NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF PHOENIX, ARIZONA, Petitioner, STORY PRESERVATION ASSOCIATION, INC. et al. Petitioners, v. MICHAEL HUERTA, Administrator of the Federal Aviation Administration, and FEDERAL AVIATION ADMINISTRATION, Respondents.	)	Case Nos. 15-1158 & 15-1247 Petitions for Review

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REPLY BRIEF OF PETITIONER CITY OF PHOENIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases[1]

[1] Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Public Laws

Regulations and FAA Orders

GLOSSARY OF TERMS

Airport ..... Phoenix Sky Harbor Internation Airport

APA ..... Administrative Procedure Act

City ..... City of Phoenix

FAA ..... Federal Aviation Administration

PBN Working Group ..... Performance Based Navigation Working Group[2]

NEPA ..... National Environmental Policy Act

NHPA ..... National Historical Preservation Act

RNAV ..... Area Navigation

SHPO ..... State Historic Preservation Officer

[2] The City provides acronyms for "Performance Based Navigation Working Group" and "Area Navigation" as both terms are commonly referenced by their acronyms in FAA's implementation of new Area Navigation procedures and routes at issue in this case. Further explanation of these terms is provided in the brief.

SUMMARY OF ARGUMENT

Federal Aviation Administration (FAA) deviated from traditional administrative procedure and environmental review obligations in its implementation of Area Navigation (RNAV) routes at Phoenix Sky Harbor International Airport (Airport). The June 1, 2015, letter (June Letter, AR-H33) that marked the culmination of the implementation process does not look like a traditional agency order because FAA never provided a process sufficient under the law and never developed any decision document to provide a clean end point. Instead, FAA started using the RNAV procedures in September 2014 without adequate environmental review and consultation with the City of Phoenix (City). Then, after beginning use of the routes and finding unexpected impacts, it told the City and others that it was changing them to address the impacts. FAA cannot avoid judicial review because of its irregular process.

The "final action" that FAA identifies was the September 2014 publication of a map in aviation portals used by pilots and air traffic control. FAA Br. at 26. It is telling that FAA almost never actually cites its "final order," because it is just a map and technical procedures. The map contained no discussion of FAA's bases for action or reference to Order 7100.41's post-implementation process that makes the routes interim until the process is completed. The map was not a final order, because immediately following its publication, FAA began assuring that it was

making changes to the routes and procedures. City Br. at 17–18. For the following months through June 1, 2015, FAA repeatedly assured the City and Arizona's Delegation that it was in the process of evaluating changes, negating any "finality" that could be associated with the map.

Consistent with its campaign of promises, FAA reconvened its Performance Based Navigation (PBN) Working Group in February 2015, an element of its Order 7100.41 process that precedes finalization of route procedures. Order 7100.41 at 2-17, AD-094. This process did not end until April 2015. In an April 14, 2015, letter (April Letter) FAA provided the City with its Post-Implementation Assessment Report (Final Report) pursuant to Order 7100.41, which reaffirmed FAA's environmental conclusions, but without addressing any of the specific data and analysis provided by the City. AR-H28. Even then, FAA kept the door open by encouraging the City to identify specific changes that FAA should consider. *Id.* at 1. In response, the City submitted a last round of comments on the Final Report and FAA's failure to meaningfully involve the City under Order 7100.41; the City requested that FAA respond to its requests for reinitiation of consultation under the National Historic Preservation Act (NHPA), 54 U.S.C. § 300101, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c). AR-H29, H30, & H32.

Although the June Letter marked the logical point at which FAA would address the City's detailed analysis, it did not. Despite the City's formal request for reinitiation of consultation, FAA reaffirmed its environmental review without any substantive response to the detailed identification of impacts it never addressed prior to its map publication in 2014. FAA's June Letter made clear that FAA was not going to correct the procedural and substantive flaws identified by the City.[3]

Accepting FAA's argument to the contrary would force the City to bring suit within 60 days of interim measures, even while the agency is saying it is making changes and considering more changes. FAA's position also would allow agencies to do what it did here: dangle repeated promises of change that the agency never delivers on and then try to avoid closure. FAA's position further suggests that the City could not rely on Order 7100.41, which provides that the implementation process is not complete upon the initial publication of a map.

FAA violated NHPA, Section 4(f) and the National Environmental Policy (NEPA), 42 U.S.C. § 4321, throughout the routes' implementation. FAA's categorical exclusion and determinations of no impact to NHPA and Section 4(f) properties were based on arbitrary, unsupported assumptions. Despite eight

[3] FAA's April Letter and Final Report could have also constituted the final action, because they marked the end of the Order 7100.41 process. City Br. at 35 n.9. The City filed its petition for review within 60 days of the April Letter. However, FAA invited further input from the City, which FAA responded to in the June Letter.

months of opportunity until June 1, 2015, FAA never addressed the procedural flaws in its route implementation that render it arbitrary, including its failure to mitigate and reinitiate NHPA consultation under 36 C.F.R. § 800.2(c)(3), AD-029. FAA reaffirmed its environmental analyses in the Final Report without addressing the City's detailed information on noise impacts to historic districts, along with their noise sensitivity. And, FAA failed to address the City's arguments in April 2015 that FAA violated Order 7100.41 by excluding it from the Working Group.

