

06-5267-ag

In the United States Court of Appeals for the Second Circuit

Natural Resources Defense Council, Inc., Defenders of Wildlife,
Friends of PFN,
Petitioners,

v.

Federal Aviation Administration, Marion C. Blakey, Administrator, Federal
Aviation Administration,
Respondents.

On Petition for Review of a Decision of the
Federal Aviation Administration

PETITIONERS' BRIEF

MELANIE SHEPHERDSON
BENJAMIN H. LONGSTRETH
Natural Resources Defense Council
1200 New York Ave., NW, Ste. 400
Washington, D.C. 20005
Tel: (202) 289-6868

JASON RYLANDER
Defenders of Wildlife
1130 17th Street, NW
Washington, DC 20036
Tel: (202) (202) 682-9400

DAVID N. ELLENHORN
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
Tel: 212-969-3000

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Counsel for Petitioners

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 the Natural Resources Defense Council, Defenders of Wildlife, and Friends of PFN (“Petitioners”) state the following:

Petitioner Natural Resources Defense Council is a not-for-profit corporation existing under the laws of the State of New York. There is no parent company or publicly held company that has a 10% or greater ownership interest in the Natural Resources Defense Council. Petitioner Defenders of Wildlife is a not-for-profit corporation existing under the laws of the District of Columbia. There is no parent company or publicly held company that has a 10% or greater ownership interest in Defenders of Wildlife. Petitioner Friends of PFN is a not-for-profit corporation existing under the laws of the State of Florida. There is no parent company or publicly held company that has a 10% or greater ownership interest in Friends of PFN.

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STATEMENT OF JURISDICTION

Pursuant to 49 U.S.C. § 46110(a), petitioners may file a petition for review of an order of the Federal Aviation Administration (“FAA”) within sixty days of the decision in the Court of Appeals for the District of Columbia or the Circuit “in which the person resides or has its principal place of business.” 49 U.S.C. § 46110(a). FAA issued its Record of Decision regarding the Panama City-Bay County International Airport on September 15, 2006. (JA-1650). Petitioners filed a timely petition on November 14, 2006 in the Second Circuit, where Petitioner Natural Resources Defense Council (“NRDC”) has its principal place of business. Petitioners have standing because the proposed airport relocation would harm their organizational interests and the interests of their members. See affidavits of Allen Jelks, Wayne Whitaker, Fred Werner, William Gregory Bruce, Linda Lopez, Laurie Macdonald, and Carroll Haynes, attached in addendum.

STATEMENT OF ISSUES

1. Whether Federal Aviation Administration’s (“FAA”) decision to authorize the closing of an existing airport and allow construction of an entirely new airport in Bay County, Florida, is arbitrary and capricious, and violates the Airport and Airways Improvement Act (“AAIA”), 49 U.S.C. § 47106, where the AAIA prohibits approval of projects that will result in significant adverse effects to natural resources if there are possible and prudent alternatives, and the record

shows that there are such alternatives available that would cause far less damage to the natural resources of the area than would result from construction of the new airport?

2. Whether FAA acted arbitrarily and capriciously and violated the AAIA by considering in its analysis of impacts to “natural resources” purely social impacts, where the AAIA does not authorize such considerations?

3. Whether FAA acted arbitrarily and capriciously and violated the AAIA by deferring to the view of the local sponsor that there are no available alternatives, when the AAIA directs the Secretary of Transportation to independently determine whether there are alternatives that would not result in significant adverse effects on natural resources?

4. Whether FAA acted arbitrarily and capriciously and violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., by skewing the Environmental Impact Statement’s (“EIS”) disclosure of potential effects in favor of building a new airport rather than expanding an existing airport?

5. Whether FAA’s failure to complete a Supplemental EIS to evaluate the impacts of the proposed airport on the critically endangered ivory billed woodpecker is arbitrary and capricious, and violates the NEPA?

STATEMENT OF THE CASE

FAA approved a proposal to close the existing airport in Panama City, Florida and construct a new airport on an undeveloped, ecologically important area near West Bay. The proposed relocation would result in the filling and destruction of an extraordinary 596 acres of wetlands. FAA's Record of Decision ("ROD") approving the new airport is arbitrary and capricious and contrary to law and Petitioners request that this Court enjoin FAA from implementing the ROD. Specifically, FAA's approval violates the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 47106, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321. Petitioners seek direct review in this Court pursuant to 49 U.S.C. § 46110(a).

STATEMENT OF FACTS

A. The Existing Airport Has Ample Capacity And, At Most, a Short Runway Extension May Be Required In the Future

The Panama City-Bay County Airport (“PFN”) is located in Panama City, which sits on the Gulf of Mexico in northwestern Florida. Panama City is the population and business center of Bay County, which has a population of roughly 161,000.¹ The airport is owned and operated by a state-chartered Airport Authority (referred to by FAA as the “Sponsor”). The PFN Airport was upgraded in 1996 and is safely serving all aviation demand in the area. (JA-116, 304-05).² Today, PFN is operating at less than half of its capacity. Affidavit of Donald R. Hodges ¶ 7.³ Aviation demand at PFN has been falling in recent years. Currently, there are thirteen commercial flights at PFN daily compared to twenty-two six years ago.

Id.

The PFN runway is 6,300 feet. At its present length, the runway safely serves all of the planes which the airlines, based on consumer demand, fly to Panama City. In fact, during the 1990s, larger planes --- Boeing 737s --- flew

¹ See <http://quickfacts.census.gov/qfd/states/12/12005.html>.

² “JA” refers to the Joint Appendix.

³ Petitioners have filed a motion to consider extra-record evidence, consisting of expert declarations by (1) Dr. Stephen Davis, III, a wetland ecologist; (2) Mr. Donald R. Hodges, a professional engineer; and (3) Dr. Jerome Jackson, an ornithologist. Their affidavits are included in the addendum to this brief.

between Atlanta and PFN daily, and larger Boeing 757s routinely use the shorter 5,700 foot runway at John Wayne Airport in Orange County, California.⁴ (JA-129, 135). The main runway at LaGuardia airport is 7,000 feet. (JA-134).

The Sponsor contends the airport should be taken down and a new airport built in West Bay because, the Sponsor claims, the runway must be lengthened to 8,400 feet. (JA-1660, 1671). FAA disagrees. (Id.). Based on a detailed analysis, FAA determined a runway of only 6,800 feet, just 500 feet longer than the current runway, will satisfy future aviation demand. (JA-1670).

In order to justify the airport relocation, the Sponsor predicts passenger traffic at PFN will grow, requiring a longer runway to accommodate larger planes and longer direct flights.⁵ (JA-1671). However, the Sponsor has consistently predicted more growth than FAA has estimated. (JA-1666) (Sponsor predicts seventy-two percent more passengers by 2018 than FAA). The Sponsor predicted

⁴ Congress recently imposed a new requirement that, by 2015, all runways provide a thousand foot runway safety area or other runway over-run safety features such as an engineered system called Engineered Materials Arresting System (“EMAS”). 2006 Transportation Appropriations Act, Pub. L. No. 109-115, 119 Stat. 2396 (2005). PFN, like most airports nationwide, id., does not yet meet this new requirement. However, the alternatives proposed for the existing site meet the provision.

⁵ Proponents of the new airport have suggested that there are safety reasons for moving the airport. However, FAA has never supported these claims and statements from numerous aviation experts in the record refute them. (JA-137, 117).

air travel would grow to 217,247 passengers (“enplanements”) by 2005, whereas FAA predicted 197,813 passengers by 2005. (JA-58, 60). As it turned out, both estimates were too high: In 2005 there were only 189,938 passengers at PFN. (JA-312).

Based on its inflated predictions of growth, the Sponsor contends an 8,400 foot runway is needed to accommodate potential “international charter flights” and wide-bodied aircraft. (JA-1671). FAA’s analysis contradicts this contention. FAA planning criteria require that runway length be based on aircraft that are “anticipated to use the runway on a regular basis, which is defined . . . as at least 250 departures per year.” (JA-2354). FAA found “no documentation of adequate demand” for any airline service requiring an 8,400 foot runway. (JA-2364). Rather, FAA determined that, by 2015 at the earliest, direct service between New York and PFN might be initiated and, if so, regional jets, which require only a 6,500 foot runway, would likely be used. (JA-2363). Even assuming the slim possibility that a 737 would be used, FAA concluded that, at most, a 6,800 foot runway was needed. Because no more than 6,800 feet is needed, FAA has stated that no federal funds can be spent on a longer runway. (JA-1724).

B. The Proposal To Build a New Airport With an 8,400 Foot Runway at the West Bay Site

In 1998, the Sponsor proposed extending the existing runway to 8,400 feet by filling a significant area of Goose Bayou. (JA-336). This proposed extension

would have destroyed ecologically significant seagrasses. Because of the harm to seagrasses, State and Federal natural resource agencies expressed their opposition and the plan was withdrawn. (JA-39, 126, 336).

Following the withdrawal of this proposal, the St. Joe Corporation (“St. Joe”), which is the largest private landowner in Florida and has major real estate development plans for the area, offered the Sponsor a four thousand acre parcel of upland and wetlands near West Bay if it would build a new airport there.⁶ (JA-53-54). St. Joe owns 96 percent of the 78,000 acres surrounding the proposed airport site that would “become ripe for commercial development” if the airport were built. (JA-1648). St. Joe historically was a timber company but recently switched to real estate. (JA-1647). St. Joe has told its shareholders that relocating the airport to West Bay is “essential to unlocking the enormous value of our holdings.” (JA-1564).

