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VIA E-MAIL (CAYLA.MORGAN@FAA.GOV)

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Federal Aviation Administration
1601 Lind Avenue, S.W.
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Re: Final Environmental Assessment, Snohomish County Airport Paine Field - Comments by City of Mukilteo, Washington

Dear Ms. Morgan:

The following are the comments of the City of Mukilteo ("Mukilteo") concerning the Final Environmental Assessment, Snohomish County Airport Paine Field ("FEA"). Despite all its new verbiage, nothing much has changed in the FEA over that which was reported in the Draft Environmental Assessment ("DEA"). The FEA persists in the same errors that tainted the DEA, including, but not limited to:

(1) Segmenting the operational portion of the four-part project description such that the FEA's analysis is limited to the impacts of the entrance of only two air carriers, Horizon and Allegiant, who have currently requested entrance, where the Project Description manifestly includes a Part 139 Operating Certificate, requiring, by law, the admission of any air carrier that so requests, and which, therefore, vitiates the attenuated "project's" independent utility;

(2) Further limiting the terminal expansion segment of the Project Description, and its associated analyses, to the 29,350 foot modular terminal, where the FEA plainly acknowledges that the airport's approved ALP, the only document guiding airport planning, still contains provision for a 30,000 square foot permanent terminal, as well as the "modular terminal," and where the modular terminal alone, Appendix Q, Letter L, p. L.102, as well as the potential combined coverage of the two which remains unanalyzed, will allow for far greater numbers of gates than reported in the FEA ["The proposed 'modular' terminal building may have capacity to serve other airlines in addition to Horizon and Allegiant Air"];

(3) Declining to analyze the potential for future increased operations over and above the initial two operations, at minimum, as cumulative impacts, on the ground that they are not

"reasonably foreseeable," where the airport's Master Plan already anticipates much greater levels of operation than are analyzed in the DEA or FEA, where the ALP includes more than sufficient current and proposed terminal facilities to accommodate the Master Plan projections, and where accepted methodologies exist to forecast the future operations and their impacts;

(4) Skewing the baseline for analysis by "piecemealing the project" such that, even if, for argument's sake, additional environmental review as promised in the FEA were appropriate for the entrance of every new air carrier and the addition of every new gate, which it is not, the additional environmental analysis would not be based on the "existing conditions" before the project begins, *see, e.g.*, *Half Moon Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988), but on the impacts of the already approved segment of the project, thus raising the baseline for analysis and concomitantly minimizing the subsequent project's environmental impacts;

(5) Failing to adequately analyze the project's potential noise and air quality impacts or propose reasonable measures to mitigate them; and

(6) Declining to perform the necessary environmental analysis within the context of a full Environmental Impact Statement ("EIS"), despite the project's manifest potential for significant environmental impacts.

I. FAA'S INSTRUCTION THAT IT WILL CONSIDER COMMENTS ONLY ON FEA REVISIONS IS ARBITRARY AND CAPRICIOUS AND VIOLATIVE OF CONSTITUTIONAL DUE PROCESS

As a threshold matter, the instructions given to the public to "specifically cite the new information that is the subject of their comment" ["Notice of Availability of a Final NEPA Environmental Assessment for the Amendment of Operations Specifications for Air Carrier Operations, Amendment of a FAR Part 139 Certificate, and Potential Funding for Modification and Modular Expansion of the Terminal at the Snohomish County Airport/Paine Field," p. 1], and that "all other comments will not be considered further by the agency," *Id.* flies in the face not only of NEPA's fundamental purpose, of "ensur[ing] the agency will inform the public that it has indeed considered environmental concerns in its decision making process," *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1020 (9th Cir. 2006), but also of the Due Process mandates of the United States Constitution.

It has long been taken for granted that NEPA "serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project." *See, e.g.*, *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973). It is also mandated regulatory practice that the administrative process remain open for input from the public until the Record of Decision is signed by the agency finally approving the project. *See, e.g.*, 49 C.F.R. § 611.5 ["T]he NEPA process is completed when a Record of Decision (ROD) or Finding of No Significant Impact (FONSI) is issued."]. NEPA regulations also preclude members of the public from bringing legal action on matters on

which they have not commented during the administrative process. Finally, one of the overarching principles upon which the governmental process rests is the Due Process Clause of the United States Constitution which guarantees the public not only "notice" of governmental action, but also the "opportunity to be heard" on its merits. U.S. Const. amend. V and XIV. Taken together, these principles require that governmental agencies leave open the scope of public comment throughout the administrative process so as not to arbitrarily limit the public's right to be heard on the full scope of the project's impacts at whatever point in the administrative process they are determined.

