UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CITY OF LOS ANGELES, Petitioner,
CITY OF CULVER CITY, Petitioner-Intervenor,
v.
STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration, and FEDERAL AVIATION ADMINISTRATION, Respondents.

On Petition for Review of Actions By the Federal Aviation Administration

PETITIONER CITY OF LOS ANGELES' MOTION FOR SUMMARY DISPOSITION AND VACATUR

MICHAEL N. FEUER
City Attorney

DAVID J. MICHAELSON
Chief Assistant City Attorney

RUTH M. KWON, Deputy City Attorney City Hall East, 200 N. Main St., Ste. 800 Los Angeles, CA 90012

PETER J. KIRSCH NATHANIEL H. HUNT SAMANTHA R. CARAVELLO
Kaplan Kirsch & Rockwell LLP 1675 Broadway, Suite 2300 Denver, Colorado 80202

INTRODUCTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rules 3-6 and 27-1,

Petitioner City of Los Angeles (Los Angeles) respectfully requests that its petition for review be summarily granted because the Federal Aviation Administration (FAA) committed clear error in failing to complete an environmental review of three flight procedures for aircraft arriving at Los Angeles International Airport (the Arrival Routes).

FAA personnel have admitted this error. No amount of protracted merits briefing can alter, obscure, or remedy this error.

A fundamental premise of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., requires a federal agency to determine the environmental effects of its proposed action prior to making a decision. Yet FAA's administrative record filed with this Court shows that FAA made its Arrival Routes decision without first conducting an environmental review.

Moreover, records produced by FAA in response to a Los Angeles City Attorney's Freedom of Information Act request reveal why no NEPA determination appears in the record: it simply does not exist. Months after publishing the Arrival Routes, FAA realized (and documented) that no environmental review of the Arrival Routes had been conducted and no

environmental determination had been made prior to its Arrival Routes decision— a clear violation of NEPA.

FAA's clear error warrants summary disposition of this petition. It is undisputed that FAA was required to, but did not, complete an environmental review of the Arrival Routes prior to making its decision. Any further explanation offered by FAA in this litigation would be a legally irrelevant, post-hoc justification. Los Angeles therefore requests that the Court summarily grant its petition for review of FAA's Arrival Routes decision and vacate and remand FAA's decision.

1 STANDARD OF REVIEW

Petitions for review of an FAA final decision are reviewed under the Administrative Procedure Act *(APA), 5 U.S.C. §§ 701–706; Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1132 (9th Cir. 2011).*

A reviewing court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or adopted "without observance of procedure required by law." *5 U.S.C. § 706(2)(A), (D); see also 49 U.S.C. § 46110(c) (authorizing reviewing court to set aside any part of an FAA order).*

Under Circuit Rule 3-6, the Court may grant summary disposition of a petition for review at any time prior to the completion of briefing if the Court
1 Counsel for Intervenor Culver City has stated that Culver City does not oppose this Motion. Counsel for FAA has stated that FAA opposes this Motion.

determines that a "clear error" has occurred. Summary disposition is appropriate where it is "manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." *United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (citation omitted); see also Sills v. Fed. Bureau of Prisons, 761 F.2d 792, 793–94 (D.C. Cir. 1985) (granting summary reversal where merits were "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the court's] decision").*

FACTUAL BACKGROUND

A. FAA Publishes Arrival Routes

On May 24, 2018, FAA published and implemented the Arrival Routes—HUULL TWO, IRNMN TWO, and RYDRR TWO—that modified existing arrival routes known as the North Downwind arrival procedures for aircraft approaching Los Angeles International Airport.

B. FAA Cannot Confirm Any Pre-Decisional Environmental Review

Following FAA's Arrival Routes decision, the Los Angeles City Attorney's Office contacted FAA on July 6, 2018, requesting all records relating to FAA's environmental review of the decision. Hunt Decl. Ex. C, at 1–2 (Hunt Declaration filed as Exhibit 1 to this Motion). That inquiry sparked an internal FAA investigation to determine whether FAA had properly conducted an environmental review of the Arrival Routes as required by NEPA. Id. at 1 **("Do you know**

anything about these procedures? I am not sure if a CATEX was issued."). Agency records show that FAA staff could not locate any categorical exclusion determination or any other FAA environmental determination for the Arrival Routes made pursuant to NEPA. Id. **("I cannot**

find any files/folders on our r: drive, the SoCal ksn site, or the final CATEX ksn database.”).

Without any agency environmental determination, FAA staff pondered ways in which FAA could somehow show that it had conducted the equivalent of an environmental review. *See Hunt Decl. Ex. E, at 1–2*. For instance, on July 19, 2018, an FAA environmental specialist e-mailed numerous FAA staff inquiring whether a **“signed copy of the [Initial Environmental Review] can be located”** and suggesting that **“maybe one could make the leap that [it] could act as our decision document”** if such a document could be located. Id. The search was not successful.

