United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1377 **September Term, 2018**

FILED ON: November 30, 2018

DONALD A. VAUGHN, *et al.*,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
RESPONDENTS

Consolidated with 16-1378, 17-1010, 17-1029

On Petitions for Review of an Order of the
Federal Aviation Administration

Before: TATEL, *Circuit Judge*, and EDWARDS and GINSBURG, *Senior Circuit Judges*.

J U D G M E N T

The court considered these consolidated petitions for review on the record from the Federal Aviation Administration and the briefs and oral arguments of the parties. The court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons explained in the accompanying memorandum, it is

ORDERED and **ADJUDGED** that the consolidated petitions for review be denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

MEMORANDUM

In 2016, as part of a broader project to modernize the federal airspace, the Federal Aviation Administration (FAA) decided to redesign air-traffic control procedures and flight paths at several airports in Southern California. This SoCal Metroplex project – which is now fully implemented – is intended to improve the operational efficiency of air traffic, but the redesigned flight routes have allegedly led to increased noise in certain neighborhoods.

Four consolidated petitioners object to the FAA's conclusion that there would be no significant environmental effects resulting from the project. They raise several lines of attack against the FAA's analysis, arguing the agency failed to account adequately for noise, air emissions, and cumulative environmental effects, in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*.; the Century of Aviation Reauthorization Act of 2003, Pub. L. No. 108-176, 117 Stat. 2490 (2003) (Vision 100 Act); and the Clean Air Act, 42 U.S.C. § 7401 *et seq*. The petitioners also raise a procedural objection, claiming the FAA shared information with the public based upon inaccurate flight paths.

We review the FAA's compliance with these statutes under the arbitrary and capricious standard of the Administrative Procedure Act, asking whether the FAA took a "hard look" at the environmental consequences of its action. *Sierra Club v. FERC,* 867 F.3d 1357, 1367 (D.C. Cir. 2017). We ultimately deny the petitions for review, because the FAA's environmental analysis was substantively reasonable and procedurally sound.

I. Standing and Exhaustion

The four petitioners are Culver City; the Santa Monica Canyon Civic Association, a nonprofit organization that protects the environment quality of its neighborhood; and two individuals who live in areas affected by the purportedly increased noise and other emissions from the SoCal Metroplex project. The FAA challenges the standing of Culver City, but we need not consider this question because at least one of the individual petitioners has undisputed standing to raise the claims. *See City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007).

Although the FAA also challenges our jurisdiction over the Santa Monica Canyon Civic Association's petition because the Association did not submit comments to the FAA during the notice-and-comment period, we hold this court has jurisdiction over the petition because other parties raised the same objections. 49 U.S.C. § 46110(d) (a court can consider an objection "if the objection was made" in the FAA proceeding); *see Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295–96 (5th Cir. 1998) ("concerns underlying the exhaustion doctrine are not implicated" when the agency has already had "the opportunity to consider the issue").

II. Background

Under the NEPA, a federal agency must prepare a detailed "environmental impact statement" before engaging in any action that "significantly affect[s] the quality of the human

environment." 42 U.S.C. § 4332(2)(C)(i). In order to determine whether environmental effects are "significant," an agency may prepare a concise Environmental Assessment. 40 C.F.R. § 1508.9. If, based upon that assessment, the agency decides its proposed action does not warrant a full environmental impact statement, then it may issue a Finding of No Significant Impact (FONSI). *Id.* In this instance, the FAA issued an Environmental Assessment and then a FONSI for the SoCal Metroplex project in 2016.

The petitioners object to this determination. As described below, however, none of their objections identifies a significant deficiency under the NEPA, the Vision 100 Act, or the Clean Air Act, and none of them indicates the FAA failed to take a "hard look" at the environmental effects of the project. *Sierra Club v. FERC*, 867 F.3d at 1367.

III. Noise Effects

The petitioners first challenge the FAA's conclusion that the SoCal Metroplex project would not lead to noise increases above the agency's "significance threshold."

A. Vision 100 Act

According to the petitioners, the FAA has a statutory duty not only to consider noise, but to consider ways of reducing it. Specifically, the SoCal Metroplex project is part of a broader FAA program called the Next-Generation Air Transportation System (NextGen), which aims to transition the national airspace from using outdated procedures to ones that take advantage of new technologies such as the Global Positioning System. One of the seven goals for NextGen is that the FAA must "take into consideration, to the greatest extent practicable, design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents." Vision 100 Act, § 709(c)(7). Based upon this goal, the petitioners argue the FAA must strive to reduce noise below the pre-existing level, rather than simply avoid any significant increase in noise.

