MEMORANDUM

To: Quiet Skies Coalition

From: Matthew Adams

Date: January 18, 2017

Subject: Claims Against The Federal Aviation Administration

You asked us to prepare a non-confidential memorandum summarizing (1) recent changes to certain departure patterns at Seattle-Tacoma International Airport (Sea-Tac); (2) potential National Environmental Policy Act (NEPA) claims against the Federal Aviation Administration (FAA) arising from those changes; (3) other potential claims against the FAA under federal law; (4) procedural steps associated with the pursuit of claims against the FAA; and (5) potential remedies. I understand you intend to share this memorandum with certain Burien stakeholders, including the City Council and the City Attorney, and, for that reason, you have asked that the memorandum, unlike typical attorney-client communications, be considered non-confidential.

1. Recent Changes to Departure Procedures at Sea-Tac

For years, north flow departures from Sea-Tac followed a settled pattern. That pattern involved occasional flights over the City of Burien, but those flights were rare, were not the subject of procedures, plans, or other formal arrangements, and were dispersed over the City so as to avoid concentrating noise impacts in any particular area.

After months of investigation, the Coalition has now confirmed that in the summer of 2016, without notice to City residents, the FAA began experimenting with a new procedure for north flow departures (the New Route). The New Route sends certain aircraft on a fixed, consistent path at low altitude over the City of Burien, resulting in significant noise and air quality impacts within that corridor. The specific areas underlying the New Route include schools, parks, and otherwise-quiet residential areas.

I understand that Coalition members and City residents spent a considerable amount of time and effort trying to obtain from the FAA information about the New Route, its implementation, and whether/when the agency's decision-making process had been completed. I also understand that the FAA did not provide a formal response to these inquiries until December 16, 2016.

2. Potential National Environmental Policy Act Claims Against the Federal Aviation Administration

NEPA requires federal agencies to identify, evaluate, disclose, and consider reasonable alternatives to the environmental consequences of their proposed actions. As relevant here, environmental consequences include noise, air pollution, and impacts to historic resources and parklands, among others.

The NEPA process serves two objectives: (1) it "ensures that the agency...will have available, and will carefully consider, detailed information concerning significant environmental impacts" and (2) it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of [the] decision."[1] In short, NEPA requires that federal agencies both consider and make available to the public a rigorous analytical evaluation of environmental issues.

There are three (and only three) ways for federal agencies to comply with NEPA:

- For proposed actions that would significantly impact the human environment, the agency must prepare an Environmental Impact Statement (EIS).[2] An EIS is a lengthy, comprehensive document that must fully evaluate all reasonable alternatives.[3]

- For proposed actions that fall within one or more previously-promulgated categories of actions determined to have no possibility of a significant impact on the environment, the agency may elect to rely on a Categorical Exclusion from NEPA review.[4] If a proposed action is eligible for a Categorical Exclusion, the agency need not evaluate alternatives.

- For all other proposed actions, the agency must prepare an Environmental Assessment (EA) to determine whether significant environmental consequences are possible.[5] If so, the agency must proceed with an EIS.[6] If not, the agency may memorialize its NEPA compliance with a Finding of No Significant Impacts (FONSI).[7] In preparing an EA, the agency must evaluate potential alternatives to the proposed action.[8]

Agencies must follow one of these three compliance pathways ***before*** approving or otherwise committing resources to a proposed project.[9] The FAA does not appear to have done so here. We can be certain that the agency did not prepare an EIS or an EA because none of the required public notices associated with those documents were ever issued. The only remaining compliance path involves reliance on a Categorical Exclusion. And, for a number of reasons, it appears that a Categorical Exclusion was not — and could not have properly been — used:

- The New Route does not fall within any of the FAA's previously-promulgated categories of actions determined to have no possibility of a significant impact on the environment.[10] Therefore it was not eligible for a Categorical Exclusion.

- The FAA's own regulatory orders state that an EA (rather than a Categorical Exclusion) must normally be prepared for any action that would routinely route aircraft over noise-

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[1] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).
[2] 42 U.S.C. §4332(2)(C); 40 C.F.R. part 1502.
[3] 40 C.F.R. part 1502.
[4] 40 C.F.R. §1508.4.
[5] 42 U.S.C. §4332(2)(E); 40 C.F.R. §1502.9.
[6] 42 U.S.C. §4332(2)(C); 40 C.F.R. §§1502.3, 1508.9.
[7] 40 C.F.R. §§1508.9, 1508.13.
[8] 42 U.S.C. §4332(2)(E). As a general matter, the evaluation of alternatives in an EA may be somewhat narrower than the evaluation of alternatives required for an EIS.
[9] 40 C.F.R. §§1501.2, 1506.1.
[10] *See* FAA Order 1050.1F, part 5-6.5(i) (Categorical Exclusion for new air traffic control procedures does not apply to actions routing aircraft over noise-sensitive areas at less than 3,000 feet or to actions significantly increasing noise over noise-sensitive areas).

