No. 13-71202
(Consolidated with cases listed on page 26 herein)

In the United States Court of Appeals
For the Ninth Circuit

AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES AND
U.S. CONTRACT TOWER ASSOCIATION,

Petitioners,

v.

MICHAEL P. HUERTA, ADMINISTRATOR, AND
FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Review of the Federal Aviation Administration's
March 22, 2013, Decision to Close 149 Federal Contract Towers

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OPENING BRIEF OF AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES AND U.S. CONTRACT TOWER ASSOCIATION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the American Association of Airport Executives ("AAAE") and the U.S. Contract Tower Association ("USCTA") make the following corporate disclosure statement:

AAAE is a nonprofit corporation organized under the laws of Illinois. It has no parent companies, and no publicly held corporation has a 10 percent or greater ownership interest in it.

USCTA is an affiliate of AAAE. It was created in 1997 to promote the Federal Aviation Administration ("FAA") contract tower program and to enhance aviation safety at smaller airports.

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STATEMENT OF JURISDICTION

The Federal Aviation Administration ("FAA") asserted jurisdiction to issue its decision to close 149 air traffic control towers pursuant to the FAA Act, 49 U.S.C. §§ 40101 *et seq.*, and the Balanced Budget and Emergency Deficit Control Act, as amended, 2 U.S.C. §§ 900 *et seq.* FAA was required to reduce its programs, projects, and activities by five percent in the fiscal year starting on March 1, 2013.

The Courts of Appeals have jurisdiction over reviews of final agency decisions pursuant to 5 U.S.C. § 702, 49 U.S.C. § 46110, and Rule 15(a) of the Federal Rules of Appellate Procedure. Title 49 of the United States Code, Section 46110, provides exclusive jurisdiction to Courts of Appeals in this matter ("a person disclosing a substantial interest in an order issued by . . . [FAA] . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business"). 49 U.S.C. § 46110(a).

FAA issued its decision on March 22, 2013. AAAE and USCTA filed a timely Petition for Review in the U.S. Court of

Appeals for the District of Columbia Circuit on April 3, 2013, pursuant to 49 U.S.C § 46110(a).

This Court obtained jurisdiction pursuant to an April 5, 2013, order of the D.C. Circuit transferring AAAE and USCTA's action to this Court.

STATEMENT OF ISSUES

1. Whether FAA violated the Administrative Procedure Act by failing to consider whether its decision to close 149 air traffic control towers was consistent with its statutory mandates to "develop plans and policy for the use of the navigable airspace . . . *necessary to ensure the safety of aircraft and the efficient use of airspace*," pursuant to 49 U.S.C. § 40103(b)(1) (emphasis added), and to ensure a safe and efficient national transportation system, pursuant to 49 U.S.C. § 47101(a)(1), (5), (b)(1), (3), (5).
2. Whether FAA violated the Administrative Procedure Act by failing to comply with the National Environmental Policy Act's requirements that FAA analyze the environmental impacts of its decision to close 149 air traffic control towers, pursuant to 42 U.S.C. § 4332(2)(C).

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28-2.7, Petitioners AAAE and USCTA are submitting pertinent statutes, regulations, and rules verbatim in an addendum included with this brief.

STATEMENT OF THE CASE

The FAA decision under review was issued on March 22, 2013, and communicated in an email sent to affected airports and federal contract tower organizations. AR2; ER000011.[1] In its decision, FAA provided a list of 149 airports with federal contract towers that FAA would close, as part of a four-week phased closure beginning on April 7, 2013. *Id*.

On April 2, 2013, AAAE and USCTA requested an administrative stay from FAA. *See* AR5; ER000571. On April 3, 2013, FAA denied the request. *See* AR5; ER000575. That same day, AAAE and USCTA commenced this action by filing a Petition for

[1] Cites to the Administrative Record herein include (1) a cite to the category provided in FAA's Certified Index of Record and Supplemental Certified Index of Record (AR1 Declarations, AR2 Outgoing Communications, AR3 Review Team Materials, AR4 Safety Risk Management Document, AR5 Administrative Stay Requests and Responses) ("AR") and (2) a cite to the Excerpts of Record ("ER") filed by the petitioners in *Spokane Airport Board v. Huerta*, Case No. 13-71172.

Review of FAA's decision in the D.C. Circuit. *Am. Ass'n of Airport Execs. v. Huerta*, No. 13-1109 (D.C. Cir. Apr. 3, 2013). On April 4, 2013, AAAE and USCTA filed an Emergency Motion for Stay. *Id.*, Doc. No. 1429095 (D.C. Cir. Apr. 4, 2013). On April 5, 2013, the case was transferred to this Court. *See* ECF No. 1.

