

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,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent,

MASSACHUSETTS PORT AUTHORITY,
Intervenor.

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

PETITIONERS' OPENING BRIEF

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**REASONS WHY ORAL ARGUMENT
SHOULD BE HEARD**

Pursuant to Local Rule 34.0 of this Court, Petitioners respectfully inform the Court that they believe oral argument in this case is essential because it would significantly aid the Court's decisional process concerning the complex facts and legal arguments in the brief attached hereto. Oral argument would assist the Court in determining whether the Federal Aviation Administration fulfilled the pertinent substantive and procedural requirements before permitting the demolition of historic Hangar 24 at Hanscom Field.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review, under 49 U.S.C. § 46110, a final order by the Federal Aviation Administration (“FAA”), an agency of the U.S. Department of Transportation, acting under 49 U.S.C. § 40101 *et seq.*¹ The contested order authorized the demolition of the historic Hangar 24 at Hanscom-Bedford Field (“Hanscom”) and redevelopment of the Hangar 24 site. Petitioners timely filed a petition for review with this Court on August 16, 2010, within 60 days of the June 18, 2010 effective date of the FAA order. Petitioners timely file this opening brief on December 17, 2010, pursuant to the Court’s Order of November 30, 2010. All legal issues presented in this case were raised in oral comments and formal written objections made to FAA and each Petitioner (other than Walden Woods Project) was a consulting party below or provided public comment.

PETITIONERS’ STANDING

Petitioners satisfy the Article III and prudential standing requirements for each asserted claim.

Petitioner Safeguarding the Historic Hanscom Area’s Irreplaceable

¹ This Court “has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.” 49 U.S.C. § 46110(c).

Resources, Inc. (“SHHAir”) is a nonprofit organization with 1,300 households as members. Declaration of Margaret Coppe (“Coppe Dec.”) ¶¶ 2, 4. SHHAir’s mission is to safeguard the historic Hanscom-area communities – the birthplace of our nation – from the increased noise, ground traffic, and environmental pollution that would result from the expansion of air traffic or the intensification of the use of Hanscom. Id. ¶ 6. Accordingly, SHHAir seeks to preserve Hangar 24 and the historically significant sites surrounding Hanscom. Id. ¶ 9.

Petitioner Save Our Heritage, Inc. (“SOH”) is a nonprofit corporation with its principal office in Concord. Declaration of Anna West Winter (“Winter Dec.”) ¶ 2. SOH’s mission is to achieve permanent protections for the national historical, cultural, and environmental resources in the towns of Concord, Bedford, Lincoln and Lexington in order to prevent their degradation by pollution, noise and development. Id. ¶ 3. SOH seeks to preserve historic Hangar 24. Id. ¶ 14. SOH owns historic landmarks located within five miles of Hanscom, including the Colonel James Barrett Farm House, which is listed on the National Register of Historic Places (“National Register”) and was the military objective of the British march on Concord on April 19, 1775 that started the American Revolution. Id. ¶ 7. Barrett’s Farm is located directly under the flight path of Hanscom’s main runway

and each flight overhead from Hanscom diminishes the pastoral setting SOH strives to preserve there. Id. ¶ 9. SOH’s efforts to protect living history sites requires the preservation of natural landscapes and soundscapes. Id. ¶ 13.

Petitioner Concord Historical Commission (“CHC”) is a commission of the Town of Concord. Declaration of Nancy Butman (“Butman Dec.”) ¶ 2. CHC’s mission is to “identify and safeguard for posterity the unique physical attributes of the town, as exemplified by the various sites, buildings, and other edifices of historic, literary, architectural, or archaeological significance to Concord.” Id. ¶ 5. As Concord’s official watchdog with respect to local historical resources, CHC speaks on behalf of Concord in such matters. Id. CHC opposes the demolition of Hangar 24 as the worst fate that can befall a historic structure. Id. ¶ 8. Pursuant to Concord bylaws, CHC has classified Hangar 24 as one of the unique physical attributes of the town’s historic legacy that CHC works to protect pursuant to its mission. Id. The Town of Concord owns other historic landmarks located within approximately five miles of Hanscom field, including the former Hebb lands, a 16-acre parcel located between Virginia Road and Lexington Road that is historically significant because of Concord’s history as an agricultural center. Id. ¶¶ 10-11. Minute Man National Historic Park (“Minute Man”) is located adjacent to the airport in

Concord and protects the “Battle Road” along which the Minutemen and British Regulars fought the first battle of the American Revolution. Id. ¶ 18. CHC seeks to protect this invaluable historic park from increased air pollution, noise pollution and vehicular traffic from the proposed expansion of Hanscom. Id.

Petitioner Walden Woods Project (“WWP”) is a nonprofit organization headquartered in Lincoln. Declaration of Kathleen R. Anderson (“Anderson Dec.”) ¶ 2. WWP preserves the land, literature and legacy of Henry David Thoreau to foster an ethic of environmental stewardship and social responsibility through conservation, education, research, and advocacy. Id. ¶ 3. Central to this mission is preserving and protecting the landscapes of Walden Woods and the Thoreau country in recognition of their worldwide literary, historical and environmental significance. Id. ¶ 4. Walden Pond, where Thoreau lived when he wrote *Walden*, is a National Historic Landmark and is on the National Register. Id. ¶ 5. WWP owns, maintains, and preserves over 160 acres of land in the historic Walden Woods of Concord and Lincoln. Id. ¶ 6. WWP owns historic landmarks located within approximately six miles of Hanscom, including Brister’s Hill, an 18-acre self-guided interpretive trail on conservation land, and the Thoreau Institute at Walden Woods, a research and education center. Id. ¶¶ 9-10.

The maintenance of a quiet, contemplative atmosphere is critical to the integrity of these historic places. Id. ¶¶ 4, 11, 15.

Petitioner Lynn Vanacore Bloom lives at 25 Fuller Lane in Concord. Declaration of Lynn Vanacore Bloom (“Bloom Dec.”) ¶ 2. Ms. Bloom’s house is located approximately 600 feet from Hangar 24. Id. She has a longstanding interest in historic preservation and lives in Concord’s East Quarter due in part to its rich rural and cultural history. Id. ¶ 3. She has a direct view of Hangar 24 from her house and looks at Hangar 24 daily, appreciating its historic significance and envisioning its preservation as another contribution to this historic quarter of Concord and the nation. Id. Ms. Bloom and her family already experience effects of the noise and pollution emitted from airport activity at Hanscom, which disrupts conversations, disturbs her family’s sleep, and causes offensive fumes and odors to enter her home and property. Id. ¶ 6. These effects are particularly disruptive to the health and lives of her and her family when they take place near Hangar 24 and the runway adjacent to Virginia Road. Id. On these occasions it becomes impossible to use her backyard or to keep the windows of her house open. Id. The increase in aircraft operations as a result of the destruction of Hangar 24 and its replacement with a larger hangar will increase the noise and pollution impacts to her family and her. Id.

Petitioners have Article III standing because they have established harm 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.” Town of Winthrop v. FAA, 535 F.3d 1, 6 (1st Cir. 2008); Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 55 (1st Cir. 2001). Aesthetic and environmental injuries are “cognizable interests” and a “reasonable claim of minimal impact is enough for standing.” Save Our Heritage, 269 F.3d at 55-56. An unreasonable exposure to risk of environmental harm may itself cause cognizable injury. Harvey v. Veneman, 396 F.3d 28, 34 (1st Cir. 2005). This Court has held that violations of procedural rights, such as those created by the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”), receive “special” treatment and that “immediacy concerns [are] relaxed” when it comes to standing. Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 27 (1st Cir. 2007) (holding that plaintiffs had standing to bring NEPA and NHPA claims); accord Dubois v. United States Dep’t of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996). “[P]laintiffs who use the area threatened by a proposed action or who own land near the site of a proposed action have little difficulty establishing a concrete interest.” Impson, 503 F.3d at 27 (quotation omitted).

Petitioners' complaints fall within the “zone of interests protected by the law invoked.” Id. at 26. NEPA and NHPA were “specifically designed” to protect against harm to the environment and historic preservation. Id. Section 4(f) is meant to protect certain historic sites. Save Our Heritage, 269 F.3d at 58.

Petitioners SOH, CHC, WWP and Bloom have standing to bring all of the claims in their own capacities as landowners because FAA's approval of the destruction of Hangar 24 and the construction of a larger complex to accommodate and enable increased aircraft operations will cause aesthetic/visual, noise and other environmental impacts to the use and enjoyment of properties owned by petitioners. See Save Our Heritage, 269 F.3d at 55 (“There is little reason to doubt that the two nonprofit landowners (Walden Woods Project and the Alcott Association) would be affected by both noise and air pollution, given their function and proximity to Hanscom . . .”); Impson, 503 F.3d at 27.

Petitioners SHHAir, SOH, CHC and WWP also have standing in their capacities as nonprofit charitable organizations with a substantial interest in the preservation of Hangar 24 and the preservation of historic sites near Hanscom for reasons central to their respective missions of preserving historical properties located in Concord. See Warth v. Seldin, 422 U.S. 490,

511 (1975); Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 544-46 (6th Cir. 2004).

All petitioners have satisfied traceability and redressability.

