
Colorado

Criminal Justice Reform Coalition

*Prevention, treatment, and alternatives work
Prison should be the last resort*

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June 11, 2004

Cynthia Nelson, Environmental Planner
FAA Northwest Mountain Region
Airports Division
Denver Airports District Office
26805 East 68th Ave.
Denver, CO 80249

Re: Release of Lot 69, Pueblo Memorial Airport

VIA CERTIFIED MAIL 7002 2410 0005 7633 4077

Dear Ms. Nelson:

In an attempt to ensure that the record in the above-referenced proceeding is complete and accurate, our organization recently requested copies of materials submitted to the Federal Aviation Administration (FAA) relating to this matter. The requested materials were sent to us on June 7 from the FAA's Northwest Mountain Region office in Renton, Washington. Among these documents was a letter addressed to you, dated November 12, 2003, from Thomas E. Jagger, Pueblo's City Attorney. A review of Mr. Jagger's letter indicates that in order for the FAA to have an accurate record on which to make a decision, a supplemental filing responding to the comments of Mr. Jagger is required.

Pueblo's Interpretation of Environmental Law is Too Narrow

The FAA's "Airport Environmental Handbook" (FAA Order 5050.4A) sets forth several of the FAA's administrative regulations which implement the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. §4371, *et seq.*). In his letter of November 12, Mr. Jagger states

none of the extraordinary circumstances set forth in Chapter 3, paragraph 24 [of Order 5050.4A] are present in this request for release. Although the proposed use of Lot 69 for a correctional facility may be controversial for those who oppose correctional facilities, it is not highly controversial on environmental grounds.

Paragraph 24 states that actions which are normally categorically excluded under FAA regulations, "shall be subject of an environmental assessment" if, *inter alia*, the action is "likely to be highly controversial on environmental grounds." Mr. Jagger's interpretation of "environmental grounds" does not appear to take the broader context of NEPA into account. NEPA's legislative declaration (42 U.S.C. §4331(a)) establishes that

it is the continuing policy of the Federal Government...to use all practicable means and measures...in a manner calculated to foster and

promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the *social, economic*, and other requirements of present and future generations of Americans. (emphasis added)

The inclusion of social and economic spheres in NEPA is not accidental, and must be given weight by the executive and judicial branches. In Section 102 of NEPA, Congress directs all agencies of the Federal government to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment” (42 U.S.C. §4332(A)). Congress’s use of “natural *and* social sciences” further indicates that NEPA requires agency planning activities to extend beyond the narrow scope of natural resources. Mr. Jagger’s reading of what constitutes “environmental grounds” embraces a selective reading of NEPA which disregards certain words and statements. Such a reading contradicts the U.S. Supreme Court’s instructions that a statute must be read as a whole, since “Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used” (*King v. St. Vincent’s Hospital*, 502 U.S. 512 (1991), quoting *NLRB v. Federbrush Co.*, 121 F.2d 954, 957 (2d Cir., 1941)).

The Council on Environmental Quality (CEQ) has promulgated regulations to implement NEPA. First, the regulations note that “impact” is used synonymously with “effect” and the definition of “effect” includes “Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable” (40 C.F.R. §1508.8(b)). As FAA considers Pueblo’s request, it must take into account not just the impacts of issuing a deed of release, but the cumulative impacts stemming from the proposed private correctional facility. Second, the key words in NEPA appear in Section 102(C), which requires study of “major Federal actions significantly affecting the quality of the human environment.” Using the CEQ regulations (which are “applicable to and binding on all Federal agencies” (40 C.F.R. §1500.3)) as instruction, it is plain to see that granting of Pueblo’s request would constitute a major Federal action significantly affecting the quality of the human environment.

Major Federal action. The CEQ regulations define “major federal action” to include “approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities” (40 C.F.R. §1508.18(b)(4)). Although FAA Order 5050.4A lists land releases under categorical exclusions (Paragraph 23), it also acknowledges that even though land releases are “normally categorically excluded, [they] may require an environmental assessment in accordance with the provisions of paragraph 24.” Mr. Jagger’s assertion that the controversy condition of paragraph 24 is not met seems to be based on the fact that “most if not all objections [to the prison] related to correctional facilities and Wackenhut, and none of the objections were based upon realistic environmental concerns or significant environmental impacts.” The FAA’s record in this matter shows that numerous interested parties have raised serious issues of natural resources, social considerations, and economic impacts. The City of Pueblo appears to have dismissed these concerns because some interested parties (such as our organization) are motivated largely by objections to private, for-profit correctional facilities. No statute, administrative regulation, or case law concerning NEPA requires an interested party to have a certain motivation.

Regardless of the parties' motivations, significant issues which are germane under NEPA have been raised and Pueblo has failed to respond in an adequate manner.