On April 5, 2013, FAA announced it would delay the tower closures until June 15. AR2; ER000005. Petitioners filed a Joint Motion to Stay Proceedings on April 22, 2013. *See* ECF No. 8.

STATEMENT OF FACTS

AAAE and USCTA adopt by reference the Statement of Facts contained in the Joint Opening Brief filed by petitioners in *Spokane Airport Board v. Huerta*, Case No. 13-71172.

SUMMARY OF THE ARGUMENT

FAA's decision to close the 149 federal contract towers is in violation of the Administrative Procedure Act ("APA") and should be set aside because it is "arbitrary, capricious," "in excess of statutory jurisdiction, [and] authority," and "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). A review of the Administrative Record, both now and as it existed at the time FAA made its decision, demonstrates that – in contravention of the

agency's statutory mandates to "develop plans and policy for the use of the navigable airspace . . . to ensure the safety of aircraft and the efficient use of airspace," 49 U.S.C. § 40103(b)(1), and to ensure a safe and efficient national transportation system, 49 U.S.C. § 47101(a)(1), (5), (b)(1), (3), (5)[2] – FAA performed only a cursory review, ignored safety and efficiency concerns, and failed to provide any reasoned analysis supporting its decision to close the towers. Furthermore, FAA failed to conduct an environmental review of the impacts its decision would have on the national airspace system, as required by the National Environmental Policy Act ("NEPA").

For these reasons, Petitioners – on behalf of their members – ask this Court to set aside FAA's decision.

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[2] FAA failed to consider whether its decision would further its Congressionally mandated policies "to encourage the development of . . . systems to serve air transportation passengers and cargo efficiently and effectively and promote economic development," 49 U.S.C. § 47101(a)(5), and to transport passengers and property in the most efficient manner, *see* 49 U.S.C. § 47101(b)(1), (3), (5). This includes providing users "with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States." 49 U.S.C. § 47101(b)(5).

ARGUMENT

I. AAAE AND USCTA HAVE STANDING TO PETITION FOR REVIEW

AAAE and USCTA have standing to petition for review on behalf of their members. First, AAAE and USCTA members have standing to sue in their own right. Second, the interests the associations seek to protect are germane to their purposes. Third, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, No. 11-16228, 2013 U.S. App. LEXIS 7564, at *15 (9th Cir. Apr. 16, 2013) (citing *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir. 1998)); *see also Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

AAAE is the world's largest professional organization for airport executives, representing thousands of airport management personnel at some 850 airports. Decl. of J. Spencer Dickerson ¶ 2. It represents the airport community through a range of services, including regulatory and legislative advocacy, training, and professional development. *Id*. Its affiliate organization, USCTA, was created to advance aviation safety and enhance the future viability of

the FAA contract tower program.[3] *Id*. Together, the membership of AAAE and USCTA represents all of the 149 airports that will lose towers. *See id.* ¶ 4. Through this appeal, AAAE and USCTA seek to protect their members' interests in the safety and efficiency of the national airspace system and ensure numerous airports' ability to participate in the contract tower program. These interests are directly germane to the organizations' purposes.

Many individual members of AAAE and USCTA have standing in their own right because the agency action will directly impact their airport operations.[4] For example, Ryan Airfield ("RYN") in Tucson, Arizona, which operates a tower slated for closure, is a member of both AAAE and USCTA. *See* Decl. of Danette M. Bewley ¶¶ 2-3. RYN is the country's ninth busiest general aviation airport with a contract tower and the only such airport in southern Arizona with a full spectrum of flight training operations. *Id.* ¶¶ 4-5. It serves important national security functions: the Army Air National Guard

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[3] AAAE and USCTA represent 251 FAA contract towers – 45 percent of all towers in the country and 30 percent of all tower aircraft operations nationwide.

[4] In fact, certain members have determined to bring suits on an individual basis. *See* Statement of Related Cases, *infra*. All airport petitioners are members of AAAE or USCTA.

conducts extensive training operations at RYN, and Customs and Border Protection uses RYN as a way station for interdiction operations. *Id.* ¶ 6. RYN is also critical to the U.S. Forestry Service as the base of its aerial firefighting operations for all of southern Arizona. *Id.* ¶ 7. Without the tower, the Forestry Service will be forced to relocate, degrading firefighting and rescue operations in the region. *Id.*

RYN is just one of many AAAE and USCTA members that have standing to sue in their own right. *See Associated Gen. Contractors*, 2013 U.S. App. LEXIS 7564, at *16 (association must establish at least *one* identified member would suffer harm); *see also, e.g.*, Decl. of Jeffrey P. Bourk ¶¶ 4-7 (Branson Airport is new Southwest Airlines service location; one of largest listed towers in enplanements; possible cessation of Southwest and Frontier Airlines commercial service; dangerous radar gaps).