Petitioners' injuries are caused by FAA's decision to allow the destruction of Hangar 24 and the increased visual, noise and other environmental impacts caused by the proposal to build a larger facility to accommodate and enable increased aircraft operations. Impson, 503 F.3d at 28 (holding that NEPA and NHPA seek to minimize future harm by making government officials consider environmental and other impacts). The Court may redress petitioners' injuries by requiring FAA to comply with the procedures required by Section 4(f), NHPA and NEPA. Id.

Finally, Petitioners SOH and WWP have associational standing to pursue all claims. See Maine People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 283 (1st Cir. 2006). In a case seeking a declaration or injunction, participation of individual members is not necessary. College of Dental Surgs. of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 41 (1st Cir. 2009). SOH member and executive director Anna Winter has visited Barrett's Farm and the Old North Bridge on a regular basis and will continue to do so in the future. Winter Dec. ¶¶ 10, 12. WWP member and executive director Kathleen Anderson has visited Brister's Hill at least once a week for

recreational and other purposes and will continue to do so in the future.

Anderson Dec. ¶ 9. She also works at the Thoreau Institute five days a week and will continue to use and enjoy the Institute in the future. Id. ¶ 11.

ISSUES PRESENTED FOR REVIEW

1. Has FAA properly determined that there is no “prudent and feasible alternative” to the destruction of Hangar 24 and conducted all possible planning to minimize that harm, pursuant to its obligations under Section 4(f) of the Transportation Act?

2. Has FAA properly identified each historic property directly or indirectly affected by the redevelopment of the Hangar 24 site and avoided, minimized and mitigated the adverse impact of its decision, pursuant to its obligations under Section 106 of the NHPA?

3. Has FAA properly determined under NEPA that no significant environmental impact will result from the development of facilities for increased air traffic at Hanscom?

ADDENDUM

Pertinent statutes and regulations are reprinted in the Petitioners’ Addendum to this brief.

STATEMENT OF THE CASE

The Massachusetts Port Authority (“Massport”) has proposed to demolish the historic, National Register-eligible Hangar 24, located Hanscom, so that it can clear the way for possible construction of a larger complex capable of servicing and maintaining large private jets. FAA determined that the proposed project required an Environmental Assessment (“EA”) to evaluate the environmental impacts of this proposal and its alternatives under NEPA and the impacts on historic properties under Section 106 of the NHPA and Section 4(f) of the Transportation Act. In its EA, effective June 18, 2010, FAA (1) issued a Finding of No Significant Impact (“FONSI”) under NEPA, (2) approved the proposed replacement of Hangar 24 as the only “prudent and feasible alternative” under Section 4(f), and (3) found the replacement would have an adverse effect under Section 106 only on Hangar 24 itself and proposed compensatory mitigation. Petitioners seek review of this final FAA action.

STATEMENT OF FACTS

I. Historic Hangar 24.

Hangar 24 is an 18,500 square foot structure located in Concord in the southwest portion of Hanscom. Petitioners’ Appendix (“App.”) at 7 (EA at 2). Hangar 24 is eligible for listing on the National Register as a site

“significant on the local, state, and national levels for its historical associations with developments in flight and defense during the second half of the 20th century.” App. at 161 (Massachusetts Historical Commission (“MHC”) Eligibility Opinion at 2, Administrative Record (“AR”) #12).

Hangar 24 served as the test facility for MIT’s Lincoln Laboratories, aiding in the development of sophisticated radar systems employed in air defense against potential Soviet nuclear attacks during the Cold War. Id. Also at Hangar 24, Charles Stark Draper, a pioneer in aeronautical engineering known as the “father of inertial navigation,” developed the theory and technology that brought inertial navigation, which allows vehicles to sense changes in direction, to operational use in aircraft, space vehicles, and submarines. Id.

MIT’s Lincoln Laboratory operated in Hangar 24 until 2001, at which time it was in good operating condition. App. at 35 (Benkert Comments).²

Upon taking possession of Hangar 24, Massport severed “[a]ll services HVAC, electrical and plumbing” and “[e]xterior doors were left open to

² John Benkert has deep knowledge of the logistics of aircraft movements in and around Hangar 24 based on his twelve years with MIT/Lincoln Laboratory as the Aviation Group Leader and managing the Flight Test Facility. App. at 35.

elements due to negligence.” Id. Massport now seeks to demolish Hangar 24.

II. Massport Requests Proposals To Demolish Hangar 24 and Construct a New, Larger Fixed Base Operator Facility.

In 2004 and again in 2005, Massport issued Requests for Proposals (“RFP”) for the development of Hangar 24 at Hanscom, which Massport owns and operates. App. at 72 (Klavens Feb. 20, 2009 ltr. to FAA (“Klavens 2009 ltr.”) at 5). The core business at Hanscom is “[o]perations conducted by single-engine piston aircraft [that] accounted for 68.5 percent of total activity” in 2005. Massport 2005 Environmental Status and Planning Report (“ESPR”) at 3-3 (AR # 5).

Massport specified that the proposed development would extend to all or a portion of an eight-acre site and would be “expected to result in a 30,000 – 80,000 square foot hangar with associated offices and ramp spaces,” among other facilities. Project Notification Form, Dec. 11, 2006, at 2 (AR #14). Although Hangar 24 occupied only a fraction of the eight-acre site, Massport’s RFPs *required* demolition of Hangar 24. App. at 72 (Klavens 2009 ltr. at 5). In 2005, Massport selected Crosspoint Aviation Services, LLC to replace Hangar 24 with a Fixed Base Operator (“FBO”) facility, which would “provide service, maintenance, fueling, and shelter for general aviation aircraft.” App. at 7 (EA at 2).

Upon learning of Massport’s proposal to raze Hangar 24, petitioner SOH requested a formal opinion from the MHC regarding whether Hangar 24 was eligible for listing on the National Register. In September, 2006, MHC issued its opinion that Hangar 24 was eligible for listing under Criterion A, because it is “associated with events that have made a significant contribution to the broad patterns of our history,” 36 C.F.R. § 60.4(a), and Criterion B, because it is “associated with the lives of persons significant in our past,” 36 C.F.R. § 60.4(b). App. at 161 (MHC Opinion at 2, AR #12).³ The following month, MHC notified Massport of its eligibility opinion and that Hangar 24 “is included in MHC’s Inventory of Historic Assets of the Commonwealth.” MHC ltr. to Massport (AR #11).

III. The Developer Withdraws and Massport and FAA Press On Even Without Any Specific Development Proposal.

In or about late 2006, Crosspoint withdrew its development proposal. Although Massport and FAA lacked any specific demolition, development, and operation plans and details, they nonetheless pressed forward with reviews under NEPA, Section 106 and Section 4(f).

³ MHC noted Hangar 24’s “double-hangar closed Howe truss plan,” but determined that it lacked “sufficient information at present to determine whether the Hangar fulfills Criteria C,” for embodying distinctive architectural characteristics. Id.

In December, 2006, Massport submitted a Project Notification Form to MHC describing its plan generally as the “redevelopment of the Project site for general aviation uses.” (AR #14). Massport specified that “[r]edevlopment of the Project site includes demolition of Hangar 24.” Id. Although at this time the Section 4(f) and other review processes were just beginning, Massport had already pre-determined that Hangar 24 and/or its outbuildings “ha[d] exceeded their design life” and that “there [was] no feasible and prudent alternative to redevelopment of the Hangar 24 Project site.” Id. at 2. In response, MHC reminded Massport that Hangar 24 was due additional protections as a historically significant structure and requested “a conditions and feasibility study for Hangar 24 and associated outbuildings to document and evaluate their current conditions, including issues of structural integrity, public safety, and reuse potential (either in situ or off site).” MHC ltr. to Massport at 1 (AR #15).

Massport’s “Condition Assessment & Feasibility Study” was completed in March, 2007. (AR #17). This engineer’s report found that the outbuildings are in poor condition, but that the “structural elements of the hangar (i.e. trusses, columns, bracing, CMU walls, etc.) appear in sound condition,” id. at 18, that “the building envelope (i.e. metal siding, doors, roof, etc.) appear in fair condition,” id., and that the “roof overall appears in

generally good condition with minimal signs of leakage.” Id. at 4. The study concluded that rehabilitation of Hangar 24 was “logistically feasible.” Id. at 18. However, the study reiterated Massport’s conclusion that Hangar 24 was “functionally obsolete” because it was too small to handle a Gulfstream 5 aircraft, and recommended that “the entire facility should be demolished” because spending the money to enlarge the structure and bring it up to code was “not considered to be prudent.” Id.⁴

The study did not evaluate the historic value of Hangar 24. Nor did it consider several relevant facts suggesting that demolishing Hangar 24 to establish an FBO would be unnecessary and/or imprudent:

- Hanscom already has two FBOs that have serviced the entire airfield’s needs for over 13 years, including periods of rapid economic expansion, and a third FBO may over saturate this small market, which could lead to the failure of one or two of the existing FBOs with resulting decline of service, job loss and building vacancies; App. at 32 (Benkert Comments ¶ 6);

⁴ SHHAir challenged this recommendation noting that the study only compared costs of alternatives using “order of magnitude” cost estimation and that the cost of refurbishing Hangar 24 was within the same order of magnitude as demolition and construction of a new building. (Klavens Aug. 1, 2008 ltr. at 5, AR # 79).

