

SHUTE MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

April 24, 2014

Via Electronic Mail Only

Ms. Patricia Daniel
Project Manager
NorCal OAPM EA
Federal Aviation Administration
Western Service Center-Operations
Support Group
7-ANM-NorCalOAPM@faa.gov

Re: Northern California Optimization of Airspace and Procedures in the
Metroplex Environmental Assessment

Dear Ms. Daniel:

This firm represents CLASS (Citizens' League for Airport Safety and Serenity), which is a corporation of homeowner associations formed to protect the safety, health, and welfare of people living in communities near the Oakland airport. We have reviewed the Draft Environmental Assessment ("Draft EA") on the Northern California Optimization of Airspace and Procedures in the Metroplex ("NorCal OAPM"). On behalf of CLASS, we respectfully submit these comments to help ensure that agency decision-makers fully comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. section 4321 et seq. Our client is deeply concerned about the far-ranging environmental impacts the Project may have in the Bay Area, and particularly in the City of Alameda.

As a preliminary matter, the comment period provided for the public to review the Draft EA is insufficient. Given that the Draft EA is highly technical in nature, members of the public and affected public agencies require additional time for careful review of the documents if they are to make informed comments about this Project. CLASS is not the only organization that requested additional time to review and comment on the document. The agency received requests for an extension of the public comment period from the cities of Alameda and San Leandro, and from members of the Oakland Noise Forum, which includes six East Bay cities and two counties affected by the Project. In this letter, we are submitting our preliminary comments on the Draft EA. Should we discover additional issues with the

Draft EA upon further review, we will submit additional comments to the agency at a later date.

After our review of the NorCal OAPM Draft EA for the Project, we have concluded that it fails in numerous respects to comply with the requirements of NEPA. As described below, the Draft EA violates NEPA because it: (1) fails to adequately describe the Project; and (2) fails to adequately analyze and disclose the significant environmental impacts of the Project. In addition, the Draft EA fails to comply with the agency's own guidance for complying with NEPA. *See* FAA Order 1050.1E and section IV of this letter infra.

NEPA requires that federal agencies "consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that [they have] indeed considered environmental concerns in [their] decision-making process[es]." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1300 (9th Cir. 2003) (citations omitted). Where, as here, the environmental review document fails to fully and accurately inform decision-makers, and the public, of the environmental consequences of proposed actions, it does not satisfy the basic goals of the statute. See 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). As a result of the NorCal OAPM Draft EA's serious inadequacies, there can be no meaningful public review of the Project. The Federal Aviation Administration ("FAA") must revise and recirculate the Draft EA in order to permit an adequate understanding of the environmental issues at stake.

I. The Draft EA's Flawed Project Description Does Not Permit Meaningful Public Review of the Project.

NEPA's most basic purpose is to inform governmental decision-makers and the public about the potential significant environmental effects of a proposed project. 40 C.F.R. § 1500.1(b). In order for an environmental document to adequately evaluate the adverse impacts of a project, it must first provide a comprehensive description of the project itself. NEPA requires an accurate and consistent project description in order to fulfill its purpose of facilitating informed decision-making. 43 U.S.C. § 4332(2)(C). Accordingly, "[a]n accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." *Id.* (citation omitted). The Draft EA fails to meet this mandate.

Here, the Project description is so vague as to preclude the public and decision-makers from adequately assessing the true impacts of the Project. For example, the Draft EA acknowledges that flight route information, including how many aircraft and where

they will fly, is a key element of the Project. Draft EA Aircraft Noise Technical Report at 3-33. However, the Draft EA fails to provide detailed information on these key elements. It fails to provide information at a scale and level of detail that makes clear how the proposed action would change operations in areas that will experience overflights at 10,000 foot elevations and lower, where noise impacts are most impactful. Draft EA Exhibit 3-8. Instead, the Draft EA provides only graphics showing arrival and departure flight tracks at a scale that makes the information incomprehensible and therefore meaningless. *See Id.* and Draft EA Aircraft Noise Technical Appendix at 8 and 9 .