While the individual airports represented by AAAE and USCTA may assert these claims, neither the claims asserted nor the relief requested require their participation. If FAA's decision is set aside, it will directly benefit all 149 impacted airports represented by

AAAE and USCTA – and indirectly benefit all their members by ensuring a safer and more efficient national airspace system.

II. STANDARD OF REVIEW

Under the APA, courts shall set aside federal agency actions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An action is arbitrary and capricious if the agency

> "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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."

League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1068 (9th Cir. 2012) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)).

Courts have held that FAA acted arbitrarily and capriciously when the agency made a decision not supported by substantial evidence or failed to analyze certain risks it was required to consider. *See, e.g.*, *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 606 (D.C. Cir. 2007) (granting Petition for Review of FAA decision regarding product testing because "the agency's decision . . . finds no support in the evidence the agency considered"); *Town of Barnstable v. FAA*, 659 F.3d 28, 35 (D.C. Cir. 2011) (granting Petitions for Review of FAA No Hazard determinations because the agency's misreading of its handbook caused it to "fail[] to supply any apparent analysis of the record evidence").

FAA may attempt to argue that its decision implementing the budget sequestrations should be accorded deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Such deference is not warranted. FAA did not engage in any formal decision making or adjudication. Rather, it issued its decision via executive fiat, in a short email, void of any reasoned explanation, detailed analysis, or opportunity for comment. *See* AR2; ER000011; *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* deference is appropriate only when "it appears that

Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

At most, under *Mead*, such decisions short of rulemaking or adjudication are "entitled to . . . respect," but only to the extent that they have the "power to persuade." *Mead*, 533 U.S. at 235, 246 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Given the dearth of pre-decisional materials in the Administrative Record, FAA's interpretation and decision should not even be entitled to respect, given the complete *lack* of "thoroughness evident in its consideration." *Mead*, 533 U.S. at 228. Accordingly, either no or *Skidmore*-type deference should be accorded to FAA. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) ("[W]e neither defer nor settle on any degree of deference because the [agency] is clearly wrong.").

III. FAA'S DECISION IS ARBITRARY AND CAPRICIOUS

A. FAA Failed To Act Consistently With Its Duty To Ensure The Safety Of Aircraft And The Efficient Use Of Airspace

Under 49 U.S.C. § 40103(b)(1), FAA is required to "develop plans and policy for the use of the navigable airspace and assign by

regulation or order the use of the airspace necessary *to ensure the safety of aircraft and the efficient use of airspace*." *Id*. (emphasis added); *accord* 49 U.S.C. § 47101(a)(5), (b)(1), (3), (5).

1. FAA Failed to Ensure Safety and Efficiency in Targeting the Federal Contract Tower Program.

In determining how to comply with the Balanced Budget and Emergency Deficit Control Act, as amended, 2 U.S.C. §§ 900 *et seq.*, FAA was required to act consistently with its duty to ensure safety and efficiency. It did not do so.

FAA provided *no* reasoned safety or efficiency analysis – indeed, it provided *no* analysis at all – regarding why it decided to target the federal contract tower program, instead of its own air traffic control tower program or any other component of its Air Traffic Organization ("ATO") budget.[5] FAA informed Petitioners' members that its "guiding principles in implementing the budget sequestration are to maintain [its] high safety standards, and to minimize the impact

[5] FAA stated that the sequestration statute required generally "an immediate reduction of approximately $375 million to the ATO's budget." AR5; ER000618. However, if the funds allocated to ATO's budget are insufficient, it is incumbent upon FAA to "reduce nonsafety-related activities" to fully fund operations. *See* 49 U.S.C. § 106(k)(3). This provides authority to respond to the sequestration by transferring funds both within and among programs in FAA's Operations account.

to the greatest number of passengers," AR2; ER000034; however, FAA's *post hoc* explanation demonstrates that while the agency may have considered the impact on commercial passengers in targeting the federal contract tower program,[6] it failed to consider any safety or efficiency effects. FAA ignored the significant safety and efficiency effects of such closures on the national airspace system, including the inevitable increased delays and noise impacts at other airports from re-routed aircraft, cessation of commercial air carrier service, increased fuel consumption, economic harms to the airports, and direct and indirect job losses in affected regions. *See* AR5; ER000573-74.[7]

FAA suggested, in response to AAAE and USCTA's letter raising such concerns, that to *not* close the federal contract towers would lead to such harms because the agency would be required to further furlough air traffic controllers at larger airports. *See* AR5;

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[6] *See* AR5; ER000620.

