

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X
4 CITY OF PHOENIX, ARIZONA, :
5 Petitioner, :
6 v. : No. 15-1158, et al.
7 MICHAEL P. HUERTA, ET AL., :
8 Respondents. :
9 - - - - - X

10 Friday, March 17, 2017
11 Washington, D.C.

12 The above-entitled matter came on for oral argument
13 pursuant to notice.

14 BEFORE:

15 CIRCUIT JUDGES ROGERS AND GRIFFITH, AND SENIOR
16 CIRCUIT JUDGE SENTELLE

17 APPEARANCES:

18 ON BEHALF OF THE PETITIONERS:

19 JOHN E. PUTNAM, ESQ.
20 MATTHEW ADAMS, ESQ.

21 ON BEHALF OF THE RESPONDENTS:

22 LANE MCFADDEN, ESQ.

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1
2 THE CLERK: Case number 15-1158, et al., City of
3 Phoenix, Arizona, Petitioner v. Michael P. Huerta, et al.
4 Mr. Putnam for Petitioner City of Phoenix, Arizona; Mr.
5 Adams for Petitioners Story Preservation Association, et
6 al.; and Mr. McFadden for Respondents Michael Huerta, et al.

7 JUDGE ROGERS: Good morning. Judge Griffith will
8 be participating in the oral argument by telephone, so you
9 may direct questions to him, if you wish, and he may have
10 some for you.

11 ORAL ARGUMENT OF JOHN E. PUTNAM, ESQ.

12 ON BEHALF OF THE PETITIONER CITY OF PHOENIX, ARIZONA

13 MR. PUTNAM: Excellent. Thank you, Your Honor.
14 Good morning, and may it please the Court. My name is John
15 Putnam and I represent the City of Phoenix, Arizona. I wish
16 to reserve a minute of my time for rebuttal, and will be
17 sharing three minutes of my time with Counsel for the
18 Historic Neighborhood Petitioners, Mr. Adams. In 2014, FAA
19 changed decades of flight patterns in the City of Phoenix by
20 moving flight routes from industrial and agricultural areas
21 to historic neighborhoods.

22 JUDGE ROGERS: And when did it do that?

23 MR. PUTNAM: It did that on September 18th, 2014,
24 Your Honor, when it published routes in the Federal
25 Register, and also at that time actually started flying

1 aircraft on that route.

2 FAA departed from its own practice and legal
3 requirements to avoid public review and implement these
4 changes more quickly. When the new routes resulted in
5 intense public scrutiny and controversy FAA told the City
6 that it had underestimated the noise impacts associated with
7 the routes, and was looking at changes to effect those
8 concerns.

9 JUDGE ROGERS: So, since the City knew that as of
10 September the routes had changed, wasn't the City obligated
11 to file a petition within 60 days if it wanted to challenge
12 the new routes?

13 MR. PUTNAM: Excuse me. I don't believe it was,
14 Your Honor. In this circumstance within 60 days, in fact,
15 even within 30 days FAA told the City that it recognized
16 that the noise impacts were greater that it had expected,
17 and that it intended to listen to the community, and listen
18 to the City, and go about a process to evaluate possible
19 changes --

20 JUDGE SENTELLE: But did that change anything, the
21 fact that they said we may consider making some changes,
22 nonetheless, the September 14th decision is what's governing
23 at that point, and don't you have the obligation to file
24 within 60 days if you're objecting to that action?

25 MR. PUTNAM: Your Honor, we also have an

1 obligation to exhaust administrative remedies and only bring
2 an action when it's final.

3 JUDGE SENTELLE: What did you do to exhaust
4 administrative remedies?

5 MR. PUTNAM: So, what --

6 JUDGE SENTELLE: What action did you take during
7 60 days?

8 MR. PUTNAM: The first action that we took within
9 60 days was to hold a joint public hearing and meeting with
10 the FAA in the community, at which FAA heard from the
11 public, heard from the City, and indicated that they would
12 get back to the City about next steps. Before the 60 days
13 elapsed the FAA sent a letter to the City of Phoenix and
14 told the City that it would be evaluating changes, and that
15 in fact it actually did make a change in November, 2014
16 before the 60 days elapsed and intended to move forward.
17 From that point --

18 JUDGE ROGERS: So, let me ask you were you relying
19 on any regulation or guidance from the FAA indicating that
20 it had an exhaustion requirement, or it had a
21 reconsideration procedure?

22 MR. PUTNAM: At the initial stage, Your Honor, the
23 primary reliance that we had was on FAA's commitment from
24 the Regional Administrator, you know, a high level official
25 within the FAA, that they were going to be evaluating and

1 making potential changes to these documents. Subsequent to
2 that point in January --

3 JUDGE ROGERS: To what documents, the flight plan?

4 MR. PUTNAM: To the flight routes, which were --

5 JUDGE ROGERS: Which --

6 MR. PUTNAM: -- essentially maps.

7 JUDGE ROGERS: Right. Okay. I'm just trying to
8 understand sort of the City's thinking here when it knew
9 that the FAA had made a decision on the flight paths that
10 they had actually implemented them, and that the City was
11 representing that in fact some of the assumptions that the
12 FAA had made were inaccurate, and subsequently produced a
13 lot of information raising questions about some of the
14 procedures that were used. But I'm trying to understand
15 that what did the City think it could achieve when the
16 Regional Administrator and others were saying things like
17 well, it looks like maybe we made a mistake, those aren't
18 his words, but in effect. In other words, doesn't that
19 happen all the time with agencies, not all the time, but an
20 agency promulgates a rule, they get new information, they
21 realize maybe they ought to reexamine this, but it doesn't
22 eliminate the rule until they change the rule, and don't
23 parties have to abide by the statutory time limit if they
24 want to challenge the rule?

25 MR. PUTNAM: So, in this case, Your Honor, I think

1 while that often does occur, the degree to which the Agency
2 got this wrong I think was unusual, and the fact that so
3 very quickly the Regional Administrator of the FAA committed
4 to the City that it would be undertaking a process to make
5 changes, and actually made those changes within 60 days and
6 said others may be forthcoming --

7 JUDGE ROGERS: So, the changes it made, and
8 correct me if I'm wrong, were that it discovered what was
9 going on with the planes actually flying, and that they were
10 not necessarily flying in the correct paths that the
11 September 14th map required, so they, so the FAA required
12 the planes to follow the September 14 maps, so there was no
13 change in the September 14, it was just a conformance with
14 September 14, isn't that correct?

15 MR. PUTNAM: So, it was a change because there's
16 not just the map with the route, but also procedures that
17 the airlines and the pilots and the air traffic control have
18 to follow associated with those. There was a change in the
19 procedures that they identified, FAA has not been clear, and
20 we've not been able to determine either from this record or
21 through FOIA requests exactly what that change was, but
22 you're absolutely right, the intent was to try to get those
23 aircraft back on the route that they should have been flying
24 based on that map.

25 JUDGE SENTELLE: Isn't it a little hard to say

1 that that is a change, that that's a new final decision from
2 which your 60 days would start running over when it is not
3 doing anything facially at least other than reiterating this
4 is what we meant the first time?

5 MR. PUTNAM: So, Your Honor, under the precedent
6 of this Court in for example *City of Dania Beach*, to the
7 extent that they make a decision, even an informal decision
8 that affects the way that aircraft are actually being flown
9 has a practical effect in the real world, that does make a
10 difference. The way that their procedures were working were
11 not keeping aircraft on that route, they were actually
12 diverting off of that route, and even more over the historic
13 neighborhoods than the route would be otherwise.

14 JUDGE SENTELLE: But isn't that just back to what
15 Judge Rogers said, that that's not a change, it's just a
16 reiteration, or a push for what they've done already on
17 September 14th?

18 MR. PUTNAM: It's a change in the procedures, Your
19 Honor, because their procedures originally were not adequate
20 to keep the aircraft --

21 JUDGE SENTELLE: So, at most that would mean that
22 we can review the procedures today with a different 60-day
23 standard than it was from September 14th?

24 MR. PUTNAM: So, Your Honor, I believe that the
25 final decision came much later in the process when FAA had

1 gone through its administrative process, including
2 eventually the invocation of its order 7100.4(a), which
3 provides a formal procedure for reevaluating these routes
4 and potentially mitigating problems and concerns with those
5 routes.

6 JUDGE ROGERS: So, that's your stage five
7 argument --

8 MR. PUTNAM: That's correct, Your Honor.

9 JUDGE ROGERS: -- just so I'm clear? So, you're
10 reading that to mean that what happened on September 14th is
11 somewhat preliminary, they're final in the sense that they
12 will stay in effect unless at stage five the FAA's
13 evaluation shows that changes need to be made. If it does
14 the stage five and decides no changes need to be made, and
15 advises the people who are interested, namely the June
16 letter, then you think the 60 days starts from that point?

17 MR. PUTNAM: I do, Your Honor, and there's two
18 pieces, one, Order 7100.41 does provide that process, and
19 does allow for changes of routes to address concerns. The
20 Administrator of the FAA advised the City of Phoenix that
21 that process would be used to address noise concerns that
22 the City might have. So, the City had reasonable grounds
23 like in *Paralyzed Veterans* or other decisions of this Court.

24 JUDGE ROGERS: So, let me just ask you, when did
25 they tell you that? Was there a letter or something?

1 MR. PUTNAM: There was a letter from the
2 Administrator of the FAA, Michael Huerta.

3 JUDGE ROGERS: And which letter is that, the
4 January or --

5 MR. PUTNAM: That was the January letter --

6 JUDGE ROGERS: All right.

7 MR. PUTNAM: -- that went to the City, at that
8 point where they said we're going to consider noise as part
9 of this process, and you the City will be an important part
10 of that process.

