No. 07-1493

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTY OF ROCKLAND, NEW YORK, *et al.,*

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL AVIATION ADMINISTRATION

BRIEF *AMICUS CURIAE* OF CHRISTOPHER J. DODD AND ARLEN SPECTER IN SUPPORT OF PETITIONERS

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

1) Parties

a) Petitioners

-- County of Delaware, Pennsylvania	-- City of Elizabeth, New Jersey
-- Hon. Andrew J. Reilly	-- Hon. Linda A. Cartisano
-- Hon. Mary Alice Brennan	-- Hon. Michael V. Puppio
-- Hon. John J. Whelan	-- Friends of the Heinz Wildlife Refuge at Tinicum, Inc.
-- Hon. Ron Raymond	-- Hank Hox
-- Hon. Elric C. Gerner	-- Hon. Geoff Semenuk
-- Hon. Henry A. Eberle, Jr.	-- Robert J. Willert
-- Thomas J. Giancristoforo, Jr.	-- Michael Smith, Pastor, Ridley Park Presbyterian Church
-- County of Rockland, New York	-- Frank Samsel
-- John F. Gresch	-- Timbers Civic Association
-- Friends of the Rockefeller State Park Preserve, Inc.	-- Town of New Canaan, Connecticut
-- Board of Chosen Freeholders of the	-- Gina McCarthy, Commissioner,

County of Bergen, New Jersey	Department of Environmental Protection, State of Connecticut
-- New Jersey Coalition Against Aircraft Noise	-- John Hodge, First Selectman, Town of New Fairfield, Connecticut
-- Borough of Emerson, New Jersey	-- United States Department of Transportation
-- County of Union, New Jersey	-- Mary E. Peters, Secretary of Transportation
-- Federal Aviation Administration	-- Bobby Sturgell, Acting Administrator, Federal Aviation Administration
-- Manny Weiss, Regional Administrator, Federal Aviation Administration Eastern Region	

b) Respondents –

-- United States Department of Transportation	-- Mary E. Peters
-- Federal Aviation Administration	-- Marion C. Blakey
-- William C. Withycombe	-- Bobby Sturgell
-- Manny Weiss	

c) Intervenors – None.

d) Amici – United States Senators, Christopher J. Dodd and Arlen Specter; Anne Milgram, Attorney General of the State of New Jersey.

2) Ruling Under Review

Reference to the ruling under review appears in the Brief for Petitioners.

3) Related Cases

Reference to a related case appears in the Brief for Petitioners.

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153 Cong. Rec. H8346 (daily ed. July 24, 2007) 10

Air Traffic Departures at Newark International Airport: HEARING BEFORE THE SUBCOMM. ON AVIATION OF THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMM., (Nov. 4, 1999) (statement of Arlene B. Feldman, Regional Administrator for the Eastern Region, Federal Aviation Administration*)* (emphasis added), *available at* http://testimony.ost.dot.gov/test/pasttest/99test/staten.htm. 14

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I. INTERESTS OF AMICI CURIAE

Amici curiae are Members of Congress with great interest in this case due to its direct impact on their constituents. Senator Christopher J. Dodd is the senior Senator from the State of Connecticut and Senator Arlen Specter is the senior Senator from the Commonwealth of Pennsylvania.

The Joint Petition for Review challenges the Federal Aviation Administration's (FAA's or Agency's) September 2007 Record of Decision (ROD) for the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign.[1/] Petitioners assert that the Agency violated requirements of the National Environmental Policy Act (NEPA), 42 U.S.C.§ 4321 *et seq*.; the Clean Air Act, 42 U.S.C.§ 7401, *et seq*.; section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c); and other U.S. Environmental Protection Agency (EPA) and FAA regulatory mandates without any analysis of the growth-inducing and cumulative impacts that will result from the changed headings and procedures. The redesign proposed by the FAA will directly and adversely impact the environment and quality of life for many thousands of residents of Connecticut and Pennsylvania. Thus, Petitioners' allegations of legal violations by the FAA – particularly its failure to give due weight to considerations of noise mitigation, should be carefully

[1/] All references to the ROD in this brief will be to the corrected version, AR 9762.

reviewed in the context of clear expressions of contrary Congressional intent.

