Case No. 10-1972

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SAFEGUARDING THE HISTORIC HANSCOM AREA'S IRREPLACEABLE RESOURCES, INC.; SAVE OUR HERITAGE, INC.; CONCORD HISTORICAL COMMISSION; LYNN VANACORE BLOOM; THE WALDEN WOODS PROJECT, INC.,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent,

and

MASSACHUSETTS PORT AUTHORITY,
Intervenor.

On Petition for Review of an Order of
the Federal Aviation Administration

RESPONDENT'S ANSWERING BRIEF

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App.	Petitioners' Appendix
dB	Decibel(s)
DNL	Day-Night Average Sound Level
ESPR	Environmental Status and Planning Report
FAA	Federal Aviation Administration
FBO	Fixed Base Operator
GA	General Aviation
Massport	Massachusetts Port Authority
MHC	Massachusetts Historical Commission
MIT	Massachusetts Institute of Technology
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
SHPO	State Historic Preservation Officer
Supp. App.	Respondent's Supplemental Appendix

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument would be appropriate in this case to allow counsel to address any questions that the Court might have concerning the administrative record, which might be particularly important considering the fact-bound nature of petitioners' arguments.

JURISDICTION

Petitioners here challenge a June 18, 2010, order by the Federal Aviation Administration ("FAA") approving an amendment to the airport layout plan for Hanscom Field pursuant to 49 U.S.C. § 47107(a)(16)(B). *See* App. 1; *see also* App. 22-23. The Court has jurisdiction over the petition for review pursuant to 49 U.S.C. § 46110(a). The petition was timely because it was filed on August 16, 2010, within 60 days of the order. *Id*.

ISSUES PRESENTED

1. Whether FAA complied with Section 4(f) of the Department of Transportation Act by concluding that: (a) there were no other prudent and feasible alternatives to replacing Hangar 24; and (b) the approved hangar replacement incorporated all possible planning to minimize harm to the hangar's historic values.

2. Whether FAA complied with the National Historic Preservation Act ("NHPA") by: (a) defining the area of potential effects as the footprint of the hangar and outbuildings; and (b) basing its determination that the hangar was eligible for listing on the National Register of Historic Places ("National Register") on criteria other than the hangar's architectural or engineering attributes.

3. Whether the environmental assessment ("EA") prepared by FAA complied with the National Environmental Policy Act ("NEPA") by adequately

analyzing potential environmental impacts from the proposed hangar replacement and concluding that such impacts would not be significant.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioners seek review of FAA's June 18, 2010, record of decision authorizing an amendment to the airport layout plan for Laurence G. Hanscom Field ("Hanscom"), a general aviation airport located northwest of Boston, Massachusetts. The decision authorizes the removal of Hangar 24, an approximately 70-year old structure located at Hanscom that is eligible for listing on the National Register, and it also authorizes the construction of a new hangar in its place for housing a fixed base operator ("FBO") – a company that handles a range of needs for aircraft, their operators, and their passengers, *e.g.*, maintenance, fueling, parking, and hangaring the aircraft; providing flight planning services for their pilots; and arranging for ground transportation or overnight accommodations.

Petitioners allege that in issuing its decision, FAA failed to comply with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), which allows FAA to approve a transportation project requiring the use of the land of an historic site only if there is "no prudent and feasible alternative to using that land" and if the project "includes all possible planning to minimize harm" to the historic site resulting from the use. Petitioners also allege that FAA violated NHPA, which

requires agencies like FAA having jurisdiction over a proposed federal undertaking to "take into account the effect of the undertaking" on structures eligible for listing on the National Register before approving the undertaking. 16 U.S.C. § 470f. Finally, petitioners allege that FAA violated NEPA, which requires the agency to prepare a detailed environmental impact statement ("EIS") for major federal actions "significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), and if an EA is prepared instead, to "[b]riefly provide sufficient evidence and analysis for determining" that there would not be any significant environmental impacts. 40 C.F.R. § 1508.9(a)(1).

II. Legal Background

A. *Airport Planning*

An airport layout plan is a document which "identifies all existing and future runways, runway extensions, terminal buildings and other airfield facilities, and the descriptions of the development needed to support them." Supp. App. 25.[1] The airport layout plan is "for planning purposes only" and does not commit the airport sponsor to build any of the depicted facilities. *Id.* Nor does it commit FAA to provide funding for those facilities. *Id.* In order for the sponsor to remain eligible for funding, however, any revisions to the airport layout plan must be approved by FAA. 49 U.S.C. § 47107(a)(16)(B).

[1] Citations are to the petitioners' appendix ("App."), the respondents' supplemental appendix ("Supp. App."), or to the administrative record ("AR") directly.

In considering proposed changes to the airport layout plan, FAA follows the policy that the "safe operation of the airport" is the "highest aviation priority." 49 U.S.C § 47101(a)(1). Other policies guide FAA as well, including that it is to give "special emphasis to developing reliever airports" like Hanscom, that airports should be "as self sustaining as possible" under the circumstances at each airport, and that airport programs should "foster competition. 49 U.S.C § 47101(a)(3), (a)(13), (d). Consistent with that last goal, FAA considers it to be in the public interest to "plac[e] maximum reliance on competitive market forces and on actual and potential competition." *See* 49 U.S.C. § 40101(a)(6).

B. *Department of Transportation Act*

In relevant part, Section 4(f) of the Department of Transportation Act provides that the Secretary of Transportation may approve a transportation project "requiring the use of . . . land of an historic site . . . only if: (1) there is no prudent and feasible alternative to using that land; and (2) the . . . project includes all possible planning to minimize harm to the . . . historic site . . . ." 49 U.S.C. § 303(c) ("Section 4(f)"); *see also* 23 U.S.C. § 138.

C. *National Historic Preservation Act*

Section 106 of the NHPA requires federal agencies to "take into account the effect of [any] undertaking" on certain historic structures. 16 U.S.C. § 470f. The agency must also provide the Advisory Council on Historic Preservation a

"reasonable opportunity" to comment with regard to such undertaking. *Id*. Section 106 is a "procedural statute that requires agency decisionmakers to 'stop, look, and listen,' but not to reach particular outcomes." *Neighborhood Ass'n of Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 60 (1st Cir. 2006).

The Advisory Council promulgated regulations, found at 36 C.F.R. Part 800, to define how agencies meet their responsibilities under the Act. Pursuant to those regulations, a federal agency first determines whether its proposed action is an "undertaking" and if so, whether it "has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). In consultation with the State Historic Preservation Officer ("SHPO"), the agency first determines and documents the "area of potential effects," which is the "geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties. 36 C.F.R. § 800.16(d); *see also* 36 C.F.R. § 800.4(a)(1).

The agency identifies possible historic properties within the area of potential effects and applies the National Register criteria to evaluate their historic significance. 36 C.F.R. § 800.4(c)(1); *see also* 36 C.F.R. § 60.4. If the agency concludes that any of the National Register criteria are met and the SHPO agrees, then the property is considered eligible. 36 C.F.R. § 800.4(c)(2). The agency must then, in consultation with the SHPO, determine whether the undertaking would have an adverse effect on the historic property, taking into consideration any views

of the consulting parties and the public. 36 C.F.R. § 800.4(d)(2).[2] If an adverse effect is found, the agency must evaluate alternatives for avoiding, minimizing, or mitigating the adverse effect. *See* 36 C.F.R. §§ 800.5(d)(2), 800.6(a). The agency must provide notice of the adverse effect to the Advisory Council, which may or may not choose to participate in the consultation. *See* 36 C.F.R. § 800.6(a)(1).

As part of the consultation, the agency must provide for public comments and take those comments into consideration. 36 C.F.R. § 800.6(a)(4). If the agency and the SHPO agree on how to resolve the adverse effect, they execute a memorandum of agreement and provide it to the Council, along with other documentation concerning the adverse effects of the undertaking on the historic property, prior to approving the undertaking. 36 C.F.R. § 800.6(b)(1)(iv). The executed agreement, which must be followed, then "evidences compliance with section 106" and the regulations. 36 C.F.R. § 800.6(c).

D. *National Environmental Policy Act*

NEPA requires federal agencies to prepare a detailed environmental impact statement ("EIS") when proposing "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If it is unclear

[2] Consulting parties include, *inter alia*, the SHPO, local government representatives, and the project sponsor. 36 C.F.R. § 800.2(c)(1) – (4). Interested organizations may become consulting parties due to their concern with the undertaking's effect on historic properties. 36 C.F.R. §§ 800.2(c)(5), 800.6(a)(2).

whether a proposed action would have significant environmental effects, an agency instead may prepare a less-detailed environmental assessment ("EA"). *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004); *see Sierra Club v. Wagner*, 555 F.3d 21, 24 (1st Cir. 2009). If, based upon the analysis of impacts and alternatives in the EA, an agency reaches a finding of no significant impact ("FONSI"), then it need not prepare an EIS. *Id.* at 757-58; *see also* 40 C.F.R. § 1501.4(c), (e).[3]

NEPA's requirements are purely procedural – they do not "mandate particular results" but simply prescribe the necessary process. *Pub. Citizen*, 541 U.S. at 756 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)); *accord, Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1284 (1st Cir. 1996). So long as the agency adequately analyzes environmental impacts, NEPA does not prevent the selection of an environmentally damaging alternative. *See Sierra Club v. Marsh*, 872 F.2d 497, 502 (1st Cir. 1989).

