ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-1366, 16-1377, 16-1378,
17-1010, 17-1029 (consolidated)

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

BENEDICT HILLS ESTATES ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents

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

PETITIONERS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES, INTERVENORS AND AMICI

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

2. Respondents – Federal Aviation Administration, Michael P. Huerta, U.S. Department of Transportation, Anthony Foxx

3. Intervenor - None

4. Amici – None

B. RULING UNDER REVIEW

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

C. RELATED CASES

None.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

FRAP 26.1, 28(a)(1); Cir. R. 26.1; 28(a)(1)(A)

1. Petitioner City of Culver City is a governmental entity that is not publicly held and does not have a parent organization.

2. Petitioner Santa Monica Canyon Civic Association is a California nonprofit corporation that is not publicly held and does not have a parent organization.

3. Petitioner Donald Vaughn is an individual.

4. Petitioner Stephen Murray is an individual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

1050.1F Desk Reference	Federal Aviation Administration, Office of the Environment and Energy, *1050.1F Desk Reference*, July 2015
AB 32	California Global Warming Solutions Act of 2006
AEDT	Aviation Environmental Design Tool
AGL	Above Ground Level
APA	Administrative Procedures Act, 5 U.S.C. § 500, *et seq.*
AR	Administrative Record
CAA	Clean Air Act, 42 U.S.C. § 7401, *et seq.*
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act, Cal. Pub. Res. Code § 21000, *et seq.*
CEQ Guidelines	40 C.F.R. Parts 1500-1508
CNEL	Cumulative Noise Equivalency Level
EA	Environmental Assessment
EIR	Environmental Impact Report
EIS	Environmental Impact Statement

EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAA Primer	*Aviation Emissions, Impacts & Mitigation: A Primer*, January 2015
FAA Act	Federal Aviation Act, 49 U.S.C. § 40101, *et seq.*
FEA	Final Environmental Assessment
FONSI	Finding of No Significant Impact
GHG	Greenhouse Gas
JA	Joint Appendix
LAX	Los Angeles International Airport
DNL	Day-Night Sound Level
NAAQS	National Ambient Air Quality Standards
NAS	National Airspace System
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*
NextGen	Next Generation Air Transportation System
NIRS	Noise Integrated Routing System
Order 1050.1E	U.S. Department of Transportation, Federal Aviation Administration, Order 1050.1E, Change 1, *Environmental Impacts: Policies and Procedures*, March 20, 2006

Order 1050.1F	U.S. Department of Transportation, Federal Aviation Administration, Order 1050.1F, *Environmental Impacts: Policies and Procedures*, July 16, 2015
Order 5050.4B	U.S. Department of Transportation, Federal Aviation Administration, Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions, April 28, 2006
PDARS	Performance Data Analysis and Reporting System
Project	Southern California Metroplex Project
PTC Rule	*Federal Presumed to Conform Actions Under General Conformity*, 72 Fed. Reg. 41565-580 (July 30, 2007)
Revised Draft Guidance	*Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects on Climate Change in NEPA Reviews*; 79 Fed. Reg. 77802-77831, December 24, 2014
RNAV	Area Navigation
RNP	Required Navigation Performance
ROD	Record of Decision
SCAQMP	Southern California Air Quality Management Plan
SIP	State Implementation Plan

SMCCA	Santa Monica Canyon Civic Association
SMO	Santa Monica Airport
SoCal Metroplex	Southern California Metroplex Project
SPAS	Specific Plan Amendment Study
Vision 100	*Vision 100 – Century of Aviation Reauthorization Act of 2003*, Pub.L. No. 108-176, December 12, 2003

JURISDICTION

This Court has jurisdiction under the Federal Aviation Act, which provides for judicial review of Federal Aviation Administration ("FAA") decision-making "by filing a petition for review in the United States Court of Appeals for the District of Columbia." 49 U.S.C. § 46110(a). Petitions for review must be filed within 60 days of FAA's "final order" unless there are reasonable grounds for not filing by the 60th day. *Id.*

These consolidated Petitions challenge the "Finding of No Significant Impact (FONSI) and Record of Decision (ROD) For the Southern California Metroplex Project (SoCal Metroplex) August 2016" [AR 1-A-1; JA ____] ("SoCal Metroplex" or "Project"), as issued by FAA on August 31, 2016. "This FONSI/ROD constitutes a final order of the FAA Administrator and is subject to exclusive judicial review under 49 U.S.C. § 46110 by the U.S. Circuit Court of Appeals …" FONSI/ROD, p. 16 [AR 1-A-1 at 16; JA ____]. For purposes of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), and the Administrative Procedures Act, 5 U.S.C. § 500, *et seq.* ("APA"), the ROD constitutes final agency action. All consolidated Petitions were filed

within 60 days following issuance of the ROD, as required by 49 U.S.C. § 46110(a).

ISSUES PRESENTED FOR REVIEW

1. Whether deference to FAA's technical determinations and regulatory interpretations is inappropriate where FAA's conclusions are in violation of both NEPA and its own regulations.

2. Whether FAA acted arbitrarily and capriciously by defying its own regulations and performing a noise analysis for the Project using an outdated and rejected model, a disfavored metric, and inaccurate flight paths.

3. Whether FAA acted arbitrarily and capriciously by invoking an inapplicable "Presumption of Conformity" with the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA") [AR 9-A-7], and thereby failing to perform the required evaluation of the Project's air quality impacts.

4. Whether FAA acted arbitrarily and capriciously by entirely failing to analyze the Project's cumulative air quality and noise impacts.

5. Whether FAA acted arbitrarily and capriciously by failing to consider Congress' intent to consider the design of flight routes that reduce noise and emissions in the NextGen program.

6. Whether FAA acted arbitrarily and capriciously by improperly narrowing its Purpose and Need without including the Congressionally-articulated goal of designing flight routes that reduce noise and emissions pollution.

7. Whether FAA acted arbitrarily and capriciously by failing to consider relevant alternatives to the SoCal Metroplex Project that would reduce noise and emissions pollution in addition to enhancing safety and efficiency of the Southern California airspace.

8. Whether FAA acted arbitrarily and capriciously by failing to analyze the Project's impacts on Greenhouse Gas ("GHG") emissions.

9. Whether FAA's arbitrary and capricious actions have resulted in prejudice to Petitioners.

STATEMENT OF THE CASE

A. Legal Framework

NEPA requires federal agencies to identify, evaluate, and disclose to the public the environmental impacts of proposed actions and to consider reasonable alternatives thereto. See 42 U.S.C. § 4332(2)(C), (E); 40 C.F.R. Parts 1500-1508 ("CEQ Guidelines"). Agencies must fully comply with NEPA before taking any action that could have an adverse

environmental impact or limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1.

Under NEPA, proposed actions with significant environmental effects must be evaluated in a detailed, comprehensive Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C). Actions with environmental effects that are less than significant (and actions whose effects are not fully known) are evaluated in a more concise document known as an Environmental Assessment ("EA"). 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1501.3; 40 C.F.R. § 1508.9. In limited circumstances, an agency may proceed without an EIS or an EA if its proposed action falls within a defined Categorical Exclusion — a category of actions which have been found, by properly-adopted procedures, to present no possibility of a significant environmental impact. See 40 C.F.R. § 1508.4.

The SoCal Metroplex Project is part of the FAA's Next Generation Air Transportation System ("NextGen"). In 2003, Congress enacted the *Vision 100 – Century of Aviation Reauthorization Act of 2003*, Pub.L. No. 108-176, December 12, 2003 ("Vision 100"), which defined high-level goals, objectives, and requirements to transform the air transportation

system. Included in Vision 100 were congressional directives that NextGen was to achieve. Requiring the FAA to "take into consideration, to the greatest extent practicable, design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents" is one of those directives. Vision 100, § 709(c)(7) [Addendum A, p. 82]. Since the "Metroplex Initiative," of which SoCal Metroplex is a part, is the primary vehicle through which FAA seeks to design new approach and departure flight paths, the FAA's SoCal Metroplex must be viewed in the context of the Vision 100 directives.

B. Procedural History

On March 21, 2012, FAA mandated the use of new proprietary software, the Aviation Environmental Design Tool ("AEDT"), that employs a more advanced analytical model for all noise and fuel burn analyses. FAA has explained that AEDT was selected "to replace NIRS as the required tool to analyze noise and fuel burn for air traffic airspace and procedure actions." 77 Fed. Reg. 18297-18298, *Air Traffic Noise, Fuel Burn, and Emissions Modeling Using the Aviation Environmental Design Tool Version 2a*, March 27, 2012 [Addendum A,

p. 56];[1] *see also* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, *Subject-Guidance on Using AEDT 2a to Conduct Environmental Modeling for FAA Air Traffic and Procedure Actions*, March 21, 2012 [AR 9-A-13; JA ____] ["AEDT 2a replaces NIRS, and is now the required FAA NEPA compliance tool for modeling aircraft noise, as well as fuel burn and emissions, for air traffic airspace and procedure actions that meet one or more of the above-quoted criteria."].

FAA's policy change was published in the Federal Register on March 27, 2012, stating:

> This document provides a statement of FAA policy concerning the required use of the Aviation Environmental Design Tool version 2a (AEDT 2a) to analyze noise, fuel burn, and emissions for FAA air traffic airspace and procedure actions where the study area is larger than the immediate vicinity of an airport, incorporates more than one airport, or includes actions above 3,000 feet above ground level (AGL). The policy statement is intended to ensure consistency and quality of analysis performed to assess noise, fuel burn, and emissions impacts of such actions under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 United States Code (U.S.C.) §§ 4321 et seq.

[1] Addendum A referencing pertinent statutes, regulations, and other authorities is filed concurrently herewith.

77 Fed. Reg. 18297-18298, *Air Traffic Noise, Fuel Burn, and Emissions Modeling Using the Aviation Environmental Design Tool Version 2a*, March 27, 2012 [Addendum A, p. 56].

Beginning on December 1, 2012, FAA collected data for 365 days on 1,242,614 flights in Southern California using FAA's Performance Data Analysis and Reporting System ("PDARS"). FEA at p. 4-7 [AR 1-B-5 at 7; JA ____]. According to FAA:

> The PDARS data provided tracks for each flight that occurred from December 1, 2012 through November 30, 2013. The FAA used the data to define the AAD track locations and use representing a typical flow of traffic, as well as the typical climb and descent patterns that occur along each flow. The FAA analyzed the tracks using proprietary software. All the trajectories were "bundled" into a set of tracks representing a flow. The flows comprise of all the typical flight routings within the General Study Area for an AAD. NIRS tracks are then developed based on the group of radar tracks representing each flow.

FEA at p. 4-7 [AR 1-B-5 at 7; JA ____].

FAA was collecting the data to prepare for implementation of NextGen, which is FAA's plan to modernize the National Airspace System ("NAS") through 2025. *See* FONSI/ROD at p. 2 [AR 1-A-1 at 2; JA ____], *see also, e.g.*, Vision 100, § 709(c) [Addendum A, p. 82]. To achieve NextGen goals, FAA is implementing new Area Navigation

("RNAV") and Required Navigation Performance ("RNP") air traffic routes and instrument procedures, which consolidate flight paths on arrival and departure from airports, ostensibly increasing efficiency by allowing additional aircraft to arrive and depart within the same period of time. FEA, § 2.2, p. 2-15 [AR 1-B-3 at 15; JA ____]; FEA, Appendix F, p. F-10 [AR 1-B-12 at 16; JA ____].