As we read the statute, however, the FAA has sufficiently considered reducing noise levels. The White Paper the FAA developed in response to public comments describes several ways in which the agency modified the project in order to address community concerns about noise. For example, due to "local concern about the proposed design eliminating [a particular] waypoint," which would lead to greater noise over certain areas, the FAA redesigned the procedures "with an intervening, redundant waypoint" in order to "address community concerns ... while providing the airspace safety and efficiency enhancements sought by the proposed action." These modifications demonstrate the FAA considered reducing noise and emissions to the extent practicable. Vision 100 Act, § 709(c). We therefore reject this challenge.

B. Use of Outdated Software

The petitioners next object to the FAA's use of an outdated computer program called NIRS to analyze noise levels. According to the petitioners, the FAA's use of NIRS violates the agency's own guidance memorandum, which calls for using AEDT, a newer software program,

for "projects whose environmental analysis" started after March 1, 2012. FAA Order 1050.1E, *Subject-Guidance on Using AEDT 2a to Conduct Environmental Modeling for FAA Air Traffic and Procedure Actions* (Mar. 21, 2012).*

The FAA counters that, although the dataset used for its environmental analysis covers the period from December 2012 to November 2013, noise analysis using NIRS actually began before the March 2012 cut-off date. We defer to the FAA's reasonable explanation that this early noise screening counts as "environmental analysis" for the purpose of complying with the agency's own guidance. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation"). Because the FAA started conducting its environmental analysis before March 2012, it was not required to switch to the new software in March 2012.

C. Use of DNL Noise Metric

Finally, the petitioners take issue with the agency's choice of a metric to measure noise. Instead of using the Cumulative Noise Equivalency Level (CNEL), which weights more heavily noise occurring in the evening hours, the FAA used the Day-Night Sound Level (DNL), which does not. According to the petitioners, FAA Order 5050.4B, *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions*, § 9(n) (Apr. 28, 2006) requires the agency to use CNEL for projects in California.

As the FAA explains, however, when viewed in light of another FAA order, the agency was permitted but not required to use the CNEL metric for this project. *See* Airports Desk Reference for FAA Order 5050.4B, Ch. 17 para. 1(c) at 2 (Oct. 2007) ("While DNL is the primary metric FAA uses to determine noise impacts, FAA accepts the CNEL when a state requires that metric to assess noise effects"). The FAA's final Environmental Assessment explains that the SoCal Metroplex project does not involve any state environmental review; hence, it was not required to use CNEL. Accordingly, we view the FAA's choice of metric as defensible, not arbitrary and capricious.

IV. Air Emissions and Climate Change Effects

The FAA also determined the project would have a minimal effect on air emissions and on the climate. The petitioners object to these findings but once again fail to show the agency acted in an arbitrary and capricious way.

A. Air Quality

The Clean Air Act establishes a federal/state cooperative program for the control of air pollution. For each pollutant identified in the Act, each state must adopt a "state implementation plan" (SIP) and submit it to the Environmental Protection Agency for approval. 42 U.S.C. § 7410. A federal agency must then ensure that any project it undertakes conforms to the relevant SIP. A formal "conformity determination" is not always required, however; the EPA has promulgated regulations that allow each federal agency to identify its own list of actions that are

"presumed to conform" to any SIP. 42 C.F.R. § 93.153(f).

The petitioners argue the FAA improperly presumed the SoCal Metroplex project would conform to California's SIP. More specifically, the petitioners challenge the FAA's reliance upon its presumed-to-conform list, which specifies that modifications to flight routes and procedures at or above the mixing height (generally 3,000 feet above ground level) have only a de minimis effect on the environment and that, below that altitude, modifications are presumed to conform if they are "designed to enhance operational efficiency (i.e., to reduce delay)." 72 Fed. Reg. 41578/2 (2007). *See also* 40 C.F.R. § 93.153(c)(2)(xxii). Rather than challenging the validity of the presumptions, however, the petitioners' main contention is that the presumptions do not apply to the project.

First, the petitioners claim "most, if not all" the procedures will occur below 3,000 feet and therefore the FAA cannot presume that effects on air emissions are de minimis. The final Environmental Assessment shows the opposite to be true: "changes to flight paths ... would primarily occur at or above 3,000 feet [above ground level]."

Second, the petitioners argue that any modifications to procedures below 3,000 feet do not qualify for the presumption of conformity because they are expected to increase fuel burn, albeit very slightly, and therefore are not "designed to enhance operational efficiency." 72 Fed. Reg. 41578/2 (2007). The petitioners' implicit assumption that an increase in fuel burn means the project was not designed to enhance operational efficiency is a non sequitur. As the FAA points out, the purpose of the SoCal Metroplex project is to address congestion in the airspace and improve safety – benefits the FAA could reasonably conclude overpower the negligible increase in fuel burn. *See* Vision 100 Act, § 709(c) (describing the multi-factor nature of the FAA's mandate to implement NextGen).

B. Climate

In its final Environmental Assessment, the FAA concluded the project would not have a significant effect on the climate because the project would increase greenhouse gases by only 35 metric tons (MT) (0.41%) in 2016 and 42 MT (0.44%) in 2021.