STATEMENT OF FACTS

I. Overview of Hanscom Field

Laurence G. Hanscom Field ("Hanscom") is a general aviation ("GA") airport located northwest of Boston, Massachusetts, whose primary role is to

[3] The Council on Environmental Quality, an agency within the Executive Office of the President, has promulgated regulations implementing NEPA, found at 40 C.F.R. Parts 1500-1508, which are entitled to substantial deference. *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 301 (1st Cir. 1999).

provide general aviation ("GA") services so as to relieve Logan International Airport of those responsibilities and allow it to focus upon large-scale commercial air operations. Supp. App. 8, 105. As a GA reliever, Hanscom provides services such as private pilot training, business, charter, cargo, and air taxi operations for corporations, research and development firms, educational institutions, and individuals. *Ibid.* Some commercial flights to limited destinations are also provided. *Ibid.* Originally leased by the Army Air Corps during World War II, Hanscom has been operated exclusively since 1974 by the Massachusetts Port Authority ("Massport"), an independent public entity established by Massachusetts law. Supp. App. 105; *see also* Mass. Gen. Laws ch. 91 App., § 1-2

Like other GA airports, some third party development occurs at Hanscom. *See, e.g.*, Supp. App. 10. Since at least 2003, the public has been on notice that Massport was considering the construction of several small hangars and the replacement of two existing hangars, including one previously owned by Massachusetts Institute of Technology ("MIT"), known as Hangar 24. *See* Supp. App 9-12.

Hangar 24 was originally constructed in southern Georgia in the 1930s, then moved to New England, where it was reconstructed at Hanscom in 1948 when the facility was still an Army Air base. App. 7. The hangar was used by MIT for

research until it was no longer suitable for their needs and vacated in 2001. *Id*. It is currently owned by Massport. *Id*.

II. Removal and Replacement of Hangar 24

In 2005, Massport issued a request for proposals to redevelop Hangar 24. Supp. App. 38. In 2006, one of the petitioners in this case requested that the Massachusetts Historical Commission ("MHC") evaluate Hangar 24 for inclusion on the National Register, contending that it met two criteria for such listing – *i.e.*, that it was associated with significant historical events (Criterion A) and with the lives of significant historical persons (Criterion B). AR:10. The Historical Commission evaluated the property, concurred that it was eligible under Criteria A and B, and requested that Massport have a study conducted to assess Hangar 24's condition and consider the prudence and feasibility of alternative uses to the hangar, including, *inter alia*, possible rehabilitation by Massachusetts Air and Space Museum. Supp. App. 111-112; *see also* App. 160.

A. Massachusetts Air and Space Museum's Inspection Report

The Air and Space Museum, which was seeking a venue to house a collection of artifacts and other items pertaining to accomplishments in the aeronautics and aerospace industries related to Massachusetts, had originally considered Hangar 24 as a possible location for such an endeavor. Supp. App. 115. In March 2007, however, after conducting a visual internal and external

inspection of the hangar and adjoining property, the Museum issued a report ("Museum Report") concluding that the structure and property "fall far short of what would be necessary to make the museum a viable entity," and that the "problems ranging from structural issues to [the Hangar's] badly deteriorated condition would require far more than simply rehabilitation." Supp. App. 113. In particular, the Museum identified several issues. Due to their non-use and lack of maintenance, floors and ceilings of structures adjoining the Hangar would require total replacement. Supp. App. 115. Also, insulation would have to be installed in the Hangar, and it was questionable whether the roof, which was originally constructed in Georgia without the need to consider New England snow loads, would bear the additional weight of such insulation. *Id.*

Spray-on insulation, suspected to contain asbestos, was present "in great abundance" throughout the Hangar for insulating the heating system. Supp. App. 116. Windows and doors were in poor condition, and emergency exit doors would have to be added throughout the complex to meet public safety requirements. *Id.* Electrical systems were non-standard and non-compliant with existing codes, and the Museum estimated there was a "strong likelihood" that the systems would have to be replaced entirely. *Id.* Similar concerns existed for heating, cooling, fire protection, and security systems, and additional modifications would have to be made to provide adequate access for the disabled. *Id.* Additionally, the size of the

hangar was found to be "quite inadequate for any meaningful display area," and expansion constrained in several ways. Supp. App. 113; *see also* Supp. App. 116. The Museum noted that bringing the Hangar into compliance with current municipal codes "*would be nearly impossible.*" Supp. App. 117. (emphasis added).

B. Massport's Condition Assessment and Feasibility Study

In addition to the Museum Report, Massport had a condition assessment and feasibility study prepared for Hangar 24 (referenced as the "HNTB" report, after the name of Massport's consultant). Based upon a visual inspection and also review of available drawings and reports, the study documented and described the condition of the hangar and its associated structures. Supp. App. 131-141. It also identified and discussed seven different alternatives for redeveloping the Hangar: rehabilitating the existing hangar to meet current building code standards; redeveloping the hangar for use by G5 aircraft; redevelopment either for office use, warehouse space, on-site, or off-site museums; and demolition and removal. Supp. App. 141-143.

The study found that the hangar was "functionally obsolete" for aviation use because both the height of the hangar door and the depth of the hangar itself were inadequate for a G5 aircraft. Supp. App. 113 (quotation omitted). And while the basic structural elements of the hangar appeared sound, the study found the hangar

to be "out of compliance with basic code requirements for fire safety, life safety, and handicapped access," and that the "overall assessment of the hangar is poor." Supp. App. 144.

Some of the basic requirements not being met include a lack of sprinkler system or other fire-fighting equipment, absence of fire-rated separation in required locations, and improperly located electrical equipment. Supp. App. 140. Also, some elements of the hangar appeared to contain hazardous materials – *e.g.*, lead-based paint, and asbestos insulation on the hangar doors and around the plumbing. Further, energy systems would have to be upgraded to meet current standards for efficiency. All the ancillary buildings were found to be "in very poor condition." Supp. App. 144.

The study also included cost estimates of the seven different options for redeveloping the hangar. Supp. App. 139-145. Importantly, the study was inconclusive as to whether it was structurally feasible to modify the hangar for contemporary general aviation use. Supp. App. 142. Even assuming that it were feasible, redeveloping the hangar for aviation use would cost *more* ($3 million) than constructing a new hangar ($2.5 million). *See* Supp. App. 142-143. Massport provided the HNTB report to the Massachusetts Historical Commission and also explained that airside space is valuable and limited, and that Hangar 24 is the only

accessible site at Hanscom that is currently readily available for redevelopment. Supp. App. 147.

As part of a consultation process under state law, Massport, its consultant, and the Commission met with several interested parties, including some of the petitioners. *See* Supp. App. 148. Comment letters were also submitted from the public, including some of the petitioners and *amici*, and Massport responded to those comments. *See* Supp. App. 148-157. Massport then prepared a draft memorandum of agreement for the Commission, published it for public comment, and responded to those comments. *See* Supp. App. 158-166.

C. FAA's Historic Act Consultation and Environmental Review

Consultation under Section 106 of NHPA was initiated in April 2008, when FAA informed the Massachusetts Historical Commission that Massport's proposed change to the Hanscom airport layout plan related to the proposed removal and replacement of Hangar 24 was an "undertaking" within the meaning of NHPA. App. 170. FAA determined, consistent with the Commission's conclusion, that the hangar was eligible for listing on the National Register of Historic Places because of its association with historical events and an historical person, specifically, the hangar's use as a post-war test flight facility where an individual named Charles Draper conducted aeronautical engineering research, specifically concerning inertial navigation and flight guidance systems. *Id.* The area of potential effects,

FAA concluded, was the footprint of the hangar and outbuildings. *Id.* FAA notified the Advisory Council on Historic Preservation to provide it a chance to participate in the consultation, if it desired. App. 171. FAA also invited non-governmental parties, including several of the petitioners and *amici*, to be consulting parties pursuant to 36 C.F.R. § 800.2(c), and provided multiple opportunities throughout the process, of which petitioners and amici availed themselves, for public comment and participation. App. 170; *see also* App. 176-81 (public meeting notes); App. 188-93 (public comments); AR:38, AR:39, AR:40, AR:79, AR:85.

In December 2008, FAA issued a draft EA and made it available for public comment, App. 196-219, also providing it to state and federal agencies, including, *inter alia*, the Department of the Interior and the Advisory Council. Supp. App. 177; 180. The Council responded, stating that it was "encouraged that FAA continues to make progress in its Section 106 review process, including making additional information available to consulting parties," and that its "participation in the consultation to resolve adverse effects is unnecessary." Supp. App. 178. The Massachusetts Historical Commission concurred with FAA's determinations concerning the project's effects on historic properties. Supp. App. 181-183. Following an additional meeting with the consulting parties, the Advisory Council commented that "the analysis of alternatives in the draft EA . . . is exhaustive."