After November 30, 2013, FAA began its environmental analysis using the PDARS data to analyze potential impacts to noise, fuel burn, and emissions. *See* FEA at p. 4-1 [AR 1-B-5 at 1; JA ____] ["December 1, 2012 through November 30, 2013" was selected for the noise analysis because it "was the most recent year of data available."]. Critically, FAA did not use the AEDT model that had been mandated on March 21, 2012. Instead, FAA input the PDARS data into the obsolete Noise Integrated Routing System ("NIRS") software. FEA at p. 4-7 [AR 1-B-5 at 7; JA ____].

On January 16, 2014, FAA distributed notice of intent to prepare an EA for the SoCal Metroplex Project to 282 federal, state, regional, and local officials as well as to 30 tribes. *See* FEA at p. 2-18 [AR 1-B-3 at 18; JA ____].

On June 10, 2015, FAA released its Draft EA. Due to the flood of comments received regarding the inadequacy of the Draft EA, the 30 day public comment period was extended several times, resulting in a total public comment period of 120 days. *See* FEA at p. 2-18 [AR 1-B-3 at 18; JA ____]. FAA received comments from private citizens and groups, elected officials, municipalities, and local, State, and Federal agencies. In total, 4,095 individual substantive comments were included in the 2,754 unique comment letters and form letters received on the Draft EA. *See* FEA at p. 2-19 [AR 1-B-3 at 19; JA ____]. Petitioners in this action submitted comments (and supplemental comments) during the relevant public comment period. [AR 6-A-1 at 1534-1541; JA ____], [AR 6-A-1 at 3960-3963; JA ____] Petitioners' comment letters raised serious concerns regarding the inadequacy of FAA's Draft EA, including comments covering all of the arguments set forth in this Petition. [AR 6-A-1 at 1534-1541; JA ____], [AR 6-A-1 at 3960-3963; JA ____].

On August 31, 2016, FAA released its FONSI/ROD and the Final EA, which suffered from the same inadequacies that had plagued the

Draft EA (notwithstanding the thousands of comments targeting the Draft EA).

On August 25, 2015, one week before comments were due on the EA, FAA published the TARGETS Distribution Package, FEA, Appendix F, Volume II, p. F-817-819 [AR 1-B-13 at 65-67; JA ____] in response to numerous comments that the EA did not contain any indication of the specific flight paths anticipated to be created by the Project, at, among other airports, LAX. As a result, FAA extended the original comment period from September 8 to October 8, 2016. Petitioner Culver City filed additional comments on the EA on October 8, 2016. [AR 6-A-1 at 3960-3963; JA ____].

Petitioners timely filed these consolidated petitions challenging FAA's FONSI/ROD as an arbitrary and capricious agency action.

SUMMARY OF ARGUMENT

This case arises from the unanalyzed and undisclosed impacts of FAA's redesign of the airspace over tens of thousands of square miles in the Southern California region (including 760 historic resources and 60 tribal properties), and millions of inhabitants, and FAA's stubborn refusal to take into account the environmental impacts of the

realignment of aircraft flight tracks approaching and departing numerous airports throughout Southern California, despite repeated requests and admonitions from parties affected by the Project, and despite the fact that these changes consolidate arrival and departure flight paths over areas not previously overflown, thereby affecting hundreds of thousands of additional residential, commercial and open space properties.

On March 21, 2012, FAA mandated the use of the new and improved AEDT model for analysis of noise and air quality impacts. Instead of adhering to its own regulations governing the analysis of aircraft noise, and mandating use of the AEDT model, which is significantly more accurate in the disclosure of noise impacts than its predecessor, the NIRS model; instead of complying with either its own rules governing the analysis of air quality impacts, or those of the Environmental Protection Agency ("EPA"), instead choosing a Presumption of Conformity with the requirements of the CAA in a region in severe nonattainment with the National Ambient Air Quality Standards ("NAAQS") for ozone and nonattainment for particulate matter; and, instead of complying with the unequivocal requirements of

NEPA, to take into account in its noise, air quality and other analyses, the impacts of the Project when combined with "past, present, and reasonably foreseeable future projects," FAA figuratively thumbed its nose at NEPA and its own regulatory requirements, and thus abused its discretion, by:

(1) defying its own regulations and thereby substantially understating the noise and air quality impacts of the Project, by, among other notable omissions, using the outdated NIRS model that FAA had itself rejected in March 2012, instead of the currently required AEDT model;

(2) failing and refusing to perform any quantification of the Project's air quality impacts, and instead relying on a Presumption of Conformity, even where the EA reveals numerous procedures on arrival and departure that will take place below the 3,000 foot "mixing height;" and a reduction in "efficiency" of operations caused by the acknowledged increase in fuel consumption caused by the Project;

(3) failing and refusing to include in its purported "cumulative impact" analysis the numerous "past, present, and reasonably foreseeable" future projects (including, but not limited to, the runway

realignments and extension project approved five years ago at LAX in the LAX Specific Plan Amendment Study ("SPAS") Final EIR [Environmental Impact Report], January 2013, § 2.4, Cumulative Impacts of the LAWA Staff-Recommended Alternative,[2] [RJN, Exhibit A], which when taken together with the Project's impacts materially increase the impacts of the Project on affected populations;

(4) failing and refusing to analyze the GHG emissions of the Project in defiance of California law and the then-applicable guidance for federal agencies in the evaluation of GHG impacts. And FAA has similarly failed to provide the requisite "explanation for its departure from established precedent" in favor of the simple, conclusory statement of "no impact" rejected by this Court. *Jicarilla Apache Nation v. United States DOI*, 613 F.3d 1112, 1119 (D.C. Cir. 2010); and

(5) In the final analysis, failing and refusing to honor its statutory mandate to balance the public interest in reduction of noise and emissions impacts in the implementation of the SoCal Metroplex Project with its benefit of increased operational efficiency.

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[2] An EIR is the California state law equivalent of NEPA. *See* Cal. Pub. Res. Code § 21000, *et seq.*

These "sins" of omission seriously prejudice Petitioners. While Petitioners noted the absence of the required analyses, and raised the issues during the administrative process below, FAA has never since remedied these deficiencies by fully and accurately informing the public of the scope and degree of the SoCal Metroplex Project's impacts, or allowed affected parties to comment on those impacts, or given them any opportunity to weigh in on the possibilities of mitigation.

Consequently, Petitioners have sufficiently established the requisite "substantial probability" that local conditions will be adversely affected, and, thus, bring harm to Petitioners and thousands, if not millions of others similarly situated.

In summary, Petitioners have provided substantial evidence that FAA abused its discretion in the analysis, and acted in an arbitrary and capricious fashion in the approval, of the SoCal Metroplex EA, and the FONSI/ROD for the Project. This Court is, therefore, fully justified in granting the Petition for Review in this case.

STANDING

Petitioners include a public entity, Culver City; voluntary association, Santa Monica Civic Association; and two individuals,

Stephen Murray and Donald Vaughn, all of which have suffered substantial, concrete and direct injury caused by FAA's approval and ultimate implementation of the Project, which injury has not been overcome by events, and is now ripe for adjudication by this Court.

I. PETITIONERS HAVE MET THE BASIC REQUIREMENTS FOR STANDING

"'Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.' [Citation omitted] 'The Constitution limits our "judicial Power" to "Cases" and "Controversies,"' [citation omitted, citing U.S. CONST. art. III, § 2, cl. 1], and 'there is no justiciable case or controversy unless the plaintiff has standing,'" *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 181 (D.C. Cir. 2017), quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102 (1998).

> Article III's "irreducible constitutional minimum of standing" requires a plaintiff to meet three requirements. *Lujan,* 504 U.S. at 560. "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). Second, the plaintiff must demonstrate "a causal connection between the injury and the conduct complained of" such that the

> "injury in fact" is fairly traceable "to the challenged action of the defendant," and not the result of "the independent action of some third party not before the court." *Id.* (internal quotation marks omitted). Finally, a favorable decision must be "likely" to redress the alleged injury; "[w]hen conjecture is necessary, redressability is lacking."

Ctr. for Biological Diversity, supra, 861 F.3d at 181-182.

Here, a procedural injury in the form of the violation of the procedures required by NEPA is at issue. In the case of procedural injury, the standard for causation is less stringent. "Establishing causation in the context of a procedural injury requires a showing of two causal links: 'one connecting the omitted [procedural step] to some substantive government decision that may have been wrongly decided because of the lack of [that procedural requirement] and one connecting that substantive decision to the plaintiff's particularized injury.'" *Ctr. for Biological Diversity, supra*, 861 F.3d at 184 citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013), *see also City of Dania Beach v. FAA,* 485 F.3d 1181, 1186 (D.C. Cir. 2007), *Nat'l Parks Conservation Ass'n v Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005).

"'All that is necessary is to show that the procedural step was connected to the substantive result.'" *Ctr. for Biological Diversity, supra*, 861 F.3d at 184.

Similarly, "[a] procedural-rights plaintiff need not show that 'court-ordered compliance with the procedure would alter the final [agency decision]." *Ctr. for Biological Diversity, supra*, 861 F.3d at 185, quoting *Nat'l Parks Conservation Ass'n, supra*, 414 F.3d at 5. Instead, as the plaintiff did in *WildEarth Guardians*, "all the [petitioner] need show is that a revisitation of the registration order that includes an effects determination and any required consultation would redress [petitioner] members' injury because the EPA *could* reach a different conclusion." *Id.* [emphasis added] citing *WildEarth Guardians, supra*, 738 F.3d at 306.

Nevertheless, "[r]egarding the second link, a plaintiff 'must still demonstrate a causal connection between the agency action and the alleged injury.'" *Ctr. for Biological Diversity, supra*, 861 F.3d at 184, quoting *City of Dania Beach, supra*, 485 F.3d at 1186. "That is not to say that the [petitioner] need establish the merits of its case, *i.e.*, that harm to a [petitioner] member has in fact resulted from the [respondent's] procedural failures; instead, it must demonstrate that there is a 'substantial probability' that local conditions will be adversely affected and thus harm a [petitioner]." *Id.*, citing *API v. United States*

EPA, 216 F.3d 50, 63 (D.C. Cir. 2000) (per curiam); *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014).

II. PETITIONER CULVER CITY HAS MORE THAN SUFFICIENTLY ESTABLISHED ITS STANDING AS A CITY

Direct standing is, therefore, conclusively established where, as here, Petitioner Culver City has more than sufficiently alleged a probability that local conditions will be adversely affected and, consequently, injure residents of Culver City. In fact, Culver City has brought to the attention of Respondents on multiple occasions (*see, e.g.*, comment letters of September 8, 2015 [AR 6-A-1 at 1534-1541; JA ____] and October 8, 2015 [AR 6-A-1 at 3960-3963; JA ____]) the harms to Culver City and its citizens already arising from the Project, including, but not limited to: (1) increased noise over parts of Culver City not previously overflown; (2) increased emissions and GHG impacts from the increased numbers of aircraft over certain sections of the City potentially causing its citizens to suffer health impacts; and (3) FAA's failure to consider these impacts in concert with similar, cumulative impacts arising from projects at Los Angeles International Airport

("LAX"), lying only two miles west and south of Culver City, which cumulative impacts materially enhance the impacts of the Project alone.

Moreover, Culver City has sufficiently alleged injury to itself as a City, not just to its citizens. Petitioner Culver City has long understood and acknowledged that "'[a] State does not have standing as *parens patriae* to bring an action against the Federal Government'" on behalf of its citizens. *West Virginia v.* EPA, 362 F.3d 861, 868 (D.C. Cir. 2004). That is not the case at bar for at least two reasons. First, Culver City is not a subdivision of the State of California, but an independent entity, as a charter city, under Cal. Gov. Code § 34101, *et seq.* Thus, it is not acting as the "state" in bringing this action.