In patent defiance of these unequivocal mandates, FAA has issued instructions that limit the public's comments only to those matters FAA designates as having been changed in the interim between the publication of the DEA and FEA. Leaving aside the possibility of error in FAA's designations,[1] as well as the above requirement to exhaust administrative remedies, it must be abundantly clear that, from a substantive perspective, the matters that have not been changed may have just as great, or even greater, import than those that have been. This is because it is in the failure to rectify lack of full disclosure of environmental impacts that the potential for the greatest impacts lie, and, thus, the greatest potential for violation of NEPA.

Adding insult to injury, and despite the 2 ½ years, and numerous technical iterations the record demonstrates it took FAA to address the patent inadequacies of the DEA, FAA arbitrarily and capriciously, and in blatant defiance of the Due Process clause of the United States Constitution, failed to respond to Mukilteo's repeated requests for extension of the 30 day comment period on the FEA to give the public which Mukilteo represents a fair chance to be fully "heard" on the credibility of the complex, highly technical revisions contained in the FEA and its appendices.

Finally, despite Mukilteo's requests under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, ("FOIA"), August 31, 2012, FAA has repeatedly failed and refused to produce the requested documents, for reasons that have, from FAA documents obtained through ancillary sources, become painfully clear. Specifically, those documents obtained through FOIA requests made to FAA by other parties reveal not only that FAA had predetermined that the scope of the project would include a new terminal and lease with Horizon, e-mail from Mike Deller, Bank of Everett, to various recipients, February 2, 2009, attached hereto as Attachment 1 [". . . [U]ntil there is a deal struck with Horizon for a lease and an adequate terminal that those [discretionary

[1] Notably, the Snohomish County Airport/Paine Field Final Environmental Assessment Errata Sheet's ("Errata Sheet") list of alleged changes to the DEA omits Appendix Q, Responses to Comments, which itself contains voluminous entirely new purported justifications for the FAA's findings, which under FAA's instructions, are justifiably subjects of public comments, as they did not exist in the DEA. The following are the FEA sections and appendices upon which Mukilteo bases its comments: (1) Notice of Availability of a Final NEPA Environmental Assessment for the Amendment of Operations Specifications for Air Carrier Operations, Amendment of a FAR Part 139 Certificate, and Potential Funding for Modification and Modular Expansion of the Terminal at the Snohomish County Airport/Paine Field; (2) FEA Purpose and Need Chapter; (3) FEA Alternatives Chapter; (4) FEA Environmental Consequences Chapter; (5) FEA Appendix D Noise Analysis; (6) FEA Appendix F Traffic Impact Analysis; (7) FEA Appendix G Forecast Reports; (8) FEA Appendix I Traffic VMT Report; (9) FEA Appendix P Terminal Capacity Analysis; and (10) FEA Appendix Q, Letter L – Response to Comments.

grants] and any stimulus dollars will not be issued"], but also that FAA intended, at all costs, to coerce Snohomish County's compliance with its requests by threats to withhold discretionary funding, ignoring the legally required procedures under, among other processes, 14 C.F.R. Part 16. *See*, Memo from Carol Suomi to Roman Pinon, Stan Allison, Tim Shaw, Cayla Morgan, Bill Watson, January 8, 2009, attached hereto as Attachment 2 ["The suggestion is to just tell them that we will hold back from giving them any additional discretionary funds until they have successfully negotiated leases with both Allegiant and Horizon Air."].

Shockingly, and despite repeated, more clear headed counsel, *see, e.g.*, Memo from Joelle Briggs to Carol Suomi, January 8, 2009, attached hereto as Attachment 3; Memorandum from outside counsel Kaplan, Kirsch & Rockwell, January 7, 2009, attached hereto as Attachment 4 ["[A]n airport sponsor like Snohomish County: . . . [I]s not required to construct facilities to accommodate the carrier if such facilities do not already exist."], FAA leadership persisted in its predetermination of the scope of the project, as well as the level of environmental review that would ultimately be completed. *See, e.g.*, Memo from Carol Suomi to Dave Waggoner, February 9, 2009, attached hereto as Attachment 5 ["There will only be funding of an EA IF the County agrees to build a terminal . . ."].

Belatedly realizing the prohibition on predetermination of the ultimate outcome of the project and the level of environmental review required,[2] FAA has now decided to keep further evidence of its patently arbitrary and capricious decisionmaking process[3] from the public by failing and refusing to provide the requested documents to Mukilteo.