11 JUDGE ROGERS: As part of stage five?

12 MR. PUTNAM: As part of stage five that post-
13 implementation analysis done through what was known as a
14 performance based navigation working group. The other piece
15 that's important I think to understand is that one of the
16 substantive concerns that the City has identified is that
17 the National Historic Preservation Act has a provision that
18 requires re-consultation and mitigation to the extent that
19 impacts are discovered after the original implementation of
20 a particular decision, that can't happen before a decision
21 is implemented. The City asked for that re-initiation in
22 February of 2015 when it collected data, it provided over
23 10,000 pages of information to the FAA regarding noise data,
24 regarding the quiet in those neighborhoods, and the
25 importance of quiet to those neighborhoods from a historic

1 perspective, FAA never responded to any of that information,
2 any of those concerns, we believe that's one of the core
3 violations in this case. A very open and shut question of
4 administrative law, if they have an affirmative obligation
5 to do these things, evidence is presented to them, and they
6 ignore that information, that's about as simple a case of
7 arbitrary and capricious behavior.

8 JUDGE ROGERS: So, let me ask you as to your stage
9 five argument, in its brief the FAA basically tells us the
10 way it interprets its guidance, stage four is the last step,
11 and stage five is sort of this typical let's look at what
12 happened, and evaluate, and then if we see we need to make
13 changes we'll go back to the drawing boards and come up with
14 a new final order. What's your response to that?

15 MR. PUTNAM: So, I have three very quick
16 responses, and see that I'm out of time here. The first is
17 that's inconsistent with what the Administrator of the FAA
18 said at the time through that January letter that it will be
19 addressing noise, and would be potentially making changes to
20 flight tracks. FAA's current position is a post-hoc
21 rationalization from Counsel, which this Court generally
22 will not consider. Second, the provision of the order
23 itself, and if you take a look at addendum page 94 you'll
24 see pretty clearly that it identifies the potential for
25 addressing any causes or concerns that are identified in

1 that stage five and any amendments. And third, they still
2 have a legal obligation to address that issue under the part
3 800 regulations implementing the National Historic
4 Preservation Act.

5 JUDGE ROGERS: Okay.

6 MR. PUTNAM: And with that I'll turn it over to my
7 colleague, Mr. Adams.

8 JUDGE ROGERS: Thank you.

9 ORAL ARGUMENT OF MATTHEW ADAMS, ESQ.

10 ON BEHALF OF THE PETITIONERS

11 STORY PRESERVATION ASSOCIATION, ET AL.

12 MR. ADAMS: Good morning, and may it please the
13 Court, Matthew Adams for the Historic Neighborhood
14 Petitioners. We share the City's position on a number of
15 the issues already addressed, but there are two additional
16 issues where our position is somewhat distinct, and with the
17 permission I'd like to start with those.

18 First, on the jurisdictional question, so, there's
19 a clear difference of opinion between the City and the FAA
20 as to who said what to whom and when. But there's no doubt
21 that the Historic Neighborhood Petitioners were not involved
22 in any of those discussions. From October, 2014 when the
23 FAA first made representations that it would change the new
24 routes, or explore adjustments as Mr. Putnam said, until
25 June of 2015 when the City filed its petition for review we

1 reasonably understood that the new routes remained subject
2 to change and that the FAA and the City were working on
3 that.

4 JUDGE ROGERS: So, what was the significance of
5 your first sentence, that your organization was not
6 involved, involved when and what?

7 MR. ADAMS: So, much of the communication between
8 the City and the FAA took place in a series of letters which
9 are in the administrative record.

10 JUDGE ROGERS: Right.

11 MR. ADAMS: The Historic Neighborhood Petitioners
12 were not involved in that, we don't know what
13 representations were made to whom or when. There were,
14 however, two distinct points during that --

15 JUDGE ROGERS: All right. But you, was your
16 organization aware of the September 14th change?

17 MR. ADAMS: We were, Your Honor, because they were
18 flying directly over our homes.

19 JUDGE ROGERS: Precisely.

20 MR. ADAMS: Yes.

21 JUDGE ROGERS: So, why weren't you obligated to
22 file within 60 days?

23 MR. ADAMS: Because --

24 JUDGE ROGERS: Particularly when you were not
25 involved in the communications between the City and others,

1 and FAA representatives.

2 MR. ADAMS: So, although we were not involved in
3 the letters back and forth, there were two distinct points
4 where the FAA and the City made specific representations to
5 us, and those were in two public meetings. The first was in
6 October of 2014, October 16th, so this would have been about
7 30 days after the planes started flying, well, 28 days. And
8 the FAA came to the City of Phoenix City Council Chambers,
9 acknowledged the community concerns, and it said we're going
10 to work with the City to explore adjustments to these
11 routes.

12 JUDGE SENTELLE: I'm not sure how that helps you
13 jurisdictionally. You still have to be within 60 days of
14 the final order.

15 MR. ADAMS: Your Honor --

16 JUDGE SENTELLE: And if you are or are not
17 involved in whatever is going on after the final order I
18 don't see how you're any better off jurisdictionally.

19 MR. ADAMS: Yes. So, Your Honor, we believe these
20 are reasonable grounds supporting a later filing date for
21 us, in other words --

22 JUDGE ROGERS: All right. So, you've got the
23 October meeting, and what's the second one, just so I'm
24 clear?

25 MR. ADAMS: So, December 16th, 2014 --

1 JUDGE ROGERS: All right.

2 MR. ADAMS: -- this is the meeting at which the
3 FAA Regional Administrator came to the City of Phoenix and
4 said the process was not enough, we didn't anticipate this
5 being as significant as it was, and committed to continue
6 working on this. And Your Honors, I see that I'm running a
7 little bit low on time, but --

8 JUDGE ROGERS: Please continue so we get your --

9 MR. ADAMS: Sure.

10 JUDGE ROGERS: -- position.

11 MR. ADAMS: But it's important to note that the
12 City Council at that meeting where the FAA appeared passed a
13 resolution directing its staff to work with the FAA to
14 return to the original routes, and that's at Joint Appendix
15 772. So, those are the things that we were aware of, and
16 so, based on those two data points we had reasonable
17 grounds, we believe, for a later filing date, particularly
18 under this Court's decisions in *Safe Extensions* and
19 *Paralyzed Veterans*.

20 Unless Your Honors have further questions on that,
21 I'll just briefly touch on the merits issue on which we
22 differ slightly from the City, and that is the issue of
23 public controversy, the FAA proceeded on a categorical
24 exclusion, categorical exclusion can't be used in
25 extraordinary circumstances, FAA Order 1050.1(e) says that

1 one such circumstance is the existence of significant
2 controversy on environmental grounds, but if you look at the
3 administrative record of the Agency's analysis before the
4 planes started flying there's no evidence of any real
5 consideration of this, in fact, there is an acknowledgement
6 that local citizens and community leaders were not aware of
7 the new routes. And then as Mr. Putnam says there was an
8 outpouring of public controversy immediately after the
9 planes started flying, and although the FAA subsequently
10 reevaluated and issued a couple of errata to its initial
11 environmental analysis, none of those reevaluations properly
12 addressed the public controversy that is indisputable.

13 JUDGE ROGERS: All right.

14 MR. ADAMS: Your Honor, I'll reserve whatever time
15 is remaining to us. Thank you.

16 JUDGE ROGERS: Yes, we'll give you some time on
17 rebuttal. All right. All right. Counsel for the FAA.

18 ORAL ARGUMENT OF LAND MCFADDEN, ESQ.

19 ON BEHALF OF THE RESPONDENTS MICHAEL HUERTA, ET AL.

20 MR. MCFADDEN: Good morning, Your Honors, and may
21 it please the Court, my name is Lane McFadden, I represent
22 the Federal Respondents. With me at Counsel table is Ms.
23 Jessica Rankin of the Federal Aviation Administration. The
24 Federal Aviation Administration's final order in this case
25 implementing the routes, and representing its conclusions as

1 to all of its environmental review, and all of its safety
2 and technical review of these procedures, was issued in
3 September, 2014, and nothing in either the briefs or the
4 argument presented to you today undercuts that.

5 JUDGE ROGERS: Well, let me just ask a couple of
6 things here? September 14, as of that date there had been
7 no communication between the FAA and the City advising the
8 City of these routes, other than through a low level
9 employee who said A) he had no authority to speak for the
10 City; and B) through, or are these one in the same, the
11 State officials? And your position in your brief is the FAA
12 had no obligation to contact City officials, is that
13 correct?

