ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-1377, 16-1378,
17-1010, 17-1029 (consolidated)

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

DONALD VAUGHN, *et al.*,
Petitioners

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents

On Petition for Review of an Order of the
Federal Aviation Administration
49 U.S.C. § 46110

PETITIONERS' REPLY BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES, INTERVENORS AND AMICI

1. Petitioners - City of Culver City, Santa Monica Canyon Civic Association, Donald Vaughn, and Stephen Murray

2. Respondents – Federal Aviation Administration, Daniel K. Elwell, U.S. Department of Transportation, Elaine L. Chao

3. Intervenor - None

4. Amici – City of Los Angeles, West Adams for Clear Skies

B. RULING UNDER REVIEW

Federal Aviation Administration Finding of No Significant Impact (FONSI) and Record of Decision (ROD) For the Southern California Metroplex Project (SoCal Metroplex) August 2016, issued on August 31, 2016.

C. RELATED CASES

None.

Respectfully submitted,

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Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

AEDT	Aviation Environmental Design Tool
AR	Administrative Record
CAA	Clean Air Act, 42 U.S.C. § 7401, *et seq.*
CATEX	Categorical Exclusion
CEQA	California Environmental Quality Act, Cal. Pub. Res. Code § 21000, *et seq.*
DNL	Day-Night Sound Level
EA	Environmental Assessment
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAA Primer	*Aviation Emissions, Impacts & Mitigation: A Primer*, January 2015
FEA	Final Environmental Assessment
Final Report	Optimization of Airspace and Procedures in the Metroplex (OAPM), Study Team Final Report
FMRA	FAA Modernization and Reform Act of 2012, Pub.L. 112-95

FONSI	Finding of No Significant Impact
FONSI/ROD	Finding of No Significant Impact (FONSI) and Record of Decision (ROD) For the Southern California Metroplex Project (SoCal Metroplex) August 2016
Guidance Memo	FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012
JA	Joint Appendix
LAX	Los Angeles International Airport
OEE	Office of Environment and Energy
NAC	NextGen Advisory Committee
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*
NextGen	Next Generation Air Transportation System
NIRS	Noise Integrated Routing System
PBN	Performance Based Navigation
Project	Southern California Metroplex Project
RNAV	Area Navigation
RNP	Required Navigation Performance
ROD	Record of Decision

SPAS Opposition	City's Opposition to ARSAC's Opening Brief in *Alliance for a Regional Solution to Airport Congestion, et al. v. City of Los Angeles, et al.*, Ventura County Superior Court Case No. 56-2014-00451038-CU-WM-OXN
SIP	State Implementation Plan
SMCCA	Santa Monica Canyon Civic Association
SoCal Metroplex	Southern California Metroplex Project
SPAS	Specific Plan Amendment Study
Vision 100	Vision 100 – Century of Aviation Reauthorization Act of 2003, Pub.L. No. 108-176, December 12, 2003

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents sing the same "song" that has made the appellate hit parade so many times before, *see, e.g.*, *Grand Canyon Trust v. FAA*, 290 F.3d 339, 347 (D.C. Cir. 2002), *i.e.*, no matter how many legal and procedural errors mark their analyses, Respondents must be given deference over what they emphatically – although improperly – characterize as "technical" determinations delegated to them by Congress.

Deference is misplaced, however, when granted to Respondents for: (1) their interpretations of the *sufficiency* of analysis under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), *Grand Canyon Trust, supra,* 290 F.3d at 342; (2) trampling of their own regulation governing the proper analytic tools for measuring the Southern California Metroplex Project's ("SoCal Metroplex" or "Project") noise impacts; (3) improper reliance on the "presumption" of conformity with the federal Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA"), where evidence in the Administrative Record ("AR") demonstrates that aircraft emissions will increase as a result of the Project; or (4) conclusions about cumulative impacts that ignore the Project's vast geographic

scope, ranging from Santa Barbara to the Mexican border (Resp.Br., p.7), including 21 airports and an equally vast population.

Far from alleging scrupulous compliance with regulations promulgated in the exercise of Congress' ""express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,"" *Del. Riverkeeper v. FERC*, 857 F.3d 388, 395-96 (D.C. Cir. 2017), citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984), Respondents offer nothing more than inconsistent and unsubstantiated excuses for noncompliance.

First, Respondents claim that the Project's design and environmental review was sufficient to meet their principal aims of "safety and operational efficiency," [Resp.Br., p.10, explaining how "designing the Project with noise reduction as a priority would have contradicted FAA's statutory mandate"]. In doing so, Respondents ignore this Court's ruling that "neither § 40103 when read as whole nor the plain text of § 40103(b)(2) requires that air safety be the primary goal of all FAA regulations," *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 434 (D.C. Cir. 2013), as well as Congress' "affirmative grant of authority to regulate 'the use of the navigable airspace ... for ...

protecting individuals and property on the ground.'" *Id.* at 435, quoting 49 U.S.C. § 40103(b)(2).

Respondents then duck behind the pretext that, even if they did not give adequate consideration to the Project's environmental impacts, Culver City has no standing to complain. [Resp.Br. pp.11, 13-16; *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002)]. In reaching that conclusion, Respondents turn a blind eye to this Court's ruling in *Olmsted Falls* (made on exactly the same grounds as those articulated by Culver City in this case), that petitioner, Olmsted Falls, did have standing, *Id.* at 268 ["Olmsted Falls has alleged harm to its own economic interests based on the environmental impacts of the approved project"]; *see also City of Dania Beach v. FAA*, 485 F.3d 1181, 1185-86 (D.C. Cir. 2007) ["petitioners--who live in close proximity to the airport--will be even more susceptible to these injuries in the future."].

While Respondents demand deference for what they insist are "technical conclusions" or "expert *factual* determinations" [*see* Resp.Br., p.19], they fail to explain such bold labels and conclusions. Instead, those broad strokes are aimed at covering up such glaring deficiencies as Respondents' failure to heed their *own* regulation, as set forth in 77

Fed.Reg. 18297-18298, March 27, 2012 [Addendum A-156], facially mandating use of the Aviation Environmental Design Tool ("AEDT") model in noise and air quality analyses begun, as here, after March 1, 2012. FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012 ("Guidance Memo") [AR 9-A-13; JA ____]. Respondents' after-the-fact interpretation of their own rules seeks endorsement from this Court for improper use of *both*: (1) the outdated Noise Integrated Routing System ("NIRS") model in the noise analysis began after March, 2012, FEA, App.F, p.F-23 [AR 1-B-12 at 29; Joint Appendix ("JA") ____]; and (2) a distinct variant of the NIRS model, the NIRS "screening" model, to prove that analysis began before March 1, 2012, even though, as admitted by Respondents, it is "a dramatic simplification from what a full and detailed noise analysis would require," [AR 4-B-5 at 13; JA ____]. The AR demonstrates that Respondents' claims amount to nothing more than impermissible *post hoc* rationalization, *Gerber v. Norton*, 294 F.3d 173, 183-184 (D.C. Cir. 2002).

Instead of addressing the acknowledged increase in fuel consumption and emissions resulting from the Project, Respondents

write them off to a "presumption of conformity." In doing so, Respondents ignore this Court's position that a reduction, not an increase, in fuel burn gives rise to a reduction in emissions, that, in turn, justifies the presumption of conformity, *see County of Rockland v. FAA*, 335 Fed.Appx. 52, 56 (D.C. Cir. 2009).