- flight operations at Hanscom peaked in 1985 and have trended downward for the last six years, id.;
- the East Ramp could handle large aircraft without infrastructure improvements, id.; and
- the Hangar site is physically constrained by abutting facilities, its proximity to the safe area of runway 5/23 and the adjacent taxiway and the 100' wingspan of a Gulfstream V aircraft, id.

IV. Massport Releases a Memorandum of Agreement Under State Historic Preservation Law Before Coordinating With FAA Under NHPA and Without Consulting With Interested Parties.

Massport submitted its feasibility study to MHC in April, 2007, along with a draft Memorandum of Agreement (“MOA”) (AR #18), purporting to resolve and/or mitigate the adverse effects of Hangar 24’s destruction.

Massport drafted the MOA without having coordinated with FAA, whose approval was required for the proposed project, App. at 7 (EA at 2), and which was responsible for compliance with Section 106. Massport also prepared the MOA without first holding any public meetings or consulting with interested parties to identify potentially affected historic properties and how any adverse effects might be minimized, avoided or mitigated. Public comments on the draft MOA, including from members of Congress, the Towns of Concord, Lincoln, and Lexington, and the National Trust for

Historic Preservation, unanimously opposed the draft MOA, identified potentially affected historic properties, and implored Massport to preserve Hangar 24. (AR #22) (compiling comment letters). Massport's revised draft MOA, published for comment in August, 2007, met with a similar chorus of opposition. See, e.g., AR ## 26, 29, 30, 33. Thereafter, MHC notified Massport that "MHC's state review cannot substitute for Section 106 review" under federal regulations, and recommended that FAA initiate the Section 106 review. MHC ltr. to FAA (AR # 34).

FAA entered the review processes on April 1, 2008, by releasing its determination that Hangar 24 was eligible for listing on the National Register and, even though the project site was eight acres, "further determin[ing] that the Area of Potential Effect of the Hangar 24 project is the footprint of the hangar and outbuildings." App. at 170 (FAA ltr. to MHC, AR # 35). Thereafter, consulting parties and other public comments persistently advocated for the preservation of Hangar 24, raised concerns that the scope of FAA's evaluation was unduly narrow and failed to consider effects on nearby historic properties, and expressed doubt in an impact-assessment process without an actual plan or proposal. See, e.g., AR ## 36, 38-41, 44, 46-47, 51.

For instance, a June 17, 2008 letter from the National Park Service (“NPS”) to FAA noted that Minute Man was designated as one of the “Eleven Most Endangered Places” in the U.S. because of activities at Hanscom, and raised the grave concern that the proposed location of a fuel depot in proximity to the park “would pose a fire threat to the forests and the irreplaceable historic structures along Battle Road, such as the Ephraim Hartwell Tavern, built in 1733, where colonial patriots exchanged the latest revolutionary news, and the home of William Smith, Captain of the Lincoln Minute Men, built in 1693.” App. at 174-75 (AR # 52). Members of the State Legislature (AR #58), U.S. Congress (AR # 59), the Hanscom Area Towns Committee, App. at 176-82 (AR #61), and others echoed concerns about potential adverse effects to nearby historic sites.⁵ FAA, however, never expanded its early decision to limit the Area of Potential Effect (“APE”) beyond the footprint of Hangar 24.

V. FAA Issues the Draft Environmental Assessment.

In December 2008, FAA released its draft EA containing FAA’s environmental and historic impact reviews without reference to a specific

⁵ See e.g., AR # 85 (compiling comments regarding Barrett’s Farm, Draper Centrifuge Building at Hanscom, Minute Man National Historic Park, Thoreau Birthplace, Virginia Road, Walden Woods, and Wheeler-Merriam House).

project. App. at 196-219 (AR #89). Instead, FAA simply assumed “[t]he new hangar would most likely house the third FBO at Hanscom,” and “would most likely also have facilities for general aviation passengers and crew.” App. at 206 (draft EA at 8). FAA explained that it reviewed four alternatives (No Build, Locate hangar elsewhere at Hanscom, Adaptive reuse, Replace hangar as proposed by Massport), and determined that:

1. Demolition of Hangar 24 (Alternative 4) would have an adverse effect on a historic structure but that its permanent loss could be mitigated;
2. Demolition of Hangar 24 was unavoidable despite “all possible planning to minimize harm resulting from the use;” and
3. Demolition of Hangar 24 “will not significantly affect the quality of the human environment, “and thus an EIS is not warranted.

App. at 212 (draft EA at 14).

When justifying the need for the project, FAA assumed “that aircraft operations will grow at an increasing rate when the economy improves,” and expected that the “development of the East Ramp would help achieve” a rebound in aircraft operations back to 2005 levels. App. at 206 (draft EA at

8).⁶ However, when justifying its conclusion of no adverse impacts on the environmental or historic resources, FAA inconsistently claimed that there is a “poor correlation between aviation infrastructure and induced demand,” App. at 210 (draft EA at 12), and thus, unlike the East Ramp, the redevelopment of the Hangar 24 site “is unlikely to induce any increase in airport operations.” Id.

Commenters almost unanimously expressed the view that FAA had not satisfied the requirements of NEPA, NHPA or Section 4(f). See, e.g., App. at 69 (Klavens 2009 ltr. at 2); App. at 49-50 (NPS ltr. to FAA).

Commenters pointed out that the draft EA did not even establish the need for the project since FAA failed to demonstrate why:

- Hanscom’s two existing FBOs were incapable of handling any increased demand;
- service would be disrupted without a third FBO, App. at 70 (Klavens 2009 ltr. at 3), App. at 32 (Benkert comments ¶ 6);
- there was demand for a third FBO in light of the fact that the number of general aviation aircraft based at Hanscom have significantly

⁶ FAA deleted from the final EA this statement that new development at the East Ramp would induce new aircraft operations even though that was the assumption of the 2005 ESPR on which FAA heavily relies. App. at 20 (EA at 15).

declined since 1996, and Massport's own data show a continuing declining trend, App. at 31 (Benkert comments ¶ 3);

- a third FBO with fueling facilities would not be redundant and over saturate the market causing FBOs to retract or fail, App. at 32 (id. ¶ 6).

FAA also received technical comments questioning the validity of the noise studies of the East Ramp project upon which FAA relied to determine that there would not be any cumulative impacts to nearby historic properties from the Hangar 24 project. Noise Control Engineering, Inc. ("NCE") estimated that the new hangar could be located as close as 250 feet from the nearest residential abutter in comparison to 2100 feet and 2900 feet from the closest existing FBO buildings, App. at 85, and projected that the proposed FBO at the Hangar 24 site could result in an increase in jet taxi noise of 20dB. NCE further projected that the absolute level of the jet taxi noise to be approximately 60-70 dB(A) based on spherical spreading, which under the worst case scenario would be 30 to 40 dB above typical nighttime background noise levels when other flight operations are not occurring and would be a perceptible increase that could interfere with sleeping. App. at 86.

Beyond East Ramp studies, FAA cited no technical, empirical analyses

at all of the direct and indirect impacts of demolition, construction and operation of what, if anything, will replace Hangar 24 since there is no plan in place. The record also does not contain any technical evaluation of the potential fire, public safety and contamination hazards posed by the proposed fuel depot.

Notwithstanding the overwhelmingly critical comments on the draft EA, in June 2010 FAA issued a virtually identical final EA authorizing Massport's project. App. at 1-23. The final EA contained FAA's often conclusory responses to comments on the draft. For instance, to support its conclusion that cumulative noise impacts "would be less than .5 decibels DNL," FAA relied on the 2005 ESPR air traffic forecast indicating a 0.3 decibel increase in the airport noise contour from the East Ramp improvements. App. at 20 (EA at 15). To that, FAA just tacked on 0.2 decibels for the Hangar 24 redevelopment without any reference to any scientific foundation for that number. Id.

Similarly, with respect to concerns about potential water and wetland contamination, FAA responded "No adverse effect would occur to wetlands or water quality. Facilities such as an FBO and associated ramp are routinely designed to avoid adverse effect." App. at 98 (EA at 20). No record evidence supports FAA's conclusion that the redevelopment of an

eight-acre site could not possibly have any significant adverse water or wetland impacts.

The final EA was also internally inconsistent. For instance, FAA, based on forecasts from 2005 “conclude[ed] that aircraft operations over the next three to five years will increase,” even while conceding that “aircraft operations have been declining over the last few years.” App. at 99 (EA at 21). FAA also responded to comments regarding Section 4(f)’s planning obligation by stating that FAA was not obligated “to evaluate a possible use of Hangar 24 that would make re-use feasible,” App. at 101 (EA at 23), and that a specific impact analysis was not done because “[d]esign details are unknown at this time.” App. at 108 (EA at 30). FAA’s response to a comment that it had failed to consider as a reasonable alternative use of Worcester airport to satisfy Hanscom’s alleged need was simply that it was “not practical” because it was 50 miles away. App. at 107 (EA at 29).

This petition for review of FAA’s EA was timely filed on August 16, 2010. App. at 141.

SUMMARY OF ARGUMENT

This Court should set aside FAA’s final EA because it violates both the substantive and procedural requirements of the statutes it purports to fulfill.

In violation of Section 4(f) of the Transportation Act, FAA approved an

imprudent project that would destroy Hangar 24 and adversely affect other historic sites despite more prudent, feasible alternatives. FAA failed to show that the project is more prudent than other options, including a “No Build” option. FAA’s primary justification—facilitating a projected increased in general aviation air traffic at Hanscom—is belied by the actual, long-declining demand and directly contradicted by FAA’s claims that the project will not lead to any increase in airport operations. Furthermore, FAA failed to conduct all planning necessary to minimize harm to historic sites.