FAA's persistence in its arbitrary limitation on the scope of the comments in the FEA may potentially render the entire exercise of the FEA's publication, the solicitation of comments, and FAA's ultimate approval of the FEA, a nullity. Moreover, given the manifest relevance of Mukilteo's requested documents under FOIA to the outcome of the environmental process, Mukilteo deems FAA's failure to timely respond to, and produce, the requested documents under FOIA as a waiver of the purported time limitation on comments on the FEA, and an approval of a supplement to the current comments within a reasonable time, not to exceed 30 days, of FAA's legally mandated production of the documents requested by Mukilteo under FOIA.

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[2] Predetermination occurs "when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis – which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action. . . In evaluating whether an agency has predetermined the result of its NEPA analysis, we are permitted to look to the NEPA analysis itself – for example the DEIS or FEIS – as well as to evidence outside of the analysis–for example, . . . intra-agency comments, e-mail correspondence, or meeting minutes regarding the proposed action." *Wyoming v. U.S. Dept. of Agriculture*, 661 F.3d 1209, 1264 (10th Cir. 2011), citing *Forest Guardians v. U.S. Fish & Wildlife Service*, 611 F.3d 692, 716-18 (10th Cir. 2010).

[3] An agency's decision is arbitrary and capricious if, among other things, the agency "failed to base its decision on consideration of the relevant factors, *see, e.g., Forest Guardians, supra*, 611 F.3d at 711; *see also* FAA Order 1050.1E § 208a ["NEPA and the CEQ regulations, in describing the public involvement process, require Federal agencies to: consider environmental information in their decision making process."].

II. THE FEA REPRESENTS AN IMPERMISSIBLE SEGMENTATION OF NUMEROUS, INTERDEPENDENT ACTIONS THAT SHOULD BE EVALUATED IN A SINGLE, COMPREHENSIVE ENVIRONMENTAL DOCUMENT

The FEA defines the project to include essentially three components: changes to the operations specifications for two airlines, Horizon and Allegiant; changes to the operating certificate for Paine Field to allow the unlimited operation of commercial aircraft; and the construction of a new "modular terminal" not reflected on the currently approved Master Plan or Airport Layout Plan ("ALP") for Paine Field. Nevertheless, the impacts of these components are analyzed, not only in isolation from one another, but also without regard to the reasonably foreseeable future impacts of the three components when aggregated into what, in fact, constitutes a single project.

The FEA, like the DEA before it, ignores NEPA's mandate that "[a]gencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope ([40 C.F.R.] § 1508.25) to determine which proposal(s) shall be the subject of a particular statement." 40 C.F.R. § 1502.4(a).[4] Those criteria for determining project scope are dispositive here. CEQ Regulations § 1508.25 defines "connected actions," as actions that are "closely related and therefore should be discussed in the same impact statement," § 1508.25(a)(1), if, among other things, they may "[a]utomatically trigger other actions which may require environmental impact statements." § 1508.25(a)(1)(i). FAA's own Order 5050.4B, § 905.c(1) echoes this definition. [Connected actions are "closely related to the proposed action and should be discussed in the same EIS. These actions: (a) May automatically trigger other actions requiring EAs or EIS . . ."]

Nevertheless, FAA bases its decision to perform an attenuated environmental review on three constraining principles: (1) terminal size is not anticipated to be larger than the 29,350 square foot modular terminal added to the 1,600 square foot existing terminal; (2) only two gates will be available based on the terminal capacity to accommodate passengers; and (3) only two airlines have requested service. The FEA further asserts that it is not to be possible to currently anticipate the capacity impacts of future requests by air carriers for access. None of those purported constraints provides a cognizable basis for limiting the scope of environmental review merely to the impacts of the two gate, 29,350 square foot terminal serving only two carriers.

First, the claim of terminal constraints falls directly within the scope of both CEQ Regulations 1508.25(a)(1)(i) and FAA Order 5050.4B, § 905.c(1). The FEA concedes that "[t]he proposed 'modular' terminal building may have capacity to serve other airlines in addition to Horizon and Allegiant," FEA, Appendix Q, Letter L, p. L.102, but, in the event additional demand for terminal space is identified in the future, NEPA compliance would be required. *Id.* at L.102-103. In other words, the heretofore unanalyzed additional capacity of the modular terminal building may "trigger" requests by other airlines for access which would automatically "require" further environmental review.

[4] The regulations set forth in 40 C.F.R. §§ 1500.1, *et seq.*, shall be referred to hereafter as "CEQ Regulations."