Senators Dodd and Specter are concerned that the FAA's Study Area includes land designated as a region of national significance by the Highlands Conservation Act (Pub. L. No. 108-421), which was enacted in 2004. *Amici* were original cosponsors of the legislation. The Highlands region encompasses more than two million acres stretching from western Connecticut across the Lower Hudson River Valley and northern New Jersey into east central Pennsylvania. *See* S. Rep. No. 108-376 at 3 (2004). Among the concerns that motivated Congress to enact this legislation were the national significance of the "water, forest, agricultural, wildlife, recreational and cultural resources of the Highlands region, in combination with the proximity of the Highland region to the largest metropolitan areas of the United States." H. Rep. No. 108-373 at 2 (2004). Congress recognized that "continued population growth and land use patterns" have a negative impact on this environmentally unique region, and while it is reasonable that the FAA would want to narrow its focus on certain § 4(f) properties over others, the federal designation of the Highland region should have led the FAA to do a thorough review of all publicly-owned parks or areas within that outlined Study Area. This did not happen, however and, as a result, areas such as Kent Falls State Park, located in Kent, Connecticut, a public-owned state park that is both located within the Study Area and part of the federally designated Highland

region, was not included in the FAA's Environmental Impact Statement ("EIS"). The potential harm caused by an inadequate review of sensitive areas is underscored by the noise pollution and associated problems already demonstrated in Pennsylvania.

Senator Specter is also concerned that on December 17, 2007, pursuant to the airspace redesign, the air traffic control procedures at Philadelphia International Airport (PHL) began routing aircraft departing PHL to the west and northwest over heavily populated sections of Delaware County, Pennsylvania, which were not previously overflown. Residents have complained that the new flight paths are not, as originally stated by the FAA, utilized only during limited hours and only to alleviate serious delays. Instead, planes no longer are required to reach an altitude of 3,000 feet before turning and flying over heavily populated areas. County officials recently testified that calls to the airport noise hotline have increased exponentially.[2] The new flight path, at low altitudes, is also over the John Heinz

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[2] *See County Council Vice-Chair Speaks for Residents at Senate Hearing on Airport,* TOWN TALK NEWS (Philadelphia), May 6, 2008 (quoting Delaware County Council Vice-Chairman Jack Whelan as follows: "December 19, 2007, was a defining moment in this whole misguided airspace redesign plan. Since the new departure heading went into effect, complaint calls to the airport's noise hotline increased a remarkable 1400 percent."); *see also* Alex Rose, *Specter is at a loss for Straight Answers,* DelcoTimes.com, April 28, 2008 (quoting Whelan as follows, "What's more disturbing is that after Dec. 19, 10 percent of the complaints, 88, were made between midnight and 5 a.m., a time when the FAA admits traffic is light. The FAA said it would only utilize this new departure heading when traffic

National Wildlife Refuge, the largest urban wildlife refuge in the United States, which is located approximately one mile from PHL.[3] It appears that the FAA made these dispersal heading changes hastily, after a flawed and inadequate environmental review that was criticized not only by residents, but also by the National Park Service. Under the previous PHL airspace regime, aircraft would overfly the Delaware River, along the southern, more sparsely populated portion of Delaware County; this also circumvented the Heinz Refuge.

In order to learn more about the impact of the changes and to question the Acting FAA Administrator regarding the FAA's statements in November 2007 that new headings at PHL would be limited to use only for relief when more than 10 aircraft are waiting on the runway to depart, Senator Specter chaired a Senate Transportation Appropriations Subcommittee field hearing in Philadelphia, Pennsylvania on April 25, 2008. After repeated questioning, the Acting FAA Administrator admitted that the FAA is not directing use of the new headings exclusively to relieve congestion.[4]

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was backed up during airport rush hours. But these headings are being used in the middle of the night, in blatant opposition to what was promised.").

[3] *See* County of Delaware, Pennsylvania, et al., Statement of Basis for Petitioners' Standing, Affidavit of Hank Hox ¶¶ 2-3.

[4] *See, e.g.,* Patrick Walters, *FAA official says planes routed over suburban Philly area,* ASSOCIATED PRESS, Apr. 26, 2008, ("A top Federal Aviation Administration official said Friday that planes using Philadelphia International Airport are

All parties to this case have been contacted; none oppose the filing of this brief *amicus curiae*.