14 MR. MCFADDEN: Not entirely, Your Honor.

15 JUDGE ROGERS: All right. So, what was your
16 obligation to contact City officials before --

17 MR. MCFADDEN: So, our --

18 JUDGE ROGERS: -- September 14th?

19 MR. MCFADDEN: The obligation, the only regulatory
20 obligation to consult with the City comes from the
21 regulation implementing the National Historic Preservation
22 Act. If you look at 36 C.F.R. --

23 JUDGE ROGERS: Right.

24 MR. MCFADDEN: -- 800.2 --

25 JUDGE ROGERS: And so, what did you do?

1 MR. MCFADDEN: So, the City's Aviation Department
2 representative --

3 JUDGE ROGERS: Right, that's --

4 MR. MCFADDEN: -- specifically their --

5 JUDGE ROGERS: -- this low level employee.

6 MR. MCFADDEN: That is the explanation given to us
7 now after the fact, but --

8 JUDGE ROGERS: Well, who was he?

9 MR. MCFADDEN: He was the noise abatement
10 specialist who worked for their Aviation Department, he was
11 specifically contacted because the concern that we
12 anticipated the City would have would be about aircraft
13 noise, and so we consulted with the Aviation Department and
14 with the Airport Authority, the two components of the City
15 that FAA reasonably believed would know the most about
16 aircraft noise, and would understand the --

17 JUDGE ROGERS: And the assumption was he would
18 notify his boss --

19 MR. MCFADDEN: Yes, of course.

20 JUDGE ROGERS: -- who would -- well, I'm just
21 asking.

22 MR. MCFADDEN: Yes. Yes, that was the
23 assumption --

24 JUDGE ROGERS: Who would then --

25 MR. MCFADDEN: -- the assumption --

1 JUDGE ROGERS: -- notify the City officials, I
2 mean, the Mayor, or the City Council?

3 MR. MCFADDEN: Well, so consider it from FAA's
4 perspective, the City's representative was involved in the
5 design of the procedures in 2012, then in August --

6 JUDGE ROGERS: Who was that?

7 MR. MCFADDEN: The same Aviation Department
8 employee, Mr. Davies (phonetic sp.).

9 JUDGE ROGERS: And could I just be clear so I
10 know? What level is this employee? In other words, if you
11 were to look here in D.C., you know, they have a noise unit,
12 but it's not a policy making unit.

13 MR. MCFADDEN: Sure. I mean, I don't know the
14 specific answer to your question about his level.

15 JUDGE ROGERS: No, but I'm trying to draw the --

16 MR. MCFADDEN: He had -- right.

17 JUDGE ROGERS: -- distinction between them, a
18 bureaucrat who has no policy making authority, and someone
19 who can give you numbers and data, because that's his or her
20 area of --

21 MR. MCFADDEN: Right.

22 JUDGE ROGERS: -- specialty, special --

23 MR. MCFADDEN: Well, I think if Phoenix's --

24 JUDGE ROGERS: -- specialization.

25 MR. MCFADDEN: -- government works the way that

1 D.C.'s government does the only people with ultimate policy
2 making authority are either the Mayor or members of the City
3 Council, and everyone below them would qualify as a
4 bureaucrat.

5 JUDGE ROGERS: So, when the FAA is deciding to
6 change flight paths for good safety reasons why wouldn't the
7 statutes and your own procedures contemplate notifying
8 policy making officials?

9 MR. MCFADDEN: Well, they don't, Your Honor, and I
10 think it's because that places --

11 JUDGE ROGERS: Otherwise, it's sort of a stealth
12 operation, all of a sudden you wake up and the plane is
13 flying over your house and you didn't even know about it.

14 MR. MCFADDEN: But the FAA's burden isn't to
15 understand the inner workings of each local government with
16 which it interacts.

17 JUDGE ROGERS: No, but you admit it has an
18 obligation to consult with the City, and you're interpreting
19 the City to mean a low level official with no policy making
20 authority, I just want to be clear about that.

21 MR. MCFADDEN: The specific regulatory obligation
22 is to consult with, quote, a representative of the local
23 government with jurisdiction over the area.

24 JUDGE ROGERS: But this person told your clients
25 he had no authority to speak for the City?

1 MR. MCFADDEN: No, Your Honor, that statement was
2 made after the FAA's final order.

3 JUDGE ROGERS: I see.

4 MR. MCFADDEN: It was made by other members of the
5 City who said retroactively this person didn't speak for us.
6 There was no representation made to the FAA from August,
7 2013 when the entirety of the environmental review was
8 provided to the City's Aviation Department through the next
9 13 months before the procedures were implemented. The
10 City --

11 JUDGE ROGERS: Well --

12 MR. MCFADDEN: -- said nothing to the FAA
13 objecting to, or raising further questions --

14 JUDGE ROGERS: But you understand what I'm getting
15 at --

16 MR. MCFADDEN: Yes, Your Honor.

17 JUDGE ROGERS: -- Congress passes all these
18 statutes saying, you know, affected people should be
19 notified so that their input can be considered before the
20 Agency makes a decision. And you can interpret that in a
21 way that says yes, we let the janitor know, or yes, we let a
22 low level bureaucrat know, but the rest of the City is
23 totally oblivious to this plan, and the first notion it has
24 is when they hear these planes coming.

25 MR. MCFADDEN: Well, the question is whether that

1 is, that is the fault of some failure on the FAA's part to
2 satisfy its legal obligations. If we had had --

3 JUDGE ROGERS: Well, what I'm trying to
4 understand, though is --

5 MR. MCFADDEN: Right.

6 JUDGE ROGERS: -- what the FAA thinks is its legal
7 obligation where Congress has passed a statute that talks,
8 at least one way to read it is to notify the officials who
9 can speak on behalf of the City and represent its position
10 to the FAA, why isn't that --

11 MR. MCFADDEN: Your Honor, many of the public
12 notification provisions you're talking about apply in
13 circumstances other than these, they apply --

14 JUDGE ROGERS: No, I'm using --

15 MR. MCFADDEN: -- where there's the potential for
16 adverse effects.

17 JUDGE ROGERS: You told me when --

18 MR. MCFADDEN: Right.

19 JUDGE ROGERS: -- you started --

20 MR. MCFADDEN: A representative of local
21 government.

22 JUDGE ROGERS: -- that the National Historic
23 Preservation Act required you, required your client to
24 consult with the City, that's where we started.

25 MR. MCFADDEN: Right.

1 JUDGE ROGERS: So, I'm trying to understand how
2 you're interpreting that statute by Congress in terms of the
3 FAA's obligations to provide prior notice.

4 MR. MCFADDEN: Well, two points of clarification,
5 the local government consultation requirement is regulatory,
6 it doesn't come from the statute.

7 JUDGE ROGERS: Well, you told me you had an
8 obligation to, I wrote it down, to consult the City under
9 the National Historic Preservation Act.

10 MR. MCFADDEN: Under the regulations implementing
11 that statute, yes. So, 800.2(c)(3) requires us to contact a
12 representative of the local government, which we believed
13 the City's Aviation Department was --

14 JUDGE ROGERS: So, what do you think Congress
15 meant, I just want to be clear about that, what do you think
16 Congress meant --

17 JUDGE SENTELLE: Is that congressional language,
18 or is that --

19 JUDGE ROGERS: Yes, that's --

20 JUDGE SENTELLE: -- regulatory language.

21 MR. MCFADDEN: That is regulatory language.

22 JUDGE SENTELLE: Yes.

23 JUDGE ROGERS: And what does the statute say?

24 MR. MCFADDEN: The statute doesn't specify the
25 mechanisms of consultation.

1 JUDGE ROGERS: What does it say?

2 MR. MCFADDEN: I don't have it in front of me,
3 Your Honor.

4 JUDGE ROGERS: All right. But I'll go --

5 MR. MCFADDEN: It authorized --

6 JUDGE ROGERS: -- look at it.

7 MR. MCFADDEN: Okay.

8 JUDGE ROGERS: But, I mean, my point is that if
9 the statute, and I'm just looking to see if I have it handy,
10 says -- anyway, we'll get to that. So, the Agency comes up
11 with a regulation that says obligation to consult with the
12 City.

13 MR. MCFADDEN: Obligation to consult with a
14 representative of the local government, yes.

15 JUDGE ROGERS: A representative of the local
16 government.

17 MR. MCFADDEN: Right.

18 JUDGE ROGERS: And is that a representative who
19 can speak on behalf of the local government?

20 MR. MCFADDEN: There's no more language in the law
21 requiring the identification of that person.

22 JUDGE ROGERS: But you see what I'm getting at,
23 you notified somebody who has no authority to make any
24 representation on behalf of the City as to what its position
25 would be regarding this new flight plan. You've got data

1 from this person who I'm assuming, you know, would naturally
2 give the Agency the data he had.

3 MR. MCFADDEN: Well, Your Honor, if you --

4 JUDGE ROGERS: Yes.

5 MR. MCFADDEN: -- indulge me a moment to explain
6 what occurred in this scenario. The City was present
7 through the Aviation Department at the big meeting where the
8 procedures were initially designed in 2012, then there was a
9 lot more work done, the City was --

10 JUDGE ROGERS: So, you say you don't know who from
11 the Department was represented, is that correct?

12 MR. MCFADDEN: No, we had -- this is all -- if you
13 look at J.A. 1120 and --

14 JUDGE ROGERS: Right.

15 MR. MCFADDEN: -- the following pages the names
16 are all given.

17 JUDGE ROGERS: Right.

18 MR. MCFADDEN: Primarily it was a gentleman named
19 Jim Davies who was the Noise Abatement Specialist at the
20 City's Aviation Department.

21 JUDGE ROGERS: That's the same person --

22 JUDGE SENTELLE: Yes.

23 JUDGE ROGERS: -- we've been talking about --

24 MR. MCFADDEN: Right, and I --

25 JUDGE ROGERS: -- the non-policy making person.

1 MR. MCFADDEN: Well, let me jump ahead --

2 JUDGE SENTELLE: Are you aware of anyone above
3 that person who had --

4 JUDGE ROGERS: Yes.

5 JUDGE SENTELLE: specific responsibility for noise
6 and aviation concerns?

7 MR. MCFADDEN: No, and --

8 JUDGE SENTELLE: You're not aware of anybody above
9 that position, so it was rather logical --

10 MR. MCFADDEN: No, he had supervisors.

11 JUDGE SENTELLE: -- to consult with that person,
12 right?

13 MR. MCFADDEN: That's right, Your Honor. And if
14 you look at, for example, J.A. 307 where we provided the
15 Aviation Department with all the environmental, Your Honor
16 suggested the City provided the FAA data, it was actually
17 the other way around, we gave them all of our information,
18 specifically a Google Earth file with all of the exact
19 locations of all the anticipated noise impact, exactly where
20 they'd be in the City, and how big they would be, and what
21 they would look like. And he wrote back to say thank you,
22 I'm sharing this with the City's NEPA Specialist to ensure
23 that everyone at the City with knowledge in this area has
24 been consulted. And then the only times we heard back from
25 the City --

1 JUDGE ROGERS: I know he said he was going to send
2 it to the NEPA Specialist, did he say that last phrase, as
3 well?

4 MR. MCFADDEN: He may not have.

5 JUDGE ROGERS: Yes, I thought that was --

6 MR. MCFADDEN: That may --

7 JUDGE ROGERS: -- an elaboration by Counsel.

8 MR. MCFADDEN: Sorry. I apologize.

9 JUDGE ROGERS: No, I mean, that's serious, we're
10 trying to understand what happened. He said he was going to
11 pass it on to the NEPA Specialist.