The FEA further concedes that "because the proposed service requires less terminal space than that shown on the ALP and due to the volatility and unknown potential of success or failure of commercial service at Paine Field, the FAA will permit the Airport to modify the terminal concept to a 'modular' expansion of the existing terminal building," FEA, Appendix Q, Letter L, p. L.102, without amending the ALP. In other words, the existing permanent terminal specification will remain on the current ALP to which the new "modular" terminal will eventually be added, allegedly "because it is consistent with the designated use shown on the current ALP." *Id.* No clearer example of a "connected action," as defined in the CEQ Regulations and FAA Order exists.[5]

The FEA's third constraining principle, the absence of requests for service by air carriers other than Horizon and Allegiant is similarly baseless. The project being evaluated manifestly includes an upgrade from Paine Field's current Category IV Operating Certificate, which does not allow scheduled operations by large aircraft over 30,000 pounds, to a Category I Operating Certificate which allows operations by all types and sizes of aircraft. The project sponsor is, no doubt, aware that, once designated a Category I airport, the airport must allow access by all aircraft so requesting, where airport facilities make it safe to do so, and terminal facilities are adequate to accommodate them. *See, e.g.*, Airline Deregulation Act of 1978, 49 U.S.C. § 41713; Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47521, *et seq.* Nevertheless, and despite the preemptive authority of Federal law, the FEA, like the DEA before it, fails to include in the Project Description the ultimate effects of the grant to the airport of a Part 139 Operating Certificate, effectively opening the airport to all comers, particularly where, as here, the terminal facilities will, as conceded by the project sponsor, be adequate to accommodate them.

The project sponsor attempts to excuse the absence of these necessary components of the Project Description by claiming that:

> "[T]he FAA determined that the forecasts noted in the EA are reasonably foreseeable. The conditions outlined in the other forecast scenarios are speculative for the following reasons:
>
> - Once commercial service begins, if it is successful, increases in daily and annual operations over time might be realized. However, the magnitude of those increases and the associated timing are not possible to predict.
>
> - Some commenters speculated that additional carriers might choose to begin service at Paine Field in addition to Horizon Air and Allegiant Air. That might occur, but is dependent on a new carrier coming forward. Predictions of environmental effect would vary based on the aircraft mix that would be

[5] The number of gates identified as a constraint on analysis in the FEA is a derivative of the terminal capacity, falls just as squarely within the definition of "connected action," and does not constitute an impediment to analysis of the project as a coherent whole.

> operated by the new carrier. The amount of noise and emissions vary substantially whether the aircraft is a large commercial jet (and can vary substantially among the models of commercial jets) or if the aircraft are turboprops. Thus, without knowing a specific carrier, it would be speculative to estimate environmental effects of an additional unknown carrier."

FEA, Appendix P, p. 4.

The governing law, however, disagrees. "Section 1502.22(b)(4) requires that an agency unable to fill a gap in the relevant data 'deal with uncertainties' that result from the missing data by evaluating potential impacts using theoretical means." *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549, 560, n. 6 (9th Cir. 2011); *see also, San Luis Obispo Mothers for Peace v. Nuclear Regulatory Com'n*, 449 F.3d 1016, 1033 (9th Cir. 2006). The FEA does not, however, disclose that: (1) there are methodologies available and commonly utilized by the FAA and airport operators for estimating future aircraft activity given airport capacity and market conditions; and (2) such methodologies have already been employed at Paine Field to develop market forecasts.

Airport operators and the FAA routinely forecast future airport operations. FAA aircraft activity forecasts are reflected in publications such as "FAA Aerospace Forecast Fiscal Years 2012-2032" (FAA, HQ-121545) and databases such as FAA's Terminal Area Forecast ("TAF") system. Airport operators employ forecasting techniques as a required component of the FAA master planning process. In fact, the FAA Advisory Circular on Airport Master Plan development (FAA, Airport Master Plans, Advisory Circular 150/5070-6B, Change1) devotes an entire chapter, Chapter 7, to forecasting requirements and procedures.

> "Forecasts of future levels of aviation activity are the basis for effective decisions in airport planning. These projections are used to determine the need for new or expanded facilities. In general, forecasts should be realistic, based upon the latest available data, be supported by information in the study, and provide an adequate justification for airport planning and development. Any activity that could potentially create a facility need should be included in the forecast. . . <u>The planning agency should use appropriate statistical techniques to estimate activity where actual operations counts are not available</u>."

