ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1158, 15-1247 (consolidated)

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

CITY OF PHOENIX, ARIZONA, *et al.*
Petitioners

v.

MICHAEL P. HUERTA, in his official capacity as Administrator, Federal Aviation Administration, *et al.*,
Federal Respondents

On Petition for Review of a Decision
By the Federal Aviation Administration

ANSWERING BRIEF OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The parties in this Court include:

Petitioners:
The City of Phoenix, Arizona
Story Preservation Association, Inc.
Robert A. Croft
Willo Neighborhood Association
Marilyn Rendon
Encanto-Palmcroft Historic Preservation Association, Inc.
Brent J. Kleinman
Roosevelt Action Association, Inc.
Karl G. Obergh
Judith Hillman-Butzine
Christin Puetz
John Saccoman
Twila Lake

Respondents:
The Federal Aviation Administration ("FAA")
Michael P. Huerta, FAA Administrator

B. Rulings under review

The petitions for review in these consolidated cases identify two letters sent by the FAA to the City of Phoenix as the subject of this Court's review. They may be found in the Joint Appendix at AR H20 and AR H21.

C. Related cases

This case was not previously before this Court or any other court. There are no related cases, as defined by D.C. Cir. 28(a)(1)(C), currently pending in this Court or any other court of which counsel is aware.

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JURISDICTION

In these consolidated petitions for review, the City of Phoenix, Arizona, and several residents and neighborhood groups in Phoenix (the "Neighborhood Petitioners") attempt to challenge a letter written by the Federal Aviation Administration ("FAA") discussing a previously-issued order implementing new air traffic procedures for aircraft departing Phoenix Sky Harbor International Airport. The Petitioners allege that this Court has jurisdiction under 49 U.S.C. § 46110(a).

The City of Phoenix filed its petition for review on June 2, 2015. The Neighborhood Petitioners filed their petition for review on July 31, 2015. This Court lacks jurisdiction, because the June 1, 2015 letter identified in the petitions for review is not an "order" of FAA reviewable under 49 U.S.C. § 46110. Additionally, any challenge to FAA's decision to implement new procedures at the Airport is untimely, because the petitions were filed more than sixty days after September 18, 2014, the date on which FAA issued its order.

STATEMENT OF THE ISSUES

FAA implemented new air traffic procedures for arrivals and departures at Phoenix Sky Harbor International Airport, taking advantage of modern technology to improve the safety and efficiency of aircraft operations in the airspace around the Airport. FAA developed these procedures over a two-year period, involving personnel from the Aviation Department of the City of Phoenix. FAA conducted a noise analysis of the proposed procedures and determined that two areas would experience a small increase in noise. After discussing these increases with the Airport and the Arizona State Historic Preservation Officer, FAA concluded that the increases were not large enough to trigger any additional requirements under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(c), the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108, or Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c). After completing the consultation and documentation requirements of each of those environmental statutes (along with other federal requirements), FAA published and implemented these new procedures on September 18, 2014. This case presents the following issues:

1. Is the June 1, 2015 letter identified in the petitions for review an FAA "order" reviewable by this Court under 49 U.S.C. § 46110(a)?
2. If so, did FAA satisfy its obligations for environmental review, including:
    a. Did FAA satisfy the requirements of the NHPA to consult with, and receive the concurrence of, the State Historic Preservation Officer?
    b. Did FAA satisfy the requirements of Section 4(f) of the Department of Transportation Act, when it determined that none of the affected areas would be substantially impaired by the new procedures as defined by regulation and FAA Order?
    c. Did FAA violate the Administrative Procedure Act, 5 U.S.C. § 706, by failing to follow procedures outlined in an FAA Order that requires an opportunity for an airport sponsor to provide input on a post-implementation analysis of new procedures?
    d. Did FAA satisfy the requirements of NEPA, when it applied a categorical exclusion from further review that was

established by Congress specifically for procedures such as these, after concluding that any noise increases were not significant as defined by regulation and FAA Order?

STATEMENT OF THE CASE

I. At the direction of Congress, FAA is modernizing the National Airspace System to make it safer and more efficient.

1. FAA is responsible for the safety and efficiency of the National Airspace System.

The Federal Aviation Act of 1958, 49 U.S.C. § 40101, *et seq.*, delegated to FAA control over use of the nation's navigable airspace and regulation of domestic civil and military aircraft operations in the interest of maintaining safety and efficiency. *See, e.g.*, 49 U.S.C. § 40101(d)(4). Congress has authorized FAA to prescribe air traffic rules and regulations governing the flight, navigation, protection, and identification of aircraft, and to ensure the efficient utilization of navigable airspace. 49 U.S.C. § 40103(b)(2). That provision also directs FAA to ensure the protection of persons and property on the ground by prescribing rules for safe altitudes of flight and rules for the prevention of collisions between aircraft. *Id.*

2. FAA is transitioning the National Airspace System to take advantage of modern technologies in order to improve safety and efficiency.

One method of providing predictable and efficient routes through the National Airspace System is the publication of instrument procedures, which are a series of steps that pilots follow, that include things like where to turn, what direction to fly, when and where to ascend or descend, and at what speeds. Published procedures enhance safety by reducing the need for communication between air traffic controllers and pilots, and ensuring a safe distance between aircraft in the sky.

Published instrument procedures are described as "conventional" procedures when they use ground-based navigational aids or are based on verbal instructions (or "vectors") from an air traffic controller. FAA is moving away from the use of these conventional procedures in favor of those that use newer technologies, such as the Global Positioning System and computerized guidance systems found in more modern aircraft. This national effort is referred to as "NextGen," which is "a comprehensive overhaul of our National Airspace System to make air travel more convenient and dependable." (AR C14 at 4.)

Transitioning to NextGen provides a number of benefits. It can reduce delays considerably as compared to more conventional approaches to air traffic. *Id.* at 5. Reducing delay in turn reduces the unnecessary use of fuel, at an estimated national savings of $24 billion and a significant reduction in carbon dioxide emissions in the coming years. *Id.* And NextGen procedures afford flexibility in routing around bad weather and traffic conditions that previous technologies did not allow. *Id.* at 7.

But most importantly, the implementation of NextGen and use of these more modern procedures makes the National Airspace System safer. *Id.* at 8. In keeping with FAA's mandate under the Federal Aviation Act, FAA's first priority is safety, *id.*, and NextGen improves safety in a number of ways. Newer technologies allow both pilots and air traffic controllers to have better real-time awareness of aircraft locations. *Id.* Replacing voice transmissions from the tower to the cockpit with digital transmissions that can, in many instances, be interpreted and carried out automatically by the aircraft's computer, reduces the likelihood of misunderstandings and delay. *Id.* And pilots can maintain the appropriate separation between their aircraft and the

ones they are following even at night or in other circumstances where visual contact is difficult. *Id.* at 12. *See also id.* at 19-21 (further explaining benefits).

Phoenix Sky Harbor was an early adopter of the types of performance-based navigation procedures that NextGen utilizes, first putting such procedures in place in October 2000. In 2006, FAA put in place two arrival procedures that utilize area-based navigation technologies (referred to throughout the administrative record as "RNAV" procedures)[1], which led to "significant benefits." *Id.* Aircraft were able to descend more quickly and predictably, reducing a third the amount of time they stayed in level flight at low altitudes. *Id.* This resulted in an estimated annual savings of $2 million in fuel costs and 2500 metric tons of carbon dioxide emissions at the Airport. *Id.* All told, FAA worked with the Airport to implement over 20 different NextGen procedures between 2000 and 2013, prior to putting in place the procedures challenged in this case.

[1] Area navigation was once referred to as "random navigation," which provides the origin of this acronym.

3. Congress directed FAA to implement the NextGen transition nationwide, with expedited environmental review.

In 2012, Congress enacted the FAA Modernization and Reform Act of 2012, Pub. L. 112-95, "to streamline programs, create efficiencies, reduce waste, and improve aviation safety and capacity." (AR C13 at 1.)[2] This statute provided long-term funding and direction for FAA's implementation of NextGen, directing the agency to proceed promptly. *Id.* at 2.

Congress required FAA to publish a report identifying new procedures to be developed for the nation's core airports (determined by FAA to be 30 of the busiest airports in the country, including Phoenix Sky Harbor) "to maximize the fuel efficiency and airspace capacity" of these airports. (AR 13C at § 213(a)(1)(A).) Congress required the development of implementation plans with a "clearly defined budget, schedule, project organization, and leadership requirements," as well as "specific implementation and transition steps" and metrics for measuring progress. (AR 13C at § 213(a)(1)(C)(i)-(iii).)

[2] Both of Arizona's Senators voted in favor of this statute. *See* http://clerk.house.gov/evs/2012/roll033.xml.

And Congress ordered FAA to waste no time, requiring FAA to implement NextGen navigation procedures at the nation's busiest airports in three years (by 2015). *Id.* § 213. In the accompanying House Committee Report, the Committee noted that "it believes that the true benefits of NextGen will only be achieved with a streamlined and expedited process to approve navigation procedures . . . ." H.R. 112-29 Part 1 at 110 (Mar. 10, 2011). Congress provided just such a streamlined and expedited process by allowing for "coordinated and expedited review" under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321. (AR 13C at § 213(c)(1).) Congress authorized FAA to presume (absent extraordinary circumstances) that RNAV procedures are ". . . covered by a categorical exclusion (as defined in section 1508.4 of title 40, Code of Federal Regulations)." (AR 13C at § 213(c)(1).) FAA used this Congressionally-created categorical exclusion to approve the procedures challenged in this case.

II. FAA began to implement new arrival and departure procedures at Phoenix Sky Harbor International Airport.

Following the earlier successful introduction of new RNAV procedures at Phoenix Sky Harbor, FAA began in 2012 to more fully

implement NextGen at this airport consistent with the direction from Congress in the FAA Modernization Act of 2012. After two years of design review and environmental study, it published fourteen new air traffic procedures for use at Phoenix Sky Harbor, and those procedures have successfully been in use since September 18, 2014.