App. 47. "Given that the airport must weigh other concerns as well as historic preservation to meet long-term operational and management needs," the Council explained, the EA "evidence[d] that the FAA attempted to reach a balance between project needs and historic preservation values." *Id.* The Council therefore continued to believe that its participation was unwarranted. *Id.*

FAA prepared a draft memorandum of agreement to memorialize the commitments to mitigate the removal of the hangar and circulated it to the consulting parties for a 30-day comment period. App. 10; *see also* Supp. App. 194. FAA responded to the comments in the final EA, which also included the final version of the agreement. App. 125-34. Under the agreement, Massport would be required, *inter alia*, to: prepare archival documentation of the hangar; identify, inventory, and (where feasible) salvage certain architectural elements of the hangar; install a publicly-accessible interpretive display at the airport; and work cooperatively with interested parties to identify an appropriate site at Hanscom or elsewhere for a future aviation museum. App. 130-32.

D. Environmental Assessment / Finding of No Significant Impact / 4(f) Finding.

FAA issued a final EA on June 16, 2010, which responded to public comments on the draft EA. App. 98-111. The EA included an analysis of four alternatives –no action, the proposed replacement of Hangar 24, construction of a new hangar elsewhere at the airport, and adaptive re-use of Hangar 24. App. 10-

14. The EA focused on several topics of potential significance, including, *inter alia*, historical properties, Section 4(f), and cumulative impacts from noise and air quality. App. 15; *see also* App. 16-21.[4] Concerning historical properties, the EA noted that because the hangar did not qualify for the National Register for its architectural achievement (Criterion C) or ability to yield historical information (Criterion D), the mitigation in the memorandum of agreement would be sufficient to avoid significant effects. App. 17.

For 4(f) resources, the EA noted that while all the alternatives were feasible, only the removal of Hangar 24 was prudent. App. 18. Among other sources, the EA relied upon the HNTB report, which it incorporated by reference. App. 15-16. The EA stated that FAA considered planning to minimize harm to the hangar but that it was not prudent given the need for demolition, and that compensatory mitigation was addressed by the memorandum of agreement. App. 18. FAA was "particularly mindful" of the proximity of the Minute Man National Historical Park to the project, the EA explained, but ultimately concluded that there would be no direct or indirect effects upon the Park. *Id.* In particular, most of the aircraft using the new facility would be larger corporate aircraft operating on the longer runway

[4] Many environmental resources traditionally analyzed in EAs – *e.g.*, coastal features, rivers, plants and wildlife, compatible land use, threatened and endangered species, environmental justice, farmlands, floodplains, light emissions, and wetlands – were determined not to be applicable either to Hanscom generally or to the project in particular. App. 14.

and would not overfly the Park. *Id*. Also, replacement of Hangar 24, the EA explained, was unlikely to induce any increase in aircraft operations, since many of the jets that would utilize a third FBO would operate at Hanscom anyway and would not be induced to operate at Hanscom because of the presence of a third FBO. *Id*. As the EA explained, aviation infrastructure (including hangars) at most, only contributes to incidental growth, except where airports are capacity-constrained, which is not the case at Hanscom. *Id*.

Based on the analysis in the EA and the record as a whole, FAA found that the proposed amendment to the airport layout plan would not have a significant effect on the environment. App. 22. On June 18, 2010, FAA's decision became effective, authorizing the plan to be amended to depict the selected alternative – the removal and replacement of Hangar 24 with a new hangar. App. 23; *see also* AR:125.

STANDARD OF REVIEW

An agency's decision not to prepare an EIS may only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Pub. Citizen*, 541 U.S. at 763. Compliance with Section 4(f) is also reviewed for whether the agency's findings are arbitrary and capricious. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416-417 (1971). "To make this finding the court must consider whether the decision was

based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416. The "arbitrary and capricious" standard applies to NHPA review as well. *Back Bay*, 463 F.3d at 61-63. Under the arbitrary and capricious standard, an agency's scientific findings are entitled to deference, especially where the agency is making predictions in a field where it possesses expertise. *Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983); *see also DiPerri v. FAA*, 671 F.2d 54, 58 (1st Cir. 1982).

FAA's factual findings must be upheld if they are supported by substantial evidence, 49 U.S.C. § 46110(d), which means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 718 (1st Cir. 1999) (citation omitted). In other words, the evidence must "be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling Stamping Co.*, 306 U.S. 292, 300 (1939); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998) (the standard "gives the agency the benefit of the doubt").

SUMMARY OF ARGUMENT

Petitioners challenge FAA's approval to amend Hanscom's airport layout plan to depict the future removal and replacement of Hangar 24, an approximately 70-year old structure that is not up to current code for health, safety, or disabled

access, and is functionally obsolete for housing modern corporate jet aircraft. Prior to approving the amendment, FAA conducted an extensive public involvement process, including NHPA consultation in which petitioners and *amici* were heavily involved. FAA also prepared and circulated for public comment an EA under NEPA which analyzed three main alternatives to a new hangar – doing nothing, locating the hangar elsewhere, and rehabilitating the hangar. The Advisory Council, which assists federal agencies in complying with NHPA, remarked that the EA's consideration of alternatives was "exhaustive." Based on that analysis, FAA reasonably concluded that none of the alternatives to the proposed hangar replacement was prudent, except the proposed action itself. Additionally, given the mitigation measures identified in a memorandum of agreement, all possible measures to minimize harm had been taken, in compliance with Section 4(f).

Petitioners' chief arguments in this appeal are based upon the notion that because general aviation use overall is generally decreasing at Hanscom, that there must not be a demand for another FBO. That reasoning is flawed. The record here contains ample data demonstrating that corporate jet use has been increasing at Hanscom and that a need exists there to expand service to this subset of general aviation. This trend and the forecasts for future use, which are supported by the record, show that the purpose and need of the project were sufficiently rational. FAA also adequately explained why other options – locating the FBO fifty miles

away, or on the East Ramp where another project was already proceeding to convert existing aircraft tie-downs to covered hangars, or re-using the old hangar which was too small, short, and would cost as much to rehabilitate as building a brand new facility – were imprudent due to the cumulation of these various factors. Finally, FAA adequately incorporated mitigation to document the historic hangar and install an interpretive display at Hanscom, all in satisfaction of Section 4(f).

FAA complied with NHPA through a detailed public involvement process that involved several petitioners and *amici* as consulting parties. Contrary to petitioners' argument, FAA's limitation of the area of potential effects to the hangar and outbuildings was based on the reasonable conclusion that there would not be any indirect effects concerning noise or other environmental impacts. In FAA's experience, as the EA explained, airport development (like new FBOs) does not induce additional trips to the airport unless the airport is capacity-constrained, which Hanscom is not. Regardless, FAA undertook a worst case analysis which supports the conclusion that cumulative effects from noise to nearby sensitive locations would be insignificant. Additionally, the record supports FAA's conclusion that the hangar's eligibility for listing on the register of historic places should not be based upon any architectural significance of the structure itself. FAA complied with NHPA. For similar reasons, the EA's analysis of effects (including cumulative effects) concerning noise at nearby historic sites was

sufficient to support FAA's finding of no significant impact. Nor was the analysis segmented in any way. In sum, there is no merit to the petitioners' arguments, and the petition for review should be denied.

ARGUMENT

I. FAA Complied With Section 4(f) of the Transportation Act

A. FAA's Conclusion That Other Alternatives To Hangar Replacement Were Not Prudent Was Not Arbitrary Or Capricious

1. The Need For The Project Is Supported By Substantial Evidence In The Administrative Record

It is well settled that, in evaluating alternatives under Section 4(f), an agency may reject an alternative as "not prudent if it does not meet the transportation needs of a project." *Back Bay*, 463 F.3d at 65. As a preliminary matter, petitioners argue that FAA has not established a need for the project. Br. 29. There is substantial evidence in the record, however, to support the project's defined purpose and need.

"The purpose of the project is [to] replace Hangar 24 with a modern hangar facility that would provide service, maintenance, fueling, and shelter for general aviation aircraft, particularly larger aircraft," with a need for efficient access to the runway and taxiways. App. 7; *see also* App. 106. The need for the project was based upon data showing that corporate flights at Hanscom increased by approximately 4.4 percent per year between 1990 and 2005, consistent with

national trends. Supp. App. 50; *see also* Supp. App. 51. These increases correspond with increasing business jet travel, which in 2005 accounted for 77 percent of corporate flight at Hanscom and "has been growing at a fairly consistent rate at Hanscom, increasing by 8.9 percent per year in the 1990s and by 9.8 percent per year" between 2000 and 2005. *Ibid.* Part of the increase in business jet travel resulted from a surge after the tragic events of September 11, 2001, which caused many corporate travelers to turn to private jets over commercial carriers. *See* Supp. App. 107, 110. But the long-term trend has been a general increase as well. *See* Supp. App. 51.

In addition to documenting an existing, upward trend in corporate jet use at Hanscom, the record also contains Massport's forecast that such use will continue to increase in the future, from 42,000 operations in the base year to 90,000 in the 2020 Moderate Growth Scenario and 104,000 in the 2020 High Growth Scenario (which assumes an average annual increase of 7.3 percent). *See* Supp. App. 59; *see also* Supp. App. 56.

