Case Studies on Community Challenges to Airport Development

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CONTENTS

CASE STUDIES ON COMMUNITY CHALLENGES TO AIRPORT DEVELOPMENT

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I. INTRODUCTION

A. Scope, Purpose, and Need

Development activities at airports around the United States have resulted in a number of challenges against the Federal Aviation Administration (FAA) and airport proprietors from municipalities and community groups seeking to modify or prevent airport expansion and development. Many of these challenges are predicated on environmental issues, either through the procedural requirements of the National Environmental Policy Act of 1969[1] (NEPA) and state "mini-NEPA" laws[2] or directly under "special purpose laws" such as the Endangered Species Act of 1973 (ESA);[3] the National Historic Preservation Act of 1966 (NHPA);[4] Airport and Airway Improvement Act of 1982 (AAIA);[5] park, natural resource area, and historic site protection in the Department of Transportation Act (Transportation Act), Section 4(f);[6] the Clean Air Act (CAA);[7] and the Clean Water Act (CWA).[8] Other challenges include state and federal constitutional and other statutory challenges and local land use litigation. This digest addresses both federal and state cases brought by communities and nonprofit organizations in opposition to airport expansion or to development or operations at airports. The digest does not address challenges to the exercise of eminent domain that have been brought by individual property owners against airport proprietors seeking to expand their boundaries through such a taking. The digest summarizes certain of these judicial decisions and explains the basis of the challenge, the defense to that challenge, and the outcome of the case. This collection is intended to convey the strategies used by the FAA and airport proprietors to address community challenges and identify which strategies have succeeded, which have failed, and the reasons.

A questionnaire (a copy of which appears in Appendix A) was circulated among airport proprietors in connection with the preparation of this digest. The questionnaire was intended to elicit specific feedback about litigation strategies used in the face of community challenges to airport development. Twenty-nine responses were received. It is interesting to note that 19, or more than half of the questionnaire responses, indicated no community challenges to airport improvements whatsoever. Two other respondents reported projects in development, but no litigation as of the date of response. One respondent reported that the litigation that followed an airport improvement project involved a dispute as to a contract award, a topic which is not covered in the scope of this digest. Only seven respondents reported community challenges to airport development or operations. Discussions of many of these responses are incorporated in this digest. The list of questionnaire recipients and respondents appears in Appendix B.

B. Summary and Comment—Strategies and Outcomes

1. Litigation Avoidance

While the case law regarding community challenges to airport development and operations is fairly extensive, the survey results indicate that, for the most part, airport proprietors have managed to avoid such litigation. Two proprietors of large airport properties, Metropolitan Washington Airports Authority (MWA) and San Francisco International Airport, reported that their proactive approach to working with stakeholders has been the key to avoiding community challenges. The MWA is an independent body created by the Commonwealth of Virginia and the District of Columbia. It operates and maintains Ronald Reagan Washington National Airport and Washington Dulles International Airport. MWA is a public body, corporate and politic, and is independent of all other bodies. It is not an agency of the Commonwealth of Virginia or the District of Columbia, nor is it a federal agency.

MWA began its second major capital initiative at Dulles in 2000 with a program in excess of $3 billion. The program is funded by a combination of bonds issued by the MWA; Passenger Facility Charges (PFC); federal funding though the FAA (entitlements, discretionary grants, letters-of-intent, reimbursable agreements) and the Transportation Security Administration; and Commonwealth of Virginia grants. While the program involves projects of a scale and nature that could be expected to attract litigation in opposition, this has been avoided through prior planning and buffering, positive community relations and local government support, and compliance with environmental regula-

[1] 42 U.S.C. § 4332(2)(C).

[2] For example, N.Y. ENVTL. CONSERV. LAW art. 8 (McKinney 2005); CAL. PUB. RES. div. 13 (West 2007); and WASH. REV. CODE ch. 43.21C (West 2004).

[3] 16 U.S.C.A. § 1531 *et seq*.

[4] 16 U.S.C.A. § 470 *et seq*.

[5] 49 U.S.C.A. § 47101 *et seq*.

[6] 49 U.S.C.A. §§ 303(c) and FHWA Environmental Impact Policy Guide, 23 C.F.R. § 771.1354(f).

[7] 42 U.S.C.A. §§ 7409, 7410, 7502–14, and 7571–74.

[8] 33 U.S.C.A. § 1251 *et seq*. See also FAA Order 1050.1E, chg. 1, § 404f.

tion.[9] Similarly, the San Francisco International Airport reported that proactive work with environmental groups and regulatory agencies and personal attendance at a monthly Noise Roundtable with elected officials has helped to establish and maintain relationships based on trust.[10] Consistent with this general approach, the responses from the Sarasota Manatee Airport Authority also observed that neighbors have recently been more tolerant toward airport developments, resulting in a sharp reduction in development-related lawsuits.

2. Federal Actions

Certain airport litigation may be unavoidable, and most, although not all, will fall into two general categories: federal environmental challenges and local zoning challenges. This is supported by the survey response from the Sarasota Manatee Airport Authority, which stated: "Typically, legal challenges [will be] brought by community groups exerting pressure on the local government to deny zoning permits or exerting pressure on the FAA to withhold environmental approvals." Airport development projects that rely on federal funding or require other federal approvals will be open to environmental challenges under NEPA and other federal environmental laws and regulations (of the respondents to the survey who indicated funding sources, only one was funded solely with airport revenues). For an environmental review process to withstand court scrutiny, airport project sponsors should ensure that an effective and comprehensive environmental review is performed in accordance with applicable federal and state law and FAA regulation and guidance. An FAA conclusion about any matter that triggers the application of NEPA may be challenged only on the basis of the agency's failure to satisfy the procedural requirements of NEPA, as set forth in the statute or in the Council on Environmental Quality (CEQ) regulations, and specific FAA regulations promulgated in accordance with NEPA.

The survey response of the City of Phoenix Aviation Department is instructive for the kind of diligence required of airport proprietors. In 2002, the City of Tempe filed a preliminary injunction in the United States Court of Appeals for the District of Columbia Circuit[11] to prevent Phoenix from repaving its center runway in concrete. The City of Tempe indicated that the FAA did not appropriately study the air quality impacts of this conversion when it authorized Phoenix to do the work under NEPA. The judge denied the preliminary injunction, and the case was ultimately dismissed in July 2003. Although it did not appear that Phoenix needed to perform the air quality work that it performed during the design phase, it ultimately helped to result in the successful outcome of the case because the judge found that, even if the FAA should have done more air quality analysis, Phoenix had already done the analysis and the result would have been the same, therefore, an injunction was not appropriate.

Many older community challenges have involved issues of jurisdiction and standard of review in federal actions, which have been largely settled by the United States Supreme Court. Only circuit courts may review airport development actions, and courts must review agency decisions under an arbitrary and capricious standard.

3. State Actions

State law challenges very often arise out of land use restrictions as they relate to airport development. State and local governments have the power to enact zoning regulations that apply directly to airport operations. These ordinances must be complied with, or variances obtained from them, for an airport operator or developer to legally proceed with the airport. As two of the survey respondents noted, their least successful arguments against community challenges have involved the assertion of federal preemption, claiming that the federal control of airports trumps local land use regulations.[12] A change to state law may be required to overcome a community challenge based on a local zoning ordinance.[13]

II. ENVIRONMENTAL LAW CHALLENGES

A. National Environmental Policy Act of 1969

NEPA requires all federal agencies to prepare an Environmental Impact Statement (EIS) before taking any "major action 'significantly affecting the quality of

[9] Response of William Legebern, Manager, Planning Department. The program included a new runway, which opened in 2008; mitigation of more than 100 acres of wetlands; and the expansion of the terminal complex, including the replacement of Dulles's mobile lounge system with the AeroTrain automated people mover system. The program included an Environmental Impact Statement (EIS) process for the new runway and a future, fifth runway, as well as two significant Environmental Assessments for the new Airport Traffic Control Tower and a replacement of a major midfield concourse. This program is described in greater detail at: http://www.metwashairports.com/dulles/d2_dulles_development_2/d2_home and in various publications that are available on the Metropolitan Washington Airports Authority Web site, including at: http://www.metwashairports.com/news_publications/publications/annual_reports and http://www.metwashairports.com/news_publications/publications/financial.

[10] Response of John L. Martin, Airport Director.

[11] City of Tempe v. F.A.A, 239 F. Supp. 2d 55 (D.D.C. 2003).

[12] Responses of Sarasota Manatee Airport Authority and Dallas Fort Worth International Airport Board (see Dallas Fort Worth Int'l Airport Bd. v. The City of Irving, 854 S.W.2d 161 (Tex. App. 1993) (discussed in greater detail *infra*.)

[13] See City of Euless v. Dallas/Fort Worth Int'l Airport Bd., 936 S.W.2d 699 (Tex. App. 1996). Gary Keene of the Dallas Fort Worth (DFW) International Airport reported that its best strategy was to seek statutory change from the Texas Legislature when State law appeared to allow the nonowner cities of Irving, Euless, and Grapevine to exercise zoning control within the boundaries of DFW Airport. "The economic importance of DFW Airport carried the day with the Texas Legislature."

the human environment."[14] The purpose of an EIS is to "provide full and fair discussion of significant environmental impacts and [to] inform decision makers and the public of the reasonable alternatives which would avoid or minimize the adverse impacts or enhance the quality of the human environment."[15] This requirement is implemented through regulations promulgated by the CEQ.[16] The CEQ regulations direct that federal agencies integrate the NEPA process with other planning "at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."[17]

Federal agencies are required to adopt implementing procedures to supplement the CEQ's NEPA regulations. These procedures must, among other things, set forth specific criteria for and identification of those typical classes of action that do and do not normally require either an EIS or an Environmental Assessment (EA).[18] FAA publishes its agency-wide policies and procedures for compliance with NEPA and implementing regulations issued by the CEQ in the *Federal Register* without codifying them in the Code of Federal Regulations (C.F.R.).[19] FAA Order 1050.1E, as supplemented by Order 5050.4B and the applicable CEQ regulations,[20] applies to actions directly undertaken by the FAA and where the FAA has sufficient control and responsibility to condition the license or project approval of a nonfederal entity.[21]

The airport proprietor will be active in preparing the environmental studies, and the FAA's function in the process will be to review the proprietor's plan for adequacy. FAA Order 1050.1E delineates the agency's policies and procedures for compliance with NEPA and the CEQ regulations. The order establishes three major levels of NEPA review: categorical exclusions, EAs, and EIS's. The order specifically requires the agency to prepare either an EA or an EIS unless the proposed action falls within a categorical exclusion or if extraordinary circumstances apply.[22] FAA Order 1050.1E enumerates the actions that are categorically excluded and will not require further study.[23] The FAA is the sole arbiter of whether to proceed with an EIS or a Finding of No Significant Impact (FONSI).

NEPA and the CEQ regulations require that agencies define the scope of the project,[24] consider alternatives to the proposed action,[25] cooperate with other federal agencies in preparing and implementing an EIS,[26] address the environmental consequences of the proposed action,[27] and ensure the professional integrity, including scientific integrity, of the discussions and analyses in the EIS.[28] An agency is required to prepare a draft EIS and invite comments on the draft from other federal agencies with relevant expertise, appropriate state and local agencies, Indian tribes (when a reservation may be affected), and the public. An agency also may request comments on a final EIS before the decision is finally made.[29] An agency must prepare a supplemental EIS if the agency makes substantial changes in the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[30]

It is important to understand that NEPA as well as the CEQ and other federal agency regulations implementing the statute are purely procedural in nature. The U.S. Supreme Court has expressly recognized that "NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action."[31] Hence, an FAA conclusion about any matter that triggers the application of NEPA may be challenged only on the basis of the agency's failure to satisfy the procedural requirements of NEPA as set forth in the statute or in the CEQ and specific FAA regulations promulgated in connection with NEPA.

1. Threshhold Consideration of Whether There Is Federal Action in NEPA Challenges to Airport Development

Within the FAA's authority is the control and regulation of the designation, construction, maintenance, and operation of all civil airports in the United States.[32] FAA actions constitute "federal action" within the meaning of NEPA.[33] As discussed above, federal action must be "major" before the EIS requirement applies.[34]

[14] 42 U.S.C. § 4332(2)(C).

[15] 40 C.F.R. § 1502.1.

[16] *See* 40 C.F.R. § 1500–1508.

[17] 40 C.F.R. § 1501.2.

[18] 40 C.F.R. § 1507.3.

[19] *See* FAA Order 1050.1E, chg. 1; Notice of Adoption, 69 C.F.R. 3378 (2004); FAA Order 5050.4B, Apr. 2006 (airport development projects and actions); 71 Fed. Reg. 29014 (2006).

[20] 40 C.F.R. pts. 1500–1508.

[21] See Cover Memorandum to Order 1050.1E, effective Mar. 20, 2006.

[22] FAA Order 1050.1E, chg. 1, para. 201.

[23] FAA Order 1050.1E, chg. 1. Categorical exclusions are addressed in paras. 307–312, and extraordinary circumstances are addressed in para. 304.

[24] 40 C.F.R. § 1501.7.

[25] 40 C.F.R. § 1502.2 and 1502.14.

[26] 40 C.F.R. § 1501.6.

[27] 40 C.F.R. § 1502.16.

[28] 40 C.F.R. § 1502.24.

[29] 40 C.F.R. § 1503.1.

[30] 40 C.F.R. § 1502.9.

[31] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989).

[32] 49 U.S.C.A. § 40101 *et seq*.

[33] FAA Order 5050.4B defines a "federal action" for purposes of the FAA's Office of Airports as follows:

1) Conditional, unconditional, or mixed approval of federal funding for airport planning and development projects, includ-

Questions regarding federal participation arise when an action is contemplated by a nonfederal proprietor and the applicable project may be eligible for federal assistance or require federal permits or approvals. In the case of *Citizens Advocacy Center v. DuPage Airport Auth.*,[35] the Seventh Circuit held that there was no federal action when a major airport runway extension at DuPage Airport was paid for with local funds. In this case, the plaintiffs sought to bring a claim under NEPA soon after DuPage Airport had applied for federal aid, but the court denied federal jurisdiction on the grounds that the runway extension had been completed with funds from state and local government. Similarly, see *City of Boston v. Volpe*,[36] in which the First Circuit held that a tentative funding commitment for an airport improvement did not make the project federal. Likewise, the Ninth Circuit has held that FAA approval of an airport layout plan (ALP) and federal assistance for certain airport projects does not federalize other nonfederal projects at the same airport.[37]

Federal participation questions also arise when nonfederal entities attempt to "segment" a project and claim the nonfederal segment does not fall under NEPA. In the case of *Communities, Inc. v. Busey,*[38] petitioners contended that the FAA had violated NEPA by improperly "segmenting" the analysis of hazardous wastes and transportation. The segmentation claim arose from the perceived lack of a complete remediation or mitigation plan. The Sixth Circuit found that FAA consideration of contamination had met the "hard look" standard.[39] With respect to the transportation impact, the Final EIS (FEIS) and Record of Decision (ROD) were clear that any reconstruction of a roadway would take place sufficiently into the future so that the FAA could properly delay consideration of the speculative project and treat the roadway as closed. The court held that the identification and discussion of various potential measures to mitigate were legally sufficient.[40]

2. NEPA Challenges Limited to Process

The purpose of an EIS is to "provide full and fair discussion of significant environmental impacts and [to] inform decision makers and the public of the reasonable alternatives which would avoid or minimize the adverse impacts or enhance the quality of the human environment."[41] The statutory requirement that a federal agency prepare an EIS serves NEPA's "action forcing" purpose 1) by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and 2) by guaranteeing "that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision."[42] One of the principal purposes of NEPA is to ensure public disclosure of information relevant to federal decisions significantly affecting the environment.[43]

Courts consistently have emphasized that NEPA simply requires agencies to take a hard look at environmental consequences.[44] NEPA itself does not mandate particular results, but simply prescribes the necessary process, even though the procedures followed under NEPA may impact the agency's substantive decision. As the D.C. Circuit stated in *Citizens Against Burlington, Inc. v. Busey*,

ing separate funding of plans and specifications for those projects;

2) Conditional, unconditional, or mixed approval of a location for a new, public use airport;

3) Conditional, unconditional, or mixed approval of a first-time or changed airport layout plan (ALP);

4) Authorizing an airport sponsor to impose and use Passenger Facility Charges (PFC);

5) Conditional, unconditional, or mixed approval of an airport sponsor's request under 49 U.S.C., § 47125, to use or transfer federally-owned land to carry out an action under 49 U.S.C. ch. 471, subch. I, at a public-use airport or to support the airport's operations;

6) Conditional, unconditional, or mixed approval of an airport sponsor's request to release airport land from a federally-obligated, public-use airport when the land would be used for nonaeronautical purposes;

7) Conditional, unconditional, or mixed approval of the use of a facility as a public-use airport when the facility becomes available under the Surplus Property Act;

8) Approving noise compatibility programs under 14 C.F.R. pt. 150;

9) Approving an airport sponsor to restrict the use of Stage 3 aircraft at public-use airports under 14 C.F.R. pt. 161;

10) Issuing a Part 139 certification; and

11) Conditional, unconditional, or mixed approval of funding for measures in an FAA-approved Wildlife Hazard Management Plan or approving ALP changes to accommodate those measures.

[34] 42 U.S.C. § 4332(2)(c).

[35] 141 F.3d 713 (7th Cir. 1998).

[36] 464 F.2d 254 (1st Cir. 1972).

[37] *See* Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975).

[38] 956 F.2d 619 (6th Cir. 1992).

[39] *See* § II.A.2 *infra*.

[40] *Id*. at 625, citing to Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S. Ct. 1835, 104 L. Ed.2d 351 (1989) *See also* highway cases: Historic Pres. Guild v. Burnley, 896 F.2d 985 (6th Cir. 1989); Save Barton Creek Ass'n v. Fed. Highway Admin., 950 F.2d 1129 (5th Cir. 1992); *See also* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 8:18, 2d ed. Supp. 2009).

[41] 40 C.F.R. § 1502.1.

[42] Robertson v. Methow Valley Citizens Council, 490 U.S. at 349 (1989).

[43] Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 681, 359 U.S. App. D.C. 383 (D.C. Cir. 2004), citing *Robertson*.

[44] *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 206, 290 U.S. App. D.C. 371 (D.C. Cir. 1991), citing *Robertson* and referencing 40 C.F.R. § 1502.1.

> Because the statute directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another, federal judges correspondingly enforce the statute by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decision makers to reach certain results.[45]

In that case, discussed in greater detail below in Section 3.D, the court upheld the FAA's decision to approve an airport expansion project for the Toledo Express Airport. The court concluded that the FAA had taken the requisite "hard look" at alternatives to the proposed action and found that the FAA had complied with NEPA.

In the case of *City of Bridgeton v. Slater*,[46] the Eighth Circuit considered whether the FAA had adequately considered reasonable alternatives when it prepared the EIS for the expansion of the Lambert–St. Louis International Airport. After "having given the FAA's decision and administrative record the thorough, probing, but deferential review required,"[47] the court concluded that the FAA had taken the requisite "hard look." The court noted the voluminous findings, analysis, and correspondence, and the extensive comparison of the environmental impacts of alternatives. The court simply stated, "The NEPA requires no more."[48] NEPA requires that the adverse environmental effects of a proposed action are adequately identified and evaluated.[49] Although other statutes may impose substantive environmental obligations on federal agencies, NEPA simply imposes procedural requirements designed to ensure that agencies make decisions only after they are fully informed about relevant considerations.

In the case of *Runway 27 Coalition, Inc. v. Engen,*[50] the court found that the FAA did not properly or adequately consider environmental impacts as required by NEPA, CEQ regulations, or FAA NEPA/CEQ-implementing regulations. In that case, the petitioners requested a court order requiring the FAA to prepare either an EA or an EIS in connection with changes to runway configurations and departure headings and procedures that were implemented at Logan International Airport. The court described the administrative record of the agency's decision not to prepare an EIS as "virtually nonexistent," and devoid of any evidence that the FAA had performed an EA or "environmental consideration" before authorizing or acquiescing in the challenged changes concerning runway configurations and departures.[51] In addition, the court concluded that the FAA's failure to prepare an EA was in violation of FAA NEPA-implementing orders that were in effect during the time period that the challenged runway-related changes were authorized.[52] The court therefore determined that the FAA refusal to prepare an EA in this case was erroneous as a matter of law, and preparation of an EA was ordered.[53]

3. Challenges to the Agency That Prepared an EA or EIS

If more than one federal agency is involved in the proposed federal action, each agency has an independent obligation under NEPA. An agency may not avoid NEPA's requirement by simply relying on another agency's conclusions about a federal action's impact on the environment.[54] However, an agency may adopt another agency's EA after reviewing it, accepting responsibility for its scope and content, and issuing its own FONSI.[55] The case of *State of North Carolina v. Federal Aviation Administration*[56] illustrates these points. In *North Carolina*, the FAA, at the request of the Navy, issued a final rule revoking, realigning, and establishing restricted airspace over eastern North Carolina. The state sought revocation of the FAA rule on the ground that the FAA simply accepted the Navy's statement of compliance with NEPA rather than conducting its own EA or reviewing and independently evaluating the Navy's EA. The FAA initially took the position that compliance with NEPA was the Navy's responsibility; however, in response to criticism from North Carolina, the General Accounting Office, and the CEQ, the FAA revised its position and undertook an independent review of the Navy's EA. The FAA then issued its own FONSI, taking responsibility for the scope and content of the Navy's assessment. The court therefore concluded that the FAA had complied with CEQ regulations.

4. Challenges That Involve the Use of Contractors/Consultants for Preparation of an EIS

FAA Order 1050.1E, Change 1, permits the use of contracted consulting services for the preparation of essential environmental documents or information. Contractors also may be used to prepare background or supplemental material and otherwise assist in prepar-

[45] *Id*. at 194.

[46] 212 F.3d 448 (8th Cir. 2000).

[47] *Id*. at 452.

[48] *Id*. at 459.

[49] Robertson at 350; State of N.C. v. Fed. Aviation Admin., 957 F.2d 1125, 1130 (4th Cir. 1992).

[50] 679 F. Supp. 95 (D. Mass. 1987).

[51] *Id*. at 108.

[52] The NEPA-implementing Orders all were earlier versions of Order 1050.1E. The court stated:

> The record on which the agency acted in deciding not to prepare an EA would not support a finding of fact that the challenged changes in rules and practices for Runway 27 departures were not "[n]ew or revised air traffic control procedures which routinely route air traffic over noise sensitive areas at less than 3,000 feet ABOVE GROUND LEVEL," FAA Order 1050.1D at Appendix 3, para. 3(a), or were not [n]ew Instrument approach Procedures, Departure Procedures, En Route Procedures [or] Modification to currently approved instrument procedures which are conducted below 3,000 feet ABOVE GROUND LEVEL and which will tend to increase noise over noise sensitive areas. *Id*. at Appendix 4, para. 3(g).

Runway 27 Coalition at 102.

[53] *Id*. at 101–02, 109.

[54] N.C. v. FAA. 957 F.2d 1125, 1129–30 (1992).

[55] *Id*. at 1130, citing Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34265–66 (1983).

[56] 957 F.2d 1125 (1992).

ing draft or final environmental documents for which the FAA takes responsibility. When a contractor prepares an EA or an EIS for the FAA or an EA for a non-FAA party seeking FAA approval or funding, the contractor must comply with the provisions of FAA Order 1050.1E, Change 1.[57] Community challenges arise in the context of consultant selection and supervision; however, the courts generally have not recognized issues sufficient to invalidate an EIS.

In the case of *Citizens Against Burlington, Inc. v. Busey*,[58] the court found that the FAA had violated CEQ regulations by failing to itself select the consultant that prepared the EIS; however, the court held that this particular error in and of itself did not compromise the objectivity and integrity of the NEPA process and therefore did not invalidate the EIS. In *Citizens Against Burlington*, the Toledo-Lucas Port Authority sought expansion of the Toledo Express Airport to make Toledo a cargo hub. The FAA approved this plan, relying upon an EIS that was prepared by a contractor who had been selected by the port authority. The fact that the FAA had "concurred" in the selection of the contractor was found insufficient to comply with 40 C.F.R. § 1506.5(c), which states: "It is the intent of these regulations that the contractor be chosen solely by the lead agency…to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency…specifying that they have no financial or other interest in the outcome of the project." In *Citizens Against Burlington*, the contractor had failed to fill out the required disclosure form. Therefore, rather than invalidating the EIS, the court ordered the FAA to have the contractor execute an appropriate disclosure statement so that FAA could determine whether a conflict of interest existed, and if so, how to proceed.[59]

Similarly, in the case of *Communities Against Runway Expansion, Inc. v. FAA*,[60] the court upheld the EIS despite a claim that the FAA had not properly selected and supervised the contractor who prepared the EIS, because there was no showing that this "putative error" compromised the objectivity and integrity of the NEPA review process.[61] *Communities* concerned an EIS related to expansion of Logan International Airport that was prepared jointly by the FAA and the Massachusetts Port Authority (Massport), a Massachusetts State agency.[62] The record in the case left unclear whether it was the FAA or Massport who selected the contractor, and the court held that it need not determine the FAA's precise role in contractor selection because there was no showing that the manner in which the contractor was chosen prejudiced the FAA's review of the project. In addition, the contractor had executed a disclosure statement specifying that it had no conflict of interest, and the court noted that there was nothing evident in the record that would otherwise disqualify the contractor from preparing the EIS.[63]

B. Standard of Review Under NEPA—"Arbitrary or Capricious"

Federal agency determinations related to the NEPA process are subject to court review under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, which empowers federal courts to "hold unlawful and set aside agency action, findings, and conclusions, if they fail to conform with any of six specified standards," one of which is the "arbitrary or capricious" standard.[64] In *Marsh v. Oregon Natural Resources Council*, the U.S. Supreme Court explained that when resolution of a dispute under NEPA involves primarily issues of fact, an agency's determination deserves deference and will not be set aside unless that determination was "arbitrary or capricious."[65] *Marsh* concerned a challenge to a decision by the U.S. Army Corps of Engineers (USACE) not to prepare a supplemental EIS to review new information. The Court held that the Corps' decision did not violate NEPA because it was founded on a "reasoned evaluation of the relevant information."[66] The *Marsh* court emphasized that the ultimate standard of review is a narrow one, and that an agency decision will be upheld even if another decisionmaker might have reached a contrary result, so long as the decision is not "arbitrary or capricious."[67]

Since *Marsh*, the "arbitrary or capricious" standard consistently has been applied in cases involving challenges to airport development. For example, *County of*

[57] FAA Order 1050.1E, chg. 1, § 204a.

[58] 938 F.2d 190, 290 U.S. App. D.C. 371 (D.C. Cir. 1991).

[59] *Id*. at 202.

[60] 355 F.3d 678, 359 U.S. App. D.C. 383 (D.C. Cir. 2004).

[61] The petitioners claimed that the FAA violated CEQ regulations as well as the FAA's internal third-party contracting guidance (EIS Preparation Guidance—Third Party Contracting (July 24, 1995), http://www1.faa.gov/arp/app600/5054a/3rdprty.htm). *Id*. at 686.

[62] 40 C.F.R. § 1506.2(c) requires federal agencies to cooperate with state and local agencies to the fullest extent possible, including in the preparation of joint environmental assessments.

[63] *Communities Against Runway Expansion*, 355 F.3d at 686–87.

[64] Marsh v. Or. Natural Res. Council, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989).

[65] *Id.* at 375–78. Prior to *Marsh*, the 7th, 8th, and D.C. Circuits applied a "reasonableness standard" or a "substantial evidence test," which was expressly rejected in *Marsh*. These courts would weigh the evidence to determine whether an agency determination was reasonable. See Suburban O'Hare v. Dole, 787 F.2d 186 (7th Cir. 1986). The distinction between "reasonableness" and "arbitrary and capricious" was often not clear and sometimes used interchangeably. See Boles v. Onton Dock, Inc., 659 F.2d 74 (6th Cir. 1981); Cmty. for Auto Responsibility v. Solomon, 603 F.2d 992, 195 U.S. App. D.C. 410 (D.C. Cir. 1979).

