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September 10, 2008

via Overnight Delivery

Mark J. Langer, Clerk
U.S. Court of Appeals
District of Columbia Circuit
5523 E. Barret Prettyman
U.S. Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Re: County of Rockland, NY, et al. V. Federal
Aviation Administration, et al.
No.: 07-1363 (and consolidated cases)

Dear Mr. Langer:

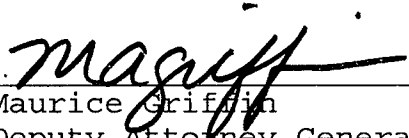
Enclosed for filing in the referenced matter are the original and seven copies of the Brief of Amicus Curiae the State of New Jersey in Support of Petitioner.

Also, please mark one copy "Filed" and return it to my attention. I have enclosed a self-addressed stamped envelope for your convenience. If you have any questions, please contact me at 609-633-8713.

Sincerely yours,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: _____


Maurice Griffin
Deputy Attorney General



No. 07-1363

Consolidated with Nos.. 07-1437, 07-1483, 07-1484, 07-1485, 07-1486, 07-1497, 07-1498,
07-1499, 08-1105, 08-1106, AND 08-1106

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

County of Rockland, New York, et al,

Petitioners

v.

Federal Aviation Administration, et al,

Respondents

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

BRIEF OF AMICUS CURIAE THE STATE OF NEW JERSEY
IN SUPPORT OF PETITIONERS

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STATEMENT REGARDING DEFERRED APPENDIX

Pursuant to Federal Rule of Appellate Procedure 30(c), D.C. Circuit Rule 30(c), and this Court's Order dated July 11, 2008, a deferred appendix will be used.

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* Authorities upon which New Jersey chiefly rely are marked with asterisks.

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* Airborne Characterization of the Chemical, Optical and Meteorological Properties, and Origins of a Combined Ozone-Haze Episode over the Eastern United States, Brent F. Taubman, et al, Journal of Atmospheric Sciences at 1782 6

* State of New Jersey, Department of Environmental Protection, State Implementation Plan (SIP) Revision For The Attainment And Maintenance Of The Ozone National Ambient Air Quality Standard, October, 2007 <http://www.nj.gov/dep/baqp/8hrsip/8hrsip.html#final>, para.1.4. 7

* State of New Jersey, State Implementation Plan (SIP) Revision For The Attainment And Maintenance Of The Fine Particulate Matter (PM2.5) National Ambient Air Quality Standard, June, 2008 Proposal
<http://www.nj.gov/dep/baqp/pm25sip/Chapter1-SIP-Intro.pdf>, para. 1.1 7

* Authorities upon which New Jersey chiefly rely are marked with asterisks.

INTEREST OF AMICUS CURIAE

The State of New Jersey (“New Jersey”) respectfully submits this amicus curiae brief in support of the Petitioners’ Joint Brief filed August 29, 2008 challenging the Federal Aviation Administration’s (“FAA”) September 2007 Record of Decision (“ROD”) for the New York/New Jersey/Philadelphia Area Metropolitan Area Airspace Redesign (“Project”). New Jersey concurs with Petitioners that the FAA’s environmental review of the Project violated the National Environmental Policy Act, 42 U.S.C. § 4331(b)(2) (“NEPA”) and Section 176 of the Clean Air Act, 42 U.S.C. §7506 (“CAA”) and joins Petitioners in urging this Court to vacate the ROD and remand the matter back to FAA to correct the deficiencies in FAA’s Final Environmental Impact Statement (“FEIS”).

New Jersey has two primary concerns related to the ROD and the environmental data the FAA relied upon in issuing the ROD. First, New Jersey has the primary responsibility for administering and enforcing the CAA within its borders. See Alaska Dept. Of Env. Conservation v. EPA, 540 U.S. 461, 490 (2004). Second, New Jersey regulates noise pollution in the State and has a strong interest in protecting the health and well-being of its citizens from the severe noise impacts of the Project. See N.J.S.A. 13:1G-1 et seq. Thus, New Jersey has a strong interest in ensuring that the Project is based on a thorough, comprehensive analysis of the environmental impacts of the Project on New Jersey’s environment, particularly air emissions and noise. However, the FEIS did not adequately address the air and noise pollution impacts associated with the Project.

The study area for the Project includes the entire State of New Jersey, and three of the five major airports that are the subject of the Project are either located in New Jersey (Newark Liberty International Airport (“EWR”) and Teterboro Airport (“TEB”)) or immediately outside the boundaries of New Jersey (Philadelphia International Airport (“PHL”)). ROD at 4.

Accordingly, this Court should stay FAA's implementation of the Project and remand the ROD to FAA for completion of a supplemental Environmental Impact Statement that fully addresses these issues.