Second, even if it were not a charter city, which it is, Culver City is not suing to redress the injuries of its citizens, but to redress its own injuries, *i.e.*, the injuries as "city qua city," *see City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002). These injuries include the Project's interference with: (1) Culver City's responsibility to protect its citizens' "health safety and welfare," *see* Culver City Municipal Code, § 1.02.005, July 24, 2000 [Addendum A, p. 70] in that, among other things, the EA improperly conceals relevant information about the

Project's impacts on noise and air emissions by purposefully using an outdated model, NIRS, the use of which is foreclosed by FAA's own Order, 77 Fed. Reg. 18297-18298, *Air Traffic Noise, Fuel Burn, and Emissions Modeling Using the Aviation Environmental Design Tool Version 2a*, March 27, 2012 [Addendum A, p. 56]; *see also* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012 [AR 9-A-13; JA ____]], instead of FAA's regulatorily-mandated analytic tool for assessing air quality and noise impacts, AEDT, leading to an understatement of the Project's noise impacts; (2) Culver City's compliance with state law Assembly Bill 32, the California Global Warming Solutions Act of 2006, the California climate change statute that limits emission of GHG ("AB 32") [Addendum A, p. 99]; and (3) Culver City's responsibilities under, and compliance with, the CAA, the Southern California Air Quality Management Plan ("SCAQMP") and the California State Implementation Plan ("SIP"), *Myersville Citizens for a Rural Cmty. V. FERC,* 783 F.3d 1301, 1320 (D.C. Cir. 2015) ["A jurisdiction's] rights under the Clean Air Act are those that it can exercise under its SIP."].

In this case, FAA even went so far as to displace CAA analysis in the SoCal Metroplex EA entirely with a Presumption of Conformity, FEA, Appendix F, p. F-13 [AR 1-B-12 at 19; JA ____], and failed to do any analysis, even a cursory one, of the Project's impacts on air quality. This is despite the fact that the specific terms of the EA contradict that Presumption of Conformity (*see, e.g.*, Final Environmental Assessment ("FEA"), p. 5-17 [AR 1-B-6 at 17; JA ____] ["[u]nder the Proposed Action there would be a slight increase in fuel burn;"] *see also* FEA, § 5.8.1, p. 5-16 [AR 1-B-6 at 16; JA ____] ["changes to flight paths under the Proposed Action would primarily occur at or above 3,000 feet AGL. . ." [emphasis added]]). Therefore, Culver City, in bringing its Petition, has adequately alleged its intent to protect the performance of its own responsibilities as a City under federal, state and municipal law, and has successfully established its independent standing.

III. PETITIONER ASSOCIATIONS AND INDIVIDUAL PETITIONERS STEPHEN MURRAY AND DONALD VAUGHN HAVE ALSO SUCCESSFULLY ESTABLISHED STANDING

A petitioner demonstrates Article III standing by showing that (1) it has suffered a concrete and particularized "injury in fact that is actual or imminent, not conjectural or hypothetical; (2) the injury is

"fairly traceable" to the challenged actions of the respondent; and (3) the injury is likely to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). (*See* Declarations of Stephen Murray [Addendum B, pp. 1-2] and Donald Vaughn [Addendum B, pp. 3-5]).

In addition, "'[a]n association "has standing to sue under Article III of the Constitution of the United States only if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit."'" *Ctr. for Biological Diversity, supra*, 861 F.3d at 182, citing *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013).

Petitioner Santa Monica Canyon Civic Association ("SMCCA") easily meets the above-listed requirements. First, the members of SMCCA have been — and continue to be — severely injured by the new SoCal Metroplex flight routes. Declarations of the individual members of SMCCA describing the concrete and particularized injuries rising

from the new SoCal Metroplex flight routes are attached to Petitioners' Addendum B[3] as follows: Wesley Hough [Addendum B, pp. 6-7]; Debra Warfel [Addendum B, pp. 8-10]; George S. Wolfberg [Addendum B, pp. 11-12]; Tori Nourafchan [Addendum B, pp. 13-14]; David Rosenstein [Addendum B, pp. 15-16]; and Marilyn Wexler [Addendum B, pp. 17-18]. *See* D.C. Cir. R. 28(a)(7).

Second, each of the members of the SMCCA's injuries is fairly traceable to the FAA's unlawful authorization of the new SoCal Metroplex flight routes. Third, each of Petitioners' injuries can be redressed by a favorable decision requiring the FAA to comply with *Vision 100*, NEPA, and the CAA. *See, e.g., City of Dania Beach, supra*, 485 F.3d at 1185-87 ["An agency action that is taken without following the proper environmental procedures can be set aside by this Court and remanded to the agency for completion of the review process"].

Finally, the SMCCA is a nonprofit group whose purposes include protection of the quality of the environment quality in its neighborhood. Because the individual members of the group would have standing in

[3] Addendum B containing declarations regarding standing is filed concurrently herewith.

their own right, the group likewise satisfies the requirements of Article III. *Friends of the Earth, supra,* 528 U.S. at 181.

In any event, this Court has taken the consistent position that "[i]f constitutional standing 'can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.'" *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 9 (D.C. Cir. 2017) citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

ARGUMENT

I. NEPA'S PURPOSE

This Court has consistently held that "'NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" *WildEarth Guardians, supra*, 738 F.3d at 302. It has just as consistently held that the EIS is the principal tool to further these aims. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002), citing 42 U.S.C. § 4332(2)(C).

An environmental assessment, as performed in this case, "is made for the purpose of determining whether an EIS is required." *Id.* citing 40 C.F.R. § 1508.9. "'If *any* "significant" environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken." *Id.* [emphasis added].

II. STANDARD OF REVIEW

Whether an EIS or EA is at issue, NEPA does not provide for a private right of action. Therefore, "the Administrative Procedures Act (APA) supplies the applicable vehicle for review . . . By the terms of the APA, a reviewing court shall set aside any agency action, finding, or conclusion that is 'arbitrary, capricious, or not otherwise in accordance with the law.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010); 5 U.S.C. § 706(2)(A).[4]

[4] In addition to 5 U.S.C. § 706(2)(A), the APA also provides that the reviewing court shall "(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. §§ 706(2)B-F.

"Agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.'" *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017).

As this Court has also frequently acknowledged, the role of the Court in reviewing agency compliance with NEPA is limited. It is merely ""to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious."" *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017), citing *WildEarth Guardians, supra*, 738 F.3d at 308.

The Court's role in reviewing an agency's decision not to issue an EIS is even more limited, "designed primarily to ensure 'that no arguably significant consequences have been ignored.'" *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006).

> This court will overturn an agency's decision to issue a FONSI [Finding of No Significant Impact] - and therefore not to prepare an EIS - only "if the decision was arbitrary, capricious, or an abuse of discretion." [Citation omitted]. When examining a FONSI, our job is to determine whether the agency: (1) has "'accurately identified the relevant

> environmental concern,'" (2) has taken a "'hard look'" at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because "'changes or safeguards in the project sufficiently reduce the impact to a minimum.'"

Id. quoting *Town of Cave Creek v. FAA,* 325 F.3d 320, 327 (D.C. Cir. 2003).

In other words, environmental review "is deficient, and the agency action it undergirds is arbitrary and capricious, if the [environmental review] does not contain 'sufficient discussion of the relevant issues and opposing viewpoints,' [citations omitted], or if it does not demonstrate 'reasoned decisionmaking.'" *Sierra Club v. FERC, supra*, 867 F.3d at 1368 citing *Nevada v. DOE*, 457 F.3d 78, 93 (D.C. Cir. 2005). "'We have held that '[r]easoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent,' and an agency that neglects to do so acts arbitrarily and capriciously." *Jicarilla, supra,* 613 F.3d at 1119, quoting *Dillmon v. NTSB*, 558 F.3d 1085, 1089-90 (D.C. Cir. 2009).[5]

[5] This Court invoked the latter exception in *Jicarilla*, and found the DOI's actions "arbitrary and capricious," *Jicarilla, supra,* 613 F.3d at

"Although the standard of review is deferential, we have made it clear that '[s]imple, conclusory statements of "no impact" are not enough to fulfill an agency's duty under NEPA.' [Citation omitted]. The agency must comply with 'principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and [the Council on Environmental Quality's] regulations.'" *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014), quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).

The APA standard of review is further modified with the admonition that "[i]n making the foregoing determinations, the court shall review the whole record or those parts of its cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. "The burden to demonstrate prejudicial error is on the party challenging agency action." *Jicarilla, supra*, 613 F.3d at 1121. However, "the harmless error rule is 'not . . . a particularly onerous

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1118, where, as here, it "'failed to consider an important aspect of the problem,'" *Id.* at 1119, quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("State Farm"), "because Interior applied the 1988 Regulations to reject the Jicarilla methodology for computing gas royalties for the period from January 1984 through February 1988, even though the 1988 Regulations were not in effect until March 1, 1988." *Id.* at 1118.

requirement," *Id.*, quoting *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009), "and the Supreme Court has cautioned courts applying the rule against 'us[ing] mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record.'" *Id.* quoting *Shinseki, supra*, 556 U.S. 396 at 407. "If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further." *Id.* at 1121.

"To show that error was prejudicial, a plaintiff must indicate with reasonable specificity what portions of the documents it objects to and how it might have responded if given the opportunity." *Myersville Citizens, supra,* 783 F.3d at 1327. Absent such an explanation, "[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *Nevada, supra,* 457 F.3d at 90.

III. PETITIONERS' CHALLENGE INDISPUTABLY BECAME RIPE UPON FAA'S APPROVAL OF THE FONSI/ROD

Disposition by this Court is appropriate because Petitioners' challenge to approval of the FONSI/ROD is ripe for adjudication. The FONSI/ROD constitutes an Order of the [FAA] Administrator which is subject to review by the Courts of Appeals of the U.S. in accordance

with the provisions of 49 U.S.C. § 46110. "A reviewable order under 49 U.S.C. § 46110(a) 'must possess the quintessential feature of agency decisionmaking suitable for judicial review: finality,'" *City of Dania Beach, supra,* 485 F.3d at 1187, citing *Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006). "To be deemed 'final,' an order must mark the 'consummation' of the agency's decisionmaking process, and must determine 'rights or obligations' or give rise to 'legal consequences.'" *City of Dania Beach, supra*, 485 F.3d at 1187, quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

The FONSI/ROD here indisputably meets these tests. It is the consummation of FAA's decisionmaking process, as evidenced by the plain fact that FAA has already implemented its procedures with no further environmental or decisionmaking process, thus determining the rights and obligations and creating legal consequences, in the form, among others, of the imposition of a limit on Petitioners' right to challenge the Project to 60 days. *See* 49 U.S.C. § 46110(a).

Further, the FONSI/ROD contains no contrary indication that FAA's statements and conclusions are in any way "tentative, open to further consideration, or conditional on future agency action," *City of*

Dania Beach, supra, 485 F.3d at 1188, nor do FAA's actions reflect a tentative aspect to its decisions as it has already implemented the Project based on them. For all the foregoing reasons, the ripeness of the Project for legal challenge is not subject to dispute.