[66] *Marsh*, 490 U.S. at 385.

[67] *Id*. at 378 and 385.

Rockland, New York v. FAA,[68] concerned a challenge to an FAA multiphase plan to modernize the New York/New Jersey/Philadelphia Metropolitan Area airspace. The petitioners objected to the FAA's forecast of future traffic, arguing 1) that the FAA failed to consider reasonably foreseeable indirect effect of the redesign because it did not adjust its forecast for the growth-inducing effect of reductions in flight delay, 2) that the FAA should have adjusted the baseline for its environmental analysis once it recognized that it had overestimated future traffic, and 3) that the FAA should have forecast the impact of future traffic in 2012 and in 2017 because the agency "usually" forecasts such impacts for the year of anticipated project implementation and for 5 to 10 years after implementation. Applying the "arbitrary or capricious" standard to these arguments, the court concluded that the FAA's environmental impact analysis was "procedurally sound and substantively reasonable."[69] The court stated that the FAA had created its models with the best information available when it began its analysis and had checked the assumptions of those models as new information became available. The court also concluded that the FAA had complied with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures App. A Section 14.1g(2) (March 20, 2006), stating that under that regulation, the FAA need only select an "appropriate time frame" for its forecast (which was not necessarily the "usual" forecast for the year of anticipated project implementation and for 5 to 10 years after implementation).

In *Communities Against Runway Expansion,* the petitioners sought review of an FAA order approving changes to the layout plan for Boston's Logan International Airport (including construction of a new runway and improvement of existing taxiways). The *DC Circuit* stated: "In reviewing the FAA's compliance with NEPA, our role "is simply to ensure that the…decision [of the agency] is not arbitrary or capricious."[70] The court explained that the scope of review under the "arbitrary or capricious" standard is narrow, and that while a court may not substitute its judgment for that of the agency, the agency must articulate a satisfactory explanation for its action including "a rational connection between the facts found and the decision made."[71] The court then held that the FAA had not been "arbitrary or capricious" 1) in connection with its choice of contractor (as discussed in greater detail in Section 3.D above), or 2) with regard to the FAA's failure to publicly disclose certain information.

The court in *Communities, Inc. v. Busey*[72] also applied the "arbitrary and capricious" standard to its review of a complaint that the FAA had not used the proper noise analysis method when it approved the Louisville Airport Improvement Plan. Noting that it was within the agency's expertise to determine proper testing methods, the court concluded that the noise analysis method chosen by the FAA was reasonable, and therefore, the FAA did not act in an "arbitrary or capricious" manner.[73]

While the courts will uphold agency action if there is a rational basis for an agency determination, in *National Parks and Conservation Association v. FAA*,[74] the Tenth Circuit has applied the arbitrary and capricious standard and found that the FAA had made determinations based on various assumptions and subjective values, which the court decided did not provide it with a rational decision it could assess.

C. Challenges to FAA Determination to Issue a FONSI

Generally, the courts will defer to the FAA's decision to issue a FONSI. In the case of *C.A.R.E. Now, Inc. v. Federal Aviation Administration,* the FAA[75] issued a FONSI in connection with its order approving a runway extension at DeKalb-Peachtree Airport. The petitioner, a nonprofit civic organization consisting of homeowner associations and neighborhood groups in areas encircling the airport, opposed a proposal that would extend one of the runways by 1,000 ft. The petitioner raised four issues in connection with the FONSI: 1) whether the impacts as presented by the FONSI were "significant" so as to require an EIS pursuant to NEPA; 2) whether the FONSI was deficient because the FAA failed to determine whether prudent alternatives to the project existed; 3) whether the FONSI was deficient because the FAA failed to consider the cumulative im-

[68] County of Rockland, N.Y. v. FAA, 335 Fed. App'x 52, 2009 U.S. App. LEXIS 12513 (D.C. Cir. 2009).

[69] *Id*.

[70] 355 F.3d 678, 685, citing City of Olmstead Falls, OH v. F.A.A., 292 F.3d 261, 269 (D.C. Cir. 2002) (quoting Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97–98, 103 S. Ct. 2246, 2252–53, 76 L. Ed. 2d 437 (1983)).

[71] *Id*. at 685.

[72] 956 F.2d 619 (6th Cir. 1992).

[73] There have been numerous challenges to the FAA's choice of noise analysis methodology in which the courts have determined that the FAA was not "arbitrary or capricious," including Seattle Cmty. Council Fed'n v. FAA, 961 F.2d 829 (9th Cir. 1992) (neither CEQ nor FAA regulations require single-event testing in addition to or in lieu of cumulative testing re noise); Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998) (FAA used measurements by the National Park Service and a private consultant); Custer County Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001) (Methodologies used to measure noise impacts were reasonable; they were well established and widely accepted methodologies); Town of Cave Creek Ariz. v. FAA, 325 F.3d 320 (D.C. Cir. 2003) (FAA adequately considered the degree to which the effects on the quality of the human environment are likely to be "highly controversial" where FAA chose one model over another proferred model to evaluate noise impacts); and City of Bridgeton v. FAA, 212 F.3d 448 (8th Cir. 2000) (FAA method of noise measurement complied with NEPA).

[74] Nat'l Parks and Conservation Ass'n v. U.S. Dep't of Transp. and F.A.A., 222 F.3d 677 (9th Cir. 2000).

[75] 844 F.2d 1569 (11th Cir. 1988).

pact of past, present, and reasonably foreseeable actions in finding that the project would not significantly impact the environment; and 4) whether the FAA erred in considering speculative mitigation measures in concluding that the project would have no significant impact on the environment. The Eleventh Circuit held that the FONSI survived each of these four concerns.[76] The court concluded 1) that the FAA employed legally adequate methods for projecting the potential impact on the human environment, 2) that the FAA made a "reasoned choice" among alternatives, 3) that the FAA's limited analysis of cumulative effects was warranted, and 4) that because the FAA imposed mitigation measures as a condition precedent to construction of the runway extension, the FAA's finding that the mitigation measures reduce the potential environmental impact to an insignificant level was a reasonable conclusion.

Similarly, in *City of Alexandria v. Helms*,[77] the Fourth Circuit held that the FAA did not abuse its discretion in issuing a FONSI related to its "scatter plan" test to distribute aircraft noise as equitably as possible among areas near the airport, because the test was to last no more than 90 days, and the FAA invited public comments on and carefully considered possible environmental consequences of the plan. In *Burbank Anti-Noise Group v. Goldschmidt*,[78] the Ninth Circuit held that the financing and acquisition of an existing airport is not a change in status quo that requires preparation of an EIS. In *Town of Cave Creek Arizona v. FAA*,[79] the D.C. Circuit supported a FONSI determination in which the court found that the FAA had properly employed a well-established methodology to evaluate required noise impact criteria under NEPA.

Although the weight of authority has shown judicial deference to FAA's decision to issue a FONSI, the courts will require an administrative record that supports the agency's determination not to require an EIS. In the case of *Runway 27 Coalition*,[80] the FAA approved changes to runway configurations and departure headings and procedures for implementation at Logan International Airport without preparing either an EA or an EIS and without issuing a FONSI. The court ordered the FAA to prepare an EA because there was virtually no administrative record of the agency's decision not to require an EIS.

D. Challenges to Whether FAA Adequately Considered Alternatives Under NEPA

The CEQ regulations implementing NEPA provide that an EIS must rigorously explore and objectively evaluate all reasonable alternatives, but it need only briefly discuss the reasons why other alternatives were eliminated from more detailed study.[81] FAA NEPA-implementing policies and procedures require evaluation of alternatives that are reasonable and feasible and achieve the project's purpose, including no action, proposed action, and other reasonable alternatives.[82] Community challenges have included claims that the FAA has not sufficiently considered available alternatives.

In *Citizens Against Burlington, Inc.,*[83] an alliance of people who lived near the Toledo Express Airport challenged an FAA order approving the city of Toledo's (Toledo-Lucas Port Authority) plan to expand the airport in furtherance of the port authority's objective to make Toledo a cargo hub. The petitioners contended that the FAA failed to comply with NEPA because the EIS included detailed analysis of only two alternatives—the proposed alternative and the do-nothing alternative. In the EIS, the FAA described five alternatives and briefly explained why it eliminated all but two for detailed consideration. The court held that the FAA's reasoning fully supported its decision to evaluate only the two alternatives because the FAA properly focused on the purpose of the proposed action in making that decision. The court stated: "An agency may not define the objectives of its action 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."[84] The court concluded that the FAA acted reasonably in defining the purpose of its action as fulfilling the FAA's statutory mandate to facilitate the establishment of air cargo hubs under the AAIA of 1982. The court held that the FAA complied with NEPA because it acted reasonably when it eliminated from detailed discussion the alternatives that would not accomplish the purpose of its action.

Similarly, in *Custer County Action Association v. Garvey*,[85] the court concluded that the EIS adopted by the FAA satisfied NEPA standards when it considered in detail only those alternatives that were reasonable in the context of the primary purpose of the proposed action. In that case, the petitioners sought reversal of an FAA order that approved the

[76] Central to the court's analysis of the issues presented in *C.A.R.E. Now* was the pivotal fact that the terms of the proposed runway extension specifically forbade the introduction of new types of aircraft and heavier loads.

[77] 728 F.2d 643 (4th Cir. 1984).

[78] 623 F.2d 115 (9th Cir. 1980).

[79] 325 F.3d 320, 355 U.S. App. D.C. 420 (D.C. Cir. 2003). See also Longboat Key, Save our Shore, Inc. v. FAA, 46 Fed. App'x 617, 2002 U.S. App. LEXIS 19976 (2002) (reported by the Sarasota Manatee Airport Authority), in which the court upheld an FAA determination that no EIS was necessary prior to implementing a revised departure procedure for northbound aircraft departing the Sarasota Bradenton International Airport. The court dismissed the action, deferring to the "informed discretion" of the FAA on a matter requiring "a high level of technical expertise," and ruled that the decision was "founded on a reasoned evaluation of the relevant factors."

[80] 679 F. Supp 95 (D. Mass 1987).

[81] 40 C.F.R. § 1502.14; City of Bridgeton v. Slater, 212 F.3d 448, 455 (8th Cir 2000).

[82] FAA Order 1050-1E, chg. 1, § 405d and 506e.

[83] 938 F.2d 190, 290 U.S. App. D.C. 371 (D.C. Cir. 1991).

[84] *Id.* at 196.

[85] 256 F.3d 1024 (10th Cir. 2001).

> Colorado Airspace Initiative–proposed changes to the National Airspace System designed to (1) provide the necessary airspace for the 140th Tactical Fighter Wing of the Colorado ANG to be able to train with the F-16 fighter jet under realistic conditions; and (2) respond to changes in commercial aircraft arrival and departure corridors required for operation of Denver International Airport.[86]

The court stated that NEPA requires only that reasonable alternatives be considered and that "alternatives that do not accomplish the purpose of an action are not reasonable."[87] The primary purpose of the FAA's proposed action was to develop adequate training opportunities for ANG pilots within the distance limitations specified by the U.S. Air Forces' training standards. The FAA identified seven alternatives, but eliminated four from consideration because none of those four allowed military flying units to meet their total training requirements. Ruling in favor of the FAA, the court concluded that the petitioners' challenge to the adequacy of FAA's alternatives analysis failed because "the FAA defined the objectives of the Initiative, identified alternatives that would accomplish those objectives, and took a hard, comparative look at the environmental impacts associated with each reasonable alternative." [88]

In the case *City of Bridgeton v. Slater*,[89] two cities and a county located to the west of Lambert-St. Louis International Airport sought review of the FAA's approval of and authorization for federal funding for a proposed westward expansion of the airport. The FAA's decision was based in part upon consideration of several alternatives, only some of which received detailed analysis in the EIS. The petitioners contended that certain alternatives that were "reasonable" should also have been included in the EIS's detailed environmental analysis. The court found that the FAA had used a reasonable three-tiered process to screen alternatives for the purpose of selecting which alternatives to analyze in detail. The EIS in this matter devoted more than 200 pages to a comparison of the environmental impacts of the three alternatives that were selected for detailed analysis and briefly discussed why the other alternatives were eliminated from detailed consideration. Accordingly, the court held that the FAA had met NEPA requirements.[90]

In *Airport Neighbors Alliance, Inc. v. United States,*[91] a neighborhood group challenged an FAA FONSI issued in connection with a proposed runway upgrade at the Albuquerque International Airport. The petitioners argued that the EA failed to discuss reasonable alternatives to the proposed expansion because it only evaluated the no-action alternative while summarily rejecting other reasonable alternatives, including 1) construction of a second parallel runway, and 2) development of a new airport. The EA concluded that a parallel runway was not feasible because of terrain constraints as well as the close proximity of developed urban use and Air Force weapons laboratories and storage facilities. The EA also set forth numerous reasons why building a new airport was not feasible. The court stated that the FAA was not arbitrary in concluding that the petitioner-proposed alternatives were infeasible. The FONSI was upheld because "an agency need not analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative…impractical or ineffective."[92]

E. Challenges to Whether FAA Adequately Considered Cumulative Effects Under NEPA

NEPA requires that an agency examine not only the environmental impact directly attributable to one project, but also the cumulative effects of that project.[93] Cumulative effects are defined as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[94] Cumulative effects can be both direct and indirect.[95]

1. Court Determines Consideration of Cumulative Effects To Be Sufficient

In *C.A.R.E. Now, Inc. v. FAA,*[96] a citizens group requested court review of an FAA order approving a runway extension at DeKalb-Peachtree Airport. The pro-

[86] *Id*. at 1028.

[87] *Id*. at 1041.

[88] *Id*. *See also* Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998) (FAA decision not "arbitrary or capricious," when it discussed reasonable alternative routes even though it did not choose them, because the FAA found them unsuitable for accomplishing the primary purpose of the project—definition of a new airspace sector.).

[89] 212 F.3d 448 (8th Cir. 2000).

[90] *Id*. at 459.

[91] 90 F.3d 426 (10th Cir. 1996).

[92] *Id*. at 432. *See also* State of N.C. v. Fed. Aviation Admin., 957 F.2d 1125, 1134 (1992) (The range of alternatives that must be considered in an EA is smaller than the range of alternatives that must be considered in an EIS; in an EIS, the agency does not need to discuss remote or speculative alternatives; citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 551, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978) and Coal. for Responsible Reg'l Dev. v. Coleman, 555 F.2d 398, 402 n.19 (4th Cir. 1977); C.A.R.E. Now, Inc. v. FAA, 844 F.2d 1569 (11th Cir. 1988) (Court's task is not to choose the best alternative, but to ascertain that the FAA made a "reasoned choice" among alternatives); Boles v Onton Dock, Inc., 659 F.2d 74 (6th Cir. 1981) (Army Corps did not have to consider alternatives because there were no "unresolved conflicts" concerning alternative uses of available resources).

[93] C.A.R.E. Now, Inc. v. FAA, 844 F.2d 1569 (11th Cir. 1988).

[94] 40 C.F.R. § 1508.7.

[95] 40 C.F.R. § 1508.8.

[96] 844 F.2d 1569 (11th Cir. 1988).

posal at issue included a 1,000-ft runway extension, a corresponding extension of a parallel taxiway, and installation of approach lights, the purpose of which was to satisfy optimum safety requirements for the corporate jets that were already using the runway. The proposal came in a context of greater growth and expansion at the airport that was part of a long-range plan funded and approved by the FAA. The petitioners claimed that when the FAA issued a FONSI relative to the runway extension, it considered the runway extension in isolation instead of viewing it in the context of the broader expansion plans for the airport. The petitioners asserted that the increased length of the runway would foreseeably lead to the introduction of larger aircraft and heavier loads at the airport. They further argued that 10 years of development at the airport had proceeded without any analysis of the cumulative impacts of the expansion in whole. The Eleventh Circuit nevertheless held that the FAA's limited analysis of cumulative effects was appropriate. The court explained that the "action" to be addressed in an EA or an EIS is very narrow, and that, therefore, in this case, the only matter at issue was the portion of growth at the airport that would be caused by the specific runway extension being proposed. The court noted that the proposed extension, by its terms, specifically forbade the introduction of new types of aircraft and heavier loads, and that there were factors not attributable to the proposed extension that could cause an increase of capacity at the airport. The court found that "the effect caused by the runway extension will be a higher percentage of safe landings, not a higher number of planes landing."[97] Accordingly, the court held: "The FAA's limited analysis of cumulative effects was warranted given the limited effect, direct or indirect, of the proposal."[98]

In *Airport Neighbors Alliance, Inc. v. United States*,[99] the FAA issued a FONSI in connection with a proposed runway upgrade at Albuquerque International Airport. A neighborhood group challenged the adequacy of the pre-FONSI EA prepared by the FAA, contending that the EA was inadequate because it did not analyze extensively the cumulative impacts associated with the proposed runway upgrade. The petitioners argued that consideration of cumulative effects was required because the upgrade was a single component in a larger contemplated expansion at the airport, as evidenced by the city of Albuquerque's Master Plan for development of the airport. The court explained that "the test for whether particular actions could be considered cumulative impacts of the proposed action [is] whether the actions were so interdependent that it would be unwise or irrational to complete one without the others."[100] The court determined that there was no "inextricable nexus" between the proposed runway upgrade and other components of the Master Plan because 1) the city could abandon the Master Plan without destroying the functionality of the proposed upgrade, and 2) the record in the case suggested that the FAA and the city would upgrade the runway even if other components of the Master Plan never get off the ground. The court affirmed the FAA's decision to issue a FONSI, agreeing with the FAA that it need not consider cumulative effects of the proposed action because the proposed runway expansion and the remaining components of the Master Plan were not so interdependent that it would be unwise or irrational to complete the proposed runway upgrade without the remaining components.[101]

2. Court Determines FAA Review of Alternatives Insufficient

In *Grand Canyon Trust v. FAA*,[102] an environmental organization challenged FAA approval of actions necessary to allow the city of St. George, Utah, to construct a replacement airport near Zion National Park. The petitioner contended that the EA did not adequately consider the cumulative impact on the natural quiet of the park, and instead only addressed the incremental impact of the replacement airport. The court stated: "Depending on the environmental concern at issue, the agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum."[103] Here, the court focused on whether construction of a replacement airport would have significant impact on the environment of the park. The court held that the EA should have addressed more than just the incremental impact of the replacement airport as compared to the existing airport. The court reasoned that without analyzing the total noise impact on the park resulting from construction of a new airport, the FAA was in no position to determine whether the additional noise projected to come from the expansion of the airport facility at a new location would cause a significant environmental impact on the park and thus require preparation of an EIS. Accordingly, the court remanded the case, requiring the FAA to "evalu-

[97] *Id*. at 1575.

[98] *Id*.

[99] 90 F.3d 426 (10th Cir. 1996).

[100] *Id*. at 430, citing Park County Res. Council, Inc. v. U.S. Dep't of Agric., 817 F.2d 609, 623 (10th Cir. 1987).

[101] *See also* Town of Cave Creek Ariz. v. FAA, 325 F.3d 320, 355 U.S. App. D.C. 420 (D.C. Cir. 2003) (FONSI upheld when FAA's evaluation process examined both the incremental impact of the project as well as the environmental baseline, and where FAA modeled noise effects for 5 years into the future); Custer County Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001) (Because commercial and nonmilitary flight activity was not related to or dependent on the action at issue, they did not need to be analyzed as part of EIS. Record did not show any indication of a clear nexus between action and other military airspace proposals across the nation; therefore, no need for a programmatic or nationwide environmental impact analysis.); City of Oxford v. FAA, 428 F.3d 1346 (11th Cir. 2005) (In EA that resulted in FONSI, FAA not required under NEPA to take into account possible cumulative impact of actions that were speculative, including highway widening that apparently was not being planned).

[102] 290 F.3d 339, 351 U.S. App. D.C. 253 (D.C. Cir. 2002).

[103] *Id*. at 342.

ate the cumulative impact of noise pollution on the Park as a result of construction of the proposed replacement airport in light of air traffic near and over the Park from whatever airport, air tours near or in the Park, and…acoustical data collected by NPS [National Park Service]."[104]

F. Challenges to Whether FAA Properly Considered Mitigation Under NEPA

The CEQ regulations also require a federal agency to discuss possible mitigation measures in defining the scope of the EIS,[105] discussing alternatives to the proposed action,[106] discussing consequences of that action,[107] and explaining its ultimate decision.[108]

CEQ regulations define "mitigation" to include:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
>
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
>
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
>
> (e) Compensating for the impact by replacing or providing substitute resources or environments."[109]

The Supreme Court has held that under NEPA, mitigation must be discussed in the EIS in sufficient detail to ensure that environmental consequences have been fairly evaluated, but that NEPA does not impose a substantive requirement that a complete mitigation plan be actually formulated and adopted as part of the EIS.[110] In *Robertson v. Methow Valley Citizens Council*,[111] citizens groups challenged the Forest Service's issuance of a special use permit for development and operation of a ski resort on national forest land. The petitioners asserted that NEPA required the agency to include in its EIS a fully developed mitigation plan. The Court emphasized that it would be inconsistent with NEPA's reliance on procedural mechanisms rather than substantive result-based standards to require a fully developed plan to mitigate environmental harm before the agency can act. Accordingly, the Court concluded that "NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts."[112]

In *Communities, Inc. v. Busey*,[113] community groups sought review of an FAA order approving an airport improvement plan that called for two independent parallel runways to be constructed at Standiford Field in Louisville, Kentucky. The petitioners contended that the EIS did not include a complete remediation or mitigation plan for dealing with hazardous waste sites impacted by the proposed agency action. The court determined that the FAA's EIS included identification and discussion of various potential measures to mitigate the environmental impact of the proposed agency action as it related to the hazardous wastes. The court held that the "FAA's discussion in the FEIS of remediation is precisely the type of analysis explicitly approved of in *Robertson*," and that, therefore, the FAA had met NEPA requirements.[114]

In *C.A.R.E. Now, Inc. v. FAA*,[115] a citizens association challenged the FAA's FONSI issued in connection with a proposed runway extension at the DeKalb-Peachtree Airport. In this case, the FAA conditioned approval of the project upon voluntary mitigation measures that would reduce noise impacts. The FAA issued a FONSI, determining that these mitigation measures would reduce the noise impacts enough so that the proposed runway extension would not have a significant environmental impact. The petitioner's contended that the FAA's consideration of mitigation measures was too speculative to offset the anticipated increase in noise exposure due to the project. The court upheld the FONSI. It stated: "When mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of 'significant impacts' is not reached so no EIS is required."[116] The court also stated that it was appropriate for the agency to "consider voluntary noise abatement programs as mitigation to potentially adverse environmental impacts."[117] In this case, at least one of the voluntary mitigation measures upon which the project approval was conditioned had been used experimentally and found successful. The court held that the FAA reached a reasonable conclusion when it determined that the mitigation measures reduced the

[104] *Id*. at 347. *See also* the case of Citizens for Responsible Area Growth v. Adams, 477 F. Supp. 994 (D.N.H. 1979), in which the City of Lebanon, N.H., proposed to expand its airport and an adjacent industrial park. In that case, each of the components of the project was simultaneously under way, and the federal agencies involved in the various components had consistently considered each of the components as part of a single project. The District Court in that case held that the agencies were required to consider the overall cumulative effect of the ultimate project in determining whether to prepare an EIS.

[105] 40 C.F.R. § 1508.25(b).

[106] 40 C.F.R. § 1502.14(f).

[107] 40 C.F.R. § 1502.16(h).

[108] 40 C.F.R. § 1501.2(c).

[109] 40 C.F.R. § 1508.20.

[110] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352, 358, 109 S. Ct. 1835, 1857, 1850, 104 L. Ed. 2d 351, 371, 376 (1989).

[111] *Id*. at 332.

[112] *Id*. at 358.

[113] 956 F.2d 619 (6th Cir. 1992).

[114] *Id*. at 626.

[115] 844 F.2d 1569 (11th Cir. 1988).

[116] *Id*. at 1575, citing Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

[117] *Id*., citing Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120, 129243 U.S. App. D.C. 302 (D.C. Cir. 1985).

potential environmental impact to an insignificant level.

G. Challenges to Whether FAA Has Properly Supplemented an EIS Under NEPA

CEQ regulations require agencies to prepare supplements to either draft or final EISs if "(i) The agency makes substantial changes in the proposed action that are relevant to the environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." [118] Under CEQ regulations, agencies also may prepare supplements "when the agency determines that the purposes of [NEPA] will be furthered by doing so."[119]

In *Marsh v. Oregon Natural Resources Council*,[120] the U.S. Supreme Court explained that the necessity for a supplemental EIS

> turns on the value of the new information to the still pending decisionmaking process—if the new information is sufficient to show that the remaining action will 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.[121]

In *Marsh,* the Court determined that the Corps had carefully scrutinized proffered new information and had used independent experts to evaluate the accuracy and significance of the new information. The Court determined that the agency had acted reasonably in deciding not to issue a supplemental EIS. Therefore, the Court held that the agency had not been "arbitrary or capricious" when it decided not to issue a supplemental EIS.

The case *County of Rockland, New York v. FAA*[122] concerned a challenge to an FAA multiphase plan to modernize the New York/New Jersey/Philadelphia Metropolitan Area airspace. The plan shifted flight paths, relocated management of particular sectors of airspace among air traffic control facilities, and adopted new flight procedures. The petitioners complained the FAA should have produced a supplemental draft EIS, asserting that the agency substantially changed the project by designing a noise mitigation measure related to part of the Rockefeller State Park Preserve "at the eleventh hour."[123] The FAA explained that it essentially readopted the pre-redesign flight path over the park that had been assessed when the agency assessed the no-action alternative prior to issuing the EIS. The court accepted this as a reasonable explanation for the FAA's decision that a supplemental analysis was not necessary.

The case *City of Las Vegas, Nevada v. FAA*[124] involved changes in flight departure paths from one of the runways at the Las Vegas McCarran International Airport. In 2001, FAA issued FONSI/ROD to implement a new plan. In 2005, FAA proposed another change to the flight paths and issued a Draft Supplemental Environmental Assessment (DSEA). After issuance of the DSEA, the FAA realized that it needed a waiver of one of its own regulations to implement the plan. However, prior to issuing the necessary waiver, the FAA concurrently issued a Final Supplemental EA (FSEA) and a FONSI/ROD that approved the new route. (The necessary waiver was issued 2 months after the FAA issued the FSEA and the FONSI/ROD.) The FSEA included an analysis of the post-DSEA modifications to the flight path. The court held that the FAA did not act arbitrarily and capriciously in its analysis of the post-DSEA modifications to the flight path because prior to seeking the waiver needed for the path, the FAA conducted tests regarding the safety of the path and because approval/nonapproval of the waiver did not impact the noise or air quality. Therefore, the FAA was not required to produce a new SEA that analyzed the impact of the waiver and the post-DSEA modifications.

H. Litigation Brought Under State Environmental Policy Acts

NEPA's application is limited to major federal actions.[125] As such, 15 states have adopted their own environmental policy acts modeled after NEPA.[126] These state environmental policy acts (SEPAs, or "mini-NEPAs") require state and local agencies to prepare an EIS for actions covered by the statute. State agency action that falls under the language of a SEPA will require the state or local agency to prepare an EIS that contains a discussion of reasonable alternatives and takes into consideration the project's effects on the en-

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[118] 40 C.F.R. § 1502.9(c)(1).

[119] 40 C.F.R § 1502.9(c)(2).

[120] 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 277 (1989).