[7] FAA also ignored its duty in 49 U.S.C. § 47101(a)(5) to consider the significant economic harms that airports and the communities in which they operate will face. Impacted airports will lose revenue, making them more reliant on federal grants-in-aid, and communities will lose vital economic and transportation links to the national and international marketplace. AR5; ER000573. Airlines will face increased costs in revising schedules and accommodating passengers from canceled flights. *Id*.

ER000578. However, the pre-decisional materials reflect no analysis of such a trade off or consideration of alternative solutions, including those that would impact neither the contract tower program nor FAA control towers. In addition, the actual process FAA stated that it engaged in to determine how to make its cuts lacks reasoned analysis. In its letter to counsel for the Spokane Airport Board, FAA described certain actions it implemented to achieve ATO budget cuts, including furloughing ATO employees. AR5; ER000620.[8] It then vaguely described how, seemingly haphazardly and in reverse logical order, the contract tower program was placed on the chopping block: "[t]his dollar amount [related to furloughs] subsequently drove the dollar amount left to be applied to the tower contract. . . . The FAA started analyzing the cost savings of furlough days and their impact on operations and the cost of facilities with lower level activity and their impact on operation." *Id*. This sort of superficial explanation does not meet the APA's requirements for reasoned decision making, nor should such explanation be accorded any deference given the

[8] FAA, in its April 3, 2013, letter to AAAE and USCTA, incorporated by reference its April 2, 2013, letter to the Spokane Airport Board. *See* AR5; ER000576.

complete *lack* of "thoroughness evident in its consideration." *See Mead*, 533 U.S. at 228.

2. FAA Failed to Ensure Safety and Efficiency in Determining to Close Certain Federal Contract Towers.

In addition, once it decided to target federal contract towers in its sequestration decision, in determining whether it would be acceptable to close the 149 towers at issue, FAA was again required to act consistently with its duty to ensure safety and efficiency. It did not do so.

First, FAA failed to perform any reasoned analysis of the safety and efficiency concerns implicated by the closure of each of the 149 towers *before* the closure decision was made. FAA stated that it decided which towers to close based on four "[n]ational interest considerations." *See* AR2; ER000012. However, none of the factors – "significant threats to the national security," "significant, adverse economic impact," "significant impact on multi-state transportation, communication or bank/financial networks," and "the extent to which an airport . . . is a critical diversionary airport to a large hub" – is explicitly related to safety or efficiency. *Id.* The pre-decisional materials for each federal contract tower in FAA's Administrative

Record, *i.e.*, those developed by FAA before its March 22 decision, lack any reasoned safety or efficiency analyses. *See generally* AR3; ER000020-31, ER000117-22, ER000158-566. For example, FAA created "summary fact sheet[s]" for each of the 189 towers originally proposed for closure. These fact sheets contain just that – facts – and comments received by FAA on behalf of the affected airports, but nothing more.[9]

Second, although in FAA's largely-*post hoc* Administrative Record, FAA claimed it analyzed safety issues related to the federal contract tower closures in April (*i.e.*, *after* the March 22 decision), this review was conducted too late to meet basic APA requirements (discussed in greater detail in Section III.B., *infra*). Furthermore, in claiming to focus primarily on safety issues – albeit *after* FAA's decision was made and not satisfactorily – FAA's analysis failed to substantively address half of its statutorily-mandated duty: ensuring the "efficient use of airspace." 49 U.S.C. § 40103(b)(1); *accord* 49 U.S.C. § 47101(a)(5), (b)(1), (3), (5). Indeed, FAA openly conceded

[9] *See*, *e.g.*, AR3; ER000393 (RYN fact sheet (3/12/2013) (listing the closest commercial service airports, annual cost for contract controllers, and five-year traffic trend; providing a table summarizing input received; attaching copies of comments received)); AR3; ER000175 (BBG fact sheet (3/12/2013) (same)).

its decision would be contrary to its mandate in its Administrative Record.[10]