FAA fails to provide sufficient answers to any of these points, all of which were supported in the City Brief by extensive citations to FAA's record. Because FAA did not address these issues, FAA's primary response to the City Brief is *post hoc* rationalization. *Kansas City v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991). However, FAA had the responsibility to address the City's information under the Administrative Procedure Act (APA), not litigation counsel. 5 U.S.C. § 706, AD-005. FAA's implementation of the RNAV routes was arbitrary and they should be vacated by the Court.

ARGUMENT

I. The June Letter Is a Final, Reviewable Order.

A. The June Letter Concluded FAA's Implementation Process.

The June Letter concluded the ill-conceived process to implement the routes that did not comply with FAA's own orders, NHPA regulations, or the APA. FAA urges the Court to ignore FAA's process leading up to the June Letter and view the

document in a vacuum, suggesting there is no "indicia of finality." FAA Br. at 39–40. But, FAA ignores the context of the June Letter within the Order 7100.41 process and series of FAA commitments to address noise concerns. Courts do not impose rigid standards for determining the finality of agency decision; there is no requirement of the magical words "this order is final." An "'order' must be final, but *need not be a formal order, the product of a formal decision-making process*, or be issued personally by the Administrator." *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998) (emphasis added). Determining the concept of finality is flexible and dependent on the circumstances of the case. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 n.7 (D.C. Cir. 1986). This flexibility is important where FAA's administrative process was fluid, consisting of a complicated mix of formal and informal changes to the routes and commitments to consider changes.

B. FAA Disregards the Language of Order 7100.41, Which Provides a Process To Finalize and Change RNAV Routes.

FAA asserts that the initial *publication* of the map was final because it started using the RNAV routes the same day. FAA Br. at 42. However, FAA cannot explain why the publication of the routes was final when, under the plain language of Order 7100.41, they were subject to a continuing process for modification; only the completion of the final fifth phase "marks the end of the project." Order 7100.41 at 2-19, AD-096.

FAA attempts to dismiss Order 7100.41 by describing the final phase of implementation as an exploratory exercise "'to collect lessons learned' for the future." FAA Br. at 47. The description conflicts with the process defined by Order 7100.41 (to which FAA bound itself when it decided to complete implementation pursuant to it). City Br. at 5–6. It is also inconsistent with FAA's January 2015 letter, in which Administrator Huerta sought City participation in Order 7100.41's process, stating that the PBN Working Group would address Phoenix noise impacts by assessing route modification. AR-H20 at 1. *See Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002) (no deference to "interpretation advanced during litigation . . . if the position is inconsistent with the agency's prior statements and actions").

Order 7100.41 expressly provides for modifications of initial route implementation in the final "Phase V" of its process. Phase V starts with the "use of the procedures and routes, including the monitoring of the initial usage" and ends "with the completion of the PBN Post Implementation Analysis Report and the closing of the project." Order 7100.41 at 2-17, AD-094. During Phase V, the PBN Working Group leader "[m]ust mitigate causes of all events/concerns associated with [RNAV] procedure, and "[e]nsure appropriate notification to all stakeholders of the *impending implementation* to include notification of *additional amendments* that arise." *Id*. (emphasis added). FAA action "does not complete the

agency's decision-making process" where there are additional phases to complete under Order 7100.41. *Village of Bensenville v. FAA* 457 F.3d 52, 69 (D.C. Cir. 2006).

C. The June Letter Made It Clear That FAA Would Not Reinitiate NHPA Consultation.

FAA's Final Report ignored the City's request for compliance with 36 C.F.R. § 800.13(b), AD-047, and detailed information about impacts, while confirming its original categorical exclusion. AR-H28. But, FAA's April Letter still invited further input from the City, and the City responded by providing extensive comments on the post-implementation process and its request for consultation. AR-H29, H30. The June Letter ignored the City's requests, again, and was the functional equivalent of denying the City's request, thereby "determin[ing] rights or obligations." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007). FAA had an obligation under the NHPA to mitigate and reinitiate consultation if new information showed adverse impacts that FAA had not originally considered. 36 C.F.R. § 800.13(b), AD-047. By not granting the City's requests under Section 800.13(b) based on new information showing adverse effects to the historic districts, the June Letter denied the City's rights and had legal consequences.

FAA argues that the June Letter could not determine "rights or obligations" because they were already determined when FAA published the map. FAA Br. at

42–43. FAA also argues that, because FAA made clear in January 2015 that it would not return the initial RNAV routes to the pre-existing procedures, there was no ongoing implementation process. *Id*. at 39. FAA's arguments find no support in the record.

