

HINSHAW

& C U L B E R T S O N L L P

December 21, 2011

**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION
DO NOT PRODUCE**

Mr. Jim Hock
City of Park Ridge
505 Butler Place
Park Ridge, IL 60068

**Re: Options to Pursue with FAA in O'Hare Modernization
Program NEPA Action**

Dear Mr. Hock:

On October 25, 2011, the City of Park Ridge, Illinois, through its attorneys, Hinshaw & Culbertson, sent a letter to the Federal Aviation Administration (FAA) requesting preparation of a Supplemental Environmental Impact Study (SEIS) for the O'Hare Modernization Program (OMP). The letter detailed that there are significant new circumstances and information relevant to environmental concerns and bearing on the proposed action or in the alternative that the FAA use its delegated authority under the National Environmental Policy Act (NEPA) and the regulations promulgated thereunder and begin a Supplemental Environmental Impact Study (SEIS) to address the myriad of issues that have arisen since the completion of the EIS and the issuance of the Record of Decision. The FAA has indicated that they will respond to this letter in January 2012.

There are several options available to the City of Park Ridge in the event that the FAA denies their request to perform a SEIS. This correspondence will outline those options.

File a Formal Protest

If the City of Park Ridge would like to initially avoid pursuing this as a litigation matter, the City can formally protest the denial to the Director of the Agency. The Director may then either ask the agency to revise the EIS, or why the complaints outlined in the request are not actually being taken care of or addressed by the agency.

File for Injunctive and Declaratory Relief

Another option which may be available to the City of Park Ridge is to file for injunctive and declaratory relief pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.

ATTORNEYS AT LAW

100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389

815-490-4900

815-490-4901 (fax)

www.hinshawlaw.com

and the Administrative Procedure Act, 5 U.S.C. § 500 et seq. and these statutes' implementing regulations.

An action to compel the preparation of a SEIS is not a challenge to a final agency decision but rather, an action under § 706(1) of the APA, which requires a court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (1). In *March v. Oregon Natural Res. Council*, the court stated that "[a] decision not to prepare a SEIS is entitled to deference and cannot be set aside unless it was arbitrary and capricious., 490 U.S. 360, 377-78 (1989). To prevail on a claim that an agency failed to prepare a SEIS, the proponent must prove that "defendants have refused to prepare a SEIS despite a clear legal duty to do so." *Id.*, see also *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998). An agency is required to prepare a SEIS when "[t]here 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).

In January 2003, the Sierra Club sued the Nevada Department of Transportation over its denial of Sierra Club's request to issue a supplemental EIS addressing air emissions of particulate matter and hazardous air pollutants in the case of widening US Highway 95 through Las Vegas. The defendants won in the U.S. District Court under Judge Philip Pro, who ruled that the transportation agencies had acted in a manner that was not arbitrary and capricious, despite the agencies' technical arguments regarding the lack of available modeling tools being contradicted by a number of peer-reviewed studies published in scientific journals, see *Sierra Club v. U.S. Department of Transportation*, 245 F.Supp.2d 1109. On appeal to the U.S. Ninth Circuit, the Appeals Court stayed new construction on the highway pending the court's final decision. The Sierra Club and the defendants settled out of court, setting up a research program on the air quality impacts of U.S. Route 95 on nearby schools.

The United States Supreme Court reiterated a four-part standard for injunctive relief in *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010), holding that showings of (1) irreparable injury, (2) inadequacy of legal remedies, (3) a balance of hardships tipping in favor of the party seeking the injunction and (4) consideration of the public interest are all necessary before an injunction may issue.

File for a Writ of Mandamus

A final option which is available to the City of Park Ridge is to file for the issuance of a writ of mandamus upon the FAA to force them to comply with the request for SEIS.

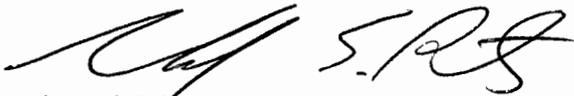
To take action, you must wait until the FAA takes action upon the request for SEIS. As previously indicated, the FAA has stated that they intend to respond to the initial letter in January 2010.

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We would welcome the opportunity to formally present these options to the City of Park Ridge. We would also be happy to prepare budgets for each of the options if it would be helpful. Please give me a call at (815) 490-4920 or send me an e-mail at rporter@hinshawlaw.com to discuss the City's plans related to this matter.

Sincerely,

HINSHAW & CULBERTSON LLP

A handwritten signature in black ink, appearing to read 'R. S. Porter', is written over the printed name.

Richard S. Porter
815-490-4920
rporter@hinshawlaw.com

RSP:dbm