[121] *Id*. at 374. The Court also specifically turned to the definition of the term "significantly" contained in the CEQ NEPA implementing regulations at 40 C.F.R § 1508.27:

> *Significantly* as used in NEPA requires considerations of both context and intensity:
>
> *(a) Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action…
>
> *(b) Intensity*. This refers to the severity of impact…. The following should be considered in evaluation of intensity: (1) Impacts that may be both beneficial and adverse…(2) The degree to which the proposed action affects public health or safety; (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

[122] County of Rockland, N.Y., v. FAA, 335 Fed App'x 52, 2009 U.S. App. LEXIS 12513 (D.C. Cir. June 10, 2009).

[123] *Id*. at 54.

[124] 570 F.3d 1109, 2009 U.S. App. LEXIS 12694 (9th Cir. Oct. 22, 2008).

[125] National Environmental Policy Act, 42 U.S.C. § 4332 (1975).

[126] MANDELKER, *supra* note 40, at § 8:18.

vironment.[127] The types of actions requiring impact statements vary with the language of the various state statutes, though several states follow NEPA's language. For example, Washington State modeled NEPA by requiring state agencies to prepare impact statements for "major actions."[128] New York law defines an "action" as "a project or activity directly undertaken or funded by an agency or 'involving the issuance…of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies.'"[129] California requires state agencies to prepare impact statements on "any project they propose to carry out or approve."[130]

Many SEPAs expressly authorize judicial review. For example, Washington authorizes review of governmental action to ensure that procedures and policies are in compliance with Washington's environmental policy act.[131] California's environmental quality statute has two judicial review provisions dependent on whether the agency is required by law to hold hearings and make findings.[132] Hawaii sets limitations for proceedings arising under the statute.[133] When judicial review is not expressly authorized, SEPA actions may be judicially reviewable under provisions of certain state administrative procedure acts.[134] For a court to review under a state's administrative procedure act, the court must first find that the SEPA or the action falls within the purview of such act.[135]

If judicial review is not implicitly or expressly granted, an aggrieved person may still petition for review. However, it is up to the petitioner to demonstrate that it has legal standing and that a judicial remedy exists for its claim.[136] To establish standing in state courts, an aggrieved person must demonstrate injury in fact.[137] The general public may not simply allege an interest in protecting the environment, but must assert a personal environmental injury to have standing to sue. The landmark case *Sierra v. Morton*[138]opened the standing door for environmental cases. Prior to this case, the Court looked for an assertion of an economic injury to fulfill statutory standing requirements.[139] However, the Court reasoned that the trend of cases arising under the Administrative Procedure Act and other statutes authorizing judicial review of agency action has been towards the recognition of injury other than economic harm. However, the Court stated that the acknowledgment of additional types of injury does not abandon the requirement that the plaintiff bringing the case must have personally suffered an injury in fact. Once injury in fact has been established, the plaintiff must demonstrate that a judicial remedy exists to solve its environmental claim. Judicial remedies under SEPAs are similar to those under NEPA. Generally, judicial remedies regarding environmental policies are limited to injunctive relief, but occasionally declaratory relief may also be requested in addition to an injunction.[140]

In the case of *Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners*,[141] the California Court of Appeals reviewed the decision of the Board of Port Commissioners for the Port of Oakland to certify the environmental impact report (EIR), prepared in accordance with the California Environmental Quality Act (CEQA),[142] that analyzed the environmental consequences of the proposed Airport Development Plan for the Metropolitan Oakland International Airport. The Court of Appeals not only upheld the trial court's determination that the EIR violated CEQA by failing to analyze a reasonable range of alternatives and by failing to evaluate the cumulative impacts of the ADP in combination with other reasonably foreseeable projects, it remanded for further consideration of the noise impacts from planned additional nighttime flights, further assessment of the emission of toxic air contaminants from jet aircraft, failure to support the decision not to evaluate health risks associated with the emission of toxic air contaminants with meaningful analysis, and improperl deferral of devising a mitigation plan for the Western Burrowing Owl. The court ordered the port commissioners to prepare a new supplemental EIR.

The court recognized its statutory standard of review as one in which the court must determine whether the agency prejudicially abused its discretion.[143] The court went on to determine, in a lengthy and detailed opinion, that the EIR's analysis of environmental impacts was insufficient for purposes of CEQA. It is also worth not-

[127] *Id*. § 12:21.

[128] *Id*. § 12:11 n.2 (citing Concerned Citizens of Brentwood v. Dist. of Columbia Bd. of Zoning Adjustment, 634 A.2d 1234 (C.A.D.C. 1993) (reviewing Zoning Board decision to determine whether use was of right and not subject to law); Vill. Dev. Co. Inc. v. Sec'y of Executive Office of Envtl. Affairs, 410 Mass. 100, 571 N.E.2d 361 (1991) (reviewing easement from state agency for private development); *Matter of SDDS, Inc*., 472 N.W.2d 502 (S.D. 1991) (reviewing permit for municipal solid waste system)).

[129] N.Y. ENVTL. CONSERV. LAW § 8-0105(4)(ii) (McKinney 2005).

[130] CAL. PUB. RES. § 21100 (West 2007).

[131] WASH. REV. CODE ANN. § 43.21C.075.

[132] CAL. PUB. RES. § 21168 (hearings and findings), § 21168.5 (hearings and findings not required).

[133] HAW. REV. STAT. §§ 343-7.

[134] MANDELKER, *supra* note 40, at § 12:6.

[135] *Id*., citing Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Social Servs., 130 Wis. 2d 79, 387 N.W.2d 254 (1986) (upholding a statute repealing contested case procedures for single project held unconstitutional); North Lake Mgmt. Dist. v. Wis. Dep't of Natural Res., 182 Wis. 2d 500, 513 N.W.2d 703 (1994) (finding that Department of Natural Resources need not hold contested case hearing on decision whether to prepare an impact statement).

[136] MANDELKER, *supra* note 40, at §§ 12:6-7.

[137] *Id.* at § 12:8.

[138] 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

[139] *Id*. at 737.

[140] MANDELKER, at § 12:7.

[141] 91 Cal. App. 4th 1344, 92 Cal. App. 4th 1016, 111 Cal. Rptr. 2d 598 (Cal. App. Dist. 1 2001).

[142] CAL. PUB RES. §§ 21000 *et seq*.

[143] *Id*. at 1356, citing to PUB. RES. CODE § 21168.5.

ing that the California courts awarded the petitioners attorneys fees under California's common law "private attorney general doctrine and Code of Civil procedure section 1021.5 (providing for awards of attorneys fees in public interest cases). On appeal the only issue considered was the amount, and the Court of Appeals remanded with the direction that the amount is to be calculated using a lodestar or touchstone method based on consideration of each petitioner's contribution to the litigation. The court added that fees should be awarded for administrative proceedings that were useful and necessary and directly contributed to the favorable result by the prevailing party, and further that compensation should include hours spent that were necessary to establish and defend the fee claim.[144]

I. Litigation Brought Under the Endangered Species Act

The ESA was enacted in 1973 and works to conserve threatened and endangered species and preserve their habitats.[145] The ESA is administered by the U.S. Fish and Wildlife Service (FWS) in conjunction with the Commerce Department's National Marine Fisheries Service (NMFS). Under the ESA, federal agencies are compelled to preserve endangered and threatened species and to utilize their authority in the furtherance of the Act.[146] The ESA requires that federal agencies must not authorize, fund, or carry out any action that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[147]

Section 7 of the ESA, as amended, sets forth requirements for consultation to determine if the proposed action "may affect" an endangered or threatened species. If a federal agency determines that an action "may affect" a threatened or endangered species, then Section 7(a)(2) requires each agency to consult with FWS and NMFS to establish whether there is a risk of species or habitat modification or destruction.[148] The ESA requires a biological assessment (BA) to be performed if a federal agency is advised or has "reason to believe" that a threatened or endangered species may be present in an action area.[149] The BA uses the best commercial and scientific data available to identify any threatened or endangered species that are likely to be affected by the action.[150] The BA may be done in conjunction with any EIS required under Section 102 of NEPA.[151] FAA Order 1050.1E directs the FAA to perform a BA for "major construction activities," but allows that BAs are not required to analyze alternatives to proposed actions.[152]

Formal consultation is concluded when the FWS or the NMFS issues a Biological Opinion. If a Biological Opinion states that the proposed action is not likely to jeopardize the continued existence of federally-listed threatened or endangered species in the affected area or to result in the destruction or adverse modification of federally-designated critical habitat in the affected area, it is a No Jeopardy/Adverse Modification Opinion. If a Biological Opinion determines that the proposed action is likely to jeopardize the species or adversely modify critical habitat (a Jeopardy/Adverse Modification Opinion), it will include nondiscretionary reasonable and prudent alternatives. Upon the issuance of a Jeopardy/Adverse modification Opinion, FAA may not proceed with the action unless the project is modified sufficiently to enable the issuance of a No Jeopardy/Adverse Modification Opinion, or the action is exempted under 50 C.F.R. Part 451.[153]

Endangered species challenges are often seen supporting or in conjunction with NEPA or SEPA challenges.[154] In the case of *National Parks and Conservation Assoc. v. U.S. Dept. of Trans.*,[155] the petitioners argued that the FAA violated NEPA by failing to analyze the impact of the expansion of Kahului Airport in Maui, Hawaii, on the introduction of alien, nonindigenous species into Maui. In declining to review the decision of the FAA to approve the EIS prepared in connection with the project, the Ninth Circuit made reference to the Biological Opinion of the FWS, which found that the project "was 'not likely to jeopardize the continued existence of any endangered, threatened, or proposed endangered species on Maui.'"[156] The court distinguished cases in which agency consideration of alien species issues was "cursory" or discussion of mitigation measures was "perfunctory." The court referenced the "volume of information in the EIS that addresses alien species" and cited to the FWS conclusion in the Biological Opinion that the "state of the art" measures at issue here "should make Kahului Airport a better barrier to invasion by alien species than any other airport in Hawaii."[157] The court found that the EIS

[144] *Id*., citations omitted.

[145] 16 U.S.C.A. § 1531 *et seq*.

[146] 16 U.S.C. § 1531(2)(b)(1).

[147] 16 U.S.C. § 1531(7)(a)(2).

[148] 16 U.S.C. § 1531(7)(a)(3); *see also* FAA Order 1051E, chg., § 8.1.

[149] 16 U.S.C. § 1531(7)(c).

[150] 16 U.S.C. § 1531(7)(c)(1).

[151] 16 U.S.C. § 1531(7)(c)(2).

[152] *See* FAA Rule 1051.E, chg. 1, § 8.2(d), *citing to* 50 C.F.R. § 4501.12(b).

[153] FAA Rule 1050.1E, chg.1, § 8.

[154] *See* Winter v. Natural Res. Defense Council, Inc. 129 S. Ct. 365, 391, 172 L. Ed. 2d 249, 279 (2008) (alleging that the Navy's use of sonar violated NEPA and the ESA); *See also* Sierra Club v. Dep't of Transp. 115 Haw. 299, 167 P.3d 292 (2007) (failing to adequately consider the impacts on threatened and endangered marine species violates the Hawaii Environmental Policy Act).

[155] 222 F.3d 677 (9th Cir. 2000).

[156] *Id*. at 679.

[157] *Id*. at 680–81.

had taken the requisite "hard look" at the alien species problem in satisfaction of NEPA.[158]

In *State of North Carolina. v. F.A.A.*,[159] petitioners cited the ESA to challenge the FAA's decision to amend naval airspace over North Carolina. The court found that the Navy's supplemental EA fulfilled ESA requirements by establishing that there were not any endangered species in the action area and that the new flight path would not have an effect on wildlife "other than the present and continuing threat to birds, which pilots of all aircraft are admonished to avoid."[160] By contrast, in *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs,*[161] the California court included an ESA violation in its rationale for finding that an EIR for a proposed airport development plan violated the CEQA. The petitioners argued that the EIR's project description failed to adequately disclose the scale of the project, including the effects on the Western Burrowing Owl.[162] In its opinion, the court found that the EIR improperly deferred devising a mitigation plan for the threatened Western Burrowing Owl, in addition to failing to properly mitigate against other adverse impacts. This failure to devise adequate mitigation plans constituted a violation of the CEQA and justified the trial court's decision to set aside approval of the EIR until adequate supplementation occurred.[163]

Since reasonable and prudent alternatives often exist to avoid a jeopardy determination, it is rare that federal projects are terminated or withdrawn due to the jeopardy posed to a species.[164] Furthermore, the ESA allows for exemptions if the "Endangered Species Committee" determines that the benefits of the project outweigh the benefits of preserving the species.[165]

The Second Circuit has also suggested that federal agencies may approve projects that significantly harm endangered species' habitat areas if prudent alternatives do not exist. In *Natural Resources Defense Council, Inc. v. F.A.A.*,[166] the court held that the FAA did not act arbitrarily or capriciously by approving a project with significant impacts on natural resources in an endangered species habitat area because no prudent alternatives existed. Petitioners challenged the proposed airport development in Panama City, Florida. Although the EIS and analysis determined that building the airport at the proposed site "would have significant adverse impacts in the categories of water quality, biotic communities, endangered and threatened species, wetlands, floodplains, and construction impacts," the FAA found that no possible and prudent alternatives existed. The FAA stated that "'none of the build alternatives can be deemed clearly environmentally superior'" and "meet both the FAA's and the Airport Sponsor's purposes and needs."[167] Citing the AAIA, the court held that the FAA's finding was not arbitrary and capricious.[168] The AAIA authorizes the Secretary of Transportation to approve an application for an airport development project even if the project is

> found to have a significant adverse effect on natural resources, including fish and wildlife, natural, scenic, and recreation assets, water and air quality, or another factor affecting the environment…[but only after a] …finding that no possible and prudent alternative to the project exists and that every reasonable step has been taken to minimize the adverse effect."[169]

The court reasoned that the FAA adequately considered social impacts and impacts to natural resources in assessing prudent alternatives and adequately evaluated the project's purpose and need.[170] Thus, the FAA's determination that no prudent alternatives existed was not arbitrary, capricious, or an abuse of discretion.[171]

J. National Historic Preservation Act

The NHPA[172] is another of the "special purpose laws" that must be addressed by the FAA in completing its environmental analyses of major federal actions involving airports.[173] Section 106 of the NHPA, as implemented through 36 C.F.R. Part 800, is intended to require federal agencies to consider the effects of their undertakings on historic properties. The NHPA provides, in relevant part:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.[174]

For purposes of FAA, an undertaking is an action that constitutes a "federal action" for purposes of NEPA as defined in FAA Order 5050.4B, paragraph 9g. These actions include, but are not limited to, any airport de-

[158] *Id*. at 680.

[159] 957 F.2d 1125 (4th Cir. 1992).

[160] *Id*. at 1132.

[161] 91 Cal. App. 4th 1344, 111 Cal. Rptr. 2d 598 (Cal. Ct. App. 2001).

[162] *Id*. at 1353.

[163] *Id*. at 1350.

[164] U.S. FISH AND WILDLIFE SERVICE, ESA BASICS: MORE THAN 30 YEARS PROTECTING ENDANGERED SPECIES 2 (2009), http://www.fws.gov/endangered/factsheets/ESA_basics.pdf.

[165] 16 U.S.C § 1531(7)(g).

[166] 564 F.3d 549, 554 (2d Cir. 2009).

[167] *Id*. at 563, quoting the Record of Decision at 68.

[168] *Id*. at 567.

[169] *Id*., quoting 49 U.S.C. § 47106(c)(1)(B).

[170] *Id*. at 567–69.

[171] *Id*. at 569.

[172] 16 U.S.C.A. § 470 *et seq*.

[173] FAA Order 5050.4B, para. 9(t), tbl. 1-1.

[174] 16 U.S.C.A. § 470(f).

velopment project funded under the Airport Improvement Program or Passenger Facility Charge (PFC) Program or, subject to unconditional FAA approval, to be depicted on an ALP.[175] Section 106 of the NHPA does not require formal permits, certifications, or approvals, but the FAA documentation should demonstrate that FAA has 1) consulted with the applicable State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer; 2) notified the Advisory Council on Historic Preservation or provided it the opportunity to participate in consultation, as appropriate under the NHPA regulations; and 3) conducted its process in a reasonable and good faith manner.

In the following cases, the courts adhered strictly to the terms of the procedures established in the NHPA regulations and denied petitions charging that FAA failed to comply with the procedural requirements imposed by the NHPA for analyzing the projects' impacts on historic properties.

The Petitioner in *City of Oxford v. FAA*[176] claimed that the FAA failed to abide by the procedural requirements of NHPA by failing to properly involve the consulting parties in the NHPA process. In this case, the City of Covington, Georgia, sought to renovate the airport to better serve Covington and the surrounding communities in accordance with the Georgia Aviation System Plan, which the Georgia Department of Transportation promulgated in an effort to respond to Georgia's aviation needs. Specifically, the city sought to extend and widen a runway. The Covington Municipal Airport abuts the city limits of the City of Oxford, a small town with a historic district listed on the National Register of Historic Places.[177]

In support of its claim that the FAA impermissibly "short circuited" the NHPA consultation requirements, petitioner claimed that the invitation to the second special interest meeting stated that the meeting's purpose was to discuss the revised aviation forecasts and noise contours, rather than the discussion of "historic preservation issues."[178] The court noted that, like NEPA, the NHPA imposes purely procedural requirements.[179] The NHPA regulations simply require the FAA to identify consulting parties and invite them to participate in the NHPA process; however, "[t]he regulations do not speak to the form and content of written invitations to meetings with consulting parties." The court pointed out that given that the revised aviation forecasts and noise contours were conducted for the purpose of NHPA compliance, "It should have been obvious to Petitioner that discussions at the meeting would include historic preservation issues."[180] Further, while the petitioner complained that FAA had ignored its request for an additional special interest meeting, the court observed that the FAA had held two special interest meetings and a public meeting, revised aviation forecasts, and conducted noise contour studies in response to concerns raised by the SHPO and the consulting parties. The court found that the FAA properly exercised its discretion in concluding that no further meetings would be useful.[181]

Finally, the City of Oxford claimed that the FAA violated NHPA by failing to provide it with documentation of its finding of no adverse effect. Again, the court looked to the plain language of the NHPA regulations and found that FAA's obligation was limited to notification of consulting parties of its finding of no adverse effect, which finding was to be included in the EA and FONSI/ROD.[182] The court noted that the record showed that the petitioner received copies of the Final EA and the FONSI/ROD, and thus the FAA fulfilled its duty to provide the petitioner of notification of no adverse effect.[183]

The Court in *Morongo Band of Mission Indians v. FAA*[184] upheld the FAA's conclusion that no EIS was required for the implementation of an arrival enhancement project at the Los Angeles International Airport. In this case, the Morongo Band of Mission Indians (Tribe) cited to FAA Order 1050.1D, 37.a(1), in support of its claim that an EIS is required if an FAA action has an effect that is "not minimal" on properties protected by NHPA.[185] The Morongo Reservation, located approximately 90 mi east of Los Angeles, includes canyons and undeveloped areas where tribal members conduct traditional ceremonies, as well as sites they consider sacred for cultural and spiritual purposes. In its EA, the FAA had stated that the only change caused by the project would be increased high-altitude overflights, thus the FAA's noise, land use, and visual impact studies all concluded that the project would cause no adverse impacts, leading to the conclusion that historic resources would be unaffected by any of the alternatives.[186]

The Tribe complained that the FAA failed to respond to a letter from the Tribe that indicated the possibility of historic or cultural property in the area. Here, the FAA's conclusion was based not on a finding of no cultural properties in the area, but on the fact that studies showed that there would be no impact on any type of property in the project area.[187] The FAA had informed

[175] FED. AVIATION ADMIN., FAA AIRPORTS DESK REFERENCE, ch. 14, para. 1d.

[176] 428 F.3d 1346 (11th Cir. 2005).

[177] *Id*. at 1350.

[178] *Id*. at 1357.

[179] *Id*. at 1356.

[180] *Id*. at 1357.

[181] *Id*.

[182] *Id*. at 1357; *See* 36 C.F.R. §§ 800.4(d)(1) & 800.8(a)(3).

[183] *Id*. at 1357–58.

[184] 161 F.3d 569 (9th Cir. 1998).

[185] *Id*. at 582. *See* FAA Order 1050.1E, 304a, which requires an EA or an EIS if a proposed action involves "extraordinary circumstances." Extraordinary circumstances exist when the proposed action involves, among others, 1) an adverse effect on cultural resources protected under NHPA, *and* 2) may have a significant effect.

[186] *Morongo Band of Mission Indians*, 161 F.3d at 582.

[187] *Id*. The court differentiated this case from Pueblo of Sandia v. United States, 50 F.3d 856, 860 (10th Cir. 1995), in

the SHPO of its finding that the project would have no effect on cultural values, submitting as documentation the draft of the EA. The SHPO had no objection because of the unique high-altitude nature of the undertaking. The court held that the Tribe had failed to establish that the FAA's studies were arbitrary or capricious; thus the FAA did not violate NHPA.[188]

The Tribe also argued that NHPA required the FAA to obtain the Tribe's consent before implementing the project. The regulations state, "When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement."[189] Again, citing to the strict language of the regulations, the court found that consent is required only if the action is found to have an effect on the land and here, no effect was made. The court stated, "Where, as here, any effect is insignificant or minimal, the FAA was not required to obtain the Tribe's consent before implementing the AEP."[190]

The court in *City of Grapevine, Texas v. Department of Transportation*[191] also declined to find a violation of the NHPA when the FAA issued its ROD before review under the NHPA was complete. The FAA specifically noted in the ROD that it would "take into account the conclusions and recommendations arising out of the consultation process required by Section 106" of the NHPA.[192] The court noted that "it is of course desirable for the § 106 process to occur as early as possible in a project's planning stage," but that since the FAA's approval was expressly conditioned upon completion of the Section 106 process, there was no violation of any requirements of the NHPA.[193]

K. Department of Transportation Act, Section 4(f)

Section 4(f) of the Department of Transportation Act establishes a federal policy with respect to federal transportation projects "that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges and historic sites."[194] Section 4(f) states that the Secretary of Transportation may approve a transportation program or project requiring the use of publicly-owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance, or land of a historic site of national, state, or local significance (as determined by federal, state, or local officials having jurisdiction over the park, area, refuge, or site) only if 1) There is no prudent and feasible alternative to using that land, and 2) The program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.[195]

FAA Order 1050.1E, Change 1, directs FAA officials to "give particular attention to its responsibilities under section 4(f) of the DOT Act to insure that a special effort is made to preserve the natural beauty of countryside, public parks, and recreation lands, wildlife and waterfowl refuges, wild and scenic rivers or study rivers, and historic sites.[196] FAA will not approve actions requiring the use of properties under section 4(f) unless there is no feasible and prudent alternative to the use and the program includes all possible planning to minimize harm from the use.[197] FAA uses Federal Highway Administration (FHWA)/Federal Transit Administration (FTA) Section 4(f) regulations as guidance to the extent relevant to FAA programs. FAA also uses FHWA's Section 4(f) policy paper as of March 1, 2005, as an aid in implementing Section 4(f).[198]

The leading case regarding Section 4(f) is *Citizens to Preserve Overton Park v. Volpe*.[199] In *Overton Park*, Petitioners challenged the determination of the Secretary of Transportation to approve the construction of a six-lane interstate highway through a Memphis public park. The Court determined that agency decisions under the Transportation Act are reviewed under the same arbitrary and capricious standard as NEPA.[200] In addition, in cases involving 4(f), the court must additionally find that "the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems."[201] The Court held that the feasible and prudent clause of Section 4(f) "is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted."[202] The Court recognized the place of cost, directness of route, and community disruption in highway routing, but the existence of the statute "indicates that protection of parkland was to be given paramount importance."[203]

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which the Tenth Circuit held that the Forestry Service did not make a reasonable effort to identify property eligible for the *National Register* because it failed to follow up on information indicating the existence of such property ("a mere request for information is not necessarily sufficient to constitute the reasonable effort [NHPA] requires").

[188] *Morongo Band of Mission Indians*, 161 F.3d at 582.

[189] *Id*., quoting 36 C.F.R. § 800.1(c)(2)(iii).

[190] *Id*. at 583.

[191] 17 F.3d 1502, 1508, 305 U.S. App. D.C. (D.C. Cir. 1994).

[192] *Id*. at 1508–09.

[193] *Id*. at 1509.

[194] 49 U.S.C.A. § 303.

[195] 49 U.S.C.A. § 303(c).

[196] FAA Order 1050.1E, chg. 1, para. 206c.

[197] DOT and FAA policies and procedures for preparing § 4(f) evaluations and determinations and for consulting with other agencies are stated in DOT Order 5610.1C, Attachment 2, para. 4.

[198] FED. AVIATION ADMIN., ch. 7, para. 2; *see also* 23 C.F.R. § 771.135 (FHWA/FTA 4(f) procedures for determining constructive use).

[199] 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

[200] *Id*. at 416.

[201] *Id*.

[202] *Id*. at 411.

[203] *Id*. at 412–13.

In the following cases, the courts found that the airport developments at issue did not "use" historic properties within the meaning of Section 4(f).

In *Citizens Against Burlington, Inc. v. Busey*, the court differentiated the analyses required under NEPA and 4(f) as follows:

> The Transportation Act differs from NEPA in at least two ways. First, the Transportation Act requires the agency to evaluate "prudent…alternatives to using the land"—alternatives to the project, that is—not alternatives to the federal action. Second, contrary to the FAA's argument, the case law uniformly holds that an alternative is imprudent under section 4(f)(1) if it does not meet the transportation needs of a project. See *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 164 (4th Cir. 1990); *Druid Hills Civic Ass'n v. Federal Highway Admin*., 772 F.2d 700, 715 (11th Cir. 1985); *Arizona Past & Future Found. v. Dole*, 722 F.2d 1423, 1428–29 (9th Cir. 1983). The Transportation Act is similar to NEPA in that the agency bears the responsibility for defining at the outset the transportation goals for a project and for determining which alternatives would reasonably fulfill those goals.[204]

The court chided the FAA for failing to focus on the statutes' apparent similarities and disregarding their differences, and advised that in future cases, the FAA should bear in mind the differences between NEPA and Section 4(f), and Section 4(f) documentation should reflect the concerns of the latter statute.[205] Nonetheless, the Court deferred to FAA's decision to approve the City of Toledo's airport expansion plan, finding that FAA had thoroughly examined the impacts that the airport's expansion would have had on protected parkland and proposed mitigation tactics, stating: "[F]ederal courts are neither empowered nor competent to micromanage strategies for saving the nation's parklands. Because the FAA's decision in this case does not reflect a 'clear error of judgment,' we are constrained to let it stand."[206] (citations omitted).

In *City of Grapevine, Texas v. Department of Transportation*,[207] various individuals and political subdivisions unsuccessfully petitioned for review of the FAA's decision to approve a plan to expand the Dallas/Fort Worth International Airport and declare portions of the expansion project eligible for federal funding. The petitioners argued that the noise from the expansion project would be an impermissible "use" of certain historic properties in violation of Section 4(f).[208] The FAA applied its standard "Part 150" noise measurement technique, as set forth at Appendix A to 14 C.F.R. § 150, and found that the protected areas—parks and historic sites—potentially affected by the airport's expansion would not be "used" within the meaning of 4(f). While there is no guideline specifically for historic sites, all of the historic sites at issue were residential properties, so the FAA used the guideline applicable to residences.[209] The court noted past precedents and FAA's ongoing cooperation with the U.S. Environmental Protection Agency (EPA) to study different methods of evaluating noise pollution, and concluded that the metric relied upon by the agency was neither arbitrary nor capricious.[210]

The petitioners also challenged the FAA's application of the Part 150 standard for "residential properties" to historic sites, arguing that to determine whether a Section 4(f) "use" has occurred, the standard used must bear some relevance to the value, significance, and enjoyment of the lands at issue.[211] The court conceded that, while there might be instances where the standard for residential properties may be inadequate to protect the values that led to the designation of a site as historic, for example, the preservation of a village for the purposes of conveying rural life in an earlier time, it declined to do so in this case. In this case, there was no showing that a different standard should have been applied to a private home merely because it was historic.[212]

Similarly, in *Communities Inc. v. Busey,*[213] the petitioners' main contention was that the FAA failed to properly assess whether certain resources protected by Section 4(f), and located out of the projected noise contour, would be "used" by the Louisville Airport Improvement Plan. The improvement plan proposed to construct two new, independent, parallel runways to be constructed on the site of Standiford Field. Some of the residential neighborhoods directly under the flight path of the runways are "historic neighborhoods."[214] The plaintiffs argued that the FAA should have used an individual event noise level analysis rather than a cumulative noise level analysis; nevertheless, the court held that it was clearly within the expertise and discretion of the FAA to determine proper testing methods. The court found no abuse of discretion in the choice of the cumulative noise level: "The fact that the agency in exercising its expertise relied on the cumulative impact levels as being more indicative of the actual environ-

[204] 938 F.2d 190, 203-04 (D.C. Cir. 1991).