The Sponsor accepted St. Joe’s offer and proposed relocating the airport to West Bay. In its initial phase, the Sponsor proposed building new terminals and support facilities, an 8,400 foot primary runway and a 5,000 foot crosswind runway. The relocation would result in the direct fill of an extremely large area of

⁶ The 4000-acres is valued at approximately 12 million dollars, or just 3.8 percent of the project cost. See <http://pcairport.bechtel.com/>. St. Joe is entitled to seek a tax deduction. (JA-1626).

wetlands---596.2 acres in the first phase of the project alone. Remarkably, the Sponsor has plans for additional phases of development on the site and proposes to ultimately fill 1,513 acres of wetlands at the 4,000-acre West Bay site. (JA-279).

The current estimated cost for the first phase of the project has grown from an initial estimate of \$140 to \$180 million to \$331 million.⁷ In 2006, the FAA Administrator stated that the project had such a “low benefit-cost ratio” that it would likely not be eligible for certain FAA funding. (JA-1609).

The proposed relocation has engendered public opposition in Bay County. In 2004, a majority of Bay County voters opposed the new airport in a non-binding referendum. (JA-26). In addition, newspaper opinion pages have frequently carried criticisms of the proposed relocation as an environmentally damaging boondoggle that will primarily aid St. Joe. (e.g., JA-116, 129-30).

C. The Extraordinary Natural Resources Of The West Bay Site

The proposed West Bay site is located in a largely undisturbed and ecologically vital area. The Nature Conservancy recently declared this part of the Panhandle the sixth most biodiverse region within the United States. (JA-229). The region provides habitat for twenty-seven federally endangered species, including the green turtle, red-cockaded woodpecker and wood stork, and fifteen federally-threatened species, including the American alligator, loggerhead turtle,

⁷ Compare (JA-51) with <http://pcairport.bechtel.com/>.

and bald eagle. (JA-229). NRDC has included the region among a handful of ecologically critical “Biogems” which are its highest-priority conservation areas. (JA-229).

Approximately half of the four thousand acre parcel offered by St. Joe is wetlands. (JA-1075). The site contains a variety of wetland types including cypress, titi swamp, wetland hardwoods, and pine flatwoods. (JA-1076-77). Portions of the site’s forested wetlands were timbered by St. Joe, which then planted slash pine. (JA-1076). As explained in the attached affidavit of Dr. Steve Davis, a professor of wetland ecologist at the Texas A&M Univeristy, these previously harvested wetlands continue to serve important hydrologic and ecological functions. Davis Aff. ¶ 10. The area provides potential habitat for four species listed under the Endangered Species Act -- American alligator, bald eagle, eastern indigo snake, and flatwoods salamander -- as well as numerous species listed by the State of Florida. (JA-1073). Vegetative and wildlife surveys within a limited study area of the site revealed hundreds of plant and hundreds of wildlife species. (JA-1004-11).

The proposed relocation site is ecologically and hydrologically connected to West Bay and two of its most important tributaries. The site is located between Crooked and Burnt Creeks, which are large, important tributaries to West Bay. (JA-484). Because the project site and watershed surrounding these creeks is

generally undeveloped, the waterways are in excellent condition. (JA-500).

Crooked and Burnt Mill Creek as well as the area's wetlands, are low-nutrient, "blackwater" river systems that are particularly sensitive to pollution, and changes in hydrology and nutrient loading. (Davis Decl. ¶ 11; see also JA-502).

These waterways provide a critical source of freshwater to West Bay, which is itself an important fish nursery and has been designated as Essential Fish Habitat by the National Marine Fisheries Service. (JA-114). The majority of West Bay is conditionally approved for shellfish harvest, but could lose this designation if water quality declined. (JA-705-09, 1017).

On September 26, 2006, ornithological researchers at Auburn University announced that they had detected ivory-billed woodpeckers in wetlands along the Choctawhatchee River less than twenty miles from the proposed airport relocation. (JA-2516, 2520, 2546). The ivory-billed woodpecker is the largest woodpecker in North America and, until recently, was thought extinct. (JA-2491). Along the Choctawhatchee, ornithologists have made numerous sightings of the ivory-billed woodpecker, identifying it by distinctive white markings, and also heard and recorded distinctive "kent calls" and double-knocks, which they compared to recordings from the 1930s. (JA-2491 et seq.) Researchers have recently made additional ivory-billed woodpecker sightings and heard additional calls and

double-knocks. (JA-2621-23). The researchers have not yet been able to photograph the bird.

D. Environmental Impacts of Building a New Airport

FAA prepared an EIS discussing effects of the proposal to build a new airport with an 8,400 foot runway at the West Bay site. The EIS described impacts to 1,378 acres of terrestrial and aquatic habitat at the West Bay Site, including 596 acres of wetlands. (JA-435). This amount of wetland destruction is extraordinary for a single project; in 2003 the average size of a wetland fill was just over one-quarter acre.⁸ Based on its findings, FAA concluded that relocating the airport would have a “significant adverse effect on natural resources,” specifically “water quality, biotic communities, endangered and threatened species, wetlands, [and] floodplains.” (JA-1723).

Waters at the West Bay site would be irreversibly altered by the proposed airport construction. 596 acres of wetlands and 7,279 feet of streams would be filled, in turn disrupting the ecology of downstream waters. (JA-705). Almost 800 acres of impervious surfaces—including runways, taxiway, and parking lots—would be constructed in the Crooked Creek and Burnt Mill Creek watersheds. (JA-706). By preventing infiltration, the airport would increase stormwater runoff,

⁸ Calculated from 2003 wetland fill data (including general permits).
<http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf>

which causes stream erosion, pollution, and acute changes in salinity. (JA-705-06). Runoff would likely contain oil, grease, fuel, heavy metals, deicing agents, ammonia, nitrate, herbicides, and pesticides. (JA-706).

The proposed construction would also have profound consequences for wildlife. Over 1,000 acres of pine plantation, 150 acres of titi swamp, 72 acres of titi-bay-pine swamp, and 19 acres of cypress would be impacted. (JA-721).

“Several state-listed plant species would be lost at the West Bay Site by dredging and filling activities.” (JA-737, 735). The project could destroy habitat suitable for the federally-listed Eastern indigo snake and woodstork, and is “likely to adversely affect” the threatened flatwoods salamander. (JA-732, 737). In addition to these immediate impacts, the relocation would partition now-contiguous forest habitat, isolating remaining populations and increasing their vulnerability. (JA-723).

The environmental consequences of relocation would extend far beyond the airport itself because the airport would induce development on more than 20,000 acres. “[T]he West Bay [Detailed Specific Area Plan] provides for the development of 16,566 acres of mixed uses, including residential, business and office, commercial, retail, and recreational.” (JA-637). Based on St. Joe’s plans, the FEIS projected 2 million square feet of “Tech Park, Industrial” land use and 1 million square feet of warehouse development within 20 years. (JA-638). In

contrast, if an existing site alternative were chosen, this land would be used primarily as “Upland Forest” and “Wetland.” (JA-639). Although the EIS conceded the airport would spur growth in adjacent counties, it contains no estimate of how much growth would be induced. Most importantly, there is no analysis of the effects of any of the induced growth on natural resources. (JA-435).

In addition, relocation to West Bay entails the redevelopment of the current airport site -- in order to pay for the relocation -- and this redevelopment would have substantial environmental impacts. Construction activities and the operation of a proposed marina at the existing site could harm highly-valued seagrass and oyster beds. (JA-711). Pollutants could foul wetlands and Goose Bayou, which is classified an “Outstanding Florida Water.” (JA-710). Redevelopment could impact numerous federally- and state-listed species, including manatee, gulf sturgeon, gopher tortoise, Florida pine snake, Eastern indigo snake, gopher frog, spoon-leaved sundew, and sea turtles and wading birds. (JA-738).

As required by the Clean Water Act, the Sponsor proposes mitigation to offset the destruction of wetlands. (JA-743). Numerous individuals, organizations, and agencies submitted comments highly critical of both the environmental analysis and the proposed mitigation. (See, e.g., JA-1538-1607) (including comments from NRDC, Sierra Club Northwest Florida Group, Florida

Wildlife Federation, and Bay County Audubon). EPA questioned whether the mitigation would be successful and whether the proposal included adequate criteria to gauge future success. (JA-1207). Likewise, NRDC presented a National Research Council paper showing wetland mitigation is most often unsuccessful. (JA-159, 168 et seq.; see also JA-1588; JA-66). As explained by Dr. Davis, the mitigation plan has numerous flaws and “will not nullify or adequately mitigate for impacts associated with this development.” Davis Decl. ¶¶ 7, 17-27. FAA failed to acknowledge these and other criticisms of the mitigation proposal in the EIS or otherwise support its claim that the mitigation will offset the loss of wetlands.

E. Feasible Alternatives To The Proposed Project

NEPA requires FAA to identify and evaluate “all reasonable alternatives that might accomplish the objectives of the proposed project.” (JA-356). In assessing the Sponsor’s proposal, FAA sought alternatives that would achieve its purpose of expanding the runway to 6,800 feet while ensuring safety, local demand, and noise and land use compatibility. (JA-342, 356-57). In contrast, the Sponsor asserted an unreasonable and narrowly defined purpose that could only be satisfied by an 8,400 foot runway at the West Bay site. (JA-327, 339-40).

FAA presented several alternatives in the Draft EIS. (JA-356, 362, 369). Public commenters on the draft recommended additional options. (JA-1677). Donald Hodges, an engineer and former Delta executive, presented two

alternatives for the existing site which lessened impacts on local communities by using a safety technology called Engineered Materials Arresting System (“EMAS”) instead of standard over-run areas. (JA-1255-56). EMAS is in use at fourteen airports including JFK. Hodges Aff. ¶ 13. FAA decided to consider fully only one of these proposals in the Final EIS (“FEIS”). (JA-1677).