Respondents then encompass in four pages the entire cumulative impacts analysis for the area extending from Santa Barbara to the Mexican border, and on that basis, determine that the Project implicates no significant cumulative impacts. In doing so, Respondents dismiss, as "not 'reasonably foreseeable,'" [Resp.Br., p.43], the 6L/24R approved runway project at Los Angeles International Airport ("LAX"), as well as potentially capacity-enhancing projects at the other 21 airports throughout Southern California.

Finally, Respondents argue that a halt to the Project is not a remedy, because development of alternate Area Navigation ("RNAV") procedures might take additional years to implement. Respondents, however, fail to mention the option of returning to presumptively "safe," prior flight paths, at least temporarily, pending completion of

supportable environmental analyses, as this Court required in *City of Phoenix v. Huerta*, 869 F.3d 963, 975 (D.C. Cir. 2017).[1]

In light of Respondents' dependence on excuses instead of "established precedent," *Jicarilla Apache Nation v. United States DOI*, 613 F.3d 1112, 1119 (D.C. Cir. 2010); the clear showing in the record of the vast scope of the Project [Resp.Br., p.7]; and the manifest prejudice to Petitioners who exhaustively objected to the omissions from analysis, and instructed Respondents on the way in which Petitioners might have responded to full disclosure if given the opportunity, *Myersville Citizens for a Rural Cmty. v. FERC,* 783 F.3d 1301, 1327 (D.C. Cir. 2015), this Court is justified in refusing the deference to Respondents' environmental conclusions they so vocally seek; vacating the Finding of No Significant Impact (FONSI) and Record of Decision (ROD) For the Southern California Metroplex Project (SoCal Metroplex) August 2016 ("FONSI/ROD"); and remanding the Project to Respondents for further,

[1] The fact that this Court dealt with a Categorical Exclusion in *City of Phoenix*, is not dispositive in this case. The exclusions from required analysis here entailed a far greater degree of prejudice to a far greater number of persons than those impacted in *City of Phoenix*, *supra,* at 972.

complete and technically substantiated analyses of, at minimum, the Project's noise, air quality and cumulative impacts.

ARGUMENT

Petitioners need not belabor this Court's relatively narrow role in the evaluation of the Environmental Assessment's ("EA") legal sufficiency. Where, as here, an agency has performed an EA and decided that a project will create no significant environmental impacts, this Court's job "is to determine whether the agency: ... (2) has taken a "'hard look'" at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no significant impact. . ." *TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006). Respondents have satisfied neither prong here.

Respondents' findings that there are no significant noise, air quality or cumulative impacts arising from thousands of relocated aircraft flight paths, over "nine counties, from Santa Barbara south to the Mexican border" [Resp.Br., p.7], one of the most densely populated regions in the United States, some of which has never previously been overflown, are not such that reasonable minds might accept them, *see Schoenbohm v. FCC*, 204 F.3d 243, 246 (D.C. Cir. 2000), because

Respondents have repudiated the governing statutory authority, 49 U.S.C. § 40103(b)(2), their own regulations, *see* 77 Fed.Reg. 18297-18298, March 27, 2012 [Addendum A-156]; Guidance Memo [AR 9-A-13; JA ____], and this Court's precedent, *see, e.g., Helicopter Ass'n Int'l, supra,* 722 F.3d at 434, and chosen instead to use outdated analytic tools such as the NIRS noise model, better suited to a previous era.

A. Respondents Attack on Petitioners' Standing is Meritless

1. Respondents First Claim Culver City Does Not Have Standing

Despite Respondents' multi-pronged efforts, there is no question that Culver City has more than adequately met the requirements for standing in the context of a claim for violation of NEPA, an "'essentially procedural' statute intended to ensure 'fully informed and well-considered' decisionmaking." *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). "To establish injury-in-fact in a 'procedural injury' case, petitioners must show that 'the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'" *City of Dania Beach, supra,* 485 F.3d at 1185.

This Court consistently holds that "[a] violation of the procedural requirements of a statute is sufficient to grant a plaintiff standing to

sue, so long as the procedural requirement was designed to protect some threatened concrete interest of the plaintiff." *City of Dania Beach*, *supra*, 485 F.3d at 1185. Moreover, despite Respondents' attempt to use *Olmsted Falls, supra,* 292 F.3d at 268 for the contrary proposition, this Court held that standing of a public entity to make a procedural challenge under NEPA exists on the same ground as that alleged by Culver City here, *i.e.*, threat to "concrete interests of plaintiff," *City of Dania Beach, supra*, 485 F.3d at 1185, by "making it more difficult for them to comply, as they must, with the air quality standards imposed upon them by the Clean Air Act." *Olmsted Falls, supra,* 292 F.3d at 268.

First, Respondents refuse to relinquish their tried and true "*parens patriae*" argument, *i.e.*, that a state may not sue the federal government to protect the interests of its citizens. *See, e.g.*, *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). That argument will not work in this case because Culver City is a "charter city" under California's Constitution and, thus, not a subdivision of the State.

Even though Respondents dismiss the import of the denomination "charter city" without even a gesture at verification, *see, e.g.,* Resp.Br.,

p.14, fn. 3 ["Whatever the significance of this distinction for California law . . ."], the distinction between general law and charter cities is critical here. First, it arises out of California Constitution, Article XI, § 5(a) [Addendum A-353] which states:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

In this case, because Culver City possesses a concrete and statutorily-mandated interest through its charter, in such patently "municipal affairs" as protecting the public health and safety (Culver City Charter, incorporated in Municipal Code § 17.100.010 [Addendum A-354] ["This Title is adopted to protect and promote the public health, safety, and general welfare . . ."], and compliance with its mandated responsibilities under the State of California's Clean Air Act State Implementation Plan ("SIP") (*see, e.g.*, 42 U.S.C. § 7407(a)), Culver City is an independent entity to which the limitations of the *parens patriae* doctrine do not apply.

Respondents then try to discredit Culver City's "particularized interest" on the grounds that "[t]he municipal and state laws that Culver City cites neither impose obligations on, nor grant authority to, the City respecting environmental impacts from aircraft operating in the national airspace." [Resp.Br., p.15]. As Respondents are well aware, however, NEPA is about full disclosure. "Control" over impactful environmental conditions is not a prerequisite to the exercise of that entitlement. "Preparation of an environmental impact statement [can] never 'force' an agency to change the course of action it proposes. The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed." *Lemon v. Geren,* 514 F.3d 1312, 1315 (D.C. Cir. 2008).

In short, as this Court has consistently ruled, requirements for standing with respect to procedural injury are relatively liberal. "That is not to say that [petitioners] need establish the merits of its case, *i.e.*, that harm to a [petitioner] has in fact resulted from [respondents'] procedural failures; instead it must demonstrate that there is a

'substantial probability' that local conditions will be adversely affected and thus harm a [petitioner]." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Cir. 2017). Culver City has successfully established such a probability here, where it has alleged both its responsibilities under its charter, and the manner in which the Project will interfere with the execution of those responsibilities, and thus, its standing before this Court.