12 MR. MCFADDEN: He did.

13 JUDGE ROGERS: He didn't say anything about so the
14 City would, City officials would know what was going on.

15 MR. MCFADDEN: No, there was never any
16 discussion --

17 JUDGE ROGERS: Right.

18 MR. MCFADDEN: -- of --

19 JUDGE ROGERS: This is staff to staff.

20 MR. MCFADDEN: -- his chain of command.

21 JUDGE ROGERS: That's right.

22 MR. MCFADDEN: It was staff to staff.

23 JUDGE ROGERS: All right.

24 MR. MCFADDEN: That's right. And so, of course,
25 after the fact we discovered that no one, that none of the

1 proper people above him had been informed up to the highest
2 decision level, decision-making levels of the City, but we
3 had no indication of that at the time.

4 JUDGE ROGERS: So, I just need to be clear how
5 this federal agency is proceeding, where its own regulation,
6 you tell me, say it has an obligation to consult with the
7 City, and it's interpreting this to mean it can consult with
8 a non-policy making person.

9 MR. MCFADDEN: I mean --

10 JUDGE ROGERS: In other words --

11 MR. MCFADDEN: -- yes.

12 JUDGE ROGERS: -- it's a data --

13 MR. MCFADDEN: The state --

14 JUDGE ROGERS: -- gathering obligation, it's not
15 an obligation to notify public officials of the Agency's
16 action, proposed action.

17 MR. MCFADDEN: Two points on that, Your Honor. I
18 mean, first of all, the regulations are not, by the way,
19 promulgated by the Federal Aviation Administration, these
20 are the Advisory Council's regulations that govern all
21 federal agencies when they're applying the National Historic
22 Preservation Act. But, and they, and those regulations
23 farther up the page make very clear that the extent and, the
24 extent of consultation and the amount of effort put into
25 consultation must be proportionate to the anticipated

1 impacts, and here throughout the process from the very
2 beginning to the point where the procedures were implemented
3 all indications to the Federal Aviation Administration was
4 that there would be no adverse impacts because the noise
5 impacts were so low, they were below --

6 JUDGE ROGERS: So, let me ask you, do you live in
7 this region?

8 MR. MCFADDEN: No, I do not.

9 JUDGE ROGERS: If you lived in this region you
10 would know that noise from airplanes is a sensitive public
11 issue.

12 MR. MCFADDEN: I'm sorry, Your Honor, I live in
13 this region, I thought you meant whether I lived in Phoenix.

14 JUDGE ROGERS: Sorry.

15 MR. MCFADDEN: I'm aware of the concerns about
16 aircraft noise in D.C., certainly.

17 JUDGE ROGERS: So, what may be five decibels of an
18 increase on a chart may not be viewed in the same way by the
19 residents living in the area.

20 MR. MCFADDEN: There's no dispute about that.

21 JUDGE ROGERS: All right.

22 MR. MCFADDEN: And the position the Petitioners
23 have taken is that the FAA's entire way of measuring noise
24 is wrong precisely because some people are more sensitive to
25 it than others, and it can be disturbing to some people more

1 so than others.

2 JUDGE ROGERS: No, I understand your point about
3 they don't actually challenge your methodology here.

4 MR. MCFADDEN: And because of that --

5 JUDGE ROGERS: Yes.

6 MR. MCFADDEN: -- the regulatory standards for
7 what noise is significant and what noise is adverse control
8 here, and those --

9 JUDGE ROGERS: And so, once you apply the
10 methodology that they do not challenge, the Agency has
11 fulfilled its legal obligations.

12 MR. MCFADDEN: If the results are such that
13 there's --

14 JUDGE ROGERS: Yes.

15 MR. MCFADDEN: -- no anticipated significant
16 environmental impact, which was true here, and no
17 anticipated adverse affect on historic properties, which was
18 true here, so the Agency has fulfilled all of its regulatory
19 obligations in that context, if there had been bigger
20 impacts there would have been more consultation required,
21 and the burden on the Agency would have been greater than it
22 was in this circumstance.

23 JUDGE ROGERS: So, moving after September 14 what
24 I hear being said, and this is my language, not Petitioners'
25 language, they were lulled into believing that the FAA was

1 taking its concerns seriously, and was not simply going to
2 deep six them, but was going to substantively address them.
3 And so, they had these relationships, and meetings, and
4 letters, and it's that lulling that caused them not to rush
5 to court, but rather to try to work with the Agency, and at
6 the point it was clear that the Agency was not going to
7 address these claims seriously as they had thought, then
8 they did come to court.

9 MR. MCFADDEN: That is their description of
10 events, Your Honor. The dates they gave you where they were
11 lulled, as Your Honor put it, for the Historic Neighborhood
12 Petitioners the latest one was the public meeting of
13 December, 2014. So, let's accept their theory that that
14 gave them reasonable grounds not to sue 60 days from
15 September, then they were obligated to sue 60 days from
16 December when they saw no changes to the procedures, and no
17 further information from the FAA forthcoming. The City had
18 more, much more formal contact with the Federal Aviation
19 Administration, and it received letters from us in January
20 making very clear not only that we were not going to undo
21 the old procedures, but we were not going to revisit
22 consultation under the National Historic Preservation Act,
23 we were not going to reconsider the environmental review of
24 these procedures, they were most certainly on notice of what
25 they now claim is their position that we should have

1 reconsidered --

2 JUDGE ROGERS: So --

3 MR. MCFADDEN: -- in January.

4 JUDGE ROGERS: -- could -- go ahead. Could --

5 JUDGE SENTELLE: Go ahead.

6 JUDGE ROGERS: Could the City not reasonably have
7 read the January letter to say the FAA has decided that in
8 the interest of safety flight plan changes are necessary, so
9 we're not going back to the situation we had before
10 September 14th, but on the other hand we are, i.e. the FAA
11 is open to consider adjustments to the flight paths, or the
12 timing, or whatever?

13 MR. MCFADDEN: The letter importantly says one
14 additional thing --

15 JUDGE ROGERS: All right.

16 MR. MCFADDEN: -- which is that if the FAA
17 considers adjustments when it implements them they will be
18 the part of a new process, and a new decision making
19 activity that will lead to a new final Agency action. The
20 previous action is done, it is final, and has been final,
21 and we are happy to talk about future decisions that the
22 Agency might make.

23 JUDGE SENTELLE: So, there is a possibility of
24 future proceedings if circumstances are changed, or new
25 circumstances are brought to the Agency's attention?

1 MR. MCFADDEN: That's right, Your Honor.

2 JUDGE SENTELLE: Okay.

3 MR. MCFADDEN: That was for --

4 JUDGE SENTELLE: Thank you.

5 MR. MCFADDEN: That had been always our position
6 that that could happen in the future, and you could
7 challenge those changes, but the September procedures are
8 final.

9 JUDGE ROGERS: So, absent coming, absent going to
10 court the City and the Historic Preservation Association
11 should have filed a petition for a new rule-making?

12 MR. MCFADDEN: They could have done that, but they
13 also had to file a petition with this Court within 60 days.

14 JUDGE ROGERS: No, I'm supposing they decided not
15 to do that, all right.

16 MR. MCFADDEN: Well, that is what happened --

17 JUDGE ROGERS: Then they could --

18 MR. MCFADDEN: -- they decided not to do that.

19 JUDGE ROGERS: Then they -- well, they are in
20 court now. They could have gone to the Agency and filed, I
21 don't know what the formal term is, but a request for a new
22 rule-making?

23 MR. MCFADDEN: I suppose they could have done
24 that.

25 JUDGE ROGERS: No, I'm trying to think about this

1 very --

2 MR. MCFADDEN: Right, right. I understand.

3 JUDGE ROGERS: -- practically.

4 MR. MCFADDEN: Right.

5 JUDGE SENTELLE: That's what I think I was asking
6 you --

7 JUDGE ROGERS: Yes.

8 JUDGE SENTELLE: -- actually.

9 MR. MCFADDEN: Yes. Yes. I suppose they could
10 have done that. The FAA doesn't have --

11 JUDGE SENTELLE: Suppose you just had these
12 regulations in effect, or --

13 JUDGE ROGERS: Right.

14 JUDGE SENTELLE: -- were in effect for years, and
15 they come in and say look, aircraft are bigger now, they're
16 flying different times, and we need a new --

17 MR. MCFADDEN: Right.

18 JUDGE SENTELLE: -- set of flight plans, is there
19 a procedure about which they could get a new, I thought I
20 understood you to say they could petition for a new rule-
21 making, or some new process?

22 MR. MCFADDEN: Well, the reason I hesitated with
23 the question is there aren't FAA regulations that provide a
24 process for that, there's no -- they did send us a letter
25 asking us to reconsider, but there are no regulations

1 governing how to respond to that.