[205] *Id*. at 204.

[206] *Id*. at 204, citing to *Overton Park*, 401 U.S. at 416.

[207] 17 F.3d 1502, 305 U.S. App. D.C. 149 (D.C. Cir. 1994).

[208] *Id*. at 1507; *See* Allison v. U.S. DOT, 908 F.2d 1024 (D.C. Cir. 1990) (stating that for the purpose of § 4(f), noise that is inconsistent with a parcel of land continuing to serve its recreational, refuge, or historical purpose is a "use" of that land).

[209] City of Grapevine, 17 F.3d at 1508.

[210] *Id*. at 1508; *See* Sierra Club v. DOT, 753 F.2d 120, 128 (D.C. Cir. 1985); Citizens Against Burlington, 938 F.2d at 195.

[211] City of Grapevine, 17 F.3d at 1508; citing to Allison v. DOT, 908 F.2d 1024, 1029 (D.C. Cir. 1990) (finding that the standard for "recreational parks," which includes amusement parks and recreational waters, could not be applied to determine whether airport noise would constructively use a wildlife preserve).

[212] *City of Grapevine,* 17 F.3d at 1508.

[213] 956 F.2d 619 (6th Cir. 1992).

[214] *Id*. at 621.

mental disturbance is well within the area of discretion given to the agency."[215]

Further, the court found that the petitioners failed to demonstrate how mere noise may "use" the historic 4(f) resources involved in the case. The property in Old Louisville qualified for listing on the National Register of Historic Places because of its architectural importance and historical significance. The court held that it was not arbitrary or capricious for the FAA to determine that an increase in noise levels would not affect the relevant characteristics of Old Louisville—"its architecture and place in history."[216]

Finally, petitioners in *Communities, Inc*. failed to propose an alternative that would not use Section 4(f) resources. The Sixth Circuit agreed with the D.C. Circuit that the burden of suggesting a cognizable alternative is properly placed on petitioners.[217]

In *Town of Cave Creek, Arizona v. FAA,*[218] the court articulated the three-step process required for Section 4(f) compliance: 1) the FAA must identify the resources which are protected; 2) the FAA must determine whether the proposed project will "use" the lands identified; and 3) if the project uses the challenged area, the FAA may proceed *only* if there is "no prudent and feasible alternative" and the agency undertakes "all possible planning to minimize harm." Although the court recognized that noise that is inconsistent with a parcel of land's recreational, refuge, or historical purpose is a "use" of that land, it found that the petitioners in this case did not make a serious argument that the plan to change the high-altitude arrival and departure procedures to the north, northeast, and northwest of the Phoenix Sky Harbor International Airport would have a "significant adverse" impact on the property's uses.[219] Similarly, in *Allison v. Department of Transportation*,[220] the court found that even though the FAA had applied inappropriate guidelines, its determination of no "use" was upheld because of the substantial evidence presented that the activity complained of would have only an insignificant effect on the existing use of the parkland.

The Ninth Circuit has held that Section 4(f) "use" turns on whether the action "substantially impairs the value of the site in terms of its prior significance and enjoyment." In the case of *National Parks and Conservation v. US DOT and FAA,*[221] petitioner complained that the expansion of Kahului Airport in Maui, Hawaii, would result in the introduction of alien species, which would constitute an impermissible "use" of Haleakala National Park, a property protected by Section 4(f). Citing *Adler*, the court held that the petitioner could not demonstrate that the proposed runway extension would so increase the rate of alien species introduction as to substantially impair Haleakala's economic or environmental value.[222]

L. Clean Air Act

Two primary laws apply to air quality: NEPA and the CAA. [223] Under NEPA, FAA is required to prepare an EIS or EA for major federal actions that have the potential to affect the quality, including air quality, of the human environment.[224] An air quality assessment prepared for inclusion in a NEPA environmental document should include an analysis and conclusions of a proposed action's impacts on air quality. The CAA establishes National Ambient Air Quality Standards and designates attainment or nonattainment areas based on those standards within a state.[225] It also requires the states to prepare air quality plans, known as State Implementation Plans (SIP), for EPA approval.[226] Once a SIP is approved by the EPA and promulgated, federal departments, agencies, and instrumentalities are restricted from supporting any activity that does not conform to the standards set forth by the SIP.[227] In default of an approved SIP, the EPA is required to promulgate a federal implementation plan.[228]

The CAA provides for two different approaches for controlling air quality. The first limits emissions to the extent necessary to ensure that national ambient air quality standards are attained and maintained.[229] The second limits emissions from particular sources of pollutants regardless of the concentration of particulates in ambient air.[230] The emission limitations are estab-

[215] *Id*. at 624, citing to Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120, 128, 243 U.S. App. D.C. 302 (D.C. Cir. 1985).

[216] *Id*. at 624.

[217] *Id*. at 625. The court cited to other circuits, holding that an alternative route that causes substantially equal damage to 4(f) property is not a cognizable alternative within the meaning of 4(f). See Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 645, 263 U.S. App. D.C. 426 (D.C. Cir. 1987); Druid Hill Civic Ass'n v. Fed. Highway Admin., 772 F.2d 700, 715 (11th Cir. 1985). *See also* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 290 U.S. App. D.C. 371 (D.C. Cir. 1991) (finding that the case law uniformly holds that an alternative is imprudent under § 4(f)(1) if it does not meet the transportation needs of a project).

[218] 325 F.3d 320, 333, 355 U.S. App. D.C. 420 (D.C. Cir. 2003); citing to 49 U.S.C. § 303(c).

[219] *Id*. at 333.

[220] 908 F.2d 1024, 1029–30 (D.C. Cir. 1990); *See also* Sierra Club v. USDOT, 753 F.2d 120, 130 (D.C. Cir. 1985) (concluding that the addition of commercial jets would result only in "relatively minor changes in the operational characteristics of an established transportation facility" and holding that such flights would not be a "use" for purposes of 4(f)).

[221] 222 F.3d 677, 682 (9th Cir. 2000) *citing* Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982).

[222] *Id*.

[223] 42 U.S.C. §§ 7409, 7410, 7502–14 & 7571–74.

[224] 42 U.S.C. § 4332(c).

[225] 42 U.S.C.A. § 7505.

[226] 42 U.S.C.A. § 7410.

[227] 42 U.S.C.A. § 7506(c)(1). The EPA's general conformity criteria are codified at 40 C.F.R. § 51.858.

[228] 42 U.S.C.A. § 7410.

[229] 42 U.S.C.A. § 7408.

[230] 42 U.S.C.A. § 7411.

lished either by the state or agency administrator and limit the "quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice, or operational standard promulgated under the Act."[231]

1. Judicial Review Under the CAA

To achieve judicial review under the CAA, a party must have adequate standing to sue. Constitutional standing requires "concrete and particularized injury that is: (1) actual or imminent; (2) caused by or fairly traceable to, an act that the litigant challenges in the instant litigation; and (3) redressable by the court."[232] The party must allege an injury related to the environmental interest being harmed.[233] Thus, parties living in a state and whose health may be affected by air pollution from sources regulated by the SIP, have standing to challenge decisions affecting the plan.[234] The courts are careful to ensure that the challenging parties in fact have standing before continuing review.[235]

In reviewing actions under the CAA, courts may allow for the reversal of actions that are: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) contrary to constitutional right, power, privilege, or immunity; or 3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.[236]

However, in reviewing claims arising out of nonconformity with a SIP, the courts have determined that the appropriate standard of review for challenges arising under the CAA is the "arbitrary and capricious standard."[237] In *City of Olmsted Falls, OH v. F.A.A*, the city challenged the FAA's approval of the ROD for proposed runway improvements at Cleveland Hopkins International Airport.[238] The court stated that federal departments, agencies, or instrumentalities are required to make their own conformity determination consistent with the requirements of Section 176 of the CAA.[239] As such, review of such a conformity determination is treated to the same standard with which any other final agency action is determined in accordance with the Administrative Procedure Act.[240]

2. State Implementation Plans and Conformity Determinations

Under Section 176(c) of the CAA, the FAA must assure conformity with the SIP only if it would occur in a nonattainment or maintenance area.[241] To assure conformity, a federal agency is required to make a complete conformity determination where a proposed federal action would cause the total of "direct and indirect emissions of the pollutant in a nonattainment or maintenance area to equal or exceed certain rates.[242] However, an agency is exempt from the conformity determination if an 'applicability analysis' demonstrates that the total emissions from a proposed project are below the emissions levels specified,[243] or if the proposed action 'would result in no emissions increase or an increase in emissions that is clearly de minimis.'"[244]

In *City of Normandy Park v. Port of Seattle*, the petitioners claimed that the final approval of the project adopted by the Port of Seattle for the expansion of the Seattle–Tacoma International Airport violated the CAA's conformity requirements. The court held that the project did not violate the CAA.[245] The city conducted extensive environmental analysis, including a conformity determination, leading to the conclusion that the air emissions would be *de minimis*.[246] Similarly, in *Suburban O'Hare Com'n v. Dole,* the court found that the ALP would not violate the Illinois SIP because the city was obligated to take steps to mitigate the impact of air quality as part of the funding agreement.[247] Suburban alleged that the FAA's approval of the ALP violated the conformity requirements of the CAA. However, the FAA approved the ALP subject to the agreement by the city to take steps to mitigate the effect on air quality. The agreement would be enforced by the EPA and the FAA.

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[231] 61B AM. JUR. 2d *Pollution Control* § 149 (2009).

[232] City of Olmsted Falls v. F.A.A. 292 F.3d 261, 267, 353 U.S. App. D.C. 30 (D.C. Cir. 2002), *quoting* Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. 1996).

[233] *Id*. at 267.

[234] 61B AM. JUR. 2d *Pollution Control* § 688 (2009).

[235] *See* City of Olmsted Falls, 292 F.3d 261 (holding that city has standing to sue as long as it alleges an injury to itself as a city); City of Las Vegas, Nev. v. F.A.A. 570 F.3d 1109 (9th Cir. 2009) (finding that city had standing to sue under Nevada law to protect its environmental interests, and FAA's Finding of No Significant Impact was "final action" that adversely affected the city, leading to standing under the APA); County of Delaware, Pa. v. Dep't of Transp., 554 F.3d 143, 384 U.S. App. D.C. 280 (D.C. Cir. 2009) (finding that Petitioners failed to demonstrate that injury alleged was caused by promulgated rule as required to establish art. III standing).

[236] 42 U.S.C.A. § 7607(d)(9).

[237] *City of Olmsted Falls,* 292 F.3d at 269.

[238] *Id*.

[239] *Id*. *(*citing 40 C.F.R. § 93.154 (1995)).

[240] *Id*. at 269 (citing Conservation Law Found., Inc. v. Busey, 79 F.3d 1250, 1260-63 (1st Cir. 1996)); *See also* Ethyl Corp. v. EPA, 51 F.3d 1053, 1064, 311 U.S. App. D.C. 163 (D.C. Cir. 1995) (finding that the Clean Air Act's judicial review standard is to be taken directly from Administrative Procedure Act).

[241] 42 U.S.C.A. § 7506(c)(1) (2005).

[242] 40 C.F.R. § 93.153(b) (July 17, 2006).

[243] Emissions levels are specified in 40 C.F.R. § 93.153(b)

[244] City of Las Vegas, Nev. v. F.A.A. 570 F.3d 1109, 1117 (9th Cir. 2009) (quoting 40 C.F.R. § 93.153(c)(2) (July 17, 2006)).

[245] City of Normandy Park v. Port of Seattle, 165 F.3d 35, 1998 U.S. App. LEXIS 36115 (9th Cir. 1998).

[246] *Id*.

[247] Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 198 (7th Cir. 1986).

The court reasoned that because of the mitigation requirement, the CAA was not violated.[248]

In *City of Olmsted Falls v. FAA,* petitioner failed to carry its burden to demonstrate that FAA's ultimate conclusion that a *de minimus* exception applied under the CAA was unreasonable. Olmsted Falls challenged the FAA's approval of the ROD for the approval of runway improvements at Cleveland Hopkins International Airport.[249] The city claimed that the record of decision violated the conformity provisions of the CAA by failing to adequately disclose and analyze several air quality impacts of the project and by omitting analysis of nitrogen oxides from 21 known construction-related projects.[250] The D.C. Circuit held that the city waived its claim under the CAA by not challenging the noninclusion of the 21 construction-related projects before the FAA in administrative proceedings. Additionally, the court held that, even if the 21 projects were not adequately disclosed, the city failed to show that the nondisclosure undermined the FAA's conclusion that emissions from the proposed airport development were *de minimis*.[251] The city conceded that the 21 construction-related projects "*might* undermine the FAA's *de minimis* determination, *not* that they necessarily will."[252]

In an effort to assist in conformity determinations, the EPA promulgated regulations that listed actions presumed to conform (PTC) to SIPs.[253] The EPA stated in its preamble to the regulation that the list was intended to be illustrative and that there exist "too many federal actions that are *de minimis* to completely list…."[254] In 2007, the FAA, with the support of the EPA, promulgated its own list of PTCs.[255] The FAA cites 15 categories of airport actions that are PTC to SIPs.[256] If an action falls under one of the listed categories, the action does not require a conformity determination.

In *City of Las Vegas*,[257] the court held that a flight path change did not require a conformity determination because the action was categorically *de minimis*.[258] Las Vegas challenged the FAA's FONSI approving departure flight path modifications. The court cited the EPA's 1993 PTC regulation[259] and reasoned that the list of PTCs is intended to be illustrative and not exclusive.[260] Additionally, the preamble of the regulation clearly states that the EPA considered flight path modifications as categorically *de minimis*: the "EPA believes that…air traffic control activities and adopting approach, departure and enroute procedures for air operations" are categorically *de minimis*.[261]

M. Clean Water Act

The CWA[262] was enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[263] Under the CWA, the discharge of any pollutant into a navigable body of water is unlawful unless the point source has obtained a permit from the EPA.[264] The U.S. Supreme Court has interpreted the definition of "navigable waters" broadly.[265] The terms "navigable waters" and "waters of the United States" are not limited to traditional definitions of navigable waters.[266] The CWA authorized the development of the

[248] *Id*.

[249] City of Olmsted Falls, Ohio v. F.A.A., 292 F.3d 261 (D.C. Cir. 2002).

[250] *Id*. at 268.

[251] *Id*. at 272.

[252] *Id*. at 272–3.

[253] Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 C.F.R. § 63214 (1993).

[254] *Id*. at 63229.

[255] Federal Presumed to Conform Actions under General Conformity, 72 C.F.R. § 41565-02, 2007.

[256] The FAA cites 15 categories of airport actions that are presumed to conform (PTC) to SIPs. The regulation lists: Pavement Markings; Pavement Monitoring Systems; Non-Runway Pavement Work; Aircraft Gate Areas on Airside; Lighting Systems; Terminal and Concourse Upgrade; New HVAC Systems, Upgrades, and Expansions; Airport Security; Airport Safety; Airport Maintenance Facilities; Airport Signage; Commercial Vehicle Staging Areas; Low-Emission Technology and Alternative Fuel Vehicles; Air Traffic Control Activities and Adopting Approach; Departure and Enroute Procedures for Air Operations; and Routine Installation and Operation of Aviation Navigation Aids. 72 C.F.R. § 41565 (2007).

[257] 570 F.3d 1109 (9th Cir. 2009); *See also* City of Olmsted Falls, Ohio v. F.A.A., 292 F.3d 261, 269 (D.C. Cir. 2002) (holding that the petitioners failed to demonstrate that the F.A.A.'s ultimate conclusion, that the de minimis exception applied, was unreasonable); c.f. Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 24 ERC 1134, 16 Envtl. L. Rep. 20,686 (7th Cir. 1986) (holding that Airport Layout Plan would not violate the Illinois implementation plan because city was obligated to take steps to mitigate the impact of air quality as part of funding agreement).

[258] *Id*. at 117.

[259] Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 C.F.R. § 63214-01 (1993).

[260] City of Las Vegas, Nev. v. F.A.A., 570 F.3d 1109, 1118 (9th Cir. 2009).

[261] *Id*. (citing Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 C.F.R. §§ 63214-01, 63229 (1993)).

[262] Wooster, Ann K., Actions Brought Under Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) (33 U.S.C.A. §§ 1251 *et seq*.)—Supreme Court cases, 115 A.L.R. Fed. § 5312(a) (1993).

[263] 33 U.S.C.A. §§ 1251 *et seq*. (1987).

[264] 33 U.S.C.A. § 1342(a)(1) (2008).

[265] See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (extending the definition of "navigable waters" under CWA to include intrastate waters used by migratory birds for habitat exceeded authority granted to Corps under CWA); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985) (expanding regulatory authority to wetlands adjacent to navigable waters).

[266] Rapanos v. United States, 547 U.S. 715, 731, 126 S. Ct. 2208, 2220, 165 L. Ed. 2d 159, 173 (2006).

National Pollution Discharge and Elimination System (NPDES), which handles permitting of point-source discharges into navigable waters.[267] Under this system, the Administrator of the EPA has the authority to issue permits that "impose conditions on data and information collection, reporting, and such other requirements as the administrator deems appropriate."[268]

Additionally, nonpoint-source discharges are also regulated under the CWA. Section 404 requires permits for the dredging or filling of a wetland.[269] Under Section 404, the Army Corps of Engineers issues permits for the discharge into or draining of a wetland. In *Rapanos v. United States*, the Court determined that wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are adjacent to such waters and covered by the CWA.[270]

Failure to comply with the CWA requirements may have both civil and criminal penalties. The EPA Administrator may enforce CWA violations by issuing an order to comply or by bringing a civil action against any person in violation.[271] If violation of a compliance order occurs, the Administrator may commence a civil action or seek criminal sanctions.[272] In addition to federal enforcement, any citizen may bring a civil action against any person who is alleged to be in violation of the CWA.[273] This is not limited to private parties, as a CWA suit may be brought against the United States or against "any other governmental instrumentality or agency."[274] A citizen suit is limited to only those violators who are the instrumentality discharging the pollution.[275] As such, the CWA does not create a responsibility on the behalf of a state regulatory agency to pursue enforcement where the agency has already decided not to enforce. However, citizens may petition for judicial review of final agency action.[276]

Case law for CWA challenges relating to airport development and expansion is limited. However, there are two ways in which community challenges are likely to arise. The first is a citizen suit filed directly against an airport proprietor allegedly in violation of the CWA.[277] The second is through judicial review of agency action authorizing permits for the discharge of pollutants.[278]

Except as limited by statute, any citizen may commence an action against an alleged violator of the statute or EPA order.[279] Plaintiff must have a good faith basis for alleging continuing or intermittent violations.[280] Before an action may commence, a plaintiff is required to provide notice of intent to file suit to the alleged violator, the state in which the violation is occurring, and the EPA administrator.[281] Compliance with the notification requirement is mandatory, and such compliance must be pleaded.[282] Citizen suits may seek declaratory and injunctive relief, civil penalties, and additional costs.[283] Additionally, CWA actions are not rendered moot upon compliance of permit limits absent a showing that violations are not likely to reoccur.[284] In the case of *Save Ourselves, Inc. et al. v. U.S. Army Corps of Engineers,*[285] the Fifth Circuit held that a group of nonprofit organizations interested in protecting and preserving the waters of Ascension Parish, Louisiana, did not have standing to assert a claim of adverse effect or aggrievement against the Army Corps of Engineers for failing to declare an airport development site a wetland under the CWA. In order to show adverse effect or aggrievement, the plaintiffs were required to establish that the injury complained of "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[286] Further, the plaintiffs have standing as organizations or associations to protect this interest only if 1) the interest is germane to the purpose of the plaintiff organizations, 2) any of the plaintiff organizations' members have standing to sue on their own behalf, and 3) the participation of individual members in the lawsuit is not required.[287] The Court held that, while this interest fell within the "zone of interests" of the organization, the plaintiffs failed to satisfy the second prong required for standing. At no time during the proceedings before the district court did the plaintiffs allege

[267] 61C AM. JUR. 2d *Pollution Control* § 779 (2009) (citing 33 U.S.C.A. § 1342(a)(1) (2008)).

[268] 33 U.S.C.A. §§ 1318, 1342 (2008).

[269] 33 U.S.C.A. § 1344 (1987).

[270] Rapanos**,** 547 U.S. at 740-41 (2006)

[271] 61C AM. JUR. 2d *Pollution Control* § 749 (2009).

[272] 33 U.S.C.A. § 1319(b)-(c) (1990).

[273] 33 U.S.C.A. § 1365(a)–(b) (1987).

[274] 61C AM. JUR. 2d *Pollution Control* § 924 (2009).

[275] 61C AM. JUR. 2d *Pollution Control* § 923 (2009) (citing 33 U.S.C.A. § 1365(f) (1987)).

[276] 61C AM. JUR. 2d *Pollution Control* § 878 (*citing* 33 U.S.C.A. § 1369(b) (1988)).

[277] 33 U.S.C.A. § 1365(a)–(b) (1987).

[278] 33 U.S.C.A. § 1369 (1988).

[279] 61C AM. JUR. 2d *Pollution Control* § 923 (2009)

[280] 61C Am. Jur. 2d *Pollution Control* § 925 (2009).

[281] 33 U.S.C.A. § 1365(b)(1)(A) (1987).

[282] 61C AM. JUR. 2d *Pollution Control* § 928 (2009).

[283] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that the environmental groups had standing to sue for injunctive relief and civil penalties).

[284] *Id*. at 189 (stating that presumption of future injury is too great when the defendant voluntarily ceases and desists in the face of litigation; the action could not be rendered moot absent showing that violations could not reasonably be expected to recur); *citing* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S. Ct. 1070 (1982), 71 L. Ed. 2d 152 ("a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.").

[285] 958 F.2d 659 (5th Cir. 1992).

[286] *Id*. at 661 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 110 S. Ct. 3177, 3186, 111 L. Ed. 2d 695, 713 (1990)).

[287] *Id*., citing Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 342, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383, 393 (1977).

specific facts showing a direct injury to any of its members.[288]

The appropriate standard of review for CWA suits is the "arbitrary and capricious" standard under the Administrative Procedure Act.[289] The courts will not substitute their own opinion for that of the agency unless review shows that the decision clearly lacks a rational basis.[290] In *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency*, [291] a downtown municipality and private citizen brought suit challenging the fill and dredge permit issued in connection with the filling and culverting required to build a new runway at Hopkins International Airport. Plaintiffs alleged that the Army Corps of Engineers improperly relied on the Ohio EPA's waiver pursuant to Section 401 of the CWA.[292] The Court of Appeals discussed three issues. First, it determined that the claim had not become moot due to the completion of construction on the airport expansion. The court explained that a "live controversy" existed pertaining to the permit itself, and such a controversy could not render the case moot.[293] Second, the court determined that the Ohio EPA did not violate Ohio law by issuing a waiver under Section 401 of the CWA.[294] The court reasoned that if the Corps cannot rely on a state's agency to follow its own laws and procedures, then the waiver process under Section 401 would require the Corps to perform its own independent analysis of each state's laws and regulations. Such a process would undermine the role of state environmental agencies.[295]

Finally, the court addressed the issues decided on the agency record. First, the court established the appropriate standard of review. The CWA does not specify its own standard of review, and thus, the court established that review of agency action must be done pursuant to the Administrative Procedure Act.[296] The court must determine whether the agency action was "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law."[297] The court determined that the Corps' issuance of the permit was not arbitrary or capricious.[298] The court reasoned that the Corps' decision to issue the permit was not arbitrary or capricious given that the mitigation agreement agreed upon by the city would exceed the state's water quality requirements.[299]

Plaintiffs argued that the Corps erred in issuing the permit without first determining whether the antidegradation rule was fulfilled.[300] The court held that the antidegradation rule placed obligations on the state, not the Corps defendants. Thus, the Corps could not be liable for violations of the regulation when they do not have any obligations under the federal regulation.[301] Next, plaintiffs argued that the district court misinterpreted the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency entitled The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (MOA)."[302] The MOA discusses two types of mitigation: compensatory and avoidance/minimization. The plaintiffs argued "that avoidance and minimization mitigation are the only permissible forms of mitigation for…" creeks and streams.[303] The court held that the language of the MOA does not foreclose the application of compensatory mitigation to creeks and streams.[304]

III. CONSTITUTIONAL LAW CHALLENGES

A number of community challenges to airport development have included constitutional law claims, includ-

[288] *Id*. at 662. This is consistent with the holding in Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc**.**, 528 U.S. 167, 187, 120 S. Ct. 693, 707, 145 L. Ed. 2d 610, 631 (2000), which held that environmental groups could sue for injunctive and civil penalties as long as they could establish standing for each remedy.

[289] See Cerro Copper Prods. Co. v. Ruckelshaus, 766 F.2d 1060 (7th Cir. 1985) (stating that CWA actions by the EPA are reviewed under 33 U.S.C.A. § 1369(b)(1)).

[290] 61C AM. JUR. 2d *Pollution Control* § 889 (2009).

[291] 435 F.3d 632, 633 (6th Cir. 2006).

[292] *Id*. at 635.

[293] If the plaintiff's claims prevailed, the permit would have to be invalidated and a new permitting process would be required. *Id*. at 636.

[294] In order to obtain a dredge and fill permit under § 404 of the CWA, an applicant must comply with § 401(a)(1). Section 401(a)(1) requires that

> [a]ny applicant for a Federal License or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State, in which the discharge will comply with [certain provisions] of this title…. If the State…fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the proceeding sentence….

33 U.S.C. § 1341(a)(1).

[295] *City of Olmsted Falls*, 435 F.3d at 636.

[296] *Id*. at 636–37.

[297] *Id*. at 637; (citing 5 U.S.C. § 706(2)(A)).

[298] *Id*. at 638.

[299] *Id*. at 639.

[300] "The federal antidegradation rule requires states to develop an antidegradation policy. 40 C.F.R. §§ 131.1, 131.12(a)." *City of Olmsted Falls*, 435 F.3d at 637.

[301] *Id*.

[302] *Id*. at 636.

[303] *Id*. at 637.

[304] The court reasoned that "No federal regulation…indicates that avoidance and minimization is the only permissible means to mitigate environmental impacts on streams or creeks." Additionally, it is not stated anywhere that compensatory mitigation is limited in its application or cannot be applied to offset environmental degradation of creeks and streams. *Id*.

ing the right to due process, violation of equal protection, lack of representation, violation of the right to free exercise of religion, and preemption of federal law.