ARGUMENT

I. FAA'S ANALYSIS OF AIR QUALITY IMPACTS WAS INADEQUATE

New Jersey concurs with Petitioners' assertions that FAA's environmental review of the Project violated Section 176 of the Clean Air Act, 42 U.S.C. § 7506 ("CAA"). Rather than repeat the arguments made by the Petitioners, New Jersey seeks to add its additional perspective as the State entity charged with enforcing the CAA within its borders.

New Jersey concurs with and joins in the arguments set forth in Petitioners' Joint Brief that (1) the Project is not exempt from the CAA or Environmental Protection Agency ("EPA"), regulations; See Petitioners' Brief at 88-89); (2) FAA's presumption of conformity for air traffic control procedures is not applicable to the Project; See Petitioners' Brief at 89-96; and (3) neither FAA's regulations nor the record in this matter supports FAA's fuel burn study; See Petitioner's Brief at 96-102). As a result, FAA failed to disclose the full extent of the air quality impacts of the Project on the residents of New Jersey.

The Project has the potential to significantly affect New Jersey because of this State's central location within the study area. It is home to two of the five major airports that are the subject of the Project and is in close proximity to a third. New Jersey residents will be affected by the Project's changes in arrival and departure procedures at these airports and by the inevitable increase in flight operations that will result from the Project, particularly at Newark Airport. These flight operations include additional arrivals and departures of aircraft as well as increased ground operations that will be needed to support those flights.

The basis for FAA's claim that an air quality assessment of the Project is not required is its assertion that the Project "is not a capacity enhancement project" and would not increase the total

number of operations at airports in the study area.” ROD at 42. This assertion is contradicted, however, by FAA’s stated purpose of the Project to “increase the efficiency and reliability of the airspace structure ... thereby accommodating growth.” ROD at 9. In addition to the potential for an increase in the total number of flight operations as a result of the Project, there is also a potential for a shifting of flights from non-peak to peak periods. FAA recognized in the ROD that aircraft operations in the study area have been increasing despite the operational delays experienced by aircraft operators and acknowledges that increases in flight operations are forecast to continue. ROD at 6. FAA also recognizes that people have dramatically increased their use of aviation as a mode of travel. ROD at 8. Therefore, it is logical to conclude that, if flight operations will continue to increase in spite of operational delays, they will surely increase as delays are reduced due to the Project, and many of those flights are likely to occur during the peak periods when people want to travel. The Project will increase the number of departure routes from Newark Airport, reduce the horizontal spacing between aircraft in flight and will allow the use of both parallel runways at Newark Airport for arriving aircraft. ROD at 18. The inevitable increase in flight operations and shifting of flights into peak periods that will result from the Project’s ability to accommodate increasing levels of air traffic is a reasonably foreseeable effect of the Project and the resulting air impacts should have been analyzed in the FEIS. Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992). As described in Petitioners’ Joint Brief, FAA recognizes that reduced delays will induce higher user demand for services resulting in a higher level of aircraft operations. See Petitioners’ Brief, at 28. In view of the potentially significant increase in flight operations at Newark Airport, FAA’s conclusion that the Project will only result in a *de minimus* increase in air emissions was arbitrary and capricious and violated its responsibility under NEPA to identify and assess the

environmental consequences of the Project. The air emissions from the Project should have been evaluated pursuant to 42 U.S.C. §7506 to determine whether the Project will have an adverse effect on the citizens of New Jersey.

FAA's failure to conduct an air quality analysis of the Project may significantly impact the State's ability to comply with the National Ambient Air Quality Standards ("NAAQS") under the CAA. New Jersey administers and enforces the Clean Air Act within its borders. See Alaska Dept. Of Env. Conservation v. EPA, 540 U.S. 461, 490 (2004). Under the Clean Air Act (42 U.S.C. § 7409(b)(2) (Section 109(b)(2)), EPA sets NAAQS "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." When an area does not meet the established NAAQS for a criteria pollutant, the area is subject to a formal designation process by the EPA, which establishes the area as nonattainment for that pollutant. The CAA also requires each state to adopt a State Implementation Plan ("SIP") that provides for the implementation, maintenance and enforcement of NAAQS in each air quality control region (or portion thereof) within such state. 42 U.S.C. §7410(a)(1). SIPs must "include enforceable emissions limitations and other control measures, means or techniques ... as well as schedules and time tables for compliance, as may be necessary or appropriate." 42 U.S.C. §7410(a)2(A).

FAA relies on its questionable assertion that the Project will not result in an increase in flight operations to presume that the Project conforms to New Jersey's SIP. By asserting that the Project is not a capacity enhancement project, FAA is able to conclude that any increase in emissions from the Project will be *de minimus* and, therefore, in conformance with New Jersey's SIP. 40 C.F.R. 93.153(c)(2). As stated previously, this assertion is contrary to FAA's stated purpose of the Project

to accommodate growth. ROD at 9.