In violation of the NHPA, FAA failed to give due consideration to the effect of its actions on historic properties. This failure derives from FAA’s arbitrary narrowing of the area of potential effects to Hangar 24, neglecting indirect effects elsewhere, and its failure to consider the architectural significance of Hangar 24, which would qualify it for greater protection under the NHPA’s Criterion C.

FAA also failed to satisfy NEPA. Its finding of no significant impact violated its obligation to properly analyze the cumulative impacts, was not supported by substantial evidence, and failed to take a hard look at the relevant impacts.

STANDARD OF REVIEW

As described in Penobscot Air Servs., Ltd. v. FAA, 164 F.3d 713, 720 (1st Cir. 1999), factual findings by FAA must be supported by “substantial evidence,” 49 U.S.C. § 46110(c), and the court “must take into account contradictory evidence in the record,” while errors of law are reviewed de novo under the Chevron two-step test, and other FAA actions, findings, and conclusions must be set aside if they are found “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A) (Administrative Procedure Act). See, e.g., Save Our Heritage v. FAA, 269 F.3d 49, 60 (1st Cir. 2001); Neighborhood Ass’n of the Back Bay, Inc. v. FTA, 463 F.3d 50, 59 (1st Cir. 2006) (Transportation Act section 4(f) & NHPA section 106). The reviewing court “must undertake a thorough, probing, in-depth review and a ‘searching and careful’ inquiry into the record” to “ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.” Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 203 (1st Cir. 1999) (NEPA).

Agency action is

arbitrary and capricious if the agency lacks a rational basis for adopting it—for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise.

Assoc. Fisheries of Maine v. Daley, 127 F.3d 104, 109 (1st Cir. 1999).

“Even where [Chevron] deference is due, the agency’s explication of its reasoning must not be inadequate, irrational, or arbitrary.” Penobscot, 164 F.3d at 719 (quotation omitted).

ARGUMENT

I. FAA VIOLATED SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT.

Section 4(f) of the Department of Transportation Act substantively limits the discretion of the Department (including its agencies, like FAA) to approve projects that “use publicly owned land of ... an historic site of national, State, or local significance.” 49 U.S.C. § 303(c). The “use” of land under Section 4(f) includes both direct physical takings such as the destruction of Hangar 24 and “constructive use” that results from a project in close proximity to a historic site such as from overflights, noise, traffic, pollution, or vibrations. Save Our Heritage, 269 F3d at 58. Section 4(f) lands include those listed, or eligible for inclusion, on the National Register pursuant to Section 106 of the NHPA. Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368, 370-71 (D.C. Cir. 1999). Projects that “use” Section 4(f) land cannot be approved unless “(1) there is no prudent and feasible alternative to using that land; and (2) 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.” 49 U.S.C. § 303(c).

FAA has failed both requirements.

A. The Record Fails to Support FAA’s Conclusion That There Are No Prudent and Feasible Alternatives.

Protection of Section 4(f) properties is to be given “paramount importance.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412-13 (1971). In considering whether there is a “prudent or feasible alternative” to a project, the Secretary must find that “alternatives present unique problems.” Id. at 413. This requires agencies affirmatively to eliminate alternatives as imprudent. Use of protected lands is impermissible “unless there [are] *truly unusual factors* present in a particular case or the cost or community disruption resulting from alternative routes reach[es] *extraordinary magnitudes.*” Id. (emphases added). This test is “quite restrictive.” Save Our Heritage, 269 F.3d at 49. Approval of a project subject to 4(f) review is invalid if the agency fails to show that alternatives, including a “No Build” alternative, are imprudent. Stop H-3 Ass’n v. Dole, 740 F.2d 1442 (9th Cir. 1984); Louisiana Env’tl. Soc’y, Inc. v. Coleman, 537 F.2d 79, 84 (5th Cir. 1976). “Cost is a subsidiary factor in all but the most exceptional cases.” Stop H-3, 740 F.2d at 1452 (quotation omitted).

Here, FAA admits that all four of the alternatives that it examined are

feasible. App. at 18 (EA at 13). Thus, the only dispute is whether razing Hagar 24 is the only prudent alternative. It is not.

1. FAA Has Failed To Establish Any Need at All for the Project.

At the outset, the EA fails in its most basic function under Section 4(f). It never establishes any need, based upon record evidence, for a third FBO to service larger general aviation (“GA”) aircraft. FAA merely asserts, in a wholly conclusory fashion, that “it is reasonable to *assume* that this demand either currently exists or will exist over the next few years as the economy recovers.” App. at 11 (EA at 6) (emphasis added). FAA never actually documents with any record evidence that there is or will be a demand for FBO services for GA aircraft that are too large to be serviced in the two existing FBOs.

FAA then builds one assumption upon another. It assumes that aircraft operations in general will increase at some uncertain date in the future:

Since there is a strong correlation between economic cycles and general aviation aircraft operations, it is reasonable to *assume* that aircraft operations will grow at an increasing rate when the economy improves. Even if operations were to decline over the next two to three years, FAA believes that it is nevertheless appropriate to begin to provide for an economic recovery thereafter, so that the facilities will be fully operational when the economy recovers.

App. at 14 (EA at 9); see also App. at 11 (EA at 6) (“Massport’s intent is based on continued growth in general aviation activity.”). But FAA never

provides any record evidence to demonstrate that any such correlation between the economy and GA operations actually exists, either nationally or at Hanscom. Nor does FAA make any attempt to adduce evidence of future economic or GA trends in the United States generally or at Hanscom specifically.

The data that does exist in the record mostly contradicts FAA's assumptions. The EA relies upon Massport's 2005 Environmental Status and Planning Report ("ESPR") but acknowledges that the ESPR's forecasted increase in aircraft operations failed to materialize. App. at 14 (EA at 9). The ESPR, moreover, states that: actual 2005 aircraft operations at Hanscom were 26-31 percent below the levels Massport had forecast in a year 2000 ESPR, 2005 ESPR at ES-4 (AR #5); total aircraft operations at Hanscom decreased at an average annual rate of 2.1 percent from 1990 to 2005; and GA operations at Hanscom fell by 2.2 percent annually during this period compared to a national overall decline of 1.1 percent per year. Id. at 3-4 (AR #5). From 2000 to 2005, GA operations in the general Boston area declined even faster, by 2.6 percent annually on average and by 4.2 percent annually on average at Hanscom. Id. at 5-3; see also id. at 3-6 (from 2002 to 2005 drop in GA operations became a "sharp decline" both nationally and at Hanscom). Passenger activity at Hanscom plummeted by 34 percent

annually from 2000 to 2002 and by 37 percent from 2002 to 2005. Id. at 5-8 Table 5-2. While the subcategory of business jet operations at Hanscom has increased over time, this category represented, in 2005, less than twenty percent of Hanscom aircraft operations. See 2005 ESPR at 3-3 (AR # 5). Moreover, there is no data in the record (1) regarding demand for the services of a new FBO now or in the future, (2) regarding trends in aircraft sizes, (3) demonstrating the inability of the existing FBOs to satisfy the needs of current or projected business jets at Hanscom, and (4) on any of these issues at all post-2005.

Some of the data that FAA ignored is not hard to find. Official government data from FAA's own website shows that the overall declining trend in GA operations over the years has continued at Hanscom:

Table 1⁷

ATADS : Airport Operations : Standard Report

From 01/2002 To 12/2009 | Facility=BED

Calendar Year	Itinerant					Local			Total Operations
	Air Carrier	Air Taxi	General Aviation	Military	Total	Civil	Military	Total	
2002	233	26,546	113,196	1,344	141,319	76,849	80	76,929	218,248
2003	296	21,219	100,541	1,135	123,191	71,688	8	71,696	194,887
2004	410	23,658	94,741	1,144	119,953	60,678	51	60,729	180,682
2005	350	22,852	87,321	875	111,398	58,584	72	58,656	170,054
2006	446	24,906	86,303	1,378	113,033	59,223	214	59,437	172,470
2007	448	27,232	80,448	1,367	109,495	56,487	297	56,784	166,279
2008	598	28,160	89,139	1,573	119,470	66,354	241	66,595	186,065
2009	660	25,541	92,424	1,725	120,350	58,562	125	58,687	179,037
Total:	3,441	200,114	744,113	10,541	958,209	508,425	1,088	509,513	1,467,722

Report created on Sun Dec 12 14:54:10 EST 2010
Sources: Air Traffic Activity System (ATADS)

The Court may take judicial notice of this official government data. Gent v. Cuna Mut. Ins. Soc’y, 611 F.3d 79 (1st Cir. 2010) (“[W]e take judicial notice of the relevant facts provided on the [government] website, which are ‘not subject to reasonable dispute.’”) (quoting Fed. R. Evid. 201(b)); see also Fed R. Evid. 201(d). Notably, the only years in this period with increased GA operations at Hanscom over the prior year are those that coincided with the severe recession of 2008 and 2009, thus undercutting FAA’s primary assumption that GA operations at Hanscom will increase with future

⁷ Available at <http://aspm.faa.gov/opsnet/sys/Airport.asp>.

improvements in the economy.⁸

Moreover, FAA does not contend that the new FBO itself will alter the downward trends at Hanscom. It states in the EA that “replacement of Hangar 24 with an FBO facility is unlikely to induce any increase in airport operations,” App. at 18 (EA at 13), that “[m]any of the corporate jets and other aircraft that would be served by the facility already operate at Hanscom,” and that “growth in aviation activity should not be influenced by the existence of a third FBO on the airport.” Id.