A. Preemption

The preemption doctrine stems from the Supremacy Clause of the U.S. Constitution, which states

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or the laws of any State to the Contrary notwithstanding.[305]

Generally, the preemption doctrine restricts the ability of local and state agencies to pass laws and ordinances governing airport operations. The Supremacy Clause has been interpreted as supporting three ways in which federal law can preempt state and local law: express preemption, conflict (or implied) preemption, and field (or complete) preemption. Express preemption occurs when a federal statute explicitly states that it overrides state or local law. Conflict preemption exists if it would be impossible for a party to comply with both local and federal requirements or where local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Field preemption occurs when federal law so thoroughly "occupies a legislative field" as to make it reasonable to infer that Congress left no room for the states to act.[306] Federal law and regulation clearly establish that the fields of noise regulation and aviation safety are completely occupied by the federal government, but zoning ordinances that merely regulate or restrict airport location or ground operations generally have been upheld as not federally preempted.[307]

1. Local Noise Regulations Preempted by Federal Law

In *City of Burbank v. Lockheed Air Terminal, Inc.*,[308] the Supreme Court affirmed a decision by the Ninth Circuit invalidating a local ordinance that imposed curfew hours on the takeoff of jet aircraft from an airport on the grounds that federal law preempted the local ordinance. A majority of the Court held that local governments are preempted by the Federal Aviation Act and the Noise Control Act of 1972 from local regulation of aircraft noise.[309] The Court stated:

> If we were to uphold the Burbank ordinance and significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties in scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.[310]

The Court recognized that noise control falls within the police power of the states, yet held that, "the pervasive control vested in EPA and in FAA under the [Noise Control Act of] 1972 seems to us to leave no room for local curfews or other local controls."[311] This pervasiveness was found in the existence of the express language in a Senate report, which stated that "states and local governments are preempted from establishing or enforcing noise emission standards…"; and in the existing preemption rule that confers upon the EPA and the FAA with control over aircraft noise; and the imposition of a variety of regulations governing noise by the Administrator of the FAA. Based on this evidence of pervasiveness, the Court in *Burbank* determined that aircraft noise was so comprehensively and strictly regulated at a federal level that it preempted state or local laws on the same subject.[312]

Subsequent court decisions have applied this preemption ruling to local ordinances that attempt to control noise by regulating the flight of planes. The Court of Appeals for the Eleventh Circuit followed suit in *Pirolo v. City of Clearwater*,[313] finding that local ordinances prohibiting night operations and proscribing air traffic patterns were preempted. The Court of Appeals for the Ninth Circuit found that curfews on aircraft flights were preempted in *San Diego Unified Port Dist.*

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[305] U.S. CONST. art. VI, cl. 2.

[306] Hoagland v. Town of Clear Lake, Ind., 415 F.3d 693, 696 (7th Cir. 2005).

[307] See ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 85-4 (2008); Montalvo v. Spirit Airlines, 508 F.3d 464 (9th Cir. 2007) (holding that the Federal Aviation Act and corresponding regulations preempted any state-imposed duty to warn airline passengers about risks of deep vein thrombosis).

[308] 411 U.S. 624, 626, 93 S. Ct. 1854, 1856, 36 L. Ed. 2d 547, 549 (1973). Burbank has been recognized as the "preeminent authority on the question of federal preemption in the area of aviation." *See* Harrison v. Schwartz, 319 Md. 360, 572 A.2d 528, 531 (Md. App. 1990), citing to Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F. Supp 678, 691 (N.D.N.Y. 1989).

[309] *Burbank*, 411 U.S. at 626. The Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §§ 1301 *et seq*., as amended by the Noise Control Act of 1972, 86 Stat. 1234, and the regulations under it, 14 C.F.R. pts. 71, 73, 75, 77, 91, 93, 95, and 97 are central to the question of preemption. *Id*. 49 U.S.C. § 40103(a)(1) (formerly 1508(a)), provides in part, "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States…" In 49 U.S.C. § 40103(b)(1) (formerly 1348), the Administrator of the FAA has been given broad authority to regulate the use of navigable airspace "in order to insure the safety of aircraft and the efficient utilization of such airspace…" and "for the protection of persons and property on the ground." In regard to federal preemption, 49 U.S.C. § 41713(b)(1) (formerly 1305(a)(1)), states:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier that may provide air transportation under this subpart.

[310] *Burbank*, 411 U.S. at 639.

[311] *Id*. at 638.

[312] *Id*.

[313] 711 F.2d 1006 (11th Cir. 1983).

v. Gianturco. [314] The Court in *Gianturco* listed 14 earlier decisions from several federal circuits and 6 states that have accepted, "without contrary authority," the "proposition that the federal government has preempted the area of flight control regulation to eliminate or reduce noise."[315] In *State of Minnesota by Minnesota Public Lobby and by South Metro Airport Action Council v. Metropolitan Airports Commission*, [316] the Minnesota Supreme Court held that federal law preempts the noise standards of the state's pollution control agency, (MPCA), as applied to the Metropolitan Airport Commission's (MAC) operation of the Minneapolis-St. Paul International Airport. While recognizing MAC's admitted violation of the noise standards and the "serious and unpleasant problem" of airport noise, "which interferes with the enjoyment of life and property for people living in areas affected by that noise," the court cited to *Burbank* and held that "states may not enact noise regulations which impinge on aircraft operations and that is precisely what the MPCA noise standards do."[317]

In *Harrison v. Schwartz,* [318] the court applied the Supreme Court's preemption rationale in *Burbank* to a small, privately-owned airport that did not involve inter-airport commercial cargo or passenger flights. In *Harrison*, a group of neighbors argued that a privately-owned local airport, which had originally been granted a conditional use permit by the Carroll County Board of Zoning to operate as a "private airport site and drop zone for parachutists," was being used by a glider organization, Bay Soaring, in violation of the limits originally established under the conditional use permit. The Zoning Board granted a new permit, but established new limits on aircraft takeoffs intended to reduce the intensification of the use of the property. The neighbors sought to differentiate this case from *Burbank*, claiming that the airplanes involved in Bay Soaring's enterprise are not used for the transport of goods or persons in the stream of commerce and that FAA control over glider port operations is minimal. It was argued that the Court in *Burbank* was concerned with the congestion and the loss of efficiency that might be caused by the imposition of a curfew at a commercial airport. The court in *Harrison* rejected these arguments, pointing to the dissent in *Burbank,* which argued that noise regulation was a matter of particularly local concern and that federal preemption extended only to the regulation of technological methods of reducing the output of noise by aircraft, and noting that the holding of the majority was far more expansive.[319] It held that, consistent with the holding in *Burbank*, the county's exercise of police powers to control noise by regulating the flight of planes was invalidated on the ground of federal preemption, regardless of the size of the airport.[320]

In *Wright v. City of Winnebago*,[321] the court distinguished *Burbank* on the grounds that Winnebago County was not attempting to regulate an already existing airfield, but determining whether to allow use at all. In *Wright*, local authorities, acting under a zoning ordinance, denied the Wrights permission to establish a restricted aircraft landing area from which Mr. Wright proposed to commute to work by plane. Defendants argued that the right to choose not to have an airport in the first place should be local, especially where the airport is one where service to the public is not a consideration. The court agreed, finding first that there is no express provision of preemption in the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, and holding that in the absence of any evidence of pervasive federal regulation of the placement of restricted landing areas (RLA), or that the denial of a special use permit for an RLA would interfere with federal policies, the Federal Aviation Act does not preempt local power to decide whether to allow new private RLAs on the basis of potential noise problems.[322] Nevertheless, it has been pointed out that the essential rationale in *Wright* is that local government may exercise zoning authority to prohibit an RLA altogether. To deny permission to create an airport-like facility does not invade the noise-control field that is federally occupied, for that sort of denial cannot affect the way in which aircraft operate in navigable airspace.[323]

The courts have also recognized that the Supreme Court in *Burbank* holds open the possibility that an airport proprietor (including a municipality) may issue valid regulations controlling airport noise.[324] For example, in *Santa Monica Airport Ass'n v. City of Santa Monica,*[325] a curfew and other noise control regulations

[314] 651 F.2d 1306 (9th Cir. 1981).

[315] *Id*. at 1315, n.22.

[316] 520 N.W.2d 388 (Minn. 1994).

[317] *Id*. at 393. The court also noted MAC's argument that Congress again "reaffirmed" its intent to preempt aircraft noise regulation in the Airport Noise and Capacity Act of 1990. Congress stated in this legislation that: (2) community noise concerns have led to uncoordinated and inconsistent restrictions on aviation which could impede the national air transportation system; (3) a noise policy must be implemented at the national level. 49 U.S.C. App. § 2151 (Supp. 1994). *Id*. at 390, n.3.

[318] 319 Md. 360, 572 A.2d 528 (Md. Ct. App. 1990).

[319] *Id*. at 532–33.

[320] *Id*. at 374–75.

[321] 73 Ill. App. 3d 337, 391 N.E.2d 772 (Ill. Ct. App. 1979).

[322] *Id*. at 777.

[323] Harrison v. Schwartz at 319 Md. 371.

[324] *Burbank,* 411 U.S. at 635–36 n.14.

(The letter from the Secretary of Transportation also expressed the view that

the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

(Emphasis added.) This portion as well was quoted with approval in the Senate Report. S. REP. NO. 1353, 90th Cong., 2d Sess., 6).

[325] 659 F.2d 100 (9th Cir. 1981).

were upheld. But, the court pointed out that the City of Santa Monica was the proprietor of the airport in question, and thus within the proprietor exception to the general rule of *Burbank*.[326] Various courts have recognized that the proprietor exception is based on the fact that an airport proprietor may be liable for noise emanating from aircraft that use the airport.[327] In order to guard against liability, the airport proprietor should be able to promulgate reasonable noise regulations. The proprietor exception to *Burbank* has been recognized and explained by a number of courts, including *City of Blue Ash v. McLucas*,[328] *Harrison v. Schwartz,*[329] *Northeast Phoenix Homeowners' Association v. Scottsdale Municipal Airport,*[330] *National Business Aviation Ass'n., Inc. v. City of Naples Airport Authority,*[331] and *United States v. New York*.[332]

In *Northeast Phoenix Homeowners*,[333] the plaintiff, a nonprofit organization representing landowners whose homes were located under the flight path of airplanes using the airport and within 1,000 yd of the airport, sought to restrain the City of Scottsdale from proceeding with a runway extension project at the Scottsdale Municipal Airport and to impose a reasonable curfew upon the hours of flight operations, prohibit nonstandard turns, and require the aircraft to utilize the full runway and threshold available in their operations so as to minimize the impact of operations on plaintiffs' lands. The plaintiffs suggested that judicially-imposed regulation of municipally-owned airports through the court's injunctive power would fall within the proprietary regulation exemption from federal preemption. The court rejected this argument, holding that, while the City of Scottsdale, as proprietor, admittedly had the discretion to voluntarily take actions affecting the operation of the airport so as to lessen the impact of noise on the neighbors, such action could not be mandated by the State through injunctive relief by Arizona courts applying Arizona common law principles.[334]

In the *United States v. New York*[335] case, the court recognized that the State of New York, as the proprietor of the airport at issue, was not preempted from promulgating a curfew in response to local community complaints of noise pollution. However, the court noted that the State is vested "with only the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster."[336] Nonetheless, the court invalidated the curfew as "overbroad, unreasonable and arbitrary" in view of the federal preemption of regulations concerning noise and planes in flight.[337] By contrast, the court in *National Business Aviation Ass'n., Inc. v. City of Naples Airport Authority*,[338] held that the *Burbank* case does not support the contention that either the Supremacy Clause or the Commerce Clause imposes reasonableness or nondiscrimination requirements upon airport proprietors' efforts to ban aircraft.

2. Safety Regulations Preempted by Federal Law

The courts have also recognized that federal law preempts the general field of aviation safety. In a leading Third Circuit case, *Abdullah v. American Airlines, Inc*.,[339] the plaintiffs were passengers who were injured when an airline encountered turbulence. They sued the airline for negligence for failing to warn the passengers about the turbulence. The court found implied field preemption based on its conclusion that the Federal Aviation Act and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions. The Third Circuit examined statutory and regulatory language, congressional intent, and earlier case law and held that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation.[340] The plaintiffs could recover only if they could show that the airline had violated a federal standard of care.

In *Montalvo v. Spirit Airlines*,[341] the Ninth Circuit adopted the Third Circuit's broad, historical approach to hold that federal law generally establishes the applicable standards of care in the field of aviation safety. In this case, the plaintiffs also claimed that the airlines had negligently failed to warn of the risk of developing deep vein thrombosis and to inform passengers of steps that they might have taken to mitigate that risk. Again, the court cited to the purpose, history, and language of the Federal Aviation Act and concluded that Congress's intent "to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in the area, and the legislative goal of

[326] *Id*. at 103–04.

[327] "The rationale for this exception is clear: since airport proprietors bear liability for excessive aircraft noise under *Griggs v. Allegheny*, 369 U.S. 84 (1962), fairness dictates that they must have power to insulate themselves from that liability." United States v. State of N.Y., 552 F. Supp. 255, 263 (N.D.N.Y. 1982).

[328] 596 F.2d 709, 712 (6th Cir. 1979).

[329] 319 Md. 360, 572 A.2d 528.

[330] 636 P.2d 1269, 1274 (Ariz. Ct. App. 1981).

[331] 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

[332] 552 F. Supp. 255, 263–64 (N.D.N.Y. 1982).

[333] 636 P.2d 1269 (Ariz. Ct. App. 1981).

[334] *Id*. at 1277.

[335] 552 F. Supp. 255, 264 (N.D.N.Y. 1982).

[336] *Id*., citing British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75, 84 (2d Cir. 1977).

[337] *Id*. at 265.

[338] 162 F. Supp. 2d 1343, 1352 (M.D. Fla. 2001).

[339] 181 F.3d 363 (3d Cir. 1999).

[340] *Id*. at 367.

[341] 508 F.3d 464 (9th Cir. 2007).

establishing a single, uniform system of control over air safety."[342]

Other Circuits have considered whether federal law preempts discrete aspects of air safety. In *French v. Pan Am Express, Inc.,*[343] the court held that the Federal Aviation Act governs issues of pilot suitability, including submission to drug testing. In *Kohr v. Allegheny Airlines, Inc*.,[344] a mid-air collision case, the Seventh Circuit found the rights and liabilities of the parties to be federally preempted. The court wrote of Congress's objective in enacting the Federal Aviation Act: "[T]he principal purpose of the [FAA] is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace."[345]

In *Tweed-New Haven Airport Authority v. Town of East Haven,*[346] the Tweed-New Haven Airport Authority sought to prevent the East Haven defendants from continuing to use their local municipal powers over wetlands to obstruct construction of a federally-mandated, federally-funded, and state- and federally-approved aviation safety and air navigation project. According to the FAA's final EIS, Twee-New Haven Airport has "[i]nsufficient runway safety areas on its [Runway], *270 which do not meet current [FAA] safety standards."[347] The court held that two local regulations, as applied to the runway project, were preempted by the Federal Aviation Act, "because the runway safety areas are being created for the purpose of meeting the FAA safety standards and the runway project is being done within Authority property."[348]

3. No Federal Preemption of State and Local Law

Local zoning ordinances may generally allow, prohibit, or otherwise restrict proposed airport development or operations or the development or operations of related facilities to the same extent as other uses of land. Such zoning ordinances must comply with enabling act requirements relating to the adoption of such ordinances and such ordinances must have a real relationship to public health, safety, or welfare.[349] These cases generally distinguish between land use regulations that affect a proposed airport, heliport, or landing strip development from such a facility that may already be in operation.[350] They further differentiate between land owned by an airport and land owned by individuals and municipalities.[351]

In the case of *Gustafson v. City of Lake Angelus*,[352] the court considered whether the city's prohibition against landing seaplanes on a city lake was preempted. Determining that a lake landing site was analogous to an airstrip on land, the court found that the prohibition was not preempted: "[W]e believe that the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight is distinguishable from the regulation of the designation of plane landing sites, which involve the local control of land (or in the present case, water) use."[353]

The court acknowledged that the plain language of 49 U.S.C. § 41713(b)(1) of the Federal Aviation Act expressly prohibits states from regulating aviation rates, routes, or services, but found that the City of Lake Angelus ordinances do not infringe on these expressly preempted fields. The court looked to FAA regulation for additional guidance, specifically 14 C.F.R. § 157.7(a). This regulation provides, as to proposed airports, that the FAA will conduct an aeronautical study and issue a determination, considering such matters as the effect the proposed airfield would have on existing traffic patterns or neighboring airports and the effects on the existing airspace structure. But a "determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts."[354] The court in *Gustafson* viewed this regulation as indicating clear FAA deference to local zoning regulations, since it requires the establishment of an airport in compliance with a municipality's land use scheme. The court differentiated *Burbank,* and explained that while the Supreme Court held that the Federal Aviation Act made clear its intent to regulate aircraft noise, FAA regulation 14 C.F.R. § 157.7 indicates that the FAA does not intend to pervasively regulate the designation of local airports. [355] The court went on to differentiate the preemptive power of the Federal Aviation Act to regulate "airspace" and "the flight of aircraft" from the authority of states and municipalities to control local "ground space."[356]

Similarly, in *Hoagland v. Town of Clear Lake*,[357] the Seventh Circuit upheld the land use ordinance of the Town of Clear Lake, which sought to terminate the use of a private heliport and imposed a requirement of the special permission of the Zoning Board of Appeals for the designation of any aircraft landing area and further provided that any preexisting, unapproved aircraft

[342] *Id*. at 473.

[343] 869 F.2d 1 (1st Cir. 1989).

[344] 504 F.2d 400 (7th Cir. 1974).

[345] *Id*. at 404.

[346] 582 F. Supp. 2d 261 (D. Conn. 2008).

[347] *Id*. at 269–70.

[348] *Id*. at 270.

[349] RATHKOPF, *supra* note 307, at § 85:2 (citations omitted).

[350] *See* Wright v. City of Winnebago, 73 Ill. App. 3d 337, 391 N.E.2d 772 (Ill. Ct. App. 1979); Dallas/Ft. Worth Int'l Airport Bd. v. City of Irving, 854 S.W.2d 161 (Tex. App. 1993).

[351] *See* Dallas/Ft. Worth Int'l Airport Bd. v. City of Irving, 854 S.W.2d 161 (Tex. Ct. App. 1993).

[352] 76 F.3d 778 (6th Cir. 1996).

[353] *Id*. at 783.

[354] 14 C.F.R. § 157.7(a) (1995).

[355] *Gustafson,* 76 F.3d at 785.

[356] *Id*. at 787.

[357] 415 F.3d 693 (7th Cir. 2005).

landing area must be discontinued within 5 years or upon the transfer of the property. Mr. Hoagland claimed that the ordinance was expressly preempted by 49 U.S.C. § 41713(b)(1) as an impermissible regulation of the route of an air carrier. The court disagreed, stating:

> The Clear Lake ordinance is a land use, or zoning ordinance, not a flight pattern regulation. We are not convinced that Congress meant to take the siting of air fields out of the hands of local officials. The siting of an airfield—so long as it does not interfere with existing traffic patterns, etc.—remains an issue for local control.[358]

See also *Condor Corp. v. City of St Paul*,[359] in which the Eighth Circuit found there was no preemption in the denial to operate a heliport: "Here, Condor asserts the City's action in denying its permit conflicts with the FAA's regulation of airspace. We see no conflict between a city's regulatory power over land use and the federal regulation of airspace, and have found no case recognizing a conflict. (citations omitted.)"[360]

In the case *Dallas/Ft. Worth International Airport Brd. v. City of Irving,*[361] a joint board of Dallas/Fort Worth sued the cities of Irving, Euless, and Grapevine for requiring the Airport Board to follow the cities' local zoning ordinances.[362] The court held that FAA regulations preempt local laws relating to safety, airspace, and noise control, but not local land use regulation. This case was brought in connection with the Board's $3.5 billion redevelopment plan of the Dallas/Fort Worth International Airport, including the construction of two new runways, additional taxiways, aircraft holding areas, the extension of existing runways and the construction of other airport facilities. In 1992, the FAA assigned $100 million to the initial phase of the extension plan and issued an ROD formally approving and authorizing funding for the construction of the new runway on the east side of the airport. In 1989 and 1990, the cities had amended their zoning ordinances to insure that all structures and land uses that might result in large environmental impacts, including, but not limited to airports, are consistent with each city's comprehensive zoning plan.

The court addressed the preemption issue with reference to *Burbank* and differentiated *Burbank* on several grounds. First, the Airport Board wished to expand onto land not currently owned by the airport, but rather onto land owned by individuals and cities. While the court would not dispute that federal law preempts local regulation within the boundaries of an airport, the court declined to extend preemption to other property, absent a showing of safety concerns.[363] The court also cited to Justice Rehnquist's dissent in *Burbank* to support the argument that the majority did not find preemption in the case of land that is not already part of an airport:

> A local governing body could…use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the Supremacy Clause merely because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control.[364]

The court also pointed out that the FAA, in its ROD approving the project, stated that local permits were a matter of local law and assumed compliance with local ordinances.[365]

In the case *In re Commercial Airfield,*[366] the Vermont Supreme Court considered the extent to which the Federal Aviation Act and regulations of the FAA and other federal agencies preempt local land use regulations and concluded that no conflict existed. In this case, the owner of a small private airport sought to make certain improvements to his airport and associated flight activities, but was informed that he needed to apply for a permit under the state's comprehensive land use act (Act 250). The court conceded that the federal government has preempted certain aspects of aircraft and airport operation, but recognized that there had been no attempt by the state to regulate air safety or aircraft noise. The court concluded that the federal government has not pervasively occupied the field of land use regulations relating to aviation.[367]

The court in *City of Cleveland v. City of Brook Park*[368] found no preemption by federal aviation law and that the City of Cleveland, owner of the Cleveland Hopkins International Airport, was required to conform to the zoning ordinances of the City of Brook Park, in which a part of the airport is located. The City of Cleveland claimed that the Brook Park ordinances violated both the Supremacy Clause and the Commerce Clause of the U.S. Constitution and sought an injunction against the

[358] *Id.* at 697.

[359] 912 F.2d 215 (8th Cir. 1990).

[360] *Id*. at 219.

[361] 854 S.W.2d 161 (Tex. Ct. App. 1993).

[362] *Id*. at 167–68.

[363] *Id*.

[364] *Id*. at 168 (*citing Burbank,* 411 U. S. at 653, 93 S. Ct. at 1869, 336 L. Ed. 2d at 565).

[365] It was noted by a representative of the DFW International Airport, in connection with a survey circulated for purposes of this report, that following the decision in this case, the Texas legislature then amended the Texas Transportation Code § 22.074 to unmistakably confer exclusive land use control within the DFW airport on the DFW Airport Board. This statutory amendment was then upheld by the Texas Courts (see City of Irving, Tex. v. Dallas/Fort Worth Int'l Airport Bd., 894 S.W.2d 452 (Tex. Ct. App. 1995)). It was also noted that the Board's strongest strategy was to seek the necessary legislation at the state level, arguing for the economic importance of the airport. The Board's weakest argument was that local zoning was preempted by federal law.

[366] 170 Vt. 595, 752 A.2d 13 (Vt. 2000).

[367] *Id*. at 597.

[368] 893 F. Supp. 742, 751 (N.D. Ohio 1995).

enforcement of the ordinances. To address safety issues anticipated to arise with projected increases in traffic, the City proposed to extend one runway and construct another, much of which would be located on property in Brook Park. Brook Park amended its Planning and Zoning Code, the net effect of which was to require the City to obtain a conditional use permit or obtain immunity from the zoning ordinances before it could expand the airport within its existing boundaries.

Addressing the City of Cleveland's claim of preemption, the court determined that the provisions of the local zoning ordinances neither conflicted with nor frustrated the federal purposes of the Federal Aviation Act, the Noise Control Act, or the AAIA.[369] With respect to the commerce clause, the court found that the ordinances would not burden interstate commerce. The court noted that the incidental effect that may be caused by the airport's ability to attract out-of-state carriers was outweighed by Brook Park's substantial interest in determining the appropriate use of land within its borders.[370]

In the case of *The People ex rel. Joseph E. Birkett, et al. v. The City of Chicago*,[371] the plaintiffs sought to compel the City of Chicago to apply for a certificate from the Illinois Department of Transportation (IDOT) regarding the city's plans for terminal and roadway construction and a new quad runway system at O'Hare International Airport. Section 47 of the Illinois Aeronautics Act requires any municipality making any alteration or extension of an existing airport to obtain a certificate of approval from IDOT.[372] IDOT regulations define "alteration or extension" to mean any material change in length, width, or direction of runways or landing strips.[373] The court agreed with the plaintiffs that the record showed ample evidence that the city's plans included building additional runways; however, the city asserted that federal law occupied the entire field of air traffic flow and thus preempted the state's requirement for an IDOT certification.[374] The court disagreed, holding that the Illinois statute at issue, as limited by the IDOT regulation, does not attempt to regulate the operation and uses of navigable airspace. "While the alteration or construction of runways may have a tangential effect on the operation of aircraft and the use of navigable airspace, it is not substantial. Thus, section 47 of the Aeronautics Act as applicable in this case is not preempted by the Federal Aviation Act."[375]

But see *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*,[376] in which the court struck down local regulation of taxiways and runways as preempted by the Federal Aviation Act, holding that it interferes with the movement and operation of aircraft. In this case, the airport sued the City of Los Angeles to enjoin enforcement of a city ordinance requiring prior submission and approval of any plans for development on a parcel of airport land that is used exclusively for airplane landings and takeoffs. The dispositive question was whether the ordinance was preempted by the Federal Aviation Act and the Noise Control Act. In a cursory opinion, the court determined that the city may not condition the construction and reconstruction of runways and taxiways on city approval. "Stated simply, a non-proprietor municipality may not exercise its police power to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport."[377] The courts in the *In re Commercial Airfield,*[378] *City of Cleveland v. City of Brook Park,*[379] and *The People ex rel Joseph Birkett* [380] cases expressly declined to follow the Ninth Circuit holding in the *Burbank-Glendale-Pasadena* case, which they recognized as inconsistent with their holdings. The Vermont Court thought the Ninth Circuit decision "unhelpful."[381] The U.S. District Court, N.D. Ohio, found that the Ninth Circuit's "view of the scope of the Aviation Act is simply broader than that implied in a reasonable reading of the statute,"[382] and the Illinois Court declared that the "analysis was incomplete; it prohibits local governments from regulating land use, a subject traditionally left to state and local authorities; and it is inconsistent with our duty to decline to find preemption absent the clear and manifest intent of Congress."[383]

B. Free Exercise of Religion

In the case of *St. John's United Church of Christ v. City of Chicago,*[384] the Seventh Circuit held that an amendment to the Illinois Religious Freedom Restoration Act (IRFRA) did not violate a religious cemetery's rights under the Free Exercise Clause of the United States Constitution. The Free Exercise Clause prohibits the government from "placing a substantial burden on the observation of a central religious belief or practice" without first demonstrating that a "compelling governmental interest justifies the burden."[385] The IRFRA es-

[369] *Id*. at 752.

[370] *Id*. at 753.

[371] 329 Ill. App. 3d 477, 769 N.E.2d 263 (Ill. Ct. App. 2002).

[372] 620 ILL. COMP. STAT. 5/47 (1998).

[373] 92 ILL. ADMIN. CODE § 14.640 (1998).

[374] *See* 49 U.S.C. § 40101(a)(1) (exclusive sovereignty of airspace in the United States).

[375] *The People ex rel Birkett*, 329 Ill. App. 3d at 487.

[376] 979 F.2d 1338, 1340 (9th Cir. 1992).

[377] *Id*. at 1341.

[378] 170 Vt. at 595, 752 A.2d 13 (2000).

[379] 893 F. Supp. 742 (N.D. Ohio 1995).

[380] 329 Ill. App. 3d 477, 769 N.E.2d 263 (Ill. Ct. App. 2002).

[381] *See Commercial Airfield*, 170 Vt. at 597.

[382] 893 F. Supp. 742, 751, and 329 Ill. App. 3d 477, 487.

[383] 329 Ill. App. 3d 477, 487, 769 N.E.2d 84, 94.

