircraft noise exposure at school could have long-term consequences for children's learning outcomes. ("Does Exposure to Aircraft Noise at Primary School Influence Later Learning Outcomes?: Findings from the UK RANCH follow-up study" (5aNSc1) by Charlotte Clark, Jenny Head, and Stephen A. Stansfeld, presented at the 163rd Acoustical Society of America Meeting, on May 18, 2012). In addition, a chronic environmental stressor-aircraft noise-could impair learning and development in children. *Id.* This follow-up study also re-emphasized the one of the conclusions of the initial study, that schools exposed to high levels of aircraft noise are not healthy educational environments. *Id.*

In its response, the FAA does not dispute that Monitor 26, in the heart of Park Ridge, showed that there were 18 noise events at 85 dB or greater and 116 noise events over 65dB. Nor does the FAA dispute that this is a 225% increase in noise events above 85dB (from 8 to 18) and a 133% increase in noise events above 65dB (from 87 to 116) from December 2008 to August 2010. In fact, the FAA makes it clear that the monthly monitoring data (i.e. actual recorded noise levels from the communities surrounding O'Hare Airport), is "not the basis for the noise contours presented in the FEIS." The noise contours do not utilize actual data from the surrounding areas, but rather are based upon hypothetical inputs, with results which remain unconfirmed, according to the FAA. The FAA should be required to readdress the noise assessment taking into account actual data, to which the community members and students of Park Ridge are being subjected.

Regardless of what the circumstances were at the time the EIS was prepared, conditions have changed such that the FAA should re-evaluate the situation in order to properly protect the communities surrounding the airport from the substantial health effects and risks that accompany aircraft noise. Multiple studies have been performed (some addressed here, some addressed in the October 2011 correspondence, and many others yet to be addressed) which conclusively determine that the impacts from noise pollution emanating from airports is more significant than was accounted for in the EIS. Surely, the FAA must agree that auditory technology and science has changed since 1992, and therefore policies with regard to noise which were implemented over 20 years ago should be re-evaluated.

5. FAA Failed to take a "Hard Look" at the New Information and Circumstances Identified by The City of Park Ridge

In order to comply with NEPA's "hard look" requirement, the decision of the FAA to refuse to prepare a supplemental environmental impact statement "must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide a [potential] reviewing court with the necessary factual specificity to conduct its review." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir.2006) (quoting *Comm. to Pres. Boomer Lake Park v. U.S. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir.1993)).

FAA action will be considered "arbitrary and capricious" if the FAA, in deciding not to prepare a supplemental environmental impact statement, "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 if the agency

action “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793–94 (10th Cir.2010) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

While the FAA is correct that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized, the FAA fails to adequately address the fact that if there remains “major Federal action” to occur, and if there is new information which is sufficient to show that the remaining action may “affect the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS *must* be prepared. *Marsh*, 490 U.S. at 374, 109 S.Ct. 1851. This is not at the agency’s discretion, it is mandatory.

The FAA, in its response, does not dispute that the EIS did not address the new 1997 National Ambient Air Quality Standards (NAAQS) for ozone (85 ppb) based on an 8-hour average. Nor does the FAA dispute that the EIS could not have possibly addressed the latest 2008 tightening of the 8-hour ozone standard (75 ppb). Furthermore, the FAA did not dispute that the EIS considered only the impacts of the O’Hare Airport expansion/modernization on the 1997 NAAQS for PM_{2.5} (65 ppb) based on 24-hour average and could not have addressed the 2006 tightening of the PM_{2.5} NAAQS (35 ppb – 24 hour average). Finally, with regards to deficiencies in meeting current NAAQS, the EIA did not address the Primary NAAQS for NO₂ based on a 1-hour average (100 ppb) to supplement the long-standing NO₂ standard (53 ppb).

In its response, the FAA focuses on the numerical changes to the NAAQS, but fails to account for the rationale underlying the more stringent standards. The USEPA implemented more stringent standards for ozone, PM_{2.5}, and NO₂ based upon new information. Utilizing that new information, the USEPA determined that the old standards were inadequate to properly protect human health and the environment. As such, by adhering to NAAQS standards that the USEPA found inadequate to protect human health and the environment, the FAA, in implementing the O’Hare Modernization Project puts at risk both human health and environmental health. Since the EIS does not address the information which instigated promulgation of the new NAAQS standards, it does not adequately address the USEPA’s determinations as to the maximum concentration of pollution allowed in the ambient air to protect human health and the environment, and the FAA must consider this new information in an SEIS.¹

¹ The FAA Regional Administrator attempts to bolster his argument that air quality impacts have already been addressed by comparing actual measurements of PM_{2.5} in the communities surrounding O’Hare Airport to the new, more stringent NAAQS for PM_{2.5}. However, FAA compares the actual annual concentrations of PM_{2.5} recorded at the Schiller Park monitoring station (14.6 ppb annual average) to the short-term 24-hour NAAQS for PM_{2.5}. Had the FAA compared “apples to apples” the comparison loses its persuasiveness. The actual annual measurements of 14.6 ppb at the Schiller Park location are extremely close to the 15 ppb annual NAAQS for PM_{2.5} that has been in place since 1997.

Mr. Barry D. Cooper
October 4, 2012
Page 8

Once again, we would like to reiterate that The City of Park Ridge would like to set up a meeting with you to discuss how the FAA and the City of Park Ridge can reach an agreement about the necessary steps to take to resolve these outstanding environmental issues. If you have any questions or comments, please feel free to contact either of the undersigned at their respective telephone numbers or e-mail addresses.

Sincerely,

HINSHAW & CULBERTSON LLP



Richard S. Porter
815-490-4920
rporter@hinshawlaw.com



Jon S. Faletto
809-999-9809
jfaletto@hinshawlaw.com

RSP:dbm

cc: Mr. Shawn Hamilton (Acting City Manager, City of Park Ridge)
Mr. James Argionis (Chair of the Park Ridge O'Hare Airport Commission)
Mr. David Schmidt (Mayor, City of Park Ridge)