2 JUDGE SENTELLE: There is no formal procedure set
3 forth whereby they can do that?

4 MR. MCFADDEN: Correct.

5 JUDGE ROGERS: So --

6 MR. MCFADDEN: And I --

7 JUDGE ROGERS: -- since the regulations don't
8 provide for reconsideration, they don't provide a process
9 for filing a petition for a new rule-making, what is a City
10 supposed to do?

11 MR. MCFADDEN: It should come to this Court.

12 JUDGE ROGERS: It --

13 JUDGE SENTELLE: Whoa, whoa, whoa, whoa.

14 JUDGE ROGERS: Whoa, whoa, whoa.

15 JUDGE SENTELLE: Yes. Suppose they've been around
16 for years, the 60-day rule is not involved, they simply are
17 raising the circumstance that under present circumstances
18 these flight plans are no longer, they are now too noisy,
19 too unsafe, or too whatever to be in effect, is there not
20 some other way they can get the Agency to think about the
21 problems and got to fix them, or --

22 MR. MCFADDEN: Well, the --

23 JUDGE SENTELLE: -- see if they're there?

24 MR. MCFADDEN: If for example the environmental
25 impacts have changed over the years --

1 JUDGE SENTELLE: Yes.

2 MR. MCFADDEN: -- the Agency has obligations
3 outside of its own regulations to reconsider, or to revisit
4 in light of new information.

5 JUDGE SENTELLE: Is there a way in which the City
6 can get them to do that?

7 MR. MCFADDEN: Well, the City could ask them to do
8 that, and if the FAA declined there would be judicial
9 review, I think, of the question of whether the FAA had
10 appropriately decided this was not new information requiring
11 reconsideration.

12 JUDGE ROGERS: So, what we have is a situation
13 where there is sort of a black hole, and it's not clear what
14 an affected party is to do in order to bring the Agency to
15 reconsider, and yet, what the record shows here is that the
16 City wrote letters, it submitted information, and there was
17 a response by FAA, it participated in meetings, it even went
18 to the City Council, and then it set up this new working
19 group. So, aren't those actions by the FAA sufficient in
20 the absence of any procedural requirements promulgated by
21 the FAA to stay this 60-day period until the FAA says, you
22 know, we've looked at your information, and we're not going
23 to make any changes, at that point then they come to court?

24 MR. MCFADDEN: That, Your Honor, would be a much
25 broader reading of the reasonable grounds provision than

1 this Court has ever before held.

2 JUDGE ROGERS: Well, have we ever had a situation
3 where the Agency hasn't had some sort of regulatory scheme
4 that gives notice to the public about how to proceed in
5 order to get the Agency to reconsider an order it's issued?

6 MR. MCFADDEN: Well, I don't know, Your Honor, but
7 the question is whether the affected parties have any
8 provision for how to get relief from, to get judicial
9 relief, and that is very clear, right? That's the petition
10 for review provision in 46110(a). If they want the Agency
11 to do something else then it depends on the specific nature
12 of what they're asking the Agency to do, but if they want
13 them to stop doing what they had previously decided to do
14 that is a matter for the courts, and Congress is very clear
15 there is a very short statute of limitations. The reply
16 brief cites this Court's recent opinion in *National*
17 *Federation for the Blind* where there was, the National
18 Federation for the Blind said that there was some ambiguity
19 about what court to go to, and they were late to this Court
20 by 11 days, and this Court held that if that was the case
21 the only appropriate course of action was to protect
22 yourself by filing in both courts simultaneously. This
23 Court has routinely in reasonable grounds cases held that
24 you must preserve your rights for judicial review first, and
25 then you can worry after the fact about what other recourse

1 you might have from the Agency. The same holds true here,
2 the appropriate course of action is to file a petition for
3 review, and then after you've done that you can still talk
4 to the Federal Aviation Administration, there are numerous
5 examples of that occurring right now at other airports in
6 the country.

7 JUDGE ROGERS: So, as soon as the City started
8 talking to the FAA employee, that employee should have told
9 the City can't talk to you, can't do anything, go to court?

10 MR. MCFADDEN: I don't think that was the FAA
11 employee's responsibility, Your Honor. It is incumbent
12 on --

13 JUDGE ROGERS: Well --

14 MR. MCFADDEN: -- the Petitioners to know.

15 JUDGE ROGERS: -- if I had been in the legal
16 office and I went to look to the FAA's regulations, I
17 wouldn't have found anything.

18 MR. MCFADDEN: Right, because the judicial review
19 provision is in a statute, and the City Attorney's Office
20 could easily have looked there and it says very clearly you
21 have 60 days from the order issued.

22 JUDGE ROGERS: Right. So, when the -- I mean, I'm
23 just trying to understand what's going on here. The FAA is
24 taking a view that it has no responsibility to notify policy
25 level making officials who live in the jurisdiction that

1 will be directly affected by an order issued by the Agency.

2 MR. MCFADDEN: It has taken that position specific
3 to circumstances such as these where there was no
4 significant environmental effect, no adverse effect on
5 historic properties --

6 JUDGE ROGERS: Well, those are --

7 MR. MCFADDEN: -- no effect of any kind.

8 JUDGE ROGERS: Go ahead.

9 JUDGE SENTELLE: But it did notify the relevant
10 departments of the City?

11 MR. MCFADDEN: It certainly did.

12 JUDGE SENTELLE: Without respect to who the
13 individual is in those departments it notified --

14 MR. MCFADDEN: That's correct.

15 JUDGE SENTELLE: -- the relevant parties?

16 MR. MCFADDEN: And received no complaints back
17 from that person or anyone else at the City indicating there
18 were any objections of any kind for more than a year. The
19 FAA was never given any indication that more was asked of it
20 from the City, it certainly would have responded if it had
21 been.

22 JUDGE ROGERS: Well, if the City had known. I
23 understand your point, but I'm trying to understand what it
24 means to notify an affected party.

25 MR. MCFADDEN: That requirement varies depending

1 on the level of anticipated environmental effect, and you
2 have before you a case of the very lowest possible
3 anticipated environmental effect, one that triggers no
4 obligations under NEPA --

5 JUDGE SENTELLE: Well, suppose there were a lot of
6 effect here, is there anybody other than those departments
7 that you would have notified anyway?

8 MR. MCFADDEN: I don't think we would have been
9 required by law to, but there would have been public notice
10 requirements, and I think you would expect as a practical
11 matter the Parks Department, or the Historic Preservation
12 Officer to show up --

13 JUDGE SENTELLE: Okay.

14 MR. MCFADDEN: -- to those meetings and get
15 involved. But in this situation we didn't have to identify
16 those individuals separately, look them up, and try to seek
17 them out, the obligation was to find the representative of
18 the local government who understood this subject area, and
19 that was certainly the person that the FAA talked to. If
20 this Court has no further questions?

21 JUDGE ROGERS: Yes, I do have one further
22 question.

23 MR. MCFADDEN: Great.

24 JUDGE ROGERS: What about this June letter, does
25 that have any effect in the nature of a final decision by

1 the Agency such that a new 60-day period would start to run?

2 MR. MCFADDEN: No. For it to have that effect it
3 would have to impose some legal consequences on the City,
4 and it did not. They say, they, I think they concede in the
5 reply briefs that it says nothing as to any of the --

6 JUDGE ROGERS: All right.

7 MR. MCFADDEN: -- topics they're concerned about,
8 and they say but implicitly by not addressing those topics
9 you've rejected our reconsideration request. And that gets
10 back to this Court's decision in *Pro Products* decades ago
11 where it said that you can't simply repeatedly request
12 reconsideration and keep restarting your statute of
13 limitations.

14 JUDGE ROGERS: So, if this Court accepts the FAA's
15 position in this case, and the City gets, and the
16 City -- I'm hearing something. The City obtains no relief
17 in terms of for example a remand for the Agency to
18 reconsider, address, whatever, then what is the option
19 available to the City to get FAA to reconsider these flight
20 plans? I'm just not sure what it is, I mean, 30 days from
21 now when FAA says we're not changing anything, and the City
22 has to come back to court --

23 MR. MCFADDEN: I think the City has already --

24 JUDGE ROGERS: -- and then we get the 60-day
25 argument all over again?

1 MR. MCFADDEN: I mean, the City has already, I
2 think, provided the FAA what information it believes
3 requires reconsideration, and the FAA has already been
4 through that.

5 JUDGE ROGERS: No, no.

6 MR. MCFADDEN: But --

7 JUDGE ROGERS: No, in fairness, Counsel, the City
8 submitted information and there has been no response.

9 MR. MCFADDEN: That's true, Your Honor, I can --

10 JUDGE ROGERS: So, that's --

11 MR. MCFADDEN: -- represent to you that it has
12 been considered, but --

13 JUDGE ROGERS: No. No, no. No, no. Represent --

14 MR. MCFADDEN: Okay.

15 JUDGE ROGERS: -- to me, only give me what's in
16 the record. What I'm trying to understand is what happens
17 now? Just hypothetically, everybody in Phoenix is up in a
18 roar --

19 MR. MCFADDEN: Right.

20 JUDGE ROGERS: -- about these flight paths.

21 MR. MCFADDEN: I mean, given that there are no
22 procedures for this --

23 JUDGE ROGERS: That's right.

24 MR. MCFADDEN: -- they can resubmit their request,
25 require a response --

1 JUDGE ROGERS: They've already sent it. They
2 can't --

3 MR. MCFADDEN: -- then the FAA can --

4 JUDGE ROGERS: -- require -- Counsel, they can't
5 require a response.

6 MR. MCFADDEN: That's true, Your Honor. I don't
7 know. I mean, the FAA can send --

8 JUDGE ROGERS: So, there is nothing --

9 MR. MCFADDEN: -- a written response --

10 JUDGE ROGERS: -- there is nothing the City can do
11 because it's lost in court --

12 MR. MCFADDEN: The City has --

13 JUDGE ROGERS: -- and the only thing it can do is
14 what? At the next --

15 MR. MCFADDEN: Unless --

16 JUDGE ROGERS: -- election vote? I mean --

17 MR. MCFADDEN: Unless there is new information
18 that the original understanding of the environmental text
19 was wrong in some fashion --

20 JUDGE ROGERS: Well, your own --

21 MR. MCFADDEN: -- then --

22 JUDGE ROGERS: -- representative told the City
23 that they had underestimated the impact, that they didn't
24 realize, so, you know --

25 MR. MCFADDEN: Right, and he was clearly talking

1 about the fact that there was a public uproar, that we'd
2 asked the City's representative and the airport authority do
3 we expect --

4 JUDGE ROGERS: But Counsel, you understand the
5 difference --

6 MR. MCFADDEN: -- any controversy and they said
7 no.

8 JUDGE ROGERS: -- between the FAA sticking to its
9 substantive position, and having some process, I don't
10 understand the process here, does the City of Phoenix have
11 to go to Congress and get Congress to pass a statute telling
12 the FAA to consider the City of Phoenix's concerns?