[384] 502 F.3d 616 (7th Cir. Ill. 2007). The Free Exercise Clause, together with the Establishment Clause of the First Amendment of the Constitution, read: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

[385] *St. John's United Church of Christ*, 502 F.3d, at 631, *citing* Hernandez v. C.I.R, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

sentially mirrors the federal Religious Freedom and Restoration Act of 1993 (RFRA) and imposes a compelling interest test to state measures affecting religious practices.[386] The legislature acted again in the O'Hare Modernization Act (OMA), which the legislature passed in response to a growth in demand for the services of Chicago's O'Hare International Airport in order to improve and expand the airport.[387] The OMA added a new Section 30 to the IRFRA, which put religious institutions on the same footing as all other property owners for purposes of the O'Hare project. The section states that nothing in the IRFRA "limits the authority of the City of Chicago to exercise the powers under the [OMA] for the purpose of relocation of cemeteries or graves located therein."[388] The OMA also amended the Illinois Municipal Code to allow the city to remove cemetery remains for airport expansion without the assent of cemetery trustees or owners.[389] In connection with the expansion project, the city announced its plans to acquire 433 acres of land located in the Villages of Elk Grove and Bensenville. A wide variety of properties were scheduled for condemnation, including homes, businesses, municipal facilities, parklands, and two cemeteries, one of which was owned by the St. John's United Church of Christ.

St. John's filed a complaint alleging that the city proposed to condemn the cemetery without demonstrating a compelling governmental interest and use of the least restrictive mechanism, as IRFRA ordinarily requires. According to St. John's, a major tenet of its religious beliefs is that the remains of those buried at the cemetery must not be disturbed until Jesus Christ raises these remains on the day of Resurrection. Therefore, the city's plan to acquire and condemn the cemetery is a "sacrilege to its religious faith."[390] St. John's also argued that the OMA impermissibly targeted the religious cemeteries adjacent to O'Hare, stripping them of the protection under IRFRA that is afforded to every other religious institution in the state. The court analyzed this question with reference to *Church of Lukemi Babalu Aye, Inc. v. City of Hialeah*[391] and concluded that, in looking at OMA, it must look at the Act as a whole in order to determine whether the object of the OMA was to "infringe upon or restrict practices because of their religious motivation."[392] The court began with the text of the OMA and found that nothing in the language of the new Section 20 of the IRFRA "referred to a religious practice without a secular meaning discernable from the language or the context." The court concluded that there is nothing inherently religious about cemeteries or graves and the act of relocating them does not on its face infringe upon a religious practice, and that the OMA was facially neutral.[393]

Nevertheless, even if a law is found to be neutral, the court must consider whether it embodies a more subtle or masked hostility to religion.[394] To answer that question, the court looked at evidence regarding the law's object, the historical background of the enactment, and the legislative or administrative history, and found that "there are simply no facts in the voluminous record on appeal that support any such claim of targeting religious institutions or practices."[395] In fact, most of the provisions of the OMA had nothing whatsoever to do with religion, cemeteries, or the IRFRA, but rather took all steps necessary to accomplish its stated purpose of insuring that "legal impediments to the completion of the [O'Hare] project be eliminated."[396] While St. John's pointed out that, as matters developed, it was the only cemetery in the State of Illinois affected by the new Section 30 of the IRFRA, the court found that this only supported the city. Since the legislation left all other religious cemeteries untouched, the legislature must have had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion.[397]

Finally, for the sake of completeness, the court considered whether the city's plan passed the strict scrutiny test, and whether the city had shown that it was the least restrictive means of furthering the governmental interest, and found that it had. The court cited statistics regarding the heavy use of O'Hare and its role as a "vital transportation link for the mid-west region, for North America and for the world."[398] It also looked to the airport's congestion and record of delays and held that, "Given O'Hare's unique importance to the national transportation infrastructure, we are persuaded that the City and the State have a compelling interest in fixing the problems from which O'Hare suffers."[399] With respect to whether the city's plan is the least restrictive alternative, the court found that St. John's had failed to provide any evidence to suggest that it is not. To the contrary, the city noted the exhaustive review of alternatives and the city's concerns about the religious entities affected. Where the city could redesign and relocate facilities to avoid the condemnation of another ceme-

[386] See 775 ILL. COMP. STAT. 35/15

(Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.).

[387] 620 ILL. COMP. STAT 65/5.

[388] 775 ILL. COMP. STAT 35/30.

[389] 65 ILL. COMP. STAT 5/11/51-1.

[390] *St. John's United Church of Christ*, 502 F.3d at 632.

[391] 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

[392] *St. John's United Church of Christ,* 502 F.3d at 631 (citing Church of Lukemi Babalu Aye, Inc., 508 U.S. at 533).

[393] *Id*. at 632.

[394] *Id*. at 633 (citing to Gillette v. United States, 401 U.S. 437, 452, 91 S. Ct. 828, 28 L. Ed. 2d 136 (1971) and Bowen v. Roy, 476 U.S. 693, 703, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986)).

[395] *St. John's United Church of Christ*, 502 F.3d at 633.

[396] *Id*. (citing OMA § 5(b)).

[397] *Id*.

[398] *Id.* at 634.

[399] *Id*.

tery, it did so. The record even demonstrated that the city and the FAA attempted to minimize encroachment on the St. John's cemetery as much as possible, but the ultimate result would have compromised FAA safety standards. The court also noted the significance of the fact that the case involved physical intrusion, not the curtailment or prohibition of a religious practice; each alternative presented a reality that conflicted with competing operational concerns. The court concluded that the city's plan represented the least restrictive alternative.[400]

C. Due Process

1. No Violation of the Fifth Amendment Right of Due Process

In the case of *Village of Bensenville v. FAA,*[401] petitioners brought numerous challenges against the City of Chicago and the FAA in connection with the city's plan to expand and reconfigure O'Hare International Airport. The principal issue in the appeal was whether the federal RFRA requires strict scrutiny of FAA's approval of the ALP incident to the determination of eligibility for federal funding.[402] However, petitioners made a variety of other claims, including administrative law challenges to the FAA's decision-making process. Petitioners contended that the FAA violated the Due Process Clause of the Fifth Amendment by denying them the right to a full hearing in two ways: 1) by creating financial incentives that drive FAA employees and officials to approve runway projects, by employing individuals who formerly worked for the city or its consultants; and 2) by withholding thousands of documents that would help them establish procedural misconduct. The court found the claims to be "vague and conclusory."[403] In its analysis, the court conceded that administrative decisions made by adjudicators with a pecuniary interest in the results of the proceedings may suffer reversal; however, the court found that the petitioners had described a fairly standard, performance-based compensation system.[404] Bonuses were not tied to individual performance or runway approvals. Further, the petitioners failed to identify a single individual who might have had conflicts of interest from prior employment. Finally, nothing in the record justified the claim that FAA had withheld thousands of documents. The court pointed to the "voluminous administrative record," much of which included specific responses to points raised by petitioners, which undermined the claim that the plaintiffs were denied a "reasonable opportunity to know the claims of the opposing party and to meet them."[405]

2. Violation of the Fifth Amendment Right to Due Process

In *Air Transport Association of America v. FAA,*[406] the court considered whether the FAA was permitted to rely on material submitted *ex parte* by the Port Authority of New York and New Jersey in support of its application to collect a passenger fee after the notice and comment period on the application had expired. The FAA found "adequate justification" for the light rail project in question because it would enhance capacity at John F. Kennedy (JFK) International Airport. Although it viewed the Port Authority's original application as insufficient to justify the $1.248 billion expenditure, the FAA was persuaded by supplemental information provided to it *ex parte* by the Port Authority after the close of the comment period. The petitioner cited to the statute that requires the FAA to "provide notice and an opportunity to air carriers…and other interested persons to comment on the application."[407] The court noted that this provision is similar to the notice and comment procedure for informal rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553, and analogized the airport's application to a notice of proposed rulemaking.[408] In the rulemaking context, an agency's notice must

> fairly apprise interested persons of the subject and issues involved in the rulemaking, but even if the final rule deviates from the proposed rule, so long as the final rule promulgated by the agency is a logical outgrowth of the proposed rule, the purposes of notice and comment have been adequately served, and we will find no procedural violation.[409]

In this case, the government argued that the supplemental material merely clarified and expanded upon information in the application, but the court pointed out that the focus in rulemaking cases is primarily on whether the final rule changes critically from the proposed rule rather than on whether the agency relies on supporting material not published for comment.[410] The

[400] *Id*.

[401] 457 F.3d 52, 372 U.S. App. D.C. 406 (D.C. Cir. 2006).

[402] *See infra* § VI.B, "No Violation of RFRA."

[403] *Id*. at 72.

[404] *Id*. at 73.

[405] *Id*. at 71–72 (quoting Morgan v. United States, 304 U.S. 1, 18, 58 S. Ct. 773, 82 L. Ed. 1129 (1938).

[406] 169 F.3d 1, 335 U.S. App. D.C. 85 (D.C. Cir. 1999); Air Transport Association is not, strictly speaking, a community challenge to airport development, but rather a challenge by an association of air carriers to the FAA's partial approval of the Port Authority of New York and New Jersey's application to collect a passenger fee and use the resulting revenue to construct a light rail system providing ground access to John F. Kennedy International Airport. Nevertheless, it is instructive as a case in which the court found a violation of the petitioner's Fifth Amendment right to due process in the context of an FAA proceeding to approve Passenger Facility Charges for an airport development purpose.

[407] *See* 49 U.S.C. § 41117(c)(3).

[408] Air Transport Assoc., 169 F.3d at 6.

[409] *Id*. at 6–7 (citations omitted).

[410] *Id*. at 7.

court found that the supplemental material provided *ex parte* as justification for its application critically deviated from the justification in the application itself. Because the transmission of this information was never made public, the petitioner did not have a fair opportunity to comment on it. Further, the petitioner was prejudiced because it had no knowledge of the new information until the final decision was made and had no subsequent opportunity to provide comments.[411]

D. Lack of Representation

In *State ex rel. Anoka County Airport Protest Committee v. Minneapolis-St. Paul Metropolitan Airports Commission,*[412] the court held that the state statutory provision for the Metropolitan Airports Commission having control over airports and air traffic in an area comprising contiguous cities and the area 25 mi from the city hall or either of such cities is not unconstitutional for failure to provide on the board of control of such commission representation from the area outside the corporate limits of the cities. In this case, the commission sought to acquire additional land and expand the facilities at the Anoka County Airport so as to make it available and suitable for use for jet-propelled planes. The petitioner claimed that L. 1943, c. 500, as amended by L. 1947, c. 363 and L. 1951, c. 72 (the Act), violated the federal and Minnesota constitutions and that the acts of the commission, acting under said statutes, are similarly unconstitutional. The plaintiff contends that, inasmuch as the residents of Anoka County have no representation on the Board of the Commission, there is such a deprivation of rights of such residents as to constitute a violation of the U.S. Constitution, Article IV, Section 4, as well as under the Minnesota Constitution. Under the Act, the governing body of the commission is composed of the mayor of each of the cities involved, a member of the council of each city, a member of the board of commissioners of airports of such cities, a non-office-holding freeholder of each city, and a qualified voter of a noncontiguous county, to be appointed by the governor. No resident of Anoka County, or of any other county contiguous to Minneapolis and St. Paul can ever serve on the board of governors.

The court made two points in declining to find a constitutional barrier on the ground of lack of representation. First, a municipality is only a subdivision of the state created for the purpose of performing those functions entrusted to them by the legislature. It can take powers away from one municipality and confer it to another. It may also vest in a public corporation certain functions, even though the territory involved in the exercise of such functions overlaps territory of other municipalities.[413] Second, the very nature of air traffic is such that it demands a unified, integrated, centralized system of control throughout the state and particularly in and around large metropolitan areas. Providing such control was within the legislature's police power. In creating this agency, the court held, it was clearly the prerogative of the legislature to provide how such agency should be constituted. [414]

IV. STATE LAW ISSUES

Local land use and zoning ordinances are often used to support community challenges to airport development. In addition to issues of preemption by federal law, local ordinances may be challenged by airport operators and municipalities on the basis of state law claims of preemption. Questions may also arise as to whether a municipality must comply with its own zoning regulations and ordinances while carrying out airport projects or activities and as to whether a municipality must comply with the zoning regulations and ordinances of another municipality while carrying out the governmental projects or activities on land within the other municipality.[415]

A. State Law Preemption Issues

1. State Law Preemption of Local Ordinance

In *City of Euless et al. v. Dallas/Fort Worth International Airport Board*,[416] the Texas Court of Appeals ruled that the Texas State law gave the airport board sole authority to exercise eminent domain power within the airport's geographic boundaries, as those boundaries may be expanded, to preempt certain zoning ordinances enacted by suburban cities. The Cities of Euless and Grapevine challenged amendments to the State's Texas Municipal Airports Act, which withdraws their power of eminent domain power over roadways located within the geographic boundaries of the Dallas/Fort Worth International Airport.[417] The cities first argued that state law did not withdraw their exclusive dominion with "unmistakable clarity" because the statute failed to mention "roadways."[418] The court disagreed, citing first, the express power of eminent domain of the airport board, and second, the express prohibition on

[411] *Id*. at 8.

[412] 248 Minn. 134, 144, 78 N.W.2d 722, 729 (Minn. 1956).

[413] *Id*. at 728.

[414] *Id*.

[415] *See* Elaine Marie Tomko-DeLuca, J.D., *Applicability of Zoning Regulations to Governmental Projects or Activities*, 55 A.L.R. 5th (2009); *see also* L.S. Tellier, *Zoning Regulations as Affecting Airports and Airport Sites*, 161 A.L.R. 1232 (2009).

[416] 936 S.W.2d 699 (Tex. Ct. App. 1996).

[417] TEX. TRANSP. CODE ANN. §§ 22.001–.159 (Vernon 1997). If the constituent public agencies of a joint board are populous home-rule municipalities, these powers are exclusively the powers of the board regardless of whether all or part of the airport, air navigation facility, or airport hazard area is located within or outside the territorial limits of any of the constituent public agencies, and another municipality, county, or other political subdivision shall not enact or enforce a zoning ordinance, subdivision regulation, construction code, or any other ordinance purporting to regulate the use or development of property applicable within the geographic boundaries of the airport as it may be expanded. *Id*. at § 22.074(d).

[418] *City of Euless*, 936 S.W. at 702.

local governments from enacting "any other ordinance purporting to regulate the use or development of property applicable within the geographic boundaries of the airport as it may be expanded."[419]

In *City of Washington v. Warren County*,[420] the Missouri Supreme Court held that the City of Washington, which owns and operates the Washington Memorial Airport located in Warren County, derives its power of eminent domain from the state constitution and, as such, is immune from the county's zoning ordinances as they relate to the city airport. In this case, the County had amended its zoning ordinance to reclassify the airport property as part of a flood plain district. Pursuant to this classification, expansion of the airport would be prohibited. Subsequently, the city filed applications with the county commissioners to rezone the airport property and to expand the airport's runway. The county approved the applications, but included in its permit a provision prohibiting further expansion or development without approval from the county. When the city later applied for a conditional use permit to build an additional hangar, the county denied the permit. The city sought a declaratory judgment that the property was exempt from the zoning order.

As a threshold issue, the court considered whether the city had the power to condemn property outside its borders for airport purposes and found that state law authorized it to do so. Section 305.170 authorizes cities to acquire by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft *either within or without the limits of such cities*.[421] Section 305.190 cross-references Section 305.170 and declares that the acquisition, ownership, control, and occupation of airports is a public purpose and a public necessity.[422] The court found that, taken together, the legislature has authorized cities to construct airports outside of their city boundaries and to condemn property for that construction.[423]

Nonetheless, the county argued that the power to condemn property does not immunize cities from the zoning laws of the county. The court recognized two tests: 1) the "power of eminent domain" test, and 2) the "balancing of interests" test.[424] Using the power of eminent domain test, the court focused on the source of the powers in conflict. If a power has its source in the constitution, although delegated by statute, then it prevails over and cannot be limited by another government entity's power, such as zoning, that is delegated solely by statute. Only where a zoning authority is likewise found to have its source in the constitution will the court apply the "balancing of interests" test.[425] The court ascertained that the city's power to condemn property is found in Article I, Sections 26 and 27 of the Missouri Constitution.[426] To implement this constitutional authority, the legislature enacted Sections 305.170 and 305.190, thereby delegating to cities the power to condemn for airport purposes, either within or without the city limits. As such, even though delegated by the State, the court found that the city's condemnation power carries with it the power's constitutional source.[427]

In *Garden State Farms Inc. v. Mayor Louis Bay,*[428] the court disagreed with the complainant that the zoning ordinance at issue was "void" and that municipal legislation on the subject of aviation is precluded by the State Aviation Act, but nonetheless granted relief to the complainant on state statutory and regulatory grounds. In *Garden State Farms*, Garden State sought to maintain a helistop on its vacant land and challenged a local zoning ordinance that prohibited the use of any land and buildings in the municipality for airplane or helicopter use. The court recognized that an ordinance adopted pursuant to municipal zoning power is ineffective when, in the particular circumstances, it conflicts with powers granted by other legislation to the state.[429] The State Aviation Act gives the Commissioner of Transportation, acting through the Division of Aeronautics, the ultimate authority to determine where aeronautical facilities may be located free from municipal control, except to the extent the Commissioner, by regulation, deems it appropriate to give controlling weight to local zoning ordinances.[430] The court reviewed the five classes of aeronautical facilities in the regulations and found that with respect to public-use airports and private landing strips, which typically would involve large areas of land, the applicable regulation gives controlling effect to the local regulations. The court found that no such regulatory provision appears appli-

[419] *Id*. at 704 (quoting TEX. TRANSP. CODE. ANN. § 22.074(d)). In its survey response, the DFW International Airport made clear that statutory change was required to achieve this result. See discussion of Dallas Fort Worth Int'l Airport Bd. *et al.* v. City of Irving in § IV.A.2 *infra*.

[420] 899 S.W.2d 863 (Mo. 1995).

[421] MO. REV. STAT. 1939 § 15122; MO. ANN. STAT § 305.170 (1994).

[422] MO. REV. STAT. 1939 § 15124; MO. ANN. STAT § 305.190 (1994).

[423] *City of Washington*, 899 S.W.2d at 865.

[424] *Id*. at 865–6.

[425] The court noted that the courts of several jurisdictions and a number of commentators criticize the "power of eminent domain" test because it wrongly assumes that zoning regulations limit the power to condemn land. The court rejected this position, arguing that the power of eminent domain is used to condemn land for a public purpose. To the extent a zoning regulation may prohibit that public purpose or use, it limits the power to condemn. 899 S.W.2d 863, 866 (citations omitted).

[426] *Id*. at 867.

[427] *Id*.; *See also* State *ex rel.* Helsel v. Bd. of Comm'rs of Cuyahoga County, 79 N.E.2d 698 (Ohio C.P. 1947) (finding that municipal ordinances restricting use of property to residential use would not be effective to prevent county from using property that had been taken by county by eminent domain, for airport purposes).

[428] 146, N.J. Super. 438, 442, 370 A.2d 37, 39 (N.J. Super. Ct. App. Div. 1977).

[429] *Id*.

[430] N.J. STAT. ANN. 6:1020 *et seq*. (1938).

cable to the other three classes, including heliports and helistops, and thus left the matter up to a determination of the Commissioner, after holding the required public hearing.[431]

In the case of *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*,[432] the California Court of Appeals held that state statute prevailed over a local initiative measure that placed numerous restrictions and conditions on the development of the Burbank-Glendale-Pasadena Airport. This initiative provided specific and detailed directions regarding how, when, and under what circumstances the City of Burbank could consent to an acquisition, financing, zoning, construction, or modification of any land or facility around the airport. In California, the Public Utilities Code controls aviation matters within the state.[433] Section 21661.6 of the Public Utilities Code delegates exclusive approval powers to the city council regarding the acquisition of land in connection with the expansion or enlargement of any existing publicly-owned airport.[434] While the court recognized the presumed right of a local electorate to initiative and referendum, it noted that this presumption can be rebutted by a legislative intent to delegate discretionary power to legislate in a particular area exclusively to a local governing body, precluding legislation through initiative.[435]

The court applied guidelines from earlier decisions, such as whether the legislature used general or specific language in describing the governing body and whether the matter at issue involves strictly a municipal affair or whether it has statewide application, and found that the specific reference to the city council in the Public Utility Code provided a strong inference intended to preclude action regarding airport expansion by initiative or referendum. The court further found this inference strengthened because the statute addresses a matter of statewide concern rather than purely local interest.[436] The court pointed to the regional and national nature of the airport and also noted that the airport and its facilities are located in multiple jurisdictions.[437]

In the case of *Yorkavitz v. Bd. of Twp. Trustees of Columbia*,[438] the court struck down an ordinance that deemed airport development in the unincorporated territory of the township to constitute a nuisance and prohibited such development. The court noted that the origin of the police power of the township lies in the statutory delegation of such power from the General Assembly. The court concluded that the General Assembly could not be held to have delegated to township officials the authority to adopt zoning resolutions that contravene the general laws of the state.[439] Contrary to airports being nuisances, state policy favors aviation under the auspices of the "Ohio Aviation Board," expressly created for the promotion and encouragement of aviation. The court cited numerous authorities for its position that "the view that airports are not nuisances *per se* is supported by the great weight of authority."[440]

2. No State Law Preemption of Local Zoning Ordinance

In the case of *Dallas Fort Worth International Airport Board v. The City of Irving,*[441] described in greater detail in Section III.A.3 *supra*, Dallas/Fort Worth International Airport sought to enjoin the cities of Grapevine, Euless, and Irving from using their zoning authority to prohibit the construction of new runways at the airport, but within their city boundaries. The state trial court and the state Court of Appeals sided with the cities on the grounds that state law had not deprived them of their rights, as home-rule municipalities, to zone within the airport's boundaries with the requisite "unmistakable clarity."

State courts have generally rejected implied state preemption claims based on state licensing or regulation of pilots or aircraft or control of other aspects of airport development and operation.[442] In *Clarke v. Township of Hermitage*,[443] the court held that the Pennsylvania Aeronautics Commission did not have sole jurisdiction to establish and decide the location of airport facilities and that the township was not barred from utilizing its zoning powers to prohibit the location of a private airport on private land just because the Commission had issued a license to operate such airport. Similarly, the court in *Sunset Skyranch Pilots Association v. County of Sacramento*[444] held that the county's decision to deny renewal of a conditional use permit needed for continued operation of a privately-owned, public-use airport was not preempted by or contrary to the State Aeronautics Act. Nothing in the Act protected

[431] *Garden State Farms*, 370 A.2d at 40.

[432] 113 Cal. App. 4th 465, 468 (Cal. Ct. App. 2003).

[433] *Id*. at 472.

[434] CAL. PUB. UTIL. § 21661.2 (2002).

[435] *City of Burbank*, 113 Cal. App. 4th at 474.

[436] *Id*. at 475.

[437] *Id*. at 479. The court distinguished City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 72 Cal. App. 4th 366 (Cal. Ct. App. 1999) ("Local agencies created under state law must comply with the City's building and zoning ordinances"), arguing that this case involved a local zoning ordinance.

[438] 166 Ohio St. 349, 142 N.E.2d 655 (Ohio 1957).

[439] *Id*. at 352–3.

[440] *Id*. at 352 (citations omitted); *But see* Thomson Indust., Inc. v. Incorporated Village of Port Washington North, 304 N.Y.S.2d 83 (N.Y. App. 2d Dep't 1969) (finding that where conditions warrant the exercise of the power, the establishment of a heliport or helicopter landing site may be restricted by a municipality; the restriction may constitute a prohibition of such activities when a danger or nuisance would result if the activities were allowed to be carried on).

[441] 854 S.W.2d 161 (Tex. App. 1993).

[442] RATHKOPF, supra note 307, at § 85-3.

[443] 61 Pa. Commw. 307, 433 A.2d 631 (Pa. 1981).

[444] 164 Cal. App. 4th 671, 79 Cal. Rptr. 539 (3d Cir. 2008) (certified for publication with the exceptions of parts IV and V of the Discussion).

the airport from closure by a local land use decision, in spite of the existence of a valid state permit.[445]

V. JURISDICTIONAL ISSUES

A. Subject Matter Jurisdiction

For decades, circuit courts around the country routinely held that federal courts of appeals have exclusive jurisdiction to hear challenges to any FAA order related to an airport development project. See, for example, *Suburban O'Hare Commission v. Dole*,[446] *Allison v. Dep't. of Transportation*,[447] and *City of Grapevine v. Dep't. of Transportation*.[448] These cases were decided under 49 U.S.C. § 1486, which provided exclusive appellate court jurisdiction over any Department of Transportation order issued "under this chapter," which included the entire federal aviation program. Section 1486 was the precursor to 49 U.S.C. § 46110(a) of the AAIA, which was adopted in 1994 and amended in 2001 and 2003[449] and currently provides:

> [A] person disclosing a substantial interest in an order issued by the secretary of transportation…in whole or in part under [Part A], *Part B*, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business (emphasis added).

The recodified jurisdiction provision is divided into four parts: Part A—Air Commerce and Safety; Part B—Airport Development and Noise; Part C—Financing; and Part D—Miscellaneous.[450] The 1994 recodification originally omitted the reference to Part B and led some circuit courts to conclude that earlier cases that based exclusive appellate jurisdiction on U.S.C. § 1486 were distinguishable since the jurisdictional provision of § 46110(a) was located in Part A, and thus applicable only to matters that involved Part A.

In *City of Los Angeles, et al. v. FAA*,[451] the petitioners challenged a Final Policy issued by the FAA. The court described the principal issue as whether it had jurisdiction to hear the case as a direct appeal of agency action or whether the case must first be brought in district court. The court examined the structure and the language of the statute and determined that the Final Policy relating to revenue use restrictions concerned only matters covered by Part B of the Act. The court determined that its jurisdiction reached only matters brought under Part A—Air Commerce and Safety, and thus it lacked appellate jurisdiction and transferred the case to district court. This precedent was followed in *City of Alameda et al. v. FAA,*[452] when the court, on its own initiative, rejected jurisdiction on the basis that the challenge to the FAA's FONSI and ROD approving a proposed expansion of Oakland International Airport concerned only matters covered by Part B, i.e., the proposed airport development project and related noise impacts. The court stated:

> Because Congress chose to cabin the availability of direct appeal to the court of appeals, limiting the scope of 49 U.S.C. § 46110(a), subdividing Subtitle VII into four parts and lodging this jurisdictional provision within Part A alone, it would contravene clear Congressional intent to allow petitioners to bring claims concerning Airport Development and Noise, regulated under Part B, under the jurisdictional provisions or Part A.[453]

Concern was expressed by practitioners that these Ninth Circuit rulings would make legal challenges to airport development more complex, creating confusion as to which court has proper jurisdiction.[454] However, as noted above, U.S.C. § 46110(a) was amended in 2004 to add express reference to appellate court jurisdiction for matters arising under Part B, eliminating any ambiguity about congressional intent. In *St. John's United Church of Christ v. Chicago*,[455] the Seventh Circuit accepted jurisdiction for review of a challenge to FAA approval of an ALP prepared in connection with Chicago's O'Hare International Airport with express reference to § 46110(a), as amended, and stated that "the jurisdictional language could not be plainer," and continued with reference to the statutory language, that "'…Part B' refers to the Airport Development and Noise provisions of the same subtitle, see 49 U.S.C. § 47107 *et seq*., which include the provision that grants the FAA the

[445] *See also* Washington County v. Stark, 499 P.2d 1337, 10 Or. App. 384 (Or. 1972) (licensing of airports by state did not preempt local zoning control).

[446] 787 F.2d 186, 192 (7th Cir. 1986).

[447] 908 F.2d 1024, 285 U.S. App. D.C. (1990).

[448] 17 F.3d 1502, 1503, 305 U.S. App. D.C. 149 (D.C. Cir. 1994).

[449] *See* Pub. L. No. 103-272, § 1(e), July 5, 1994, 108 Stat. 1230; Pub. L. No. 107-71, tit. I, § 140(b)(1), (2), Nov. 19, 2001, 115 Stat. 641; Pub. L. No. 108-176, tit. II, § 228, Dec. 12, 2003, 117 Stat. 2532.