In the FEIS, FAA evaluated seven alternatives, including the Sponsor’s proposal and a “no-action” alternative. (JA-1678). At the existing site, FAA considered three alternatives: a 8,400 alternative, a 6,800 foot alternative, and “EMAS 2,” one of Mr. Hodges’s suggestions. (Id.). At the West Bay site, FAA considered the proposed design with a 8,400 foot runway and two 6,800 foot runway alternatives. (Id.).

All of these alternatives met FAA’s purpose. Both the West Bay and existing site alternatives are compatible with operations at Tyndall Air Force Base and “the current airspace configuration and utilization.” (JA-372, 393).⁹ In addition, the existing site alternatives were determined to have acceptable impacts on the local community. FAA determined no alternative should require more than 225 single-family relocations. (JA-397, 407-10). The EMAS 2 alternative, for

⁹ Although FAA suggests in the ROD that the West Bay site is preferable with respect to compatibility with air bases in the area, the United States Air Force indicated that it “does not want to be the reason that a particular site is chosen.” AR 3-2; see also (JA-1219 (comments of Brigadier General Jack B. Egginton indicating relocation is not required by Air Force); JA-2266-67 (comments of retired General Carl D. Peterson rebutting claim of conflict between uses).

example, met all noise criteria and would require only 49 residential relocations, far below the 225 limit. (JA-431).

However, FAA did not fully consider any expansion of the existing airport that would impact, to any degree, Goose Bayou. FAA screened out such alternatives in its “Level 2” screen, which eliminated alternatives if there was any impact to Florida Class II Waters, seagrass habitat, and State sovereign submerged lands. (JA-394, 1576-1577). Although some alternatives screened out would have filled up to 48.4 acres of Goose Bayou including 27.6 acres of seagrasses, (JA-402), FAA also screened out Mr. Hodges’ second EMAS alternative (“EMAS 3”), which would use only a 4.2 acre pier, resulting in far less impact on Goose Bayou, no fill and no impact to seagrasses. (JA-405). Importantly, the impacts of EMAS 3 are less significant than the proposed action, which would itself pollute Goose Bayou and harm its seagrasses and oyster beds through redevelopment of the existing site. (JA-711, 735). The U.S. Fish and Wildlife Service (“USFWS”) criticized the Level 2 screen and recommended full evaluation of all existing site alternatives, pointing out that “an existing site alternative, with appropriate mitigation [could have] less overall impacts than the West Bay alternative, along with its mitigation and the direct and indirect impacts of induced development.” (JA-1225-26).

In sum, the FEIS shows that forecasted aviation demand and safety standards can be met by either upgrading the existing airport or building a new airport in the West Bay area. However, relocating the airport would involve destruction of 596 acres of wetlands and streams that provide important freshwater input to West Bay, and would induce development on over 20,000 acres of natural lands. In addition, redevelopment of the existing site -- required to fund the new airport -- would harm seagrass and oyster beds (Class II Waters). (JA-711, 725). In contrast, upgrading the existing airport using the EMAS 2 would cost far less money and result in far less harm to the environment. During several public comment periods, commenters pointed out the unacceptable environmental harm from building a new airport and advocated for the alternatives at the existing site. (JA-1574-75).

F. FAA Decision To Approve the West Bay, 8,400 Foot Alternative

FAA determined in the ROD that, despite the far greater environmental harm and the availability of alternatives, it would approve the proposal to move the airport to the West Bay site and construct an unnecessarily long 8,400 foot runway. (JA-1689).

In order to approve the relocation, the Secretary was required to make certain determinations pursuant to the AAIA. If an airport relocation will result in a significant adverse effect on natural resources, the Secretary may

approve it only if there are no possible and prudent alternatives and every reasonable step has been taken to minimize the adverse effect. 49 U.S.C. § 47106(c)(1)(B); (JA-1723). Here, FAA found that building at the West Bay site would result in significant adverse effects on natural resources. (JA-1723). FAA nonetheless concluded the relocation could be approved because there were no possible and prudent alternatives. (Id.). FAA supported this conclusion by claiming that “the impacts at each site are different and each build alternative would have associated significant impacts, [and thus] none of the build alternatives can be deemed clearly environmentally superior.” (Id.). In addition, FAA indicated that, although the alternatives at the existing site would satisfy FAA’s purpose and need, only the West Bay 8,400 foot runway alternative would satisfy the Sponsor. (JA-1724). Finally, FAA concluded the adverse effects on natural resources could not be further minimized because the Sponsor wanted an 8,400 foot runway. (Id.).

Before the project can move forward, the Army Corps of Engineers must issue a permit to fill wetlands under the Clean Water Act. On August 29, 2006, the Army Corps indicated that it intended to issue the permit but has not yet done so. (JA-1735-36).

SUMMARY OF ARGUMENT

Under the AAIA, FAA may not approve an airport development project that will result in significant adverse effects to natural resources, unless there are no possible and prudent alternatives and all reasonable steps have been taken to minimize such adverse effects. 49 U.S.C. § 47106(c)(1)(B). In this case, the initial phase of construction of a new airport at the West Bay site will alone destroy 596 acres of wetlands and 7,279 linear feet of streams. This destruction can, and must, be avoided because there are several possible and prudent alternatives to the construction of a new airport, including expansion of the existing airport whose main runway can easily be lengthened to meet future aviation demand and applicable runway standards. FAA itself admits that such alternatives exist and that those alternatives would cause only a small fraction of the harm to the natural resources that relocating the airport would entail. Nevertheless, FAA deferred to the preference of the local Sponsor and unlawfully disregarded Congress' determination, in the AAIA, that airport relocation projects may not cause significant harm to natural resources if alternatives exist.

FAA's attempt to rationalize its decision to approve the sponsor's proposal, despite its grave harm to natural resources, is arbitrary and capricious. First, FAA makes the untenable claim that between building a new airport in West Bay and the existing site alternatives "none were clearly environmentally superior." This conclusion is flawed because it depends entirely upon alleged "social impacts,"

whereas the AAIA directs FAA to consider only effects to “natural resources.” In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the Supreme Court rejected a directly analogous effort by the Department of Transportation to evade a provision governing construction of highways through parklands.

Second, the FAA rejected possible and prudent alternatives simply because the sponsor wants a 8,400 foot runway. However, the FAA itself determined that a 8,400 foot runway is unwarranted, and that a 6,800 foot runway will meet foreseeable future aviation demand. The FAA’s deference to the Sponsor’s unreasonable preference violates the AAIA’s requirement that the Secretary of Transportation must evaluate the alternatives, and subverts the statutory protection of natural resources Congress imposed through the AAIA. Accordingly, this Court should issue a declaration that the FAA violated the AAIA and a permanent injunction barring FAA from implementing its decision.

The FAA’s decision to authorize the construction of a new airport with an 8,400 foot runway at the West Bay site also violates the National Environmental Policy Act (“NEPA”). First, the FAA failed to comply with its obligations under NEPA to rigorously explore and objectively evaluate all reasonable alternatives. Although the FAA should have evaluated alternative upland sites, it simply evaluated sites that suffer from the same defects as the West Bay site because they are dominated by wetlands. Second, the screening criteria the FAA used to

evaluate alternatives are arbitrary and capricious because they categorically foreclose any alternatives that would affect Goose Bayou, even though the new airport at the West Bay site would result in tremendous harm to wetlands, floodplains, streams, and West Bay. Remarkably, building the new airport itself would result in harm to Goose Bayou's seagrass and oyster beds as the result of redevelopment of the existing airport site which is necessary to finance construction of the new airport. Third, the FAA failed to evaluate the impact of plans to build two new four lane highways to provide transportation routes to the West Bay airport. Fourth, the FAA acknowledged that the new airport would be a catalyst for vast development and economic growth in the area surrounding the West Bay site, but failed to analyze the harm to natural resources such induced growth would cause, thus downplaying the true impact of the proposal. Fifth, the FAA relies on the benefits of mitigation that is required to offset the wide-scale destruction of natural resources the new airport would cause but, as numerous critics pointed out, the scientific evidence shows that such mitigation is likely to fail to compensate for the loss of wetlands and burying of streams. Nowhere in the EIS does the FAA acknowledge even the possibility that mitigation will not succeed. Finally, shortly after the FAA issued its decision, scientists announced that they had sighted the critically endangered ivory bill woodpecker in the Choctawhatchee River, just northwest of the proposed West Bay airport site.

Given this significant new information and the magnitude of the impacts to the woodpecker from building a new airport, the FAA must evaluate the proposal's impacts on the ivory bill woodpecker in a Supplemental EIS before committing any further resources to the proposal.

STANDARD OF REVIEW

The Court of Appeals reviews the non-factual aspects of Petitioner's challenge under the Administrative Procedure Act and may set aside the ROD if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Southeast Queens Concerned Neighbors, Inc. v. Federal Aviation Admin., 229 F.3d 387, 394 (2nd Cir. 2000). "To determine whether an agency has acted in an arbitrary and capricious fashion, we ask whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency, 399 F.3d 486, 498 (2nd Cir. 2005) (quoting Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983)). "Normally, we must deem arbitrary and capricious an agency rule where 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or

is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Id. (quoting State Farm, 463 U.S. at 43).

The factual determinations made by the “Secretary, Under Secretary, or Administrator if supported by substantial evidence, are conclusive.” 49 U.S.C. § 46110(c); see also Southeast Queens Concerned Neighbors, 229 F.3d at 295.

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Gully v. Nat’l Credit Union, 341 F.3d 155, 163 (2d Cir. 2003).