1. FAA met with the City and other stakeholders in 2012 to preliminarily design the new procedures.

Located near downtown Phoenix, Phoenix Sky Harbor is the ninth busiest airport in the country. It serves as a hub for both American Airlines and Southwest Airlines, as well as a major gateway to Mexico and South America. It is surrounded by some of the busiest general aviation airports in the world, operating flight schools with very high volumes of traffic. Just to the west, Luke Air Force Base operates the largest F-16 pilot training program in the United States, operating in restricted military airspace that further constrains routes taken by commercial aircraft. Phoenix Sky Harbor had 30 arrival and departure procedures that vary simultaneously in interconnected ways, with the potential to cause volatility and uncertainty in the interactions between aircraft. Redesigning this complex airspace would be a complicated

undertaking, and so FAA began to reach out at the beginning of the process to stakeholders with expertise in this area.

The City of Phoenix had numerous opportunities for involvement in the development of the new procedures at the Airport. The Phoenix Airspace Users Work Group, which has long been established to communicate information of broad interest to users and stakeholders at the Airport, met in early 2012 and discussed the proposal for new RNAV procedures. (AR G2 at 2.) This group consists of over 30 members representing FAA, the armed forces, the City of Phoenix, other neighboring cities, and the airlines. *See, e.g.*, AR G2. A similarly broad group of representatives from various agencies, including the City, comprised a different working group expressly dedicated to the development of new RNAV standard instrument departures from Phoenix Sky Harbor. This group held an advance meeting in February 2012. (AR G4.) These two meetings were followed by a two-day "kick-off meeting" in March 2012 of the dedicated work group, to begin the technical process of developing the procedures. (AR G5 at 2.) Representatives from the City of Phoenix attended the February meetings and were invited to this March meeting as well. (AR G6 (email

from FAA providing the meeting agenda to representatives of the City).) In August 2012, a large meeting was held at which the procedures were drafted with specificity, using computer models run by specialists, with adjustments made in response to input from the various stakeholders present. *See* AR H35a at 8-9. The Noise Abatement Specialist of the City of Phoenix's Aviation Department attended this meeting. *Id.*

Under the pre-existing procedures for departing the Airport, many flights would depart to the west and then turn to either the north or south towards their eventual destination east of Phoenix. The newly-proposed departure procedures would add a third departure track in which planes departing west from the Airport would turn earlier, to the northwest, before heading towards their ultimate destination to the east of Phoenix. The addition of a third track reduces the amount of time that each departing flight must wait after the preceding plane takes off, because of separation rules necessary for safety. The third track therefore increases the number of operations that can be conducted in a given period of time. This new departure track was designed to fly directly over Grand Avenue in Phoenix, a major commercial and industrial corridor, rather than fly over the residential

areas on either side of this corridor. At the August 2012 meeting discussed above, the City's Aviation Department representative was directly asked about this proposal, and he informed FAA that "if divergent departure headings were the ultimate goal then Grand Ave. would make sense because of its predominant industrial land-use." (AR H35a at 9.)

The following year (2013) FAA conducted an environmental review of these proposed procedures, and analyzed any potential noise impacts. FAA used a component of FAA's Noise Integrated Routing System called the Noise Screening Tool. (AR F16 at 3.) By using this sophisticated computer modeling software, FAA determined that there would be two locations with an increase in noise large enough to report. (AR F16 at 4-6.) Although FAA addressed these two locations in its environmental review, the anticipated noise increases were below the usual thresholds for reportable increases and well below the applicable threshold for significance as established by FAA regulation. (AR B2 at 17.)

The noise increase in two areas predicted by FAA's noise analysis was within a range established by FAA Order 7400.2J as reportable,

and therefore a possible indicator of "potential controversy." (AR F17; AR F21 at 324.) So "FAA spoke extensively with the Airport Authority" about the potential public reaction to any increase in noise impacts. (AR F17.) The Airport Authority is part of the government of the City of Phoenix, which owns and operates the Phoenix Sky Harbor International Airport.[3] At the time of these conversations, FAA had finished its noise screening and could identify exactly where noise impacts were expected to increase, and by how much. The Airport Authority assured FAA that the decision to implement these new procedures would not be controversial. *Id.*

2. FAA concluded that the anticipated increases in noise impacts were not "significant."

The National Environmental Policy Act requires federal agencies to prepare an environmental impact statement disclosing the potential environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). *See, e.g.*, *WildEarth Guardians v. Jewell*, 738 F.3d 298,

[3] *See, e.g.*, "About Sky Harbor," http://www.skyharbor.com/about (last visited July 20, 2016).

302-03 (D.C. Cir. 2013) (describing NEPA's requirements). FAA has established by regulation what levels of increase in noise are "significant" for purposes of triggering NEPA's requirement to prepare an environmental impact statement. (AR C6 at A-61.) In order to depict and evaluate changes in noise, FAA overlays grid points on a map and then models the projected noise between each point. *See, e.g.*, AR B2 at 57-58 (figures depicting grid points for this noise analysis).

The relevant measurement of noise for these purposes is the Yearly Day- Night Average Sound Level, referred to most commonly as "DNL." A particular DNL, which is stated in decibels, represents the average sound exposure at a particular location over a 24-hour time period and then annualized. (AR F16 at 3.) This average is weighted, assigning a 10-decibel increase to any noise events occurring between 10:00pm and 7:00am "to account for increased annoyance due to noise during the night hours." *Id.* FAA has long used DNL as a means of expressing noise impacts. Although "there are many other metrics that can be used to describe aircraft noise levels, . . . DNL has been most widely accepted as the preferred metric for determining noise level exposure at airports." *Id.*

Whether an increase in noise impacts resulting from an FAA action is "significant" for NEPA purposes is expressed in terms of decibel increases within a particular DNL contour. "A significant noise impact would occur if analysis shows that the proposed action will cause noise sensitive areas to experience an increase in noise of DNL 1.5 [decibels] or more at or above DNL 65 [decibels] noise exposure when compared to the no action alternative for the same timeframe." (AR C6 at 153.) In other words, at a location within the 65-70 DNL contour (meaning that the annualized, weighted, average daily noise exposure at that location is between 65 and 70 decibels), an action that raises that average by 1.5 DNL or more is "significant" for NEPA purposes. "Courts have long accepted the FAA's DNL standard as the appropriate methodology for assessing the impact of aircraft noise." *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 326 (D.C. Cir. 2003); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 200-01 (D.C. Cir. 1991); *Sierra Club v. DOT*, 753 F.2d 120, 128 (D.C. Cir. 1985).

Analysis of the anticipated noise impacts from the new departure procedures proposed at Phoenix Sky Harbor demonstrated reportable noise increases in two locations. However, those increases were not

significant. The increases occurred in two areas west of the Airport, both of which were within the 45-60 DNL contour. Each of these areas was forecast to experience an approximately 5-decibel increase in DNL exposure, but these increases would not reach the 65 DNL level at which "significant" impacts could occur. (AR B2 at 17; AR C6 at 156 ¶ 14.4h.) Nevertheless, FAA disclosed these impacts and discussed them with the Airport Authority, *supra* at 14, prior to issuing its decision in September 2014. The result of these discussions, coupled with the fact that the increases were well below the significance thresholds, led FAA to conclude that the noise impacts would not be of further concern.

3. FAA received the concurrence of the State Historic Preservation Officer.

After analyzing the potential noise impacts, FAA consulted with the Arizona State Historic Preservation Officer, as required by Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108 (2015).[4] This Act requires the head of any federal agency that

[4] This Act was recodified in December 2014. The relevant provision at the time of FAA's decision was 16 U.S.C. § 470(f) (2014), but we refer

proposes an "undertaking" to first "take into account the effect of the undertaking on any historic property." *Id.* The agency must also "afford the [Advisory] Council [on Historic Preservation] a reasonable opportunity to comment with regard to the undertaking." *Id.* These requirements may be met by following procedures established by regulation. 36 C.F.R. § 800 *et seq.*

In keeping with these requirements, FAA sent a letter in August 2013 to the Arizona State Historic Preservation Officer, disclosing the anticipated noise impacts of the new procedures. (AR B6.) "The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage." 36 C.F.R. § 800.2(c)(1)(i). The State Historic Preservation Officer's role in the consultation process is not only to evaluate the impacts of an agency undertaking on properties of historic significance but also to coordinate further review with other "agencies, local governments and organizations and individuals," if warranted by the nature of the undertaking. *Id.*

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here to the current section of the U.S. Code as the statutory requirements relevant to this case have not been altered.

FAA explained to the Arizona State Historic Preservation Officer the proposal to create nine new departure procedures and five new arrival procedures at Phoenix Sky Harbor, and provided figures illustrating both the current traffic and the new procedures at the Airport. (AR B6 at 1, 6-9.) The letter explained that the noise screening analysis indicated two areas in which there was a potential for a 5-decibel noise increase within the 45-60 DNL contours, *id.* at 1, depicting them on a map. *Id.* at 10. The letter also identified exactly which historic properties were within the area of potential effect. *Id.* at 4 and 5. There were 25 affected locations listed on the National Register of Historic Places, which were listed in the letter by name and National Registry number, as well as nine additional locations identified as sensitive areas. *Id.*

The letter included a figure describing the typical background noise levels at various DNL levels. *Id.* at 11. That figure indicates that 65 DNL is equivalent to the typical outdoor noise experience of a commercial area, about as loud as the sound of a conversational human voice from three feet away. *Id.* at 1. Therefore, the letter explained that the resulting noise in the area of potential effect would be "no louder

than the background noise of a commercial area," and would not disrupt normal conversation at three feet away. *Id.* at 3. Although the actual metrics used for noise-based decision-making are far more precise than this, these statements were included to give some basis of comparison that could be readily understood.

After receiving this information in August 2013, the Arizona State Historic Preservation Officer expressed no concerns and sought no additional information. Four days later, he returned the letter to FAA with his signature and a stamped concurrence, concluding FAA's regulatory obligations to engage in NHPA consultation. 36 C.F.R. § 800.5(c)(1).

4. FAA concluded its environmental review and published the new procedures in September 2014.

a. FAA applied a categorical exclusion as directed by Congress.

Regulations promulgated by the Council on Environmental Quality, applicable to all federal agencies' compliance with NEPA, provide that some types of agency actions may be identified as not "significantly affecting the quality of the human environment," 42

U.S.C. § 4332(C), and can be categorically excluded from further NEPA review. 40 C.F.R. § 1508.4. These can include any "category of actions which do not individually or cumulatively have a significant effect on the human environment." *Id.* Federal agencies must first develop procedures for adopting categorical exclusions in order to make such a finding for a category of actions. *Id.* FAA has done so, and has promulgated a series of categorical exclusions that are described in FAA Order 1050.1E, which governs FAA's compliance with NEPA and associated environmental statutes. (AR C6.)