B. FAA Failed To Provide Any Reasoned Analysis For Its Decision

FAA, in deciding to close 149 air traffic control towers, was required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted). This Court, in reviewing FAA's explanation for its decision under the "arbitrary and capricious" standard, must "consider whether the decision was based on a

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[10] *See*, *e.g.*, AR1; ER001106 (Decl. of Joseph S. Teixeira (Apr. 23, 2013) ¶ 19 (stating that individuals on the Safety Risk Management Panel were informed that "the following assumptions would formulate the scope of the evaluation and analysis . . . . The potential closure of 149 towers would likely have an impact on traffic capacity and efficiency.")); AR2; ER000123 (Letter from Ray LaHood and Michael Huerta to Airlines for America, et al. (Feb. 22, 2013) ("Safety is our top priority, and . . . we may reduce the efficiency of the national airspace in order to maintain the highest safety standards.")); AR4; ER001126, ER001154-55 (Safety Risk Management Document (Apr. 19, 2013) ("system efficiency may suffer and there may not be as many traffic advisories offered.") ("The loss of the FCT to deliver basic ATC services . . . will force a number of those aircraft desiring those services to the controlling IFR facility. . . .")).

consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. (internal citations and quotations omitted). To do so, this Court must review "the whole record" of FAA in this matter. 5 U.S.C. § 706(2).

Here, FAA issued its decision on March 22, 2013, with no administrative record made known to the affected airports other than several letters and emails announcing the closures, *see* AR2; ER000011, ER000034, ER000123, and no reasoned safety or efficiency analysis.[11] As such, the agency has failed to provide a record adequate for this Court to review its decision.

FAA has filed an Administrative Record, including many substantive documents dated *after* its March 22 decision;[12] however, this Court may not consider FAA's *post hoc* rationalizations for its

[11] FAA also failed to abide by several of its procedures related to airport traffic control tower operations. FAA did not comply with its regulations "set[ting] forth establishment and discontinuance criteria for the Air Traffic Control Towers." *See* 14 C.F.R. §§ 170.11-170.15. The regulations provide for a benefit/cost analysis to discontinue an airport traffic control tower. Nor did FAA comply with its Order 7232.5G, *Changing Operating Hours for Terminal Facilities*, which "establishes criteria and provides guidance . . . for reducing or increasing hours of operation."

[12] *See*, *e.g*., AR1; ER000742-1120 (Decls. of J. David Grizzle (Apr. 23, 2013), Joseph S. Teixeira (Apr. 23, 2013), and Thomas Skiles (Apr. 24, 2013) and attachment thereto); AR4; ER001121-1356 (Safety Risk Management documentation).

decision. Rather, this Court's review "is to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (observing that affidavits created for litigation were merely "'post hoc' rationalizations, which have traditionally been found to be an inadequate basis for review") (internal citation omitted); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (stating that judicial review of agency action under the arbitrary and capricious standard must focus on "the administrative record already in existence, not some new record made initially in the reviewing court").

A review of the paltry record that existed at the time FAA made its decision demonstrates that the agency failed to undertake any reasoned analysis regarding safety and efficiency. A review of the entire *post hoc* record reveals nothing more than a safety review that is lackluster, at best.

C. FAA Failed To Comply With Its Mandate To Continue The Air Traffic Control Tower Contract Program For Certain Towers

FAA is required to "continue the . . . air traffic control tower contract program established . . . for towers existing on December 30,

1987." 49 U.S.C. § 47124(b)(1)(A). For contract tower programs that came into existence thereafter, the statute requires FAA to extend the program to those towers "as practicable." *Id*. FAA, therefore, acted arbitrarily and capriciously in closing contract tower programs for towers that were in existence on December 30, 1987.

IV. FAA FAILED TO SATISFY ITS OBLIGATIONS UNDER NEPA

A. FAA's Decision is Subject to NEPA

NEPA applies to all "major Federal actions significantly affecting the quality of the human environment" and requires a "detailed statement" on the environmental impacts of the proposed action. 42 U.S.C. § 4332(2)(C). FAA's failure to conform to NEPA's requirements is a statutory violation; all subsequent FAA actions are in violation of law.