ARGUMENT

I. FAA’S APPROVAL OF THE AIRPORT RELOCATION VIOLATES THE AAIA

A. AAIA

Congress imposed strict and substantive natural resource protections for airport development projects. The preamble to the AAIA states it is “national policy that airport development projects authorized pursuant to this title shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation.” Pub. L. No. 97-248, 96 Stat. 324 (1982). The principal means by which the AAIA accomplishes this objective is by prohibiting the Secretary of Transportation from approving any airport relocation or major runway project that would have a significant adverse effect on natural resources if there are possible and prudent alternatives. 49 U.S.C. § 47106(c)(1)(B).

Under the AAIA, the Secretary may approve an application to construct a airport, runway, or major runway extension

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

49 U.S.C. § 47106(c)(1)(B) (emphasis added). Thus, in order to protect natural resources, the Secretary must answer three basic questions. (1) Will the airport project have a significant adverse effect on the natural resources? (2) If the project

will have a significant adverse effect, are there “possible and prudent alternatives?”

(3) If there are no alternatives, has every reasonable step been taken to minimize the adverse effect? Town of Stratford v. Federal Aviation Admin., 285 F.3d 84, 90 (2d Cir. 2002).

B. FAA’s Decision

FAA found that closing the existing airport and building a new airport in West Bay with a 8,400 foot runway “would have significant adverse impacts” on natural resources “in the categories of water quality, biotic communities, endangered and threatened species, wetlands, floodplains, and construction impacts.” (JA-1723).¹⁰ FAA then briefly addressed the question of whether any possible and prudent alternatives existed, reasoning that

given that the impacts at each site are different and each build alternative would have associated significant impacts, none of the build alternatives can be deemed clearly environmentally superior. For this reason, and because only the West Bay Site 8,400 foot Alternative

¹⁰ FAA adds that such adverse impacts would occur “without the mitigation described in Section 9 of the ROD.” (JA-1723). It does not appear from this statement that FAA was claiming that the proposed mitigation prevented the “significant adverse effect on natural resources” provision from being triggered. Instead, FAA asserts that the project satisfies the natural resource provision because no possible and prudent alternatives exist. (JA-1723-24). However, any claim that the adverse effects provision was not triggered because of the mitigation would be in error. The AAIA requires that FAA avoid causing harm to natural resources in the first place where possible and prudent alternatives exist. 49 U.S.C. § 47106(c)(1)(B). It is only if no alternatives exist that the AAIA contemplates steps to “minimize the adverse effect.” Id.

meets both FAA's and the Airport Sponsor's purposes and needs, FAA finds that no possible and prudent alternative exists to the Proposed Project. *See* Section 7 of this ROD. Although FAA's independent runway length analysis demonstrated that a 6,800 foot runway at the West Bay Site would be sufficient to accommodate projected aviation demand, the Airport Sponsor still seeks the added flexibility that would be afforded by a longer runway at that site.

Because the Airport Sponsor has elected not to modify its goal of attracting new, longer range non-stop service, there is no possible, prudent, or practicable alternative to the West Bay 8,400 foot Alternative.

(JA-1723-24).

C. FAA's Erroneous Conclusion That There Are No Possible and Prudent Alternatives Is Arbitrary and Capricious.

FAA correctly determined that the proposed relocation "would have significant adverse impacts" to natural resources, (JA-1723), and thus the AAIA prohibits FAA from approving the project unless there are no possible and prudent alternatives. 49 U.S.C. § 47106(c)(1)(B). Here, FAA's conclusion that there are no possible and prudent alternatives is arbitrary and capricious because, as described in public comments to FAA, the evidence shows there are alternatives which the Agency itself concluded would meet aviation needs. In addition, FAA's consideration of alternatives is based on factors Congress did not intend FAA to consider.

1. Possible and Prudent Alternatives Exist.

FAA’s own findings demonstrate that possible and prudent alternatives exist at the current airport site. Indeed, FAA identified and fully analyzed three alternatives that would meet FAA safety and design criteria by expanding the existing runway to the Southeast. (JA-426). For example, the “EMAS 2” alternative would create a 6,800 foot runway while causing relatively little harm to the environment or impact to the community.¹¹ EMAS 2 would impact only 13.1 acres of wetlands and 28.4 acres of “biotic communities.” (JA-1670). EMAS 2 would require relocation of 49 residences, well under the maximum of 225 relocations identified by FAA. (JA-1683; see also JA-405 (noting “[c]omparable replacement housing is likely to be available for these residents”). Such relocations are frequently required for airport projects; FAA recently approved airport projects involving the relocation of 188 residence (Hebron, KT), 539 residences (Chicago, IL), and 1,265 residences (Atlanta, GA). See ROD excerpts attached in addendum.

¹¹ As discussed in detail in Section II(A)(2), FAA should have fully considered a fourth alternative identified as EMAS Scenario 3, which was recommended in public comments. (JA-368, 405). EMAS scenario 3 proposed placing the EMAS overrun area on a pier structure and would thereby reduce the number of residential relocations to 22. (JA-368).

2. Alternatives At the Existing Location Would Cause Far Less Harm To Natural Resources.

FAA's conclusion that the existing site alternatives are not "environmentally superior," as compared to the West Bay site, is contradicted by the facts contained in the record and is based on factors that Congress did not permit the Agency to consider.

Construction of an airport at West Bay would cause dramatically more harm to natural resources than would implementation of alternatives at the existing airport site. Building the airport, from scratch, on an entirely undeveloped site would result in the direct destruction of 596.2 acres of wetlands, impacts on 1,377.8 acres of "Biotic Communities," and the loss of 7,279 linear feet of streams. (JA-1683-84). The destruction of these habitats would harm species listed under the Federal Endangered Species Act. (JA-423). Furthermore, the project would induce the construction of more than three million square feet of additional commercial and residential development in the West Bay area, which will compound the ecological harm from the airport itself. Finally, moving the airport would also result in additional wetland filling and impacts to Class II Waters and seagrasses in Goose Bayou at the existing site, the redevelopment of which is required in order for the Sponsor to raise its share of the relocation costs. (JA-711).

In contrast, the effects on natural resources from the extension of the runway at the existing airport would be several orders of magnitude less. For example, the alternative identified as EMAS 2 would impact only 13.1 acres of wetlands and only 28.4 acres of “biotic communities.” (JA-1683-84). Thus, based on these two metrics of natural resource damage, the extension of the existing runway in Panama City would result in approximately two percent of the direct harm that construction of the airport would cause and would not induce any growth in the ecologically critical West Bay area.

Because there are possible and prudent alternatives that cause far less harm to natural resources, the AAIA prohibits FAA from approving the West Bay proposal. 49 U.S.C. § 47106(c)(1)(B).

3. FAA’s Analysis of Effects on Natural Resources Improperly Considered Social Factors.

FAA concedes building an airport on West Bay will have far worse effects on natural resources than expansion at the existing airport. Nonetheless, FAA attempts to circumvent the AAIA’s natural resources provisions by treating social impacts as the equivalent of impacts to natural resources. (JA-1723-24). As Petitioner demonstrates below, FAA’s effort to include social impacts in an analysis of natural resources is contrary to the AAIA and must be rejected.

In its cursory discussion of the AAIA’s natural resource provision, FAA claims extension of the runway at the existing airport is not “clearly

environmentally superior” because “the impacts at each site are different and each build alternative would have associated significant impacts.” (Id.). The citation provided in support of FAA’s claim shows that the “different” impacts are social impacts as opposed to natural resource impacts. (JA-1724). Specifically, FAA cites Section 7 of the ROD which discusses the alternatives considered in the EIS. There, FAA admits that “at the Existing Site, the primary considerations relate to impacts to people and communities, whereas considerations at the West Bay Site relate primarily to natural communities and values.” (Id.).

FAA’s inclusion of social impacts in its analysis is inconsistent with the AAIA’s directive to protect “natural resources, including fish and wildlife, natural, scenic, and recreational assets, water and air quality, or another factor affecting the environment.” 49 U.S.C. § 47107(c)(1)(B) (emphasis added). Elsewhere in the AAIA, Congress addressed effects on communities and, in contrast, did not provide strict protections, merely requiring that “the interests of the community in or near which the project may be located [be] given fair consideration.” 49 U.S.C. §§ 47106(b)(2); see also id. § 47106(a)(1) (requiring that airport projects follow local zoning). The AAIA’s unambiguous terms and structure both demonstrate that when analyzing section 47106(c)(1)(B) the Secretary is to consider effects to the natural rather than the social environment. FAA’s contrary interpretation is “at odds with the plain language of the statute itself” and therefore not “entitled to

judicial deference.” Stewart Park & Reserve Coalition, Inc. v. Slater, 352 F.3d 545, 554 (2d Cir. 2003) (internal quotations omitted). Accordingly, FAA’s decision approving the relocation is arbitrary and capricious because it “relied on factors which Congress has not intended it to consider.” State Farm, 463 U.S. at 43; see also Waterkeeper Alliance, 399 F.3d at 498.

In Overton Park, the Supreme Court rejected arguments similar to those made by FAA in the context of an analogous provision, Section 4(f), of the Department of Transportation Act of 1966, 49 U.S.C. § 303. Section 4(f) protects against construction of federally-financed highways through public parks. Overton Park, 401 U.S. at 405. Section 4(f)’s parkland protections directly parallel the AAIA’s natural resource protections: Section 4(f) prohibits use of parkland for highways unless there is “no prudent and feasible alternative.” 49 U.S.C. § 303(c)(1). As the Supreme Court noted, Section 4(f)’s “language is a plain and explicit bar to . . . construction of highways through parks—only the most unusual situations are exempted.” Overton Park, 401 U.S. at 411.