Massport's forecasting methodology and assumptions are identified and explained in the record. *See, e.g.*, Supp. App. 52-53, 57. Plus, the record shows that actual corporate jet use in 2005 was within Massport's forecasted range five years earlier. *See* Supp. App. 54. Further, the average annual growth rate, even in

the 2020 high growth scenario (7.3%), is lower than that in the 1990s (8.9%) and between 2000 and 2005 (9.8%). *Compare* Supp. App. 50 *with* Supp. App. 59.

Along with forecasting overall corporate jet use, Massport used historic ratios of such use to the number of based aircraft to determine that based jets would also increase at Hanscom under both the moderate and high growth scenarios in 2020, accounting for an increasing share of total based aircraft over that period. Supp. App. 59. The increase in corporate aircraft use would logically drive an increased demand for maintenance, fueling, and other services for such aircraft. In other words, much of the increased growth between 2005 and 2020 "would would be attributable to business jets, which would increase the demand for GA hangars and associated facilities." Supp. App. 63.

Similarly the forecasted increase in based jet aircraft through 2020 will be "increasing the need for GA/corporate hangar and FBO space over the forecast period." *Ibid.*; *see also* Supp. App. 86 ("[A]n FBO will continue to provide an array of services to support GA activities for personal/recreational *and business/corporate flyers*."). Plus, the record establishes that "the majority of FBO activity involves servicing corporate general aviation activity." Supp. App. 40; *see also* Supp. App. 85.

Petitioners argue that FAA has not established that a third FBO is needed. Br. 21-22, 29. The EA explains, however, that not all FBOs serve the same needs

for all users. App. 11. Rather, some FBOs specialize in servicing particular brands of aircraft. *Id.* Thus, FAA explained, it is incorrect to assume that a new FBO is not needed until the other FBOs are at maximum capacity. *Id.*

Petitioners cite data from FAA's website to argue that general aviation use at Hanscom has been declining and therefore does not support the need for a new FBO. Br. 32. Petitioners' argument misses the mark. Regardless of how general aviation might be trending overall, the long-term trend in corporate jet use – a subset of general aviation – has been increasing.

FAA acknowledged that business jet use had recently decreased somewhat because of the slow economy, but it noted that the need for the new hangar had not disappeared because historically, the demand for corporate jet use has corresponded with economic growth and would likely increase again with the end of the recession. App. 14. Petitioners attack FAA's analysis by arguing (Br. 32) that *general aviation* use at Hanscom was increasing during the recent recession, which they argue shows a lack of correlation. Again, however, petitioners are not looking at trends in *business jet* use. In a 2005 noise report, Massport observed that it is "traditionally accepted that the economic health of the area influences the business jet activity," pointing out that jet operations declined during the economic downturn in the late 1980s and early 1990s, recovered during the economic upsurge lasting through 2000, then decreased slightly between January and August

2001 when the economy began to soften. Supp. App. 109-110; *see also* Supp. App. 50. FAA's business jet data reports also provide recent confirmation of decreased business jet use nationwide during the recent recession.[5] *See* http://aspm.faa.gov/apmd/sys/bjpdf/b-jet-201101.pdf (visited February 21, 2011).

Although petitioners acknowledge the general increases in business jet operations, they try to minimize the importance of those trends by arguing that the category represented "less than twenty percent" of aircraft operations at Hanscom in 2005. Br. 31. Business jets, however, are the target market for the proposed FBO services, the whole purpose of the proposed project. *See* Supp. App. 40, 85 (noting that "the majority of FBO activity involves servicing corporate general aviation activity"). By contrast, the broader category of general aviation includes other users such as flight schools, where every touch-and-go is counted as two operations: a take-off and landing. Supp. App. 48, 57.

Moreover, it is not surprising that general aviation use (as opposed to corporate jet use) has decreased at Hanscom in recent years. FAA restrictions that were imposed temporarily after September 11, 2001, on urban areas encompassing Hanscom caused many single engine piston pilots based at that airport to move permanently elsewhere. Supp. App. 108. Similarly, high fuel costs, a slow

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[5] As petitioners acknowledge, the recession occurred between December 2007 and June 2009. Br. 33 n.8.

economy, and rising fees and user costs may have also impacted small aircraft users at Hanscom. *Id.*

Petitioners argue that FAA failed to demonstrate the need for a hangar specifically to service larger jets that cannot fit in the other FBOs. Br. 29, 33. As the agency explained in the EA, however, the purpose of the project was never so limited. *See* App. 106 ("The proposed project is not to restore Hangar 24 to hangar G5 aircraft"). Regardless, there is sufficient data in the record concerning forecasted demands for large jets. For example, the average number of total daily operations of Gulfstream V and Global Express jets at Hanscom is forecasted to more than double between 2005 and 2020 under either a moderate or high growth scenario (*i.e.*, from 2.7 to more than 6.3). *See* Supp. App. 89-91.

Where FAA is acting to further its statutory policy of promoting competition,[6] it may reasonably choose to rely upon the business judgment of the airport sponsors. Requiring FAA to do otherwise would risk contravening the agency's responsibility under NEPA to develop a range of alternatives that accounts for the goals of the non-federal project sponsor. *See, e.g.*, *Roosevelt Campobello Intern. Park Comm'n v. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (upholding analysis of alternatives to proposed wastewater discharge permit for oil

[6] *See* 49 U.S.C. § 40101(a)(6), § 47101(d).

refinery where the choice of alternatives sites "was focused by the primary objectives of the permit applicant").[7]

Petitioners and *amici* rely on the Ninth Circuit's decision in *Stop H-3 Association v. Dole*, 740 F.2d 1442 (1984), which takes a narrow view of when cost may be taken into account in assessing Section 4(f) compliance. Pet. Br. 28, 35, 37; Amici Br. 9, 10, 15. That reliance is misplaced. The imprudence of other alternatives resulted from a cumulation of problems, including not only cost but poor building condition, small size, and inferior access to the taxiways of other locations.[8] The lower cost of building a new hangar rather than re-developing Hangar 24 was but one factor. *See Hickory Neighborhood Def. League v. Skinner*,

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[7] Other courts have recognized that where a federal agency is not the sponsor of a project, NEPA prohibits the evaluation of alternatives from ignoring the applicant's objectives, to which the agency should give substantial weight. *E.g.*, *Envtl. L. & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 683-84 (7th Cir. 2006); *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1324 (10th Cir. 2004); *City of Grapevine v. Dep't of Transp.,* 17 F.3d 1502, 1506 (D.C. Cir. 1994).

[8] Redeveloping Hangar 24 would cost more than constructing a new hangar of the same size suitable for G5 aircraft. Supp. App. 144. Not only that, but the existing size of Hangar 24 (18,500 square feet) "is considerably less than the 30,000-60,000 square feet that would reasonably respond to foreseeable demand" at Hanscom (App. 12), so construction of an expanded hangar would be required to meet the project need. Further, it is reasonable to assume that the benefits of obtaining a brand new facility at a lower cost would be greater than those obtained from re-using the approximately 70-year old structure, given the need for ongoing maintenance. See Supp. App. 145 (a rehabilitated structure would be "inefficient to use and maintain; below modern, health, safety, and amenity standards as an office or museum; and unusable as a hangar").

910 F.2d 159, 163-64 (4th Cir. 1990) ("*Hickory II*") (alternative may be imprudent due to the cumulation of multiple problems); *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 805 (7th Cir. 1987) (same).

In any event, the Ninth Circuit subsequently distinguished *Stop H-3* as a case in which the court "assumed [that] the rejected alternatives met the stated purpose of the project." *Alaska Ctr. for Env't v. Armbrister*, 131 F.3d 1285, 1288 (9th Cir. 1997). Consequently, the statement in *Stop H-3* that agencies may only reject alternatives due to costs when they are of "extraordinary magnitudes" has been limited to apply only "if a rejected alternative would satisfy the purpose of the project" without using 4(f) land. *Id.* at 1288-89. That is not the case here. Petitioners and *amici* cite *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), to argue that Hangar 24 could be destroyed only if FAA found that there were "truly unusual" factors present, that alternatives would result in "extraordinary" costs and would present "unique" problems. Pet. Br. 28; Amici Br. 6-10. Most courts to consider the issue, however, have concluded that transportation agencies do not have to recite any such magic words to comply with 4(f). *See, e.g.*, *Hickory II*, 910 F.2d at 162 (fact that agency did not use the terms "unique" and "extraordinary" did not compel a finding that agency violated 4(f)); *Eagle Found.*, 813 F.2d at 804-05 (same); *see also Comm. To Preserve Boomer Lake v. Dep't of Transp.*, 4 F.3d 1543, 1550-51 (10th Cir. 1993) ("mechanical use"

of the words "feasible and prudent" was not necessary to demonstrate the substantive merit of agency's analysis).