II. The Draft EA Fails to Take a “Hard Look” at the Potential for Project-Related Noise Impacts.

Under well-established case law, NEPA requires federal agencies to take a “hard look” at impacts resulting from a proposed action. *Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113 (9th Cir. 2012) (concluding that the Department took a hard look with respect to various NEPA impacts); *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004) (holding that the U.S. Forest Service took the ‘hard look’ NEPA requires in issuing a finding of no significant impact and a special use permit with regard to a bison capture facility). The Draft EA fails to meet this standard.

As the Draft EA acknowledges, the Project has the potential to impact more than 2 million people. Draft EA at 4-9. Given the sensitive noise environment and the potential for the Project to affect so many people, the Draft EA should have provided a thorough investigation of related impacts. The Draft EA makes no effort to quantify the likelihood that residents would experience increased overflights, to identify areas that may be more or less likely to experience increases in noise levels, or to evaluate the likelihood that residents would experience increased sleep disturbance.

Because the city of Alameda is located directly below the main departure paths from OAK and SFO, a significant number of its inhabitants experience noisy overflights, many of which occur at night and in the early morning hours. That problem would be exacerbated for many Alameda residents (and residents in other adjacent communities) if flights are concentrated along narrower flight paths, increasing the frequency of overflights and noise events. The Draft EA’s analysis of Project-related noise impacts does not address this impact.

Moreover, by narrowing the current “fan” of departures into a much narrower band, the Project would result in noise shifting from one segment of the community to another. In addition, achievement of the proposed action’s goal of increasing efficiency is likely to result in a corresponding increase in the number of operations implemented in the

Metroplex. Regardless, the potential shift in noise has serious noise impacts and equity issues associated with it, even if no increased flights result.

While the Draft EA explains that measures of instantaneous noise levels are used to determine the potential for speech interference and sleep disturbance, the document fails to include these metrics in its noise analysis. Draft EA, Appendix E at E-8 and E-9. Instead, the Draft EA noise evaluation is limited to using the Day-Night Average Sound Level (“DNL”) metric. Draft EA, Aircraft Noise Technical Report at 1-2. As the Draft EA explains, the DNL metric only measures average noise exposure level over a 24-hour period. Use of the DNL metric alone is inadequate in this instance for several reasons. First, residents affected by the change in flight tracks do not experience “average” noise. They experience single noise events each time they occur. The noise resulting from airplane traffic is so acute that the intensity of single flyover events should be measured in addition to average daily levels. See *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs* (2001) 91 Cal.App.4th at 1382, fn. 23 (establishing that environmental documents are required to “measure how many high-noise events will take place during the noise-sensitive nighttime hours [and] describe the effects of noise on normal nighttime activities, such as sleep.”) and at 1372-83 (the court stressed the need to provide information in a form that is useful to help nearby residents evaluate the impact of future increased air traffic on their daily lives. In particular, the environmental document must enable residents to evaluate the degree to which the “single events” of aircraft takeoffs and landings interfere with their sleep and conversation.)

Second, the DNL metric does not capture the frequency and timing of flight departures or the effects of these flights on noise contours under proposed Project conditions. The Draft EA should have, at a minimum, provided single event noise contours for each aircraft and flight track, frequency and times of occurrence, as well as actual numbers of households or people that would be disturbed on a nightly basis. Doing so would give residents important information about the noise impact, frequency and timing of “single events,” enabling them to evaluate the significance of those impacts on sleep and quality of life. Without such information, the Draft EA’s effort in this regard can hardly be called a “hard look” at the environmental consequences of the proposed action as required under NEPA.