Just as FAA in this case has attempted to broaden the AAIA’s natural resource provision to include social impacts, the Department of Transportation tried more than thirty years ago to broaden Section 4(f)’s strict parkland protections into “a wide-ranging balancing of competing interests,” such as “cost, directness of route, and community disruption.” Id. at 411, 413 (emphasis added).

The Supreme Court rejected the Department’s attempt, holding that “no such wide-ranging endeavor was intended.” Id. at 411. Instead, parkland can only be taken if “community disruption resulting from alternative routes reached extraordinary magnitudes.” Id. at 413.

In light of the similarity between the AAIA and the Transportation Act, the Court must follow the Supreme Court’s analysis in Overton Park and reject FAA’s attempt to dilute the AAIA’s natural resource protections.¹² When Congress passed the AAIA in 1982, the Supreme Court had already decided Overton Park. “When Congress enacts a statute, it is deemed to know of its prior actions, particularly where the subject matter of the statutes in question is related . . . [and] also to be aware of prior judicial interpretations of similar statutory provisions.” Strom v. Goldman, Sachs & Co., 202 F.3d 138, 147 (2d Cir. 1999). In such cases, Congress “must be regarded as having intended that its use of” similar provisions would have the same effect. Id.; see also Cannon v. Univ. of Chicago, 441 U.S.

¹² FAA does not argue that the social effects involve a disruption of “extraordinary magnitude.” EMAS Scenario 2 would require the relocation of forty-nine residences and seventeen businesses. (JA-1683). The 6,800 and 8,400 foot runway alternatives with standard over-run areas would require relocation of, respectively, 106 and 207 residences, and, in both cases, fifteen businesses. (JA-399-401). EMAS Scenario 3, which was not fully analyzed, would involve relocation of only twenty-two residences and four off-site businesses. (JA-405). All of these are within the threshold of 225 residential relocations FAA itself determined was the maximum acceptable. (JA-397). Moreover, FAA has recently approved airport projects requiring relocation of far more residences than the existing site alternatives. See ROD Excerpts in Addendum.

677, 696-97 (1979) (holding that where Congress enacts statutory terms similar to terms previously interpreted by courts, the new enactment should be given the same meaning as the former statute). Accordingly, because the statutory language of the AAIA closely parallels section 4(f), the Supreme Court's decision in Overton Park must govern this case as well.

In sum, FAA's effort to evade the AAIA's natural resource protections is contrary to the plain language of the AAIA as well as Supreme Court precedent addressing similar statutory language and must be rejected.

4. FAA Improperly Relied On The Sponsor's Preferences To Reject Possible and Prudent Alternatives.

In its analysis of the AAIA's natural resources provision, FAA improperly relied on the preferences of the Sponsor to reject possible and prudent alternatives. Such deference to the Sponsor's preferences violates the AAIA, which requires that the Secretary of Transportation make an independent evaluation of alternatives to the Sponsor's proposal. 49 U.S.C. § 47106(c).

FAA states in the ROD that "no possible and prudent alternative exists to the Proposed Site" "because only the West Bay Site 8,400 foot Alternative meets both FAA's and the Sponsor's purposes and needs." (JA-1723-24). This statement falsely suggests that the West Bay Site 8,400 foot alternative represents some common ground between FAA's and Sponsor's purpose and needs. In fact, FAA's purpose -- to provide a 6,800 foot runway -- could be met at the existing site. Only

the Sponsor unreasonably claimed that it needed a 8,400 foot runway to serve potential international charter flights. However, FAA considered and rejected the Sponsor's claims; FAA's analysis found "no documentation of adequate demand" for any airline service requiring an 8,400 foot runway. (JA-1670; 2365).

It violates the AAIA for FAA to approve the West Bay 8,400 alternative merely because the Sponsor prefers that alternative. Congress' statutory directive that the "Secretary of Transportation" approve only relocation projects subject to Section 47106(c)(1)(B), plainly requires that the Secretary independently determine whether the conditions of that provision are satisfied. 49 U.S.C. § 47106(c); see Overton Park, 401 U.S. at 409 (recognizing that when evaluating Section 4(f)'s protection for parks, the Secretary could not "merely rel[y] on the judgment of the Memphis City Council" but must "exercise his independent judgment"). Nowhere in the AAIA did Congress indicate that alternatives less harmful to natural resources could be ignored because the Sponsor preferred its choice and unreasonably "contrive[d] a purpose so slender as to define competing 'reasonable alternatives' out of consideration." Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997) (rejecting narrow purpose under NEPA).

In addition to being contrary to the text of the AAIA, an interpretation of the AAIA that permits FAA to substitute the local sponsor's preferences for its judgment regarding "possible and prudent alternatives" would make a nullity of the

AAIA's natural resources provision. This is because, although FAA regulates airport relocations as part of the National Plan of Integrated Airport Systems, the proposals are made by local sponsors, who naturally prefer their proposals. 49 U.S.C. §47106(c); (see JA-271) ("FAA does not initiate airport redevelopment projects"). Thus, the only time Section 47106(c)(1)(B) comes into play is when a local sponsor's proposal will significantly harm natural resources. If, in such cases, the sponsor's preference rules out alternatives FAA would find possible and prudent, Section 47106(c)(1)(B) would be without effect. Such an interpretation would "violate the cardinal principle of statutory interpretation that courts must give effect, if possible, to every clause and word of a statute." Treistman v. United States, 124 F.3d 361, 375 (2d Cir. 1997) (internal quotations omitted).

Accordingly, it is arbitrary and capricious for FAA to rely on the Sponsor's preference when determining whether a proposal satisfies the natural resource protections of Section 47106(c)(1)(B).

In sum, FAA's decision to approve the West Bay 8,400 Foot alternative violates the AAIA because there are possible and prudent alternatives at the existing site, which result in dramatically less harm to natural resources, and because, in rejected those alternatives, FAA relied on factors -- social impacts and

the preference of the Sponsor -- that “Congress has not intended it to consider.”¹³

State Farm, 463 U.S. at 43.

II. FAA FAILED TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT.

The purpose of NEPA is to establish a “national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere...” 42 U.S.C. § 4321. To accomplish this, federal agencies to prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Within an EIS, an agency must required to define the purpose and need for the proposed action, objectively evaluate all reasonable alternatives for achieving that purpose and need, and thoroughly analyze by taking a “hard look” at the environmental impacts of the proposed action and the alternatives. 40 C.F.R. § 1502.14(a); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). This analysis must consider

¹³ Even if the existing airport alternatives were not possible and prudent, the West Bay 8,400 foot airport would also violate the AAIA’s separate requirement that, if there are no alternatives, the project must include “every reasonable step . . . to minimize the adverse effect.” 49 U.S.C. § 47106(c)(1)(B). The most obvious reasonable step would be to construct a 6,800 foot runway – the longest needed to support aviation demand – rather than a 8,400 foot runway. The 8,400 foot runway destroys 120 acres more wetlands than a 6,800 foot runway. (JA-1683). Thus, although any construction at West Bay site is unjustified, FAA’s approval of a 8,400 foot runway at West Bay is also arbitrary and capricious because it fails to minimize the adverse effects on natural resources.

direct effects, indirect effects such as induced growth, and cumulative effects. 40 C.F.R. §§ 1502.16, 1508.8. The EIS must also discuss “any responsible opposing view . . . and . . . indicate the agency's response to the issues raised.” 40 C.F.R. § 1502.9(b).

The purpose of the NEPA process is two-fold. First, it helps agencies make fully informed and well-considered decisions by ensuring that significant environmental impacts are not overlooked or underestimated. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Second, the NEPA process serves as an “environmental full disclosure law so that the public can weigh a project’s benefits against its environmental costs.” Sierra Club v. U.S. Army Corps of Eng’rs, 772 F.2d 1043, 1049 (2d Cir. 1985). The public can assist the agency in making better decisions through public comments.

The EIS for the proposed Bay County airport violates NEPA in five ways. First, it fails to adequately evaluate alternatives to the proposal. Second, it fails to evaluate the environmental impacts of new highways proposed to serve the airport. Third, it fails to take a hard look at the environmental impacts of induced growth and cumulative impacts and to include these effects in its comparison of alternatives. Fourth, it fails to disclose the scientific evidence indicating the mitigation will likely not succeed in offsetting the loss of wetlands. Finally, FAA

failed to complete a supplemental EIS to evaluate the impacts to the critically endangered ivory billed woodpecker.

A. FAA Fails to Disclose and Compare the Environmental Impacts of All Feasible Alternatives.

NEPA requires that an EIS must discuss alternatives to the proposed action to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14; see also 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1507.2(d), 1508.9(b). The Council on Environmental Quality, which wrote the NEPA regulations that are binding on all federal agencies, describes the alternatives as “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The purpose of this requirement is “to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.” Envtl. Def. Fund v. U.S. Army Corps of Eng’rs, 492 F.2d 1123, 1135 (5th Cir. 1974).

1. FAA Failed to Evaluate Any Alternative Upland Sites.

Building a new airport with an 8,400 foot runway at the West Bay site would have tremendous impacts on aquatic resources because wetlands cover more than forty percent of the West Bay site. (JA-381). NEPA’s implementing regulations require that the EIS “[r]igorously explore and objectively evaluate all reasonable alternatives...” 40 C.F.R. § 1502.14(a); see 40 C.F.R. § 1502.1. FAA should have

explored the feasibility of building a new airport at an upland site, but instead the two alternative sites it considered, the East Bay/West Gulf site and the Callaway site, are also predominately wetlands. (JA-384) (describing sites as respectively 75 and 45 percent wetlands).