IV. THIS CASE IS NOT MOOT BECAUSE IT REMAINS AN ACTUAL ONGOING CONTROVERSY FOR WHICH THIS COURT MAY GRANT RELIEF

The United States Constitution, "Article III limits the jurisdiction of federal courts to 'actual, ongoing controversies,'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011), quoting *Honig v. Doe*, 484 U.S. 305, 317-18 (1988). "If it becomes 'impossible for the court to grant "any effectual relief whatever" to a prevailing party' on a particular claim, that claim must be dismissed." *Id.* at 79, quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

In this case, the continuing availability of relief is plain. Where, as here, a "procedural injury" is at issue, in that "[petitioners] suffer harm from the agency's failure to follow NEPA procedures, compliance with which might have changed the agency's mind . . ." *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008), the remedy is to require FAA to perform the omitted NEPA procedures.

Although "[p]reparation of an environmental impact statement will never 'force' an agency to change the course of action it proposes," *Id.*, citing *Lemon v. Harvey*, 448 F.Supp.2d 97, 104 (D.D.C. 2006), "[t]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed." *Id.* at 1315, citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

In this case, this Court still has open to it the option of requiring FAA to perform an environmental review consistent with the requirements of NEPA; halt implementation of the Project until the requisite environmental review is completed; and require FAA to impose relevant and appropriate mitigation measures to ameliorate the impacts of its actions, thus eliminating any potential that this case is moot.

V. JUDICIAL DEFERENCE TO FAA'S AIRSPACE DETERMINATION IS INAPPROPRIATE HERE IN BOTH PRACTICE AND PRINCIPLE

FAA will certainly rely on its oft-invoked defense of "judicial deference" to its decisions, as the agency charged with implementing

congressional mandates for air safety. FAA is 'barking up the wrong tree" in this case. FAA is correct about only one thing. It is almost universally accepted that in evaluating the actions of administrative agencies, "the two-step analytic framework" of *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) may govern.

> Under the *Chevron* framework, "an agency's power to regulate 'is limited to the scope of the authority Congress has delegated to it.' [Cites omitted.] Pursuant to *Chevron* Step One, if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent. If Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* Step Two. Under Step Two '[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are . . . manifestly contrary to the statute.'"

Del. Riverkeeper Network v. FERC, 857 F.3d 388, 395-396 (D.C. Cir. 2017), quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005).

While such deference may be the norm, it is not universally accorded. "'While courts routinely defer to agency modeling of complex phenomena, model assumptions must have a "rational relationship" to the real world.'" *West Virginia, supra,* 362 F.3d at 866-67 quoting

Chemical Mfrs. Ass'n v. EPA, 28 F.3d 1259, 1265 (D.C. Cir. 1994). Thus, although an agency's interpretation may, on its face, appear "reasonable," "its failure to explain why it made that choice [is] error, particularly in the face of contrary real-world data." *Id.* at 867.

Specifically, this Court has consistently held that deference to an agency interpretation of regulations is unwarranted under several circumstances, including when the agency's action is "unhinged from the regulation's plain text" (*see Huerta v. Ducote,* 792 F.3d 144, 153 (D.C. Cir. 2015)) and when the agency's "interpretation is 'plainly erroneous or inconsistent with the regulation'" (*see Decker v. Nw. Envtl. Def. Ctr.,* 568 U.S. 597, 133 S.Ct. 1326, 1337 (2013) (quoting *Chase Bank USA, N. A. v. McCoy,* 562 U.S. 195, 131 S.Ct. 871, 880 (2011)). "Federal agencies must follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions." *Steenholdt v. FAA,* 314 F.3d 633, 639 (D.C. Cir. 2003); *see also Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994). An agency interpretation that conflicts with an unambiguous regulation is "substantively invalid" because "to defer in such a case would allow the agency 'to create *de facto* a new regulation.'" *Perez v. Mortg. Bankers Ass'n,* 575 U.S. ___,

135 S.Ct. 1199, 1208 (2015)(quoting *Christensen v. Harris County,* 529 U.S. 576, 588 (2000)).

Finally, this limitation is even more relevant where, as here, environmental review under NEPA is involved. In that case, the court's mandate is "'simply to ensure that the agency has adequately considered and disclosed the environmental impacts of its actions,'" *Sierra Club v. FERC, supra*, 867 F.3d at 1367 and "that [it] [is] the product of reasoned decisionmaking.'" *Jicarilla, supra,* 613 F.3d at 1118, quoting *State Farm* at 52.

A. Any Deference to FAA's Technical Determinations Must be Tempered by Its Failure to Give Equal Attention to the Impact of Those Determinations on the "Public Interest," as Required by Congress

In this case, the parameters of "reasoned decisionmaking" are established in the confluence of the Federal Aviation Act, 49 U.S.C. § 40101, *et. seq.* ("FAA Act"), and NEPA. While it is true that FAA has been assigned by Congress the power to "develop plans and polic[ies] for the use of the navigable airspace and assign by regulation or order the use of airspace," 49 U.S.C. § 40103(b)(1), that power is subject to modification by the "public interest," where "[t]he Administrator may

modify or revoke an assignment when required in the public interest." 49 U.S.C. § 40103(b)(1).

1. The FAA Act Mandates Equal Consideration of the Public Interest

This Court has construed the mandate to consider the "public interest" in general, and "public health and welfare" in particular, to apply to restricting aircraft noise over sensitive receptors and protecting the property over which aircraft fly. *Helicopter Association International Inc. v. Federal Aviation Administration*, 722 F.3d 430, 433–435 (D.C. Cir. 2013). Likewise, the FAA has a duty under 49 U.S.C. § 44715(a)(1)(A) to "prescribe . . . regulations to control and abate aircraft noise and sonic boom" in order "[t]o relieve and protect the public health and welfare from aircraft noise and sonic boom." 49 U.S.C. § 44715(a)(1)(A). The Court in *Helicopter Association International* stated that the FAA has the authority as well as the duty to protect people on the ground from noise from aircraft ["Under the plain text of [49 U.S.C.] § 40103, the FAA has authority to 'prescribe air traffic regulations . . . [to] protect[] individuals and property on the ground.'"].

In that case, the FAA changed helicopter routes along the north shore of Long Island because of noise complaints, even though the noise levels were below 45 DNL. The Court pointed out that the "FAA found that 'residents along the north shore of Long Island emphatically agreed that helicopter overflights during the summer months are unbearable and negatively impact their quality of life.'" On this basis, the Court found, the FAA made the North Shore Helicopter route mandatory, despite the fact that "[t]he FAA found that the sound levels, which were below DNL 45 dB, were 'below levels at which homes are significantly impacted.'" Thus, this duty extends to the protection of people and property under flight paths even if the sound levels are "below levels at which homes are significantly impacted."

2. NEPA Similarly Requires Consideration of Public Interest in the Approval of Any Project

Compliance with NEPA represents the very heart of the "public interest" here, where Congress has made it

> the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in

> productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a).

Congress has further mandated that the federal government make environmental preservation among its highest priorities.

> In order the carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

42 U.S.C. § 4331(b). "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter. . ." 42 U.S.C. § 4332. Thus, compliance with NEPA is made synonymous with the definition of "public interest," as that concept is incorporated into the FAA Act, 49 U.S.C. § 40103(b)(1).

NEPA's implementing regulations, the Council on Environmental Quality ("CEQ") Guidelines, fortify this priority in favor of protecting

the public. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Moreover, "Federal agencies shall to the fullest extent possible: . . . (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 C.F.R. § 1500.2(f).

In short, the United States Congress has taken the unequivocal position that compliance with NEPA is synonymous with the "public interest," and any deference paid to FAA's airspace determinations is modified by the priorities established in 49 U.S.C. § 40103(b), and the CEQ Guidelines.[6] And no matter what position FAA takes here on the adequacy of the challenged EA, this "court owes no deference to the FAA's interpretation of NEPA or the CEQ regulations because NEPA is

[6] While the "binding effect of CEQ regulations is far from clear," *TOMAC, supra*, 433 F.3d at 861 citing *City of Alexandria v. Slater*, 198 F.3d 862, 866, n. 3 (D.C. Cir. 1999), the United States Supreme Court has accorded the CEQ Guidelines "substantial deference." *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

addressed to all federal agencies and Congress did not entrust administration of NEPA to the FAA alone." *Grand Canyon Trust, supra,* 290 F.3d at 342. Consequently, the public interest and its surrogate, compliance with NEPA, must be construed the functional prerequisite to the carrying out of FAA's airspace functions, and, thus, equally (if not more) deserving of this Court's deference.

B. Deference to FAA's Technical Determinations Contravenes the Most Basic Constitutional Policy of the Separation of Powers

Finally, from a principled, as well as practical, perspective, FAA is owed no deference to the approval of the SoCal Metroplex Project and its EA. In *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), Judge (now Justice) Neil Gorsuch, in his Concurring Opinion, took the concept of judicial deference to the proverbial "woodshed," and returned with a bruised and battered remnant of that seemingly impregnable rule.

As a general proposition, Justice Gorsuch observed that "in the Administrative Procedures Act (APA), Congress vested the courts with the power to 'interpret . . . statutory provisions' and overturn agency action inconsistent with those interpretations." *Id.* at 1151, quoting 5

U.S.C. § 706. Nevertheless, and seemingly in contradiction to that legislative mandate, Justice Gorsuch further observed that "rather than completing the task expressly assigned to us, rather than 'interpret[ing] . . . statutory provisions,' declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of judicial duty." *Id.* at 1151-52.

Going even further, Justice Gorsuch opines that "*Chevron* suggests we should infer an intent to delegate not because Congress has anywhere expressed any such wish, not because anyone anywhere in any legislative history even hinted at that possibility, but because the legislation in question is *silent* (ambiguous) on the subject. Usually we're told that 'an agency literally has no power to act . . . unless and until Congress confers power upon it." *Id.* at 1153, quoting *La. Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374 (1986). "Yet *Chevron* seems to stand this ancient and venerable principle nearly on its head," *Id.*, especially where as here, "in the APA Congress expressly vested the courts with the responsibility to 'interpret . . . statutory provisions' and

overturn agency action inconsistent with those interpretations." *Id.*, quoting 5 U.S.C. § 706.

Justice Gorsuch does point out that "in relatively recent times the Court has relaxed its approach to claims of unlawful legislative delegation," *Id.* at 1154, and has suggested that "Congress may allow the executive to make new rules of general applicability that look a great deal like legislation, so long as the controlling legislation contains an 'intelligible principle" that 'clearly delineates the general policy' the agency is to apply and 'the boundaries of [its] delegated authority.'" *Id.*, quoting *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989).

> But even taking the forgiving intelligible principle test as a given, it's no small question whether *Chevron* can clear it. For if an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next (and that is exactly what *Chevron* permits, *see* 467 U.S. at 857-59), you might be forgiven for asking: where's the 'substantial guidance' in that?

Id. Thus, "the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail."

Id. at 1152.

In the final analysis, it is the damage that the *Chevron* deference rule does to the public that is, to Justice Gorsuch, the most compelling argument against the invocation of deference to agency decisionmaking.

> Under *Chevron*, the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (court's often disagree on what qualities); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists?

Id.

In this case, even assuming, for argument's sake, that deference to FAA's environmental evaluation applies, the scope of that deference is not unlimited. "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001), quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). Application of this analysis to the case at bar reveals that FAA has failed on all the stated parameters. Thus, FAA's decision to approve the

Project and its EA are the farthest thing from the products of "reasoned decisionmaking," and, the grant of deference to its determinations, absent requisite analytic support, is seriously misplaced.