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sometimes directed to fly an alternate route over residential suburbs even when the path is not needed to alleviate congestion" and "Specter grilled Robert A. Sturgell, the FAA's acting administrator, on whether flights were being directed to the alternate takeoff route during times when fewer than 10 planes were waiting to take off. He cited FAA documents that indicated the new routes would be used during peak hours, at times of the greatest gridlock."); Tom Belden, *Specter demands answers on flights,* PHILADELPHIA INQUIRER, Apr. 26, 2008, D01 ("Specter, responding to hundreds of complaints about airplane noise from Delaware County residents, quizzed Robert A. Sturgell [Acting FAA Administrator] for close to an hour about what the senator said he believed was a promise to limit use of the paths to times when at least 10 planes were backed up, waiting to take off."); William Bender, *Nominee's 'doubletalk' doesn't fly with Specter*, PHILADELPHIA DAILY NEWS, Apr. 26, 2008 ("The question was relatively simple: Is the FAA flying airplanes directly over Delaware County when there are fewer than 10 planes waiting to take off? . . . . The answer, it turns out, is yes, the FAA does use the Delaware County route during peak hours when there are fewer than 10 planes waiting in line.").

II. SUMMARY OF THE ARGUMENT

Contrary to the requirements of federal law, the FAA did not consider noise mitigation to be a substantial purpose and need of the redesign project. The FAA's stated mission was "to increase efficiency and reliability of the air traffic system through the adjustment of traffic flows in the New York/New Jersey and Philadelphia areas while accommodating new technologies and reducing delays."[5/] Relegating noise reduction to merely a "consideration" is an unduly narrow interpretation of federal statutes, and it ignores repeated and unambiguous Congressional action that makes noise mitigation a primary concern of the agency, specifically in regard to the redesign project.

III. ARGUMENT

A. The FAA Did Not Give Appropriate Weight To Noise Reduction in Balancing Alternatives.

The FAA did not accord sufficient weight to noise reduction, as evidenced by the FAA's statement that noise reduction "is not a Purpose and Need for the

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[5/] *See* AR 9762 at 174, Comments of the County Attorney of Rockland County, Aug. 31, 2007 (page 4 of 4) (quoting Response #7 to Comment 4100 by New Jersey Citizens Against Aircraft Noise ("NJCAAN"), EIS at Appendix N).

Airspace Redesign."[6] The FAA defines its mission as one of increasing "efficiency and reliability of the air traffic system through the adjustment of traffic flows in the New York/New Jersey/Philadelphia areas while accommodating new technologies and reducing delays."[7] This unduly narrow interpretation ignores numerous statutory provisions and statements that demonstrate a Congressional desire that noise reduction be a primary mission of the FAA in regard to the Airspace Redesign Plan. The FAA's interpretation is also inconsistent with the FAA's statement at the outset of the NEPA process that noise abatement was one of the key goals of the Airspace Redesign Plan.

B. The FAA's Failure To Give Appropriate Weight To Noise Reduction Is Inconsistent with Congressional Intent.

In relegating the impact of aircraft noise on affected populations to merely one of many issues considered in the NEPA process, the FAA relies upon statutory language directing the Administrator to "consider" several matters concerning

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[6] ROD at 10.

[7] *See* AR 9762 at 174, Comments of the County Attorney of Rockland County, Aug. 31, 2007 (page 4 of 4) (quoting Response #7 to Comment 4100 by New Jersey Citizens Against Aircraft Noise ("NJCAAN"), EIS at Appendix N.) *See also* Response to Comment 5256: New Jersey State Legislators Senator Thomas H. Kean, Jr., Assemblyman Eric Munoz, and Assemblyman Jon M. Bramnick. *See also* ROD at 10, AR 9762.

safety in the public interest.[8] In its Record of Decision, the FAA notes its "first consideration and highest priority . . . is to serve the public interest by exercising its authority to assign, maintain and enhance safety and security of the national airspace."[9] The FAA, however, ignores language found later in the same title that broadens its mission by requiring the FAA Administrator to "prescribe air traffic regulations on the flight of aircraft . . . for . . . protecting individuals and property on the ground."[10] Additionally, FAA's narrow application of 49 U.S.C. § 40103 ignores Congressional direction that "aviation noise management is crucial to the continued increase in airport capacity." 49 U.S.C. § 47521. The reduction of aircraft noise clearly should be a high priority within the FAA's mission, since there is extensive evidence that aircraft noise negatively affects exposed populations.