First, throughout Fall 2014, FAA kept the administrative process open by telling the City that it was considering further modifications to address the noise impacts and encouraging input. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 603 (D.C. Cir. 2007). FAA in fact modified RNAV procedures in November 2014, indicating that FAA sought to address City noise concerns, even though they did not fully resolve the noise effects.[4] AR-H14. Further, Administrator Huerta committed FAA to consider modifications and reconvened the PBN Working Group to do so. AR-H20 at 1. FAA's notion that only the potential for complete revocation would make the map publication non-final is unsupported by law.[5]

Second, FAA's assertion that the City "never deviated from its position that FAA must abandon the new procedures" (FAA Br. at 28) is irrelevant, because

[4] FAA asserts that no modifications to routes occurred, but cites to no supporting record document. FAA Br. at 27. The assertion also conflicts with representations to the City in November 2014 that FAA had made unspecified changes to the procedures. AR-H14.

[5] A statement from City Councilmembers regarding their desire to sue FAA earlier in the process does not affect whether the June Letter had a legal effect. FAA Br. at 35. The desire of two members of Council to sue does not demonstrate the finality or ripeness of FAA action, but only highlights the lack of trust in the FAA's process.

whatever ultimate relief the City sought did not excuse FAA from its obligations under 36 C.F.R. § 800.13(b). The City has consistently argued that FAA needed to comply with NHPA, Section 4(f) and NEPA, because the failure to adequately study the effects of the routes led to inadequate mitigation and alternatives analyses. *City of Jersey City v. CONRAIL*, 668 F.3d 741, 744–46 (D.C. Cir. 2012) (procedural injury to "historic and environmental interest" due to NHPA violations). Further, the City's consistent position was to request that FAA explore alternatives to mitigate the routes' noise impacts, including variants of the RNAV technology with older routes and modified vectors for aircraft, not just complete reversion. AR-H29 at 3.

Third, neither the September 2014 map publication nor Administrator Huerta's January 2015 letter can serve as final orders with regard to FAA's errors committed *after* these dates. Both the City's February 2015 request to reinitiate consultation and FAA's failure to comply with Order 7100.41 during the Working Group process from February to April 2015 post-dated FAA's proffered "final actions." Those violations are subsequent actions separate and distinct from the map publication and January 2015 letter. Further, the FAA's January 2015 letter expressly acknowledged additional process and further changes to the routes; there are no indicia of finality. AR-H20 at 1.

Finally, FAA's characterization of the June Letter as the beginning of a new process by labeling it as "forward-looking" and inviting new collaboration attempts to insulate its action from challenge as both too late and too early. FAA Br. at 40. But, FAA's characterization concedes that the implementation process under Order 7100.41 and denial of the City's request to reinitiate NHPA consultation must have been complete by the June Letter. Thus, the "future possibilities" in the June Letter signified an end, not a beginning, foreclosing FAA's accommodation of the City's requests for consultation.

D. The City Was Reasonable in Waiting To File.

Even if a "final order" occurred in September 2014 or January 2015, as suggested by FAA, the City's petition for review was still timely under 49 U.S.C. § 46110, AD-014, because FAA represented that it was modifying and exploring the further modification of the routes and procedures to address noise impacts. *See Safe Extensions, Inc.*, 509 F.3d at 603 (waiting reasonable if FAA affirmatively represents that action would be revised). The City's timing did not stem from neglect or blind hope. As in *Paralyzed Veterans of America v. Civil Aeronautics Board*, the City sought to participate in the process of resolving noise impacts that FAA had established following initial implementation, including participating in the Working Group re-established by FAA. 752 F.2d 694, 705 n.82 (D.C. Cir. 1985) (waiting reasonable where petitioners aware that "rule might be undergoing

modification," were unable to predict how extensive any modification would be," and "elected to wait until the regulation was in final form before seeking review"). The City reasonably waited to file this action until June 1, 2015, when FAA made it clear that it would not accommodate the City's requests for mitigation and consultation or address City data on noise impacts.

Despite FAA's attempt to distinguish *Safe Extensions* and *Paralyzed Veterans* (FAA Br. at 49–50), FAA's factual distinctions fail to provide any principled basis to distinguish their holdings: under Section 46110, the 60-day limitation period does not apply if FAA represents that an action is undergoing modifications that have the potential to redress petitioners' grievances. Here, the City's reliance falls within the circumstances recognized in both cases, because the City's delay was "due to the FAA's misstatements about its future actions" recognized in *Safe Extensions*, and was "due to the [City's] attempt to exhaust administrative remedies," recognized in *Paralyzed Veterans.* *See Nat'l Fed'n of the Blind v. DOT*, 2016 U.S. App. Lexis 11745, *16 (D.C. Cir. June 28, 2016) (discussing reasonable grounds for delay).