In short, the record is devoid of evidence to support FAA’s assumption that there is demand for the services of an FBO for larger GA aircraft, GA operations are increasing over the years, a correlation between the economy and GA operations generally or at Hanscom specifically, and of any economic forecasting or forecasting of future GA demand. Readily available government data in fact badly undercuts FAA’s main assumptions.

What is more, after FAA weaves its web of mere assumptions in order to justify razing Hangar 24 for the sole alleged purpose of clearing the way for an FBO, FAA reveals that the new hangar to be built on the site actually

⁸ The recession commenced in December, 2007 and lasted until June, 2009. See Business Cycle Dating Committee, National Bureau of Economic Research, available at <http://www.nber.org/cycles/sept2010.html>.

might not house an FBO at all but merely “would *most likely* house the third FBO at Hanscom.” App. at 14 (EA at 9) (emphasis added). In other words, Hangar 24 must be razed in order to make way for an FBO whose need is merely assumed and that actually might not be built in any event. There is no plan in place for building a particular hangar of any particular size to accommodate any particular aircraft, no contractor ready to build a hangar, and no actual plan for an FBO if and when the new hanger is ever built.

FAA’s failure here is much like the agency failure in Sierra Club v. United States DOT, 962 F. Supp. 1037 (N.D. Ill. 1997). In that case plaintiffs challenged a planned 12.5 mile highway under section 4(f). The court held the federal highway agency failed to comply with the statute because the record “contains no analysis that indicates how or to what extent the tollroad will improve travel times.” Id. at 1044. While the agency had demonstrated a substantial increase in jobs in the area and documented “a concomitant increase in vehicular trips to those locations,” it had failed to analyze how and to what extent the tollroad would correct this problem. Id. Similarly, while the agency had documented a national trend in increasing freight demands, it had failed to identify any such needs in the region of the project or how the tollroad would alleviate any possible excessive freight demands. Id. Thus, “[w]ithout justifying these current needs and without

justifying projected needs, it becomes impossible to assess any of the possible alternatives.” Id. Just so here. FAA must do far more than it has done here in order to reject the No Build alternative as imprudent under Section 4(f). Section 4(f) requires an agency to show that the no-build implications pose an “unusual” situation, are “truly unusual factors”, or represent cost or community disruption reaching extraordinary magnitudes. Stop H-3, 740 F.2d at 1456. It has not even attempted to do so.

FAA’s decision to license the destruction of Hangar 24 is arbitrary and capricious because it has “offered a rationale contradicting the evidence before it.” Assoc. Fisheries, 127 F.3d at 109. Such a decision cannot survive the stringent review demanded by Section 4(f). Where there is “nothing in the record” to support an agency’s key contention in support of its position that use of a protected property is the only feasible and prudent alternative, it does not withstand scrutiny under this demanding statute. Stop H-3 Ass’n, 740 F.2d at 1454. A mere “bald statement” is not record evidence and is insufficient to justify use of protected land. Id. at 1457. FAA’s decision to raze Hangar 24 fails ab initio – not only does the record fail to prove that the No Build alternative is imprudent, it fails even to prove the need for a third FBO for larger aircraft.

2. FAA Failed to Establish That It Would Be Imprudent To Locate an FBO Hangar at the East Ramp or at Worcester in Lieu of Destroying Hangar 24.

FAA sets forth four alternative courses of action in the EA. The first three alternatives would leave Hangar 24 intact and allow the construction of a new hanger with an FBO at a portion of the airport known as the East Ramp. FAA rejected these alternatives in a conclusory and barebones EA devoid of any real factual analysis or critical thinking. Neither the EA itself nor the record underlying it supports FAA's conclusion that these options, separately or in some combination, are imprudent.

The three alternatives rejected by FAA are labeled (1) "Do Nothing," (2) "Locate a new hangar facility elsewhere on the airport," and (3) "adaptive reuse of Hangar 24." The do nothing alternative would, despite its name, entail making renovations to Hangar 24 in compliance with federal rehabilitation standards. App. at 10 (EA at 5). One adaptive reuse alternative would be to turn Hangar 24 into an aviation museum.

FAA acknowledges that a new hangar could feasibly be built on the East Ramp and that the East Ramp is one of two "significant areas for general aviation efficiency improvements." App. at 11 (EA at 6). Yet FAA rejected this alternative with a cursory two paragraph explanation that cannot withstand even the most modest scrutiny.

FAA first contends that locating a new hangar at the East Ramp “would not be the most efficient use of space since the East Ramp is more remote from the terminal area and other FBOs.” App. at 12 (EA at 7). But FAA never states what the distances involved would be, quantifies the inefficiency, or explains why the new FBO would need to be close to the terminal area or why the FBOs need to be close together. This is insufficient under Section 4(f) and the APA. See Stop H-3 Ass’n, 740 F.2d at 1454 (“The problem is that the record does not illustrate what magnitude of risk this alternative in fact poses and, consequently, does not support adequately the Secretary’s conclusion that the alternative is imprudent because of safety considerations.”); Tripoli Rocketry Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 437 F.3d 75, 81 (D.C. Cir. 2006) (rejecting an agency’s characterization of a chemical reaction as “much faster” than another as an insufficient explanation “because it says nothing about what kind of differential makes one . . . ‘much faster’ than another.”).

What is more, the Airport Layout Plan (AR #20) shows that the East Ramp and Hangar 24 appear to be approximately equidistant to the terminal area; a portion of the East Ramp actually appears to be the closer of the two. And in order to taxi to or from Hangar 24 and the terminal/existing FBOs, aircraft would have to cross perpendicularly over a runway and runway

protection zone – a factor not presented with respect to the East Ramp. Yet the EA is utterly silent on the obvious difficulties and safety issues raised by its preferred alternative.

FAA next contends that access to the East Ramp would be “less efficient” for passengers because such access is through a secure Air Force base. App. at 12 (EA at 7). But, again, FAA never provides any specificity or empirical information regarding this supposed inefficiency. FAA then states that Massport intends to develop the East Ramp area with “general aviation hangars” and that using the East Ramp for the GA hangar with the FBO that Massport wants to locate at Hangar 24 would conflict with that purpose. Id. No explanation is given for why passenger access is such a problem for a GA hangar with FBO services at the East Ramp but apparently no problem for a GA hangar without an FBO at the East Ramp. Nor is there any explanation of why an FBO hangar would conflict with the current and future planned use of the East Ramp for GA hangars. And FAA simply dismissed record evidence from a knowledgeable individual who worked for years at an MIT facility located at Hanscom and informed FAA that the East Ramp could handle large aircraft without infrastructure improvements and that passenger travel times between the East Ramp and the Civil Air Terminal would be minimal compared to travel times at airports of

comparable size. App. at 32 (Benkert Comments ¶¶ 7-8).

Assuming arguendo that passenger access was somehow important for an FBO facility that would provide maintenance and service for large aircraft, the record reveals substantial planning by Massport – ignored in the EA – to solve the East Ramp access issue. Massport’s 2005 ESPR has the East Ramp area slated for development of large hangars and states that “[a]ccess to the East Ramp could include escorts from a point near the Civil Air Terminal, through the Hanscom AFB or via a new roadway.” 2005 ESPR at 4-36 (AR # 5). No difficulties with such access solutions are described. Massport states that “access to the facilities at the East Ramp area could be provided via a new roadway connection to Hartwell Avenue . . . or alternatively through a connection from Old Bedford Road west of the Vandenberg gate.” Id. at 6-47. Massport examined six different configurations for a road in the ESPR, some of which required easements from private owners near Hartwell Avenue and others of which required an easement from the Air Force base. Id. at 6-84 – 6-87. No obstacles to the construction of such roads were identified in the ESPR. Yet FAA is utterly silent in the EA as to any of the East Ramp access options and simply dismisses the access issue, with no analysis, as “less efficient.” App. at 12 (EA at 7).

The East Ramp was not the only alternative location. Comments submitted to FAA during the EA process encouraged FAA to consider locating the new FBO at Worcester. App. at 107 (EA at 29). FAA acknowledged and responded to the comments yet arbitrarily dismissed the alternative due to its location 50 miles away, without analysis of whether Worcester presents truly unusual factors that would cause severe problems in meeting regional demand. Id.⁹

Where an EA summarily dismisses alternatives without a “hard look,” it cannot survive Section 4(f) scrutiny. Davis v. Mineta, 302 F.3d 1104, 1120 (9th Cir. 2002). Here, FAA has taken, at best, a passing glance at the East Ramp and at Worcester. And substantively, it has fallen far short of finding that “alternatives present unique problems.” Volpe, 401 U.S. at 413. Nor has FAA remotely identified “truly unusual factors” or established that “the cost or community disruption resulting from alternative routes reache[s] extraordinary magnitudes.” Id. It has never attempted to make the “special effort” required by section 4(f) to “preserve”

⁹ See also <http://www.massport.com/hanscom-worcester-airports/Worcester%20Regional%20Airport/Overview.aspx> (Worcester Regional Airport is “[c]onveniently located in the heart of Central Massachusetts and operated by the Massachusetts Port Authority, [and has] extensive general aviation services & amenities including a fixed-base operator.”).

a protected site. Belmont v. Dole, 766 F.2d 28, 32 (1st Cir. 1985). FAA failed to establish the imprudence of alternatives to destroying Hangar 24.