[450] 49 U.S.C. § 49101 *et seq*.

[451] 239 F.3d 1033, 1034 (9th Cir. 2001).

[452] 285 F.3d 1143 (9th Cir. 2002).

[453] *Id*. at 1145. *See also* Comm. to Stop Airport Expansion v. FAA, 320 F.3d 285 (2d Cir. 2003) (Petition dismissed for lack of jurisdiction since § 46110(a) grants jurisdiction only for review of orders issued pursuant to Part A, and that the authority to approve an airport layout plan derives from Part B). *But see* City of Bridgeton v. Slater, 212 F.3d 448 (8th Cir. 2000) (accepting jurisdiction over a challenge to the FAA's approval of the expansion of St. Louis International Airport based on 49 U.S.C. § 46110(a)). *See also* Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 359 U.S. App. D.C. 383 (D.C. Cir. 2004) (distinguishes recent decisions of Ninth and Second Circuits and found existence of subject matter jurisdiction since the applicable FAA order rests on both Parts A and B).

[454] *See* Sheppard Mullin Richter & Hampton LLP, *Shift in Federal Jurisdiction Complicates Airport Development Litigation*, June 8, 2002, http://www.sheppardmullin.com/publications-articles-77.html.

[455] 502 F.3d 616 (7th Cir. 2007).

authority to review airport layout plans."[456] Likewise, in *Natural Resources Defense Council v. FAA*,[457] the Second Circuit accepted jurisdiction pursuant to § 46110(a) over a challenge made to the FAA's decision to approve construction of a new Panama City-Bay County International Airport as a violation of the AIAA and NEPA.[458]

The courts have also considered what constitutes an "order" for purposes of the jurisdiction conferred by 49 U.S.C. § 46110(a). In *Village of Bensenville v. FAA*,[459] the D.C. Circuit declined jurisdiction to review an FAA letter of intent (LOI), as the LOI is not a final order subject to judicial review. A reviewable order under 49 U.S.C. § 46110 "must possess the quintessential feature of agency decision making suitable for judicial review: finality." For an order to be "final," the action must mark the "consummation" of an agency's decision-making process and the action must be one that determines legally enforceable rights and obligations. The court analyzed the nature of an LOI and determined that an LOI is nonfinal, but reflects the intent, rather than the obligation, of the government to fund a project. The funding decision is subject to congressional appropriation. Further, the LOI is nonfinal because it does not fix legal relationships.

In *Association of Citizens to Protect and Preserve v. FAA*,[460] the Eleventh Circuit disagreed with the FAA's argument that U.S.C. § 46110 extends to nonfinal agency orders, but determined that a FONSI is a final order subject to review by the courts of appeals in accordance with 49 U.S.C. § 46110. The court recognized a narrow exception to the general rule that jurisdiction extends only to a "final" action, which applies when an agency's failure to act results in a final order never being issued, thereby indefinitely depriving the court of appeals of jurisdiction; however, the *Association to Protect and Preserve* was not that case.[461]

The District Court has also held that an FAA letter that changed runway use procedures at Fort Lauderdale-Hollywood International Airport was a reviewable final order. In *City of Dania Beach, Florida v. FAA*,[462] the court reviewed an FAA letter to the Broward County Director of Aviation that authorized the use of all available runways to reduce congestion at the airport. The petitioners, two cities in Florida and two individuals who reside near the airport, sought to have the letter set aside because the FAA issued the letter without engaging in the environmental review process required by NEPA and the Department of Transportation Act (Transportation Act). While the FAA argued that the letter was not reviewable, because it merely explained existing procedures, the court disagreed, stating that the term "order" should be read expansively; nothing in the letter indicated that the FAA conclusions were tentative or conditional on future agency action, and the FAA letter recognized new operating procedures at the airport in light of increased congestion and delays, thus altering longstanding runway procedures.

B. Standing

This section reviews federal cases dealing with whether and under what circumstances a private citizen, association, or organization has standing to maintain an action in a federal court for injunctive relief against airport development projects. The doctrine of "standing" in federal courts as a procedural matter relates to the review of action of an administrative agency that must be considered in the framework of Article 3 of the U.S. Constitution, which restricts federal judicial power to "cases" and "controversies."[463] U.S. Supreme Court decisions have generated a two-pronged test for determining whether a plaintiff will have standing in a federal court to protect the environment from harm. First, a plaintiff must allege that the challenged injury has caused injury in fact.[464] Second, that the interests that the plaintiff has asserted are within the "zone of interests" sought to be protected by the statute or the constitutional guaranty in question.[465] To satisfy the first prong, a plaintiff organization must demonstrate that at least one of its members 1) has suffered an injury in fact that is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as proposed to merely speculative, that the injury will be redressed by a favorable decision.[466]

Section 702 of the Administrative Procedure Act[467] grants standing to "a person suffering a legal wrong

[456] *Id*. at 628.

[457] 050109 Fed. 2, No. 06-5267-ag (2d Cir. 2009).

[458] *See also* City of Las Vegas v. FAA, 570 F.3d 1109 (9th Cir. 2009) (The Ninth Circuit determined it held jurisdiction under § 46110 for review under NEPA and the Clean Air Act of an FAA FONSI/ROD approving the modification of the departure route at Las Vegas McCarran International Airport).

[459] 457 F.3d 52, 68–69, 372 U.S. App. D.C. 406 (D.C. Cir. 2006).

[460] 287 Fed. Appx. 764, 2008 U.S. App. LEXIS 15172 (11th Cir. 2008).

[461] *Id*. at 766; citing to George Kabeller, Inc. v. Busey, 999 F.2d 1417 (11th Cir. 1993).

[462] 485 F.3d 1181, 1188, 376 U.S. App. D.C. 151, 158 (D.C. Cir. 2007).

[463] U.S. CONST. art. III, § 2.

[464] *See* Hunt v. Wash. State Apple Adv. Comm'n, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383, 389 (1977), cited in Save Ourselves, Inc. v. U.S. Army Corps of Eng'rs, 958 F.2d 659, 661 (5th Cir. 1992) and Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 684, 359 U.S. App. D.C. 383, 389 (D.C. Cir. 2004).

[465] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 110 S. Ct. 3177, 3186, 111 L. Ed. 2d 695 (1990), cited in Save Ourselves, Inc. v. U.S. Army Corps of Eng'rs, 958 F.2d 659 (5th Cir. 1992).

[466] *See* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81, 120 S. Ct. 693, 703–04, 145 L. Ed. 2d 610 (2000), cited in Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 684, 359 U.S. App. D.C. 383, 389 (D.C. Cir. 2004).

[467] 5 U.S.C.A. 702.

because of agency action, or adversely affected or aggrieved by agency action, within the meaning of a relevant statute." NEPA and the Department of Transportation Act have been found to be "relevant statutes" for purposes of granting standing in community challenges to airport development. As noted above in Section V.A, § 46110(a) of the AAIA grants standing to "[A] person disclosing a substantial interest in an order issued by the secretary of transportation…in whole or in part under [Part A], *Part B*, or subsection (l) or (s) of section 114…."

1. Cases in Which Petitioners Were Held to Lack Standing

In the case of *Save Ourselves, Inc. et al. v. U.S. Army Corps of Engineers*,[468] the Fifth Circuit held that a group of nonprofit organizations interested in protecting and preserving the waters of Ascension Parish, Louisiana, did not have standing to assert a claim of adverse effect or aggrievement against the Army Corps of Engineers for failing to declare an airport development site a wetlands under the CWA. To show adverse effect or aggrievement, the plaintiffs were required to establish that the injury complained of "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[469] Further, the plaintiffs have standing as organizations or associations to protect this interest only if 1) the interest is germane to the purpose of the plaintiff organizations, 2) any of the plaintiff organizations' members have standing to sue on their own behalf, and 3) the participation of individual members in the lawsuit is not required.[470] The court held that, while this interest fell within the "zone of interests" of the organization, the plaintiffs failed to satisfy the second prong required for standing. The plaintiffs merely asserted in a statement that they are organizations "interested in protecting and preserving the clean water and public health in Ascension Parish, Louisiana, the State of Louisiana, and the United States." At no time during the proceedings before the district court did the plaintiffs allege specific facts showing a direct injury to any of its members. Plaintiffs' failure to show aggrievement under the relevant statute—here the Clean Water Act—negated the Plaintiffs' standing to pursue its claims under the citizen suit provision of the CWA.[471]

See also *Illinois Department of Transportation v. Hinson,*[472] in which the Department of Transportation challenged FAA authorization for the City of Chicago, which owns O'Hare International Airport, to levy a passenger facility charge and use the revenue to finance improvements at Gary Regional Airport. Citing to 49 U.S.C. § 46110(a), which authorizes judicial review at the behest of anyone with a "substantial interest," the court denied the department's petition for review because it had suffered no injury that could be "prevented, alleviated or cured by the lawsuit."[473] The court held that the Department of Transportation had no legal right to the revenues being diverted to the Gary airport. Further, it neither controls the airports nor the airspace. *In dicta*, the court identified those directly affected by the imposition of passenger facility charges as the airlines and passengers who pay the O'Hare passenger facility charge and use either O'Hare Airport or Gary Regional Airport, the cities of Chicago and Gary, and the FAA, and found that of all the entities possibly affected by the diversion of revenues, the department appeared to be the least affected.[474]

2. Cases in Which Petitioners Were Granted Standing

While there is some contrary authority, the trend of the decisions of the lower federal courts seems to be toward a more liberal recognition of the existence of standing. In the case of *Communities Against Runway Expansion v. FAA*,[475] the D.C. Circuit found standing given the "substantial probability" that declarants would be subjected to increased noise from airport operations at Logan Airport. This case involved a final order of the FAA approving changes to the layout plan for Boston's Logan International Airport, including construction of a new runway and improvement of existing taxiways, and making certain determinations necessary for the project to be eligible for funding under the AAIA. Petitioners claimed the order violated NEPA and the AAIA. Massport argued that the plaintiff had not demonstrated that at least one of its members 1) has suffered an injury in fact that is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as proposed to merely speculative, that the injury will be redressed by a favorable decision.[476] Individual members of the plaintiff organization were residents living close to the airport who had made declarations citing to the

[468] 958 F.2d 659 (5th Cir. 1992).

[469] *Id*. at 661, citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 110 S. Ct. 3177, 3186, 111 L. Ed. 2d 695 (1990).

[470] *Id*., citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977).

[471] *Id*. at 662.

[472] 122 F.3d 370 (7th Cir. 1997)

[473] *Id*. at 372, citations omitted.

[474] *See* Village of Bensenville v. FAA, 376 F.3d 1114, 1119, 363 U.S. App. D.C. 78, 83 (D.C. Cir. 2004), citing to *Hinson* (In a later challenge to the imposition of a passenger facility charge to fund the preparation of an EIS for the O'Hare modernization program, the D.C. Circuit found that the villages of Bensenville and Elk Grove and the City of Park Ridge could show injury in fact sufficient for standing based on the claim that they bear the cost of their officers' and employees' use of O'Hare for business travel. "Having to pay the passenger facility fee every time an officer or employee emplanes at O'Hare is a legally cognizable injury, directly traceable to the FAA's order authorizing it and redressable by a favorable ruling from us.").

[475] 355 F.3d 678, 359 U.S. App. D.C. 183 (D.C. Cir. 2004).

[476] *Id*. at 684, citing Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 180–81, 120 S. Ct. 693, 703–04, 145 L. Ed. 2d 610 (2000).

FEIS that predicted increased noise to their neighborhoods. The court granted standing, even though the declarations were not submitted until the plaintiffs' reply brief, stating, "The anticipated injuries to CARE's members are fairly traceable to the FAA's order approving the project, and these injuries would be redressed by a decision setting aside that order. We therefore conclude that CARE has standing to challenge the FAA order and the supporting EIS."[477]

Similarly, in *Natural Resources Defense Council v. FAA*,[478] the Second Circuit held that petitioners had standing to challenge FAA's decision to approve the construction of a new Panama City-Bay County Airport after reviewing affidavits submitted by various members of petitioners' organizations, including private pilots who use the old Panama City airport and persons who use and enjoy the wetlands that will be eliminated by the proposed airport, concluding that the affidavits sufficed to demonstrate the requisite interest in the challenged order.[479]

In *Town of Winthrop v. FAA*,[480] the First Circuit recognized Article III standing for the Town of Winthrop, which alleged that it feared harm-in-fact should the construction of a new taxiway at Boston's Logan International Airport go forward as approved by the FAA. The court stated that Article III standing requires an injury in fact to a cognizable interest, a causal link between that injury and respondent's action, and a likelihood that the injury could be redressed by the requested relief.[481] Intervenor Massport challenged the requirement of injury-in-fact on the grounds that the construction of the taxiway will have minimal if any environmental effect on the surrounding area. The court held that a reasonable claim of minimal impact is enough for standing and that petitioners had "reasonably and adequately alleged that they fear harm-in-fact," even though the challenged FAA order had concluded otherwise.[482]

Likewise, in *City of Las Vegas v. FAA*,[483] the Ninth Circuit found that the City of Las Vegas had standing to challenge FAA's FONSI/ROD approving the modification of the departure route at Las Vegas McCarran International. The court stated that to bring the petition for review, at least one of the petitioners must have standing.[484] Las Vegas asserted standing based on procedural injury. To establish procedural standing, the court articulated a two-pronged test: 1) it must show that it was accorded a procedural right to protect its interests; and 2) it has concrete interests that are threatened. It found that Las Vegas satisfied the first test because NEPA accords a procedural right to "local agencies, which are authorized to develop and enforce environmental standards."[485] The second requirement was also satisfied, because Las Vegas had established that the proposed departure path directed flights directly over densely populated areas of the city, threatening the city's interests in the environment and land management. Finally, the court held that Las Vegas had met the statutory requirements for standing under the Administrative Procedure Act because it had established that there was a final agency action that adversely affected the city, and it suffered injury in its interests in the environment and in safety, which fall within the "zone of interests" of NEPA.[486]

In *City of Olmstead Falls v. FAA,*[487] the D.C. Circuit found that the City of Olmstead Falls could bring a petition to challenge FAA approval of the ROD for a runway improvement project at Cleveland Hopkins International Airport upon an allegation of harm to itself "as a city qua city." The city's claim of a geographic nexus to the project was determined to be insufficient, as was the city's claim of associational standing on behalf of its citizens. Nevertheless, the court took a generous reading of the city's materials and found that the city had alleged harm to its own economic interest based on the environmental impacts of the project.

C. Other Jurisdiction Issues—Timeliness and Mootness

1. Timeliness

Section 46110 of 49 U.S.C. requires a petition to be filed within 60 days after an order is issued. "The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day."[488] Untimely challenges to FAA action have been permitted upon a showing that the FAA created

[477] *Id*. at 685. *But see* Town of Stratford, Connecticut v. FAA, 285 F.3d 84, 88–89, 350 U.S. App. D.C. 432 (D.C. Cir. 2002) (Petitioner denied standing to raise a NEPA claim with no claimed or apparent environmental interest. "[P]etitioner has not connected its claimed economic injury to any environmental effects caused by the allegedly defective EIS. Instead, its EIS claim is simply the 'handy stick' with which to attack the FAA.")

[478] 564 F.3d 549 (2d Cir. 2009).

[479] *Id*. at 555, citing generally Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009) (noting that harm that affects the recreational or even the mere aesthetic interests of plaintiffs' organizations will suffice to establish particularized injury).

[480] 535 F.3d 1 (1st Cir. 2008).

[481] *Id*. at 6 (citations omitted).

[482] *Id*., citing Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 56 (1st Cir. 2001).

[483] 570 F.3d 1109 (9th Cir. 2009).

[484] *Id*. at 1114, citing Watt v. Energy Action Educ. Found., 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981).

[485] *Id*., citing 42 U.S.C. § 4332(2)(C).

[486] *Id*.

[487] 292 F.3d 261, 267–68, 352 U.S. App. D.C. 30 (D.C. Cir. 2002).

[488] 49 § 46110(a). See also the predecessor proviso, 49 U.S.C. § 1486(a), which provided that an "order" of the FAA

> shall be subject to review by the courts of appeals of the United States ; …upon petition, filed within 60 days after the entry of such order…After expiration of said 60 days a petition may be filed only by leave of court upon a showing of reasonable grounds for failing to file the petition theretofore.

confusion. In the case of *Charter Township of Huron, Michigan v. FAA*,[489] two residential suburbs of Detroit sought review of an FAA action to redistribute landing and takeoff patterns at Detroit Metropolitan Wayne County Airport. The new procedures and airspace delegation were implemented November 16, 1989 and the original petition for review was filed with the Sixth Circuit on June 5, 1992. The court observed that the petition was clearly filed out of time, but petitioners claimed that the FAA had engaged in misconduct and "stonewalled" requests for information. The cities claimed that they had not had adequate notice of the November 1989 order and the FAA's "secretive conduct" deprived the towns of information they needed to proceed. While the court did not accept that the petitioners had made out a case for the equitable tolling of the 60-day filing requirement, nor did it accept that the FAA was guilty of secretive conduct or misconduct, it did find that the petitioners had presented reasonable grounds for permitting the late filings. "There is evidence that the FAA created confusion with respect to the scope of the changes in departure headings and the manner in which they were put in place."[490]

2. Mootness

Community challenges may also involve determinations of whether a claim has become moot as a result of subsequent agency action or completion of a project. In applying the mootness doctrine, the Supreme Court has stated that for a case to be justiciable:

> [T]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests…It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[491]

In the case of *Neighbors Organized to Insure a Sound Environment (NOISE) v. McArtor,*[492] NOISE, a nonprofit Tennessee corporation whose membership was made up of neighbors to the Metropolitan Nashville Davidson County Airport, complained that the Metropolitan Nashville Airport Authority (MNAA) and the FAA had failed to comply with NEPA by not preparing a comprehensive EIS in connection with the airport's expansion. In fact, MNAA completed construction of a new terminal complex after the issuance of a FONSI by the FAA. The Sixth Circuit held that, because the activities which NOISE sought to enjoin had already occurred, and because NOISE had not demonstrated that the issues involved in the case are capable of repetition, the appeal was dismissed as moot.

Similarly, in the case of *St. John's United Church of Christ v. Chicago*,[493] the Seventh Circuit dismissed for the lack of a live controversy. The City of Chicago had proposed to condemn a number of properties, including two cemeteries, one of which was owned by the Rest Haven Cemetery Association, for the expansion and modernization of O'Hare International Airport. The project was challenged by the owners of the cemeteries for, among other things, the violation of the plaintiff's constitutional rights under the Free Exercise Clause of the Constitution (see the discussion in Section III.B hereof). As this case was pending before the district court, the city agreed not to acquire the Rest Haven cemetery, and the FAA concluded in its final EIS that it would be possible to proceed with the project without disturbing Rest Haven. At this juncture, the district court dismissed Rest Haven from the litigation, holding that its claims were moot. On appeal, the Seventh Circuit agreed that Rest Haven no longer satisfied the constitutional jurisdictional requirement for continued personal interest in the matter; in fact, the court found that FAA had already granted Rest Haven the relief it wanted—agency approval of a layout plan that leaves it alone. The court also noted that the ROD went one step further and required the city to provide a road to the cemetery to allow continued access to the grounds during the construction project. While Rest Haven continued to claim the necessity to defend on the grounds that, without an order, the city could unilaterally terminate its agreement not to condemn Rest Haven, the court made reference to the finality of the FAA approval of the layout plan and stated,

> If what Rest Haven wants is a perpetual injunction against the City requiring it to leave its cemetery untouched until the end of time, it is overreaching. The power of eminent domain is a fundamental power of government, and a court cannot restrict future governmental authorities from its proper use.[494]

Notwithstanding the completion of an airport construction project, judicial review may not be moot if the court determines that it can provide some remedy and a violation of law has been demonstrated. In the case of *Airport Neighbors Alliance, Inc. v. United States*,[495] the Tenth Circuit permitted the Alliance, an assembly of neighborhoods surrounding the Albuquerque International Airport, to maintain an action challenging the adequacy of an EA conducted for a runway upgrade, even though construction on the runway had been substantially completed. The court recognized that, while a NEPA claim no longer presents a live controversy when the proposed action has been completed and when no effective relief is available, the present case was not moot because if it was found that the respondents had

[489] 997 F.2d 1168, 1172 (6th Cir. 1993).

[490] *See also* Greater Orlando Aviation Auth. v. FAA, 939 F.2d 954, 960 (11th Cir. 1991) (confusion created by inconsistent FAA releases presented reasonable grounds to explain why the Aviation Authority filing was delayed.)

[491] Neighbors Organized to Insure a Sound Env't, Inc. v. McArtor, 878 F.2d 174, 178 (6th Cir. 1989), citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41, 567 S. Ct. 461, 463–64, 81 L. Ed. 617 (1937).

[492] 878 F.2d 174 (6th Cir. 1989).

[493] 502 F.3d 616, 625 (7th Cir. 2007).

[494] *Id*. at 627.

[495] 90 F.3d 426, 428–29 (10th Cir. 1996).

failed to comply with NEPA, the court could order the runway closed or restrict its use until the respondents complied with NEPA.

Similarly, in *Burbank Anti-Noise Group v. Goldschmidt*,[496] the court held that transfer of title of the Hollywood-Burbank Airport (Airport) did not render a NEPA challenge to that transfer moot. In *Burbank*, the FAA had provided financial assistance to the Hollywood-Burbank Airport Authority (Authority) in order for the Authority to purchase the Airport (which was owned by Lockheed Air Terminal, Inc.). The Ninth Circuit determined that it could remand for an order to transfer the airport title back to Lockheed and return funding to the FAA, and that, therefore, nothing had transpired that deprived it of its power to affect the rights of the litigants in the case.

Also, in *National Parks and Conservation Association v. FAA*,[497] the Tenth Circuit found that the case challenging airport construction was not moot because the land could be reconveyed or certain restrictions could be placed on the use of the airport. The case was remanded for further proceedings.

VI. CHALLENGES TO PASSENGER FACILITY CHARGES

A provision of the Federal Aviation Act empowers public agencies that control airports to levy, with the approval of the FAA, a "passenger facility charge" on all emplaning passengers to finance improvements either at the airport from which the passenger emplanes or at "any other airport the agency controls."[498]

A. Challenge to Passenger Facility Charge Determination Remanded to FAA for Further Consideration

In the case of *Village of Bensenville v. FAA*,[499] the court reversed and remanded to the FAA for further consideration its approval of the City of Chicago's application to impose a PFC on passengers emplaning at O'Hare International Airport. Before the FAA authorizes a PFC, it must make three specific findings on the application: 1) that the fee will not generate excessive revenue; 2) that the specific project is an eligible airport-related project that will maintain or improve the "capacity, safety, or security of the national air transportation system; reduce airport noise; or improve conditions for competition among air carriers and foreign air carriers; …[, and 3) that]" the application contains an "adequate justification" for the specified project.[500] Petitioners, three Chicago suburbs, challenged the FAA's approval, alleging that the FAA did not find, as required by statute, that Chicago's PFC will generate only that revenue necessary for its specific purpose (the preparation of an EIS). As discussed above under Section V.B, Standing, the court found that petitioners satisfied their burden of demonstrating a legally cognizable injury. The court found that the FAA acted arbitrarily, capriciously, and contrary to law in approving Chicago's PFC; the FAA had failed to find that the amount the city proposed to impose and use was not more than the amount necessary to finance the EIS. The court recognized general agreement that the cost proposed for the EIS, $110 million, is an extraordinarily high estimate. The petitioners claimed that the amount included preliminary engineering and formal design work in furtherance of the O'Hare modernization program beyond that needed to complete the EIS. The court found that the FAA had not made a single finding regarding the necessity of the "eye-popping amount" to prepare an EIS for the modernization program. While the FAA sought to assure the court that the amount was necessary, the court remanded to the FAA for a specific finding that that the fee will not generate excessive revenue before authorizing its assessment and collection, in accordance with 49 U.S.C. § 40117(d)(1).

B. Challenge to Passenger Facility Charge Denied

In the case of *Southeast Queens Concerned Neighbors, Inc. v. FAA*,[501] the Second Circuit determined that the statutory requirement for FAA approval of a PFC for airport-related projects—that application include "adequate justification" for each project—did not require FAA to perform a strict cost/benefit analysis or to comply with any particular test of general applicability in making such determination.[502] Nonetheless, FAA does have to provide at least objective and articulable reasons in support of its conclusions. In this case, petitioners sought review of FAA approval of a PFC for the construction of a light rail system connecting JFK International Airport with several local transit stations. Petitioners claimed that the project had not been adequately justified as required by 49 U.S.C. § 40017(d)(3).

Prior to approval of the PFC, FAA had published notice in the *Federal Register* soliciting comments on the PFC application, as required by applicable regulation. FAA itself was concerned with whether the project was "adequately justified," and sought supplemental information from the applicant, the Port Authority of New York and New Jersey. The FAA's subsequent ROD relied heavily on the supplemental information, and a challenge was brought in the D.C. Circuit Court that the notice and comment procedure was defective insofar as the public was not given an opportunity to comment on the supplemental information. The D.C. Circuit remanded the case to the FAA for further proceedings.[503] The FAA initiated another round of public comments, and the FAA issued another ROD granting the Port

[496] 623 F.2d 115 (9th Cir. 1980).

[497] 998 F.2d 1523, 1525, n.3 (10th Cir. 1993).

[498] 49 U.S.C. § 40117(b).

[499] 376 F.3d 1114, 1121–22, 363 U.S. App. D.C. 78, 85 (D.C. Cir. 2004).

[500] 49 U.S.C. § 40117(d).

[501] 229 F.3d 387 (2d Cir. 2000).

[502] *See* 49 U.S.C. § 40017(d)(3).

[503] See Air Transp. Ass'n of America v. FAA, 169 F.3d 1, 6–9, 335 U.S. App. D.C. 85, 14–26 (D.C. Cir. 1999).

Authority permission to collect and use PFCs for the light rail project. The petitioners argued that each segment of the light rail project must be evaluated separately under a cost/benefit analysis and that under that analysis, one segment of the system lacked adequate justification. The court noted that the statute itself does not explain what is meant by "adequate justification," but suggested that the legislative history indicated an intent to give the FAA discretion in deciding whether a project is adequately justified. Further, the court concluded that the FAA's interpretation of the PFC statute was reasonable and consistent with the statute's purpose.

VII. OTHER STATUTORY CHALLENGES

A. Religious Freedom Restoration Act

In the case of *Village of Bensenville v. FAA*,[504] the D.C. Circuit held that the burden on religious exercise allegedly resulting from the expansion of O'Hare International Airport could not be attributed to FAA for purposes of RFRA. In this case, two suburbs of the City of Chicago, members of St. Johannes Church, and individuals petitioned for review of an FAA order approving an airport expansion plan that required the relocation of a church cemetery, claiming that approval violated the RFRA.[505] The City of Chicago, which owned and operated the airport, intervened. RFRA provides that "Government shall not substantially burden a person's exercise of religion"[506] unless application of the burden "is the least restrictive means of furthering [a] compelling governmental interest."[507] RFRA requires strict scrutiny of a federal agency's approval of an airport layout plan incident to a determination of eligibility for federal funding if the implementation of the plan may burden religious exercise. Petitioners argued that the FAA approval violated RFRA because the approved runway configuration, which required relocation of the cemetery, was not the least compelling means of satisfying the government's interest in reducing delays.