FAA improperly limited its evaluation of alternative sites to Bay County. Aviation facilities are evaluated according to the National Plan of Integrated Airport Systems, which includes the criterion that people typically should not have to travel farther than 20 miles. (JA-357). As Figure 4-6 in the EIS illustrates, a distance of 20 miles, or a thirty minute drive from the population center, extends into Gulf, Washington, and Walton Counties. (JA-573). FAA's failure to examine the portion of these Counties within twenty miles or a thirty minute drive violates NEPA's hard look standard and is arbitrary and capricious.

2. FAA Arbitrarily Rejected a Feasible Existing Site Alternative.

Public comments on the draft EIS proposed several additional alternatives to expand the existing airport that were not developed or evaluated by FAA in its draft EIS. (JA-367-68). One of these alternatives, "EMAS 3," would extend the runway to 6,800 feet while reducing the community relocations to only 22 residences through use of a 4.2 acre pier in Goose Bayou and EMAS technology to meet FAA safety standards. (JA-368). FAA found that EMAS 3 would meet safety standards and aviation demand. (JA-390). However, FAA found that this

alternative violated its “Level 2 Screen,” which barred any impact on Goose Bayou. (JA-405). Unlike the other alternatives the Level 2 Screen eliminated, EMAS 3, which relies on a 4.2 acre pier, would not fill state sovereign submerged lands or destroy seagrasses.

FAA’s Level 2 Screen was arbitrary and capricious because it categorically rejected any alternative to the proposed airport that would have any impact on class II waters (waters sufficient for shellfish propagation or harvesting), state sovereign submerged lands, or seagrasses. (see JA-394). The FEIS explains that the Florida Department of Environmental Protection (“DEP”) expressed concerns about impacts to seagrasses and indicated that permits have not been issued for “significant fill impacts to seagrass habitat.” (JA-395). However, the administrative record is devoid of support for FAA’s decision to screen out alternatives that would cause *any* impacts to class II waters and state sovereign submerged lands.¹⁴ Here, EMAS Scenario 3 would only require piers. (JA-368, 459, 462). FAA appears to wrongly assume EMAS 3 would result in seabed fill when FAA states it “would have fill impacts to 4.2 acres.” (JA-405). Critically, no seagrasses would be affected by EMAS 3. Indeed, the Sponsor characterized the

¹⁴ The Florida DEP provided preliminary comments on the alternatives in the draft EIS, which indicated that the “elimination of the waters and seagrass beds of Goose Bayou and the alteration of associated wetlands to accommodate runway extensions are not acceptable.” (JA-126). However, Florida could not have been considering the impacts of EMAS 3 because it was not included as an alternative when DEP wrote its letter.

area the pier would cover as “spoil” in its prospectus for the redevelopment. (JA-1179).

Furthermore, FAA’s Level 2 Screen was arbitrary and capricious because it categorically rejected any alternative that would affect Goose Bayou while the proposed construction in West Bay would result in tremendous harm to wetlands, floodplains, streams, and West Bay.¹⁵ Most remarkably, building the new airport would itself result in harm to Goose Bayou’s seagrass and oyster beds through the redevelopment of the existing airport site, which is a necessary to pay for the airport construction at West Bay.¹⁶ The EIS disclosed that, among other impacts of the redevelopment, the construction of a 250 slip marina could harm seagrass and oyster beds. (JA-711, 735).

FAA’s decision to arbitrarily apply the Level 2 Screen while countenancing massive destruction of wetlands also runs counter to Executive Orders protecting wetlands and floodplains, and comments by the U.S. Fish and Wildlife Service

¹⁵ The first phase of airport construction would result in the destruction of 596.2 acres of wetlands, 7,279 linear feet of streams, and impact 207.1 acres of floodplains, compared to FAA’s estimate of 4.2 acres of impact from the screened-out EMAS 3 alternative. (JA-427-28, 405). The full impacts, which include the impacts of redevelopment of the existing airport site, induced growth, and cumulative impacts would be far greater.

¹⁶ The Sponsor is relying on the sale of the existing airport site (to an entity which will redevelop the site) in order to finance the construction of the new airport. (See JA-1559). FAA conceded in the EIS that if any of the West Bay site alternatives are selected, the existing airport site would be redeveloped. (JA-680).

(USFWS). Executive Order 11990 requires that agencies “minimize the destruction, loss or degradation of wetlands, and . . . preserve and enhance the natural and beneficial values of wetlands.” 42 Fed. Reg. 26,961 (May 24, 1977). According to the USFWS, it was important to fully analyze all of the alternatives at the existing site because “an existing site alternative, with appropriate mitigation [could have] less overall impacts than the West Bay alternative, along with its mitigation and the direct and indirect impacts of induced development.” (JA-150-51; see also JA-1566-67 (NRDC comments)). The Court “may properly be skeptical as to whether an EIS’ conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.” Sierra Club v. U.S. Army Corps of Eng’rs, 701 F.2d 1011, 1030 (2d Cir. 1983).

B. FAA Failed to Evaluate the Impacts of Two Foreseeable Highway Projects Proposed To Serve the New Airport.

Under NEPA, an agency must consider closely related or “connected actions” within a single EIS. 40 C.F.R. § 1508.25. According to the NEPA regulations,

Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Id. Actions are connected where the proposed project cannot proceed without the connected action and the connected action would not proceed but for the proposed project. Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985) (finding road construction and timber sales are “inextricably intertwined” and “connected actions” where the “timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.”).

FAA failed to consider the impacts of two substantial highway projects that would provide new routes to the proposed West Bay airport site.¹⁷ First, the “West Bay Bypass” would be an entirely new four lane highway built to connect US98 and CR30A, running 16.20 miles from the coast east directly to the airport.¹⁸ Second, the Freeport-West Bay Connector, also a new four lane highway, is proposed to stretch 31.30 miles, from the West Bay site north to Ebro and Freeport. See project 40 at id. The map of the proposed highways, illustrating that the airport is the central landmark to which the proposed highways lead, shows beyond doubt that the new highway projects are designed to provide a new transportation

¹⁷ These new highway projects are included in the Northwest Florida Transportation Corridor Authority’s (“NFTCA”) recommended Master Plan, which was announced on March 15, 2007. The Florida Legislature created the NFTCA during the 2005 legislative session and the enabling statute charged the NFTCA with submitting a corridor master plan for northwest Florida no later than July 1, 2007. Fla. Stat. Ch. 343.82.

¹⁸ See project 38 on Recommended Master Plan Map, available at <http://www.nwftca.com/NWFCTA/uploads/NFTCA-Recommended-Master-Plan-March-2007-mapset.pdf> (visited March 22, 2007).

corridor to the proposed airport. See Recommended Master Plan Map, attached in addendum.

The meeting minutes discussing the Master Plan confirm that these highway projects were identified as needs for the proposed airport and the Master Plan was in the works before the FAA issued its ROD.¹⁹ Under NEPA, FAA has an obligation to ensure that its FEIS evaluates the environmental impacts of all connected actions, including the massive new highways to support the proposed new airport at the West Bay site through an area that is largely wetlands. See Chelsea Neighborhood Ass'n v. U.S. Postal Serv., 516 F.2d 378, 388 (2d Cir. 1975) (finding that if the potential impact of a connected action is not considered before the proposed project is constructed, “it will be too late to reassess the project as a whole no matter what is shown by a later EIS for the [connected action] prepared by another agency.”).

C. The EIS Failed to Take a Hard Look at the Environmental Effects of Induced Growth and Cumulative Impacts From Building a New Airport And to Include These Effects in Its Comparison of Alternatives.

An EIS must discuss the “effects” of a proposed action, including both “direct and “indirect effects” such as “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth

¹⁹ See, e.g., minutes of March 16, 2006 meeting, available at <http://www.nwftca.com/NWFCTA/BoardMembersAndMeetings/BoardMeetings.aspx> (visited March 22, 2007).

rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8. In order to ensure that the combined environmental impact of agency actions are not overlooked, NEPA also requires an agency to analyze thoroughly the “cumulative impacts” of its actions. 40 C.F.R. § 1508.25(c). “Cumulative impacts” are defined as “the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

The EIS trumpets the economic growth the West Bay airport would induce but fails to adequately disclose the environmental effects of that induced growth and to factor induced growth into its comparison of alternatives. Instead, FAA improperly combined the analysis of the induced growth and cumulative effects. The failure to consider induced growth separately frustrates NEPA’s core objective of allowing “the decisionmaker and the public to . . . make an informed comparison of the alternatives.” Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 811 (9th Cir. 2005). As EPA commented, the effects from induced growth should have been “dissected out of overall cumulative and impacts attributable to (i.e., those that would likely not occur but for) the proposed airport relocation.” (JA-1760).

The failure to separately analyze the effects of induced growth is particularly serious because of the extraordinary magnitude of the induced growth from the airport. The EIS acknowledges the new airport will induce more than three million feet of commercial and residential construction in Bay County alone.²⁰ (JA-801). The EIS fails to consider the effects that this massive development on, among other resources, surface water (JA-704); wildlife and endangered species (JA-723, 732); Essential Fish Habitat (JA-724-25); wetlands, (JA-742), or air quality (JA-699). (See also JA-437-38 (failing to include induced effects in summary comparison of alternatives)). The EIS’ bias toward the West Bay alternative is well illustrated by the fact that the one instance in which the EIS considers induced growth is when it discussed economic benefits. (JA-639). Rather than cherry-picking only the favorable employment numbers, FAA was required to properly accounted for all of the effects of the massive induced growth as part of the new airport construction. If the comparison of alternatives included induced growth, the contrast between the environmental effects of the alternatives would have been even more dramatic and would make FAA’s claim that neither the existing site nor the West Bay site is “environmentally superior” – a claim that is untenable based

²⁰ The new airport will induce: 1,000,000 square feet of warehouse; 2,000,000 square feet of technology/industrial space; 250,000 square feet of offices; 200,000 square feet of commercial/retail; 340 hotel rooms; 200,000 square feet of light industrial; 100,000 square feet of mixed use; 20,00 square feet of commercial space; 5,157 residential units; 200,000 square feet of recreational/community use. (JA-801).

on the direct effects alone – even more incredible. Accordingly, the EIS violates NEPA because it fails to accurately inform the public and decision makers of the comparative effects, including the significant effects from induced growth, of each alternative. See, e.g., Davis v. Mineta, 302 F.3d 1104, 1122-23 (10th Cir. 2002) (rejecting analysis for failing to provide an adequate discussion of growth-inducing impacts and to compare the induced growth effects of the project to a no build alternative or use of other alternatives).

