ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1158, 15-1247 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF PHOENIX, ARIZONA, *et al.*
Petitioners

v.

MICHAEL P. HUERTA, in his official capacity as Administrator, Federal Aviation Administration, *et al.*,
Federal Respondents

On Petition for Review of a Decision
By the Federal Aviation Administration

FEDERAL RESPONDENTS' RESPONSE TO PETITIONERS' JOINT MOTION REGARDING THE SCOPE OF THE ADMINISTRATIVE RECORD

JOHN C. CRUDEN
Assistant Attorney General

Of Counsel:
JESSICA L. RANKIN
Federal Aviation Admin.
Office of the Chief Counsel

LANE N. MCFADDEN
Attorney, ENRD Appellate Section
United States Dept. of Justice
PO Box 7415, Ben Franklin Station
Washington, DC 20044
(202) 353-9022

The Federal Respondents hereby respond to Petitioners' motion, dated May 13, 2016, regarding the scope of the administrative record. The Petitioners have requested conditional relief, contingent on this Court's ruling first as to its jurisdiction and identifying the appropriate agency action subject to the petitions for review. As is explained herein, some of the Petitioners' requested relief is appropriate, and some is not.

The fundamental dispute between the parties, which is reflected in the Index to the Administrative Record filed by the Federal Respondents on December 23, 2015, is that the petition for review seeks review of agency correspondence that is not an "order" of the Administrator of the Federal Aviation Administration ("FAA") as that term is defined for purposes of 49 U.S.C. § 46110, the statute that allegedly provides the Petitioners a cause of action. Instead, the relevant order of the Administrator was issued on September 18, 2014. The Federal Respondents therefore submitted an Index to this Court containing both the administrative record for that September 2014 order and a separate category of documents, outside of that administrative record, that give a fuller picture of later events.

"Ordinarily, 'review is to be based on the full administrative record that was before the [Administrator] at the time he made his decision.'" *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). The Petitioners now ask that *even if* this Court agrees with the Federal Respondents that the only reviewable order was the one issued on September 18, 2014, this Court should consider all of the documents listed on the Index, including those prepared months after the agency's final decision. There is no basis for this Court to grant that request.

1. If the only order before this Court in these consolidated petitions for review is the September 18, 2014, order, then this Court lacks subject-matter jurisdiction over these cases because the petitions for review were untimely. As explained in the Federal Respondents' Motion to Dismiss and in the forthcoming answering brief on the merits, a challenge to an order of the FAA must be filed within sixty days. 49 U.S.C. § 46110(a). As the petitions for review were filed months later (in June 2015), they were too late to challenge an order issued in September 2014. Therefore, "[i]f the Court decides that FAA's final

decision occurred on September 18, 2014," Pet's Mot. at 5 ¶ 5, then this Court need not address the scope of the administrative record at all. The Petitioners' arguments as to its contents are moot, as the petitions would be outside the statute of limitations and would have to be dismissed. 49 U.S.C. § 46110(a).

2. But should this Court nevertheless permit Petitioners to seek review of the September 18, 2014, order, it should not supplement the administrative record for that order with all of the post-decisional documents included with the Index. Petitioners present two reasons why they believe that wholesale expansion of the administrative record would be appropriate, but both are incorrect. Rare is the exception to the general rule that the review of an agency decision is based solely on the administrative record before the agency at the time the decision is made, and none of those exceptions apply here.

The Petitioners first note that review of extra-record material may be appropriate "when the record is so bare that it prevents effective judicial review." Pet's Mot. at 2 (quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010)). But the Petitioners do not indicate a single omission in the administrative

record of a document that was before the agency's decisionmakers prior to September 18, 2014. Instead, Petitioners state that they seek review of post-decisional material in support of an argument that the FAA premised its decision on insufficient information. Pet's Mot. at 3. Even if that were true (which it certainly is not), there is nothing to be gained from review of after-the-fact documentation.