By the end of July 2018, FAA’s internal review showed no environmental review of the Arrival Routes had been conducted and no categorical exclusion determination had been made before FAA issued its decision. *See Hunt Decl. ¶ 6; id. Exs. G, H*.

FAA staff documented their failure to find any completed environmental review in two internal documents apparently prepared at the request of FAA officials. In a July 27, 2018 document, SoCal Metroplex Post Implementation White Paper, FAA concluded that **“[s]ome environmental review**

was conducted, but not completed, e.g., no CATEX or its [Initial Environmental Review] was done for the RYDRR, IRNMN and HUULL procedures.” *Hunt Decl. Ex. G, at 1*.

In a second document, SoCal Metroplex Post Implementation Changes, FAA confirmed this conclusion. *Hunt Decl. Ex. H*. According to FAA, **“[i]t appear[ed] the environmental review was started for the adjustments to the RYDRR, IRNMN and HUULL procedures, but a final environmental determination was not completed for these adjustments prior to procedure publication.”** *Id. at 1 (emphasis added)*.

On September 6, 2018, two months after Los Angeles’ initial request for environmental documents, FAA finally released what FAA described as its environmental analysis and documentation for the Arrival Routes

decision. *Hunt Decl. Ex. B*. FAA provided a **“Memorandum to File: Confirmation of Categorical Exclusion Determination”** (the Confirmation). Id.

The so-called “Confirmation” was prepared on September 5, 2018, over three months after the Arrival Routes decision. The “Confirmation” was accompanied by an Initial Environmental Review (IER) prepared in August 2018—also months after the Arrival Routes decision. *Hunt Decl. Ex. I, at 1; see also Hunt Decl. ¶ 3.*

C. FAA Finalizes its Administrative Record and Then Produces Damaging Documents

On June 21, 2019, the City filed the Petition for Review. On October 4, 2019, FAA filed its index of the administrative record for the Arrival Routes decision (*ECF No. 30),* which was certified by Ryan Weller, an FAA environmental specialist. *See Hunt Decl. Ex. A, at 1–2*.

In the Certification, Mr. Weller contended that the Confirmation and IER should be included in the record—despite being post-decisional—**“because they accurately document the environmental review that the FAA conducted before amending the north downwind arrival procedures, including the FAA’s decision that the procedures qualified for a categorical exclusion under the National Environmental Policy Act.”** Id. at 1 (emphasis added).

However, Mr. Weller is the same FAA staff person who, along with FAA’s Operations Support Group, concluded in July 2018 that a **“final environmental determination was not completed for [the Arrival Routes] prior to procedure publication.”** *Hunt Decl. Ex. H, at 1 (emphasis added); see also Hunt Decl. Ex. F.*

Following FAA’s filing of the administrative record, on October 21, 2019, Los Angeles received FAA’s first production of agency records in response to a Freedom of Information Act request regarding the Arrival Routes. *Hunt Decl. ¶ 5*. Los Angeles received two additional record productions from FAA on November 4

and December 13, 2019. Id. FAA's productions included the internal e-mails and other agency records documenting FAA's conclusion that it failed to conduct a pre-decisional environmental review of the Arrival Routes. *See id. ¶ 6; see also supra pp. 3–5*. None of those records was included in FAA's administrative record certified with the Court on October 4, 2019. *Hunt Decl. ¶ 7.2*

D. FAA Represents That It Will Seek to Remand the Administrative Record

Because FAA produced relevant documents to Los Angeles after FAA had certified its administrative record, Los Angeles requested that FAA supplement the administrative record with those documents, including the documentation that no categorical exclusion determination had been made. *Id. ¶¶ 8–9*.

FAA denied all of Los Angeles' requests and, on December 4, 2019, informed Los Angeles that it would seek a remand of the administrative record to confirm FAA's purported earlier environmental analyses and explain the Arrival Routes decision.
See id.¶¶ 10–11.

Los Angeles was not opposed to an effort to ensure that the record was complete, including supplementing the record with additional FAA documents proposed by Los Angeles. However, Los Angeles opposed any remand of the FAA's records attached as exhibits to the Hunt Declaration should be included in the administrative record under FAA's justification for including the post-decisional Confirmation and IER: they "accurately document the environmental review" that FAA did not conduct before amending the Arrival Routes

See Hunt Decl. Ex. A, at 1.

record merely to allow FAA to add new, post-hoc analyses or rationalizations for its failure to conduct a proper environmental review.

On December 16, 2019, Los Angeles and FAA jointly moved for a stay of the merits briefing to allow the parties to brief an FAA motion to remand the record according to a schedule proposed by the parties. *See ECF No. 36*.