In any event, Respondents' argument is a waste of this Court's time. They do not dispute that Steven Murray, a resident of Culver City and a co-Petitioner, possesses standing, *see* Resp.Br., p.13 ["These dismissals will not result in the dismissal of the entire case, as at least one Petitioner (Stephen Murray) has demonstrated adequate standing to proceed," citing Pet. Addendum B-1]. Thus, all Petitioners have standing with respect to the issues held in common. "If constitutional standing 'can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.'" *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 9 (D.C. Cir. 2017).

2. Santa Monica Canyon Civic Association Has Fulfilled All Jurisdictional Predicates to Filing a Petition for Review under 49 U.S.C. § 46110

Respondents argue that Petitioner Santa Monica Canyon Civic Association's ("SMCCA") Petition for Review should be dismissed for "failure to comment or participate in the NEPA process." [Resp.Br., p.16]. However, commenting on the EA and participating in the NEPA process are not, as Respondents claim, "necessary predicate[s] to this Court's jurisdiction." *Id.*

Respondents base their entire argument on the provisions of 49 U.S.C. § 46110(d), which states:

> (d) Requirement for Prior Objection.—
> In reviewing an order under this section, the court may consider an objection to an order of the … Administrator only if the objection was made in the proceeding conducted by the … Administrator or if there was a reasonable ground for not making the objection in the proceeding.

49 U.S.C. § 46110. This section does not say that petitioner must submit comments during the comment period or even participate in the NEPA process. Instead, it states that the court will only consider an objection raised in a petition for review if that "objection was made in the proceeding conducted by the ... Administrator." The sole restriction on who may file a petition for review is that the petitioner be "a person

disclosing a substantial interest in an order" issued by the FAA. 49 U.S.C. § 46110(a). SMCCA has disclosed a "substantial interest" in the order being reviewed. See affidavits submitted as part of Petitioners' Opening Brief. Respondents do not contest that SMCCA has substantial interest, nor do Respondents allege that the issue/objections raised in SMCCA's Petition for Review were not raised in "the proceeding conducted by the ... Administrator."

Even if Respondents were correct that § 46110(d) restricted filing a petition for review to persons who participated in the "proceeding," which it does not, SMCCA did participate in the "proceeding." The "proceeding conducted by the ... Administrator" is not simply the NEPA process, but Respondents' entire action with respect to the SoCal Metroplex. This is a petition for review of the ROD, not just the FONSI. As Respondents' Brief [Resp.Br., p.17] and FEA [AR 10-B-13; JA ____] acknowledged, SMCCA sent a letter, had a meeting with the Regional Administrator and the Regional Administrator sent a letter to it. Moreover, prior to the issuance of the ROD SMCCA submitted a comment letter. SMCCA's Motion to Supplement, Item 1.

Because SMCCA submitted comments prior to the issuance of the ROD and because the objections stated in SMCCA's Opening Brief were raised during the "administrative proceeding," there is no basis to dismiss SMCCA's Petition for Review.

B. Separate and Apart from NEPA, FAA Has Specific Statutory Duties to Consider the Reduction of Aircraft Noise and Emissions when Approving New Air Traffic Procedures.

Contrary to Respondents' argument that reduction of noise and protection of the public's health is "aspirational," Respondents do have a congressionally mandated duty to *consider* flight routes that reduce noise and emissions. By focusing on the "twin missions of safety and efficiency," Respondents ignore their third mission: protection of people and property on the ground. *See City of Burbank v. Lockheed Air Terminal Inc.,* 411 U.S. 624, 638-39 (1973)("Federal Aviation Act requires a delicate balance between safety and efficiency and the protection of persons on the ground"); *see also Helicopter Ass'n Int'l, supra,* 722 F.3d at 434. Because Respondents ignore their duty to protect the public health and welfare of people on the ground, their decision on the Project is arbitrary and capricious.

1. Respondents Have a Statutory Duty to Protect Public Health and Welfare From the Impact of Noise From Aircraft Operations

Separate and apart from Respondents' responsibilities under NEPA, federal law clearly establishes Respondents' statutory duty to protect public health and welfare from the impact of noise from aircraft operations. Since the passage of the Noise Control Act of 1972, the protection of the public health and welfare of those people impacted from the noise of aircraft operations has been a part of the FAA's mandate. Congress could not have been clearer on that point. "[T]he Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare." 42 U.S.C. § 4901(b).

This policy was aimed directly at noise created by aircraft. Sen. Tunney, one of the sponsors of the bill, stated the purpose of the Noise Control Act of 1972:

> Both the Senate and the House were most concerned with the problem of aircraft noise and, more specifically, **with the need to protect public health and welfare in the vicinity of airports from the impact of noise from aircraft operations.**
>
> ....

> **Such regulations would be required to include proposed means of reducing noise in airport environments** through the application of emission controls on aircraft, **the regulation of flight patterns and aircraft** and airport operations, and modifications in the number, frequency, or scheduling of flights… and such other procedures **as may be determined useful and necessary to protect public health and welfare**.
>
> …..
>
> Congress intends that the reasonableness of the cost of any regulation or standard be judged in relation to the **purposes of this act, which is to protect public health and welfare from aircraft noise. Costs are to be judged against that goal, not for their effect on air commerce or particular air carriers.**

118 Cong.Rec. 37317 (1972)(emphasis added) [Addendum A-340]. The fact that the FAA has failed to promulgate the necessary regulations to implement Congress' stated goals does not diminish Congress' intent to protect the public's health and welfare. Since then, the FAA has largely ignored protecting the public health and welfare, except in situations where it has deemed it "significant" or where enough well-to-do residents complain (see *Helicopter Ass'n Int'l*).

Contrary to Respondents' arguments, federal law puts the onus of assuring that aircraft noise does not jeopardize the public's health, welfare or property squarely on the FAA. *See* 49 U.S.C. § 40103(b)(2) ("Administrator shall prescribe air traffic regulations on the flight of

aircraft (including regulations on safe altitudes) for . . . protecting individuals and property on the ground"); and 49 U.S.C. § 44715(a)(1)(A) ("prescribe … regulations to control and abate aircraft noise and sonic boom" in order "[t]o relieve and protect the public health and welfare from aircraft noise and sonic boom"). In *Helicopter Ass'n Int'l, supra,* 722 F.3d at 433-435, this Court pointed out that the "FAA found that 'residents along the north shore of Long Island emphatically agreed that helicopter overflights during the summer months are unbearable and negatively impact their quality of life.'" On this basis, the Court found, the FAA made the North Shore Helicopter route mandatory, even though "[t]he FAA found that the sound levels, which were below DNL 45 dB, were 'below levels at which homes are significantly impacted.'"

In developing the Project and in their Brief, Respondents have ignored their statutory and regulatory duty to control and abate "aircraft noise and sonic boom" and focused entirely on its NEPA duties. Respondents instead use their NEPA findings as a shield against addressing the noise and emissions that the new flight routes will create by stating the routes will not have any "significant impact."

Respondents' statutory duty to protect people and property on the ground from the deleterious effects of aircraft noise and emissions, however, goes beyond its duty under NEPA to determine what it believes to be "significant" or "reportable" under FAA Order 1050.1E.