Congress has frequently directed the FAA to protect exposed populations from the harm of aircraft noise. The Aircraft Noise Abatement Act of 1968, (Pub. L. No. 90-411) (49 U.S.C. § 44715) authorized the FAA to promulgate noise

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[8] *See* 49 U.S.C. § 40101(d).

[9] *Record of Decision, New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign*, at 6, United States Department of Transportation, Federal Aviation Administration, (Sept. 28, 2007) (citing 49 U.S.C. § 40101(d)(1)).

[10] 49 U.S.C. § 40103(b)(2)(B).

standards for aircraft to "relieve and protect the public health and welfare from aircraft noise and sonic boom . . . ."[11/] In 1972, Congress passed the Noise Control Act of 1972, (Pub. L. No. 92-574) (42 U.S.C. § 4901 *et seq.*) granting EPA the power to coordinate noise standards with the FAA to ensure that public heath and welfare were protected and declared that "it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare." 42 U.S.C. § 4901(b). Significantly, the report of the Senate Committee on Public Works noted that "[t]ools other than noise emission standards do exist for reducing aircraft noise" and that "*all existing authority over aircraft or aircraft noise be utilized to reduce that noise, including, among other things, the consideration of flight and operational changes* . . . ." S. Rep. No. 92-1160, reprinted in 1972 U.S.C.C.A.N 4655, 4663 (1972) (emphasis supplied). The Aviation Safety and Noise Abatement Act of 1979 authorized the FAA to award grants for noise mitigation projects. Pub. L. 96-143 (49 U.S.C. § 47501 *et seq.*). The Airport and Airway Improvement Act of 1982 directed that "aviation facilities be constructed and operated to minimize current and projected noise impact on nearby communities." 49 U.S.C. § 47101(a)(2). The Airport Noise and Capacity Act of 1990 established a program to transition to aircraft incorporating jet-engine

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[11/] 49 U.S.C. § 44715.

noise suppressing technology and directing that "a noise policy must be implemented at the national level" and "local interest in aviation noise management shall be considered in determining the national interest." 49 U.S.C. § 47521. Finally, the Federal Aviation Reauthorization Act of 1996 required the FAA to appoint an Aviation Noise Ombudsman to "serve as a liaison with the public on issues regarding aircraft noise" and "be consulted when the Administrator proposes changes in aircraft routes so as to minimize any increases in aircraft noise over populated areas." 49 U.S.C. § 106(q)(2). Given this history, the FAA's policy of considering noise mitigation only "where feasible" cannot withstand scrutiny.[12/] In light of the foregoing, members of Congress have criticized the FAA for the lack of weight afforded to noise reduction as a goal of the redesign plan.[13/]

[12/] Response to Comment 4100: NJCAAN, by Rutgers Environmental Law Clinic, at #28, EIS at Appendix N, *available at*, http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/feis/appendix/media/Appendix_N-Comments_and_Response_DEIS.pdf.

[13/] *See, e.g.*, 153 Cong. Rec. H8346 (daily ed. July 24, 2007) ("Quite honestly, the FAA, if you will pardon the expression, has been blowing us off for a long time. They've been dismissive.") (remarks of Rep. Rodney Frelinghuysen); *see also* 153 Cong. Record H8346 (daily ed. July 24, 2007) ("They don't care. They don't listen. They don't give us an opportunity to speak. I have constituents who have attended hearings, but are told. Listen to us. You can't testify. If we want the FAA to come and allow testimony, they say we'll come to Danbury (where the planes are at 8,000 feet), but we won't come in to Stamford where they're [at] 4,000 feet...") (remarks of Rep. Christopher Shays).