Congress directed in the FAA Modernization Act of 2012 that new RNAV procedures "shall be presumed to be covered by a categorical exclusion . . . under chapter 3 of FAA Order 1050.1E." (AR C13 at 49.) FAA then issued a guidance memo addressing application of this categorical exclusion. (AR C19.) Although "[m]ost proposed air traffic procedures are covered by established [categorical exclusions] under paragraph 311 in Chapter 3 of FAA Order 1050.1E" already, FAA determined that the statutorily-established categorical exclusion applied to new proposed RNAV procedures even when they might previously have required further NEPA review. *Id.* at 2.

However, new RNAV procedures would not be categorically excluded if "extraordinary circumstances" are present. (AR C13 at 49.) FAA has identified what specific circumstances require further review of an otherwise-excluded action in paragraph 304 of FAA Order 1050.1E. FAA's guidance document for implementation of new RNAV procedures provides that FAA will document its conclusions, and if no extraordinary circumstances exist, then FAA's compliance with NEPA is complete. (AR C19 at 2.)

b. FAA found no extraordinary circumstances.

In September 2013, after completing its noise analysis and receiving the concurrence of the Arizona State Historic Preservation Officer, FAA prepared an Initial Environmental Review documenting its findings. (AR B2.) This document specified the fourteen new procedures being proposed and explicitly considered the potential for extraordinary circumstances, concluding that none existed. (AR B2 at 15-19.)

FAA documented the 25 locations on the National Register of Historic Places that would experience some increase in noise as the

result of the new procedures. (AR B2 at 12-13.) However, none of the increases were "significant" as defined by FAA regulations. Additionally, of the two areas experiencing increased noise, one "is located on either side of Route 60, and the other area is located south of Interstate Route 10, both main transportation corridors." *Id.* at 17. FAA noted that "due to the surrounding land use" at these locations, "[a]ny cultural resources located in these areas would not be associated with quiet as a recognized attribute." (AR B2 at 15.) "Furthermore, aircraft have historically flown over these areas." *Id.* Similarly, while nineteen public parks are in the areas associated with increased noise, those parks already experienced overflights and "none of these parks have quiet as an expected attribute." *Id.* Also, due to the relatively small "degree of noise increase" and the urban locations involved, FAA found that "[t]he proposed procedures are not likely to be highly controversial on environmental grounds." *Id.*

Based on these findings and the lack of any measurably significant noise impacts, FAA concluded that no extraordinary circumstances existed and that no further public participation was required. FAA then prepared a Categorical Exclusion Declaration along

with the Initial Environmental Review. (AR B1.) FAA also made the findings necessary to satisfy Section 4(f) of the Department of Transportation Act, which seeks to minimize the "use" of certain public lands, such as parks or recreation areas, for transportation purposes. 49 U.S.C. § 303(c). FAA concluded that the RNAV procedures would not substantially impair any Section 4(f) property. (AR B2 at 15.)

c. FAA revised the procedures slightly and prepared them for publication.

FAA then further refined and reviewed the new procedures to comply with safety requirements, and conducted a renewed noise analysis. (AR F19.) This new analysis showed that the size of the area affected by a noise increase was "marginally smaller" than the previous version of the procedures. (AR F20, F21.) FAA then reconfirmed its prior categorical exclusion. (AR B3.)

During this time, FAA remained in contact with the City of Phoenix's Department of Aviation to keep it informed about the upcoming implementation of the procedures. In April 2013, FAA presented the finalized procedures, along with depictions of them, at a meeting attended by a City official. (AR H35a at 4.) Before FAA

concluded its original environmental review in September 2013, it sent the proposed procedures to the City's Department of Aviation, along with maps specifying the anticipated areas of potential noise impacts. (AR G15-G18.) FAA also provided images of each of the proposed arrival and departure tracks overlaid on a map of Phoenix. (AR G19.) The City's Aviation Department prepared its own maps of the proposed procedures, and informed FAA that higher-ranking City officials would be informed as well. (AR G20.) The City expressed no concerns when FAA said it would use a categorical exclusion for these procedures. Indeed, an Aviation Department official told FAA that "the City of Phoenix Aviation Department stands by our local FAA and their efforts to move aircraft in a safe and efficient manner. If they choose to alter our procedures at our facilities, the onus of NEPA falls on FAA's shoulders." (AR G18 at 1.)

Once environmental review was complete, FAA informed the Phoenix Airspace Users Work Group in May 2014 that the finalized procedures would be published and implemented that September. *See* AR G39 (forwarding that information to additional representatives of the City). The City expressed no concerns during these additional

months of process. Unknown to FAA, the City's Aviation Department (despite having participated in the development of the procedures and being fully informed about them) waited nearly a year after the environmental review was completed before informing any of the City's public relations personnel or elected officials. (AR H35a at 5-6.)

III. The City raised new objections to the procedures after they were implemented.

On September 18, 2014, FAA published the new procedures in the *U.S. Terminal Procedures Publication*, which is published by FAA every 56 days and contains navigational charts for use by the aviation community. (AR A1.) The procedures became effective on that date, and planes began to fly them that same day. In the following week, the Airport received 120 noise complaints, which was more than usual. FAA quickly agreed to hold a public meeting to discuss the new procedures. *See* AR H1 (a September 30, 2014, letter from Representatives Pastor and Latham acknowledging that FAA personnel "have been engaged with Phoenix Sky Harbor officials in response to these concerns.").

FAA held a public meeting on October 16, 2014, and determined that "some aircraft were not flying the new procedures as intended."

(AR H14.) FAA clarified its direction to the air traffic controllers to make sure that pilots were not being given unnecessary instructions to deviate from the procedures as published. *Id.* No changes to the procedures themselves were made. The City's Aviation Department acknowledged in response that further public engagement was "outside of the scope of the Federal Aviation Administration's (FAA) requirements under current federal guidelines." (AR H16 at 1.) Nevertheless, the Aviation Department requested that FAA meet with the City's elected officials, which FAA did in December 2014. *Id.* at 2. Despite this high level of public interest in the new procedures, no suits were filed against the FAA during the first sixty days after they were implemented.

1. FAA made clear to all stakeholders that the published procedures could be replaced with modified procedures, but not retracted completely.

After receiving complaints from some residents of Phoenix, the Arizona State Historic Preservation Officer wrote back to FAA. (AR H17.) "Although we do not question the accuracy of the evaluation FAA submitted to this office, it appears that the experience of residents of

these neighborhoods is quite different from what was expected." *Id.* at 1. The letter asked that FAA "reopen for consideration the question of the new flight path's effect on historic properties." *Id.*

Shortly thereafter, the City sent a letter to the FAA Administrator stating "the official position of the City of Phoenix, owner and custodian of Phoenix Sky Harbor International Airport (PHX) as it relates to RNAV flight paths for PHX." (AR H19 at 1.) That official position was to demand "that FAA immediately cease the use of the new RNAV flight paths implemented on September 18, 2014, and utilize the departure and arrival flight paths that were in effect prior to September 18, 2014." *Id.* Although the City and FAA continued to exchange correspondence for many months following, during which FAA repeatedly encouraged the City to propose workable adjustments to the new procedures, the City never deviated from its position that FAA must abandon the new procedures entirely. *See, e.g.*, AR H30 (Letter of April 24, 2015, from the Phoenix City Manager, stating "We continue to assert that FAA should return to the pre-September 18, 2014 flight path for the west departures.")

FAA responded in writing in January 2015 to both the City and the State Historic Preservation Officer, explaining that its prior decision was final and no additional review was legally required, but that FAA would be willing to consider a new process leading to new procedures that might help mitigate some of the noise concerns. (AR H20, H21.) As to the City's request to simply abandon the NextGen transition entirely, FAA was unequivocally clear that this was not an option.

> Although we are committed to exploring possible adjustments to the new procedures, we cannot revert to the procedures that were in use before September 18, 2014. Making changes is not as simple as turning one procedure off and turning another one on, and designing and developing possible adjustments will not be a simple or quick process. The new arrival procedures are interdependent with the new departure procedures. Making changes to one would have a domino effect, requiring changes to others.

(AR H20 at 1-2.) FAA told the City that it would consider "possible adjustments to the new procedures," in an attempt to assuage the concerns being expressed by some residents. *Id.* at 1. However, FAA explained that adjustments would not be a simple amendment or continuation of the previous decision implementing the procedures already in place. "Adjustments to the new procedures must be designed,

subjected to a rigorous safety analysis, flight-checked, and charted." *Id.* at 2. Automated programs would have to be updated, air traffic controllers would have to be trained, and FAA would have to "conduct the environmental reviews that further changes may require." *Id.*

FAA's response to the State Historic Preservation Officer was similar. FAA explained that, under the applicable regulations, the NHPA consultation process for the already-implemented procedures was over. (AR H21 at 1.) However, "[i]f FAA decides to pursue modifications to the procedures, it will initiate the appropriate environmental reviews, including additional consultation with your office and other consulting parties under Section 106, as appropriate." *Id.*

Following this pair of letters sent in January 2015, all interested parties were aware of two key facts: 1) that FAA was not going to retract its prior final decision to implement the new procedures; and 2) that any changes to those procedures would be made through a new process of design and environmental analysis consistent with all applicable federal laws. Two City Council members stated on January 23 in a press release that the "the FAA has stated that they will not be

reverting back to the original flights paths and procedures," that they viewed FAA's proposals to evaluate other options as insufficient, and that the City should pursue litigation in response.[5]

But the Petitioners did not sue FAA. Instead, the City sent a lengthy letter repeating the City's objections to the new procedures and requesting "that FAA revert to the pre-September 18, 2014, flight paths." (AR H23a at 3.) Although this letter was entitled "Formal Legal Protest," there are no regulatory procedures for making such a protest before FAA, and therefore no requirements about whether, how, or when FAA might respond. A "formal legal protest" does not preserve appeal rights or otherwise have any relationship to recognized proceedings before FAA.