13 MR. MCFADDEN: No, it doesn't have to do that, I
14 mean --

15 JUDGE ROGERS: No, it doesn't have to --

16 MR. MCFADDEN: -- this was in response to
17 Congress --

18 JUDGE ROGERS: -- but how does it get any --

19 JUDGE SENTELLE: Well, they sort of did that,
20 didn't they?

21 MR. MCFADDEN: Well, Your Honor, I appreciate your
22 concern for people of Phoenix, but I think that the answer
23 to my question --

24 JUDGE ROGERS: No, I'm not concerned only --

25 MR. MCFADDEN: -- my question --

1 JUDGE ROGERS: -- for the people of Phoenix, I'm
2 concerned generally about a federal agency making decisions
3 that affect people's lives where officials who have the
4 policy-making responsibilities have no prior notice. And
5 then when they seek to have the federal agency review what
6 it's done they get a lot of nice language, but no
7 substantive response.

8 JUDGE GRIFFITH: And well haven't they in fact
9 gone to Congress and received some relief?

10 JUDGE ROGERS: Did you hear Judge Griffith?

11 MR. MCFADDEN: I didn't. I'm sorry.

12 JUDGE ROGERS: Judge Griffith --

13 JUDGE GRIFFITH: I'm here. I was asking Counsel
14 hasn't the City of Phoenix actually gone to Congress about
15 this and gotten some relief? And I couldn't find anywhere
16 in the record that the FAA ever provided the report that
17 Congress directed that it provide within 90 days of the
18 legislation about this issue, did I miss it, or what
19 happened there? What are we to make of congressional
20 involvement in this dispute?

21 MR. MCFADDEN: The response to the newer
22 legislation, of course, is not in the record because it's
23 all years after the decision that's in dispute before this
24 Court. I am informed that that report is still being worked
25 on, and I think we can expect it forthcoming. But I think

1 that it's a mistake to retroactively impute any layer of
2 Congressional action to the legality of the FAA's decision
3 at the time of this --

4 JUDGE SENTELLE: No, there's nothing --

5 JUDGE ROGERS: No, that's not what --

6 JUDGE SENTELLE: -- in the record or in either
7 brief --

8 JUDGE ROGERS: We're getting it.

9 JUDGE SENTELLE: -- about that further
10 congressional action, is there?

11 JUDGE ROGERS: That's right.

12 MR. MCFADDEN: Correct, Your Honor.

13 JUDGE ROGERS: Right.

14 JUDGE SENTELLE: So, that's not really --

15 JUDGE ROGERS: No.

16 JUDGE SENTELLE: Yes.

17 JUDGE ROGERS: This is all in the context of my
18 question that if --

19 MR. MCFADDEN: Yes.

20 JUDGE GRIFFITH: Yes.

21 JUDGE ROGERS: -- your position in this Court were
22 to be accepted by the Court so that the petitions are
23 denied.

24 MR. MCFADDEN: Let me answer this very carefully,
25 my position in this case, and the FAA's position in this

1 case is specific to a situation where you have anticipated
2 environmental impacts below any threshold of concern
3 established by duly promulgated regulation, and no evidence
4 to the contrary. They submitted other evidence based on
5 other methodologies, but there's no serious challenge to the
6 DNL (phonetic sp.) metric, or its application here. In any
7 other circumstance where you have an expectation of the
8 possibility of significant environmental impacts under NEPA,
9 adverse effects under the National Historic Preservation
10 Act, those would all be very different cases, the Agency
11 would have different obligations, it would have more
12 obligations to consult, more obligations to document and
13 publicly disclose anticipated environmental impacts, all of
14 those cases would be different than the situation in Phoenix
15 where there is no doubt the people in Phoenix that are
16 experiencing increasing noise are very upset about the
17 increase in noise, but the increase --

18 JUDGE ROGERS: So, the City's mistake as it were
19 in your view was not to cite the NEPA statute in its request
20 for re-initiation?

21 MR. MCFADDEN: No, the City's mistake was not to
22 petition for review right away.

23 JUDGE ROGERS: Petition in court?

24 MR. MCFADDEN: Yes.

25 JUDGE SENTELLE: Yes.

1 MR. MCFADDEN: That is its --

2 JUDGE ROGERS: All right.

3 MR. MCFADDEN: -- statutory obligation if it ever
4 seeks to get remedy from a court.

5 JUDGE ROGERS: So, maybe the Agency since it
6 hasn't promulgated any regulations about anything ought to
7 let entities know?

8 MR. MCFADDEN: Well, and in formal decision
9 notices that are accompanied by bigger environmental
10 impacts, like an environmental assessment --

11 JUDGE ROGERS: Yes.

12 MR. MCFADDEN: -- you do see that language,
13 that's --

14 JUDGE ROGERS: I know, but --

15 MR. MCFADDEN: -- part of the language.

16 JUDGE ROGERS: -- my point is this process is
17 designed so that you avoid all of those obligations.

18 MR. MCFADDEN: This process, Your Honor, is
19 referring to --

20 JUDGE ROGERS: Because you don't need an EA, you
21 don't need an EIS --

22 MR. MCFADDEN: Right.

23 JUDGE ROGERS: -- you have a categorical, you
24 know --

25 MR. MCFADDEN: Exclusion.

1 JUDGE ROGERS: -- exclusion.

2 MR. MCFADDEN: Yes. And a categorical exclusion
3 is by definition a decision where there's no environmental
4 impacts of concern, and nothing more needs to be done under
5 the Federal environmental statutes. And that is, that is,
6 categorically excluded actions are taken all the time by
7 federal agencies, and are enumerable such emphasis. And
8 there -- and this Court has been clear that an agency's
9 order can take many forms, it is concerned about the legal
10 consequences on Petitioners and not whether it contains
11 boilerplate language, or whether it looks like an order,
12 that's --

13 JUDGE ROGERS: Okay.

14 MR. MCFADDEN: -- that law is clear, which was
15 what makes the publication implementation of these orders,
16 or these procedures the order, and not the prior
17 environmental reports by the Agency because those weren't
18 issued. Once the public was aware that flight paths had
19 changed, and they most certainly were aware immediately,
20 both the City and the Historic Neighborhood Petitioners knew
21 of it, the statute authorized by Congress gave them 60 days
22 to proceed in this Court, and having failed to comply with
23 that statute of limitations they now do not have the option
24 of judicial review of the Agency's decision.

25 JUDGE ROGERS: And the reasonable exception --

1 MR. MCFADDEN: Reasonable grounds.

2 JUDGE ROGERS: -- reasonable grounds exception
3 would only arise when?

4 MR. MCFADDEN: In this Court's cases it's arisen
5 where the Agency told people to completely ignore its own
6 advisory circular, don't worry, that doesn't take long,
7 right?

8 JUDGE ROGERS: So, I understand the factual
9 context in those cases, but I'm trying to under the
10 principle --

11 MR. MCFADDEN: The principle --

12 JUDGE ROGERS: -- underlying those cases.

13 MR. MCFADDEN: Right. So, the principle in that
14 case, that was a really unique set of circumstances --

15 JUDGE ROGERS: Right, it was.

16 MR. MCFADDEN: -- *Paralyzed Veterans* is a better
17 example of this --

18 JUDGE ROGERS: Yes.

19 MR. MCFADDEN: -- where they, they were too late
20 to challenge the initial decision, but the Agency issued a
21 new decision amending the suspect decision; Petitioners
22 filed within 60 days of that new amended decision and they
23 were able to seek judicial review.

24 JUDGE ROGERS: So, one last question, Counsel, I
25 hope, is Counsel for Petitioners mentioned that after

1 September 14th when the FAA indicated, these are my words,
2 not Counsels, that apparently the planes weren't following
3 the paths they should, so the FAA was going to tell the
4 planes to follow the correct paths, that some procedures
5 were changed, but that the City has not been able to find
6 out what those procedural changes were. Now, first, do you
7 represent that procedural changes were made?

8 MR. MCFADDEN: No, they weren't.

9 JUDGE ROGERS: All right.

10 MR. MCFADDEN: What was changed was the FAA gave
11 better instructions to the air traffic controllers to make
12 sure that procedures published in September were actually
13 complied with. And there's a good picture of this,
14 actually, at page 17 of their brief where you can see all --

15 JUDGE ROGERS: Yes.

16 MR. MCFADDEN: -- the planes deviating, that
17 deviation is a week after the procedures, that's all gone
18 now, they don't do that anymore, and they follow procedures
19 as required up that commercial corridor, and that was the
20 change made in the fall after the September decision, there
21 were no changes to the procedures themselves.