Since that date, FAA has not sought a remand of the record. In January 2020, FAA informed Los Angeles that FAA no longer intended to seek a remand of the record, and instead, would likely move to supplement the record with new information prepared by FAA. *Hunt Decl. ¶ 14*. However, FAA has not filed any motion regarding the record. It is unclear whether and when FAA will again try to "confirm" a non-existent NEPA decision.

ARGUMENT

FAA's records conclusively establish that FAA did not conduct an environmental review or make a categorical exclusion determination before its Arrival Routes decision—constituting a violation of NEPA.3 This "clear error" FAA's failure to conduct an environmental review required by NEPA is not the only defect in FAA's Arrival Routes decision. Los Angeles contends that the Arrival Routes do not include sufficient minimum altitudes for aircraft flying the Routes and that FAA failed to comply with the National Historic Preservation Act,

54 U.S.C. § 300101 et seq., and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303.

Because FAA's failure to comply with NEPA is grounds for summary reversal of its decision, as explained in this Motion, the Court need not address any other alleged violations to grant the requested relief. Likewise, the

warrants summary disposition in favor of Los Angeles pursuant to Circuit Rule 3-6 and vacatur of FAA's Arrival Routes decision.

I. THE CONCLUSIVE EVIDENCE THAT FAA VIOLATED NEPA WARRANTS SUMMARY DISPOSITION OF LOS ANGELES' PETITION FOR REVIEW.

FAA itself has established facts that demonstrate FAA made its Arrival Routes decision without conducting any environmental review and determination under NEPA. Any post-hoc rationale offered in this litigation cannot correct FAA's failure to comply with NEPA.
NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed [agency] action."

Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).

Agencies must fully comply with NEPA before taking any action that could have an adverse environmental impact or limit the choice of reasonable alternatives. *42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1506.1*. NEPA thus ensures "that before an agency acts, it will 'have available' and 'carefully consider detailed information concerning significant environmental impacts.

'"City of Phoenix v. Huerta, 869 F.3d 963, 971 (D.C. Cir. 2017) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)); see also Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000)
("NEPA's Court need not address the adequacy of FAA's substantive environmental analysis in the post-hoc Confirmation and IER.

*9Case: 19-71581, 02/26/2020, ID: 11610346, DktEntry: 4*1

effectiveness depends entirely on involving environmental considerations in the initial decision making process"). Environmental impacts of proposed actions are typically evaluated in a detailed environmental impact statement (EIS) or environmental assessment

(EA). 42 U.S.C. §§ 4332(2)(C), (E).

In limited circumstances, an agency may proceed without preparing either an EIS or an EA, if its proposed action falls within a defined categorical exclusion (also known as a CATEX)—a category of actions which have been found, in properly-adopted procedures, to present no possibility of a significant environmental impact.

See 40 C.F.R. § 1508.4; FAA Order 1050.1F, Environmental Impacts: Policies and Procedures ¶ 5-6 (July 16, 2015) (Order 1050.1F).

FAA's guidance for compliance with NEPA requires FAA to document its determination that a categorical exclusion applies to a particular action. *See Order 1050.1F ¶ 5-3.*

To that end, NEPA requires that, at the time the agency acted, the "agency indeed considered whether or not a categorical exclusion applied and concluded that it did.
" Wilderness Watch v. Mainella, 375 F.3d 1085, 1094–95 (11th Cir. 2004).
NEPA requirements are not waived for actions for which a categorical exclusion is later deemed an appropriate level of review. Rather, this Court has "repeatedly held that dilatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review."

Pit River Tribe v. U.S. Forest

Serv., 469 F.3d 768, 785 (9th Cir. 2006).

A categorical exclusion may not be used "as a post-hoc rationalization" because to do so would "frustrate the fundamental purpose of NEPA," which is to require agencies to consider "the environmental consequences of their actions early enough so that it can serve as an important contribution to the decision making process."

California v. Norton, 311 F.3d 1162, 1175 (9th Cir. 2002) (internal citations omitted); Utah Envtl. Cong. v. Russell, 518 F.3d 817, 825 n.4 (10th Cir. 2008) (categorical exclusions cannot "be summoned as post-hoc justifications for an agency's decision.").

FAA's own internal communications demonstrate its violations of NEPA's procedural requirements:
(1) FAA concluded that it never conducted any environmental analysis of the Arrival Routes, and
(2) FAA concluded that it never made a determination as to whether the Arrival Routes could be covered by a categorical exclusion.
Hunt Decl. Exs. G, H.

Rather than take appropriate administrative action following its realization that no environmental review was conducted, FAA personnel sought to cover

up its failure to comply with NEPA by claiming to "confirm" a determination that had never been made. FAA's attempt to justify its decision post-hoc does not remedy its NEPA violation. FAA's "post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself."

Humane Soc'y of U.S. v. Locke, 626 F.3d 1040, 1050 (9th Cir. 2010).