Significantly affecting. CEQ defines "significantly" in terms of both context and intensity. According to the regulations, "significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole." Given the comments received by the FAA, the action at question here clearly appears to be of local significance. In defining the intensity test, CEQ puts forth ten factors which should be considered in evaluating intensity—the proposed action concerning Lot 69 at Pueblo Memorial Airport raises issues under five of the ten areas:

- *"Impacts that may be both beneficial and adverse" must be considered* (40 C.F.R. §1508.27(b)(1)). Even if FAA is of the opinion that the proposed correctional facility will be more beneficial than not, CEQ instructs agencies that "a significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."
- *"The degree to which the proposed action affects public health or safety"* (40 C.F.R. §1508.27(b)(2)). The siting of a correctional facility has a clear and unquestionable impact on public safety.
- *"The degree to which the effects on the quality of the human environment are likely to be highly controversial"* (40 C.F.R. §1508.27(b)(4)). The comments already submitted to the FAA show the controversy which has been catalyzed by the proposed correctional facility. For a discussion of "human environment," see below.
- *"Whether the action is related to other actions with...cumulatively significant impacts"* (40 C.F.R. §1508.27(b)(7)). While the issuance of a deed of release could be argued to be of insignificant impact, CEQ regulations are clear that "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." Thus, since the purpose of the deed of release is to allow for the construction of a 750-1,000 bed correctional facility, the requested action poses issues of cumulative significance.
- *"The degree to which the action may adversely affect an endangered or threatened species or its habitat"* (40 C.F.R. §1508.27(b)(9)). Since the City of Pueblo has not provided an inventory of endangered or threatened species in or around the airport, it is impossible to tell at this time whether or not the proposed action would have an adverse impact on such species.

Human environment. CEQ regulations instruct agencies to interpret the term human environment "comprehensively to include the natural and physical environment and the relationship of people with that environment" (40 C.F.R. §1508.14). Although the regulations specify that social and economic impacts are not enough *by themselves* to require an environmental impact statement, "when an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement *will* discuss all of these effects on the human environment" (emphasis added). Comments already received by the FAA address not only economic and social impacts, but also discuss numerous issues concerning natural resources including drainage, water consumption, light pollution, traffic patterns, and land erosion. These topics have not been satisfactorily addressed by the City of

Pueblo and therefore should be further explored in an environmental assessment and/or environmental impact statement.

Pueblo Has Failed to Provide Sufficient Evidence for the Record

The FAA's review of Pueblo's request is governed not only by NEPA, but also by the Administrative Procedure Act (APA), which controls agency procedures concurrently with NEPA (see e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978)). Under the APA, the "proponent of a rule or order has the burden of proof" (5 U.S.C. §556(d)). In this case, the City of Pueblo has requested an action (order) by the FAA, and is thus required to prove compliance with various laws including but not limited to the Surplus Property Act of 1944, NEPA, and the APA. Not only has Pueblo failed to submit evidence sufficient to overcome the burden of proof, it has hardly provided any substantial evidence on the potential environmental, economic, and social impacts of the proposed correctional facility.

Thus far, Pueblo has failed to prove compliance with the NEPA requirements discussed previously in this letter. One of the only mentions of environmental impacts is Mr. Jagger's assertion in his November 12 letter that "City staff has reviewed water usage, wastewater treatment, stormwater discharge, and traffic impacts and has determined the correctional facility will not adversely impact these services." A simple assertion that such analysis has been performed—without entering the actual evidence into the record—does not satisfy the APA's requirement that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision" (5 U.S.C. §556(e)). For the FAA to grant Pueblo's request based on the scant information now in the record would constitute an arbitrary and capricious action. Any other information the City of Pueblo might have is irrelevant to this proceeding until such time as it is entered into the record and other interested parties are given an opportunity to object, clarify, refute, or otherwise comment (see e.g., *Sangamon Valley Television Corporation v. United States*, 269 F.2d 221 (D.C. Cir., 1959)).

NEPA's Public Participation Requirement Has Not Been Met

The statutory language of NEPA makes clear that public involvement in government decision-making is an important component of the law. CEQ's implementing regulations require agencies to "Encourage and facilitate public involvement in decisions which affect the quality of the human environment" (40 C.F.R. §1500.2(d)). The FAA's solicitation of comments has so far been the only effort to actively encourage public involvement. Although information is available from the City of Pueblo and the FAA, requiring members of the public to *react* to agency decision making by requesting information is quite different from the *proactive* public involvement envisioned by the environmental assessment and environmental impact statement processes.