VI. THE SOCAL METROPLEX EA'S ANALYSIS VIOLATES NEPA AS WELL AS FAA'S OWN RULES AND REGULATIONS

A. FAA's Noise Analysis Defies FAA's Own Regulations by Failing to Use the Required AEDT Model

On March 21, 2012, FAA officially adopted the AEDT as the required model for environmental modeling and analysis metrics (noise, fuel burn and emissions) output for regional airspace redesign/analysis projects. *See* U.S. Department of Transportation, Federal Aviation Administration, Order 1050.1E, Change 1, Guidance Memo No. 4 (March 21, 2012), p .1 [AR 9-A-13 at 1; JA ____]; followed by publication in the Federal Register on March 27, 2012, 77 Fed. Reg. 18297-18298:[7]

[7] FAA describes the AEDT model as follows:

> AEDT is a software system that models aircraft performance in space and time to estimate fuel consumption, emissions, noise, and air quality consequences. AEDT is a comprehensive tool that provides information to FAA stakeholders on each of these specific environmental impacts. AEDT facilitates environmental review activities required under NEPA by consolidating the

Prior to March 2012, FAA required the use of the NIRS model. *Id.* FAA has explained that AEDT 2a, the original version, was selected "to replace NIRS as the required tool to analyze noise and fuel burn for air traffic airspace and procedure actions." *Id.*; *see also* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012, p. 1 [AR 9-A-13 at 1; JA ____] ["AEDT 2a replaces NIRS, and is now the required FAA NEPA compliance tool for modeling aircraft noise, as well as fuel burn and emissions, for air traffic airspace and procedure actions that meet one or more of the above-quoted criteria." [Emphasis added]].[8]

> modeling of these environmental impacts in a single tool.
>
> AEDT is designed to model individual studies ranging in scope from a single flight at an airport to scenarios at the regional, national, and global levels. AEDT leverages geographic information system (GIS) and relational database technology to achieve this scalability and offers rich opportunities for exploring and presenting results. Versions of AEDT are actively used by the U.S. government for domestic aviation system planning as well as domestic and international aviation environmental policy analysis.

U.S. Department of Transportation, Federal Aviation Administration, AEDT FAA Web Page; (https://aedt.faa.gov/) [Addendum A, p. 322].

[8] *See also* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012, p. 3 [AR 9-A-13 at 3; JA _____]. ["'[A]ir traffic airspace and

FAA has offered the following explanation regarding AEDT's superiority to NIRS:

> AEDT 2a has the capability to model aircraft performance based on fleet mix, airport configuration, and operations schedule. These data are used to compute aircraft noise, fuel burn and emissions simultaneously. By standardizing these data, AEDT 2a will help FAA stakeholders make more informed decisions on specific environmental impacts of aviation.

77 Fed. Reg. 18297-18298, *Air Traffic Noise, Fuel Burn, and Emissions Modeling Using the Aviation Environmental Design Tool Version 2a*, March 27, 2012 [emphasis added] [Addendum A, p. 156].[9]

At the time that FAA adopted AEDT 2a as the required model, it also interjected a single caveat to its required use, "the use of AEDT 2a is not required for projects whose **analysis** began before the effective date of this policy" [i.e., March 21, 2012]. *Id.* [Addendum A, p. 157] (emphasis added). Here, the record clearly demonstrates that FAA's

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procedure actions' means such actions for which the study area is larger than the immediate vicinity of an airport, incorporates more than one airport, and/or includes actions above 3.000 feet above ground level (AGL)."]

[9] FAA has expressly mandated the use of the most current version of the AEDT model since its first implementation in 2012. *See* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012, p. 1 [AR 9-A-13 at 1; JA _____].

noise analysis did not begin until November 2013 at the earliest. *See* FEA at p. 4-1 [AR 1-B-5 at 1; JA ____]. This is readily apparent from the EA's identification of "December 1, 2012 through November 30, 2013" as the relevant time period during which data was collected to perform the noise analysis. *See* FEA at p. 4-1 [AR 1-B-5 at 1; JA ____]. The EA specifically states that "December 1, 2012 through November 30, 2013" was selected for the noise analysis because it "was the most recent year of data available." *See* FEA at p. 4-1 [AR 1-B-5 at 1; JA ____]. The EA explains how this data was used:

> Radar data obtained from the FAA's Performance Data Analysis and Reporting System (PDARS) identified 1,242,614 IFR-filed flights to and from the Study Airports from December 1, 2012 through November 30, 2013. The 365 days of usable data span all seasons and runway usage configurations for the Study Airports. The FAA used this data to develop the average annual day (AAD) fleet mix, time of day and night, and runway use input for NIRS.

See FEA at p. 4-7 [AR 1-B-5 at 7; JA ____]. Thus, since the noise analysis could not have been performed prior to FAA's collection of the data needed to perform the analysis, the record shows that the SoCal Metroplex noise analysis had not begun prior to March 21, 2012. *See* FEA at p. 4-1 [AR 1-B-5 at 1; JA ____].

Federal agencies are required to "follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions." *Steenholdt, supra*, 314 F.3d at 639 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), superseded on other grounds). Here, the fact that FAA's noise analysis began after March 21, 2012 means FAA was required by its own rules to use AEDT 2a. *See* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, p. 1 [AR 9-A-13 at 1; JA ____] (requiring use of the AEDT 2a model for analyses that begin after March 21, 2012). Thus, the SoCal Metroplex EA's use of the outdated NIRS model violated FAA's rules that had been implemented with the express purpose of "help[ing] FAA stakeholders make more informed decisions on specific environmental impacts of aviation." *See* 77 Fed. Reg. 18297-18298, *Air Traffic Noise, Fuel Burn, and Emissions Modeling Using the Aviation Environmental Design Tool Version 2a*, March 27, 2012 [Addendum A, p. 157].

Although an agency may amend or repeal its own regulations, "an agency is not free to ignore or violate its regulations while they remain in effect." *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (quoting *U.S. Lines, Inc. v. Fed. Mar.*

Comm'n, 584 F.2d 519, 526 n.20, (D.C. Cir. 1978)); *see also Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) ["The *Accardi* doctrine stands for the proposition that agencies may not violate their own rules and regulations to the prejudice of others."]. As a result, an agency's action is "arbitrary and capricious if the agency fails to comply with its own regulations." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 373 (D.D.C. 2017) (internal citations omitted).

McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988) is instructional here. In that case, the court held that because the EPA had announced its intent to require a certain model of waste analysis, EPA was bound to follow its own rule mandating the use of that model. EPA argued that its decision to use the model (the "VHS Model") was merely a "non-binding statement of agency policy" that is "not solely determinative of EPA's action," but rather is "one of many tools" the EPA uses in evaluating certain petitions. *Id.* EPA had also expressly provided for exceptions to the VHS rule under "compelling" circumstances. *Id.* at 1321.

Ultimately, EPA had drafted a letter regarding the mandatory use of the VHS model, stating, "Since the VHS landfill model was made

final on November 27, 1986, and all comments received in the proposal for the model were incorporated, [the company challenging the use of the model's] comments will not be entertained." *Id.* [Emphasis added]. The court found that the letter clearly indicated that use of the VHS model was a mandatory rule, rather than a mere musing about what EPA might do. *Id.* The court reasoned that the "agency's past characterizations, and more important, the nature of its past applications of the model, are what count." *Id.* The firm language contained in EPA's letter was sufficient for the court to find that the EPA had promulgated a binding rule mandating the use of the VHS model. *Id.*

Here, FAA has failed to heed the overwhelming weight of its own authority mandating the use of AEDT in this case, including its own statement, in its then governing U.S. Department of Transportation, Federal Aviation Administration, Order 1050.1E, Change 1, *Environmental Impacts: Policies and Procedures*, March 20, 2006 ("Order 1050.1E") [AR 9-A-11].[10] *See also* FAA Order 1050.1E, Change

[10] FAA Order 1050.1E has since been superseded by U.S. Department of Transportation, Federal Aviation Administration, Order 1050.1F, *Environmental Impacts: Policies and Procedures,* July 16, 2015 ("Order

1, Guidance Memo No. 4, March 21, 2012, p. 1 [AR 9-A-13 at 1; JA ____] ["AEDT 2a replaces NIRS, and is now the required FAA NEPA compliance tool for modeling aircraft noise, as well as fuel burn and emissions, for air traffic airspace and procedure actions that meet one or more of the above-quoted criteria." [Emphasis added.]].

FAA's attempted justification for ignoring its own rules is limited to a single footnote on page 5-3 of the EA. That footnote states: "The Aviation Environmental Design Tool (AEDT) became FAA's required noise model for air traffic actions in March 2012 (current version 2b was released in March 2015). However, when the SoCal Metroplex EA Project noise methodology development process began NIRS was the noise model required by FAA for analysis of air traffic actions." SoCal Metroplex FEA at p. 5-3 [AR 1-B-6 at 3; JA ____] (emphasis added). This purported "explanation" entirely fails to address FAA's "departure

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1050.1F,") [FAA Order 1050.1F, § 1-5, p. 1-1 [Addendum A, p. 240]]. FAA Order 1050.1F remains consistent with FAA Order 1050.1E with respect to the exclusive use of AEDT to replace NIRS. [FAA Order 1050.1F, § 4-2.b ["The latest FAA-approved model must be used for both air quality and noise analysis"] [Addendum A, p. 248]; *see also* Federal Aviation Administration, Office of the Environment and Energy, *1050.1F Desk Reference*, July 2015 ("1050.1F Desk Reference"), Appendix C, p. C-1, ["For air traffic airspace and procedure actions, AEDT 2b replaces AEDT 2a, which was released by the FAA in March 2012."]] [Addendum A, p. 293]].

from established precedent," *Jicarilla,* supra, 613 F.3d at 1119, for at least two reasons. [11]

First, there is no such thing as a "noise methodology development process." FAA has invented that phrase out of thin air in an attempt to justify its failure to use AEDT. Indeed, the noise methodology that was being developed prior to March 2012 was the AEDT 2a model, which FAA admits it did not use for this project. *See* SoCal Metroplex FEA at p. 5-3 [AR 1-B-6 at 3; JA ____]. Likewise, the NIRS model that *was* used for this project was developed in 1998. *See* FAA Website, Noise Integrated Routing System (NIRS) & NIRS Screening Tool (NST) (https://www.faa.gov/about/office_org/headquarters_offices/apl/research/models/nirs_nst/) [Addendum A, p. 323]. This begs the question: what noise methodology does FAA claim it was developing for this project? The EA is devoid of any explanation on this point.

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[11] This case mirrors the Court's analysis and finding in *Jicarilla*. In that case, the Court found the agency's decision arbitrary and capricious where the agency analyzed actions occurring between 1984 and 1988 using a model that was not implemented until 1988, thus making it inapplicable in the prior years. Here, FAA is attempting to analyze agency actions taking place after 2016, using a model that was superseded and taken out of use, in early 2012, thus making its use inapplicable in the years after 2012 during which the SoCal Metroplex EA noise analysis was developed. Either way, FAA's arbitrary and capricious actions were patently prejudicial to Petitioners.