Meanwhile, the City asked its attorneys to conduct an internal investigation to determine why there had not been more communication between different components of the municipal government. (AR H35a.) The City ultimately concluded that "multiple failures occurred at

[5] *Councilwoman Laura Pastor, Councilman Michael Nowakowski Joint Statement on FAA Refusal to Revert Back to Original Sky Harbor Flight Path* (Jan. 23, 2015), available at https://www.phoenix.gov/news/district4/601.

multiple levels" within the City government during the development of the procedures, AR H35a at 2, with "a long string of sub-par job performances" occurring over two years. *Id.* at 24.

2. FAA and the City continued to exchange correspondence.

The City and FAA continued to exchange letters during the spring of 2015. *See*, *e.g.*, AR H22, H26a, H27-H30, H32-34. FAA asked for the City to propose modifications to the procedures, and even recommended a few options for the City to consider. (AR H28 at 1-3.) After further meetings, the FAA's Regional Administrator optimistically suggested that some solutions were on the horizon. (AR H33.)

Following a meeting in late May 2015 between FAA, the airlines, and the City, FAA's Regional Administrator sent a letter on June 1, 2015, that the petitions for review identify as the subject of this Court's review. (AR H33 at 1.) In that letter, FAA states that "[w]e believe the discussions were productive and identified a number of adjustments that could provide some relief to the community." (AR H33 at 1.) The letter listed four "short-term options," and expressed FAA's willingness to further explore a long-term adjustment to the procedures. *Id.*

Consistent with the explanation FAA had given months before, the letter points out that no changes could happen overnight. Any changes to the procedures would require the development of new procedures through the appropriate process. Other possible solutions, such as negotiating voluntary nighttime noise abatement procedures with the airlines, would require action taken by the City. It concludes: "The FAA believes the short term adjustments can be completed within six months and the long term adjustments within a year. We look forward to continuing to work collaboratively with the City of Phoenix and the airlines on these options." *Id.* at 2.

This letter was, in FAA's view, a start to a new process by which the parties might reach a resolution. It speaks only of possible actions that the City, the airlines, and FAA might take in the future. And it makes clear that those actions "will require additional environmental review" before they can be implemented. *Id.* at 1. The letter makes no mention of the finality of the previously-implemented procedures, of the associated environmental review and historic property consultation for those procedures, nor of the legal position of any party on any of those matters.

On the same day FAA sent that letter, the City filed a petition for review with this Court, identifying the June 1, 2015 letter as the challenged "order" of FAA for purposes of this Court's jurisdiction. The Neighborhood Petitioners then filed suit as well, on July 31, 2015, challenging that same letter.

FAA moved to dismiss both petitions for review for lack of jurisdiction, but this Court in an order dated December 4, 2015, deferred that dispositive issue to the merits panel.

SUMMARY OF ARGUMENT

The June 1, 2015 letter of the FAA to the City is not an "order" that this Court may review under 49 U.S.C. § 46110. It neither marks the consummation of the agency's decision-making process, nor establishes any legal consequences for the Petitioners. The Petitioners therefore have no cause of action and the petitions for review must be dismissed.

The Petitioners attempt to reach back in time to challenge FAA's order issued on September 18, 2014, but any challenge to that order is untimely. That order was clearly final on that date, and the sixty-day

statute of limitations of 49 U.S.C. § 46110(a) expired on November 18, 2014, without anyone filing suit.

The Petitioners had no "reasonable grounds" for their delay. *Id.* The Petitioners were aware of FAA's publication and implementation of the new procedures almost immediately. Some residents filed multiple complaints right away, and less than a month later, FAA held a public meeting with residents amid discussions with the City. Even if one were to accept as true all of the Petitioners' claims that the "process" appeared to them to be iterative and continually ongoing after September 2014, no party could have believed that after an exchange of letters in January 2015 wherein FAA announced that it had no intention of revisiting the environmental review of these procedures or of withdrawing them. The very next day, elected City officials stated publicly that the next step was litigation. But still they waited. They had no "reasonable grounds" to do so within the meaning of 49 U.S.C. § 46110(a).

Even if this Court had jurisdiction over the merits of these petitions, they should be denied. FAA's conclusion that the only increase in noise resulting from the new procedures were, at most, a 5-

decibel increase within the 45-60 DNL contour is supported by substantial evidence and is therefore "conclusive." 49 U.S.C. § 46110(c). This finding forms the basis of FAA's challenged legal conclusions that historic properties would not be adversely affected under the NHPA, or "used" for purposes of Section 4(f) of the Department of Transportation Act. Those conclusions, in turn, indicate that no "extraordinary circumstances" existed and the use of a categorical exclusion under NEPA was therefore warranted with no further public outreach required.

The Petitioners have never challenged FAA's underlying noise analysis methodology or results, instead objecting that the FAA should have considered individual noise event measurements or citizen statements about subjective noise experience. But FAA's use of DNL to make these decisions is long-established and routinely upheld by courts, and nothing the Petitioners ever submitted to FAA after the fact suggested that the initial noise analysis was in error. Absent that, Petitioners' challenges to FAA's conclusions under these environmental statutes must fail. Petitioners appear to want additional opportunities for input and influence over the process established by law. But that is

an extra-legal complaint that gives this Court no basis to remand the agency's decision. The petitions for review should be dismissed.

ARGUMENT

I. The petitions for review must be dismissed for failure to identify an "order" that this Court may review.

The sole cause of action identified in either petition for review in these consolidated cases is the judicial review provision of the Federal Aviation Act, 49 U.S.C. § 46110(a). That statute provides, in relevant part:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (. . . or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit . . . *The petition must be filed not later than 60 days after the order is issued.* The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day."

Id (emphasis added). The petitions for review identify FAA's June 1, 2015 letter as the basis for this Court's review, but that letter is not an FAA "order" for purposes of 49 U.S.C. § 46110. Furthermore, Petitioners are too late to challenge the FAA order issued on September 18, 2014,

as the petitions for review were filed months after the sixty-day statute of limitations had expired, and Petitioners have no "reasonable grounds" for their untimeliness.

1. The April 14, 2015 and June 1, 2015 letters are not reviewable "orders."

For an "order" of FAA to be judicially reviewable, it "must possess the quintessential feature of agency decisionmaking suitable for judicial review: finality." *Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006) (citing *Aerosource, Inc. v. Slater*, 142 F.3d 572, 577-78 (3d Cir. 1988) (collecting cases)). And for a decision to be final, it must satisfy two conditions: it must mark the consummation of the agency's decision-making process, and it must be one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citing, *inter alia*, *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)), *as quoted by Village of Bensenville*, 457 F.3d at 68. Both Petitioners identify a June 1, 2015 letter from FAA as the subject of the petitions for review, but that letter has none of the characteristics of finality. The City (but not the

Neighborhood Petitioners) also identify an April 14, 2015, letter that is also not a reviewable final order.

Neither letter contains any of the indicia of finality that the Petitioners attribute to them. (AR H28, H33.) The Petitioners allege that the June 1, 2015 letter marked the consummation of the agency's decision-making process by "making clear that [FAA] would not return to pre-September 18, 2014 routes, perform additional environmental review under NEPA, or reinitiate consultation under the NHPA and Section 4(f)." (City Br. at 5.) The Neighborhood Petitioners allege that they "did not receive notice of FAA's final decision until the June 1 letter was issued." (Neighborhood Br. at 13 n.1.) But none of those topics are even addressed in that letter.

Nowhere does the challenged letter of June 1, 2015 mention the notion of returning to the pre-September 18, 2014, procedures or routes. (AR H33.) FAA had already explained in January 2015 that FAA would not revert to the old procedures, and that position was understood by all involved. *Supra* at 29-31. Instead, the letter speaks positively of the relationship of the various stakeholders and supports specific options for reducing noise impacts at the Airport. (AR H33.) It commits FAA to

consider implementing an adjustment to a particular procedure *in the future*. *Id.* The letter also makes no mention whatsoever of the NHPA, NEPA, or Section 4(f) of the Department of Transportation Act. (AR H33 at 1-2.) It is exclusively forward-looking, addressing possible agency decisions that were yet to be made. The letter is not an "order" for purposes of 49 U.S.C. § 46110 – it contains no statements that could affect the Petitioners' rights or obligations, and makes no statements reflecting the end of any decision-making process.

After FAA sent the June 1, 2015 letter to the City, the City filed a petition for review accompanied by a lengthy letter mere hours later. The explanation now put forth by the Petitioners that they had no idea of FAA's position or how procedures were implemented until receipt of that letter is simply not credible. FAA's procedures were published and implemented, and therefore final, no later than September 18, 2014. FAA made public statements in January 2015 that unequivocally explained the finality of its earlier decision. The letter sent on June 1, 2015 changed nothing – it imposed no legal consequences on Petitioners and could *at most* be read as the beginning of a new agency decision-making process, rather than its final conclusion. If this Court were to

"remand" that letter to FAA, that decision would have no legal consequences for the Petitioners and provide them no benefit, as the letter does not establish any legal consequences in the first place.

If Petitioners wished to challenge the new procedures at the Airport, they were obliged to file a petition for review within sixty days of the date that order was issued. 49 U.S.C. § 46110(a). The Petitioners cannot extend their deadline to challenge that decision simply by repeatedly asking FAA to revisit its decision. This Court has previously rejected that same theory. In *Impro Products, Inc. v. Block*, 722 F.2d 845 (D.C. Cir. 1983), this Court held that a letter sent outside of a statute of limitations requesting "final" reconsideration of an agency action could not itself constitute a date of accrual. "This line of analysis is patently specious." *Id.* at 850. "[A] contrary rule would provide parties with an easy means to circumvent the statute of limitations . . . simply by writing a letter requesting reconsideration." *Id.* This Court held that an untimely challenge under the APA could not be brought on the basis of later post-decisional correspondence about a prior, final decision. The outcome in this case should be exactly the same.

Nor is the April 14, 2015 letter from which the City petitions for review an "order" for purposes of 49 U.S.C. § 46110. That letter, too, speaks optimistically about possible future adjustments to procedures. (AR H28.) It does not state that FAA would not reconsider its prior order (again, because that had already been established months before). The letter discusses some alternatives in detail and invites specific comments from the City, as well as requesting a meeting with "key officials" at the Airport and the City to ensure better mutual understanding about possible future decisions. (AR H28 at 3.) This letter, just like the June 1, 2015 letter, concludes no decision-making process and imposes no legal consequences. It provides no basis for this Court's review. The petitions for review must therefore be dismissed. 49 U.S.C. § 46110(a).