FAA largely ignores the events in the Fall 2014,[6] arguing that the City's reliance on FAA's representations was unreasonable following the January 2015 letter from Administrator Huerta. FAA Br. 50–51. This approach would allow FAA to evade judicial review indefinitely by continuing to say it may fix its actions at some future point, even as it uses the routes and fails to cure outstanding legal flaws. Administrator Huerta stated that FAA was "committed" to considering measures to address noise impacts and would reconvene the PBN Working Group. AR-H20 at 1. The City reasonably relied on FAA's most senior official's representations, including his assertion that the City would be an "important player" on the Working Group. *Id.* Any statement that FAA would not fully revoke the RNAV routes did not end the process or foreclose other modifications to address noise impacts. The City's submittal of extensive information in the following months demonstrated its reasonable reliance; it did not sit idle.

[6] FAA cites *Impro Products, Inc. v. Block*, 722 F.2d 845 (D.C. Cir. 1983), to suggest that the Section 46110 finality test is not met in this case. FAA Br. at 41. However, unlike *Impro*, FAA told the City that it was making changes and considering more changes *before 60 days had elapsed* from the initial route publication. City Br. at 17–18.

II. FAA Failed To Comply with NHPA.

A. FAA Failed to Consult with City Historic Preservation Officials in Violation of NHPA Regulations and FAA Guidance.

Even though the NHPA regulations require that FAA *must consult with the City*, FAA's brief offers no explanation why it ignored this obligation in its initial environmental review to consult with the City Historic Preservation Officer. FAA Brief at 53–57. NHPA's mandate is clear:

> A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.

36 C.F.R. § 800.2(c)(3), AD-029. FAA "shall involve the consulting parties . . . in its finding and determinations made during the section 106 process." *Id.* § 800.2(a)(4), AD-025. The requirement for consultation with the City is unambiguous; any contrary FAA interpretation cannot be afforded any deference. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 341 (D.C. Cir. 2002) (no deference to FAA interpretation of NEPA regulations because they are addressed to all federal agencies, not FAA alone).

Consultation with the City is also required by FAA's orders and guidance. FAA's Section 106 Handbook expressly cites 36 C.F.R. § 800.2(c)(3), identifying "local governments" as "by-right consultation" parties. AR-23b, Exhibit 13 at 18.

FAA contends that the SHPO was responsible for ensuring that FAA met its obligation of consultation. FAA Br. at 54. However, under NHPA, it is *FAA's*

responsibility to consult with parties. *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (NHPA imposes no duties on states and operates only upon federal agencies). FAA's lament that, had only the SHPO asked, FAA would have consulted the City, is irrelevant, because FAA had the duty regardless. FAA Br. at 55.

B. FAA's Reliance on Its Noise Modeling and Nothing More Does Not Satisfy the Substantial Evidence Standard.

FAA admits that it made a Finding of No Adverse Effect regarding the historic districts covered by NHPA based on noise modeling alone, applying its default noise impact threshold of an average of 65 decibels (or "DNL"). FAA Br. at 58, 62. However, FAA's Order 1050.1E implementing NHPA and NEPA makes clear that the use of this 65-decibel threshold is not appropriate or sufficient where "other noise is very low and a quiet setting is a generally recognized purpose and attribute."[7] Order 1050.1E app. A ¶ 4.2(c), 6.2i, AD-073.

[7] FAA's argument that this requirement applies only in the Section 4(f) context is (FAA Br. at 60) illogical and was never advanced by FAA itself before litigation; the City's historic districts protected by NHPA are the same resources that FAA must consider in its Section 4(f) determination. Order 1050.1E does not supply looser standards for review of noise impacts under NHPA. Instead, the Order's noise section identifies the need for possible stricter standards for historic resources and directs readers to the Section 4(f) standards identified by the City. Order 1050.1E app. A-14. Further, the Order provides that the threshold for impact under NHPA is *lower* than under Section 4(f). *See id*. Order 1050.1E app. A ¶ 11.2a, AD-074. FAA's guidance is consistent with NHPA's requirement that FAA consider information on historic properties within the area of potential effects

The Order requires that FAA do two things when assessing impacts to historic districts: (1) predict the noise levels that would affect the historic resources; and (2) compare this against the existing noise levels and historic attributes of the affected resources. FAA did not have facts to support the second part of the finding.