After the decision in *Helicopter Ass'n International, supra,* Respondents cannot conclude that a proposed FAA action that is purportedly not "reportable" under 1050.1E, § 14.5e,[2] or that purportedly does not have a "significant impact" under 1050.1E, § 14.3[3], is not subject to FAA review and regulation pursuant to 42 USC § 4901(b), 49 U.S.C. § 40103(b)(2) and 49 U.S.C. § 44715(a)(1)(A). The issue before the court is not merely whether there will be a "significant impact" consistent with NEPA analysis. Rather, it is whether FAA carried out its statutory duty to balance safety and efficiency concerns with the protection of persons on the ground. *See Helicopter Ass'n Int'l*, 722 F.3d at 434. Since FAA failed to address the public health and welfare issues created by noise and emissions from aircraft, its action was arbitrary and capricious.

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[2] *See also* 1050.1F B-1.4, p.B-4 [Addendum A-265].

[3] *See also* 1050.1F, Table 4-1, p.4-8 [Addendum A-254].

2. Respondents Failed to Heed Congress' *Vision 100* Mandate to Consider Reducing Noise and Emissions in NextGen Flight Routes

Respondents argue that the NextGen goal of reducing noise and emissions is "aspirational" and can be ignored by the FAA in developing the flight routes for the Project. *Vision 100* makes clear, however, that "[t]he Next Generation Air Transportation System *shall*— . . . 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*, § 709(c)(1) [Addendum A-82], 49 U.S.C. § 40101, note. While the goal is qualified by the words "take into consideration" and "to the greatest extent practicable," the goal of designing airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents is no less of a goal of NextGen that *must be considered* by the FAA. It has not done so with respect to the Project.

Respondents are very careful of the wording in their brief when discussing noise. They do not state (in their brief or anywhere else) that they have considered the design of airport approach and departure flight paths that *reduce* exposure to noise and emissions pollution, as

required by *Vision 100*. Instead, they state that (1) the flight paths creates will not *increase* noise to the FAA's pre-defined level of significance; and (2) they "considered noise and emissions" (not reduction of noise and emissions) in developing the flight paths. This is despite the fact FAA has an approved method of assessing noise and emission reduction impacts that it did not use in the development of the Project. As part of the FAA Modernization and Reform Act of 2012, Pub.L. 112-95 (FMRA), FAA requested the "NextGen Advisory Committee" (NAC) to develop a method to assess whether a Performance Based Navigation (PBN) procedure, such as those developed for the Project, would result in a measurable reduction of noise and air emissions. NAC developed what it called the "Net Noise Reduction Method" and presented it to FAA. 79 Fed.Reg. 49141 (August 19, 2014) [Addendum A-343]. FAA modified the method and adopted it for use a year later. 80 Fed.Reg. 46086 (August 3, 2015) [Addendum A-347]. While far from perfect, this method has been available for use by FAA to assess the noise and emissions impacts of the flight routes developed for the Project. Instead, Respondents ignored it.

C. Respondents Violated Their Own Rules as Well as NEPA By Using the Outdated NIRS, Instead of the Mandated AEDT, Software.

Respondents admit that its software models "change over the years as technology develops," [Resp.Br. p.30], which is another way of stating the obvious – that in 1998, when the NIRS software was released [AR 4-B-5 at 16; JA ____], software was much less capable than it is today. That's why in 2012, FAA mandated use of the AEDT model for all environmental analyses beginning on or after March 1, 2012. [AR 9-A-13 at 1; JA ____]. That is also why 77 Fed.Reg. 18297-18298, March 27, 2012 [Addendum A-156], and FAA's own NextGen NEPA Compliance Plan ("NEPA Compliance Plan") [AR 9-A-32 at 12; JA ____] mandated the use of AEDT, and why Respondents' failure to employ the AEDT model in their noise analysis for the Project is a patent violation of their own rule as well as of NEPA.

Respondents do not dispute the mandatory nature of AEDT, or the inferior capabilities of NIRS. Instead, they argue that they were not required to use AEDT for the Project's environmental analysis because: (1) the use of NIRS was compliant with the Guidance Memo [AR 9-A-13; JA ____], where Respondents began their "analysis" before the Order

went into effect on March 1, 2012; (2) ATAC, a third party consultant, received "'advance written approval'" to "'use an equivalent methodology and computer model,'" from the FAA's Office of Environment and Energy ("OEE"); and (3) Petitioners were not prejudiced by Respondents' use of an outdated software model because Respondents realized their mistake, and performed the analysis using AEDT in 2017. Resp.Br. at 31-32. As the record demonstrates, each of these arguments lacks merit.

1. Respondents Failed to Use AEDT for an Environmental Analysis Beginning After March 1, 2012

Respondents do not dispute that they enacted a regulation requiring the use of the AEDT model for noise and air quality analyses beginning after March 1, 2012. *See* 77 Fed.Reg. 18297-18298, March 27, 2012 [Addendum A-156]. Instead, they rely on their own 2012 FAA Guidance Memo [AR 9-A-13; JA ____] for the proposition, not mentioned in the regulation, that "[t]he newer model was 'not required for projects whose environmental analysis began before March 1, 2012.'" [Resp.Br., p.31, citing AR 9-A-13; JA ____].

Respondents' argument conflates two separate phases of environmental review of noise impacts: (1) noise screening; and (2) noise analysis, and fails to acknowledge that the noise screening process is not for the purpose of preparing an environmental analysis; it is instead used to determine whether an environmental analysis is required. Guidance for Noise Screening Air Traffic Actions, July 2009 [AR 4-B-5 at 38; JA ____]. Far from a tool for noise analysis, FAA's own guidance confirms that the noise screening process is "a dramatic simplification from what a full and detailed noise analysis would require." [AR 4-B-5 at 13; JA ____].

It is clear that what Respondents refer to when they claim the noise analysis began before March 1, 2012 is actually the screening phase, because the record conclusively establishes that the Project's analysis of noise impacts was not begun until "December 1, 2012 through November 30, 2013," the first time period during which data was collected to perform the noise "analysis." *See* FEA, p.4-1 [AR 1-B-5 at 1; JA ____].[4]

[4] "Optimization of Airspace and Procedures in the Metroplex (OAPM), Study Team Final Report" [AR 4-B-1], upon which Respondents also rely contains no mention of NIRS modeling.

In claiming exemption from the use of AEDT, Respondents also contradict FAA's own NEPA Compliance Plan. [AR 9-A-32 at 12; JA ____]. That plan, adopted in December of 2011, illustrates the difference between the AEDT Regional model software (adopted for environmental analyses performed on or after March 1, 2012), and the NIRS Screening Tool ("NST") which remained in place as the required screening tool until 2013. [AR 9-A-32 at 12; JA ____].

According to the NEPA Compliance Plan, the timeline was as follows:

- 2012: "AEDT Regional Version Release for Air Traffic – Release AEDT with regional analysis capabilities to support NextGen air traffic NEPA compliance."
- 2012: "Enhance NIRS Screening Capabilities – The Noise Integrated Routing (NIRS) Screening Tool (NST) is used for a small number of procedures. Tool will be upgraded to align with revised guidance and process for environmental screening for NextGen capabilities and operations."

- 2013: "Develop a Screening Tool for AEDT – This would develop a screening function within AEDT tool that will replace NST."

[AR 9-A-32 at 12; JA ____] [emphasis added].