2. Petitioners may not recharacterize their challenge as a request for review of procedures implemented on September 18, 2014.

The final "order" relevant to the new procedures to which the Petitioners object was issued on September 18, 2014. They were published in the *U.S. Terminal Procedures Publication* that day, AR A1,

and could be flown by pilots beginning that day. Publication and implementation must be preceded by compliance with a variety of environmental statutes, and also a variety of safety checks and determinations. *See, e.g.*, FAA Order 8260.26F. The procedures could not have been published or flown in the absence of a final FAA decision.

The entire basis of the Petitioners' challenge is the change in noise impacts related to the implementation of these procedures on September 18, 2014, and not to any actions resulting from the letters sent the following April or June. By September 18, 2014, FAA had made a final decision that marked "the consummation of the agency's decision-making process" regarding that implementation, and determined the "rights or obligations" underlying the Petitioners' challenge. *Bennett*, 520 U.S. at 177-78. The City itself acknowledged shortly after the procedures were implemented that any additional communications from FAA regarding those procedures were "outside the scope" of any applicable federal requirements, AR H16 at 1, suggesting it knew the federal decision-making process had already ended.

But the Petitioners now suggest that FAA's decision-making process was ongoing and continued well into the following summer. The City alleges that "FAA itself kept the process open in Phoenix by repeatedly telling the City that FAA was evaluating changes to the RNAV routes and would address noise concerns." (City Br. at 34.) The City similarly claims that the procedures were not final due to FAA's requests that the City provide additional suggestions for changes. (City Br. at 35.) Not so. The finality of the order issued on September 18, 2014 was never in doubt. The "rights or obligations" of the Petitioners with respect to these procedures were not affected by an invitation for further dialogue about possible future agency decisions.

Any final decision to implement changes to the procedures would entail a *new* order following appropriate review under NEPA, the NHPA, Section 4(f) of the Department of Transportation Act, and all other applicable federal laws. That order would itself be subject to review by this Court if challenged within sixty days after it is issued. 49 U.S.C. § 46110(a). FAA explained this clearly in a letter to the City on January 22, 2015. (AR H20 at 1-2.) The Petitioners' attempt to depict FAA's decision-making process as ongoing, months *after* the decision

had already been finalized and put into effect, ignores not only the relevant law of finality but also the January 22, 2015 letter. Although the Petitioners now seek review of the "FAA's reconsideration of the routes," City Br. at 35, they were informed months prior to filing suit that there was no reconsideration process. (AR H20, H21.) FAA's willingness to consider possibly implementing new procedures in the future does not render its prior procedures uncertain – if anything, it proves the agency's decision-making process for the prior procedures was already complete.

3. FAA's post-implementation review of the new procedures does not make these petitions timely.

The Petitioners also rely on FAA Order 7100.41, which provides the steps (or "phases") the agency will take in implementing RNAV procedures such as those being challenged here. City Br. at 33; Neighborhood Br. at 17. That Order did not take effect until April 2014, and therefore was not relied on by FAA in the development of the procedures at Phoenix Sky Harbor before they were issued in

September 2014. [6] After the new procedures were put into use, FAA applied this Order in engaging in a post-implementation review, but that review did not create an ongoing decision-making process.

In early 2015, FAA assembled a Post-Implementation Working Group as recommended by Order 7100.41, to review the "efficiency, safety, controller workload, [and] capacity," of the airspace around the Airport as a result of the new procedures. This process is the final of five "phases" established by this Order. Order 7100.41 at 2-16 to 2-19. But the City is wrong that this "phase is intended to keep FAA's decisionmaking process *open*." (City Br. at 33.) The Order itself makes this clear.

The phase of the Order 7100.41 process that is relevant to the citizen-suit provision of the Federal Aviation Act, 49 U.S.C. § 46110(a), is the fourth phase, appropriately entitled "Implementation." "This phase . . . ends when the [performance-based navigation] procedures and/or routes are published and implemented." Order 7100.41 at 2-16. Thus, FAA's final *decision* to publish and implement procedures is

[6] This Order may be found at https://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/1023306.

necessarily made *before* the end of this phase. At that point, FAA has completed all prerequisite activities, including required environmental review, and FAA's judicially-reviewable "order," if not previously issued through another mechanism, is officially issued to the public through publication. *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 519 (D.C. Cir. 2011) (reading 49 U.S.C. § 46110(a) "to mean that the filing period begins to run on the date the order is officially made public"). FAA can issue its order any time after making its decision – in this case, issuance occurred with publication simultaneous with implementation. Implementation marked the end of the fourth phase contained in Order 7100.41, and the 60-day statute of limitations in 49 U.S.C. § 46110(a) began to run on that date.

The fifth phase of Order 7100.41, on which the Petitioners rely, is entitled "Post-Implementation Monitoring and Evaluation." Order 7100.41 at 2-16. During this phase, newly-implemented procedures are "observed," and data are collected and analyzed "to ensure that safe and beneficial procedures were developed." *Id.* A study is published "to collect lessons learned" for the future, to be used the next time that FAA develops performance-based navigation procedures. *Id.* at 2-18.

But conducting a study does not retroactively make the procedures in effect non-final, nor is the resulting study itself a final "order" that may be challenged under 49 U.S.C. § 46110. No legal consequences flow from the recommendations and findings of that study process unless and until FAA decides to change the procedures, in which case it would issue a new reviewable order. *Village of Bensenville*, 457 F.3d at 68-69.

4. The Petitioners had no "reasonable grounds" for failure to timely file a challenge to FAA's order.

The Federal Aviation Act provides that a party may challenge an FAA order outside of the 60-day statute of limitations if "there are reasonable grounds for not filing by the 60th day." 49 U.S.C. § 46110(a). But that exception does not apply here. FAA's procedures for publishing and implementing the challenged routes were clear, and the Petitioners cannot claim to have been unaware of FAA's decision during the 60 days following its publication. Furthermore, even if the Petitioners credibly believed that FAA's decision-making process had not concluded in September 2014, FAA explained in January 2015 that its decision was final and would not be revisited, and the Petitioners did not file

suit within 60 days of that explanation. There were no "reasonable grounds" for this failure.

This Court has twice applied the "reasonable grounds" exception, but neither of those cases are analogous to this one. This case is not like *Safe Extensions, Inc. v. FAA*, 509 F.3d 593 (D.C. Cir. 2007). There, in response to industry objections to an FAA Advisory Circular, FAA employees "told industry virtually immediately" that they could "basically ignore" the Circular because its replacement was imminent. 509 F.3d at 603. The petitioners in *Safe Extensions* waited until the publication of the subsequent advisory circular before filing a petition for review, and this Court held that the petition was timely. *Id.*at 604. Here, in contrast, FAA never told these Petitioners that a replacement of the September 18, 2014 procedures was imminent, and certainly did not tell anyone to "basically ignore" those procedures. *Id.* at 603. Instead, FAA explained that it would be willing to consider "possible" or "potential" new procedures, which would require an entirely new implementation process before they could be put into effect. (AR H33; AR H28 at 2.)

Nor is this case similar to *Paralyzed Veterans of America v. Civil Aeronautics Bd.*, 752 F.2d 694 (D.C. Cir. 1985), *rev'd on other grounds*, *United States Dep't of Transp. v. Paralyzed Veterans of America*, 106 S. Ct. 2705 (1986). In that case, the petitioners did not challenge the agency's final rule in time, but did file a petition for review within sixty days of the agency's promulgation of an amended final rule, which this Court held was itself a reviewable "order" under 49 U.S.C. § 46110(a). 752 F.2d at 705 n.82. By waiting until the agency issued a subsequent final "order," the petitioners were able to get judicial review. *Id.* In contrast, the Petitioners here waited too long to challenge the new procedures implemented in September 2014, and there have been no final modifications or amendments by FAA yet that could be the subject of a subsequent challenge.

The Petitioners' repeated statements that FAA "kept the process open," City Br. at 34, by being willing to consider implementing modifications to the procedures is directly contrary to what FAA told the City and the State Historic Preservation Officer in January 2015. *Supra* at 29-31. But even the letters of January 2015 could be considered an "order" of FAA (which this Court need not decide), no

petitions for review were filed within sixty days of that letter. The petitions for review fail to challenge an order of the FAA that this Court may review, are too late to challenge the procedures implemented on September 18, 2014, and must therefore be dismissed.

II. Even if this Court has jurisdiction, the petitions should be denied because FAA complied with all its environmental obligations.

1. FAA fulfilled its consultation requirements under the National Historic Preservation Act.

Section 106 of the NHPA "is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (*per curiam*). The NHPA's implementing regulations provide several steps that an agency must follow in order to ensure that potentially adverse effects on historic properties are considered. A federal agency must first make a reasonable and good faith effort to identify historic properties that are within the area of potential effect. 36 C.F.R. § 800.4(b). Historic properties of concern include those listed on the National Register of Historic Places, or eligible for listing. 36 C.F.R. § 800.4(c). If any effects on historic properties are anticipated,

the agency must document "[a] description of the undertaking's effects on historic properties," 36 C.F.R. § 800.11(e)(4), and a determination of whether the undertaking will have an "adverse effect." *Id.* § 800.11(e)(5). An adverse effect "means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 C.F.R. § 800.16(i).

In reaching its conclusions under the NHPA, a federal agency must consult with the State Historic Preservation Officer that oversees the area potentially affected by the federal undertaking. If the federal agency concludes that there will be no adverse effect on historic properties, the State Historic Preservation Officer "shall have 30 days from receipt to review the finding." 36 C.F.R. § 800.5(c)(1). "[T]he agency official may proceed after the close of the 30 day review period if the [State Historic Preservation Officer or Tribal Historic Preservation Officer] has agreed with the finding or has not provided a response, and no consulting party has objected." *Id.* At that point, the agency must record its finding, and "[i]mplementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. *Id.* § 800.5(d)(1).