[Emphasis added.] FAA Advisory Circular 150/5070-6B, Change 1, § 701. Therefore, the FEA's assertion that:

> "Neither the County nor either carrier has indicated any intent to expand service beyond that proposal [*i.e.*, the initial commercial

> service requests] and neither has the County received any notice of intent from any other carrier to initiate passenger service at the Airport. Therefore, no expansion of service or facilities beyond those proposed is reasonably foreseeable."

FEA, p. B.3, is patently at odds with the fundamental requirements of airport planning.

Moreover, the project sponsor's actions belie its words. Forecasts of potential commercial activity at Paine Field have already been developed as part of the most recent Master Plan Update for the airport (approved by Snohomish County in December 2002 and the FAA in November 2003). As part of that update, specific forecasts for commercial air service were developed under the assumption that "some level of unconstrained [*i.e.*, market] demand exists for passenger service at Paine Field." Snohomish County Airport/Paine Field Master Plan Update, p. B.7. The FEA further acknowledges that such theoretical forecasts were in fact performed.

> "The Master Plan forecasts were not based on actual airline derived passenger projections, but were based on generalized 'rule of thumb' airport planning estimates. The Master Plan used this approach, because at the time, there was not a specific air service proposal, and thus the needs of a possible carrier could not be precisely anticipated."

FEA, Appendix Q, Letter L, p. L.101. Clearly therefore, the FEA is deceptive in abjuring the very methodology which it concedes is appropriate, and which the project sponsor has already utilized.

Finally, the FEA, almost as an afterthought, claims that the attenuated project, as defined, possesses "independent utility." Nothing could be further from the truth. An instructive rule for determining the appropriate scope of a project was articulated by the court in *O'Reilly v. U.S. Army Corps of Engineers,* 477 F.3d 225, 236-37 (5th Cir. 2007). In that case, the court applied a

> "four-part test that asks whether 'the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.'"

Id. quoting *Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F.2d 1129, 1140 (5th Cir. 1992). Although

> "[i]mproper segmentation can occur absent the expenditure of federal funds . . . other factors look to the degree of independent function and utility of the project standing alone. The point of the inquiry is to determine whether the agency artificially divided a

> 'major Federal action' into smaller components to escape the application of NEPA to some of its segments."

O'Reilly, supra, 477 F.3d at 238, fn. 11.

In this case, the project as defined is devoid of independent utility and, conversely, reeks with segmentation "to escape the application of NEPA" to the more impactful future project activities. The FEA admits that even the planned terminal size would allow airlines other than Horizon and Allegiant to utilize it, and, after the grant of Part 139 Operating Certificate to the airport, the law does not allow any airline to be denied that right. Given the manifest growth potential of the facilities, and legal imprimatur for expansion of airline incumbency, the segments of project analyzed in the FEA have no logical termini or rationale. And substantial Federal funds are, in fact, to be spent in this case on enlarging the already existing facilities, and inaugurating the first phase of the much larger terminal expansion reflected on the Master Plan and in the current approved ALP.

Finally, even if the Master Plan and ALP had not already reached the proposal stage and been approved, *O'Reilly, supra*, 477 F.3d at 237 ["improper segmentation is usually concerned with projects that have reached the proposal stage."], "a court [may] prohibit segmentation or require a comprehensive EIS for two projects, even when one is not yet proposed, if an agency has egregiously or arbitrarily violated the underlying purpose[s] of NEPA," *Id.*, *i.e.*, to "'ensure[ ] that the agency ...will have available, and will carefully consider, detailed information concerning significant environmental impacts[, and] guarantee [ ] that the relevant information will be made available to the larger [public] audience.'" *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). Precisely that arbitrary and capricious denial of information to the public concerning the impacts of the whole project in this case fully justifies the requirement for a comprehensive EIS.

III. THE FEA, LIKE THE DEA, FAILS TO MENTION, LET ALONE ANALYZE, THE PROJECT'S REASONABLY FORESEEABLE CUMULATIVE IMPACTS

Even if the expanded terminal facility indicated on the Master Plan, its projected associated gates, and the grant of the requested Part 139 Operating Certificate for the airport included as part of the project were not integral to the Project Description, which they are, they indisputably should have been included in the calculus of cumulative impacts, which they were not. Instead, the project sponsor lists, in both the FEA and DEA, a few categories of projects, notably including an anomalous, but unexplained, category of "improvements to the passenger terminal building," and relies on FAA's equally anomalous definition of a "reasonably foreseeable" action as one "on or off-airport that a proponent would likely complete and that has been developed with enough specificity to provide meaningful information to a decisionmaker and the interested public." FAA Order 5050.4B, ¶ 9q. The FAA Order goes on to more specifically define "reasonably foreseeable" for on-airport actions as, among other things, an

> "action . . . included on an unconditionally approved ALP, and the proponent has:
> 1) committed to complete the proposed action . . .; and/or
> 2) developed preliminary design plans . . .
> Would affect all, some, or one of the environmental resources that the proposed action would affect. [And]
> Would occur within the same time frames as the . . . proposed airport action."