Even if it were permissible to lump the analysis of induced impacts with the cumulative effects analysis, the cumulative impact analysis is itself flawed. FAA is required to analyze the cumulative effects of all “past, present, and reasonably foreseeable future actions.” 40 C.F.R. §§ 1508.7, 1502.16, 1508.25(c). Although an agency has some discretion to determine the geographic scope of its analysis, Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976), “the choice of analysis scale must represent a reasoned decision and cannot be arbitrary.” Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002). In this case, the cumulative effects analysis arbitrarily confined the geographic scope of its analysis and is also substantively flawed.

First, the cumulative impact analysis arbitrarily fails to consider all of the areas that the West Bay alternatives will affect. The EIS acknowledges induced growth would extend to “Walton, Washington, Jackson, Calhoun, and Gulf

counties,” which “may experience development related to implementation of” the West Bay 8,400 foot runway alternative, (JA-435), but contains no analysis of the effects on natural resources from development in those counties. The analysis of impacts to wetland and other resources is limited to the West Bay area. (JA-481, 795). FAA’s decision to limit the scope of the cumulative effects analysis to Bay County, while admitting that building a new airport at the West Bay site would have effects in other counties, is arbitrary, and the resulting cumulative impact analysis insufficient under NEPA. Idaho Sporting Congress, 305 F.3d at 973-974.

The analysis of cumulative impacts is also insufficient because it fails to consider important environmental effects. For example, EPA pointed out that the cumulative impact analysis failed to adequately consider highway projects, stating it “is uncertain why ‘surface transportation impacts’ would only be considered ‘minimal’ given the list of transportation projects on Tables 5-87 and 5-88.” (JA-1760). Significantly, the lists of transportation projects that EPA referred to do not include the two huge new highway projects outlined in the recommended master plan and the environmental effects of transportation projects is not disclosed in the cumulative impacts evaluation.

The analysis of water quality impacts is also deficient because the EIS fails to consider effects on West Bay and considers only development on wetlands, neglecting to analyze the environmental impacts from extensive development in

non-wetland areas. (JA-813-14). As the USFWS commented, the EIS should have contained a “complete watershed ‘build-out’ analysis . . . for the West Bay alternatives” in light of the “significant amount of ‘induced development’ in the watershed.” (JA-1227).²¹ In its response, FAA asserted that it need only consider “potential wetland impacts.” (JA-1223). FAA errs because the development of new impervious surfaces in non-wetland areas will, as USFWS pointed out, increase the amount of runoff and pollution that reaches West Bay. FAA has thus failed to “consider every significant aspect of the environmental impact of” the airport construction. See Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 811 (9th Cir. 1999) (rejecting cumulative impact analysis as too general and “one-sided”).

In sum, FAA failed to meet NEPA’s requirements by failing to identify the environmental effects of the substantial development that the West Bay alternatives would induce and for failing to accurately present the cumulative effects of those alternatives and factor the complete information into its comparison of alternatives.

²¹ USFWS also faulted the cumulative effects analysis for assuming that all areas designated for “conservation” under the West Bay Sector Plan would actually be conserved, pointing out that residential development is permitted on these 22,000 acres. (JA-1227).

D. The EIS Overvalued the Benefits of the Mitigation Proposed and Failed to Disclose Science Showing the Low Success Rate For Mitigation Projects.

NEPA requires “that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” Robertson, 490 U.S. at 354. In this case, the discussion of the mitigation is skewed in favor of the West Bay alternatives and fails to acknowledge the substantial evidence that wetland mitigation projects frequently fail to perform as planned.

The EIS repeatedly mischaracterizes the mitigation, which is designed only to compensate for destruction of wetlands and burying of streams, as an affirmative environmental enhancement. For example, FAA claims the mitigation “could result in a positive cumulative impact to the Burnt Mill Creek and Crooked Creek drainage basins as well as West Bay because conservation of wetlands would serve to improve habitat value, wildlife usage, and water quality throughout the drainage basins.” (JA-808; see also JA-438-39).²² The EIS thus obscures the fact that this mitigation is designed to compensate for the loss of wetlands and other waters that would result from constructing the proposed airport. Furthermore, there simply is no support in the Administrative Record for the assertion that water quality and

²² FAA did not take the time to develop mitigation plans for any alternatives to factor into its analysis (JA-743), which further demonstrates how FAA’s comparison of alternatives is not objective and fails to meet the “hard look” standard of NEPA.

wildlife habitat will be improved beyond the current conditions in the event that the proposed airport is built. To the contrary,

[t]he proposed changes to the West Bay site landscape will have far-reaching effects...the altered timing, magnitude, and quality of water will have increasingly negative impacts, algal blooms, decreased oxygen conditions, fish kills, and overall degradation of habitat in downstream ecosystems.

Affidavit of Dr. Davis at ¶¶ 13, 14.

The EIS also erroneously presumes that the mitigation lands would be destroyed in the event that the proposed airport is not built. (See JA-432). FAA provides no analysis or evidence to support the presumption that the mitigation area would be developed and the wetlands filled. Any development that might be proposed in wetlands would need to satisfy the strict wetland protections of the Clean Water Act, which requires the U.S. Army Corps of Engineers to deny applications to destroy aquatic resources where there are feasible alternatives that would have less impact on aquatic resources. 40 C.F.R. § 230.10. The EIS's misleading suggestion that the mitigation areas will be developed violates NEPA because it fails to objectively analyze the potential effects of the alternatives. See Robertson, 490 U.S. at 354.

The EIS also fails to meet NEPA's requirements because it does not acknowledge the scientific evidence that wetland mitigation efforts frequently fail to achieve the benefits predicted or to provide assurance that this mitigation will

succeed. Rather, the EIS describes in general terms a program of harvesting planted pine forests, replanting with long-leaf pine, hydrologic restoration, and use of prescribed fire. (JA-1027). Nowhere does the EIS acknowledge that these measures may not work as planned, or provide any assurance that the mitigation will meet certain performance standards.

In its comments on the draft EIS, EPA pointed out this flaw, noting that “success criteria [for wetland mitigation] and contingency plans should be fine tuned in the FEIS and during the wetland permitting process.” (JA-1207). As EPA pointed out in its response to the FEIS, the mitigation commitments remain “generic relative to [EPA’s] request for more specific wetland mitigation success criteria and contingency plans.” (JA-1757).

Similarly, NRDC’s comments contained in the record presented a comprehensive 2001 study by the National Research Council which reported that created or enhanced wetlands frequently fail to function as ecologically viable wetlands. (JA-168 et seq). Wetland ecologist Dr. Davis confirms that the conclusions of this research paper apply to the mitigation proposed in this case. As Dr. Davis explains the bulk of failures of wetlands mitigation documented in the scientific literature

seem to be associated with inappropriate hydrologic conditions or an insufficient monitoring program Given that lack of detail regarding hydrologic processes at work in the Greater West Bay area and the insufficient

pre-construction and post-mitigation monitoring program, I can only conclude that this mitigation effort will fail as well.

Davis Aff. ¶ 30.

Comments from Bay County Audubon and NRDC also questioned the method of evaluating the value of the existing wetlands and the predicted enhancement of the mitigation areas. (JA-66; 1929). Dr. Davis' affidavit confirms that the methodology, called "WRAP," was "inappropriately used by the permit applicant to assess the level of wetland function in the West Bay site."

Davis. Decl. ¶ 24. Among other flaws in its use, the program was used to "compare[e] across different wetland types," a use the authors of WRAP themselves indicated it is not designed for. *Id.* at ¶ 25. The failure to disclose these flaws violates NEPA's requirement to provide "up-front disclosures of relevant shortcomings in" scientific analyses. Lands Council v. Powell, 395 F.3d 1019, 1031 (9th Cir. 2005).

Finally, the FEIS also fails to include any information to justify whether and how the functions of these streams, when lost, can be compensated for through mitigation. Streams are complex ecosystems, depending on a variety of factors to function properly. Groundwater and surface flows, sediment routing, soil characteristics, vegetation, and its position on the landscape are all factors leading to a living, self-sustaining stream system. (JA-1563).

FAA failed to adequately address the important questions raised in comments about whether the mitigation program would achieve the results claimed, or disclose the uncertainty regarding the ultimate success of the mitigation. Accordingly, the EIS failed to discuss mitigation “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” Robertson, 490 U.S. at 354; see Laguna Greenbelt, Inc. v. U.S. Dep’t of Tranp., 42 F.3d 517, 528 (9th Cir. 1994) (upholding analysis where “EIS also discloses that mitigation measures may not be totally successful”); Cf. Nat’l Audubon Soc’y v. Hoffman, 132 F.3d 7, 17 (2d Cir. 1997) (holding that any mitigation used to avoid preparation of an EIS must be supported with assurances regarding the mitigation’s efficacy).