As described above, FAA fulfilled its obligations by identifying listed historic properties that were within the area of potential effect, providing this information to the State Historic Preservation Officer, and documenting the reasons why FAA did not anticipate any adverse effects as defined by the regulations implementing the NHPA. *Supra* at 17-20. Although the State Historic Preservation Officer could have requested additional information, 36 C.F.R. § 800.11(a), or disagreed with FAA's finding, 36 C.F.R. § 800.5(c)(2), he did neither. He concurred in the agency's findings, AR B7, and that concurrence satisfied FAA's obligations to consult under NHPA Section 106. 36 C.F.R. §§ 800.5(c)(1), 800.5(d)(1).

a. FAA was not required to separately consult with the City of Phoenix's historic preservation officer.

The City alleges, incorrectly, that FAA was required to consult with the City's own historic preservation officer as part of its compliance with NHPA Section 106. (City Br. at 42-44.)[7] But neither

[7] The Neighborhood Petitioners do not make this argument, noting correctly that FAA must "secure the concurrence of the relevant State Historic Preservation Officer" in order to satisfy NHPA Section 106. (Neighborhood Br. at 30.)

the NHPA nor its implementing regulations require this. When a federal agency considers an action that might require NHPA consultation, it must identify the appropriate State Historic Preservation Officer, and "shall then initiate consultation with the appropriate officer or officers." 36 C.F.R. § 800.3(c). "The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes" such as NEPA and Section 4(f) of the Department of Transportation Act. 36 C.F.R. § 800.2(4).

The State Historic Preservation Officer "reflects the interests of the State and its citizens in the preservation of their cultural heritage." 36 C.F.R. § 800.2(c)(1)(i). That officer "advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking [*sic*] into consideration at all levels of planning and development." *Id.* And in this case, the State Historic Preservation Officer did not advise FAA that any additional action was necessary once he was apprised of the potential noise impacts of FAA's decision. He did not forward FAA's

decision to the City's historic preservation officer or ask FAA to do so. If he had, FAA would have included the City as a consulting party, as the City would be "entitled to participate as a consulting party" in that circumstance. 36 C.F.R. § 800.2(c)(3).

But the regulations clearly provide that if FAA consults with the State Historic Preservation Officer, provides documentation supporting a conclusion that no adverse effects are anticipated, and the State Historic Preservation Officer does not object within 30 days, then FAA's consultation requirements are complete. 36 C.F.R. § 800.5(c)(1). Nothing more is required. Given that FAA's noise modeling indicated no significant noise increases, it structured its NHPA consultation in a manner appropriate to the scale of the undertaking. 36 C.F.R. § 800.2(4).

The City is incorrect that FAA's own guidance provides a more stringent consultation requirement than the regulations of the Advisory Council on Historic Preservation. (City Br. at 43.) FAA's Order 1050.1E plainly states that if "a potential adverse effect to historic properties" will result from an FAA action, then FAA must consult with the State Historic Preservation Officer, the Advisory Council on Historic

Preservation, and a Tribal Historic Preservation Officer if appropriate. (AR C6 at 134-35 ¶ 11.1a.) Consultation with other parties "may also occur" but is not legally required to satisfy Section 106 of the NHPA. *Id.* The FAA performed each step required by 36 C.F.R. § 800.5, compliance with which "fulfills the agency official's responsibilities under [NHPA] section 106 and this part." 36 C.F.R. § 800.5(d)(1).

FAA now has a Consultation Handbook, which was not published until October 2014 (after FAA's final decision at issue in this case). The City suggests that the Handbook also requires FAA to have involved the City as a consulting party, City Br. at 43, but the quoted language does not impose that requirement.[8] The Handbook states that only the State Historic Preservation Officer (or applicable Tribal Historic Preservation Officer) "is an essential consulting party." *Id.* at 11 (citing 36 C.F.R. § 800.2(c)(1)). The Handbook repeats the regulations' statement that if a local government with jurisdiction over the affected area comes forward during the process, AR23b at 18, or submits a written request, *id.* at 11, then the local government is "entitled" to participate. But FAA

[8] In any event, the very first page of this handbook states in bold letters that "[t]he Handbook is not a substitute for legal advice and should not be cited as the source of legal requirements." (AR23b Exh. 13 at 4.)

is not legally required to seek them out, especially when the State Historic Preservation Officer does not suggest doing so and concurs in the agency's findings with no objection and without requesting any additional information.

b. FAA 's findings were supported by substantial evidence.

FAA's compliance with the NHPA is reviewed under the Administrative Procedure Act, and this Court may reverse the agency's decision only if it "is not supported by substantial evidence, or the agency has made a clear error in judgment." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). So long as the agency's decision is supported by substantial evidence, which includes "any evidence it had before it when it made its decision," *id.*, the decision does not violate the APA. *Id.* (citing *Assoc. of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984)). The "substantial evidence" standard is a "highly deferential standard of review" generally, *Hagelin v. Fed. Election Com'n*, 411 F.3d 237, 243 (D.C. Cir. 2011), but especially in the context

of FAA decision-making. "Findings of fact by the [FAA], if supported by substantial evidence, are conclusive." 49 U.S.C. § 46110(c).

Both Petitioners object to FAA's findings, in which the State Historic Preservation Officer concurred, that the noise impacts were not adverse effects as defined by the applicable historic preservation regulations. But FAA's conclusions were based on substantial evidence, documented in the administrative record, and should be upheld.

As described above, after FAA conducted a noise analysis that demonstrated an increase in noise within the 45-60 DNL contour, FAA concluded that the affected properties would not be adversely affected as defined by the NHPA regulations. (AR B2 at 15.) An adverse effect could include noise that would "diminish the integrity of the property's significant historic features." 36 C.F.R. § 800.5(a)(2)(v). FAA had several reasons for its conclusion of no adverse effect. The first, as is discussed further below, is that the affected historic properties were residences notable not for their quiet and solitude but for their architectural features and the role they played in the cultural development of Phoenix. *See infra* at 60-61. These are properties in an urban setting where the "surrounding land use" includes commercial

and industrial activity as well as a major nearby transportation corridor. (AR B2 at 15.) "Furthermore, aircraft have historically flown over these areas." *Id.* The Neighborhood Petitioners allege, with no citation to the record, that this statement is untrue. (Neighborhood Br. at 26.) But the maps provided to the State Historic Preservation Officer of traffic to and from the Airport before implementation of the new procedures show the substantial amount of air traffic already flying over these affected areas. (AR B6 at 8.)

Although the Petitioners object that FAA conducted no "analysis or research to support its conclusion," City Br. at 41, that statement is plainly incorrect, as the FAA performed a noise analysis and provided the results to the State Historic Preservation Officer. That analysis showed no significant increases in noise over any affected area. The Neighborhood Petitioners' request for an "individualized, site-specific analysis of historic properties" is not required by law. (Neighborhood Br. at 32.) FAA's methods for determining noise over areas within particular geographic contours or between points on a grid, using the DNL metric, are entitled to deference by this Court and are not directly

challenged in this case. *Town of Cave Creek,* 325 F.3d at 326 (D.C. Cir. 2003) (citations omitted).

The Petitioners' suggestions that FAA Order 1050.1E requires a different form of noise measurement for these properties is in error. In the section of their briefs challenging FAA's compliance with the NHPA, both Petitioners rely on a section of FAA Order 1050.1E dealing not with the NHPA but with Section 4(f) of the Department of Transportation Act. *See* City Br. at 40, Neighborhood Br. at 32 (both citing AR C6 at 112-114). But even if this paragraph of FAA's Order was applicable to NHPA consultation, it fully supports the approach FAA took in this case. The Petitioners quote selectively and out of context from these pages to suggest that use of the regular Part 150 noise guidelines (which FAA relied on its in Finding of No Adverse Effect under the NHPA) is inappropriate when determining whether noise will have an adverse effect on historic properties. But the Order makes clear that the Part 150 guidelines *are* appropriate in this situation.

The Order states that "FAA may also rely upon Part 150 guidelines to evaluate impacts on historic properties that are in use as

residences." (AR C6 at 113.) The historic neighborhoods at issue in this case are residential. Furthermore, "[i]f architecture is the relevant characteristics [*sic*] of an historic neighborhood, the project-related noise does not substantially impair the characteristics that led to eligibility for or listing on the National Register of Historic Places." *Id.* As is discussed further below, these neighborhoods were listed as historic not because they were quiet but because of their architectural and cultural significance. *Infra* at 65-66.

As Petitioners note, use of the Part 150 noise guidelines may not be sufficient for assessing effects on *some* types of historic properties and noise-sensitive areas. (City Br. at 40-41; Neighborhood Br. at 31-32.) But the examples given in the Order are very different from the historic residences at issue here, and include "national parks, national wildlife refuges, and historic sites including traditional cultural properties." (ARC6 at 113.)[9] One specific example of an historic property "where a quiet setting is a generally recognized purpose and attribute" is an "historic village preserved specifically to convey the atmosphere of

[9] A "traditional cultural property" is a term of art that has not been applied to the registered historic properties at issue in this case.

rural life in an earlier era." *Id.* That description in no way fits the urban neighborhoods and parks within the area of potential effect in Phoenix that are at issue here. Use of the 65 DNL noise threshold to determine whether any effects on historic properties would be "adverse" was appropriate and completely supported by FAA's Order.

c. The NHPA regulations did not require FAA to reinitiate consultation after the new procedures were implemented.

As discussed above, after some residents started filing noise complaints following implementation of the new procedures, the State Historic Preservation Officer wrote a follow-up letter to FAA suggesting that the agency reopen its decision for further consideration. (AR H17.) That letter did not "question the accuracy of the evaluation FAA submitted" during its NHPA consultation, but only noted the existence of complaints from residents of those neighborhoods after the fact. *Id.* at 1. In response, FAA explained that the consultation process had concluded, but that if new "modifications" or "potential adjustments" were made, then FAA would engage in any additional NHPA consultation that might be necessary. (ARH21 at 1.)