Not unexpectedly, that definition is wholly at odds with the CEQ Regulations on the same subject.

> "A cumulative impact is defined in NEPA's implementing regulations as '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 ... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.'"

Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 993 (9th Cir. 2004), quoting CEQ Regulation 1508.7. The term "reasonably foreseeable" includes "impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." CEQ Regulations § 1502.22(b)(1). [Emphasis added.] "[A] consideration of cumulative impacts must also consider '[c]losely related and proposed or reasonably foreseeable actions that are related by timing or geography.'" *O'Reilly, supra*, 477 F.3d at 234. "[A]n assessment of cumulative effects ask whether a project with individually 'mitigated-to-insignificant' effects may yet result in significant environmental impacts when those effects are aggregated with the foreseeable effects of other environmentally impacting human activities and natural occurrence." *Id.* at 236.

The courts have construed this to require "an analysis of the range of environmental impacts likely to result" even from an alternative of "lower probability." *San Luis Obispo Mothers for Peace, supra*, 449 F.3d at 1034. This requirement would clearly apply to the "national high" scenario set forth in Master Plan § B, p. B.30, Table B11. Nevertheless, the DEA and FEA merely list a handful of past, present and future on-airport projects. A much more complete list of projects, past, present and future, can be found in the Master Plan, § F, pp. F.1-F.5, Tables F1-F3. Since the projects have been included in an approved and operant Master Plan, they are clearly "reasonably foreseeable [actions] that have had or are expected to have impacts in the same area," *see Fritiofson v. Alexander*, 772 F.2d 1225, 1245 (5th Cir. 1985),[6] and should have been included in the FEA's cumulative impacts analysis.

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[6] "We adopt the Fifth Circuit's analysis of what a cumulative impacts analysis requires," *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 95 F.3d 892, 902 (9th Cir. 1996).

Moreover, there can be no doubt that the proposed project, when viewed in its entirety, will give rise to reasonably foreseeable future impacts. The Operating Certificate amendment enables a currently unspecified number of passenger carrier operations. The only reference for a possible estimate of such operations exists in the currently approved Master Plan, p. B.30, which indicates as many as 40,872 operations as a "national high," a "catastrophic consequence," which nevertheless must be evaluated even if its "probability of occurrence is low." 40 C.F.R. § 1502.22(b)(1). Despite the patent reasonableness of the inclusion of the omitted project components and their associated manifestations, including additional operations and growing passenger count, neither the DEA nor the FEA contains any analysis of the cumulative noise or air quality impacts of these components. Instead, the FEA supplements the DEA with a page of conclusory statements about noise, limited to an invocation of the International Civil Aviation Organization's Stage 4 standards; and air quality, limited to a paragraph of conclusions regarding the expectation that the project will not result in exceedances of the National Ambient Air Quality Standards ("NAAQS").

This approach, however, will not withstand judicial scrutiny. In *Klamath, supra*, the Ninth Circuit rejected the lead agency's conclusory approach to cumulative effects, holding that it "does not offer any more than the kind of 'general statements about possible effects and some risks' which we have held to be insufficient to constitute a 'hard look.'" *Klamath, supra*, 387 F.3d at 995, citing *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1128 (9th Cir. 2004). The *Klamath* court further held that "[a] proper consideration of the cumulative impacts of a project requires '"some quantified or detailed information; ... [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided."'" *Id.* at 994. Neither the DEA nor the FEA rise to the required level of specificity, nor do they provide any justification as to why the project sponsor did not take advantage in the preparation of the FEA of the accepted protocols of forecasting with which it was obviously familiar from its work on the Master Plan.

In short, even if the project sponsor considers an outcome "not reasonably foreseeable," the CEQ Regulations require a more stringent treatment than that which has been afforded in this FEA, specifically, "a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment," and "the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(3) and (4). As none of these steps was taken in either the DEA or FEA, the FEA's cumulative impact analysis is fatally inadequate.

IV. THE FEA'S INCREMENTAL APPROACH TO PROJECT DEVELOPMENT ENSURES THE UNDERSTATEMENT OF ENVIRONMENTAL IMPACTS

The FEA attempts to justify its incremental approach to project implementation by acknowledging the need for further environmental review for development of future aspects of the project. That commitment sounds good, but, in reality, serves the project sponsor's apparent purpose of chronically understating the environmental impacts of the whole project.