3. FAA Has Failed To Establish the Reuse of Hangar 24 as an FBO Terminal Would Be Imprudent.

The EA lacks sufficient information and analysis to determine that it is imprudent to rehabilitate Hangar 24 for use as part of an FBO terminal. In the single paragraph devoted to this alternative reuse, FAA concludes that this alternative is imprudent because the 18,500 square foot hanger “is considerably less than the 30,000-60,000 square feet that would reasonably respond to foreseeable demand.” App. at 12 (EA at 7). Yet there is no data cited to support this alleged “foreseeable demand.”

FAA also contends that the 23.5 foot height of Hangar 24’s door openings is too small for Group II and Group III aircraft. But FAA simply disregarded the comments of John Benkert, the former flight test manager at Hangar 24, who stated that it should be feasible to increase the height of Hangar 24 because its height was already increased once in the past to accommodate larger aircraft. App. at 35. Mr. Benkert also informed FAA that Hangar 24 is structurally sound, has a storied history of housing valuable aircraft and aviation equipment and could have its building systems and cosmetic features renovated to do so again. Id.; HNTB Feasibility Study at 18 (AR # 17). FAA also has failed to account for the fact that Massport

has firmly committed that any replacement of Hangar 24 must have “[b]uilding massing, height and roof design that will be respectful of views from off-site vantages.” 2005 ESPR at 1-8 (AR # 5). FAA never explains how this commitment to *preventing* excess height can be squared with its current belief that the building height of the new FBO hangar must be high enough for a door aperture of 30 or even 45 feet.

Further, FAA never bothered to require Massport to issue a new request for proposals for redevelopment of the Hangar 24 site. Instead, FAA has sanctioned Massport’s approach of prohibiting proposals to keep Hangar 24 as part of redevelopment. And in relying upon the “poor condition” of Hangar 24, FAA has simply rewarded Massport for being a poor steward of the historic resource entrusted to it: the poor condition of the hangar has resulted from Massport’s “negligence” in leaving the hangar doors open to the elements and in cutting off all utilities after the hangar was turned over to Massport in good condition in 2001. App. at 35 (Benkert Comments).

The EA simply does not contain sufficient information and analysis to demonstrate that reusing Hangar 24 is so “extraordinary,” as required under Overton Park, so as to render this option imprudent.

4. FAA Has Defined the Project Purpose So Narrowly as To Guarantee Destruction of Hangar 24.

FAA never engaged in a fair process from the start. It rejected alternatives that would preserve Hangar 24 as unrelated “to the purpose and need for replacement of Hangar 24.” App. at 12 (EA at 7). And it declared such alternatives imprudent “because of the need to demolish the facility.” App. at 18 (EA at 13). Massport has taken the same approach to Hangar 24 from the start. After allowing the hangar to decline through its own “negligence,” App. at 35 (Benkert comments), it then issued RFPs issued in 2004 and 2005 that *required* demolition of Hangar 24. App. at 72 (Klavens 2009 ltr. at 5).

An agency may “not define the project so narrowly that it foreclosed a reasonable consideration of alternatives.” Davis, 302 F.3d at 1119. “One obvious way for an agency to slip past the structures of [the statute] is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence). The federal courts cannot condone an agency’s frustration of Congressional will.”

Davis, 302 F.3d at 1119 (quotation omitted). In Davis, plaintiffs challenging a highway construction project argued for consideration of alternatives that avoided altogether the crossing of a river at a particular location. The court held that the agency had failed properly to consider alternatives where it had

assumed the need for a river crossing at that particular location in defining the scope of the project, 302 F.3d at 1119, and had then engaged in a discussion of alternatives that was “so vague and non-specific as to be essentially meaningless.” *id.* at 1122. That is precisely what FAA has done here. By defining the project as needing to achieve the demolition and replacement of Hangar 24, FAA prejudged the process from the start and violated Section 4(f).

B. FAA Failed To Conduct All Possible Planning To Minimize Harm to Historic Sites.

FAA also has violated section 4(f)(2) by failing to conduct all possible planning to minimize harm to Hangar 24. SHHAir urged FAA to postpone demolition of Hangar 24 until after the design, permitting and financing of the new FBO facility had been undertaken. App. at 73 (Klavens 2009 ltr. at 6). FAA ignored this suggestion and thus committed itself to demolition of Hangar 24 without any certainty that a new facility will ever be built there and, if so, whether the new facility could incorporate Hangar 24 and thus avert harm to the hangar. The design, planning and permitting of a new FBO facility might very well lead to opportunities to preserve Hangar 24 either in *toto* or by incorporating parts of it into a new facility.

Possible planning should include encouraging a developer to preserve portions of Hangar 24 – this might mean preserving actual elements of

Hangar 24 in place, preserving actual elements of Hangar 24 at some location within the redeveloped site, or incorporating architectural elements of Hangar 24 into the new building. FAA did none of this. By rushing headlong into the razing of Hangar 24, FAA failed to undertake “all possible planning” that could have shed light on whether Hangar 24 in fact needs to be demolished. See Merritt Parkway Conservancy v. Mineta, 424 F. Supp. 2d 396, 419 (D. Conn. 2006) (EA invalid under section 4(f)(2) for failure to “describe any alternative build options, much less analyze how they might vary in respect to their impacts on the Merritt Parkway.”).

II. FAA VIOLATED NHPA.

To ensure that proposed federal actions do not compromise the integrity of historic properties, Section 106 of NHPA requires agencies to “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.” 16 U.S.C. § 470f. Regulations implementing Section 106 establish a detailed process for identifying such historic properties, assessing potential impacts from the proposed action and mitigating those impacts. Here, in April 2008, FAA arbitrarily and irrationally defined the Area of Potential Effect (“APE”) of the proposed undertaking as just the footprint of Hangar 24. App. at 170-71 (FAA ltr. to MHC). FAA stubbornly clung to

that early decision in the face of abundant evidence in the record of potential impacts to historic sites beyond the hangar itself. As a consequence, FAA proceeded to assess the project with tunnel vision and breached its responsibilities under NHPA and its regulations.

A. FAA Arbitrarily Limited the APE to Just the Footprint of Hanger 24 Without Considering All Potential Indirect Effects.

NHPA regulations require the reviewing agency as early as possible to determine the boundaries of the proposed project's APE and to make a "reasonable and good faith effort" to identify any National Register or eligible property within that area. 36 C.F.R. §§ 800.4(b), 800.4(c). An APE "means the geographic area or areas within which an undertaking may directly *or indirectly* cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. §§ 800.16(d) (emphasis added). The size of an APE "is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." *Id.*

The agency must then assess whether the undertaking will have an adverse effect on historic properties, particularly whether it "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting,

materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5(a)(1). Adverse effects include “visible, atmospheric, or audible intrusions,” 36 C.F.R. § 800.5(a)(2), as well as “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” 36 C.F.R. § 800.5(a)(1). During the Section 106 consultation process, the agency must “seek ways to avoid, minimize or mitigate the adverse effects” and conclude the process by memorializing in a MOA “how the adverse effects will be resolved.” 36 C.F.R. § 800.6(b)(i) and (iv).

It is undisputed that Hanscom sits within a profoundly historic area that is densely populated by historic properties. Local residents, local, state and federal elected officials, local and national historic preservation organizations, owners and stewards of nearby historic sites, and other federal agencies persistently raised concerns about the proposed undertaking’s potential adverse effects on such historic properties beyond the hangar itself.¹⁰ Nevertheless, FAA never reevaluated its “determin[ation] that the

¹⁰ See, e.g., App. at 174-75 (Battle Road and Minute Man, AR # 52); App. at 183-86 (Virginia Road, AR # 68); App. at 190-92 (Minute Man, Thoreau Birthplace and Draper Centrifuge, AR # 76); App. at 188-89 (Barrett’s Farm, AR # 72); App. at 193 (Walden, AR # 77); App. at 194-95 (Virginia Road and Thoreau’s Birthplace, AR # 84); App. at 230-31 (Minute Man and

Area of Potential Effect of the Hangar 24 project is the footprint of the hangar and outbuildings.” App. at 170-71 (FAA ltr. to MHC); App. at 9 (EA at 4).

Establishing such an excessively narrow APE was arbitrary and irrational for several reasons. First, “[b]y definition, the ‘affected area,’ which includes the area where both direct and indirect effects of the proposed work or structure could reasonably be expected to occur, encompasses a larger area than the ‘permit area,’ which includes only the [area] directly affected.” Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985). FAA limited the APE to where the direct impacts would occur; this alone was facially invalid. Second, FAA’s APE was not even large enough to include all direct impacts since it did not encompass the entire eight-acre redevelopment site or even the possible 80,000-square-foot-plus footprint of the proposed FBO facility. Massport ltr. to MCH (AR # 14). Finally, FAA made its APE decision without reference to any specific development proposal even though the operative regulations provide that the size of an APE “is influenced by the scale and nature of an undertaking and may be different for different kinds of effects

Great Meadows National Wildlife Refuge, AR # 123); App. at 232-33 (Battle Road and Minute Man, AR # 124); App. at 68-84 (Klavens 2009 ltr.).

caused by the undertaking.” 36 C.F.R. §§ 800.16(d).