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sensitive areas at less than 3,000 feet above ground level.[11] As noted above, the New Route directs aircraft over parks, schools, and residential areas at less than 3,000 feet above ground level.

- The FAA's responses to various Freedom of Information Act (FOIA) requests lodged by the Quiet Skies Coalition fail to provide or disclose any of the analysis or documentation that would normally accompany an agency decision to rely on Categorical Exclusion. In other words, there does not appear to be any evidence that the FAA undertook the analysis necessary to determine whether reliance on a Categorical Exclusion was proper. That failure in and of itself is a violation of NEPA.[12]

In sum, the documentary record appears to confirm that the FAA failed to comply with NEPA before approving the New Route.

I understand the FAA now contends that "[d]ue to the historical nature of using the 250° heading [*i.e.,* the New Route], it was determined that there was no significant impact. Per FAA Order 1050.1, the FAA may document the environmental review; however, it is not required."[13] There are several obvious problems with this position:

- In documents obtained by Quiet Skies Coalition through FOIA, FAA staff clearly refer to the New Route as a significant departure from historical north flow departure procedures.
- Flight tracks confirm that the New Route is not consistent with historical operations.
- Extensive community testimony, based on first-hand experience, further confirms that the New Route substantially exceeds any previous departure flows over the City of Burien.
- As noted above, there is no evidence that the FAA actually evaluated whether the New Route might result in significant environmental consequences; on the contrary, it appears that no such evaluation was undertaken.
- While it is true that Order 1050.1 provides the FAA with a certain amount of flexibility in documenting its environmental review, it is *not* the case that the agency is entitled to proceed in reliance on a Categorical Exclusion without any documentation whatsoever.[14]
- The FAA has publicly sought to justify the New Route as necessary to accommodate a 9% increase in overall operations at Sea-Tac. That justification is not consistent with the notion that the New Route is a continuation of historical operations.

On balance, it appears that a cause of action alleging a violation of NEPA would be likely to succeed on the merits. Publicly-available documents (including those obtained from the FAA through FOIA) strongly

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[11] *See, e.g.,* FAA Order 1050.1F, part 3-1.2(12).
[12] *See* FAA Order 1050.1F, part 5-1(a); *see also American Bird Conservancy v. Federal Communication Commission*, 516 F.3d 1027, 1033-34 (D.C. Cir. 2008) (requiring strict compliance with Categorical Exclusion procedures).
[13] This statement appears in a December 28, 2016 powerpoint titled "FAA Response to Quiet Skies Coalition Request for Information from November 4, 2016 Meeting"
[14] *See* FAA Order 1050.1F, part 5-3.

indicate that the FAA failed to comply with NEPA before approving the New Route. And the FAA's explanation for that failure is arbitrary, capricious, and contrary to available evidence.

This assessment is bolstered by two facts which, although not directly dispositive of a NEPA claim, are likely to weigh against the FAA in this situation. First, the City is an environmental justice community. Second, the FAA did not provide City residents with any advance notification of the New Route.

3. Other Potential Claims Against the Federal Aviation Administration

NEPA is not the only federal environmental review statute applicable to the FAA's decision to approve the New Route. The agency was also required to comply with the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act. To the extent that the New Route can be shown to have a material impact on historic resources and/or parklands, it may be worth pursuing claims under one or both of those statutes. Doing so would not materially change the cost of bringing NEPA claims against the FAA.

4. Procedural Steps in Pursuing Claims Against the Federal Aviation Administration

FAA actions are directly reviewed in the federal appellate courts. It would be permissible to seek judicial review of the FAA's decision-making in the United States Court of Appeals for the Ninth Circuit. It may also be permissible to seek review in the United States Court of Appeals for the District of Columbia Circuit. Based on current information, a petition in the Ninth Circuit would appear to be the preferred approach.

A claim against the FAA is initiated by filing a Petition for Review. The Petition for Review can be a short document briefly summarizing the FAA decision being challenged and the substance of petitioners' claims. Normally, the court will then set out a schedule for the filing of various initial statements and submissions, including a docketing statement, a statement of issues, a statement regarding certain matters related to the appendices of record, and a statement regarding the decision underlying the case.

It is worth noting that petitions for review of FAA decision-making must be filed within 60 days of the issuance of a final agency "order" unless there are "reasonable grounds for not filing by the 60th day."[15] The FAA may seek to dismiss a challenge to the New Route on the theory that any such claims are time-barred. While it is never possible to guarantee the outcome of litigation, the factual circumstances presented here suggest that such a motion would be unlikely to succeed. First, it appears that the FAA's decision-making process continued well into the fall of 2016. Second, even if the FAA could show that it issued a final order more than 60 days prior to the filing of a petition for review, the absence of any official public announcement of the New Route, the absence of public notice or involvement in the FAA decision-making process, and the agency's dilatory and misleading responses to good-faith public inquiries about the status of the New Route suggest the existence of reasonable grounds for filing outside the normal 60-day window if indeed the 60-day window was ever triggered in the first instance.[16]

Unless settled or resolved on a motion to dismiss, claims against the FAA normally proceed to briefing on the merits. Petitioners have an opportunity for opening and reply briefs, with the FAA filing a responsive brief in between the two. Oral argument depends on the court's calendar, and is often set several months

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[15] 49 U.S.C. § 46110.