Moreover, FAA’s policies for compliance with NEPA recognize that supplemental metrics are sometimes necessary. Specifically, FAA’s Order 1050.1E (“Order”) provides that supplemental noise analyses other than DNL can be used on a case-by-case basis to characterize specific noise effects. Order at 14.5a. and 14.5b. The Order also specifies that supplemental metrics can be used “to assist the public’s understanding of the noise impact.” Order at section 14.5b. Lastly, the Order specifies supplemental metrics

that may be used to evaluate sleep disturbance and speech interference. Order at sections 14.5f and 14.5g. Such metrics should be applied in the present instance to assist the community in its understanding of the Project's effects. Without supplemental metrics, decisionmakers and members of the surrounding communities do not have adequate information to understand Project's impacts. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199-201 (D.C. Cir. 1991) (holding the FAA's analysis of noise impacts adequate where it conducted both single-event and average noise level analyses); *City of Grapevine. Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1507-08 (D.C. Cir. 1994) (same).]

The Draft EA also does not differentiate between daytime and nighttime noise. Noise can be far more intrusive during the evening and nighttime hours, when ambient noise levels are at their lowest and when sensitive receptors are sleeping. Since the surrounding area is quieter at these times, the masking effect of other noise does not screen the aircraft noise. While the DNL metric may have embedded information on nighttime flights, the data is averaged into the 24-hour timeframe, and is thus not useful for analysis of sleep disturbance. The Draft EA should have acknowledged this important issue, and evaluated how the increase/shift in noise due to aircraft operations would affect receptors during evening and nighttime hours.

In sum, given the existing conditions (i.e., surrounding communities that are already excessively burdened with aircraft noise), there is no question that any increase in noise levels for those under the proposed flight paths (especially during evening and nighttime hours) and/or an increase in the frequency of noise events, has the potential to result in significant noise impacts. A shift of flight paths that concentrates flights over particular neighborhoods may result in either or both impacts. By evaluating only average noise, rather than single events, the Draft EA downplays the Project's noise effect on nearby sensitive receptors. A revised analysis should include supplemental analysis

III. The Draft EA Fails to Analyze Inconsistencies with State and Local Plans and Laws.

NEPA regulations require federal agencies to *acknowledge and explain* conflicts between the federal agency action and local or state law or policy. See 40 C.F.R. § 1506.2(d) ("To better integrate [federal] environmental impact statements into State or local planning processes, statements shall *discuss any inconsistency* of a proposed action with any approved State or local plans and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.") (emphasis added); § 1502.16(c) (requiring the alternatives section of the EIS to discuss "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local . . . land use plans,

policies and controls for the area concerned.”). Thus, the FAA must disclose Project conflicts with state law and any local noise ordinances and explain to what extent it will reconcile the Metroplex Project’s noise impacts with state and local law. The Draft EA ignores this mandate.

First, the Project would impact flight patterns over the City of Alameda, among other communities. Despite the potential for noise impacts to Alameda residents, the Draft EA fails to analyze the Project’s consistency with the City of Alameda’s noise ordinance. Given the proximity of the operations at both Oakland and San Francisco Airports to City of Alameda residents, this omission is unacceptable.

The City of Alameda’s noise ordinance specifies noise level standards of 55 dBA during the day and 50 dBA during the night (10:00 pm to 7:00 am). Alameda Municipal Code § 4-10.4. The Draft EA fails to evaluate the Project’s consistency with this ordinance and fails to provide evidence that noise from the new flight procedures would not exceed acceptable noise standards for residential and school uses in Alameda. This omission renders the Draft EA incomplete and inadequate under NEPA. A revised analysis, must include a complete listing of all applicable policies and regulations, and an analysis of the Project consistency with each provision.