Further, as the Seventh Circuit explained in *Eagle Foundation*, the mention of "unique" problems in *Overton Park* merely indicated emphasis, not a substitute test for prudent and feasible. 813 F.2d at 804-05. Otherwise, the Supreme Court's application of the arbitrary and capricious standard – one of the most deferential standards of review – would be rendered meaningless. *See id.* Furthermore, this Court has explained that in reviewing agency action for compliance with 4(f), it must "follow the traditional approach to review of administrative action," meaning that the agency's action may be set aside only if fails to satisfy the arbitrary and capricious (or comparable) standards. *Back Bay*, 463 F.3d at 64. In all, the record here supports a conclusion that FAA's reasons for replacing Hangar 24 are "good ones, pressing ones, well thought out." *Hickory II*, 910 F.2d at 163.

2. FAA's Conclusion That Other Alternatives Were Not Prudent Was Not Arbitrary Or Capricious

Adequate evidence in the administrative record demonstrates that the other alternatives under consideration – taking no action, locating a new hangar elsewhere on the airport, and adaptively re-using the hangar – would not meet the project's purpose and need and were therefore imprudent. Petitioners argue that two alternative locations for the hangar – Worscester Regional Airport, fifty miles away, and the East Ramp – were prudent, as was re-using the hangar. Br. 36-42.

To the contrary, FAA's conclusion that such alternatives were not prudent is supported by the record and is not arbitrary or capricious.

Petitioners argue that FAA should have given more detailed consideration to the possibility of locating the FBO at Worcester Regional Airport instead of Hanscom. Br. 40. The new FBO, however, is based upon forecasted demand and increased corporate jet use at Hanscom in particular, not the region generally, as petitioners imply. A "number of aircraft *already based at the [Hanscom] airport* have expressed interest in using the [proposed] facility," and it is estimated that a third FBO can be competitive in serving itinerant aircraft that already use Hanscom. App. 18 (emphasis added).[9]

Furthermore, as FAA explained, locating the FBO at Worcester, approximately 50 miles away from Hanscom, is not practical. App. 107. That is because the FBO is designed to serve larger general aviation aircraft that already operate at Hanscom and which use that airport "because they have business to conduct in the area. Use of replacement Hangar 24 is incidental to this." App. 110. In other words, aircraft operators "make decisions on where to base their aircraft primarily by considering proximity to their place of business or residence,"

[9] Itinerant operations are those that in the process of arriving or departing from Hanscom traverse airspace beyond the airport. *See* Supp. App. 45. By contrast, local operations are conducted within the sight of Hanscom's tower and usually involve pilot training or practice take-offs and landings, *e.g.*, "touch-and-go" operations. Supp. App. 45.

and they are "unlikely to decide to come to [a particular airport] because of the availability of additional hangars" or, for that matter, FBO services. App. 103-104; *see also* App. 18. Just as building a third FBO at Hanscom would not induce corporate pilots to fly there merely due to the presence of a new facility for fuel and maintenance (*see* App. 18), so, too, is it reasonable to infer that a new FBO at Worcester would not serve the needs of increasing numbers of corporate jets at Hanscom by diverting them fifty miles away.

FAA provided numerous reasons why locating the proposed FBO on the East Ramp was not prudent. *See* App. 12. For one, the East Ramp is more remote from the terminal area and other FBOs (*id.*) – a location on the edge of the East Ramp would be approximately more than 5,000 feet in taxiing distance from the terminal area, whereas a location at Hangar 24 would be approximately 3,000 feet. *See* AR:125; *see also* Supp. App. 41, App. 139. Consequently, aircraft dropping passengers at the terminal would have to taxi a longer distance for fuel and service. Furthermore, large jet aircraft would have to taxi through many smaller parked aircraft in the busiest part of the airport (*see* Supp. App. 41), thereby complicating air traffic control. *See, e.g.*, FAA Advisory Circular 150/5030-13, at 117 (2009), *available at www.faa.gov/documentLibrary/media/Advisory_Circular/150_5300_13.pdf* (visited Feb. 25, 2011) (siting of administration and FBO buildings should be "sufficiently separated to preclude conflict between airplanes

operating from these areas."). Locating one FBO remotely from the other two also contradicts good airport planning that dictates locating similar activities in proximity. *See id.* (noting that the function of an aviation-oriented building "in relation to other aviation activities helps determine its optimum location"). The more remote location would also be a less attractive candidate for prospective FBO developers. *See* App. 12. Additionally, the East Ramp would not be efficient for public passengers because access to that area is through the adjacent Air Force base, a secure military facility. *Id.*[10]

Further, the airport is "approaching build-out," meaning that there are only two main areas for general aviation improvements in the foreseeable future – the East Ramp and Hangar 24. App. 11-12. As the EA pointed out, airside space (*e.g.*, beside runways and taxiways) at Hanscom is scarce. App. 12. That is especially so given that Massport has removed unused airside pavement at Hanscom and tries to direct new projects to existing paved areas, thereby reducing the use of

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[10] Although petitioners argue that the record should contain more detail supporting this point, they fail to make the distinction between the clientele for an FBO – principally, itinerant corporate travelers. – and the users of the East Ramp, who base their aircraft at tie-downs there. As local users, the latter group is better situated to acquire security badges that allow repeat access through the restricted military base. *See* Supp. App. 186 (discussing badge system at public meeting); *see also* Supp. App. 60 (showing badged access route across Air Force base).

undeveloped land. *See* Supp. App. 60.[11] Aircraft are already based on the East Ramp at tie-downs, and Massport has already proposed to construct hangars there to house those aircraft. *See* App. 12; App. 100. Constructing a replacement hangar on the East Ramp would preclude construction of these needed facilities at a location where the aircraft are presently parked. *See* App. 12. Accordingly, FAA concluded that it would be a more efficient use of existing space to locate the proposed FBO closer to the other existing FBOs, and the new hangars on the East Ramp. *Ibid.* Nothing in petitioners' brief establishes that such a conclusion was arbitrary or capricious.

Petitioners' argument (Br. 41-42) that re-use of the hangar was prudent is based chiefly on its contention that the record fails to support a conclusion that demand for corporate jet use or FBO services is increasing. That argument fails for the reasons explained *supra*, Part I.A.

Petitioners also argue that FAA disregarded one commenter's suggestion that it should be feasible to increase the height of Hangar 24 because the roof had already been increased once in the past. Br. 41. But that was at the time of the

[11] Because the project would re-develop an area which is already developed, it makes sense that the "proposed Hangar 24 redevelopment would not impact wetlands." Supp. App. 78; *see also* Supp. App. 77. Petitioners nonetheless argue that the record does not support such a conclusion. Br. 22-23. Not true. Wetlands were identified and mapped in the 2005 ESPR. *See* Supp. App. 76. A comparison of the wetlands map to the map depicting Hangar 24 shows that there are no wetlands at the Hangar. *Compare id. with* App. 139.

hangar's reconstruction, more than 60 years ago. App. 160. Since that time, the hangar – originally constructed in southern Georgia, has suffered the weight of many New England winter snow-loads. Supp. App. 115. Indeed, Massport's consultant, HNTB, observed that raising the roof of the structure and replacing the main hangar doors, as would be required to accommodate G5 aircraft, "may or may not be structurally feasible." Supp. App. 142. Even if it were, the cost of refurbishing the building for use as a hangar would be more than constructing a new hangar. *Ibid.*; *see also* Supp. App. 144.

3. The Project Purpose Was Not Defined Too Narrowly

Petitioners argue that FAA defined the purpose of the proposed amendment to the airport layout plan too narrowly, which they argue prejudged the analysis of alternatives. Br. 43. The Court may not consider that argument, however, because Petitioners failed to raise it during the administrative process. In reviewing the FAA's order, the Court "may consider an objection . . . only if the objection was made in the proceeding conducted by the . . . Administrator or if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d); *see also City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002). The same result is also compelled by the general administrative law principle that parties must raise particular objections before the agency. *See, e.g.*, *Pub. Citizen*, 541 U.S. at 764-65. The argument is not raised in petitioners'

comments. *See* App. 37-38, 68-87, 92-93, 110-11, 119-21, 124. Nor have they provided any reasonable ground for not raising the issue before the agency, especially given their extensive participation in the administrative process. *See, e.g., Alaska Airlines, Inc. v. Transp. Sec. Admin.*, 588 F.3d 1116, 1122 (D.C. Cir. 2009) (finding argument forfeited); *Olmsted Falls*, 292 F.3d at 274.[12]

Regardless, petitioners' claim fails on its merits. An agency's definition of objectives will be upheld so long as the objectives that the agency chooses are reasonable. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). As explained *supra*, the agency is required to "take into account the needs and goals of the [non-federal] parties involved in the application." *Id.*; *see also Roosevelt Campobello*, 684 F.2d at 1047.