Thus, from March, 2012 until the AEDT screening tool was to be developed in 2013, the required model for conducting an environmental analysis was AEDT, even though the required model for noise screening was still the NIRS Screening Tool. [AR 9-A-13; JA ____; AR 4-B-5 at 12; JA ____; AR 9-A-32 at 12; JA ____]. The fact that FAA began noise screening prior to March, 2012 is therefore irrelevant. Respondents violated their own rules, as set forth in 77 Fed.Reg. 18297-18298, March 27, 2012 [Addendum A-156] and the Guidance Memo [AR 9-A-13; JA ____] by starting the environmental analysis long after March 1, 2012, without using AEDT.

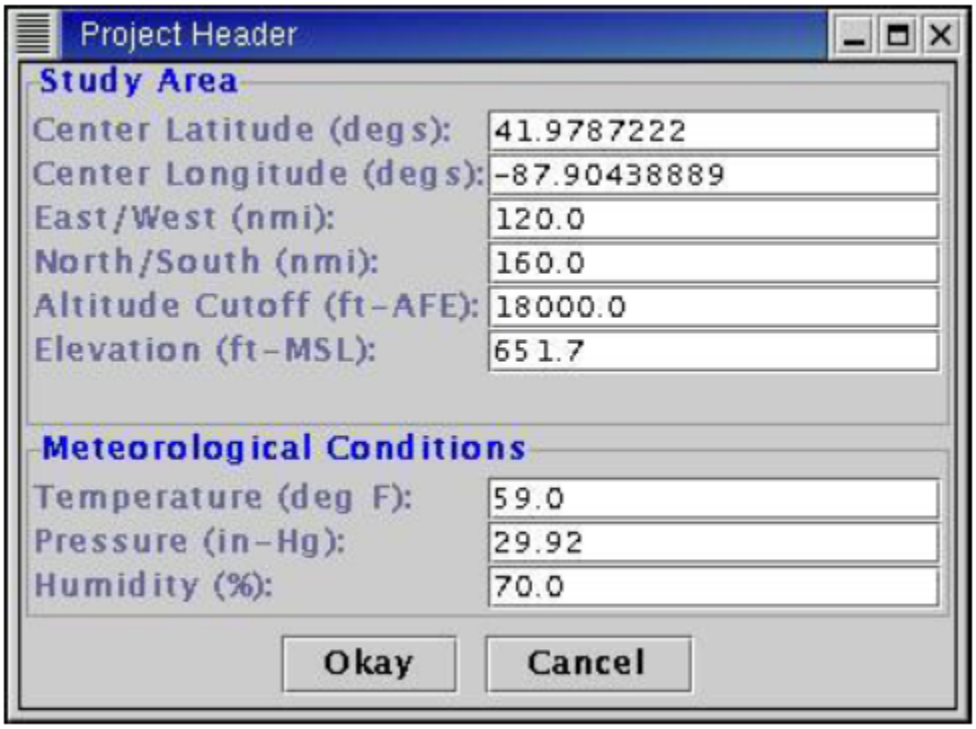
2. The NIRS Model is Inadequate to Analyze Noise on a Regional Basis and Respondents Knew It

Not only did Respondents ignore their own rule, but also employed the NIRS model which the record confirms is inadequate for noise analysis on the regional basis required for the Project [*see, e.g.*, NEPA Compliance Plan [AR 9-A-32 at 12; JA ____]]; *see also* Federal Aviation

Administration, Office of the Environment and Energy, 1050.1F *Desk Reference,* July 2015 ("Desk Reference"), Chapter 11, § 11.3, p.11-9 ["For air traffic airspace and procedure actions where the study area is larger than the immediate vicinity of an airport, incorporates more than one airport, and/or includes actions above 3,000 feet AGL, AEDT is used."] [Addendum A-381].

The red flags raised by ATAC as set forth in the AR prove the point. Throughout its NIRS analysis, ATAC repeatedly documented problems with the software arising from NIRS "single airport" limitation, requiring ATAC to cut corners and leading to glaring inaccuracies. For example, on July 6, 2016, ATAC wrote a "Note to File Memorandum" complaining: "The NIRS model accepts only one set of weather values for the whole Metroplex Study." [AR 3-B-91 at 1; JA ____]. Thus, although Respondents admit that weather variables such as "temperature, atmospheric pressure, humidity, airport average headwind, airport elevation, and terrain" play a critical role in analyzing and forecasting noise, [AR 3-B-91 at 1; JA ____], due to the limits of the NIRS software, ATAC was forced to input the average

weather conditions at a single location, LAX, for a period of 40 years (from 1973-2012). [AR 3-B-9 at 1; JA ____].

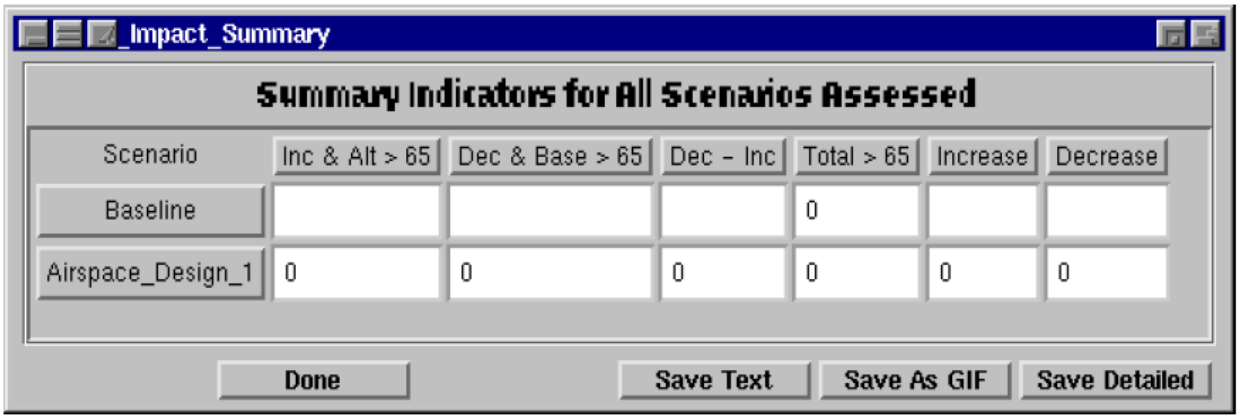


[AR 9-A-33 at 14; JA ____].

In other words, from the beaches of Santa Barbara, to the desert of Palm Springs, to the international border in San Diego, and everywhere in between, the noise impacts for each community were analyzed based on the critical variables for one airport, LAX.

Further, during the course of ATAC's NIRS modeling, FAA decided to change flight procedures in ways that caused "an increase in noise energy values in the Noise Screening model that were greater than the total noise energy value found in the SoCal Metroplex EA

noise model[,]" [AR 3-B-90 at 5; JA ____], as shown in the following box from the NIRS software:



[AR 9-A-33 at 32]. ATAC attributed the noise increases to discrepancies between the NIRS Screening Tool and the NIRS analysis model being used for the EA. [AR 3-B-90 at 5; JA ____]. Rather than reporting the noise increase to the public, ATAC's July 11, 2016 "Note to File Memorandum" reports that the FAA determined instead to manually input "zero" into the NIRS system, thus masking the true data demonstrating an increase in noise energy values. [AR 3-B-90 at 5; JA ____].

Based upon the acknowledged inadequacy of the NIRS model to analyze noise on a regional basis; the failure of Respondents to acknowledge that inadequacy in the EA; Respondents' refusal to follow their own regulation by using the AEDT model for the regional analysis

in the first instance; and this Court's consistent position that "federal agencies [must] follow their own rules . . .," *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003); neither deference nor credence need be accorded to FAA for its so-called "technical" analysis of noise, or the result of that analysis.