As a consequence of FAA defining the APE too narrowly, its subsequent Section 106 assessment was fatally flawed. For instance, it allowed FAA to dismiss an expansion of the geographic range of the 65 decibel contour, AR # 27 (2006 Annual Noise Report), and a 0.5 decibel increase in noise as “not significant,” App. at 20 (EA at 15), without giving “special consideration” to national parks and historic sites where FAA’s own policy states “[t]he DNL 65dB threshold may not adequately address noise effects on visitors to these areas.” AR #4 (Order 5050.4B, Table 7.1). The record also contains no evidence that FAA attempted to identify any and all National Register or eligible property indirectly affected by the proposed undertaking, or examined whether the undertaking might “diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5(a)(1). And FAA did not evaluate, in consultation, how to “avoid, minimize or mitigate” any adverse effects. 36 C.F.R. § 800.6(b)(1).

Indeed, the record contains no quantitative, empirical analyses of impacts on nearby historic sites that specifically relate to the demolition, construction and operation of the project itself, but only to the East Ramp project at an entirely different location of the airport. For example, FAA

notes that a “functional inadequacy” of Hangar 24 “is that the door aperture height does not permit entry by many general aviation aircraft that regularly use the airport.” App. at 12 (EA at 7). This begs several questions: How much taller will the new FBO need to be to resolve this problem? Will the taller structure be visible from nearby historic sites? Will there be exterior lighting on top of this taller structure that will be visible from nearby historic sites? And most importantly, can the impacts of these visual intrusions be avoided, minimized or mitigated? FAA refused to entertain such reasonably foreseeable effects, let alone assess them during the Section 106 process.

Perhaps the most glaring example of FAA’s omission is the lack of analysis of a grave concern expressed by a sister agency, the NPS, that the proposed location of an “above-ground fuel depot” in proximity to Minute Man “would pose a fire threat to the forests and the irreplaceable historic structures along Battle Road, such as the Ephraim Hartwell Tavern, built in 1733, where colonial patriots exchanged the latest revolutionary news, and the home of William Smith, Captain of the Lincoln Minute Men, built in 1693.” App. at 174-75 (NPS ltr. to FAA). This fire hazard is another reasonably foreseeable effect caused by the undertaking that FAA had an obligation to assess, but did not.

FAA’s failure to assess these potential effects was not harmless. FAA

had an obligation to “seek ways to avoid, minimize or mitigate the adverse effects” and to conclude the process by memorializing in a MOA “how the adverse effects will be resolved.” 36 C.F.R. § 800.6(b)(i) and (iv). Had FAA properly defined the APE in the first instance, nearby historic sites would have been identified, potential adverse effects evaluated and the MOA would have been materially different by including, inter alia, specific measures to resolve the adverse effects. Moreover, given the proximity of the Walden Pond national landmark, FAA would have to satisfy Section 110(f), requiring FAA “to the maximum extent possible, [to] undertake such planning and actions as may be necessary to minimize harm to such landmark.” 16 U.S.C. § 470h-2. See Neighborhood Ass’n, 463 F.3d at 63 (noting “higher standard” of planning required for compliance with Section 110(f)).

It is apparent that FAA did not perform the necessary analyses because there was no actual plan or design details to evaluate. FAA sought to evade these issues by irrationally limiting the APE to the footprint of Hangar 24. In essence, FAA has written a blank check for the destruction of a historic building to make way for construction of a significantly larger facility that will operate 24 hours a day of unknown nature and scale, with unknown emissions and unknown exterior lighting, that will provide unknown

aviation services for an unknown number and type of aircraft and with unknown ancillary facilities that may include an above-ground fuel depot of unknown capacity and design. Section 106 mandates greater protection of historic sites from federal agencies than simply saying, as FAA did, that it is not practical to quantify the impacts without actual design details regarding the new facility. App. at 14-15 (EA at 9-10).

FAA's failures are not cured by its so-called "cumulative impacts" analysis of the air quality, noise and traffic caused by the proposed East Ramp project. App. at 18-21 (EA at 13-16). Analysis of a different project at a different location in Hanscom that has a different APE does not substitute for empirical analysis of the demolition of Hangar 24 and the construction and operation of a new facility in its place. Indeed, since FAA has not studied and quantified the impacts from *both* projects, it has not really performed a "cumulative" analysis as much as it has simply tried to substitute its East Ramp study for actual analysis of the Hangar 24 project.

FAA's EA falls far short of compliance with the mandates of Section 106. Respectfully, the Court must prevent FAA from approving a massive, but entirely unknown, project without first having considered *all* locations from which elements of the proposed action may be visible, audible and may result in changes to the character of nearby historic properties. FAA has

approached this Section 106 process as addressing all impacts associated with the demolition of Hangar 24 and the redevelopment of that site, so clearly does not contemplate another Section 106 process or other opportunity to protect the irreplaceable historic resources of the area.

B. FAA Erred in Failing To Deem Hanger 24 Eligible for Listing on the National Register Under Criterion C.

Under Criterion C of the Section 106 regulations, a historic structure is eligible for listing on the National Register if it “embod[ies] the distinctive characteristics of a type, period, or method of construction.” 36 C.F.R. § 60.4(c). MHC determined Hangar 24 eligible under Criteria A and B, and noted that Hangar 24 might also satisfy Criterion C for embodying distinctive architectural characteristics based on its “double-hangar closed Howe truss plan,” but that it lacked sufficient information to make that determination. App. at 161 (MHC Opinion at 2).¹¹

In April, 2009, the CHC submitted more than adequate information to trigger a genuine evaluation of eligibility under Criterion C, specifically a report prepared by Frederick Detwiller, of New England Landmarks, documenting the architectural and engineering significance of Hangar 24,

¹¹ FAA also acknowledged that “[t]he range of options could include . . . preserving parts of the structure.” FAA internal email, Aug. 28, 2008 (AR #83).

including its truss-work. CHC ltr. to MHC, Apr. 18 2009 (AR # 117). FAA was required to reevaluate its eligibility determination in light of this new evidence. See 36 C.F.R. § 800.4(c)(1) (“The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible.”); see also 36 C.F.R. § 800.5(c)(1) (assessing adverse effects requires that “[c]onsideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property’s eligibility for the National Register.”). Instead, FAA wrongly indicated that the engineer’s feasibility report that described the hangar somehow sufficed for an assessment of historical architectural significance, and merely reiterated that “[t]he hangar did not qualify for the National Register for its architectural achievement (Criteria C).” App. at 17 (EA at 12). In giving this issue such short shrift, FAA breached its obligations under Section 106.

This was not a harmless error. The mitigation measures set forth in the MOA, App. at 129-39 (attached to EA), were designed specifically to compensate for the permanent loss of those features of Hangar 24 that made it eligible for listing under Criteria A and B. It follows, therefore, that the MOA would have contained different or additional measures to mitigate for

the permanent loss of Hangar 24's significant architectural elements had it been deemed eligible under Criterion C. FAA misses this point entirely when it stated that re-evaluation of new evidence was futile because "Hangar 24 would not be any more eligible [for listing] under Criterion C." FAA ltr. to MHC, June 15, 2009 (AR #121). FAA's "destroy now, ask questions later" approach violated Section 106.

III. FAA VIOLATED NEPA.

Under NEPA, FAA must provide a detailed environmental impact statement ("EIS") for any proposed major project that will significantly affect the environment. 42 U.S.C. § 4332(2)(C). FAA may make a preliminary Environmental Assessment ("EA") to determine whether a project's environmental impact is so significant that an EIS is required. It may make a finding of no significant impact ("FONSI") if there is not a "substantial possibility that agency action could significantly affect the quality of the human environment." Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985) (internal quotations omitted). When an agency makes a FONSI though the record reveals with sufficient clarity that such a substantial possibility exists, "the agency's decision (not to produce an EIS) violates NEPA." Id.

Judicial review of an agency's FONSI entails determining whether:

First, the agency [has] accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a ‘hard look’ at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.

Grand Canyon Trust v. FAA, 290 F.3d 339, 340-41 (D.C. Cir. 2002). An agency’s factual findings underlying a FONSI are reviewed under the substantial evidence standard, while the determination itself is reviewed under the arbitrary and capricious standard. Nat’l Parks & Conservation Ass’n v. FAA, 998 F. 2d 1523, 1532 (10th Cir. 1993); see also Sierra Club, 769 F.2d at 870.

A. FAA Failed To Properly Quantify Cumulative Noise Impacts.

The protected historic sites in close proximity to Hanscom are quintessentially contemplative sites. Minute Man and Walden Woods are places to be enjoyed under the kind of quiet conditions that allow one meaningfully to contemplate the people and events that have profoundly influenced our nation’s history and, indeed, its very founding. Moreover, Hanscom sits in close proximity to communities defined by their quiet, bucolic settings. The large corporate jets that FAA says Hanscom could attract with a new FBO at Hangar 24 are substantially noisier than the prop planes that currently dominate Hanscom usage. See Save Our Heritage, 269

F.3d at 59.

FAA was required to undertake a proper cumulative impacts assessment with respect to noise and other impacts. See Grand Canyon Trust, 290 F.3d at 341-42. A cumulative impact is one “which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions” and “can result from individually minor but collectively significant actions taking place over a period of time.” 40 CFR § 1508.7.