Second, even if FAA could support its contention that it had begun its "noise methodology development process," as of March 2012, FAA's own policy statements make it clear that this would still be an inadequate excuse for failing to use the AEDT 2a model, because the actual *analysis* must have begun prior to March 21, 2012 in order to invoke the exception to the rule requiring AEDT. *See* 77 Fed. Reg. 18297-18298, *Air Traffic Noise, Fuel Burn, and Emissions Modeling Using the Aviation Environmental Design Tool Version 2a*, March 27, 2012 [Addendum A, p. 157] ["the use of AEDT 2a is not required for projects whose **analysis** began before the effective date of this policy" [i.e., March 21, 2012]]. Here, there is no question that FAA began its noise analysis after March 21, 2012 because FAA admits that the input data used to perform this analysis was collected from December 2012 to November 2013. *See* FEA at p. 4-7 [AR 1-B-5 at 7; JA ____]. Thus, it would have been impossible for FAA to analyze this data prior to December 2012. *See* FEA at p. 4-7 [AR 1-B-5 at 7; JA ____].

In sum, FAA acted arbitrarily and capriciously when it violated its own rules by failing to use the required AEDT 2a model. *See* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012 [AR

9-A-13; JA _____]; *see also Eco Tour Adventures, Inc., supra*, 249 F. Supp. 3d at 373. By thumbing its nose at the required AEDT model, and using the outdated NIRS model, FAA has failed to take the "hard look" at the Project's noise impacts required by its own governing orders, and, thus, cannot "make a convincing case for its finding of no significant impact." *TOMAC, supra*, 433 F.3d at 861. In addition, FAA's conclusions fall far outside the parameters of "reasoned decisionmaking" insofar as FAA has utterly failed to provide any explanation, let alone an adequate one, "for its departure from established precedent," *Jicarilla, supra*, 613 F.3d at 1119, in the form of the use of the AEDT model for the analysis of airspace changes.

In the final analysis, the existence of prejudice to Petitioners from FAA's error is clear. Beginning as early as September 8, 2015, Petitioner Culver City catalogued the "portions of the documents it objects to," *Myersville Citizens, supra*, 783 F.3d at 1327, where it stated

> It should be noted at the outset that these comments are necessitated by the discomfort and confusion of Cities' citizens with respect to the Project's potential noise and other environmental impacts. The Cities' citizens are already suffering demonstrable increases in overflights at low altitudes, and resulting noise impacts. They are now being asked to become the recipients of the Project's additional noise, overflight, and other environmental

> impacts, the precise degree of which is as yet unascertainable, because the precise projected flight paths to be implemented by the Project cannot be deduced from the information provided to define them.

Culver City September 8, 2015 "Comments re: SoCal Metroplex OAPM – Environmental Assessment," p. 1 [[AR 6-A-1 at 1534-1541; JA ____].

Thus, Culver City made painfully clear the nature of the deviations from NEPA and FAA's own requirements that it would have been able to evaluate, and to which it would have been able to respond, if given the opportunity. *Myersville, supra*, 783 F.3d at 1327. Petitioners were clearly prejudiced by being deprived of the opportunity to ensure that "the agency's eyes are open to the environmental consequences of its actions and [that it] considers options that entail less environmental damage, [so that] it may be persuaded to alter what it proposed." *Lemon, supra*, 514 F.3d at 1315.

Thus, FAA's error is the quintessence of both "arbitrary" and "prejudicial," and may be set aside on those bases alone.

B. The SoCal Metroplex Noise Analysis is Founded on an Inapplicable Metric

Compounding and further complicating its error, FAA used in its environmental modeling a noise metric, "Day-Night Sound Level" or

"DNL" that dramatically understates the noise from the SoCal Metroplex Project. FEA, p. 4-6 [AR 1-B-5 at 6; JA ____]. As a substitute, the "Cumulative Noise Equivalency Level," or "CNEL," metric is favored for use in California. *See,* FAA Order 1050.1F, Appendix B, ¶ B-1, p. B-1 [Addendum A, p. 262].

CNEL is the time-varying noise over a 24-hour period, with a 5 dBA weighting factor applied to the hourly continuous sound level for noises occurring from 7:00 p.m. to 10:00 p.m. (defined as evening hours) and a 10 dBA weighting factor applied to noise occurring from 10:00 p.m. to 7:00 a.m. (defined as sleeping hours).

Despite FAA's seemingly equivocal endorsement,[12] this failure to use the CNEL metric strikes at the heart of the SoCal Metroplex EA noise analysis. As the CNEL metric "adds a 5 dB penalty for each aircraft operation during evening hours (7:00 p.m. to 10:00 p.m.)," Federal Aviation Administration, *Environmental Desk Reference for Airport Actions*, October 2007, Chapter 17, § 1.c(3) [Addendum A, p. 109], which does not exist in the DNL metric, to the extent that the

[12] Ironically, FAA requires the use of the CNEL noise metric in the evaluation of the noise impacts of airport development projects in California. FAA Order 5050.4B, Chapter 1, § 9.n., p. 8 [Addendum A, p. 93].

noise impacts from the Project at LAX and other airports at least partially arise from operations during those hours, the noise impacts set forth in the SoCal Metroplex EA are indisputably understated.

This additional lapse materially increases the adverse impact of FAA's improper use of the NIRS model, because it adds certainty to the underestimation of noise impacts. It thus further deprives Petitioners of the opportunity to evaluate the noise impacts of the SoCal Metroplex Project, as those impacts are normally analyzed in their community. As a result, FAA's additional deviation from normal procedures, unmitigated, *see Jicarilla, supra*, 613 F.3d at 1119, also falls comfortably within the scope of "arbitrary and capricious."

Finally, but not least important, the use of the DNL metric, rather than CNEL, adversely impacts any effort to perform a legitimate cumulative noise impact analysis. This is because noise from all the other runway, taxiway and terminal projects with which the SoCal Metroplex Project may have synergistic impacts, at LAX, as well as other airports throughout the region, have been evaluated using the CNEL metric required for use in California airport projects, including runway, taxiway and terminal improvements. U.S. Department of

Transportation, Federal Aviation Administration, Order 5050.4B, *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions*, April 28, 2006 ("Order 5050.4B), Chapter 1, § 9.n., p. 8 [Addendum A, p. 93]. Therefore, adding the noise impacts of those projects, properly evaluated using CNEL, to those of the SoCal Metroplex Project, constitutes nothing more than adding "apples to oranges" and continues the long trend of "departure from established precedent" without explanation, and consequent abuse of discretion, in addressing both the cumulative and independent noise impacts of the SoCal Metroplex Project.

C. The SoCal Metroplex Noise Analysis is Based on Inaccurate Flight Paths

Finally, adding injury to injury, FAA fails to provide, in the EA, an accurate representation of the paths anticipated for aircraft overflights, making it impossible for potentially affected citizens to anticipate the existence of the overflight impacts, or the degree of their impacts.

Specifically, the TARGETS Distribution Package for LAX was distributed on August 25, 2015, FEA, Appendix F, Volume II, p. F-817-819 [AR 1-B-13 at 65-67; JA ____], little more than a week before the

original due date for comments on the SoCal Metroplex EA. It reveals that FAA CLIFY waypoint, a principal marker for arriving aircraft at LAX, was relocated from its initial position in the Draft EA, at a point north of the Santa Monica Airport ("SMO") VORTAC, upon which affected parties based their analyses and comments, to a point collocated with the VORTAC, which is further south and closer to certain areas of Culver City. FEA, Appendix F, Volume II, p. F-817-819 [AR 1-B-13 at 65-67; JA ____]. While this does not appear to represent a substantial distance from an absolute perspective, about one-half mile, the movement is significant from a noise modeling perspective, because the SoCal Metroplex EA's noise modeling appears to have been based on the more northerly location. *Id.*

From a human perspective, this error has potentially serious, but as yet technically undocumented, impact on surrounding residents and businesses. This is because, even though an additional comment period was granted, no further analysis was performed on the new location. If the flight paths subject to the original modeling were misplaced to the north, the noise impacts on Culver City and other affected communities were materially understated. Their movement to the south should have

been accommodated in a reanalysis of the noise data using the current waypoint locations and attributes reflected in the TARGETS Distribution Packages. As it was not, when taken together with the utilization of an incorrect noise metric, *i.e.*, DNL instead of CNEL, and outdated noise model, the NIRS vs. the AEDT, the errors conclusively vitiate the "hard look" at environmental impacts required by the NEPA, and contravene any claim by FAA of "reasoned decisionmaking."

VII. FAA IMPROPERLY INVOKED A PRESUMPTION OF CONFORMITY TO AVOID EVALUATION OF THE AIR QUALITY IMPACTS OF THE PROJECT

Rather than fulfilling its responsibility to evaluate the Project's conformity with the emissions requirements of the CAA, and NEPA, FAA chose to shrug off those requirements, and, instead, depend on a "Presumption of Conformity," 40 C.F.R. § 93.153(f)-(h), applicable to aircraft operating at or above 3,000 feet above ground level ("AGL") (sometimes referred to as the "mixing height"), or even below that altitude where there are "modifications to routes and procedures . . . designed to enhance operational efficiency (i.e., to reduce delay)." FAA's *Federal Presumed to Conform Actions Under General Conformity*, 72

Fed. Reg. 41565-41580 (July 30, 2007) [AR 9-D-6; JA _____] ("PTC Rule").

The problem for FAA in this case is that, while relying on the Presumption, it cannot meet the predicate requirements. Rather, the evidence in the EA is clear that: (1) most, if not all, of the procedures at issue will occur, and the aircraft will operate for varying but extensive periods of time in their implementation, below 3,000 feet, *see, e.g.*, FEA, § 5.8.1, p. 5-16 [AR 1-B-6 at 16; JA _____]; and (2) those procedures below 3,000 feet will decrease, not increase, "efficiency" (*i.e.*, increase fuel burn). FEA, § 5.8.3, p. 5-17 [AR 1-B-6 at 17; JA _____].

A. FAA Stands Air Quality Regulations on Their Head

The CAA establishes a joint state and federal program to control the country's air pollution by establishing national air quality standards. Under this program, states must adopt, and submit to the EPA for approval, SIPs that provide for the implementation, maintenance, and enforcement of these national standards in each of their "air quality control region." 42 U.S.C. § 7410(a)(1). Federal agencies must act consistently with these state plans, and may only

engage in or approve activities that conform to SIPs. *See* 42 U.S.C. § 7506(c)(1).

The EPA promulgated regulations allowing federal agencies to establish categories of actions that are presumed to conform to a SIP, and that therefore do not require either a conformity applicability or conformity determination. *See* 40 C.F.R. §§ 93.153(f)-(h).[13] The EPA has also promulgated a Presumed to Conform Rule, *Revisions to the General Conformity Regulations*, 75 Fed. Reg. 17254-17279, July 6, 2010 [Addendum A, pp. 129-155], that relieves a federal agency of the obligation to conduct a full-scale conformity determination if the project either will result in, at most, *de minimis* emissions of criteria pollutants, 40 C.F.R. § 93.153(b)-(c), or comes within one of the categories in the agency's list of actions that are presumed to conform to any SIP, 40 C.F.R. § 93.153(f)-(h).

Here, as the SoCal Metroplex EA acknowledges, "[t]ypically, significant air quality impacts would be identified if an action would result in the exceedance of one or more of the NAAQS for any time

[13] *See also* FAA 1050.1F Desk Reference, § 1.3.5.1, p. 1-9 [Addendum A, p. 287] ["The first phase of the general conformity process, *applicability*, evaluates whether the conformity regulations would apply to a proposed Federal action." [emphasis in original]].

period analyzed." FEA § 5.8.2, p. 5-17 [[AR 1-B-6 at 17; JA ____] citing FAA Order 1050.1E, Change 1, Appendix A, § 2.3. Notably in this case, the South Coast Air Basin is in extreme nonattainment with the federal air quality standards for ozone (O_3), and in nonattainment with the federal particulate matter (both PM_{10} and $PM_{2.5}$) standards. *See* FEA, pp. 4-27 to 4-28 (Table 4-6) [AR 1-B-5 at 27-28; JA ____]. Nevertheless, the SoCal Metroplex EA relies on a Presumption of Conformity and, thus, fails to take a hard look, or, in fact, any look, at the proposed Project's potential to contribute detrimentally to the region's already poor air quality.