New Jersey is in non-attainment for ozone state-wide and thirteen of its twenty-one counties are in non-attainment for fine particulate matter. Newark Airport is located in Essex and Union Counties and Teterboro Airport is located in Bergen County which are three of the thirteen fine particulate non-attainment counties. Seven of the remaining counties, including Hudson, Mercer, Middlesex, Monmouth, Morris, Passaic and Somerset are also located in northern New Jersey, while Burlington, Camden and Gloucester Counties are in close proximity to Philadelphia International. In view of New Jersey's on-going program to achieve compliance with the NAAQS for ozone and fine particulate matter, and in view of FAA's stated purpose of the Project to accommodate growth in flight operations, this Court should not permit FAA to rely on its conclusion that the Project is presumed to conform to New Jersey's SIP. Rather, this Court should remand the ROD to FAA to conduct an air quality analysis to determine whether, in fact, the Project conforms or will negatively impact New Jersey's efforts to comply with the CAA air quality regulations.

Furthermore, in concluding in the FEIS that the Project would cause little, if any, air quality impacts above 1,500 feet to the mixing height (3,000 feet), the FAA completely ignored potential air quality impacts below 1,500 feet to ground level. FEIS 5-132. Studies have shown that meteorological phenomena have an impact on the transport of emissions at these lower altitudes. For example, one particular study shows that meteorological conditions, such as high temperatures, atmospheric stability and stagnant winds, inhibit the vertical mixing of pollutants and lead to increased local concentrations of ozone. Airborne Characterization of the Chemical, Optical and Meteorological Properties, and Origins of a Combined Ozone-Haze Episode over the Eastern United States, Brent F. Taubman, et al, Journal of Atmospheric Sciences at 1782. Since the FAA did not

consider these studies in either the ROD or in the FEIS and since the Presumed to Conform Rule does not on its face apply to emissions below 1,500 feet, the Court should remand so that the FAA can consider the recent scientific evidence that shows that emissions at the lower altitudes may be transported and may contribute to New Jersey's nonattainment for ozone and fine particulates. See 72 FR 41565, 41578.

Both ozone and fine particulate matter in the atmosphere result from the burning of fossil fuels, including fuels used in motor vehicles and aircraft. The health effects associated with exposure to both of these contaminants are significant, mainly due to their effect on the lungs. Significant health effects associated with these contaminants include premature mortality, aggravation of respiratory and cardiovascular disease, decreased lung function and difficulty breathing, asthma and other lung diseases such as pneumonia and bronchitis. State of New Jersey, Department of Environmental Protection, State Implementation Plan (SIP) Revision For The Attainment And Maintenance Of The Ozone National Ambient Air Quality Standard, October, 2007 <http://www.nj.gov/dep/baqp/8hrsip/8hrsip.html#final>, para.1.4.; State of New Jersey, State Implementation Plan (SIP) Revision For The Attainment And Maintenance Of The Fine Particulate Matter (PM2.5) National Ambient Air Quality Standard, June, 2008 Proposal <http://www.nj.gov/dep/baqp/pm25sip/Chapter1-SIP-Intro.pdf>

In view of the potential health effects of these contaminants, the inevitable increase in air operations that will result from the Project and FAA's unfounded presumption that the Project conforms to New Jersey's SIP, New Jersey urges this Court to stay the implementation of the Project and remand the ROD to FAA for completion of an air quality impact analysis that adequately addresses these issues.

II. FAA VIOLATED NEPA BECAUSE THE PROJECT WAS APPROVED ON THE BASIS OF AN INADEQUATE ENVIRONMENTAL IMPACT STATEMENT

New Jersey concurs with Petitioners' assertions that FAA's environmental review of the Project violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331(b)(2). Rather than repeat the arguments made by the Petitioners, New Jersey seeks to add its additional perspective regarding the noise impacts at this Project on its citizens. The New Jersey Legislature has determined that the citizens of New Jersey are entitled to an environment free from noise which unnecessarily degrades the quality of life, and that the levels of noise in the State have reached such a degree as to endanger their health, safety and welfare and the integrity of the environment. N.J.S.A. 13:1G-2.

New Jersey concurs with and joins in the arguments set forth in Petitioners' Joint Brief that FAA (1) ignored the growth-inducing effects of the Project; See Petitioners' Brief, at 25-33; (2) conducted an inadequate analysis of noise impacts; See Petitioners' Brief, at 42-45; and (3) failed to include a compliance monitoring plan for noise mitigation; See Petitioners' Brief, at 62-65. As a result, FAA has failed to disclose the full extent of the noise and air quality impacts of the Project on the residents of New Jersey.

The Project is intended to reduce delays at airports within the study area, including Newark Airport, Teterboro Airport and Philadelphia International, by implementing new departure headings and new departure and approach procedures that will expose new populations of New Jersey residents to noise from low-flying aircraft for the first time. With the implementation of the Project, many New Jersey residents will be exposed to significant levels of aircraft noise for the first time. Yet, FAA conducted no background noise analysis at any location proximate to Newark Airport. Nor did FAA prepare noise exposure contours to identify non-compatible land uses or noise-