And furthermore, many (if not most) of the documents that Petitioners seek to add to the administrative record have nothing to do with the topic of "information on the properties protected by the [National Historic Preservation Act] and Section 4(f) and impacted by" the FAA's decision. Pet's Mot. at 3. Although Petitioners allege in their motion that the FAA "neither sought nor had before it any information" regarding those properties, *id.*, the administrative record demonstrates otherwise. The proper administrative record (*i.e.*, documents predating the FAA's decision and on which the FAA relied) provides the FAA's reasoning with respect to possible effects on historic properties. *See, e.g.*, AR Doc. No. B-2 at 12-16. This issue does not warrant supplementation of the administrative record.

Nor does the included post-decisional information "demonstrate FAA's procedural errors" such that supplementation of the administrative record is necessary. Pet's Mot. at 3. This statement in Petitioners' motion alludes to this Court's limited review of extra-record evidence in cases "where the procedural validity of the agency's action remains in serious question." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). But the "procedural validity" of the agency's action in this case is established by the applicable statutes and regulations that Petitioners allege were violated, and what actual steps the agency took are not in dispute. The only dispute is whether the FAA's actions were legally sufficient, a question that can be resolved on the appropriate administrative record without need for supplementation.

Tellingly, the two cases on which the Petitioners rely in their motion to expand the scope of the administrative record are both cases in which this Court *denied* a similar motion. Pet's Mot. at 3-4 (citing *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 514; *CTS Corp.*, 759 F.3d at 64). Such a result is unsurprising, as the exceptions noted in those cases "are quite narrow and rarely invoked." *CTS Corp.*, 759 F.3d at 64. "It is black-letter administrative law that in an [Administrative Procedure

Act] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *Id.* (quoting *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (alteration in original) (quotation marks and additional citation omitted)). So should it be in this case as well.

3. There is one limited circumstance in which this Court may consider the post-decisional documents contained in the Index to the Administrative Record. This Court may review those documents in order to address the Federal Respondents' jurisdictional defenses, as this Court may review extra-record evidence for purposes of ascertaining its own subject-matter jurisdiction. *See, e.g.*, *Tootle v. Secretary of the Navy*, 446 F.3d 167, 173-74 (D.C. Cir. 2006); *Kidwell v. Dep't of the Army*, 56 F.3d 279, 283-84 (D.C. Cir. 2005). These documents may be necessary to determine whether the post-decisional correspondence from the agency is an independently reviewable "order" under 49 U.S.C. § 46110(a). It is for this reason that the FAA included those documents alongside the administrative record. The Federal Respondents have no objection to the consideration of documents for

that limited purpose, about which the Petitioners' motion makes no mention.

4. The Petitioners' primary jurisdictional argument in this case is that the agency's letter of June 1, 2015, is an "order" of the Federal Aviation Administration reviewable under 49 U.S.C. § 46110. The Petitioners' motion asks that should this Court agree, then "the entire record should be considered." Pet's Mot. at 5 ¶ 4. We do not disagree with that statement, generally. But we note that the post-decisional category of documents on the Index filed with this Court on December 23, 2015, have not been certified pursuant to Fed. R. App. 17 as a full and complete administrative record underlying any order of the agency after the date of September 18, 2014. The FAA provided those documents listed in the Index as relevant to that post-decisional correspondence, and therefore provided them only so that this Court could ascertain its jurisdiction or lack thereof. *Supra* at 6.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

Of Counsel:
ERIC M. ELMORE
JESSICA L. RANKIN

s/ LANE N. MCFADDEN

Federal Aviation Admin.
Office of the Chief Counsel

Attorney, Appellate Section
United States Dept. of Justice
Environment & Natural Resources Div.
PO Box 7415, Ben Franklin Station
Washington, DC 20044
(202) 353-9022
lane.mcfadden@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion on all counsel of record by use of the DC Circuit's CM/ECF system on May 25, 2016.

s/ LANE N. MCFADDEN
Attorney, Appellate Section
United States Department of Justice
Environment & Natural Res. Div.
PO Box 7415, Ben Franklin Station
Washington, DC 20044
(202) 353-9022
Lane.mcfadden@usdoj.gov