The courts have unanimously held that "[U]se of existing conditions as the starting point for analysis is reasonable." *American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186, 1198 (9th Cir. 2000). "[O]nce a project begins, the 'pre-project environment' becomes a thing of the past. Evaluating the project's effect on pre-project resources is simply impossible." *Id.* Therefore, "NEPA's effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process." *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 568 (9th Cir. 2000) [emphasis added]. This is because "[w]ithout establishing the baseline conditions which exist in the vicinity of [the project] before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Marketing Ass'n, supra*, 857 F.2d at 510.

Here, the project sponsor proposes to defy the judicial mandate to involve "environmental considerations in the initial decisionmaking process," and, instead, consider environmental impacts after "existing conditions" have been changed by the currently proposed project. The practical effect of FAA's proposal is to create "existing conditions" upon which to predicate the purported future environmental analysis which include a larger terminal, more gates and at least two airline incumbents that don't exist today; associated greater noise, air quality and traffic impacts; and, thus, a "starting point for analysis" which is elevated far above the currently "existing conditions" before initial project implementation. As those currently "existing conditions" without the project are the appropriate baseline for the project's environmental analysis, the inevitable result of the serial approach to environmental review advocated by the project sponsor is the understatement of the full scope of the project.

V. THE FEA'S AIR QUALITY ANALYSIS DOES NOT PROPERLY ACCOUNT FOR THE FULL AIR QUALITY IMPACTS OF THE PROJECT

The FEA's air quality analysis, like its other analyses, falls victim to project segmentation. As a threshold matter, the project sponsor's purported commitment to future environmental review of new airline entrants may be vitiated with respect to air quality analysis, because amendments to the certification of aircraft and engine types that are already certified to meet emissions standards, as set forth in applicable regulations, are, with a few exceptions, viewed by FAA as excluded from further environmental review. *See* FAA Order 1050.1E, § 308c. This is generally acceptable, if all such reasonably foreseeable aircraft and engine types have previously been subject to adequate environmental review. In this case, however, because the FEA does not anticipate or evaluate aircraft operations beyond those of Horizon and Allegiant, reliance on FAA Order 1050.1E would effectively exempt future aircraft entrants and their impacts from any additional air quality analysis under NEPA, even though further environmental review is claimed by the project sponsor to be the panacea for the FEA's current analytic deficiencies.

Such an exemption would be doubly problematic because it would also potentially exempt the project from "conformity" review under the Federal Clean Air Act, 42 U.S.C. § 7506(c). That section, and its implementing regulations, establish maximum levels of emissions

for projects implemented in areas that are not "in attainment" of the National Ambient Air Quality Standards ("NAAQS"), established by the Federal Environmental Protection Agency ("EPA"). *See also*, 40 C.F.R. §§ 93.150-160; 40 C.F.R. §§ 51.850-860. As disclosed in the FEA, the only pollutant with which the applicable region is not in full attainment is carbon monoxide ("CO") [FEA, p. C.5, D.44]. For that pollutant, the region is in maintenance status, meaning that the maximum CO emissions, without triggering a full conformity review, is 100 tons per year.

Despite, or perhaps because of, this clear regulatory regimen, the air quality analysis, like the analysis throughout the FEA, stopped short at a "maximum capacity" of the modular terminal of two gates or 12 boardings per day, ignoring the manifest capabilities for modeling the capacity and emissions impacts of the full terminal depicted on the approved ALP, as well as the capacity to accommodate, and likelihood of accommodating, additional airlines in the modular terminal. That artificial limitation, however, cannot mask the air quality implications of even an attenuated Project Description. The maximum modular terminal capacity forecast set forth in FEA Appendix P, p. 11, reveals, using analysis under FAA's officially sanctioned Emissions and Dispersion Modeling System ("EDMS"), that the project will emit 108.20 tons per year of carbon monoxide. This level is well over the 100 tons per year maintenance level applicable to CO, establishes the significance of the project's CO impacts, and, thus, requires a full conformity analysis in the context of a full environmental impact statement.

VI. THE FEA'S DETERMINATION OF INSIGNIFICANT NOISE IMPACTS IS BASED ON AN INSUPPORTABLE NOISE ANALYSIS

At its fundament, the FEA's noise analysis is still based on skewed data; flawed analysis, including inconsistent baselines for the analysis; and, therefore, incredible results.