FAA's recent proposals to add new information to the administrative record suggest that the agency is willing to invest even more time disguising its failure to comply with NEPA. Indeed, FAA has spent more time and effort obscuring its failures to conduct an environmental review than it would have taken to complete a full environmental review of the Arrival Routes under NEPA.
FAA's NEPA violation—established by FAA's own documented conclusions—is a clear error warranting summary disposition of this action.

II. THE APPROPRIATE REMEDY FOR FAA'S VIOLATION OF NEPA IS VACATUR OF THE ARRIVAL ROUTES DECISION.

In granting summary disposition of Los Angeles' petition for review, the Court should vacate and remand FAA's Arrival Routes decision and require that FAA conduct a proper environmental review of the Arrival Routes in compliance with NEPA and applicable federal law, including reevaluation of the Routes' minimum altitudes with which aircraft flying the Routes must comply. During remand, FAA can revert to the flight procedures that were in effect prior to its Arrival Routes decision until FAA implements modifications to the procedures in full compliance with NEPA and applicable federal law.
Vacatur of FAA's decision is appropriate. This Court orders remand without vacatur "only in 'limited circumstances.'

" Pollinator Stewardship Council v. U.S. Envtl. Prot. Agency, 806 F.3d 520, 532 (9th Cir. 2015). Failure to strictly

comply with the agency's NEPA requirements, including categorical exclusion procedures, is arbitrary and capricious.
See Am. Bird Conservancy v. Fed. Commc'n Comm'n, 516 F.3d 1027, 1033–34

(D.C. Cir. 2008) (vacating categorical exclusion).

Agency decisions are vacated where, as here, an agency fails to comply with NEPA's procedural requirements.

See Metcalf, 214 F.3d at 1135 ("The District Court is directed to order the Federal Defendants to set aside the FONSI, suspend implementation of the [project], begin the NEPA process afresh, and prepare a new EA.").

The Ninth Circuit has explained that "because [NEPA] is procedural in nature, [the court] will set aside agency actions that are adopted without observance of procedure required by law."

Pit River Tribe, 469 F.3d at 781; Idaho Sporting Cong., Inc. v. Alexander, 222 F.3d 562, 567 (9th Cir. 2000) (same).

Specifically, vacatur is the appropriate remedy where FAA has failed to comply with NEPA before altering flight procedures.

See, e.g., City of Phoenix, 869 F.3d at 972, 975 (vacating flight routes and procedures because FAA's NEPA analysis was arbitrary and capricious, among other reasons); City of Dania Beach v. FAA, 485 F.3d 1181, 1190 (D.C. Cir. 2007) (vacating FAA letter adopting new runway use procedures "for failure to follow the environmental review procedures required by NEPA").

The factual circumstances in this proceeding justify vacatur of FAA's decision to implement the Arrival Routes. FAA concluded that no environmental review of the Arrival Routes was conducted before it made its Arrival Routes decision—resulting in an uninformed and unlawful final order that did not consider the potential environmental impacts of the agency's action. The severity of FAA's error is further highlighted by its subsequent affirmative acts to cover up the lack of NEPA review, including FAA's certification to the Court that a categorical exclusion determination was completed before its Arrival Routes decision, when FAA had unequivocally concluded no such determination had been made. See Hunt Decl. Exs. A, G, H.
By issuing the Arrival Routes, without first conducting environmental review, FAA's decision violates NEPA and was made "without observance of

procedure required by law."
5 U.S.C. § 706(2)(A).

Therefore, the Arrival Routes decision should be vacated. Pit River Tribe, 469 F.3d at 781; Idaho Sporting Cong., 222 F.3d at 567.

CONCLUSION

There is no dispute that FAA failed to comply with NEPA before making its Arrival Routes decision. Therefore, Los Angeles respectfully requests that the Court summarily grant Los Angeles' petition for review and vacate and remand the

Arrival Routes and order FAA to fully comply with NEPA and all applicable federal environmental laws.

Respectfully submitted on February 26, 2020.
/s/ Peter J. Kirsch
PETER J. KIRSCH
NATHANIEL H. HUNT
SAMANTHA R. CARAVELLO
Kaplan Kirsch & Rockwell LLP
1675 Broadway, Suite 2300
Denver, Colorado 80202
Counsel for Petitioner the City of Los Angeles

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 27 AND 32

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,119 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word and complies with Fed. R. App. P. 27(d)(2)(B) and Circuit

Rule 27-1(d) because it is 15 pages in length.
Date: February 26, 2020
/s/ Peter. J. Kirsch
PETER J. KIRSCH
Kaplan Kirsch & Rockwell LLP
Counsel for Petitioner the City of Los Angeles

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: February 26, 2020
/s/ Peter J. Kirsch
PETER J. KIRSCH
Kaplan Kirsch & Rockwell LLP
Counsel for Petitioner the City of Los Angel Angeles