[16] *See, e.g., Avia Dynamics v. Federal Aviation Administration*, 641 F.3d 515, 520 (D.C. Cir. 2007) (60-day deadline not jurisdictional and "the filing period begins to run on the date the order is officially made public").

after briefing is complete. Briefing and argument are normally confined to the evidence within the administrative record, though in certain cases involving unusual procedural histories (of which this may be one), the courts will allow evidence from outside the record to be considered.

5. Remedies

Finally, there is the question of remedies. As noted above, available documents — and the FAA's responses to the Quiet Skies Coalition's FOIA requests for those documents — appear to confirm that the agency failed to comply with NEPA before approving the New Route. The courts generally invalidate and set aside agency action taken without NEPA compliance. In this case, such a remedy would remand the matter to the FAA and set aside the New Route until such time as the agency has completed an appropriate NEPA review.

On remand, the FAA would need to undertake an appropriate NEPA review. In theory, the FAA's NEPA compliance could take any of the three forms (EIS, EA, or Categorical Exclusion) described in part 2 of this memorandum. As a practical matter, however, it is unlikely that the agency would pursue a second Categorical Exclusion immediately after having its first effort invalidated. An EA on remand would place the agency on potentially safer ground, and is the option most likely to be pursued by the FAA.

While it is premature to speculate as to the precise elements of (or schedule for) such a review, the process would assuredly be open and public. This is important because it confirms that Burien stakeholders will have an opportunity to present alternative procedures by which Q400 aircraft can be dispersed from Sea-Tac. My understanding is that there are several such procedures that would have lower overall noise and air quality impacts than the New Route. Under these circumstances, it is reasonable to expect that alternatives to the New Route will receive meaningful consideration. Indeed, failure to provide such consideration would subject the FAA to additional litigation risk.

A successful litigation outcome would also bring certain long-term strategic benefits for Burien stakeholders. First, it would effectively assure Burien a seat at the table for any material future changes at Sea-Tac, a material improvement over the current situation. Second, litigation would help prevent the FAA from "regularizing" the impacts of the New Route — that is, making those impacts part of the baseline against which future proposals are measured.[17] This may become especially important if, as anticipated, the agency initiates significant changes to Sea-Tac procedures in the medium- to long-term.

[17] The FAA often tries to justify new noise and air pollution on the basis of allegedly-historic operating patterns. Indeed, it has attempted to justify the New Route in precisely those terms.

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Attorneys for Petitioner CITY OF BURIEN.

Pursuant to 49 U.S.C. § 46110 and Rule 15(a) of the Federal Rules of Appellate Procedure, the City of Burien, Washington ("City") hereby petitions the United States Court of Appeals for the Ninth Circuit for review of final decisions by the Federal Aviation Administration ("FAA") to (i) permanently implement certain flight departure procedures (the "New Route") at Seattle-Tacoma International Airport ("Sea-Tac"); (ii) denial of requests to modify or cease implementation of the New Route; and (iii) the FAA's failure to reopen consultation or to conduct required environmental review of alternative flight departure routes that would have fewer significant adverse impacts on the City and its residents.
The City is an incorporated city located in King County, Washington. It is an environmental justice community within the meaning of Executive Order 12898. In the summer of 2016, without notice to the City or its residents, the FAA began experimenting with the New Route, resulting in significant noise impacts to parks, schools, residential neighborhoods, and other noise-sensitive areas. The City and its residents spent a considerable amount of time and effort trying to obtain from the FAA information about the New Route, the implementation of the New Route, and whether and when the FAA's decision-making process had been completed. The FAA did not provide a formal response to those inquiries until December 16, 2016, after which it upheld - and refused to reconsider - the New
Route. The City and its residents have suffered - and will continue to suffer - significant, adverse impacts as a result of the FAA's New Route.
Dated: February 14, 2017

Respectfully submitted, DENTONS US LLP
By /s/ Matthew G. Adams Matthew G. Adams Jessica L. Duggan Attorneys for Petitioners

RULE 26.1 DISCLOSURE STATEMENT
Pursuant to Federal Rule of Appellate Procedure 26.1 Petitioner, by and through its counsel, hereby disclose that the City of Burien, Washington is a municipal governmental body under the laws of the State of Washington, is not a "nongovernmental corporate party," and therefore is not required to file a corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1(a).
Dated: February 14, 2017
Respectfully submitted, DENTONS US LLP
By /s/ Matthew G. Adams Matthew G. Adams Jessica L. Duggan Attorneys for Petitioners
CERTIFICATE OF SERVICE
I hereby certify, in accordance with Fed. Rule of App. Proc. 15(,c)(I), that a true copy of the foregoing Petition for Review was served by US mail on this 14th day of February, 2017 on the following:
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