Here, the project's purpose is to "replace Hangar 24 with a modern hangar facility that would provide service, maintenance, fueling, and shelter for general aviation aircraft, particularly larger aircraft," with a need for efficient access to the runway and taxiways. App. 7; *see also* App. 106. As previously explained, Massport's environmental studies demonstrated a generally increasing use and forecasted future use of Hanscom by corporate jets, which were reasonably

[12] One of petitioners' comment letters makes a fleeting request for a "clear, unbiased assessment" of the need for an additional FBO. App. 38. The rest of the letter, however, nowhere indicates that petitioners thought that the statement of purpose and need was too narrow.

predicted to drive a demand for FBO services such as fueling and repair. Further, the opinion of Massport's consultant who assessed the condition of Hangar 24 was that the structure should be demolished given that the cost was equivalent to a similarly sized new hangar, and that any rehabilitated structure would be "inefficient to use and maintain," and not up to modern health and safety expectations. Supp. App. 144. FAA's purpose legitimately took Massport's goals into account. *See Roosevelt Campobello*, 684 F.2d at 1047.

At the same time, FAA's analysis was made in objective good faith, and nothing indicates the presence of any bias. *See Envtl. Def. Fund*, 470 F.2d at 296. FAA spent approximately two years engaging in a public process to evaluate the impacts of the proposal and multiple alternatives in an environmental assessment and 4(f) analysis, and to attempt to negotiate a resolution of the adverse effect of the proposal on the Hangar directly with some of the petitioners through the NHPA consultation process. The whole purpose of defining the project's purpose and need is to establish a basis for the alternatives analysis, which the Advisory Council on Historic Preservation said was "exhaustive" here. App. 47. The EA process was hardly a "foreordained formality." *Busey*, 938 F.2d at 196. FAA solicited public comments on a draft version of the EA even though it was not required to do so. The EA itself considered alternatives that did not involve replacing the hangar, including doing nothing to destroy the hangar, locating the

new hangar elsewhere, and re-using the existing hangar as a museum. App. 10-13. In sum, the purpose and need statement was reasonable and did not hinder the objective development and analysis of alternatives.

B. FAA's Conclusion That The Project Incorporated All Possible Planning To Minimize Harm To Historic Sites Was Not Arbitrary Or Capricious

Section 4(f)(2) of the Act requires that the project "includes all possible planning to minimize harm" to the historic site. 49 U.S.C. § 303(c). An agency's determination that a particular plan minimizes harm to historical sites deserves substantial deference. *Conservation Law Found. v. Fed. Hwy. Admin.,* 24 F.3d 1465, 1476-77 (1st Cir. 1994); *see also Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 702 (3d Cir. 1999) (noting that the standard under 4(f)(2) "need not be quite so high, since by the time 4(f)(2) is reached, some historically significant property will necessarily be used").[13] Further, FAA may still reject an

[13] Both petitioners and *amici* argue that there is a possibility that all or part of Hangar 24 might be incorporated into a new facility. Pet. Br. 44; Amici Br. 14. That alternative, however, was never raised in the public comments and therefore, pursuant to Section 46110(d), cannot be raised now for the first time in litigation. *See Olmsted Falls*, 292 F.3d at 274; *see also Pub. Citizen*, 541 U.S. at 764-65. *But see Dubois*, 102 F.3d at 1290. Regardless, such alternative would suffer from many of the same problems as re-using the facility for a hangar – *i.e.*, requiring "substantial and impractical" building modifications to allow the structure to function for its intended use in compliance with current building codes. App. 12. Plus, Massport is already required to allow a qualified historic preservation consultant to identify selected architectural elements, which to the extent feasible, Massport will salvage. App. 131; *see also* Supp. App. 113 (requesting signage to be salvaged).

alternative that minimizes harm under (f)(2) if the alternative is infeasible or imprudent. *See Slater*, 176 F.3d at 702; *see also Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 62 (4th Cir. 1990) ("*Hickory I*").

As FAA concluded, because avoidance or reuse of Hangar 24 was not prudent or practical, there were no means to minimize impacts to the structure itself, apart from retrieving minor parts of the hangar such as old signage for commemorative use. App. 21. The memorandum of agreement filed with the Advisory Council includes a detailed plan for mitigating the loss of the hangar through archival documentation and display at a publicly accessible location at Hanscom. *See* App. 130-32. The agreement also commits Massport to work cooperatively to identify an appropriate site for a future aviation museum. App. 132. Although petitioners argue that Section 4(f)(2) required FAA to consider a host of options that involve preserving all or part of Hangar 24, that simply repeats their arguments that the Hangar should not be demolished. FAA already considered alternatives that involved avoiding demolition but noted that they were not prudent. For the same reasons, FAA was not required to consider avoiding demolition on the mere grounds that it would minimize harm. *Conservation Law Found.*, 24 F.3d at 1476-77.

II. FAA Complied With The National Historic Preservation Act

A. The Area Of Potential Effects Was Not Irrational

Petitioners first argue that FAA violated the NHPA by failing to account for the indirect and cumulative effects of replacing Hangar 24 when it designated the area of potential effects. Br. 49. This argument is meritless. Indirect effects were fully considered and determined to be minimal, and therefore not warranting an extension of the area of potential effects.

Instead of arguing that the new hangar would directly increase noise,[14] petitioners contend that it would indirectly increase noise by inducing additional jet traffic. Br. 49. That contention, however, is refuted by the record. As FAA explained, hangar replacement is "unlikely to induce any increase" in airport operations because "[m]any of the corporate jets and other aircraft that would be served by the facility already operate at Hanscom." App. 18. Except where an airport is capacity constrained, the EA explained – which is "not presently the case

[14] Actual direct effects from the demolition and replacement of the hangar, and direct effects of future operations – fueling and maintenance – would be insignificant. See App. 110. In particular, the larger building mass of the new hangar may increase the noise shielding of airport operations. App. 109, 110. Also, the noise of building mechanical systems is comparable to that of nearby industrial buildings, and of course, the future proponent of the hangar development would be responsible for complying with building codes and obtaining any required local noise permits. App. 110. Moreover, although petitioners argue that the area of potential effect did not adequately encompass all direct effects (Br. 48), they fail to identify any other historic sites that would have been captured by expanding the area to additional acres on the airport property.

at Hanscom" – airport infrastructure such as runways, taxiways, apron areas, and hangars contributes "at most only incidental growth at an airport." *Ibid*. The reason is that aircraft operators make decisions on where to base their aircraft "primarily by considering proximity to their place of business or residence," and less on the extent to which an airport provides hangars, fuel or maintenance services. *See* App. 103-104. FAA specifically cited its experience with construction of a new runway at Logan Airport and a new terminal building at Worcester as supporting a poor correlation between airport infrastructure development and induced demand. App. 18.

As additional reasons for concluding that any noise from induced airport operations would be insignificant, FAA pointed out that the apron area and taxiway adjacent to Hangar 24 are already used by aircraft, and that use would not significantly change with a new hangar. *See* App. 109-110. Also, the noise environment for the neighborhoods closest to the airport is dominated by landings and departures on the shorter runway, not the longer one that would more likely be used by the larger aircraft associated with the new FBO. *Id.*

Despite FAA's opinion that induced growth was unlikely, the agency nonetheless estimated the potential induced growth that might occur under a "worst-case" scenario. App. 20. FAA looked to an analysis it had prepared for development of the East Ramp, which includes construction of approximately six

to eight new hangars (approximately 320,000 to 400,000 total square feet) where currently there are aircraft tie-downs. *Id.*; *see also* Supp. App. 202. That analysis assumed a worst case scenario that the new airport infrastructure would attract all new aircraft to Hanscom. App. 20. Using the 2005 base year data from the ESPR, Massport's consultant revised the forecasted growth to reflect the current, lower levels of activity under the slowed economy and increased fuel prices.[15] The consultant estimated a net increase of approximately 26 daily civil aircraft operations (from approximately 504 under a no-build scenario to approximately 530 under the build scenario) by the time the East Ramp is completed in 2015. *See* App. 19-20; *see also* Supp. App. 202.

Using FAA's integrated noise model, the increased operations from the East Ramp translate to a maximum 0.3 decibel ("dB") increase to the day-night average sound level ("DNL") as of 2015 (the estimated year of completion for the East Ramp) at a small number of close-in residences near the approach end of the major runway and on the opposite side of the airport from Hangar 24 and the Minute Man National Historic Park. *See* App. 20; *see also* Supp. App. 192. Together with the East Ramp, FAA estimated that the redeveloped Hangar 24 would cause, at worst,

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[15] In analyzing the need for the project, FAA acknowledged that the forecasts from the 2005 ESPR turned out to be high in light of the recession. App. 14. FAA nonetheless concluded that even if operations decline for two to three more years, it is desirable as a policy matter for the facilities to be operational when an economic recovery occurs. *Id.*

a cumulative increase of approximately 0.5 dB DNL. App. 20. The agency considers a 1.5 dB increase at or within the 65 dB DNL contour as the threshold of perception and significance when evaluating a project. *Id.*; *see also* Supp. App. 20. Thus, FAA concluded that any potential increased noise would not be significant and did not warrant increasing the area of potential effects – a conclusion that deserves deference. *See Town Of Winthrop v. FAA*, 535 F.3d 1, 14 (1st Cir. 2008); *see also Town of Marshfield v. FAA*, 552 F.3d 1, 5 (1st Cir. 2008) (upholding FAA's assessment of noise effects for NHPA purposes).[16]

Petitioners argue that FAA did not adequately explain how it estimated that the Hangar 24 redevelopment by itself would increase the noise level by 0.2 dB DNL. Br. 58. That argument is flawed in several respects. First, it ignores that FAA's primary conclusion was that the Hangar 24 redevelopment would not likely cause *any* induced growth because Hanscom is not presently capacity-limited. App. 18. The estimate of what might occur under a "worst-case" scenario is not required by NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55 (1989). Nor have petitioners provided any authority that NHPA's requirements are any different – indeed, the requirements under the two statutes are

[16] The Advisory Council, responding to concerns by one of *amici* concerning the area of potential effects, stated that it "believe[d] that the FAA has addressed cumulative effects resulting from an increase in air traffic" through the draft EA. AR:119.

often similar. *E.g., Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 58 (1st Cir. 2001); *see also United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir.1993) ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

Additionally, petitioners' argument ignores several factors that make the East Ramp, another hangar development project, a reasonable benchmark – albeit an overestimate – for comparing the potential induced noise for Hangar 24 redevelopment. Both projects would involve hangar construction and sheltering or servicing of aircraft. But the East Ramp is considerably larger – up to approximately 400,000 square feet of hangar space compared to the maximum 60,000 square feet for redeveloped Hangar 24. *Compare* App. 14 *with* Supp. App. 202.