FAA, however, made no real attempt to quantify cumulative noise impacts from the development of the Hangar 24 area and other areas to be developed at Hanscom. While FAA properly quantified increased noise from the East Ramp area using an accepted methodology, see Town of Cave Creek v. FAA, 325 F.3d 320, 325-26 (D.C. Cir. 2003), App. at 20 (EA at 15), Technical Memo at pp. 2-9 (AR ER-1), FAA never applied that same methodology to the Hangar 24 area itself nor to the combined effects of developing the two areas.

Instead, after finding that there could be a 0.3 decibel incremental increase from development at the East Ramp based upon the study of its noise consultant who examined the “induced growth” in airport usage from

such development, App. at 19 (EA at 14), FAA dismissed the whole notion of induced demand from the development at Hangar 24 itself: “Replacement of Hangar 24 with an FBO facility is unlikely to induce any increase in airport operations. Many of the corporate jets and other aircraft that would be served by the facility already operate at Hanscom and other itinerant aircraft are unlikely to utilize Hanscom more because of the existence of a third FBO on the airport.” App. at 20 (EA at 15).¹²

To be sure, FAA claims that it added together the effects of “any induced operations from the replacement of Hangar 24” and the development of the East Ramp and came up with a total incremental effect of 0.5 decibels. See id. But unlike the East Ramp analysis, FAA never identifies any study quantifying the Hangar 24 development area noise levels under any empirical methodology of any kind.

Additionally, there are apparently other projects ready to move forward at Hanscom. Massport submitted two Hanscom infrastructure projects to a list of proposed transportation infrastructure projects compiled for review by the Governor. App. at 79 (Klavens 2009 ltr. at 12). Neither

¹² Elsewhere in the EA, FAA states that the FBO is needed to provide some unnamed “specialized aircraft services” and “to the extent that needs are not met at Hanscom, those larger general aviation aircraft that would normally use Hanscom would most likely use Boston-Logan International Airport instead.” App. at 11 (EA at 6).

project description refers to the Hangar 24 redevelopment project or the East Ramp project and thus these “shovel-ready” projects apparently constitute additional reasonably foreseeable actions that must be considered as part of the EA’s cumulative impacts analysis. Further, the existing Airport Layout Plan for Hanscom has at least six areas (other than the Hangar 24 site) designated for “Future Aviation or Aviation Compatible Use.” See Airport Layout Plan (AR # 20). The EA does not indicate that FAA has gathered or analyzed information from Massport regarding these additional Hanscom projects even though it was brought to FAA’s attention. App. at 79 (Klavens 2009 ltr. at 12).

In short, FAA has failed both to take a “hard look” at the cumulative noise impacts and failed to “make a convincing case” for its FONSI.

B. FAA’s Cumulative Impacts Assessment Failed To Evaluate Existing Noise Impacts at Historical Sites.

FAA also failed to examine cumulative noise impacts from all sources at protected historical sites. Instead, FAA merely examined the incremental difference in noise from Hanscom with and without the additional development at Hangar 24 and East Ramp.

In Grand Canyon Trust, *supra*, FAA’s incremental approach was held insufficient under NEPA. In that case, as here, FAA only examined the incremental difference in noise between an existing airport near a national

park and the replacement project (there, replacing the airport with a new one). The D.C. Circuit rejected FAA's approach:

a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions--past, present, and proposed, and reasonably foreseeable--that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

The analysis in the EA, in other words, cannot treat the identified environmental concern in a vacuum, as an incremental approach attempts. . . . Without analyzing the total noise impact on the Park as a result of the construction of the replacement airport, FAA is not in a position to determine whether the additional noise that is projected to come from the expansion of the St. George airport facility at a new location would cause a significant environmental impact on the Park and, thus, to require preparation of an EIS.

Grand Canyon Trust, 290 F.3d at 345-46 (quotation and citations omitted).

In other words, to comply with NEPA, the EA must use as a baseline a noise level that *excludes* existing airport and other noise from past actions. The EA must then compare that baseline to the estimated total airport noise level, assuming the completion of the proposed projects and any other reasonably foreseeable future actions. The appropriate question is not simply whether there will be a significant incremental increase in noise resulting from the East Ramp and Hangar 24 projects but rather whether,

following the completion of the projects, the resulting *total noise* represents a significant cumulative noise impact on the human environment.

This is especially important here given that Minute Man is designated as one of the “Eleven Most Endangered Places” in the U.S. because of noisy activities at Hanscom, App. at 174-75 (AR # 52). A federal inter-agency Working Group has been created to promote the long-term protection and preservation of resources within Minute Man and other nearby significant historic sites from current and future adverse transportation impacts.¹³ See also App. at 93 (Bloom comments at 2).

FAA’s “incremental only” approach has failed to comply with clear NEPA law governing the cumulative impacts analysis.

C. FAA’s Conclusion That Noise Impacts Will Be Insignificant Fails to Comply with NEPA.

FAA failed to consider or apply its own NEPA policies. In the EA, the FAA used a 1.5db increase or 65db absolute level as measures of significance. App. at 20 (EA at 15); HMMH Technical Memo at pp. 2-9 (AR ER-1); see also Town of Cave Creek, 325 F.3d at 325-26. But FAA’s own NEPA policy directly states that “[s]pecial consideration needs to be given to the evaluation of the significance of noise impacts on noise

¹³ See http://www.shhair.org/Articles/c_8796_hansc_s10.pdf (10-3).

sensitive areas within national parks, national wildlife refuges and historic sites,” and thus “the DNL 65 dB threshold *does not* adequately address the effects of noise on visitors to areas within a national park or national wildlife refuge where other noise is very low and a quiet setting is a generally recognized purpose and attribute.” FAA Order 1050.1E.¹⁴ FAA ignored its own order in preparing the Hanscom EA.

In addition, FAA ignored independent expert evidence submitted by SHHAir and prepared by Noise Control Engineering, Inc. (“NCE”). NCE pointed out that the draft EA failed to address noise impacts on residents living near Virginia Road from increased ground operations associated with a new FBO terminal at the Hangar 24 site. App. at 85 (NCE Memo. at 1). NCE states: “In the worst case situation, this would be 30 to 40 dB above typical nighttime background noise levels for this area when other flight operations are not occurring. This would be a perceptible increase and could interfere with sleeping.” App. at 86 (NCE Memo. at 2). FAA ignored this issue in the final EA.

¹⁴ Available at http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.list/parentTopicID/13.

NCE also expressed its concern that the EA does not identify or evaluate the significance of “noise from the proposed building mechanical systems such as air conditioning units, air compressors and even back-up generator along with any FBO operations outside the hangar (fueling, repairs, loading, etc.) [which] could result in noise that exceeds state and local noise regulations.” Id.

NCE also questioned the relevance and reliability of HMMH’s conclusion that cumulative noise impacts from the East Ramp and Hangar 24 projects will not be significant due to the presence of a berm located near a number of homes in Bedford. Id. NCE explains that a berm in Bedford certainly cannot mitigate noise impacts to homes in Concord. Id. NCE also expresses doubt about whether a berm could indeed mitigate aircraft noise in the manner and to the extent claimed by HMMH. Id. Given that HMMH concludes that “[w]ith the analysis including the berm, no new residents would be exposed to DNL 65 dB,” HMMH Report at 6 (AR ER-1) (emphasis added), FAA should have taken seriously, rather than ignored, this expert evidence undercutting FAA’s analysis.

FAA’s approach of simply ignoring its own policy and expert evidence does not square with its statutory mandate. FAA failed to take a “hard look” at the noise impacts or to make a “convincing case” that there

would be no impact from noise. FAA's FONSI therefore fails to comply with NEPA.

D. FAA Improperly Segmented its Analysis.

Finally, the EA is fatally flawed because FAA improperly segmented its analysis by treating the structure(s) and related development that will replace Hangar 24 as a separate action from Hangar 24's demolition. Under NEPA regulations, "[a]ctions are connected if they . . . [a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 CFR § 1508.25. FAA must consider connected actions.

Id. The sole reason FAA offers for razing Hangar 24 is to build an FBO. Yet FAA blithely assumes that an FBO will have no impacts at all because it rejects the idea of induced demand even as it states that the new FBO will prevent diversion of business to Logan, App. at 11 (EA at 6), and even as it empirically analyzed induced demand impacts from similar development elsewhere at the East Ramp. App. at 19 (EA at 14). FAA did not engage in a "hard look" analysis.

This Court rejected just this kind of segmentation in Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985), where it found that an agency's "conclusions that the project would have no significant impact rest not so much on their belief that the industrial park would not affect the

environment, as upon their belief that they need not take account of the industrial park's effects" and held "we do not believe that NEPA permits the agencies here to ignore these impacts." The same is true here.

CONCLUSION

Petitioners respectfully request the Court hold the Environmental Assessment invalid.

Dated: December 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2010, I electronically filed the foregoing Petitioners' Brief and Addendum, and the attached Declarations of Margaret Coppe, Anna West Winter, Nancy Butman, Kathleen R. Anderson and Lynn Vanacore Bloom, with the United States Court of Appeals for the First Circuit by using the Appellate Case Management / Electronic Case Filing (CM/ECF) system. All counsel for Petitioners, Respondent and Intervenor who are registered with CM/ECF will be served by that system.

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