3. Respondents' Have Provided No Evidence of "Advance Written Approval" to Use NIRS

Respondents then argue that they were not required to comply with the Guidance Memo [AR 9-A-13; JA ____], because it contains an exception to the mandatory use of AEDT "where advance written approval has been granted to use an equivalent methodology and computer model by the FAA Office of Environment and Energy[.]" [AR 9-A-13 at 1; JA ____]. According to Respondents, ATAC "twice received this approval" for use of NIRS. [Resp.Br. at 32].

Respondents' first problem is that the purported "advance written approval[s]" were not given in "advance." They are two letters from FAA OEE, dated March 23, 2015 [AR 3-A-3 at 120; JA ____], and February 9, 2016 [AR 3-A-4 at 120; JA ____], three and even four years after the approval for exclusive use of the AEDT model in noise analysis in March, 2012. Thus, this Court need look no further than the dates of

those letters to determine that the "exception" invoked by Respondents in this case does not exist.

Respondents' reliance on these letters is even less justified, if possible, because, far from green-lighting the continued use of NIRS in the analysis, each of the letters responded only to ATAC's request for approval to use "surrogate" aircraft for its noise analysis, because "certain aircraft types that occur in the Metroplex existing and forecast fleets are not included in the NIRS database." [AR 3-A-3 at 109; JA ____; AR 3-A-4 at 109; JA ____]. The OEE's approval to use "surrogate" inputs to the NIRS model, due to inadequacies in the NIRS software, discovered during the environmental analysis, does not constitute an "advance written approval" to use NIRS, but only to compensate for its defects.

4. Respondents' Flawed Noise Analysis Prejudiced Petitioners' Right to Full Disclosure

Finally, Respondents argue Petitioners were not prejudiced by their use of an outdated software model, because Respondents realized their mistake in 2017 and re-performed the analysis using AEDT. Resp.Br. at 31-32. That statement ignores that NEPA requires environmental review be conducted "during the planning stage of

agency actions." *City of Dania Beach, supra*, 485 F.3d at 1185. Here, there is nothing in the record demonstrating that Respondents performed a noise analysis using AEDT before the Project was conclusively implemented, and it is undisputed that they never provided the public with any opportunity to comment on the results of any such analysis. *See BFI Waste Sys. of N. Am. v. FAA*, 293 F.3d 527, 532 (D.C. Cir. 2002) (explaining an agency's action is arbitrary and capricious if it is "'not supported by substantial evidence' in the record as a whole").

In any event, the fact that Respondents knew that they were required under their own rules to use AEDT for this project, and purportedly did so after realizing their mistake in 2017, does nothing to alleviate the prejudice to petitioners and the public in this case. Respondents offer no reason why they did not follow their own rules from the start, and this Court is not obligated to supply one. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ["[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given," quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)].

D. Respondents Failed to Define the Project's Purpose and Need to Include Noise and Emissions

1. FAA Failed to Include the Congressionally-Mandated Purpose of the Project

As this Court pointed out in *Theodore Roosevelt Conservation P'ship v. Salazar* , 661 F.3d 66 (D.C. Cir. 2011), when an agency defines the purpose and need for action, it must "'always consider the views of Congress' to the extent they are discernible from the agency's statutory authorization and other directives." 661 F.3d at 72 *citing Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196 (D.C. Cir. 1991).

Petitioners are not arguing that Respondents' purpose and need was excessively narrow. Instead, Petitioners are arguing that Respondents failed to "reasonably define[ ] its stated goals." *Id.* That is, Respondents' purpose and need in the Final EA failed to include a vital consideration, "the design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents," *Vision 100*, § 709(c)(7) [Addendum A-82], one that Congress mandated that the FAA review when it created new flight routes as part of NextGen. Thus Congressional mandates and the statutory context demand that consideration of noise and emissions reduction be

part of the purpose and need for a NextGen project that involves the design of airport approach and departure flight paths, like the Project.

Moreover, by failing to reasonably define the purpose and need, Respondents also failed to identify a reasonable range of alternatives. There were no alternatives given that were considered that would have reduced noise or emissions for the residents of Santa Monica Canyon, Culver City, or San Diego. It is Petitioners' position that the failure to identify and consider flight routes – even if they are rejected as being unsafe and inefficient – is violative of NEPA, making FAA's action arbitrary and capricious and not in accordance with law.

2. The FAA Failed to Consider Noise Emissions Thoroughly during the Environmental Review Process.

FAA claims to have "considered" noise emissions by overlaying the new and revised flight routes over existing routes. Resp.Br., p.24 ("In many cases, historical flight tracks were used instead of designing procedures that would overfly new areas, so as to reduce the possibility of adverse noise and pollution impacts on new communities… They tried to keep aircraft within historical flight tracks to minimize noise

impacts"). By doing so, however, "they" ended up concentrating the noise over people by narrowing the flight corridor.

This, too, was in contravention of what Congress mandated. Congress specifically stated that it did not want FAA to overlay the new PBN flight paths over the existing historical flight tracks. In FMRA, the same law that FAA quotes extensively in its brief, Congress mandated that FAA "shall, to the maximum extent practicable, avoid overlays of existing flight procedures . . ." § 213(a)(1)(A) & (b)(1)(A), 126 Stat. 11, 47, 48[5] [Addendum A-359]. If FAA is "trying to keep aircraft within historical flight tracks to minimize noise impacts" it cannot at the same time be "avoid[ing] overlays of existing flight procedures" to "the maximum extent practicable."

E. Respondents' Failure to Analyze the Project's Air Quality Impacts Violates Their Own Regulations

Respondents first claim they have met the requirements of the CAA where the operations at issue will occur above Environmental

[5] FMRA also provides that if FAA *does* overlay a PBN route over an existing route, it must explain why it did so. Section 213(a)(1)(A) states: "... but if unavoidable, the Administrator shall clearly identify each required navigation performance procedure and the reason why such an overlay was used." No such explanation is anywhere in the Administrative Record.

Protection Agency's ("EPA") designated 3,000 foot "mixing height," and, thus, are exempt from analysis. Resp.Br., pp.54, 56, citing 40 C.F.R. § 93.153(c)(2)(xii) [AR 1-B-1 at 5-16; JA ____]. The evidence in the AR is to the contrary.

The AR substantiates, and Respondents do not dispute, that a portion of the Project's aircraft emissions will occur below the mixing height. Resp.Br., p.56; FEA, § 5.8.1, p.5-16 [AR 1-B-6 at 16; JA _____]; *see also* FAA's recent publication "Aviation Emissions, Impacts & Mitigation A Primer," January 2015 ("FAA Primer") [Addendum A-191], confirming that "[g]enerally, about 10 percent of aircraft pollutant emissions are emitted close to the surface of the earth (less than 3000 feet above ground level)," *Id.* at p.2 [Addendum, A-194].

This is consistent with the stated purpose of the Project, to increase "efficiency" in aircraft operations as far down as "between terminal airspace and the runway environment," FONSI/ROD, § IV, Purpose and Need, p.4 [AR 1-A-1 at 4; JA ____]. Given the vast scope of the Project, 10 percent of all operations, at 21 airports throughout the region, has, an as yet uncalculated, but strong potential, for substantial emissions impacts in the "runway environment" below 3,000 feet.