22 JUDGE ROGERS: So, if you understand what I'm
23 getting at is were the, you said just better instructions,
24 the map says go route four, and in fact they're going route
25 three, so what would the instructions say other than you

1 have to go route four?

2 MR. MCFADDEN: Well, what happens was the map says
3 go route four, the pilots start going route four, and then
4 they would get instructions from the tower that said okay,
5 you can turn now and head towards your destination, you
6 don't have to go all the way to the end of route four where
7 you would normally turn, you can turn early and go more
8 directly to your final destination. And the air traffic
9 controllers sometimes have to do that to get planes out of
10 the way of one another to de-conflict them, and sometimes
11 they'll do it if they can just to make the flights more
12 direct. That latter version of the instructions where they
13 might just do it discretionarily is what we told them not to
14 do anymore to preserve the route as it's charted and to fly
15 farther up that route, the Historic Neighborhood Petitioners
16 mentioned that the flights are directly overhead, that's
17 actually inaccurate, they're directly over the street.

18 JUDGE ROGERS: So, there were some changes,
19 Counsel.

20 MR. MCFADDEN: There were some changes in the way,
21 as Your Honor put it it was a compliance issue, there were
22 changes in the way that the pilots were --

23 JUDGE ROGERS: No, but what you've just described
24 is telling the air tower people they could no longer
25 exercise their discretion.

1 MR. MCFADDEN: In some limited fashion, yes.

2 JUDGE ROGERS: Well, isn't that a change in
3 procedures?

4 MR. MCFADDEN: No, the procedures account for the
5 discretion of air traffic controllers, that's built into the
6 procedure. The procedure charts the path of the plane that
7 there will always be the potential for the need to vary off
8 that path in certain circumstances.

9 JUDGE ROGERS: But now you're telling me they no
10 longer have that authority to exercise discretion in that --

11 MR. MCFADDEN: Well, they were instructed not to
12 use it. I don't want to --

13 JUDGE ROGERS: Well, if I had to --

14 MR. MCFADDEN: -- I don't want to overstep the
15 strength of the instruction.

16 JUDGE ROGERS: No, but I'm trying to understand
17 what's going on here?

18 MR. MCFADDEN: Right.

19 JUDGE ROGERS: That if I had discretion, and then
20 the Agency tells me I have no discretion in that regard as
21 to issue one, isn't that something new in the sense of a
22 change?

23 MR. MCFADDEN: Well, potentially. I hesitate for
24 two reasons, one is I haven't seen a transcript of what was
25 told the air traffic control tower, and they're very

1 particular about what their authority is, I don't want to
2 misrepresent exactly what was told them. I can tell you
3 that the procedure itself, the way that it was designed and
4 intended to be flown was never changed; and let's accept
5 that that was a new change, in November --

6 JUDGE ROGERS: Well, you can't represent that if
7 you don't know what was told by, what FAA told the air
8 traffic controllers.

9 MR. MCFADDEN: But part --

10 JUDGE ROGERS: Suppose --

11 MR. MCFADDEN: -- of what the --

12 JUDGE ROGERS: No, Counsel, suppose the
13 instructions were although our previous instructions said
14 one thing, now we're telling you something different?

15 MR. MCFADDEN: I can tell you it was not that.

16 JUDGE ROGERS: Well, you haven't seen it.

17 MR. MCFADDEN: No, I haven't seen it, it was a
18 conversation, but I have talked to the FAA officials
19 involved.

20 JUDGE ROGERS: So, there is no transcript, right?

21 MR. MCFADDEN: No, of course not. No.

22 JUDGE ROGERS: No. I thought you said you hadn't
23 read the transcript?

24 MR. MCFADDEN: Well, right, there is no
25 transcript. The --

1 JUDGE ROGERS: Be careful here, Counsel.

2 MR. MCFADDEN: Yes, Your Honor.

3 JUDGE ROGERS: I'm just trying to understand
4 what's going on, because if you change the procedures --

5 MR. MCFADDEN: It changed the --

6 JUDGE ROGERS: -- whereas I had discretion, and
7 now my discretion --

8 MR. MCFADDEN: Yes. Right.

9 JUDGE ROGERS: -- is limited.

10 MR. MCFADDEN: A change to the procedures would
11 require, the charts also come with instructions to pilots,
12 and would require some change in that, there was no change
13 in that. The pilots may have been deviating on their own,
14 and that was part of what was made sure the air traffic
15 controller was guarding against --

16 JUDGE ROGERS: So, your bottom line basically is
17 whatever deviations and changes there were, were simply, as
18 Judge Sentelle's earlier question suggestion, conformance --

19 MR. MCFADDEN: That is the bottom line.

20 JUDGE ROGERS: -- changes.

21 MR. MCFADDEN: And a second bottom line is we
22 notified the City in November that we'd had this
23 conversation, and that the pilots and air traffic
24 controllers were coming into compliance, if they considered
25 that a new challenge, they had 60 days to challenge that,

1 and needless to say that didn't happen. So, whether that
2 constitutes a legal change in the procedure in a new order
3 doesn't alter the outcome in this case at all.

4 JUDGE ROGERS: Anything further? Anything
5 further, Judge Griffith?

6 JUDGE GRIFFITH: No.

7 JUDGE ROGERS: All right. Thank you.

8 MR. MCFADDEN: Thank you, Your Honors.

9 JUDGE ROGERS: Thank you. All right, Counsel for
10 the City, we'll give you a couple of minutes here.

11 ORAL ARGUMENT OF JOHN E. PUTNAM, ESQ.

12 ON BEHALF OF THE PETITIONER CITY OF PHOENIX, ARIZONA

13 MR. PUTNAM: Thank you, Your Honor. I'll start
14 with that last point. The best place to look to see what
15 the Agency did is in Joint Appendix page 609, which is the
16 November 14th, 2014 letter, and it does not describe it in
17 the same way that Counsel just described, and we were not
18 able to ascertain from the record and from FOIA exactly what
19 they did. The key here, though --

20 JUDGE ROGERS: Well, but your point is they, you
21 think they did something, but didn't just --

22 MR. PUTNAM: They did do something --

23 JUDGE ROGERS: -- but didn't your 60 days have to
24 start running then?

25 MR. PUTNAM: That brings us back to the point that

1 they said we're not done yet, we're continuing to work with
2 you, we'll continue to work with you to implement more
3 changes to address noise.

4 JUDGE SENTELLE: That's not what they said either,
5 is it?

6 MR. PUTNAM: It is, actually.

7 JUDGE SENTELLE: Implement more changes is your
8 language, not theirs, correct?

9 MR. PUTNAM: It's not precise, but they did
10 indicate that they were going to work with them to seek
11 possible adjustments to the routes, and the procedures to
12 address the noise concerns of the City, in more precise
13 language. The flipside that the City is addressed with is
14 there are dozens of these routes adopted at airports around
15 the country, each one of those airports hundreds or
16 thousands, I think their rule would be that we need to file
17 a petition for review in every one of those before we
18 ascertain what the impacts of those routes would be when
19 they're categorically excluded. And --

20 JUDGE ROGERS: No, they're saying as of September
21 14th you knew the routes had changed, and if you want the
22 FAA to do anything you have to come to court.

23 JUDGE SENTELLE: You've got 60 days to do it in --

24 JUDGE ROGERS: And then the Court --

25 JUDGE SENTELLE: -- and that's statutory.

1 JUDGE ROGERS: -- has to try to figure out, and
2 you have to figure out and advising the Court in your briefs
3 what should happen next.

4 MR. PUTNAM: The tricky thing about that is you've
5 got a situation where there's no record, there's no real
6 rule about the decision-making that was done in this case,
7 and a situation where they're still making changes to those,
8 and the practical implication that once you file a petition
9 of review the Agency doesn't talk to you anymore, you talk
10 to the Agency's lawyers. And so, the practical ability to
11 actually implement change goes away, and it's actually
12 counterproductive at that point to actually try to exhaust
13 any administrative review, which is they're the experts,
14 they're the ones who have the environmental information, the
15 safety information, and the understanding how the air space
16 works.

17 JUDGE GRIFFITH: Well, Counsel, kind of all of
18 those difficulties suggest that you should have filed suit.
19 Why not do that? Why didn't that happen? It --

20 MR. PUTNAM: I think this case --

21 JUDGE GRIFFITH: -- seems that to protect your
22 rights you'd have to file suit, and then this practical
23 argument about that you just gave.

24 MR. PUTNAM: And in this case, Your Honor, I have
25 not had a situation where both the Administrator of the FAA

1 and Regional Administrator has been quite as aggressive in
2 saying we are not done in making changes with this procedure
3 and this rule, we hear you, we're going to hear you, and
4 we're going to make changes in result, and I think it was
5 the City's view that it had to exhaust that administrative
6 opportunity before moving --

7 JUDGE GRIFFITH: But your Opposing Counsel,
8 Counsel for FAA says that if we were to apply the reasonable
9 grounds exception here it would be a distortion of our
10 practice. Those aren't his words, those are mine, but it
11 would be an extension of our practice beyond anything that
12 we've come thus far, will you respond to that? Would you
13 give the Court your best argument for why the reasonable
14 grounds exception ought to apply here?