E. FAA Must Complete a Supplemental EIS To Evaluate Potential Effects On the Endangered Ivory-Billed Woodpecker

On September 26, 2006, ornithologists from Auburn University announced that they had detected ivory-billed woodpeckers in the wetlands of the Choctawatchee River near the town of Bruce, Florida. Details of their ongoing research and continued sightings can be found at <http://www.auburn.edu/ivorybill>. At twenty inches in length with a thirty-one inch wingspan, ivory-billed woodpeckers are the largest woodpeckers known to inhabit the United States. Often referred to as the “Lord God bird” because of its size and spectacular plumage, the bird was described by John James Audubon as the “great chieftain of

the woodpecker tribe.”²³ Its reported rediscovery in Arkansas in 2005 and now Northwest Florida after being thought extinct for some sixty years elated biologists and the general public. Interior Secretary Gale Norton called it “a rare second chance to preserve ... what was once thought lost forever.”²⁴

In light of this dramatic revelation, which surfaced eleven days after FAA issued its ROD on the proposed airport, Petitioners requested on October 19, 2006, that FAA prepare a supplemental EIS and reinitiate consultation with the USFWS under the Endangered Species Act (“ESA”) to evaluate the impacts of the proposed airport on the rare species. (JA-2475-79). By letter of December 6, 2006, FAA acknowledged the request and indicated it had begun “the process of discussing your letter with the U.S. Fish & Wildlife Service.” (JA-2545). On March 2, 2007, FAA denied it had any obligation to reinitiate consultation with the USFWS but released a Biological Assessment (“BA”) pursuant to the ESA that concluded the airport project “may affect” ivory-billed woodpeckers if the sightings in the region are confirmed. (JA-2546-47). To date, the USFWS is still reviewing that assessment and FAA has failed to address its obligation to prepare a supplemental EIS under NEPA. Although the FWS is still reviewing that document, its manifold

²³ See <http://www.fws.gov/southeast/news/2006/r06-061.html>.

²⁴ USFWS Press Release (Apr. 28, 2005), available at <http://www.fws.gov/southeast/news/2005/r05-029.html>.

flaws are readily apparent. It does not comply with the ESA and is not an adequate substitute for preparing a SEIS.

The potential that the relocation of the airport could affect the ivory-billed woodpecker—an effect that would undoubtedly qualify as a “significant environmental impact”—must be documented in the EIS. The proposed airport’s West Bay site is located approximately nineteen miles from the area in which the woodpeckers were found. (JA-2520). A pair of ivory bills can require a seventeen-mile home range. (JA-2525). Thus, FAA has a responsibility to address potential impacts to ivory-billed woodpeckers in a new EIS.

Supplemental EISs are required when “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). The Supreme Court has emphasized that NEPA imposes a continuing obligation on agencies to be alert to new information that may alter their original analyses, and to continue to take a “hard look at the environmental effects of [their] planned action, even after a proposal has received initial approval.” Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 (1989); Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991). “When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [an SEIS].” Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017,

1024 (9th Cir. 1980); see also South Trenton Residents Against 29 v. FHA, 176 F.3d 658, 663 (3d Cir. 1999) (requiring an SEIS when a project “will have a significant impact on the environment in a manner not previously evaluated and considered”). When determining whether new information is “significant,” “the degree to which the action may adversely affect an endangered or threatened species” should be considered. 40 C.F.R. § 1508.27.

In Friends of Clearwater v. Dombeck, the Ninth Circuit held that the Forest Service violated NEPA by failing to supplement an EIS to consider whether a timber sale and its impacts on the environment might adversely affect seven newly-listed imperiled species under the ESA. 222 F.3d 552, 558 (9th Cir. 2000). “When confronted with this important new information, it was incumbent on the Forest Service to evaluate the existing EIS to determine whether it required supplementation.” Id. Here, there is no evidence in the record that the existing EIS considered the habitat needs of the ivory-billed woodpecker or that FAA has addressed in any way its responsibility to prepare a SEIS in such a circumstance.

FAA suggests that the evidence does not yet definitively confirm that the ivory bill exists. (JA-2546). That numerous ornithologists have directly observed the species in the field is sufficient to require FAA to disclose the potential effects in a Supplemental EIS. “Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency *must* prepare an

EIS.” Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 870 (9th Cir. 2005) (emphasis added). An agency’s “lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.” Id. at 870-71 (quotation omitted). FAA’s refusal to take a “hard look” at how the airport project and its cumulative effects will impact the ivory-billed woodpecker is arbitrary and capricious and a violation of NEPA.

FAA may also argue that the preparation of a BA shows that no supplemental EIS is required, but that is not the case. First, the BA—which is required as part of the ESA’s Section 7 consultation process, 16 U.S.C. § 1536(a)(2)—cannot substitute for the public disclosure required by NEPA. NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” Robertson, 492 U.S. at 349. Second, the BA fails to show that the airport will have no effect on the ivory-billed woodpecker, as FAA must determine to avoid triggering a SEIS.

Furthermore, the March 2007 BA, like the EIS, improperly confines its analysis to the West Bay site and the West Bay sector plan. (See JA-2550 et seq.). Despite admissions in the EIS that the airport is anticipated to spur development in adjacent counties, (JA-435), the BA contains no analysis of natural habitats in these counties for the ivory-billed woodpecker. (See JA-2550 et seq.). That is

particularly problematic for the woodpecker because it is precisely in these counties—outside the West Bay Sector Plan but within the ambit of the airport’s effects—that the bird’s habitat primarily lies. See Jackson Aff. 4 ¶13. Notably, the BA considers the secondary impacts of noise on the species, but not the far more serious impacts of habitat fragmentation and development. That FAA would consider one impact outside the West Bay boundary and not others defies logic.

The BA’s discussion of ivory-billed woodpecker habitat also contains numerous flaws. As Dr. Jerome Jackson explains, the BA inaccurately cites seminal research, fails to adequately assess habitat and foraging needs for ivory-billed woodpeckers in the Florida peninsula, and reflects a lack of knowledge of the extant habitat in the Choctawhatchee River area where the woodpecker researchers are focusing their search. Most significantly, existing habitats for the ivory-billed woodpecker are not quantified in the biological assessment. Jackson Aff. at 2-4 ¶ 9-13. The BA simply contains “no significant discussion of available woodpecker habitat or the potential impacts of the airport and future development on ivory-billed woodpecker habitat outside the limited scope of the West Bay Sector Plan area.” Id. 4 ¶13.

Further, the BA notes that the West Bay mitigation parcels contain habitats that “meet the definition of potential IBW habitat” and claims that “there is a potential positive affect [sic] for future foraging in maintaining these native

habitats if it is determined that IBW are present in the region.” (JA-2559). In reality these isolated mitigation parcels were not intended to mitigate for potential impacts to the ivory-billed woodpecker, and will like provide no benefits to the species unless linked to the larger bottomland forest ecosystem via permanently protected habitat corridors. Jackson Aff. at 5 ¶14. The BA contains no analysis of how these mitigations parcels—or other alternatives—could provide these linkages.

The current BA is inadequate and has yet even to be fully evaluated by the FWS pursuant to the requirements of the ESA. Accordingly, FAA cannot rely upon an inadequate BA and incomplete ESA consultation process to avoid its separate duty under NEPA to prepare a supplemental EIS.

CONCLUSION

The FAA’s ROD is arbitrary and capricious and contrary to law because the AAIA prohibits approval of a new airport that will result in significant adverse effects on natural resources if – as is the case here – there are possible and prudent alternatives. The FAA’s ROD also violates NEPA because it fails to analyze all feasible alternatives and fails to accurately disclose the potential effects of the alternatives it did consider, and because FAA has failed to complete a SEIS to evaluate potential effects to the ivory-billed woodpecker. Petitioners request the Court to declare that the FAA’s ROD and EIS violate the AAIA and NEPA, to

vacate the Record of Decision authorizing construction of the West Bay airport,
and to enjoin FAA from implementing the project.

DATED: This 26th day of March, 2007.

Respectfully submitted,

/Benjamin Longstreth

Ben Longstreth
Melanie Shepherdson
Natural Resources Defense Council
1200 New York Ave., NW, Suite 400
Washington, DC 20005
(202) 289-6868
(202) 289-1060 (fax)

Attorneys for NRDC and Friends of PFN

Jason Rylander
Defenders of Wildlife
1130 17th Street, NW
Washington, DC 20036
(202) 682-9400
(202) 682-1331 (fax)

Attorney for Defenders of Wildlife

CERTIFICATE OF COMPLIANCE

I, Benjamin Longstreth, Attorney for Petitioners Natural Resources Defense Council and Friends of PFN, do hereby certify that the foregoing brief complies with the type-volume limitations set forth in FRAP 32(a)(7). This brief has been prepared using Microsoft Word 2003, Times New Roman font with 14-point type space. The total number of words in the foregoing brief, excluding the Table of Contents, Table of Authorities, Corporate Disclosure Statement, Certificate of Compliance, and the Certificate of Service, is 13,813.

Benjamin Longstreth

CERTIFICATE OF SERVICE

I, Benjamin Longstreth, hereby certify that I caused a true and correct copy of Petitioners' Brief to be served via Federal Express Delivery to:

Office of the Clerk
U.S. Court of Appeals, Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

I also served a copy of the above-referenced document via Federal Express Delivery to the following counsel of record:

Ellen J. Durkee Esq.
Todd S. Aagaard
Appellate Section, ENRD, DOJ
PHB Mail Room 2121
601 D Street NW
Washington, D.C. 20004

Counsel for Respondents

David J. Cynamon
Kenneth P. Quinn
Donald A. Carr
Pillsbury Winthrop Shaw Pittman LLP
2300 N St., NW
Washington, DC 20037-1122

Counsel for Intervenor Panama City-Bay County Airport And Industrial District

Date

Benjamin Longstreth