Although Order 1050.1E allows FAA's application of Part 150 guidelines (including DNL 65 threshold of significance) to "residences," many of the properties were historic *districts* (AR-B2 at 13), not individual residences. *See* 36 C.F.R. §§ 60.3, (districts), 60.4 (criteria for districts include their "setting," "feeling", and "association."). As the City Historic Preservation Officer explained to FAA, the districts have many aspects contributing to their historic designation that are not associated with individual residences. AR-H23b, Exhibit 23 at 2, 4 ("neighborhoods have a park-like setting"; "these districts were planned and developed between the early 1880s and the late 1950s, and are characterized by extensive landscaping and integrally planned streetscapes and public open space"). FAA considered no information on the historic features of the City's districts or properties. *See Grand Canyon Trust*, 290 F.3d at 345 (FAA noise analysis of

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and address whether noise will affect districts where the auditory setting contributes to the historic significance. 36 C.F.R. § 800.4(a)(2), (3), AD-33; Order 1050.1E app. A-48.

airport may be "splendid incremental analysis", but FAA could not consider "environmental concern in a vacuum" and failed to consider existing noise).

FAA's brief argues that it evaluated the districts, but determined that they were "notable not for their quiet and solitude" (FAA Br. at 58) and "were listed as historic not because they were quiet but because of their architectural and cultural significance" (*id*. at 61). The assertions are *post hoc* inventions and find *no support in the record*. Instead, FAA relies on serial internal citations, citing to "*infra* at 60-61" and "*[i]nfra* at 65-66", which do not lead to record citations showing that FAA evaluated the noise-sensitive character of the historic districts or the noise environment that existed before the RNAV routes. *Id*. at 65–66. FAA's assumptions about the characteristics of the affected districts in the Finding of No Adverse Effects were pure speculation. Similarly, there is no record evidence supporting the assumptions that FAA made in the Finding of No Adverse Effects that the "proposed action is determined not to disrupt conversation and is no louder than the background noise of a commercial area."[8] AR-B6 at 3. "[M]ere perfunctory or conclusory language will not be deemed to constitute an adequate

[8] FAA argues that it *showed* the SHPO that a "substantial amount of aircraft" already flew over the historic areas. FAA Br. at 59. But FAA only cites to a figure attached to its letter to the SHPO depicting flight tracks. AR-B6 at 8. The figure does not identify the City or its NHPA properties. *Id*. FAA later determined that the historic areas had experienced only propeller aircraft overflights in the past and that the new routes increased total traffic over the areas by 300%, including substantial jet traffic. Addendum, Exhibit A, AD-126.

record." *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F. 2d 423, 434 (5th Cir. 1984).

C. FAA Failed To Address Evidence That Required Reinitiating Consultation Pursuant To NHPA Regulations.

FAA's most inexplicable failure is its disregard of the City's request for reinitiation of consultation based on extensive new information about impacts to historic neighborhoods, including site-specific noise monitoring, historic preservation records, and the analysis of the City Historic Preservation Officer. AR-H23a, H26a. Section 800.13(b), AD-47, requires that, if "unanticipated effects on historic properties [are] found *after* the agency official has completed the section 106 process . . . , the agency official *shall* make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties" and consult with stakeholders. *Id.* (emphasis added). FAA failed to do so or explain its decision despite requests by the SHPO and City. *Petroleum Commc'ns v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action").

1. The SHPO's Letter Rescinding Concurrence Required Reopening Consultation.

FAA provided no explanation for denying SHPO's request to reopen consultation in January 2015 other than to say that it had already conducted

consultation before publication of the routes. AR-H21. FAA's response is a *non sequitur* under 36 C.F.R. § 800.13(b), AD-047, which requires reinitiation when new information is provided showing impacts *after the original consultation was concluded*.

Without record support, FAA's brief theorizes that FAA denied re-initiation of consultation because the SHPO only relayed complaints from "some residents." FAA Br. at 62. But FAA's "action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 50 (1983). The *post hoc* assertion is contradicted by the SHPO's determination that the "level of noise ha[d] become detrimental to the quality of life within these [historic] areas." AR-H17 at 1. Under NHPA, the SHPO's expert opinion was evidence of unanticipated impacts requiring action by FAA. 36 C.F.R. §§ 800.2(c)(1), AD-026, 800.13(b), AD-047. It is especially true here, because FAA relied on the SHPO's original concurrence as justification for its Finding of No Adverse Effect. FAA Br. at 58–59. FAA cannot pick and choose when to pay attention to SHPO.

2. The City's New Information Required Mitigation and Reinitiation of Consultation.

Without citing a single FAA document or finding, FAA's brief summarily dismisses thousands of pages of site-specific noise monitoring, specific historic district information, and expert analysis submitted by the City following the start

of RNAV routes. FAA's brief states it "pored over thousands of pages" of information on noise impacts to historic districts submitted by the City in February 2015, but did not find any contradictory evidence. *Id*. at 65–66. However, there are no record citations showing that FAA considered the documentation or made findings about it.