The court observed that, while the FAA is undeniably an agency of the United States for purposes of RFRA, it questioned whether the FAA's approval of the city's airport layout plan is properly the source of what the petitioners contend is the substantial burden placed on the free exercise of religion. The court concluded that it was not the FAA, but rather the City of Chicago, as owner and operator of the airport, which was responsible for the imposition of the claimed burden on religious exercise. The court declined to apply RFRA broadly, but rather looked to the intent of RFRA, the enactment of which was to reestablish a constitutional test with the expectation that the courts would look to constitutional precedence for guidance. The court narrowed its analysis of one necessary to determine whether FAA could be held responsible for the infringement of constitutional rights. The court limited its inquiry into whether there is a sufficiently close nexus between the federal government and the challenged action of the city so that the actions of the city can be fairly treated as those of the federal government. The specific burden that the petitioners challenge is the seizure and relocation of St. Johannes Cemetery; the court needed to decide if the FAA's role in the potential disinterment was "mere approval of or acquiescence in the city's plan, or whether the FAA has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the FAA."[508] The court concluded that the FAA's peripheral role in the relocation of St. Johannes is not sufficient to hold the FAA responsible for purposes of RFRA.

VIII. CONCLUSION

The volume of case law regarding community challenges to airport development and operations clearly indicates that litigation is always a threat from municipalities and community groups seeking to modify or prevent airport expansion and development. Nevertheless, airport proprietors have managed to avoid such litigation through prior planning and buffering, positive community relations and local government support, and compliance with environmental regulation. Strategically, airport proprietors are well advised to pursue a proactive relationship with parties of interest in the community as part of their airport development planning.

Certain airport litigation may be unavoidable, and a comprehensive review of the case law shows that most, although not all, community challenges to airport development will fall into the general categories of federal environmental challenges and local zoning challenges. Federal environmental challenges arise under the procedural requirements of NEPA or directly under "special purpose laws" such as the ESA, the National Historic Preservation Act of 1966, the AAIA, Section 4(f) of the Transportation Act, the CAA, and the CWA. To meet the arbitrary and capricious standard applied in the circuit courts hearing these cases, an airport project sponsor needs to ensure that it has effectively and comprehensively met or exceeded the procedural requirements of NEPA. FAA guidance is available to assist in this undertaking. In states with "mini-NEPA" laws,

[504] 457 F.3d 52, 372 U.S. App. D.C. 406 (D.C. Cir. 2006).

[505] 42 U.S.C. § 2000bb *et seq*.

[506] 42 U.S.C. § 2000bb-1(a).

[507] 42 U.S.C. § 2000bb-2(1).

[508] *See Bensenville*, 457 F.3d at 64; citations omitted. Key to the court's decision was the following passage from Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197, 290 U.S. App. D.C. 371 (D.C. Cir. 1991), which describes the FAA's role in airport development: "In the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator. Rather, the FAA facilitates airport development by providing federal financial assistance, and reviews and approves or disapproves revisions to Airport Layout Plans at federally funded airports."

sponsors of airport projects need to be equally cognizant of applicable state law and regulatory requirements.

State law challenges very often arise out of zoning regulations that apply directly to airport development. These ordinances must be complied with, or variances obtained from them, for an airport operator or developer to legally proceed with airport development projects. Federal preemption has not proven to be a successful argument against community challenges involving local land use regulations. If an airport project sponsor is unable to comply with local law or obtain a variance, it may be that its only recourse is a preemptive state law change.

As the experience of the City of Chicago has proven, NEPA and local zoning regulation may not be the only hurdles presented by community challenges to airport development. Other challenges may include federal and state constitutional challenges and other challenges brought under applicable law, such as the RFRA. Projects that impact cemeteries and other religious properties must proceed with caution and an eye toward all available alternatives. Again, the best course of action will be to do the work required in advance of the project to involve community members, businesses, organizations, and local officials in the airport planning and development process.

APPENDIX A: TABLE OF CASES, LAWS, AND RULES

United States

U.S. Const. art. I, § 10, cl. 3
U.S. Const. art. III, § 2
U.S. Const. art. VI, cl. 2

U.S.C.A. Const. Amend.

Administrative Procedure Act, 5 U.S.C. § 706(2)(A)
Airline Deregulation Act, 29 U.S.C. § 41713
Airport and Airway Improvement Act, 49 U.S.C.A § 47101 *et seq*.
Clean Air Act, 42 U.S.C.A. §§ 7409, 7410, 7502-14 and 7571-74
Clean Water Act 33 U.S.C.A. § 1251 *et seq*.
Department of Transportation Act, 49 U.S.C.A § 303(c) and 4(f)
Endangered Species Act, 16 U.S.C.A. § 1531 *et seq*.
Federal Aviation Act, 49 U.S.C. § 40101 *et seq*.
National Historic Preservation Act of 1966—16 U.S.C.A. § 470 *et seq*.
National Environmental Policy Act (42 U.S.C.A. § 4321–4347)
Noise Control Act of 1972, 86 Stat. 1234
Religious Freedom Restoration Act , 42 U.S.C. § 2000bb *et seq*.

14 C.F.R. § 150
36 C.F.R. Part 800
40 C.F.R. § 51.858
40 C.F.R. § 93
40 C.F.R. § 1500–1508
FAA Order 1050.1E, including Notice of Adoption, 69 Fed. Reg. 33778 (2004)
FAA Order 5050.4B, including 71 Fed. Reg. 29014 (2006)
FAA Airports Desk Reference
DOT Order 5610.1C

California

Cal. Pub. Res. Division 13 (West 2007)
Cal. Pub. Util. Code Division 9 (State Aeronautics Act)

Hawaii

Hawaii Rev. Stat. §§ 343-7

Illinois

620 Ill. Comp. Stat. 65/5 (O'Hare Modernization Act)
775 Ill. Comp. Stat. 35/1 *et seq*. (Illinois Religious Freedom Restoration Act)

New York

N.Y. Envtl. Conserv. Law Article 8 (McKinney 2005)

Texas

Tex. Transp. Code Ann. §§ 22.001–.159 (Vernon Pamph. 1997)

Vermont

Act 250

Washington

Wash. Rev. Code Chapter 43.21C (West 2004)

Supreme Court

Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc., 462 U.S. 87 (1983)
Church of Lukemi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)
City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982)
Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 187 (2000)
Griggs v. Allegheny, 369 U.S. 84 (1962)—*Santa Monica Airport Ass'n v. City of Santa Monica*
Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)
Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)
Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)
*Rapanos v. United States***,** 547 U.S. 715, 731 (2006)
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)
Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983)
Sierra v. Morton, 405 U.S. 727 (1972)
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)

First Circuit

City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972)
French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989)
Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 56 (1st Cir. 2001)
Town of Winthrop v. FAA, 535 F.3d 1 (1st Cir. 2008)
Valley Citizens for a Safe Environment v. Aldridge, 886 F.2d 458 (1st Cir. 1989)

Second Circuit

British Airways Board v. Port Authority of New York, 558 F.2d 75, 84 (2d Cir. 1977)
Citizens for Responsible Area Growth v. Adams, 477 F. Supp. (D.N.H. 1979)

Committee to Stop Airport Expansion v. F.A.A., 325 F.3d 320 (2d Cir. 2003)
Natural Resources Defense Council, Inc. v. F.A.A., 564 F.3d 549, 554 (2d Cir. 2009)
Runway 27 Coalition, Inc. v. Engen, 679 F. Supp. 95, 18 Envtl. L. Rep. 21, 110 (D. Mass. 1987)
Southeast Queens Concerned Neighbors, Inc. v. FAA, 229 F.3d 387 (2d Cir. 2000)
Tweed-New Haven Airport Authority v. Town of East Haven, Connecticut et. al, 582 F. Supp. 2d 261 (D. Conn. 2008).

Third Circuit

Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999)

Fourth Circuit

City of Alexandria v. Helms, 728 F.2d 643 (4th Cir. 1984)
Coalition for Responsible Regional Development v. Coleman, 555 F.2d 398 (4th Cir. 1977)
State of North Carolina v. F.A.A., 957 F.2d 1125 (4th Cir. 1992)

Fifth Circuit

Save Barton Creek Assn. v. Federal Highway Admin., 950 F.2d 1129 (5th Cir. 1992)
Save Ourselves, Inc. et al. v. U.S. Army Corps of Engineers, 958 F.2d 659 (5th Cir. 1992)

Sixth Circuit

Boles v. Onton Dock, Inc., 659 F.2d 74 (6th Cir. 1981)
Charter Township of Huron, Mich. v. Richards, 997 F.2d 1168 (6th Cir. 1993)
City of Blue Ash v. McLucas, 596 F.2d 709, 712 (6th Cir. 1979)
City of Olmstead Falls v. EPA et al., 435 F.3d 632 (6th Cir. 2006)
Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir. 1992)
Historic Pres. Guild v. Burnley, 896 F.2d 985 (6th Cir. 1989)
Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996), *rehearing en banc denied,* April 3, 1996
Neighbors Organized to Insure a Sound Environment, Inc. v. McArtor, 878 F.2d 174, 178 (6th Cir. 1989)

Seventh Circuit

Cerro Copper Products Co. v. Ruckelshaus, 766 F.2d 1060 (7th Cir. 1985)
Citizens Advocacy Center v. DuPage Airport Auth., 141 F.3d 713 (7th Cir. 1998)
Hoagland v. Town of Clear Lake, Indiana, 415 F.3d 693, 696 (7th Cir. 2005)
Illinois Department of Transportation v. Hinson, 122 F.3d 370 (7th Cir. 1997)
Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974)
St. Johns United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887 (N.D. Ill. 2005)
St. Johns United Church of Christ v. City of Chicago, *et al*, 502 F.3d 616 (7th Cir. 2007)[509]
Suburban O'Hare Commission v. Dole, 787 F.2d 186 (7th Cir. 1986), *cert denied,* 479 U.S. 846 (1986).
Suburban O'Hare v. Dole, 603 F. Supp. 1013 (N.D. Ill. 1985)

[509] Discussion of history of O'Hare International Airport modernization project and procedural history of various litigations.

People of the State of Illinois v. The City of Chicago and the City of Gary, 1996 W.L. 6556 (N.D. Ill. 1996)

Eighth Circuit

City of Bridgeton v. Slater, 212 F.3d 448 (8th Cir. 2000)
Condor Corp. v. City of St Paul, 912 F.2d 215, 219 (8th Cir. 1990)—16(c)

Ninth Circuit

Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982)
Burbank Anti-Noise Co-op v. Goldschmidt, 623 F.2d 115 (9th Cir. 1980), *cert denied*, 450 U.S. 965 (1981)
Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338 (9th Cir.)—16(c)
City of Alameda v. F.A.A., 285 F.3d 1143 (9th Cir. 2002)
City of Las Vegas, Nevada v. FAA, 2009 WL 1637076 (9th Cir. Oct. 22, 2008)
City of Los Angeles v. F.A.A., 138 F.3d 806 (9th Cir. 1998)
City of Los Angeles v. F.A.A., 239 F.3d 1093 (9th Cir. 2000)
City of Normandy Park et al. v. Port of Seattle v. F.A.A., 165 F.3d. 35 (9th Cir. 1998)
Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975)
Montalvo v. Spirit Airlines, 508 F.3d 464 (9th Cir. 2007)
Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569 (9th Cir. 1998)
National Parks and Conservation Association v. U.S. Department of Transportation and F.A.A., 222 F.3d 677 (9th Cir. 2000)
San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981)
Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981)
Seattle Community Council Federation v. F.A.A., 961 F.2d 829 (9th Cir. 1991)
Port of Seattle v. F.A.A., 165 F.3d 35 (9th Cir. 1998)

Tenth Circuit

Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426 (10th Cir. 1996)
Custer County Action Association v. Garvey, 256 F.3d 1024 (10th Cir. 2001)
National Parks and Conservation Association v. F.A.A., 998 F.2d 1523 (10th Cir. 1993)
Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995)

Eleventh Circuit

Association of Citizens to Protect and Preserve v. F.A.A., 071608 Fed. 11 07-15675 (July 16, 2008)
City of Oxford, Georgia v. F.A.A., 428 F.3d 1346 (11th Cir. 2005)
C.A.R.E. Now Inc. v. F.A.A., 844 F.2d 1569 (11th Cir. 1988)
Druid Hill Civic Association v. F.H.A., 772 F.2d 700 (11th Cir. 1985)
George Kabeller, Inc. v. Busey, 999 F.2d 1417 (11th Cir. 1993)
Greater Orlando Aviation Authority v. F.A.A., 939 F.2d 954 (11th Cir. 1991)
Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983)

DC Circuit

Air Transport Association of America v. F.A.A., 169 F.3d 1 (D.C. Cir. 1999)
Allison v. Department of Transportation, 908 F.2d 1024 (D.C. Cir. 1990)
Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991)
City of Dania Beach, Florida v. FAA, 485 F.3d 1181, 1188 (D.C. Cir. 2007)
City of Grapevine, Texas v. Department of Transportation, 17 F.3d 1502 (D.C. Cir. 1994)
City of Olmstead Falls, OH v. F.A.A., 292 F.3d 261 (D.C. Cir. 2002)
Coalition on Sensible Transportation, Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987)
Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979)
Communities Against Runway Expansion v. F.A.A., 355 F.3d 678 (D.C. Cir. 2004)
County of Rockland, New York v. FAA, 2009 WL 1791345 (D.C. Cir. 2009)
Grand Canyon Trust v. FAA, 290 F.3d 339 (D.C. Cir. 2002)
Sierra Club v. Department of Transportation, 753 F.2d 120 (D.C. Cir. 1985)
St. Johns United Church of Christ v. F.A.A., 520 F.3d 460 (CADC 2008)
Town of Cave Creek, Arizona v. F.A.A., 325 F.3d 320 (D.C. Cir. 2003)
Town of Stratford v. F.A.A., 285 F.3d 84 (D.C. Cir. 2002)
Village of Bensenville v. F.A.A., 457 F.3d 52 (D.C. Cir. 2006)
Village of Bensenville v. F.A.A., 376 F.3d 1114 (D.C. Cir. 2004)

Arizona

Northeast Phoenix Homeowners' Association v. Scottsdale Municipal Airport, 636 P.2d 1269, 1274 (Ariz. Ct. App. 1981)

California

Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners, 91 Cal. App 4th 1344, 92 Cal. App. 4th 1016, 111 Cal. Rptr. 2d 598 (Cal. App. Dist. 2001)
City of Burbank v. Burbank-Glendale-Pasadena Airport Authority, 113 Cal. App. 4th 465 (2003)[510]
Sunset Skyranch Pilots Association v. County of Sacramento, 164 Cal. App. 4th 671 (3d Cir. 2008)

Florida

National Business Aviation Ass'n., Inc. v. City of Naples Airport Authority, 162 F. Supp. 2d 1343 (M.D. Fla. 2001)

Illinois

The People ex rel. Joseph E. Birkett, et al. v. The City of Chicago, 329 Ill. App. 3d 477, 769 N.E.2d 263 (Ill. Ct. App. 2002)
Phillip v. Daley, 339 Ill. App. 3d 274 (2003)
Wright v. City of Winnebago, 391 N.E.2d 772 (Ill. Ct. App. 1979)

Maryland

Harrison v. Schwartz, 319 Md. 360, 572 A.2d 528 (Md. App. 1990)

[510] Notes 2 and 3 summarize procedural history of litigation.

Massachusetts

Hub Theaters v. Massachusetts Port Authority, 370 Mass. 153, 346 N.E.2d 371 (1976), *cert. denied*, 429 U.S. 891, 97 S. Ct. 249 (1976)
Secretary of Environmental Affairs v. Massachusetts Port Authority, 323 N.E.2d 329 (1975)
Town of Hull v. Massachusetts Port Authority, 441 Mass. 508, 806 N.E.2d 901 (2004)

Minnesota

State ex rel Anoka County Airport Protest, 1956 Minn. 139, 78 N.W.2d 722 (1956)
State of Minnesota by Minnesota Public Lobby and by South Metro Airport Action Council v. Metropolitan Airports Commission, 520 N.W.2d 388 (Minn. 1994)

Missouri

City of St. Louis v. City of Bridgeton, 705 S.W.2d 524 (Mo. App. 1985)
City of Bridgeton v. City of St. Louis, 18 S.W.3d 107 (Mo. App. ED 2000)
City of Washington v. Warren County, 1995 Mo. 22311, 899 S.W.2d 863 (Mo. App. 1995)

New Jersey

Garden State Farms, Inc. v. Bay New Jersey Superior Court, 146 N.J. Super. 438, 370 A.2d 37 (1977)

New York

Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F. Supp. 678, 691 (N.D.N.Y. 1989)
United States v. New York, 552 F. Supp. 255, 263-64 (N.D.N.Y. 1982)
Thomson Industries, Inc. v. Incorporated Village of Port Washington North, 304 N.Y.S.2d 83 (2d Dep't 1969)

North Carolina

Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, 665 S.E.2d 561 (N.C. App. 2008)

Ohio

City of Cleveland v. City of Brook Park, 893 F. Supp. 742, 751 (N.D. Ohio 1995)
Yorkavitz v. Bd. of Twp. Trustees of Columbia, 166 Ohio St. 349 (Ohio 1957)

Pennsylvania

Clarke v. Township of Hermitage, 433 A.2d 631 (Pa. 1981)

Texas

Dallas/Ft. Worth International Airport Bd. v. City of Irving, *et al., infra.* 854 S.W.2d 161 (Tex. Ct. App. 1993)

City of Euless, et al. v. Dallas/Fort Worth International Airport Board, 936 S.W.2d 699 (Ct. App. Texas 1996)

Vermont

In re Commercial Airfield, 170 Vt. 595, 752 A.2d 13 (Vt. 2000)

Other Resources

Daniel R. Mandelker, *NEPA Law and Litigation*

Arden H. Rathkopf, *The Law of Zoning and Planning* § 85-4 (Thomson Reuters/West 2008)

Wooster, Ann K., *Actions Brought Under Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) (33 U.S.C.A. §§ 1251 et seq.)—Supreme Court cases,* 115 A.L.R. Fed. § 5312(a) (1993)

Elaine Marie Tomko-DeLuca, J.D., *Applicability of Zoning Regulations to Governmental Projects or Activities*, 55 A.L.R. 5th (Thomson Reuters/West 2009)

L.S. Tellier, *Zoning Regulations as Affecting Airports and Airport Sites*, 161 A.L.R. 1232 (Thompson Reuters/West 2009)

Sheppard Mullin Richter & Hampton LLP, *Shift in Federal Jurisdiction Complicates Airport Development Litigation*, June 8, 2002, http://www.sheppardmullin.com/publications-articles-77.html

61C Am. Jur. 2d *Pollution Control*

APPENDIX B

Questionnaire

The Transportation Research Board has retained a consultant to do a research project on development activities at airports that have resulted in challenges by community groups. These challenges use various legal theories to modify or, in some cases, prevent, airport development, including federal and state challenges to the scope and sufficiency of the EIS, challenges to the funding of airport expansion using PFCs and the imposition of zoning laws. Challenges may also include various aspects of ongoing airport operations, such as changes in the approach or expanded use of a runway.

The purpose of this survey is to collect information from airports, companies and other institutions involved in the air transportation industry, federal and state cases brought in opposition to airport expansion, or the development or operations at airports.

---

1) Please provide the name and address of your agency or firm.
_____
_____
_____

2) Please provide the name, telephone number and email address of an appropriate contact person who is primarily responsible for legal matters for your agency or firm.
Name: _____
Telephone: _____
Email: _____

3) Please describe the nature of the airport development or expansion or operations with which you are/were involved and your role. If this information is publicly available on a website, please provide the web address.
_____
_____
_____

4) Please describe the source or sources of funding for this project.
_____

5) If the development activities described above resulted in a legal challenge or challenges by a community group or groups, please give:
a) The citation(s):_____
b) The jurisdiction:_____
c) Brief description of the basis or bases of such litigation (check all that apply):
- ☐ Environmental:
- ☐ Passenger Facility Charges
- ☐ Zoning Challenges
- ☐ NEPA
- ☐ State “little NEPA”
- ☐ Endangered Species
- ☐ RIFRA
- ☐ Historic Preservation
- ☐ Clean Air Act
- ☐ Clean Water Act

□ Other (please describe):

_____
_____

6) Please describe the procedural history and current status of any litigation described in question 5. If the litigation described in question 5 was settled prior to a final judicial determination, please attach the settlement agreement (or if it is available on-line please give the web address). _____
_____
_____
_____

7) The purpose of this research project is to collect information on which litigation strategies succeeded, which failed, and why.
   a) Please summarize your argument's strongest or most successful points (if you are able to attach legal briefs with your response please do so):
   _____
   _____
   _____
   b) Please summarize your argument's weakest or least successful points:
   _____
   _____
   _____

8) What, if anything, did you learn during the course of the litigation that would cause you to adopt a different strategy today?
   _____
   _____
   _____
   _____

9) Please add or share anything in your experience which relates to the foregoing airport litigation which I may not have asked in this survey:
   _____
   _____
   _____

10) If I may I call you for a telephone interview regarding your responses please leave a phone number where I may make an appointment for an interview: _____

To the extent you may have other publicly available information or correspondence with regard to any of the matters discussed above, please e-mail, fax or mail any of these materials to my attention. Thank you very much for your responses to this survey.

APPENDIX C

Questionnaire Recipients and Respondents

RECIPIENTS	RESPONSE RECEIVED	REPORTED LITIGATION
1. City of El Paso El Paso International Airport		
2. Miami-Dade County Aviation Department		
3. Sacramento County Airport System	Y	N
4. City of Dayton Department of Aviation Dayton International Airport		
5. Tucson Airport Authority Tucson International Airport		
6. McCall Municipal Airport		
7. Central West Virginia Regional Airport Authority		
8. Tallahassee Regional Airport		
9. Lee County Port Authority Southwest Florida International Airport		
10. Reno-Tahoe Airport Authority		
11. Milwaukee County Department of Public Works Airport Division		
12. Metropolitan Washington Airports Authority	Y	N
13. Tweed-New Haven Regional Airport		
14. Branson Airport, LLC		
15. San Diego County Regional Airport Authority		
16. Raleigh-Durham Airport Authority Raleigh-Durham International Airport		
17. Rhinelander/Oneida County Airport		
18. Manchester - Boston Regional Airport		
19. Brownsville South Padre Island International Airport		
20. San Bernardino International Airport Authority		
21. Maryland Aviation Administration		
22. Metropolitan Airport Authority of Rock Island County		
23. Jacksonville Aviation Authority (JAA)		
24. Memphis-Shelby County Airport Authority Memphis International Airport		
25. Gary Chicago International Airport		

26. Panama City - Bay County International Airport		
27. City of Springfield Airport Board Springfield-Branson National Airport	Y	N
28. Sanford Airport Authority	Y	N
29. Greater Rochester International Airport		
30. City and County of Denver Denver International Airport	Y	Y
31. City of Atlanta Department of Aviation Hartsfield-Jackson Atlanta Int'l Airport	Y	N
32. Port Authority of New York and New Jersey		
33. Birmingham Airport Authority		
34. Eugene Airport		
35. Lehigh-Northampton Airport Authority	Y	N
36. Indianapolis Airport Authority Indianapolis International Airport		
37. Colorado Springs Airport	Y	N
38. Asheville Regional Airport Authority		
39. Melbourne International Airport		
40. Dallas/Fort Worth International Airport	Y	Y
41. Columbia Metropolitan Airport		
42. Gulfport-Biloxi Regional Airport Authority		
43. Hawaii Department of Transportation Airports Division	Y	N
44. Greater Orlando Aviation Authority	Y	N
45. Broward County Aviation Department		
46. Lexington-Fayette Urban County Airport Board Blue Grass Airport		
47. Kern County Department of Airports		
48. Savannah Airport Commission		
49. City of Abilene Department of Aviation	Y	N
50. Monterey Peninsula Airport District		
51. North Central West Virginia Airport		
52. Oakland International Airport Port of Oakland		
53. Minneapolis-St. Paul Metropolitan Airports Commission		
54. City of Albuquerque Aviation Department		
55. Pease Development Authority		
56. Kenton County Airport Board Cincinnati/Northern Kentucky Intl. Airport		
57. Metropolitan Topeka Airport Authority		
58. New Orleans Aviation Board Louis Armstrong New Orleans International Airport		

59. City of Bangor Airport Department		
60. Philadelphia Division of Aviation Philadelphia International Airport		
61. Greenville-Spartanburg International Airport	Y	N
62. Piedmont Triad International Airport		
63. Massachusetts Port Authority		
64. Ted Stevens Anchorage International Airport		
65. Kent County Aeronautics Board Gerald R. Ford International Airport		
66. Oklahoma City Airport Trust		
67. Phoenix-Mesa Gateway Airport		
68. St. Petersburg-Clearwater International Airport		
69. Chattanooga Metropolitan Airport Authority		
70. Los Angeles World Airports		
71. Dane County Regional Airport		
72. Port San Antonio		
73. Greater Baton Rouge Airport District		
74. Burbank-Glendale-Pasadena Airport Authority		
75. Metropolitan Knoxville Airport Authority McGhee Tyson Airport	Y	
76. Flathead Municipal Airport Authority Glacier Park International Airport		
77. San Francisco Airport Commission	Y	N
78. Port of Portland Portland International Airport		
79. Boise Airport		
80. Valley International Airport		
81. Louisville Regional Airport Authority		
82. Pensacola Gulf Coast Regional Airport	Y	Y
83. Shreveport Airport Authority		
84. Tampa International Airport		
85. Port of Pasco Tri-Cities Airport		
86. Tulsa Airport Authority		
87. City of Phoenix Aviation Department Sky Harbor International Airport	Y	Y
88. John Wayne Airport Orange County		
89. MBS International Airport Commission MBS International Airport		
90. Palm Springs International Airport City of Palm Springs Department of Aviation		
91. Albany County Airport Authority		
92. Greenbrier Valley Airport	Y	N

93. Fort Smith Regional Airport		
94. Gainesville-Alachua County Regional Airport Authority		
95. Allegheny County Airport Authority Pittsburgh International Airport	Y	N
96. Sarasota Manatee Airport Authority	Y	Y
97. Charlotte County Airport Authority		
98. The South Jersey Transportation Authority		
99. Metropolitan Nashville Airport Authority		
100. Seattle-Tacoma International Airport		
101. Ft. Wayne-Allen County Airport Authority	Y	Y
102. Salt Lake City Department of Airports		
103. Columbus Regional Airport Authority		
104. Lafayette Airport Commission		
105. Wayne County Airport Authority		
106. Chicago Airport System	Y	Y
107. Barkley Regional Airport Authority Barkley Regional Airport	Y	N
108. Westchester County Department of Transportation		
109. Norfolk Airport Authority	Y	N
110. Spokane International Airport		
111. Burlington Airport Commission Burlington International Airport		
112. Capital Region Airport Authority Capital City Airport		
113. City of San Jose Airport Department Norman Y. Mineta San Jose Intl. Airport		
114. Roanoke Regional Airport Commission Roanoke Regional Airport		
115. Mobile Airport Authority		
116. St. Louis Airport Authority Lambert-St. Louis International Airport		
117. City of Austin Department of Aviation		
118. City of Des Moines Department of Aviation Des Moines International Airport		
119. Cleveland Airport System Cleveland Hopkins International Airport		
120. Peninsula Airport Commission		
121. Omaha Airport Authority		
122. City of Naples Airport Authority Naples Municipal Airport		
123. Greater Peoria Regional Airport		
124. Charleston County Aviation Authority	Y	N
125. Huntsville-Madison County Airport Authority		

126. Houston Airport System		
127. Jackson Municipal Airport Authority		
128. Fairbanks International Airport		
129. Buffalo Niagara International Airport	Y	N
130. Kansas City Aviation Department		
131. Snohomish County Airport (Paine Field)	Y	N (EA underway; "No suits yet.")
132. Clark County Department of Aviation McCarran International Airport		
133. City of San Antonio Aviation Department		
134. City of Dallas Department of Aviation Dallas Love Field		
135. Wichita Airport Authority		
136. City of Fresno—Airports Fresno Yosemite International Airport	Y	N
137. Tri-Cities Airport Commission		
138. Lincoln Airport Authority	Y	N
139. St. Augustine/St. Johns County Airport Authority		
140. Central Wisconsin Regional Airport		

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