This tension between the legislative and executive branches over noise abatement is evident in the legislative history. At one point the tension over noise abatement grew to the point that Congress directed that "no funds made available under this appropriation may be used to prepare the Environmental Impact Statement . . . as long as the FAA fails to consider" noise mitigation.[14/]

The FAA's definition of purpose and need also conflicts with requirements of NEPA, Council on Environmental Quality ("CEQ") regulations, and the FAA's NEPA regulations. It has been held that the statement of purpose and need in an EIS will provide direction on identifying and evaluating the range of alternatives

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[14/] H. Rep. No. 109-153 (2005). Many statements in the legislative history evince Congressional intent regarding noise reduction. *See, e.g.,* H. Rep. No.104-631, Dept. of Transportation and Related Agencies Appropriations Bill, 1997, at 43 (1996) ("The Committee directs the FAA to work with affected representatives from the New York-New Jersey region, including appropriate citizens groups, to develop the most feasible and cost-effective noise mitigation solution for the expanded East Coast plan. Although the FAA promulgated a final environmental impact statement in 1995 for the expanded East Coast plan, this has not satisfactorily addressed the concerns of citizens in the State of New Jersey, and further analysis of noise mitigation remedies seems appropriate"). *See also*, H. Rep. No. 108-243 (2003) at 20-21 ("The Committee directs that, of the funds provided for national airspace redesign, not less than $6,500,000 shall be allocated to airspace redesign activities in the New York/New Jersey metropolitan area. The Committee also directs FAA to submit, not later than April 1, 2004 a report to the House and Senate Committees on Appropriations on the New York/New Jersey airspace redesign effort. This report should include details on all planned components and elements of the redesign project, including details on aircraft noise reduction and any ocean routing modeling that has been conducted").

and that an agency's stated purpose and need may not be inappropriately narrowed so as to eliminate otherwise reasonable alternatives.[15/] Indeed, Congress can define the scope of an agency's statement of purpose and need or direct federal agencies to do so pursuant to statutory guidance, as it recently did in enacting the "Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users."[16/] Thus, an agency must look at its underlying statutory mandates in defining purpose and need. As the Second Circuit has held, "[s]tatutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives".[17/] Here, the FAA failed to heed its mandate to integrate noise reduction with its other laws, regulations, and polices for the redesign plan.[18/] The courts have consistently

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[15/] *See City of Alexandria, Virginia v. Slater*, 198 F.3d. 862 (D.C. Cir. 1999).

[16/] *See*, Mandelker, NEPA Law and Litigation, sec. 9: 24, 2007 ed (referencing Pub. L. No. 109-59; 119 Stat. 1144).

[17/] *City of New York v. Dep't of Transportation*, 715 F.2d. 732, 743 (2d Cir. 1983); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991)(Though the court found that the FAA acted reasonably in defining the purpose of its action, it still warned that "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality").

[18/] *See* FAA Order 1050.1E.

remanded agency actions in NEPA cases based upon a finding that the agency had incorrectly defined purpose and need.[19/]

C. The FAA's Current Interpretation That Safety and Efficiency Are Much More Important Than Noise Reduction Is Inconsistent With Its Prior Interpretations Of The Relevant Statutes

The FAA's current interpretation is particularly troubling because it is inconsistent with the Agency's stated position at the onset of the NEPA process. In the 2000 "pre-scoping document" the FAA recognized noise reduction as a basic mission when it originally defined the purpose and need to include "reducing

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[19/] *See, e.g., Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997) (reversing decision of district court and holding that the Army Corps violated NEPA by defining the project's purpose too narrowly; "the Corps therefore violated the full range of reasonable alternatives and vitiated the EIS"). In *Simmons*, the court noted, "when a federal agency prepares an Environmental Impact Statement (EIS), it must consider all reasonable alternatives in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these reasonable alternatives are. That choice, and the ensuing analysis, forms the heart of the environmental impact statement. 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. The broader the purpose, the wider the range of alternatives; and vice versa. The 'purpose' of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence). **The federal courts cannot condone an agency's frustration of Congressional will**. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E)." *Id.* at 666 (emphasis added) (citation omitted).

adverse environmental impacts such as noise and air emissions" as a "benefit."[20] This statement reflected the testimony of FAA Regional Administrator Feldman before Congress in November 1999: "The goals of the redesign project are: to maintain and improve system safety; improve the efficiency of the air traffic management and reduce delays; increase system flexibility and predictability; and **seek to reduce adverse environmental effects on communities in and around our Nation's airports.**"[21] These initial assurances proved inconsistent with the FAA's subsequent pronouncement that "No promise of mitigation or ability to reduce noise for large portions of the population have ever been made, as FAA is well aware that this study area containing 29 million people, is heavily and densely

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[20] (DEIS, Appendix M. Section M.2, pp. 1-2) (emphasis added). http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/prescoping/media/prescoping_summary.pdf.