FAA disregarded substantial information, including new noise monitoring data on the affected NHPA districts, which contradicted FAA's assumptions regarding noise levels in the historic districts cited in its original letter to SHPO seeking concurrence and the No Adverse Effect finding. In its April 7, 2015, letter, the City showed that—based on short- and long-term noise measurements at 37 sites—FAA's "assertions to SHPO were incorrect that noise from the RNAV would not be audible above background noise levels or interfere with speech." AR-H26a at 3. The City's noise monitoring data showed that FAA's unsupported assumption that historic districts had ambient levels equivalent to commercial areas exaggerated ambient levels by 10 to 15+ decibels. *Id*. The City's noise monitoring and noise modeling demonstrated that single-event noise levels in these historic areas were high enough to interfere with speech, "demonstrating that the FAA's representations to the SHPO in August 2013 were incorrect." *Id*. at 5. The City's data and analyses made it clear that the routes were having a significant

impact on historic districts where a "quiet environment and the ability to use outdoor spaces" were important to their historic designation. *Id*. at 3–4.

Based on this information, the City repeated its request to reinitiate consultation. *Id*. at 4. FAA never took a position on the information, nor explained why it was insufficient to require action under 36 C.F.R. § 800.13(b), AD-047. FAA Br. at 65. FAA's brief cannot remedy the failure to address the City's information showing significant adverse impacts to historic districts nor provide a basis for not following Section 800.13(b), AD-047. *NRDC v. EPA*, 824 F.2d 1258, 1286 n.19 (1st Cir. 1987) ("courts will not rely on appellate counsel's *post hoc* rationalizations in lieu of adequate findings or explanations from the agency itself.").

In an attempt to discredit the information submitted by the City, FAA's brief invents the argument that the City misunderstood FAA's original representation that the NHPA properties were subject to the same noise level as a "commercial area." FAA Br. at 64. This argument fails in three ways. First, under 36 C.F.R. § 800.13(b), AD-047, it is the new information about impacts that is relevant to Section 800.13(b), not the original agency finding that missed the impacts.

Second, the record does not show that FAA itself reached this conclusion in response to data and information that would have been provided in consultation

with the City. FAA's brief is now trying to do after the fact what FAA was required to do under the NHPA.

Third, FAA's assertion is disproven by the record. In its effort to secure concurrence, FAA informed the SHPO that the routes would not impact historic properties because the "action is determined not to disrupt conversation and is no louder than the background noise of a commercial area." AR-B6 at 2. Without elaboration from FAA, the statement indicated that the historic districts would not be adversely affected because they already shared the same level of commercial noise caused by the routes. *Id.* FAA *did not explain* why the noise levels of the historic districts were comparable to the noise of a "quiet urban daytime" setting. FAA Br. at 65. FAA *did not and does not know the noise levels of the historic districts in Phoenix*, but made an assumption just because the historic properties were located in the City. FAA picked the "quiet urban daytime" reference from a figure attached to FAA's letter. AR-B6 at 11. As the City informed FAA (and FAA never denied), this figure was a generic set of ranges from a St. Louis environmental document produced decades before. AR-H23a at 26.

3. The City Historic Preservation Officer's Memorandum Was New Information Requiring Reinitiation of Consultation.

FAA's brief also attacks the City Historic Preservation Officer's memorandum, claiming that it does not meet the standard of proof for demonstrating quiet as a contributing factor to the designation of the City's historic

districts. FAA Br. at 66. The critique is both unfounded and an attempt to backfill what FAA failed to do in 2015. *Id*. The City informed FAA that "[c]ontrary to the conclusory and unsupported assumptions that FAA made in its categorical exclusion determination, the affected historic districts and many of the individual properties depend on quiet and use of the outdoors as part of their historic attributes that supported their listing." AR-H23a at 18. The City provided an extensive description of the City's historic districts, submitted the City Historic Preservation Officer's analysis, and provided FAA with detailed planning information for the affected districts (including the information leading to their designations on the National Register) and support for why quiet was important. *Id*. at 18–20. The Historic Preservation Officer found that "historic residential districts have been adversely affected by the noise, vibrations, and visual intrusions resulting from a dramatic increase in the number of airplanes flying at low altitudes directly over or near these neighborhoods." AR-H23b, Exhibit 23 at 1. The effects of the routes "have compromised the ability to appreciate and value the very features that make the character of these homes and neighborhoods special." *Id*.

FAA at the time did not address that information; nothing in the record refutes the Officer's findings. *NRDC*, 824 F.2d at 1286 n.19.

4. The Replacement of Windows Is an Indirect Effect.

The Historic Preservation Officer identified serious concerns regarding substantial adverse effects on historic properties caused by replacement of historic windows by homeowners to mitigate noise from the routes. AR-23b, Exhibit 23 at 4; AR-H23a at 20–22. Under NHPA, replacement of windows is recognized as an adverse effect. *Id.* NHPA's definition of effects specifically includes "indirect effects", acknowledging that agency actions can lead to subsequent actions by a third party that can impair historic resources. 36 C.F.R. § 800.5(a)(2), AD-038.