Nothing more was required. The Petitioners cite two regulatory provisions for the proposition that FAA was legally obligated to reinitiate its prior NHPA consultation, but neither regulation supports that claim. Neighborhood Br. at 33 (citing 36 C.F.R. §§ 800.5(d)(1), 800.13(b)). The regulations promulgated by the Advisory Council on Historic Preservation only require "reopening" the NHPA Section 106 process in two specific circumstances: 1) "[i]f the agency official will not conduct the undertaking as proposed in the finding," 36 C.F.R. § 800.5(d)(1); or 2) if "historic properties are discovered or unanticipated effects on historic properties" are found after the conclusion of consultation. *Id.* § 800.13(b). Here, FAA did conduct the undertaking as proposed, and no new historic properties were discovered.

Therefore, the NHPA regulations might require additional action by FAA only if "unanticipated effects on historic properties" were discovered. 36 C.F.R. § 800.13(b). But they were not. The Petitioners have not challenged the accuracy of FAA's noise modeling of the impacts. They instead suggest that additional consultation is required because the correctly-modeled increases in noise resulted in a higher number of complaints than anticipated. But FAA's DNL model, and the

Part 150 guidelines applied in its Finding of No Adverse Effect, cannot account for the subjective experience of some individuals. The model is applied nationally in a wide array of settings and therefore uses daily averages and well-established noise thresholds that have been used for decades and repeatedly upheld by the courts. *Town of Cave Creek, Arizona*, 325 F.3d at 326.

After the State Historic Preservation Officer wrote to FAA, the City submitted additional information that it believes required a reconsideration of the NHPA consultation process. (City Br. at 45-46.) But none of this information indicated that FAA's original analysis of potential effects was incorrect. Some of the City's contentions are based on a misunderstanding of FAA's description of the effects in its original letter to the State Historic Preservation Officer. For example, the City alleges that FAA claimed "the affected NHPA properties were subject to the same noise level as a 'commercial area.'" (City Br. at 45.) To the contrary: FAA's letter to the State Historic Preservation Officer explained that the noise increases were not significant because they would *not* reach the level of outdoor noise in a commercial area (comparable to the 65 DNL contour). It explained that the affected

areas were instead within the 45-60 DNL contour, AR B6 at 2, and comparable to the outdoor noise of a "quiet urban daytime" setting. (AR B6 at 11.) In the actual noise analysis, the neighborhoods were represented as "Quiet Suburb" settings, AR B2 at 60, in order to further ensure that any increase in noise was fully recognized and accounted for. Although the City submitted some individual testimony and sporadic noise monitoring data showing that single noise events were higher than that threshold, single noise measurements are not used by FAA to measure noise impacts. None of the submitted information suggested that FAA had in any way miscalculated the weighted average noise impacts in the affected areas.

The City also relies on a letter from the City's historic preservation officer, sent several months after the new procedures were in place. (AR H23b.) But this letter provides no new information that would require FAA to reconsider its conclusions under the NHPA. Although this post-decision description of the neighborhoods points out that many of the historic homes have porches and large windows, the historic designation documents on which the letter is based do not support the claim that quiet was integral to the designation of these

neighborhoods as historic. FAA pored over the thousands of pages submitted alongside this letter when it was sent in early 2015, and found no evidence that undermined its prior conclusions. The neighborhoods were designated as historic because of their architectural styles and the manner in which they reflected different eras and patterns of development. FAA did not find, nor have Petitioners provided, evidence of any affected neighborhoods that had quiet as an attribute that contributed to their eligibility for the National Register of Historic Places.[10]

Nor did the letter provide evidence of any indirect effects that required reconsideration. Both Petitioners suggest that FAA failed to consider statements from some residents that they were interested in replacing the historic windows in their homes. Neighborhood Br. at 32-33; City Br. at 48. But these actions are not an indirect effect of FAA's decision for purposes of the NHPA.

[10] ARH23b, Exh. 22, originally contained the historic designation documents for the over three thousand individual properties broadly discussed in the letter from the City Historic Preservation Officer. In the supplemental material accompanying the administrative record this exhibit appears as a page providing a URL, but that URL no longer appears to work. FAA has retained a hard copy of these documents.

The regulations state that "[a]n adverse effect is found when *an undertaking* may alter, directly or indirectly, any of the characteristics of a historic property." 36 C.F.R. § 800.5(a)(1). But a replaced window is not the result of FAA's undertaking (implementation of the new procedures), but rather the result of the homeowners' intervening decision. Notably, neither Petitioner cites a single case that suggests that the NHPA requires consideration of intervening third-party actions as if they were a direct or indirect effect of the agency's own undertaking. Here, the replacement of windows was not "reasonably foreseeable," 36 C.F.R. § 800.5(a)(1), as FAA's noise analysis did not indicate any increases above the well-established noise thresholds. FAA's own land-use compatibility standards, which are used to determine eligibility for noise mitigation under a different FAA program, would not consider residences under the 65-DNL threshold eligible for window replacement.[11] FAA had no reason to consider these

[11] *See, e.g.*, Advisory Circular 150/5000-9A at 1-3, available at http://www.faa.gov/airports/resources/advisory_circulars/index.cfm/go/document.information/documentNumber/150_5000-9A (last visited July 20, 2016).

homeowners' actions as indirect effects under the NHPA. Further NHPA consultation was therefore not required.

2. FAA's decision did not "use" any properties in violation of Section 4(f) of the Department of Transportation Act.

The Department of Transportation Act prohibits the Secretary of Transportation from approving any project that will "use" an historic site listed on the National Register of Historic Places or a public park without first concluding that there is no "prudent and feasible alternative" to use of that land, and then minimizing any resulting harm to the historic site. 49 U.S.C. § 303(c)(1)-(2). "When there is no physical taking," as is the case here, "FAA must determine if the impacts would substantially impair the 4(f) resource." (AR C6 at 112.) "Substantial impairment occurs only when the activities, features, or attributes of the resource that contribute to its significance or enjoyment are substantially diminished." *Id.* "With respect to aircraft noise, for example, the noise must be at levels high enough to have negative consequences of a substantial nature that amount to a taking of a park or portion of a park for transportation purposes." *Id.*

As discussed above, *supra* at 60-61, FAA's Order 1050.1E expressly approves the use of the noise thresholds from the Part 150 regulations for determining compliance with Section 4(f), when the historic properties at issue "are in use as residences." (AR C6 at 113.) FAA complied with its own Order when it used these same guidelines to evaluate potential impacts on municipal parks in Phoenix, as the Order only suggests using an alternative methodology for "national parks" or "national wildlife refuges." *Id.* Therefore, it is irrelevant whether the City is correct that FAA "did not attempt to determine the actual pre-RNAV noise levels of the historic properties and parks" before evaluating them for purposes of Section 4(f). (City Br. at 50-51.) FAA followed its own Order in applying the DNL metric, AR C6 at 112, and used the appropriate noise model to determine that the proposal would have no significant impact on any of these properties as determined by FAA regulations. *See* AR B2 at 15.

FAA also noted that "these parks already experience overflights" and "none of these parks have quiet as an expected attribute." *Id.* Notably, the City does not directly dispute the accuracy of either of these statements. Instead, it asks that FAA evaluate each park on a

case by case basis, providing an anecdote about the importance of outdoor events to Encanto Park. (City Br. at 52.) But Order 1050.1E, which lays out exactly the same procedures that the City insisted should be followed for purposes of FAA's NHPA compliance, makes clear that a case-by-case analysis of subjective noise experiences is not the appropriate methodology for a Section 4(f) determination based on aircraft noise. Rather, except for especially noise-sensitive areas of the type not at issue here, FAA uses approved computer models to determine whether areas at or above the 65 DNL threshold will experience an increase in noise of 1.5 DNL or more. That level of an increase was not predicted here, and the accuracy of that prediction is not challenged. FAA was not obliged to consider the City's individual noise monitoring data that it later sent to FAA, City Br. at 52-53, nor do FAA regulations or Order 1050.1E provide any meaningful way to incorporate this type of sporadic, anecdotal information into a noise analysis that could serve as the basis of a legal conclusion.

The Petitioners also allege that the FAA violated Section 4(f) by failing to consult with the City about potential noise impacts on City parks. (City Br. at 49.) But this is a *post hoc* complaint unsupported by

the record. The City has previously acknowledged that City Aviation Department staff participated in the development of the procedures, but now claims years later that those City employees "did not have any authority to speak for the City regarding the substance of proposed routes or the process by which they would and should be evaluated." (AR H26a at 1.) The City never told FAA that at the time, and the FAA cannot be held to be arbitrary and capricious in consulting with the City's then-designated subject-matter expert on aviation on a matter regarding aircraft noise.

3. FAA did not violate FAA Order 7100.41.

The City alleges that FAA failed to follow the procedures established in FAA Order 7100.41, requiring analysis by a Working Group of the implementation of new RNAV procedures, and that this failure violated the APA. (City Br. at 53.) But the FAA *did* comply with this Order, ensuring that the City's designated representatives had "input on procedure and route design, including any potential operational or environmental impacts to the airport and surrounding

communities." Order 7100.41 at A-5. The City was afforded all the opportunity to participate in this process that FAA guidance requires.

After the procedures were implemented, FAA put together a working group of subject-matter experts to provide a post-implementation analysis of the procedures. Order 7100.41 requires post-implementation review of new procedures from the standpoint of "efficiency, safety, controller workload, [and] capacity," but not noise. Order 7100.41 at 2-18. The City alleges incorrectly that FAA "did not involve the City" in this process. (City Br. at 24.)

Senator Jeff Flake asked FAA to designate former Congressman Ed Pastor and Assistant Aviation Director Chad Makovsky as the City's representatives for this working group. (Letter from Huerta to Flake (Mar. 2, 2015), FAA Mot. to Supplement Admin. R., Exh. 1.) And FAA did so. Preliminary meetings with these representatives focused the efforts of the working group on the northern and western departures, as these were the areas of most interest to the City. (Letter from Huerta to Zuercher (Feb. 25, 2015), FAA Mot. to Supplement Admin. R., Exh. 2.) Once the initial computer models were run, the raw data was given to the City's representatives, before the working group reconvened to

discuss the data. (AR H27.) Those representatives offered no input but said they would forward the information to the City Council, and the FAA provided a detailed summary of possible modifications that the working group's efforts suggested might benefit the City. (AR H28.) That same letter proposed a number of strategies on which the City would have to take the lead and requested the City establish a formal process for future information exchanges. (AR H28 at 3-4.) Only at this stage did the City respond by objecting to the scope of the working group's efforts (despite that scope being defined by Order 7100.41, which the City now claims FAA was legally obligated to follow). (AR H30.)