The petitioners are dissatisfied with this conclusion. First, they complain that use of a de minimis standard contradicts guidance issued by the Council on Environmental Quality (CEQ). According to this guidance, a statement that additional emissions would "represent only a small fraction of global emissions ... is not an appropriate basis for deciding whether to consider climate impacts under NEPA." 79 Fed. Reg. 77825/2-3 (Dec. 24, 2014). As the FAA points out, however, the same guidance also provides a disclosure threshold of 25,000 MT, below which "a quantitative analysis ... is not recommended unless quantification is easily accomplished." *Id*. at 77,807/2. In this case, the 42 MT increase in emissions in 2021 is far less than the 25,000 MT threshold at which disclosure was suggested by the CEQ. As it is not clear the FAA had a duty even to quantify the increase in emissions, we agree with the FAA's reasonable conclusion that the project would not have a significant effect on the climate.

Second, the petitioners argue California law requires the state to reduce greenhouse gas emissions to certain levels by 2020. We fail to see how these state obligations apply to the FAA, however. The California law cited by the petitioners is not part of California's SIP and hence does not impose any duty upon the federal Government through the Clean Air Act.

V. Cumulative Effects

The NEPA requires a federal agency to conduct a cumulative impact analysis in order to account for all actions "past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1319 (D.C. Cir. 2014); 40 C.F.R. § 1508.7.

With respect to noise, the FAA did not conduct a cumulative analysis because it had already determined the project would have no significant noise effect. Despite the petitioners' non-specific objection that the EA "barely mentions cumulative noise impacts, let alone takes a 'hard look' at such impacts," the petitioners do not advance any argument against the FAA's reasoning. And we see no reason to think it is arbitrary and capricious for an agency not to conduct a cumulative impact analysis for a particular environmental resource after the agency reasonably has concluded its proposed action will not have a significant effect on that resource. *See Minisink Residents for Envt'l Pres. & Safety v. FERC*, 762 F.3d 97, 113 (D.C. Cir. 2014).

With respect to air quality, the FAA again reasonably concluded the SoCal Metroplex project would not result in any significant cumulative effects. In response, the petitioners claim the FAA failed to account for a contemporary project of much broader scope in its analysis, namely, a project at the Los Angeles International Airport that involves moving and extending runways. As the FAA explains, however, the proposal for the LAX runway project was made for 2025 – four years past the 2021 planning horizon for the SoCal Metroplex project. *See also* City of Los Angeles *Amicus* Br. at 29-30 n.18 ("[n]o such project-level review has been initiated by the City for any runway projects"). Consequently, we hold the FAA did not act arbitrarily and capriciously by excluding the runway project from its cumulative air quality analysis because the project was not reasonably foreseeable.

VI. Other NEPA Procedural Requirements

Finally, the petitioners complain – presumably under CEQ regulations implementing the NEPA, *see* 40 C.F.R. § 1500.1(b); *id.* § 1500.2(b) – that information provided in the FAA's draft Environmental Assessment was not sufficiently accurate, making it difficult for a member of the public to determine where flight paths would cross his or her neighborhood. In order to make this argument, the petitioners point only to the FAA's half-mile adjustment of a single waypoint during the comment period. According to the petitioners, the FAA did not perform a noise analysis of the change, making it "impossible" for the public to anticipate the degree of environmental effect from the project.

Not so. The FAA points to evidence in the record showing it did perform a new noise

analysis after moving the waypoint and again found there was no significant noise effect.

We also reject the petitioners' argument that the agency failed to take a hard look at a range of appropriate alternatives to the project, as required by the NEPA. 42 U.S.C. § 4332(2)(E). In order to make this argument, the petitioners first renew their claim that the FAA was required under Vision 100 to analyze alternatives that reduce noise. As noted above, however, we believe the FAA has met its duty under Vision 100. The petitioners' second contention – that the FAA's Environmental Assessment was deficient because it considered only the proposed action and the no-action alternative – is similarly unpersuasive. As the FAA points out, it evaluated various groups of procedures in different combinations, in order to determine what "alternative action" to present in the Final Environmental Assessment. In our view, given the nature and complexity of the project, the FAA has satisfied its duty to consider appropriate alternatives.

VII. Conclusion

Though the petitioners raise many arguments attacking the FAA's environmental analysis, they have failed to show the agency's conclusions are arbitrary and capricious. The petitions for review are therefore denied. Accordingly, the pending motion for leave to file extra-record evidence is dismissed as moot.

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[*] In their Reply Brief the petitioners also argue the FAA's use of NIRS software contradicts its 2011 NEPA compliance plan but we do not consider arguments raised belatedly. *Forman v. Korean Air Lines Co*., 84 F.3d 446, 448 (D.C. Cir. 1996) ("Ordinarily, we will not entertain arguments or claims raised for the first time in a reply brief").