15 MR. PUTNAM: So, I actually think this comes very
16 close to *Paralyzed Veterans* where you had a situation where
17 the D.C. Circuit noted that the party in that case, the
18 Paralyzed Veterans group, knew that the rule was open, it
19 did not know the full extent of changes that would be made,
20 and it reasonably waited to exhaust its administrative
21 arguments. I'd also note *Friedman v. FAA*, which the Court
22 decided in November after briefing was concluded in this
23 case. A similar sort of situation where the Agency wouldn't
24 make a decision on a particular application related to a
25 pilot's medical condition in that case, kept it open, and

1 essentially had a constructive denial very similar to what
2 we saw in this case where they just would not address the
3 historic impacts certainly on the record that the City
4 identified in this case. I think those are the two best
5 cases that we have. I think *Safe Extensions* is another good
6 example of --

7 JUDGE GRIFFITH: And then would you write the rule
8 for, and this is what Judge Rogers was trying to get from
9 FAA Counsel, what's the principle that underlay our
10 reasoning there?

11 MR. PUTNAM: And I'm sorry, Your Honor, I wasn't
12 able to make out your question.

13 JUDGE ROGERS: He's asking --

14 JUDGE GRIFFITH: I'm sorry.

15 JUDGE ROGERS: -- what are the principles
16 underlying those authorities that you have cited, because
17 the FAA responded that they don't apply here.

18 MR. PUTNAM: So, the principle of those decisions,
19 there's two pieces, one is that you have to have the
20 consummation of the Agency's decision-making process; and
21 two, legal obligations or responsibilities that flow from
22 that. Certainly, there have been impacts that have flowed
23 from this since the implementation of the rule, however, I
24 would argue that until June 1st, 2015 we did not know for
25 sure that FAA would not address our request for

1 reconsideration under the National Historic Preservation
2 Act, and that's a procedural right that we believe we have,
3 that's a procedural obligation that they have, and
4 obligations and impacts flow from it. In terms of the
5 question about the other prong, that's the one where the
6 City, I think, was in the toughest position, there has to be
7 the consummation of the Agency's decision-making process.
8 The Agency repeatedly told the City we counted at least five
9 indications in the record, but they're not done with the
10 process, that they're considering further changes, they're
11 considering to work on this issue to try to address the
12 City's concern, and in that face we did not believe that the
13 Agency had consummated its decision-making process, and that
14 there was actually more to come.

15 I'd like to move on to a couple of other issues
16 that Counsel for the FAA had raised, and I think one
17 important misconception, which is the notice that was
18 provided to the City prior to these routes being
19 implemented, and there's a few important issues. First, the
20 obligation under 36 C.F.R. Section 800.2(c)(1) provides that
21 the Agency needs to reach out to the official with
22 jurisdiction over the historic resource. In no stretch of
23 the imagination could they imagine a low level employee of
24 the airport --

25 JUDGE SENTELLE: Who would be the -- is that

1 regulatory language, or is that your paraphrase? Sorry.

2 MR. PUTNAM: So, the correct --

3 JUDGE SENTELLE: Is that regulatory language, or
4 are you paraphrasing?

5 MR. PUTNAM: I'm paraphrasing very closely --

6 JUDGE SENTELLE: All right. Give me the
7 regulatory language.

8 MR. PUTNAM: Yes.

9 JUDGE SENTELLE: Please. Give me the regulatory
10 language?

11 MR. PUTNAM: I will pull that regulatory language
12 right now, Your Honor.

13 JUDGE SENTELLE: I don't think reach out to is in
14 there, for one thing. Just tell me what it says?

15 MR. PUTNAM: That's correct. But if you were to
16 take a --

17 JUDGE SENTELLE: Tell me what it says, please?

18 MR. PUTNAM: It says a representative of a local
19 government with jurisdiction over the area in which effects
20 of an undertaking may occur is entitled to participate as a
21 consulting party.

22 JUDGE SENTELLE: So, in what way did they prohibit
23 any such official from participating?

24 MR. PUTNAM: So, they did not let --

25 JUDGE SENTELLE: That's not the notice provision,

1 that's the participation provision. So, whom other than the
2 departments that are charged with site on airports and noise
3 were they supposed to send notice to, whether it gets in the
4 hands of a bureaucrat or a secretary, to whom are they
5 supposed to send notice to that they didn't send notice to
6 here?

7 MR. PUTNAM: So, the person that they would send
8 notice to is the City Historic Preservation Officer, the
9 City has an identified person that Department of
10 Transportation consults with all the time, that FAA consults
11 with all the time for any historic related issues that touch
12 upon the City of Phoenix. So, if there is --

13 JUDGE SENTELLE: Did that person not have notice
14 here of what was going on?

15 MR. PUTNAM: That person did not have notice. The
16 only person was this one low level person within the
17 Aviation Department. Their guidance provides --

18 JUDGE SENTELLE: So, they didn't pass it anywhere
19 up the chain from the person who received it? We use this
20 low level term, but it's a person who is an exposed person
21 in the Department that had relevance to this event, right?

22 MR. PUTNAM: They had attended some meetings, and
23 they received e-mails and phone calls from the FAA, that is
24 true.

25 JUDGE SENTELLE: Okay.

1 MR. PUTNAM: And so, there's two issues, one is
2 what person do you choose within the Department; and then
3 what department? If I'm trying to give FAA notice of a
4 particular issue I don't reach out to the Coast Guard.

5 JUDGE SENTELLE: Neither do you go to the
6 Secretary of the Department of Transportation.

7 MR. PUTNAM: In this case, and it's actually
8 addressed in some of the comments that the City provided to
9 FAA, the normal practice of FAA when they were talking about
10 airspace and air traffic control issues was to actually
11 reach up to the Executive Director of the airport, or to one
12 of the Deputy Directors who has in charge of operations.
13 They made a different decision here and they chose a
14 particular person, and I'd like to just highlight that --

15 JUDGE SENTELLE: We're both using up time that you
16 long since ran out of, so unless the presiding judge wants
17 you to go further, I frankly --

18 JUDGE ROGERS: Right. I think --

19 JUDGE SENTELLE: -- would just as soon as --

20 JUDGE ROGERS: Yes. Any -- you said you had a
21 couple of points, that's one point, what's the second?

22 MR. PUTNAM: The second point was really to point
23 out the nature of the communication with that low level
24 employee. If you were to take a look at Joint Appendix 307
25 and take a look at the communication with that employee they

1 clearly identified I'm not the person to talk about NEPA
2 issue, and in fact, to use a direct quote, I'm just an
3 aircraft dude. And I think in that case where they persist
4 in using this person's point of communication on that very
5 important and controversial issue for a person who's clearly
6 indicated I'm just an aircraft dude, it really raises a
7 number of questions about how important they will provide,
8 and it's important to consider because they're not providing
9 any other notice to the public or to the City the importance
10 of getting that right in a categorical conclusion context is
11 critical because this was the only chance that they had.
12 With that, I would just like to say there are manifold
13 procedural deficiencies that we've identified in our briefs,
14 I believe they clearly call for vacating the routes at
15 question here, and remanding back to the Agency for further
16 proceedings.

17 JUDGE ROGERS: Thank you.

18 MR. PUTNAM: Thank you.

19 JUDGE ROGERS: All right. Counsel for Petitioner,
20 do you want to take a minute?

21 ORAL ARGUMENT OF MATTHEW ADAMS, ESQ.

22 ON BEHALF OF THE PETITIONERS

23 STORY PRESERVATION ASSOCIATION, ET AL.

24 MR. ADAMS: Thank you, Your Honor. Matthew Adams
25 for the Historic Neighborhood Petitioners. I'd like to make

1 two quick points, the first one responding to FAA Counsel's
2 arguments about the significance of the impacts, or the
3 perceived significance determining the scope of the
4 consultation. And briefly I would just direct the Court's
5 attention to 40 C.F.R. 1508.27, subsection B, subpart four.

6 JUDGE ROGERS: What was the cite, 15-what?

7 MR. ADAMS: I'm sorry, Your Honor, it's 40 C.F.C.

8 15 --

9 JUDGE ROGERS: Fifteen --

10 MR. ADAMS: -- 08.27 --

11 JUDGE ROGERS: -- 08.2 --

12 MR. ADAMS: Seven.

13 JUDGE ROGERS: Seven. Thank you.

14 MR. ADAMS: B, four.

15 JUDGE ROGERS: B, four.

16 MR. ADAMS: And the reason why that is significant
17 is it, that is a provision that says that the definition of
18 significance under NEPA actually includes the concept of
19 public controversy. In other words, a highly controversial
20 action can be a significant impact, can have a significant
21 impact.

22 The second point, Your Honor, is just to further
23 follow up on the reasonable grounds. This is not a case
24 like *National Federation of the Blind* where we filed in the
25 wrong court, and it's not a case where we ignored a letter

1 saying file by mid-November or else. We were told that
2 decision-making was ongoing, and we were told that on a
3 couple of different occasions, including the December
4 meeting that Counsel for the FAA has proposed as an
5 alternate end point today. So, even if the decision-making
6 was final in September, which we dispute, and even if the
7 City knew that fact, which we also dispute, there will still
8 be reasonable grounds.

9 And in terms of principles, I guess we would sum
10 it up as follows, as a general matter the Court has found
11 reasonable grounds where a Petitioner delayed filing based
12 on Agency representations that the decision-making process
13 was ongoing, and that reaches both *Safe Extensions* and
14 *Paralyzed Veterans*, and I think it excludes cases like
15 *National Federation of the Blind* and also *Electronic*
16 *Privacy*.

17 JUDGE ROGERS: All right. Thank you.

18 MR. ADAMS: Thank you, Your Honor.

19 JUDGE ROGERS: We will take the case under
20 advisement.

21 (Whereupon, at 10:48 a.m., the proceedings were
22 concluded.)

23

24

25

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

March 23, 2017

DEPOSITION SERVICES, INC.