The City was afforded an opportunity to participate in this process. The Order's requirement that the Airport Authority be a "principal participant" with the opportunity for "input" was more than satisfied where the Airport Authority is an instrumentality of the City government and the City designated specific representatives who were provided full access to all information and repeatedly involved. FAA committed no violation of its own Order here.

4. FAA reasonably concluded that its decision was categorically excluded from further NEPA review.

Under FAA Order 1050.1E, new or revised procedures that routinely route aircraft over noise sensitive areas at less than 3,000 feet above ground level would typically have required an Environmental Assessment. (AR C19 at 2.) But in the FAA Modernization Act of 2012, Congress authorized FAA to presume (except for in extraordinary circumstances) that RNAV procedures are ". . . covered by a categorical exclusion (as defined in section 1508.4 of title 40, Code of Federal Regulations)." (AR 13C at § 213(c)(1).) Later that year, FAA issued guidance implementing this Congressionally-established presumption, explaining that proposed RNAV procedures over noise-sensitive areas at less than 3,000 feet are presumed to be categorically excluded (so that no Environmental Assessment is required). (AR C19 at 2.) This presumption is subject to the same requirements as all other categorical exclusions, including the caveat that "extraordinary circumstances" might exist that would require an Environmental Assessment. *Id.*

"Extraordinary circumstances exist when a proposed action involves one or more of the circumstances described under paragraph 304 of Order 1050.1E and may have a significant impact." (AR C19 at

2.) "If extraordinary circumstances do not exist, FAA's environmental review will be completed with a documented [categorical exclusion] that includes the results of screening and any other reviews that were performed." *Id.* In this case, FAA performed the required screening for potentially significant noise impacts, found none, and documented the reasons for its conclusions that no extraordinary circumstances existed. (AR B2.)

The Neighborhood Petitioners allege that FAA was required to use one of the specific categorical exclusions described in paragraphs 307 to 312 of FAA Order 1050.1E, Neighborhood Br. at 22-23, but that ignores FAA's later guidance that is specific to the FAA Modernization Act of 2012 and that modified or amended FAA Order 1050.1E. (AR C19.) That guidance went into effect nearly two years before FAA implemented the procedures challenged in this case and was properly followed here. FAA reasonably concluded that no extraordinary circumstances prevented application of that categorical exclusion here, and the administrative record fully supports that conclusion.

a. The procedures would not have a significant impact on designated historic properties.

The City alleges that the "FAA had no basis to conclude" that the proposed routes would not have an adverse effect on properties that required additional consideration under either the NHPA or Section 4(f) of the Department of Transportation Act. (City Br. at 54.) This argument simply repeats those made with respect to FAA's compliance with those statutes, and the same responses apply. FAA *did* "obtain necessary relevant information," City Br. at 55, which included: 1) identification of all potentially affected properties, and 2) a noise analysis demonstrating precisely how those properties would be affected. The Petitioners have not challenged the accuracy of either of these elements of FAA's decision-making process, and as such cannot demonstrate that FAA overlooked "extraordinary circumstances" described by paragraphs 304a or 304b of Order 1050.1E. (ARC6 at 32.)

Furthermore, this Court's review of FAA's noise analysis methodology and its application of the results is highly deferential, *Safe Extensions*, 509 F.3d at 604, and the agency's findings are "conclusive" so long as they are supported by substantial evidence in the administrative record. 49 U.S.C. § 46110. As described above, the record

fully explains the basis for FAA's findings, and the resulting decision should therefore be upheld.

b. FAA was not legally required to provide for public comment on its categorical exclusion decision.

The Neighborhood Petitioners allege that FAA's Order regarding compliance with NEPA required it to provide for "public notice and outreach" prior to deciding whether a categorical exclusion applies. (Neighborhood Br. at 22.) FAA was under no such obligation.

The Neighborhood Petitioners quote selectively from FAA Order 1050.1E. *Id.* (citing AR C6 at 23). But reading the "Public Involvement" section of this Order in full makes clear that the agency's legal obligations to conduct public outreach and solicit public comment apply only when preparing an Environmental Assessment or Environmental Impact Statement. (ARC6 at 22-23.) To be sure, the Order encourages public involvement at the outset of any NEPA process, but "[t]he extent of early coordination will depend on the complexity, sensitivity, degree of Federal involvement, and anticipated environmental impacts of the proposed action." (ARC6 at 23.)

Here, FAA anticipated no significant environmental impacts. "By definition, [categorical exclusions] are categories of actions that have been predetermined not to involve significant environmental impacts." *Nat'l Trust for Historic Pres. in U.S. v. Dole*, 828 F.2d 776, 781 (D.C. Cir. 1987). Congress, in establishing the presumption of categorical exclusion at issue here, provided for no additional public comment process. For this Court to require public comment at each application of a categorical exclusion would defeat the very purpose of a categorical exclusion to streamline the NEPA process and deemphasize insignificant effects. 40 C.F.R. § 1500.4(p). That is especially true in *this* case, where the categorical exclusion was established alongside express statutory statements of purpose encouraging "coordinated and expedited review" of these very types of procedures. AR 13C at § 213(c)(1),

FAA discussed the procedures and the application of a categorical exclusion with both the Airport Authority and the City's Department of Aviation, and received no indication from either that any public concern should be expected. *Supra* at 10-14. Although FAA's Order provides that public comments "should be considered, as appropriate," when

determining whether environmental impacts will be significant, it does not require FAA to solicit public comment when no significant impacts are anticipated. (AR C6 at 23.)

"Public involvement is required when FAA prepares an [Environmental Impact Statement]." ARC6 at 22 (citing 40 C.F.R. § 1501.4(d)). And "[p]ublic involvement must be provided for, to the extent practicable, while an [Environmental Assessment] is being drafted." *Id.* (citing 40 C.F.R. § 1501.4(b)). *See Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 519-20 (D.C. Cir. 2010) (affirming agency's compliance with NEPA when it published a final decision and Environmental Assessment without first releasing NEPA documents for public notice and comment). But "there is no standard approach to public scoping," and so FAA "should tailor public scoping processes to match the complexity of the proposal." *Id.* That is what the agency did here, and the record indicates that it had no reason to believe that allowing for additional public input was necessary before the new procedures were implemented. Neither the NEPA regulations nor Order 1050.1E required more.

c. No controversy precluded use of the categorical exclusion.

The City also contends, Br. at 55, that the categorical exclusion could not have been applied because the procedures would have "[e]ffects on the quality of the human environment that are likely to be highly controversial." (ARC6 at 33.) But extraordinary circumstances do not exist every time that an agency decision is unpopular. Rather, "[t]he term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Town of Cave Creek*, 325 F.3d at 331 (quotation and alterations omitted). The City has not demonstrated *any* dispute about the "size, nature, or effect" of the proposed procedures, as it has not challenged the validity of FAA's noise analysis.

Instead, the City simply alleges that FAA's Initial Environmental Review document does not contain a sufficient explanation for the agency's conclusions on this point. (City Br. at 56.) But the administrative record makes the basis of FAA's decision clear. FAA confirmed that no significant noise impacts were anticipated at all, received the concurrence of the State Historic Preservation Officer who expressed no concerns, and then further discussed this finding with the

Airport Authority that also expressed no concerns. The agency's conclusion on this point was reasonable and is readily discernible from the administrative record.

The City also suggests that because FAA has prepared Environmental Assessments for other projects at other airports, it should have done so here. (City Br. at 57.) Many of the projects to which the City refers were multi-airport decisions (known as a "MetroPlex") that originated through a different process within the agency and are approached in a different manner. (ARH23a at 29-30.) But the issue for this Court is not whether the City would have been better served if FAA had discretionarily decided to hold public hearings and seek additional public input. The issue for this Court is whether FAA was under any legal requirement to do so, and the City has not identified any.

Each airport is different and the potential effects of any changes at those airports will differ as well. It is not the case that FAA has such a clearly-established "practice" at other airports of preparing an Environmental Assessment that it was required to do so here or risk violating the APA. *Cf.* City Br. at 58 (citing *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014)). FAA complied with applicable

laws and its own procedures as established by FAA Orders, and cannot therefore be held to have violated NEPA in any way simply because it reached a different conclusion in different circumstances.

d. FAA was not required to reconsider its original conclusions.

The Petitioners allege that FAA violated NEPA when it failed to "reevalute" its original conclusion that these procedures were categorically excluded. City Br. at 58; Neighborhood Br. at 29. But again, the Petitioners do not identify any specific statutory or regulatory requirement with which FAA failed to comply. The two cases cited by the City address the agency's *initial* decision-making process and consideration of potential environmental effects. (City Br. at 59.) And although NEPA regulations require supplementation of a draft or final environmental impact statement in some circumstances, 40 C.F.R. § 1502.9(c), they contain no comparable requirement for actions that are categorically excluded from NEPA.

But it is also not true that the City "presented the FAA with evidence demonstrating that the FAA's assumptions were incorrect." (City Br. at 59.) No party has ever presented any evidence to the FAA

demonstrating that the noise impacts from the new procedures would cause noise impacts in any location in Phoenix above the thresholds of concern established by the Part 150 Guidelines. The Petitioners provided evidence that many residents were unhappy, but that is not a basis for reconsidering the factual findings that led to FAA's conclusions that no impacts were significant.[12] The FAA did solicit additional information and tried to meet with the City to learn more, but nothing it learned revealed inaccuracies in the agency's initial legal findings. The agency's conclusions were not arbitrary and capricious, are supported by the administrative record, and should be upheld.

CONCLUSION

Because these petitions for review do not identify any order reviewable under 49 U.S.C. § 46110(a), this Court lacks jurisdiction and

[12] The Petitioners quote out of context a statement by FAA Regional Administrator Glen Martin to the City Council to suggest that FAA has "admitted" an error in its assessment of impacts. (City Br. at 59.) The Regional Administrator plainly was not using "significant" as a term of art for purposes of complying with federal environmental statutes, but instead was making the observation that after-the-fact complaints had been more numerous than expected.

must dismiss the petitions. In the alternative, the petitions for review should be denied on their merits for the foregoing reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief on all counsel of record by use of the DC Circuit's CM/ECF system on July 21, 2016.

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