The East Ramp project is also intended to shelter aircraft that are already stored at Hanscom. *See* Supp. App. 204. By contrast, a replacement for Hangar 24 will substantially serve "itinerant aircraft not based at Hanscom," which "will be using the airport not because of the availability of a new FBO but because the airport is proximate to their business destination." App. 104. That, the EA

explained, is the reason for the "lesser amount [of estimated induced noise] associated with the Hangar 24 replacement." *Id.*[17]

In addition to noise, petitioners and *amici* argue that the area of potential effects should be greater due to alleged indirect effects upon the views of the airport from nearby historic properties. Pet. Br. 49-50; Amici Br. 18-19. On the contrary, however, the record does not demonstrate that a new hangar "may well be visible" from adjacent historic properties. Amici Br. 18. Quite the opposite, actually, as the 2005 ESPR explains: "Despite its proximity to the Minute Man National Historical Park and adjacent communities, the airport is visible from few locations due to area topography." Supp. App. 37.

Nor are *amici* correct that the new hangar building is likely to be almost double the height of Hangar 24. Amici Br. 19. True, the door height may be increased up to a maximum of 45 feet. But already the current hangar height is greater than the door height. *See* Supp. App. 126 (exterior photos). Even if the

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[17] The leading case regarding induced growth, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985), is inapposite. In *Marsh*, a NEPA challenge to federal funding and permitting for construction of a causeway and port leading to an otherwise undeveloped island, the Court identified three reasons why the agency should have better analyzed induced growth: first, the record made it "nearly impossible to doubt" that building the causeway and port would lead to further development; second, the plans for further development were "precise enough" for the agency "usefully to take . . . them into account"; and third, once the port and causeway were complete, "pressure to develop the rest of the island could well prove irreversible." 769 F.2d at 878-89. No remotely similar facts are present here.

new hangar occupied the maximum 60,000 square feet, it would not be the largest hangar facility at Hanscom. Hangar 21, a double-hangar occupied by an FBO, Jet Aviation, located roughly between Hangar 24 and the airport terminal, occupies a total of approximately 74,000 square feet. Supp. App. 39-40. The size of a new hangar would therefore fit within the profile of other existing hangars at Hanscom. Given that Massport is requiring the building height and roof design of any replacement hangar to "be respectful of views from off-site vantages," it is reasonable to assume that the height of Hangar 24 would be comparable to that of other similarly-sized facilities already present at Hanscom. Supp. App. 38.

Petitioners refer to one individual's comment that Massport left the hangar doors open to the elements after taking control of the hangar from MIT in 2001. Br. at 13, 42, 43. Putting aside that the basis for the commenter's personal knowledge about such a matter is questionable,[18] the same commenter notes that MIT did the very same thing, "operat[ing] a Gulfstream jet from Hangar 24 for 7 years with the tail being exposed similar to most commercial hangars." App. 32.

Finally, petitioners mention potential indirect effects they argue might occur from a fire if the future hangar includes fuel storage. Br. 50. The EA responded to those concerns, however, stating that to the extent that the future replacement

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[18] The commenter did not work at the hangar after 2001, and the earliest time he notes returning to visit the hangar's interior was 2007. App. 35.

hangar would store fuel, such activity would be regulated by the State Fire Marshall's Office. Storage tanks are typically located away from aircraft operations, and fuel trucks typically refill or draw down from tanks in structural containment areas, all of which would minimize fire risk. *See* App. 110-111.

B. FAA's Conclusion That Criterion C Did Not Favor Making Hangar 24 Eligible For Listing On The National Register Was Neither Arbitrary Nor Capricious

Petitioners next challenge FAA's determination that Hangar 24 was eligible for listing on the National Register only under criteria A and B in the applicable regulation, based upon criteria A and B in the applicable regulation, 36 C.F.R. § 60.4, but not criterion C, which concerns buildings "that embody the distinctive characteristics of a type, period, or method of construction, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction." *Id.*[19] Contrary to petitioners' contention, FAA's conclusion had ample support. As Massport pointed out in a letter to the SHPO, to meet criterion C the hangar would have to be architecturally significant first in the context of World War II military hangars, the era when it was constructed. Supp. App. 160. But the additions (*e.g.*, auxiliary buildings) and modifications over the years compromise the integrity of the original hangar. *Ibid.*

[19] Criteria A and B pertain to a structure's association with historic events and persons, respectively. 36 C.F.R. § 60.4(a), (b).

Nor is the hangar architecturally significant for any Cold War era features, as the various mechanical systems related to the hangar's use during those years have been removed. *Ibid*. The SHPO agreed with FAA's conclusion. App. 111; *see also* Supp. App. 176.

Petitioners argue that they submitted "new evidence" that FAA failed to consider, primarily addressing the hangar's supporting truss. Br. 53-54. But as FAA pointed out in response to those comments, it was aware of the trusses at the time it made its original determination that the hangar was eligible for listing based only upon criteria A and B. *See* Supp. App. 195; *see also* App. 125. In particular, the HNTB report already noted the presence of the truss and explained that although they could potentially be moved and installed on a new building, the new hangar would have to be exactly the same size, and it would cost more than constructing an entirely new hangar. *See* Supp. App. 143; *see also* Supp. App. 126, 132.

While various other building features are mentioned by petitioners' consultant, one petitioner stated that the hangar's allegedly "unique architectural and engineering attributes" were previously identified at a public meeting with FAA in June 2008. A.R. 117 at 1. That meeting was attended by the Advisory Council, which ultimately supported FAA and declined to become a party to the consultation process. App. 47; *see also* Supp. App. 168. The supposed "new

evidence" on which petitioners rely fails to demonstrate that FAA's conclusion that the hangar was not eligible for listing under Criterion C was arbitrary and capricious.[20]

III. FAA Complied With The National Environmental Policy Act

A. Direct, Indirect, and Cumulative Noise Effects Were Adequately Analyzed

As already discussed, FAA reasonably concluded that the approved plan would not result in any significant direct, indirect, or cumulative noise impacts. Petitioners argue that FAA's analysis violated NEPA because it allegedly failed to compare the aggregate noise from the existing operations of the airport to the sound environment that would occur if the airport were not present at all.[21] Br. 59-61. Petitioners' argument is misguided.

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[20] *Amici* argue that FAA failed to initiate consultation early enough. Amici Br. 20-21. Because that argument has not been raised by petitioners, the Court should not consider it. *See United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 6 (1st Cir. 1996). Regardless, consultation began more than two years before the airport layout plan amendment was approved, and more than a year and a half before a draft EA was released to the public. That provided adequate time for public involvement and for FAA to consider a "broad range of alternatives" pursuant to 36 C.F.R. § 800.1(c), including taking no action, locating the FBO elsewhere on the airport, re-using Hangar 24 as a hangar or museum, as well as removing and replacing the hangar. App. 11-14. Further, *Amici* do not identify any additional information they would have brought to FAA's attention had consultation commenced sooner or explain how such information would have made a difference. *Cf. Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592 (9th Cir. 2010).

[21] *Amici* do not expressly join petitioners' argument that FAA violated NEPA.