FAA's theory that window replacements are caused by "intervening decisions" (FAA Br. at 67) and not subject to review is at odds with the plain language of the NHPA regulations, and finds no support in FAA guidance or case law. FAA's guidance acknowledges the need to consider noise impacts from its decisions (AR-H23b, Exhibit 13), even though the "intervening decision" of whether and when to fly aircraft are made by airlines, not FAA. Courts have long considered "indirect effects" under NEPA to include foreseeable actions by a third party induced by an agency action. *Barnes v. United States Dep't of Transp.*, 655 F.3d 1124, 1139 (9th Cir. 2011) (indirect effect attributable to additional runway under NEPA). It was reasonably foreseeable that owners of historic homes might replace historic single-pane windows to reduce noise caused by rerouting jets.

FAA's brief argues that replacement of windows was not "reasonably foreseeable" because "FAA's noise analysis did not indicate any increases above the well-established noise thresholds." FAA Br. at 67. However, the very purpose of Section 800.13(b), AD-047, is to require FAA to address information about what is actually happening, even if FAA did not foresee it in its original analysis. FAA failed to evaluate the nature of the historic properties that would be affected, including their preexisting noise environment, architecture, and fenestration. Historic houses and windows were built differently in the Phoenix desert than houses in the Midwest or Northeast. *See* AR-H23a at 18–19.

III. FAA Fails to Provide Record Evidence Supporting Its Section 4(f) Determination.

A. FAA Ignores Its Order Requiring Section 4(f) Consultation.

Order 1050.1E mandates that the "responsible FAA official *must consult* all appropriate Federal, State, and *local officials* having jurisdiction over the affected [S]ection 4(f) resources when determining whether project-related noise impacts would substantially impair the resources." Order 1050.1E app. A ¶ 6.2e, AD-072 (emphasis added). FAA "shall consult with the officials having jurisdiction over the section 4(f) propert[ies]." *Id.* app. A ¶ 6.4, AD-073. FAA's brief makes no claim that it conducted Section 4(f) consultation with the City officials having jurisdiction over the parks.

FAA attempts to blame its failure to consult on the City by characterizing the City's argument as a "*post hoc* complaint unsupported by the record." FAA Br. at 70–71. However, FAA's consultation with the City is required by Order 1050.1E; it is not an obligation initiated by the City. Following September 2014, the City *did* request Section 4(f) consultation. AR-H23a, H26a.

FAA counsel argues that FAA believed in 2013 that its contact with a lower-level staff person from the Aviation Department was Section 4(f) consultation. FAA Br. at 71. The argument is disingenuous, inconsistent with FAA's own Order and not supported by FAA's record. The Airport employee was not a City "official[] having jurisdiction over the affected [S]ection 4(f) resources" (Order 1050.1E app. A ¶ 6.2e, AD-072) and the communications cited by FAA do not refer to Section 4(f) or seek information about Section 4(f) resources. FAA Br. at 71. FAA cannot bootstrap vague communications with a low-level airport employee into the *required* Section 4(f) consultation with City park and historic preservation officials.

B. FAA Did Not Have Information on the City's Section 4(f) Resources When Making Its Section 4(f) Determination.

FAA's determination that the routes would not impair the City's 4(f) properties was based *solely* on its noise modeling and the same 65-decibel average threshold identified above. *See* FAA Br. at 69. FAA argues that its modeling did not show significant impacts. *Id*. at 64. However, as with historic resources, this

65-decibel threshold does not apply if the parks in question rely on quiet as an attribute. Order 1050.1E required that "[a]dditional factors must be weighed in determining whether to apply the thresholds listed in Part 150 guidelines to determine the significance of noise impacts on *noise sensitive areas*." Order 1050.1E app. A ¶ 6.2i, AD-073 (emphasis added). In violation of Section 4(f), FAA had no information on the parks, other than their general location, but concluded that the "parks already experienced overflights" and that "none of these parks have quiet as an expected attribute." AR-B2 at 15. FAA's brief offers no record evidence to substantiate the assertion. Under the APA, assumptions do not constitute substantial evidence. *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted) ("conclusory statements will not do; '[FAA's] statement must be one of reasoning.'").

FAA again resorts to *post hoc* rationalization of its Section 4(f) determination by arguing that the City did not dispute the Section 4(f) assumptions. FAA Br. at 69–70. But, prior to implementation, FAA never sought consultation with City park and historic preservation officials. Once the routes were in place and the impacts occurred, the City provided specific information about how the routes were impairing specific functions of City parks and historic properties that "depend on a quiet environment as part of their fundamental attributes," including information on the parks themselves and noise monitoring data. AR-H23a at 42–

43; AR-H26a at 3. FAA's brief dismisses the City's evidence as "anecdotal." FAA Br. at 70. But, it was FAA's responsibility to assess the evidence, not its litigation counsel. Also, the City's evidence was detailed and relative to specific noise-sensitive uses and specific noise-sensitive parks. AR-H23a at 42–43; AR-H26a at 3. It was prepared by the City as the steward of the Section 4(f) resources and the entity in the best position to identify impacts.