FAA's decision to close 149 contract towers is a "major" federal action. Though FAA claims it is exempt from NEPA, *see* AR5; ER000627, the categorization of its decision as a form of inaction, and therefore not a major federal action, is patently inaccurate. Major federal actions, like FAA's decision here, include "systematic and connected agency decisions allocating agency resources to implement a specific statutory program." 40 C.F.R. §

1508.18(b)(3). Furthermore, even if the closure of one tower would – in isolation – have a relatively small impact, the closure of 149 towers – nearly 29 percent of *all* control towers in the country – will have a major cumulative impact. *See* Policies and Procedures for Considering Environmental Impacts, FAA Order No. 1050.1E, Chg. 1 ¶ 501 (June 8, 2004) (effective Mar. 20, 2006) (significance of action may be shown by cumulative effects).

B. FAA Was Required To Conduct An Environmental Review Prior To Making Its Decision

When FAA takes actions subject to NEPA, it must conduct an environmental review. *See* Order 1050.1E ¶ 400a. Actions requiring such review include modifications to air traffic control procedures, *see id.* ¶¶ 401m-n, which are clearly implicated in the decision to close 149 contract towers: traffic that can no longer be accommodated at those towers will be forced to go elsewhere, increasing the noise and other environmental impacts to air traffic procedures and the strong possibility that new procedures will need to be developed.

FAA erroneously claims that its decision is categorically excluded as an "administrative and agency operating action." *See* AR5; ER000629-31; Order 1050.1E ¶ 307j. However, this categorical exclusion is intended to apply to things like procurement

documentation, not a decision to defund nearly 60 percent of a major federal air traffic program. *See* Order 1050.1E ¶ 307j.

The agency asks this Court to simply "take their word for it and not question their conclusory assertions." *Barnes v. DOT*, 655 F.3d 1124, 1137 (9th Cir. 2011). This Court owes no deference to such unsupported claims. *See id.* Furthermore, to trigger the need for an environmental review, AAAE and USCTA need only raise "substantial questions whether a project may have a significant effect." *Id.* at 1136 (quoting *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2005)). In evaluating the effects of a proposed action, courts must consider all possible effects, including those that are "later in time or farther removed in distance." 40 C.F.R. § 1508.8(b). The numerous effects that are likely – not just possible – to result from FAA's decision, among many, are: greater fuel consumption and air quality impacts from an estimated 13,500 additional annual flight hours across the country; significant increases in air traffic and associated aircraft noise at airports with operational control towers; and entirely new flight patterns and procedures for the 149 affected airports. *See* AR5; ER000574.

C. FAA's Failure To Comply With NEPA Invalidates Its Decision

NEPA requires that the federal government "carefully consider the impacts of and alternatives to major environmental decisions." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). "Its purpose is to ensure that federal agencies take a 'hard look' . . . *before* deciding to proceed." *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989)) (emphasis added); *see also Barnes*, 655 F.3d at 1131 (Congress passed NEPA "to protect the environment by requiring that federal agencies carefully weigh environmental considerations . . . before the government launches a major federal action") (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)). "Regardless of the ultimate *outcome* . . . the FAA was still required . . . to engage in the review *process*." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1190 (D.C. Cir. 2007).

FAA admits that it conducted no NEPA analysis, alleging that the Budget Control Act prevents the agency "from acting on any information that might be developed." AR5; ER000628. A careful review of the law, however, reveals no command to ignore existing laws in implementing the sequestration. *See* 2 U.S.C. § 901a.

Allowing FAA to circumvent NEPA's requirements makes a "mockery" of the act. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1117 (D.C. Cir. 1971). Even if, as FAA alleges, fulfilling the requirements of NEPA would "wholly frustrate agency mission work," AR5; ER000628, the solution cannot be to plunge headlong into an unlawful course of conduct.

CONCLUSION

For the reasons stated above, AAAE and USCTA respectfully request that this Court set aside FAA's decision to close 149 air traffic control towers.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Petitioners AAAE and USCTA are submitting the following list of cases that are related and pending in this court.

Spokane Airport Board v. Michael P. Huerta, Administrator, and Federal Aviation Administration, No. 13-71172, as lead petition for the following cases:

13-71133, 13-71175, 13-71177, 13-71178, 13-71179, 13-71181, 13-71187, 13-71247, 13-71248, 13-71253, 13-71259, 13-71348, 13-71351, 13-71388, 13-71414, 13-71423, 13-71442, 13-71514, 13-71518.

All of the above listed cases have been consolidated because they concern the same March 22, 2013, FAA decision. Spokane Airport Board is submitting a consolidated opening brief on behalf of all petitioners and intervenors except those in this case, No. 13-71202.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-71202

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached Petitioners' Opening Brief is proportionately spaced, has a typeface of 14 points and contains 4,799 words.

Dated: May 6, 2013.

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