The comparative lack of encouraging public involvement is made more noteworthy given specific statements made by the City of Pueblo which interested parties should have an opportunity to respond to. Mr. Jagger's letter makes the following statements which are selective in their representation of facts:

- *“Allegations set forth in the Complaint filed by Colorado Criminal Justice Reform Coalition, Civil Action No. 03 CV 1295...against the City Council do not constitute proof of any allegation recited therein. The City contends that the Complaint is without merit and the City Council’s actions will be sustained by and approved by the Court.”* Nearly four months after making this statement, Mr. Jagger filed a motion (see Attachment A) in connection with the aforementioned lawsuit, asking the court to invalidate the rezoning ordinance for Lot 69, since upon further review, “City Council concedes that City Council exceeded its jurisdiction in considering the Rezoning Ordinances since the proceedings before the Commission did not follow the procedures set forth in the Rezoning Ordinances as required by section 17-6-6 thereof.” District Court Judge Scott Epstein granted the City’s motion on March 17th, and the rezoning ordinance was invalidated.
- *“Parcel 69 obtains water from the Pueblo Board of Water Works and its water services are sufficient and adequate to serve the correctional facility. The City provides sanitary sewer services to the correctional facility and its sanitary sewer services are and will be adequate to serve the correctional facility.”* Pueblo has not provided any evidence to support the assertion of adequate capacity nor even to show that the City has ascertained what the probable water usage and discharge of the correctional facility will be.
- *“Access to Parcel 69 is over United Avenue which has more than sufficient capacity to handle the traffic generated by the correctional facility without any surface traffic congestion.”* Pueblo has not shown that it has ascertained what the probable traffic flow generated by the correctional facility will be, nor has it extended its scope of reference beyond United Avenue to discuss impacts on the Airport Industrial Park entrance or the intersection of Paul Harvey Boulevard and U.S. Highway 50.
- *“There is no direct access from Parcel 69 to U.S. Highway 50. In effect, there exists a substantial physical barrier between Parcel 69 and residential areas.”* In making this statement, Mr. Jagger ignores that there are several residences within 300 feet of Lot 69, which the City’s own ordinances consider to be sufficient proximity for standing in challenging a rezoning decision. It is clear from several of the comments the FAA received that nearby residents are indeed concerned about the proximity of the proposed correctional facility, making the City’s assertion of a “physical barrier” largely an issue of semantics.
- *“Site plans and specifications to be submitted by Wackenhut and approved by the City must include building design..., orientation and color of all permanent structures, traffic access, parking and loading, screening and landscaping, and exterior lighting design and plan.”* Pueblo makes no indication as to whether such plans and specifications will be available to the public prior to City approval. In order to comply with NEPA’s public participation requirement, many of the specific details mentioned above must be disclosed *before* a decision is made by the FAA. Moreover, the “site plans and specifications” enumerated by Mr. Jagger do not make any mention of air quality issues (from traffic, construction, and any on-site boilers), environmental justice issues, plans for any correctional industries proposed for the facility, geological considerations, soil analysis, solid waste impacts, nor potential noise from the facility—all of which are issues that should be studied under the requirements of NEPA.
- *“The City submits that no thresholds indicating the potential for significant impact are exceeded by the proposed release of land and requests that FAA make a finding of no*

significant impact.” Pueblo’s request for a finding of no significant impact (FONSI) is premature, since a FONSI can only be issued *subsequent* to an environmental assessment (40 CFR §1508.13).

Environmental Justice Issues Remain Unresolved

Executive Order 12898 directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States” (59 *Federal Register* 7629). Lot 69 is located in Pueblo County Census Tract 30.03, the demographics of which show a significantly larger ethnic minority and low-income population than the City of Pueblo. Data from the 2000 Census shows:

- Residents of Tract 30.03 are 38% non-white, compared to 24% in the City of Pueblo.
- Nine percent of households in Tract 30.03 are linguistically isolated (i.e., no member of household 14 or older speaks English without difficulty), compared to 4% in the City of Pueblo.
- The median household income in Tract 30.03 is \$22,132, compared to \$29,650 in the City of Pueblo.
- Twenty-five percent of Tract 30.03 residents live below the poverty level, compared to 18% in the City of Pueblo.

Economic Impacts Must Be Considered Independent of NEPA

Although economic impacts by themselves are not sufficient to trigger an environmental impact statement under NEPA, they must be addressed by FAA under the terms of the 1948 quitclaim deed (which was submitted for the record with our comments of October 28, 2003). FAA’s adjudication of this question is also governed by the APA, thus raising the same questions discussed previously in this letter about the adequacy of the record.

Conclusion

Based on the forgoing issues, which clearly are relevant to a reasoned decision in this adjudication, we request that these comments be taken into consideration in the FAA’s final decision and that the FAA staff analysis of comments specifically address these concerns as well as those raised in our original comments of October 28, 2003.

Sincerely,

Stephen Raher
Co-Director/Senior Policy Analyst

Attachment