IV. FAA Fails to Demonstrate That It Complied with Order 7100.41.

The PBN Working Group did not comply with either Order 7100.41 or Administrator Huerta's commitment to make the City an "important player" in it. *See* City Br. at 53. Following FAA's publication of the Final Report, the City Manager and Aviation Department submitted comments highlighting FAA's violation of Order 7100.41. Assistant Aviation Director Makovsky wrote:

> [d]espite considerable discussion about process during the February 12 and 19 meetings, FAA staff withheld from the City the fact that it had already executed a Scoping Document days before (on February 9) that limited the scope of the Working Group to effectively preclude the group from making any changes to the routes that would improve noise conditions in a noticeable manner.

AR-H29 at 3.

FAA does not rebut the accuracy of the City's critique. FAA Brief at 72. FAA's brief offers the same representations FAA made in its April Letter to the City (*id.*) which were disproven by the record and the City's comments on the

Final Report in April 2015 (AR-H29, H30). FAA's contention that the City somehow neglected its role as a participant on the Working Group is belied by the record. FAA Br. at 73. FAA included the City in only two preliminary meetings in February. *See* AR-H29 at 2. Then, after months of excluding the City from the PBN Working Group's analyses, FAA provided the City with a draft of the Final Report just days before the Final Report was issued, but without the technical information necessary to review it. *Id*. at 4 (FAA "still did not provide the underlying TARGETS data necessary to analyze it until Friday April 10, only one business day before the [final] Working Group meeting"). The Final Report showed that there was "nothing in the Scoping Document charge[d] to the Working Group about noise" and disclosed that the City had not been identified as a member of the Working Group. *Id.* FAA's April 13 meeting with the City "ma[de] clear that the FAA deliberately intended the City to have no chance to influence the analysis or Report, and did not include the City as a true member of the Working Group." *Id*.

FAA incorrectly contends that the post-implementation review of the RNAV routes should not involve evaluation of noise. FAA Br. at 72. It cites to no provision in Order 7100.41 that excludes consideration of noise impacts, because none exists. Order 7100.41 specifically contemplates the inclusion of airport operators in the Working Group process to provide information about the noise

environment. Order 7100.41 at A-5, AD-101. The Order requires inclusion of airports to provide "input on procedure and route design, including any potential operational or environmental impacts to . . . surrounding communities." *Id.* Consistent with the Order 7100.41, Administrator Huerta stated that the Working Group's task would be to explore modifications to the routes to address noise impacts. AR-H20 at 1.

V. FAA's Affirmance of Its Categorical Exclusion Was Arbitrary.

The record shows that FAA reconsidered its categorical exclusion twice without addressing the information it had about community controversy and impacts.[9] In November 2014, FAA revised its categorical exclusion in an erratum. AR-B5. In the Final Report, FAA determined that its categorical exclusion remained adequate. AR-H28, Report at 28. Despite opportunities to do so, FAA failed to address the City's extensive information demonstrating significant noise impacts. In its brief, FAA attempts to explain the 2014 Errata or its affirmance of the categorical exclusion in the face of overwhelming contradictory evidence.

[9] FAA's assertion that the "Airport Authority" "assured" FAA that the routes would not be controversial is a misrepresentation. FAA Br. at 14. The City made no such assurance. FAA cites to an e-mail from its environmental analyst indicating she discussed the issue with the "Airport Authority." AR-F17. The e-mail makes no reference to a City assurance and, as shown by record, the "Airport Authority" was a low-level employee with no authority to determine the potential level of controversy. AR-H35a at 2. As soon as FAA started using the routes and the City became aware of their impacts, the City made it clear to FAA that there was a very high level of controversy.

However, the APA required FAA to explain its decision before litigation, especially where FAA recognized that it "didn't anticipate this being as significant an impact" as the RNAV routes caused (AR-H23a at 12), and had thousands of pages of information about noise impacts. In violation of NEPA and the APA, FAA failed to explain its arbitrary decision in the face of contradictory evidence. *Petroleum Commc'ns*, 22 F.3d at 1172.

CONCLUSION

The City respectfully requests that the Court vacate and remand FAA's decision to implement the RNAV routes.

Respectfully submitted on August 4, 2016.

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CERTIFICATE OF COMPLIANCE

I certify on this 4th day of August, 2016, that:

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/s/ *John E. Putnam*
John E. Putnam

CERTIFICATE OF SERVICE

I certify that on this day, August 4, 2016, I electronically filed this Reply Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered to use that system and, to my knowledge, will receive copies of this document upon its filing.

/s/ *John E. Putnam*
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