Respondents attempt to cover their tracks with the claim that, as the Project replaces conventional operations with Required Navigation Performance ("RNP"), they reasonably concluded that the Project is presumed to conform, because it is "designed to enhance operational efficiency," Resp.Br., p.55, a central component of which is to "increase fuel efficiency." *Id.* This claim too is belied by the record, which reveals that the Project will increase, not decrease, "fuel burn," FEA, § 5.8.3, p.5-17 [AR 1-B-6 at 17; JA ____], and, thus, by Respondents' own definition, decrease efficiency.

Further, this increase in fuel burn is precisely the opposite effect from that upon which this Court relied in reaching its decision in *County of Rockland, supra*, 335 Fed.Appx. 56. There, this Court concluded that, even though FAA failed to perform an analysis of the conformity of the project with the requirements of the CAA, *see* 42 U.S.C. § 7506, an "emissions analysis," concluding the Project would result in reduced aircraft fuel consumption, would suffice for a presumption of conformity, because "reducing fuel consumption reduces aircraft emissions," *Id.* Respondents, however, now seek this Court's accord with precisely the opposite, that an increase in fuel consumption

and resulting increase in emissions, justifies the absence of analysis to determine the scope of the increase, the incidence of its occurrence, and how much will occur below the "mixing height."

Despite their admission that the measurement of fuel burn is "relevant for the limited purposes of the environmental assessment," Resp.Br., p.58, Respondents contend that, while it may increase fuel consumption within the Project area, "[t]he Project is anticipated to reduce fuel consumption in the national airspace overall." *Id.* [emphasis added]. Respondents ignore that: (1) the scope of the EA is limited to SoCal; (2) the AR contains no definition of the term "national airspace overall;" and (3) there is no evidence in the AR substantiating that claim.

Abandoning their reliance on yet another "*post hoc* rationalization," Respondents claim that they didn't rely on EPA's rule regarding "mixing height" anyway, because they relied instead on their own "Presumed to Conform" rule. [Resp.Br., pp.54-55; AR 1-B-6 at 5-17, JA ___; AR 1-B-7 at F-11 to F-14, JA ____-____; AR 9-D-6 at 41,569, JA ____]. Under that rule, even operations occurring below 1,500 feet

are presumed to conform if: (1) the project is designed to increase operational efficiency; and (2) reduce delay. *Id.*

Respondents can't have their cake and eat it. On the one hand, they define "efficiency," in pertinent part, as "improved flexibility and transitioning traffic between enroute and terminal airspace and between terminal airspace area and the runways. . .," FONSI/ROD, Purpose and Need, p.4 [AR 1-A-1 at 4; JA ____] [emphasis added]. That definition conforms to Respondents' definition of "capacity," *i.e.*, "the throughput rate, i.e., the maximum number of operations that can take place in an hour," FAA Advisory Circular 150/5060-5, Airport Capacity and Delay, September 23, 1983, p.1 [Addendum A-68]. This identity confirms the Project's true goal of facilitating arrival and departure by an increased number of aircraft, accompanied by increased emissions, as yet unanalyzed. If, on the other hand, Respondents take the position that the Project will not facilitate an increase in operations, Respondents are simultaneously abjuring their own definition of the fundamental purpose of the Project, *i.e.*, to increase "efficiency," and, thus, the applicability of the Presumed to Conform Rule.

Caught between a rock and a hard place, Respondents fall back on yet another improbable excuse, an admission that their fuel burn model, used in the EA, is inadequate, because it "does not account for the NextGen improvement of 'optimized profile descents' for arrivals," [Resp.Br., p.59]. This admission cements the credibility of Petitioners' claims that Respondents gave short shrift to the Project's environmental analysis by using, not only the outdated NIRS noise model, but also the admittedly outdated fuel burn model, both of which should have been replaced by the AEDT model for use in the EA, whatever the results, good or bad, might have been.

Respondents' failures of analysis are patently prejudicial to Petitioners in general, who must inhale the as-yet uncalculated pollutants created by the Project, and Culver City, as a city, with independent responsibility for compliance with the SIP. There is no dispute that "[t]he Clean Air Act establishes a joint federal-and-state program," Resp.Br., p.5, under which:

> States, however, have the "primary responsibility for assuring air quality" and must each devise, adopt, and implement a state implementation plan (SIP) specifying how the state will achieve and maintain the national air quality standards. (*Id.* § 7407(a).) … Once approved by the Administrator and codified in the Code of Federal

> Regulations, the SIP becomes federal law and may be enforced "by either the State, the [Agency], or via citizen's suits."

Alliance for California Business v. State Air Resources Bd., 23 Cal.App.5th 1050, 1053 (2018). Federal agencies must act consistently with those state plans, like cities, whether charter or general law, and only engage in approved activities that conform to SIPs, 42 U.S.C. § 7506(c)(1), or face legal challenge. As Culver City lies directly under the Project's aircraft approaches to LAX, it will be the recipient of many of the emissions from aircraft on new flight paths. [AR 6-A-1 at 1534-1541; JA ____]. Thus, its compliance with the SIP is prejudiced by Respondents' failure to fully and accurately disclose the Project's emissions for which Culver City must compensate or face challenge for violation of the SIP.

F. Respondents Omitted Projects from the Cumulative Impacts Analysis That Are "Reasonably Foreseeable"

Respondents do not dispute that "a meaningful cumulative impact analysis must identify ... (3) other 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), quoting 40 C.F.R. § 1508.7. This Court has

held that impacts are "reasonably foreseeable" if they are "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. United States DOE,* 867 F.3d 189, 198 (D.C. Cir. 2017)

A delay in Project implementation does not mean that the project is not "reasonably foreseeable." *See* Desk Reference, Chapter 15, § 15.1 ["An action may be reasonably foreseeable even in the absence of a specific proposal."] [Addendum A-393]. That is especially relevant where, as here, the exemplar Project, the movement of Runway 6L/24R at LAX 260 feet to the north, is not simply in the proposal phase, but was approved by the Los Angeles City Council in 2013, [City's Opposition to ARSAC's Opening Brief, p.18 ("SPAS Opposition") in *Alliance for a Regional Solution to Airport Congestion, et al. v. City of Los Angeles, et al.*, Ventura County Superior Court Case No. 56-2014-00451038-CU-WM-OXN] [Request for Judicial Notice ("RJN"), Exhibit D], as part of the Specific Plan Amendment Study ("SPAS") project, creating alternatives for the future development of LAX. In fact, Amicus City of Los Angeles considered the movement of Runway 6L/24R one of the SPAS project's principal objectives [*see* SPAS

Opposition, p.8 [RJN, Exhibit D]], and, one of two components of the development alternative eventually chosen. Thus, the runway movement was not just reasonably foreseeable, but virtually certain to occur as part of the ongoing SPAS project.

Nevertheless, Respondents declined to include Runway 6L/24R in the cumulative impacts analysis, despite the fact that, as Petitioners established in their Opening Brief, the purposes of both the LAX runway project ["provide the North Airfield improvements that support the safe and efficient movement of aircraft at LAX," [SPAS Opposition, p.8], and the Project at issue here ["reduced miles flown and improved vertical profiles" [AR 4-B-1 at 119; JA ____]], are identical, *i.e.*, to increase "efficiency."