First, the FEA states that the annual operations for the 2013 No Action Alternative (112,733 operations), FEA, Appendix D, § 3.1.2, represent an "increase" of 30,989 operations over the 2008 base case (143,722 operations), FEA, Appendix D, § 3.1.1. Using simple arithmetic, without complex models or computers, reveals that the 2013 No Action Alternative actually represents a decrease of 30,989 operations when compared with the 2008 base case. This elementary mistake might be chalked up to typographical error if it were not repeated in the comparisons between the 2018 No Action Alternative (113,787 operations) and the 2008 base case; and again, between the 2018 Preferred Alternative (122,127 operations) and the 2008 base case. Moreover, apparently because of the erroneous arithmetic conclusions, the FEA contains no explanation of the cause of these decreases in the later years, or, more comprehensively the assumptions that guided the noise analysis in general. Without belaboring the obvious, these unexplained counter-arithmetic results and absence of any delineation of the noise analysis' operant assumptions, casts further doubt on the integrity of the analysis in its entirety.

Second, the noise analysis is inconsistent with respect to the operant baselines for analysis. On the one hand, the FEA goes to great pains to analyze future year operations, both No Action and Preferred Alternatives, upon which the noise analysis is apparently (although not

explicitly) based, against the "2008 base case." This comparison is borne out by FEA, Figure C6, Existing Noise Contours (2008), p. C.18, and the FEA, Appendix D, p. 1, which refers to the "2008 base case."

Nevertheless, FEA, Appendix D, § 3.1.2, p.3, states, without explanation: "This [Future Year 2013 No Action Alternative] will be used as a baseline to compare Future Year 2018 Preferred Alternative noise contours." This unexplained disparity between the use of the 2008 and 2013 base cases represents another methodological nail in the coffin of the FEA's determination of the insignificance of the "project's" noise impacts.

In short, given the noise analyses' methodological inconsistencies, particularly the apparent use of inconsistent baselines for analysis throughout, the critical determination of the project's noise impacts cannot be adequately evaluated by the public, and certainly cannot be definitively determined to be insignificant. The project's noise impacts must, therefore, be fully analyzed, including all derivative noise contours, in the context of a full EIS.

VII. THE FEA FAILS TO ADEQUATELY ANALYZE THE PROJECT'S POTENTIAL SURFACE TRAFFIC IMPACTS

The traffic analysis in the FEA presupposes that the maximum impact of allowing what may potentially be unlimited commercial air service will only be 956 daily vehicle trips, assuming 1.5 to 2.4 persons per vehicle, all based on a limited number of flights by Horizon and Allegiant (which can't, as set forth above, be limited). Using these minimal volumes, the EA analyzes 15 intersections, only seven of which purportedly realized 10 or more daily peak hour trips. In addition, several critical intersections and interchanges that lead from Route I-5 to Paine Field, such as I-5/I-405/SR525 Swamp Creek interchange, SR525 and Lincoln Way, SR525 arterial, were not studied because the analysis purports to show that they would not receive more than 10 peak hour daily trips. The severity of impacts to, among others, I-5, SR525, the I-5/128 Street interchange and 128th Street (SR96) from I-5 to Paine Field, as well as the SR99/128th Street Signal which already operates at Level of Service F, the worst possible level of service patently requires further evaluation.

The FEA's analysis also contradicts earlier traffic analysis performed by consultants for Snohomish County. Specifically, the 2004 Mead & Hunt report, "Passenger Core Market Analysis," found that "Snohomish County Airport/Paine Field catchment area contains approximately 28.6% (1,118,315) of the total population of the current Seattle Tacoma International Airport catchment area (3,911,660). Accordingly, the Snohomish County Airport/Paine Field catchment area could garner a comparable share of the area's air travel market." *See*, Passenger Core Market Analysis, p. 19. Moreover, "with retention of 30% of the Snohomish County Airport/Paine Field market, 1,512,463 origin and destination passengers would be generated annually." Passenger Core Market Analysis, p. 21. Therefore, taking in to account the full capacity potential of the expanded airport, the surface traffic impacts would be vastly in excess of the 956 daily vehicle trips assumed in the FEA, thus rendering the FEA's

traffic analysis entirely inadequate. Nevertheless, no traffic mitigation is mentioned let alone proposed for these more than likely additional impacts.

Mukilteo appreciates this opportunity to comment on the FEA's full scope; anticipates FAA's consideration and response to all comments whether on changed or unchanged text; and looks forward to the future opportunity to review and comment on a complete and fully compliant Environmental Impact Statement.

Sincerely,

BUCHALTER NEMER
A Professional Corporation

By Barbara Lichman

Barbara Lichman