Cumulative effects are defined as the incremental effect of the proposed action when added to other past, present, and reasonably foreseeable future actions. *See* 40 C.F.R. 1508.7. FAA's analysis is consistent with that definition. FAA identified the only other present or reasonably foreseeable action with potential environmental impact – East Ramp development – and added the potential noise from that project (0.3 dB), as well as the incremental estimate of noise from the Hangar 24 project (0.2 dB), to the existing baseline of noise at two of the most likely to be affected historic sites, approximately 61 dB. *See* Supp. App. 201. Not only was the incremental increase less than 1.5 dB DNL, but the total increase when added to the aggregate was less than 65 dB DNL.[22]

Petitioners seem to believe that FAA's analysis did not account for the absolute magnitude of noise from existing airport operations. But that is recognized by FAA ensuring that the total DNL at sensitive historic sites does not exceed 65 dB. Other courts have uniformly recognized that agencies may conduct their cumulative effects analysis by relying upon such an environmental baseline to incorporate the effects of past projects. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir. 2008); *Coal. on Sensible Transp.,*

[22] The DNL with the East Ramp constructed as of approximately 2015 is projected to be 61.5 and 61.0 at the only two nearby historic sites above 60 dB. *See* Supp. App. 201. Adding another 0.2 dB from the worst-case estimate from the Hangar 24 replacement yields 61.7 and 61.2, well below the 65 dB DNL, especially considering that the decibel scale is logarithmic.

Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987); *Piedmont Heights Civic Club v. Moreland*, 637 F.2d 430 (5th Cir. 1981). The Council on Environmental Quality also approves such an approach. *See League*, 549 F.3d at 1217. Petitioners' arguments on this point misapprehend the issue and lack merit.

Petitioners argue that the analysis should have analyzed effects from development of areas marked on the airport layout plan for "future aviation or aviation compatible use." Br. 59; see also AR 125. But that phrase merely indicates that the areas "may be suitable for future aviation-related land uses," or that they are "potential locations" for such future uses, not that there is a reasonably foreseeable plan to develop them. Supp. App. 61; *see also* App. 12 ("Additional potential general aviation areas in the North Airfield Area are either not presently owned by Massport or involve considerable redevelopment prior to aviation use."). An airport layout plan does not commit a sponsor to future development, just as it does not commit FAA to funding such development. *See* Supp. App. 25. Nor can FAA compel such development. *Village of Bensenville v. FAA*, 457 F.3d 52, 64-65 (D.C. Cir. 2006).

If and when Massport wishes to develop a specific project in those areas, it will first need to obtain FAA's approval, pursuant to 49 U.S.C. § 47107(a)(16)(B), to depict the project on the airport layout plan – an action that will trigger the requirements of NEPA. *See* Supp. App. 18. But because there is no actual

proposal to amend the plan to reflect a specific development project in those areas, FAA would be forced to speculate what might actually occur in those areas – an exercise that is neither required by nor consistent with NEPA. *See Town of Marshfield*, 552 F.3d at 4-5; *see also City of Oxford v. FAA*, 428 F.3d 1346, 1356 (11th Cir. 2005).[23]

Petitioners argue that FAA's noise analysis was deficient because the agency's internal direction states that the 65 dB threshold does not adequately address the effects of noise on visitors to areas within national parks or wildlife refuges where other noise is very low "and a quiet setting is a generally recognized purpose and attribute." Br. 62 (quoting FAA Order 1050.1E at A-61, ¶ 14.3).

Hanscom is not located in a pristine natural setting. The closest national park, Minute Man Park, was established for several purposes – preserving and interpreting the historic landscape associated with the first battle in the American Revolution and the homes of several nineteenth-century American writers – but none of these includes a quiet setting as a generally recognized purpose or attribute. *See* 16 U.S.C. § 410s(a). Further, the original construction and operation

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[23] Petitioners complain about unidentified "shovel-ready" projects that were not part of the cumulative effects analysis. Br. 58-59. FAA is aware of only one such project, which involved re-paving part of an existing runway. For the same reasons that FAA articulated for hangar re-development, its experience is that such pavement rehabilitation projects do not induce growth at an airport like Hanscom, which is not capacity-constrained. *See* App. 18.

of Hanscom, which dates back to World War II, predates the designation of the park by more than a decade. *See* Pub. L. No. 86-321, 73 Stat. 590, 591 (1959).

In any event, noise should not be an issue, because the DNLs for nearby historic sites are well below 65 dB. For instance, even under an assumption of "high" development, all 30 of the sites analyzed within Minute Man Park were still projected to be under 57 dB DNL in 2020. Supp. App. 75. Likewise, less than 10 percent of the nearby national wildlife refuge would experience 55 dB DNL in 2020 under a high development scenario, and none of the refuge would experience 65 dB DNL. *See* Supp. App. 84.[24] Other potentially sensitive sites –including Walden Pond – were also considerably below the 65 dB threshold, even under the 2020 high development scenario. *See* Supp. App 70; *see generally* Supp. App. 68-74. Contrary to petitioners' argument (Br. 62-63), the EA responds to their noise consultant's comments. App. 109-110. For starters, the consultant's concerns about a noise berm are misplaced. That berm was part of the analysis of potential noise impacts from the East Ramp project to residences on the northeast side of the airport. As FAA acknowledged, the berm "would have no effect on Hangar 24 operations." App. 110. Contrary to petitioners' argument, the analysis of noise to

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[24] Congress has expressly provided that airplane overflights may continue above national wildlife refuges without requiring the Secretary of the Interior, who oversees such refuges, to determine whether they are compatible with the refuge. *See* 16 U.S.C. § 668dd(d)(4)(A).

historic sites located south and southwest of the airport did not depend upon the berm. Br. 63. The relevant conclusion from the noise analysis was that the DNL at historic sites close to Hangar 24 (NC-18 and NC-19, both located on Virginia Road, south of the airport) would increase by a maximum of 0.3 dB from the East Ramp project. Supp. App. 201. Nowhere does *that* conclusion depend upon the presence of the berm, which is only considered in analyzing the noise from the neighborhood closest to the East Ramp. *See id.*

FAA also addressed the consultant's comments about increased ground operations at a new FBO and noise from the proposed building mechanical systems. App. 109-110. FAA explained that the activities of an FBO – aircraft maintenance, repair, and refueling – are not noise sensitive. App. 110. Such activities would be located either in or on the airport side of the building, which would operate effectively as a noise shield. *Id.* Further, noise from mechanical systems would be similar to that from existing industrial buildings similar distances from the nearby residences and thus would not be incompatible with the community. *Id.* Plus, a future proponent would have to comply with any applicable local noise and building codes. *Id.* Finally, as previously mentioned, aircraft are already operating on the taxiway and apron at Hangar 24, and any additional aircraft associated with the hangar – although unlikely – would not operate on the runway that more directly affects petitioners. *See* App. 109-110.

B. FAA Did Not Engage In Segmentation

Finally, FAA did not violate NEPA by segmenting its analysis, as petitioners contend. Br. 64-65. Segmentation occurs where an agency fails to analyze sufficiently related proposed federal actions in the same NEPA document. *See Marsh*, 769 F.2d at 881; *see also* 40 C.F.R. 1508.25(a). The main reason for a rule prohibiting segmentation is so that an agency cannot avoid preparing an EIS by "terming an action temporary or by breaking it down into small component parts." 40 C.F.R. 1508.27(b)(7). In order for segmentation to occur, however, there must be at least one other *proposal* for major federal action that is actually pending before the agency. So for instance, in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Supreme Court declined to require the Department of the Interior to prepare a single comprehensive EIS for regionwide coal development where there was no proposal for any such development on a regionwide basis and the pending, proposed actions were not sufficiently related. *Id.* at 414-15.

Here, the proposed action at issue was the amendment of the airport layout plan to reflect future demolition of Hangar 24 and construction of a new FBO facility in its place. Petitioners fail to identify any other proposal for federal action pending before FAA that they contend was required to be analyzed in the EA. Although petitioners refer vaguely to the failure to analyze impacts from building an FBO in the future (Br. 64), the EA analyzed not just demolition of Hangar 24

but also the construction of the FBO. Also, as explained *supra*, FAA provided a reasoned explanation of why induced growth was not expected at all. Further, FAA analyzed what induced growth might occur under a worst case scenario. That is more than what NEPA requires. *See Robertson*, 490 U.S. at 354-55.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 28, 2011, I electronically filed the foregoing RESPONDENT'S ANSWERING BRIEF with the United States Court of Appeals for the First Circuit by using the Appellate Case Management / Electronic Case Filing (CM/ECF) system. According to the CM/ECF system, the following are registered as ECF Filers, and they will be served by that system:

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Statutory Addendum

National Historic Preservation Act
16 U.S.C. § 470f A-1

Department of Transportation Act, Section 4(f)
49 U.S.C. § 303(c) A-2

Code of Federal Regulations
36 C.F.R. § 60.4 .... A-3

Title 16, United States Code

§ 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

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 part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

Title 49, United States Code

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

* * *

(c) APPROVAL OF PROGRAMS AND PROJECTS.—Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) 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 an historic site of national, State, or local significance (as determined by the 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.

* * *

36 C.F.R. PART 60—NATIONAL REGISTER OF HISTORIC PLACES

§ 60.4 Criteria for evaluation.

The criteria applied to evaluate properties (other than areas of the National Park System and National Historic Landmarks) for the National Register are listed below. These criteria are worded in a manner to provide for a wide diversity of resources. The following criteria shall be used in evaluating properties for nomination to the National Register, by NPS in reviewing nominations, and for evaluating National Register eligibility of properties. Guidance in applying the criteria is further discussed in the "How To" publications, Standards & Guidelines sheets and Keeper's opinions of the National Register. Such materials are available upon request.

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

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