Instead, Respondents retreat to *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) ["when a proposed action will have minimal impacts on an environmental resource, an agency may reasonably conclude that it will not lead to any significant cumulative impacts," Resp.Br., p.42, citing *Minisink, supra*, 762 F.3d at 113.] *Minisink* is, however, clearly distinguishable. There, the plan dealt with a natural gas compressor station in a small town. Plaintiffs

alleged that a second compressor station was planned, but had not been analyzed as a cumulative impact under NEPA. The Court in *Minisink* found that, because of "the absence of any firm details surrounding project specifics," *Id.*, the cumulative impacts of that project were adequately addressed.

The circumstances here are dramatically different. Runway 6L/24R has already been approved by the City of Los Angeles; analyzed under the California Environmental Quality Act, Cal. Pub. Res. Code § 21000, *et seq.* ("CEQA"); and subjected to intense public scrutiny over a substantial period of time. [SPAS Opposition, p.15 ["2,063 individual comments on the DEIR . . ."]] [RJN, Exhibit D].

Respondents' reliance on *Theodore Roosevelt Conservation P'ship v. Salazar,* 616 F.3d 497, 513 (D.C. Cir. 2010) is equally misplaced. There, the Court held that two oil drilling projects for which Notices of Intent to Prepare an Environmental Impact Statement ("EIS") had been published, were only "incipient notions," *Id.*, and did not "establish reasonable foreseeability." Here, the runway project is not a "project[] in [its] infancy," *Id.*, as were the projects in *Theodore Roosevelt*, but an

already designed portion of a comprehensively planned and approved LAX expansion project.

In summary, although the LAX runway project is so imminent that a "person of ordinary prudence" cannot ignore it; and despite the potential for cumulative impacts from as yet undisclosed and unanalyzed projects at the 21 airports affected by the Project throughout the region, Respondents have declined to even mention those projects "expected to have impacts in the same area," *Del. Riverkeeper Network, supra*, 753 F.3d at 1319, quoting 40 C.F.R. § 1508.7, thus failing to live up to the standards for cumulative impact analysis confirmed by this Court.

G. Respondents Are Owed No Deference to Their Determination of the EA's Adequacy

In addition to the theoretical and practical reasons for withholding deference from Respondents' environmental determinations discussed in Petitioners Opening Brief, this Court has made it clear that it "owes no deference to the FAA's interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the FAA alone." *Grand Canyon Trust, supra,* 290 F.3d at 342. The same principle

deprives Respondents of deference to their interpretation of the CAA ["And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer," *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (May 21, 2018)]. Thus, this Court has consistently held that deference is not appropriate where, as here, Respondents have violated NEPA and CAA; their own regulatory requirements implementing those statutes, *see Steenholdt, supra*, 314 F.3d at 639, *see also Grand Canyon Trust, supra*, 290 F.3d at 347; and where they have failed "to provide a reasoned explanation for departing from precedent." *Jicarilla, supra*, 613 F.3d at 1119.

H. The Project Will Seriously Prejudice Petitioners in General, and Culver City in Particular

Petitioners exhaustively listed in their comment letters the harm they would suffer from Respondents' failure to analyze, among other impacts: (1) noise, using the regulatorily mandated AEDT model; (2) air quality, despite fuel burn and emissions increases; and (3) cumulative impacts, taking into account the full panoply of "reasonably foreseeable," even certain, projects at various airports throughout the region. Thus, Petitioners have clearly met the applicable standard for

establishing prejudicial error. *See Gerber, supra,* 294 F.3d at 182, quoting *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323-24 (D.C. Cir. 1988).

For example, Respondents' failure to disclose and analyze in a timely fashion, the Project's noise impacts makes it difficult, even impossible, for Culver City to zone and plan for appropriate development in areas experiencing as yet undisclosed noise and emissions levels, as it is obligated to do under its charter as codified in its Municipal Code, *see, e.g.,* Municipal Code, § 17.100, *et seq.*, and specifically § 17.100.010, Purpose [Addendum A-354]; *see also* Municipal Code, § 17.100.015, Authority, Relationship to General Plan, subsection A [Addendum A-355], referring to the "authority vested in the City of Culver City ... by the State of California, including but not limited to: the State Constitution; the State Planning and Zoning Law (Cal. Gov't Code § 65800 *et seq.*); ... and other applicable statutory provisions." Thus, without further information documenting the Project's impacts, Culver City cannot meet the principal purpose of zoning, *i.e.*, to protect the public health, safety and welfare. Municipal Code, § 17.100.010 [Addendum A-354].

In summary, both Respondents' interpretation of the sufficiency of the NEPA analysis, and the interpretation of their own regulations in a way that is "'"plainly erroneous [and not consistent] with the regulation,"'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513 (1994), is unworthy of a grant of deference by this Court; manifestly prejudicial to Petitioners; and, ultimately, an abuse of discretion that warrants the intervention of this Court.

I. Giving Respondents Another Chance at an Adequate EA is an Insufficient Remedy

Respondents whine to this Court that the Project should be allowed to proceed as planned even if this Court determines that Respondents' prejudicial analytic failures must be corrected. Respondents' request is foreclosed, however, by both their governing regulations, and the opinions of this Court. *See, e.g.*, 40 C.F.R. § 1506.1; *City of Dania Beach, supra*, 485 F.3d at 1185 [requiring environmental analysis be completed before project implementation].

Here, as in *City of Phoenix, supra,* Respondents' failures justify a more complete remedy. In that case, this Court found that Respondents' reliance on a Categorical Exclusion, instead of analyzing the potential impacts of a change in flight paths over numerous historic

properties, and ignoring the potential noise impacts on 40,000 citizens "loud enough to disrupt speech compared to before the new routes were implemented," *City of Phoenix, supra,* 869 F.3d at 967, warranted vacating the order implementing the new flight routes, and remanding "the matter to the FAA for further proceedings consistent with this opinion." *Id.* at 975.

FAA did not try to employ a Categorical Exclusion here, apparently realizing that the vast scope of the Project area would make a mockery of such attempt. Nonetheless, the analytic omissions and shortcuts employed similarly fail to adequately analyze noise loud enough to disrupt speech, or worse, over *millions* (not 40,000 people), as demonstrated by the thousands of comment letters received by FAA during the course of the EA. [AR 1-B-12, 1-B-13, 1-B-14].

Thus, the result should be the same as in *City of Phoenix*, *i.e.*, a temporary halt to implementation of the Project, and reversion to prior safe and adequately efficient procedures, pending Respondents' review, at minimum, of the Project's noise, air quality and cumulative impacts, in a manner compliant with both statutory and regulatory mandates and the decisions of this Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petitioners' Reply Brief complies with the word-length limitation of Fed.R.App.P. 32(a)(7)(B), as modified by this Court's Order of December 20, 2017 providing that Petitioners' Reply Brief not exceed 9,500 words, because, excluding the parts of the document exempted by Fed.R.App.P. 32(f) it contains 9,375 words.

I also certify that the foregoing Petitioners' Opening Brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type-style requirements of Fed.R.App.P. 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word Century 14-point.

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CERTIFICATE OF SERVICE

I certify that on June 29, 2018, I electronically filed the foregoing Petitioners' Reply Brief using this Court's CM/ECF system. All counsel of record are registered for electronic service.

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