B. FAA's Conclusion That Procedural Changes Will Occur Above 3,000 Feet Is Not Supported by Evidence in the Record

Although the EPA regulations exempt emissions occurring at 3,000 feet AGL or above from the conformity requirements of the CAA (*see* 40 C.F.R. § 93.153(c)(xxii), the EA provides no factual support for the conclusion that the operational changes associated with the proposed action will occur exclusively, or even preponderantly, at or above 3,000 feet AGL. In fact, the EA contradicts this conclusion by stating that the SoCal Metroplex Project would also change air traffic

flows during departures, descents and approaches of flights – all of which occur near ground levels. *See* FEA, § 5.7.2, p. 5-15 [AR 1-B-6 at 15; JA ____]; *see also* FEA, p. 5-12 [AR 1-B-6 at 12; JA ____] (stating "[c]hanges to flight paths under the Proposed Action would primarily occur at or above 3,000 feet AGL." [Emphasis added]. *See also* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012, p. 2 [AR 9-A-13 at 2; JA _____] ["Aircraft noise, fuel burn, and emissions are interdependent and occur simultaneously throughout all phases of flight."]. Thus, to the hitherto unspecified extent that procedures involve landing or takeoff, which are, of course, the main purpose of the Project to facilitate, FEA, Appendix F, § 05, p. F-10 [AR 1-B-12 at 16; JA _____] ["[T]he purpose of the SoCal Metroplex Project's Proposed Action is to improve the efficiency of aircraft arrival and departure procedures . . ."], as well as other phases of flight below 3,000 feet, their air quality impacts remain unanalyzed.

In addition, FAA's recent publication, "*Aviation Emissions, Impacts & Mitigation: A Primer*," January 2015 (hereafter, "FAA Primer") [Addendum A, p. 191] explains that "[g]enerally, about 10 percent of aircraft pollutant emissions are emitted close to the surface

of the earth (less than 3000 feet above ground level)." *Id.* at p. 2 [Addendum, p. 194]. Nevertheless, despite the weight of authority, and without disclosing what proportion of the operations will occur, or, at least, end up, below 3,000 feet, FAA concludes that the Project will conform.

This Court has consistently rejected this approach to environmental review. As recently as August, 2017, in *Sierra Club v. FERC*, *supra,* 867 F.3d 1357, it took the position, regarding FERC's failure to analyze Greenhouse Gas impacts of a gas pipeline project, that

> "Quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals. Without such comparisons, it is difficult to see how FERC could engage in 'informed decision making' with respect to the greenhouse-gas effects of this project, or how 'informed public comment' could be possible."

Id. at 1374 quoting *Nevada, supra*, 457 F.3d at 93.

The same rational applies to FAA's analysis of the relationship of aircraft fuel burn to emissions from aircraft. NAAQS pollutants, like their twin, Greenhouse Gas emissions, are "an indirect effect of authorizing this project, which [FAA] could reasonably foresee, and

which the agency has legal authority to mitigate." *Id.* And in the same way, FAA like FERC, has not provided a "satisfactory explanation" as to why quantification may not be feasible. *Id.*

There is no question that "[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority *to act on that information*." *Id.* at 1372. [Emphasis in original]. But there is, similarly, no question in this case that FAA has the statutory authority to make changes that mitigate the impacts of its projects. As FAA was specifically instructed to consider the "public interest" in its decisionmaking, including the public's interest in compliance with such environmental statutes as NEPA and the CAA; and as the public interest is inextricably intertwined with FAA's fundamental purpose, 49 U.S.C. § 40103(b)(1); *see also* Vision 100, § 709(c) [Addendum A, p. 82], 49 U.S.C. § 40101 *note*, there remains no question that FAA had the authority, but chose not to, properly "quantify" the emissions from the SoCal Metroplex Project, or to mitigate them, and, thus, plainly abused its discretion.

C. The SoCal Metroplex Project Will, According to the EA, Decrease Efficiency by INCREASING Fuel Burn

Moreover, the "get out of jail free" card allowed by 72 Fed. Reg. at 41578 [AR 9-D-6 at 14; JA _____] for procedures that increase "efficiency," doesn't apply here either. This is because FAA is attempting to apply the Presumption of Conformity to a Project that will increase fuel burn, and, consequently, decrease efficiency.

Specifically, the SoCal Metroplex EA acknowledges that the procedures specified in the SoCal Metroplex will increase both fuel burn and emissions, SoCal Metroplex FEA, § 5.8.3, p. 5-17 [AR 1-B-6 at 17; JA ____], *see also* FAA Order 1050.1E, Change 1, Guidance Memo No. 4, March 21, 2012, p. 2 [AR 9-A-13 at 2; JA _____] ["[a]ircraft noise, fuel burn, and emissions are interdependent . . ."] even if by a small amount. If, as FAA seeks to establish, the proposed change in operations is synonymous with "efficiency," FEA, § 5.8.2, p. 5-17 [AR 1-B-6 at 17; JA _____], the SoCal Metroplex EA cannot square its claim of "increase in operational efficiency" (*i.e.*, reducing the time an aircraft spends in arrival and departure FEA, Appendix F, § 05, p. F-10 [AR 1-B-12 at 16; JA _____]) with the specific findings showing the necessary, and acknowledged increase in emissions. *Id.* Simply stating that

"efficiency will be increased," while showing the opposite in the EA, does not satisfy the requirements for a presumption of conformity, 40 C.F.R. § 93.153(f)-(h); 72 Fed. Reg. 41565-41580 [AR 9-D-6; JA _____]; does not satisfy the requirements of NEPA, 42 U.S.C. § 4332(2)(C); and does not eliminate the prospect of potentially damaging increase in air emissions over heavily populated areas.

FAA is certain to point to cases in the nature of *County of Rockland v. FAA, 335 Fed.Appx. 52, *56-57 (D.C. Cir. 2009), 2009 U.S. App. LEXIS 12513 at *3-4,* in which, as here, FAA did not directly calculate the level of emissions resulting from a plan to redesign the New York/New Jersey/Philadelphia Metropolitan Area airspace. In that case, FAA instead relied upon a fuel burn analysis that showed the redesign will "reduce fuel consumption by just over 194 metric tons per day" in the study area. Because reducing fuel consumption reduces aircraft emissions, FAA concluded the redesign will reduce emissions in the study area. *Id.* FAA further reasoned that a project that *decreases* fuel burn cannot cause a more than *de minimis increase* in emissions and on that ground declined to perform a conformity determination.

The Court agreed that the agency was entitled to a presumption of conformity since the project would result in decreased fuel burn. *Id.*

Ironically, *County of Rockland* supports Petitioners', not FAA's, arguments. Here, the evidence is that fuel burn from the Project will increase. As acknowledged in the EA, those increases will occur in some measure below the 3,000 foot mixing altitude. As a consequence, and based on a reasonable application of both the law, and the facts set forth in FAA's EA, the decision to approve the Project without, at least, a conformity applicability analysis cannot be denominated a "reasoned" decision, and, thus, is, by definition, an arbitrary and capricious one.[14]

VIII. FAA PAYS AS LITTLE ATTENTION TO THE PROJECT'S CUMULATIVE IMPACTS AS IT DOES TO ITS INDIVIDUAL NOISE AND AIR QUALITY IMPACTS

Although the EA devotes four pages to the cumulative impacts analysis of the Project, it barely mentions cumulative noise impacts, let alone takes a "hard look" at such impacts. Instead, the FEA's purported

[14] Petitioners have met the requirements to establish prejudicial error where they have raised these omissions from the air quality analysis repeatedly during the administrative process, [AR 6-A-1 at 1534-1541; JA ____], [AR 6-A-1 at 3960-3963; JA ____], and have further established that FAA's performance of an air quality analysis would provide the information needed to support required mitigation under the CAA.

cumulative impacts analysis, § 5.10, pp. 5-18 to 5-23 [AR 1-B-6 at 18-23; JA ____], addresses (and, then only superficially), energy, air quality, and climate change impacts.

An important omission from the cumulative impacts analysis here are the major runway projects planned for the North Runway Complex at LAX. Nevertheless, on the basis of a few relatively minor projects identified in FEA Table 5-7, p. 5-19 to 5-22 [AR 1-B-6 at 19-22; JA ____], and alleged to be the full list of "Past, Present, and Reasonably Foreseeable Future Actions," the EA concludes there would be no significant long term cumulative noise or air quality impacts.[15] This approach cannot withstand judicial scrutiny.

Cumulative effects are defined by the CEQ as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over

[15] That conclusion is further based on previously conducted environmental assessments, all of which, predictably, resulted in Findings of No Significant Impact ("FONSI"). FEA Table 5-7, p. 5-19 to 5-22 [AR 1-B-6 at 19-22; JA ____]

a period of time." *Del. Riverkeeper Network, supra,* 753 F.3d at 1319, quoting 40 C.F.R. § 1508.7 [emphasis added].

This Court went on to explain that "'a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.'" *Id.,* quoting *Grand Canyon Trust, supra,* 290 F.3d at 345.

The SoCal Metroplex EA defies that mandate. First, FAA gives only a tenuous nod to factor number 3, "other actions – past, present, and proposed, and reasonably foreseeable - that have had or are expected to have impacts in the same area," listing a few projects taking place contemporaneously with, or shortly after implementation of, the SoCal Metroplex Project. Those listed projects are limited to relatively insignificant Runway Safety Area improvements at LAX, *see* FEA, §§ 5.10.2, 5.10.3, p. 5-18, Table 5-7, p. 5-19 to 5-22 [AR 1-B-6 at 19-22; JA

____] ("Potential Impacts – 2016 and 2021"), and were all the subject of FONSIs.

In limiting the scope of its analysis, FAA ignores the contemporaneous projects of much broader scope and impact approved for implementation by both FAA and the airport operator, the City of Los Angeles, five years ago on April 30, 2013, Los Angeles International Airport (LAX) Specific Plan Amendment Study (SPAS) Notice of Determination, May 1, 2013. [RJN, Exhibit B]. These include, but are not limited to, the movement of Runway 6L/24R, 260 feet north, as well as the extension of Runway 6R/24L 1,250 feet to the east, SPAS Final EIR, § 2.2.1.1, pp. 2-6, 2-7, Airfield Facilities, [RJN, Exhibit C], for the purported purpose of increasing "efficiency," by expediting simultaneous arrivals and departures. *Id.* at p. 2-7. The latter projects have already been the subject of environmental review under the CEQA, the results of which demonstrated significant noise impacts. As the implementation of those projects is more than "reasonably foreseeable," even imminent, FAA acted improperly in failing to consider their impacts in determining the SoCal Metroplex Project's cumulative impacts.

It is, moreover, those specified changes to the runway configurations that lead directly to the increase in capacity of the airfield that the SoCal Metroplex EA specifically abjures. The SoCal Metroplex EA claims that "the number and type of aircraft operations are the same under both the Proposed Action and No Action Alternative in 2016 and 2021 [because] [t]he Proposed Action does not include developing or constructing facilities, such as runways or terminal expansions, that would be necessary to accommodate an increase in aviation activity," SoCal Metroplex FEA, § 5.1.2, p. 5-3 [AR 1-B-6 at 3; JA ____]. In so concluding, the EA fails to recognize or acknowledge that the impacts of the SoCal Metroplex Project when taken together with those of other "past, present, and reasonably foreseeable future projects" such as those detailed in the SPAS EIR, may have exactly the opposite result.