Second, Oakland Airport has existing noise abatement procedures in place that may be impacted by implementation of the Project. The Silent Seven procedure, which is an instrument departure procedure at Oakland Airport, was established to reduce noise on residential communities at nighttime. The Silent Seven departure procedure is described as a turbojet aircraft take-off from Runway 30 that turns left on a heading of 270 degrees to intercept and proceed via the SFO R-342 (the San Francisco Airport radial heading of 342 degrees). This departure procedure is assigned between 10:00 p.m. and 7:00 a.m. for Runway 30 turbojet aircraft departures. The procedure helps ensure jet aircraft departing Oakland during nighttime hours turn left to fly over the Bay rather than flying over Alameda residents. The Draft EA should be revised to explain how the Silent Seven procedure will be preserved as part of the NorCal OAPM. If FAA intends to abandon or change the Silent Seven procedure as part of the NorCal OAPM, the Draft EA must be updated to evaluate the associated impacts and discuss means of reducing and avoiding those impacts.

IV. The Draft EA Fails to Comply with FAA Guidance for Compliance with NEPA.

FAA’s Order 1050.1E specifies agency-wide policies and procedures for compliance with the National Environmental Policy Act (NEPA) and implementing regulations issued by the Council on Environmental Quality (40 CFR parts 1500-1508). The Draft EA fails to comply with several provisions of the Order. Specifically, the Order provides that “illustrations shall be large enough and clear enough to be readily understood.”

Order 1050.1E, Section 14.4e. The graphics provided in the Draft EA are at a scale that fails to illustrate the Project's impacts on area residents. See, e.g., Draft EA Aircraft Noise Technical Report, at Exhibits 8 and 9. Such graphics are meaningless to the public and not useful in understanding what residents will experience on the ground.

In another example, the Order specifies that the EA shall compare future conditions both with and without the proposed action and that "comparisons should be done for appropriate timeframes." Order 1050.1E at 14.4g.(2). The five-year time frame presented in the Draft EA is not appropriate and the agency's analysis should look beyond the 2019 horizon as it projects future implementation of proposed action. Given the Draft EA's stated importance of implementation of RNAV procedures, one can infer that the FAA's goal is 100 percent implementation of the procedures. However, it is our understanding that full implementation of the procedures is dependent on aircraft being properly equipped and pilots being trained to follow the procedures. Therefore, it is likely that the Metroplex airports will implement an increasing number of operations using RNAV procedures as more operators become equipped and more pilots trained so that full implementation will not be fully realized until well after the five-year timeframe analyzed. Therefore, the Draft EA should have looked at a longer timeframe (e.g., 10-15 years) to evaluate the procedure changes along with the increase in operations over time. Order 1050.1E at section 14.4g(2).

Moreover, as discussed above, the Draft EA fails to disclose inconsistencies of the proposed action with approved State and local laws. 40 C.F.R. § 1506.2 ("To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plans and laws. Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.") A revised document must do so. See Order 1050.1E at 14.4i(3).

V. Conclusion

Because the Draft EA fails to adequately analyze the environmental impacts of the Project, and fails to substantiate its conclusion that the Project will not result in significant impacts related to noise, the Draft EA is legally deficient. Therefore, CLASS requests that the agency prepare a more thorough analysis in accordance with NEPA prior to further consideration of this Project. In addition, we request that the agency supply CLASS with the noise data employed for the NIRS noise models, including the latitude and longitude of the flight tracks as they would occur under the new procedures. If this is not possible, we request that the agency release the noise data to the Oakland Airport Noise Office so that

NorCal OAPM EA
April 24, 2014
Page 8

they might conduct additional review and analysis that corroborates whether or not the proposed action would have significant adverse impacts.

Thank you for consideration of our views. If you have any questions or comments, please do not hesitate to contact us or CLASS.

Best regards,

SHUTE, MIHALY & WEINBERGER LLP

Audrey Wolff
for Osa L. Wolff

Carmen J. Borg

Carmen J. Borg, AICP
Urban Planner

cc: The Honorable Dianne Feinstein
The Honorable Barbara Boxer
The Honorable Barbara Lee, California 13th District
Mayor, City of Alameda
Chris Lytle, Executive Director, Port of Oakland
Deborah Ale Flint, Aviation Director, Port of Oakland
Oakland Airport-Community Noise Management Forum
Larry Galindo, Oakland International Airport Noise Office

580765.3