That document stated that:

1.1 Purpose and Need for Airspace Redesign Program

Some of the benefits of a major redesign include:

- Reduced delays at major airports
- Reduced pilot/controller workload
- Enhanced safety
- *Reduced adverse environmental impacts such as noise and air emissions*
- Enhanced productivity

[21] Air Traffic Departures at Newark International Airport: HEARING BEFORE THE SUBCOMM. ON AVIATION OF THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMM., (Nov. 4, 1999) (statement of Arlene B. Feldman, Regional Administrator for the Eastern Region, Federal Aviation Administration) (emphasis added), *available at* http://testimony.ost.dot.gov/test/pasttest/99test/staten.htm.

populated, and opportunities for mitigation are slim."[22] Thus the FAA's reversal frustrated the reasonable expectation set at the outset of the NEPA process that the goal of noise abatement would not be relegated to secondary status.

The impact of the FAA's reversal along with its failure to acknowledge well-documented Congressional intent regarding its noise reduction mandate is readily apparent when considering the FAA's treatment of alternatives such as congestion management and nighttime ocean routing of flights departing from Newark.

The FAA rejected congestion management because it would not meet the Project's Purpose and Need. FEIS at 2-6. This rejection is belied by the fact that since the issuance of the ROD, the FAA has begun to implement this improperly dismissed alternative.[23] Indeed, the May 2007 FACT II Study, which FAA considered and referenced in the FEIS, portended these agency actions. *See* FEIS at 1-17. The FACT II Report was not included in the Record filed with the Court.

Regarding ocean routing, the FAA concluded that "because the purpose of the Ocean Routing Airspace Alternative is to reduce noise impacts on the citizens of New Jersey" it would not achieve the purpose of the proposed action and was

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[22] Response #28 to Comment 4100 by New Jersey Citizens Against Aircraft Noise ("NJCAAN"), FEIS App. N at 1138, AR 9304:1138.

[23] *See, e.g.*, 73 Fed. Reg. 3519 (Jan. 18, 2008) and 73 Fed. Reg. 29550 (May 21, 2008) (capping hourly operations at JFK and EWR airports, respectively, through October 2009); 73 Fed. Reg. 29626 (May 21, 2008) (proposing caps at JFK and EWR through March 2019).

only retained for further study as a mitigation measure "because of the long standing concerns of NJCAAN." FEIS 2-11. The FAA only included nighttime routing as a mitigation measure to mitigate the noise impacts of the preferred alternative. In doing so, the FAA so minimized the noise reduction element of the original project purpose as to violate a cardinal NEPA principle that "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action and the EIS would become a foreordained formality." *Citizens Against Burlington v. Busey*, 938 F. 2d 190, 196 (D.C. Cir. 1991) (citing *City of New York v. Department of Transportation*, 715 F. 2d 732, 743 (2d Cir. 1983)).

Finally, as a general proposition, *amici* are very concerned that the FAA has violated a corollary NEPA principle that "an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." *Citizens Against Burlington,* 938 F. 2d at 196. Here, the FAA initially acknowledged that reducing noise impacts was a benefit of the airspace redesign program, co-equal with redesign delays and enhancing safety; this was consistent with the long history of Congressional enactments setting out the FAA's noise reduction mandate. Later, the FAA ignored that purpose, and instead had a focus

on furthering efficiency reliability and safety, with noise reduction as merely a potential mitigation measure on the impacts of the FAA's preferred alternative. The effect of the FAA's action was to so skew balancing of alternatives as to ensure that the airspace redesign plan would be chosen irrespective of whether alternatives would maximize noise reduction benefits.

IV. CONCLUSION

For all of the foregoing reasons, and in light of stated congressional intent, *amici* respectfully request that the Court vacate the September 2007 FAA Record of Decision and stay implementation of the FAA's Airspace Redesign until completion of a remand and full consideration of the FAA's obligations under NEPA, Section 4(f), and the Clean Air Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Fed. R. App. P. 28(a)(11) and 32(a)(7) and Circuit Rule 32(a)(3)(C) because this brief contains approximately 4,149 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 5, 2008

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James B. Dougherty, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2008, two copies of the foregoing brief were served by first-class mail, postage prepaid, upon the following counsel of record for Petitioners and Respondents:

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