This is supported by the consistent position taken by FAA and its former Administrator Michael Huerta that, as is the case at LAX, "[n]ew or reconfigured runways can effectively improve capacity at airports with significant constraints," *see, e.g.*, Federal Aviation Administration Press Release – *FAA Identifies Airport Capacity*

Constraints and Improvements, January 23, 2015 [Addendum A, p. 231].

Increased "efficiency," which is the alleged goal of the SoCal Metroplex Project,[16] is also the goal of the referenced runway projects at LAX. The specified basis of the definition of "efficiency," *i.e.*, "greater number of aircraft arriving and departing during a given period of time," is an identity with the definition of "capacity," or "throughput rate, i.e., the maximum number of operations that can take place in an hour." FAA Advisory Circular 150/5060-5, *Airport Capacity and Delay*, September 23, 1983, p. 1 [Addendum A, p. 68]. Under this model, therefore, increased "efficiency" inevitably leads to increased "throughput" which is synonymous with increased "capacity." It only requires a simple algebraic identity to establish that the SoCal Metroplex Project possesses capacity enhancing potential when viewed together with LAX's "reasonably foreseeable" Specific Plan Amendment

[16] Increased efficiency is defined as "improved flexibility in transitioning traffic between enroute and terminal airspace and between terminal airspace area and the runways, improving the segregation of arrivals and departures in terminal and enroute airspace, and improving the predictability in transitioning traffic between enroute and terminal airspace and between terminal airspace and the runway environment." FONSI/ROD, § IV, Purpose and Need, p. 4 [AR 1-A-1 at 4; JA _____].

Study and other projects, although the cumulative, capacity-enhancing, and consequent potential noise and air quality, impacts have never been quantified in the SoCal Metroplex EA.

In short, although a supportable cumulative impacts analysis requires analysis and reporting of "the overall impact that can be expected if the individual impacts are allowed to accumulate," *Del. Riverkeeper Network, supra*, 753 F.3d at 1319, the SoCal Metroplex EA's cumulative impacts analysis fails to so much as take a stab at "the overall impact," which requires the full list of approved and waiting runway and taxiway projects at LAX, the largest airport in the region; calculation of the increased "capacity" they will collectively generate, as well as of the level of noise and air quality impacts resulting from that cumulative analysis. *Id.*

The SoCal Metroplex EA is currently devoid of those necessary components, and, thus, manifestly violates NEPA.

IX. THE SOCAL METROPLEX EA FAILS TO ADEQUATELY ANALYZE THE IMPACTS OF GHG EMISSIONS

The SoCal Metroplex EA concludes that, although fuel burn would increase under the Project as compared with the No Action Alternative, not only should the Project be considered more "efficient," and, thus, be

presumed to conform, but also that no significant impact on GHG emissions should be anticipated. SoCal Metroplex FEA, pp. 5-18, 5-23 [AR 1-B-6 at 18, 23; JA __, __]. In support of the latter conclusion, the SoCal Metroplex EA asserts that, while the GHG emissions from the Project "represents a slight increase of approximately 35 MT [metric tons] of CO2e [CO2 equivalent] or 0.41 percent under the Proposed Action when compared to the No Action Alternative. This would comprise less than 0.0000011 percent of U.S.-based greenhouse gas emissions and less than 0.00000014 percent of global greenhouse gas emissions." SoCal Metroplex FEA, p. 5-18 [AR 1-B-6 at 18; JA ____]. This reasoning, however, runs directly contrary to its own Interim Guidance, "*Considering Greenhouse Gases and Climate Under the National Environmental Policy Act (NEPA): Interim Guidance*," FAA Order 1050.1E, Change 1, Guidance Memo #3, January 12, 2012 [AR 9-A-12; JA ____], the guidance provided by the CEQ, and the applicable law in the State of California where the Project is expected to take place.

First, FAA guidance on the analysis of Greenhouse Gases, applicable during the time the SoCal Metroplex Project was being

evaluated, clearly contradicts this conclusion where it states "GHGs result primarily from combustion of fuels, and there is a direct relationship between fuel combustion and MT CO_2." *Id.* at p. 2 [AR 9-A-12 at 2; JA ____].

Second, the CEQ expressly rejects the use of a *de minimis* standard in accessing GHG relate climate change impacts. "[T]he statement that emissions from a government action or approval represent only a small fraction of global emissions is more a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether to consider climate impacts under NEPA. Moreover, these comparisons are not an appropriate method for characterizing the potential impacts associated with a proposed action and its alternatives and mitigations." *Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects on Climate Change in NEPA Reviews*, 79 Fed. Reg. 77802-77831, December 24, 2014 ("Revised Draft Guidance") [Addendum A, p. 158].[17]

[17] While this Guidance was set aside on April 5, 2017 by Executive Order, it was applicable during the time that the GHG analysis in the EA was being conducted.

Finally, rather than utilizing a *de minimis* approach to evaluating the GHG and air quality significance of the proposed action, and considering the context and intensity of the Project's GHG emissions on a nationwide basis, *see* 40 C.F.R. §§ 1508.27(a) and (b), FAA was responsible for considering the way in which the Project will affect the State of California, the region exclusively affected by the Project, in reaching its emissions reductions goals under AB 32, the California Global Warming Solutions Act of 2006 [Addendum A, p. 99].

This is because "[t]he Clean Air Act 'is an exercise in cooperative federalism.' [Citation omitted.] The Environmental Protection Agency promulgates air quality standards, and the states, if they wish, adopt state implementation plans (SIPs) '"providing for the implementation, maintenance, and enforcement of"' those air quality standards . . ." *Myersville, supra*, 783 F.3d at 1317 quoting *Michigan v. EPA*, 213 F.3d 663, 669 (D.C. Cir. 2000). If FAA had considered those state law mandates, as it is obligated to do under the CAA, it would have, at minimum, taken into consideration in its evaluation AB 32's requirement that California reduce its GHG emissions to 1990 levels by the year 2020. In addition, under the Governor's Executive Order B-30-

15, April 29, 2015 [Addendum A, p. 232], by 2050, California must reduce its GHG emissions to 80% below 1990 levels.

Nevertheless, the SoCal Metroplex EA entirely omits not only acknowledgement of the direct relationship between fuel burn and GHGs, but also discussion or consideration of whether the Project would impede the State's ability meet these goals, and, therefore, fails in its responsibility to honor the federal/state compact inherent in the CAA, and its legal obligation to fully consider the environmental consequences of the Project as required by both NEPA and the CAA.

X. THE EA FAILS TO ANALYZE THE FULL CATALOGUE OF ALTERNATIVES OR ADDRESS THE PURPOSE AND NEED FOR THE PROJECT

FAA failed to take a hard look at appropriate alternatives to the SoCal Metroplex Project, despite the requirement that, in preparing its environmental document under NEPA, an agency must evaluate a full range of appropriate alternatives to its recommended course of action that could fulfill the purpose and need of the project. 42 U.S.C. § 4332(2)(E). These alternatives must "cover[] the full spectrum of possibilities." *See Sierra Club v. Watkins*, 808 F.Supp. 852, 872 (D.D.C. 1991).

FAA violated NEPA by defining the purpose and need of the SoCal Metroplex Project so narrowly that only one "alternative" – the proposed flight routes – could fulfill that purpose. An agency may not define a purpose and need statement in terms so impermissibly narrow that it makes the selection of a particular alternative a foreordained conclusion. *See, e.g., Theodore Roosevelt Conservation P'ship v. Salazar, supra*, 661 F.3d at 73 [purpose and need statement is impermissibly narrow and will be rejected if the definition of objectives "compels the selection of a particular alternative"]; *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.,* 606 F.3d 1059, 1072 (9th Cir. 2010) [as a result of an unreasonably narrow purpose and need, BLM considered an unreasonably narrow range of alternatives]; *Simmons v. US Army Corps of Engineers*, 120 F.3d 664, 667 (7th Cir. 1997) [agency failed to comply with NEPA by defining impermissibly narrow purpose for project, therefore failing to consider a full range of alternative]; *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002) [agency can reject alternatives that do not meet purpose and need but cannot "define the project so narrowly that is foreclosed a reasonable consideration of alternatives"].

Moreover, an agency must consider the statutory context of the proposed action and any other congressional directives when determining the purpose and need of a federal project. *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196 (D.C. Cir. 1991) ["an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives"]; *see also Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., supra*, 606 F.3d at 1070.

Here, FAA states that the "need" for the SoCal Metroplex Project is "the inefficiency of the existing aircraft flight procedures in the Southern California Metroplex." FEA, p. 2-1 [AR 1-B-3 at 1; JA ____]. FAA goes on to describe the "purpose" as "optimiz[ing] procedures serving the Study Airports, while maintaining or enhancing safety, in accordance with FAA's mandate under federal law." *Id.* As stated above, Vision 100 lists seven goals for the FAA to achieve in the implementation of NextGen. Vision 100, § 709(c) [Addendum A, p. 82].

While the stated "purpose and need" meets the first goal of Vision 100,[18] it does not address goal seven – "take into consideration, to the greatest extent practicable, design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents." Vision 100, § 709(c)(7) [Addendum A, p. 82]. There is no discussion in the "Purpose of the Proposed Action" section of any effort on the part of the FAA to reduce noise or emissions.

FAA's "purpose and need" is thus so narrow as to foreclose reasonable alternatives in violation of NEPA. *See, e.g., Simmons, supra*, 120 F.3d at 667.

Because of that improperly narrow purpose and need statement, FAA's consideration of alternatives to its proposed SoCal Metroplex Project is also insufficient. FAA did not analyze any alternatives other than the proposed action and the no action alternative. There is no discussion about alternative flight paths that would reduce noise or emissions. While no formal alternatives to the proposed project were presented for further environmental review, FAA did discuss the

[18] "(1) improve the level of safety, security, efficiency, quality, and affordability of the National Airspace System and aviation services," Vision 100, § 709(c)(1) [Addendum A, p. 82], 49 U.S.C. § 40101, *note*.

process by which the flight paths were chosen. Not included in that process was any consideration of exposure of residents to noise or emissions. This constitutes legal error because FAA was required, but failed, to examine the full range of appropriate alternatives to its recommended course of action. *See* 42 U.S.C. § 4332(2)(E); *Sierra Club v. Watkins*, *supra*, 808 F.Supp. at 872. The FAA was required under NEPA and Vision 100 to develop and analyze alternatives that reduce noise and emission exposure in detail to fully and fairly determine whether they are valid alternatives that meet the goals for NextGen as set out in Vision 100.

XI. FAA ARBITRARILY AND CAPRICIOUSLY IGNORED FEDERAL LAW REQUIRING THE FAA TO CONSIDER FLIGHT ROUTES THAT *REDUCE* NOISE AND EMISSIONS

The Court reviews the "decisions of federal agencies, including the FAA, under the standards set forth by the Administrative Procedure Act." *D&F Afonso Realty Trust v. Garvey,* 216 F.3d 1191, 1194 (D.C. Cir. 2000). The Administrative Procedure Act states that a court must set aside an agency action if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," is taken "without observance of procedure required by law," or fails to meet

statutory, procedural or constitutional requirements. *Id.*, 5 U.S.C. § 706(2)(A), (D). An agency action is arbitrary and capricious if: (1) the decision does not rely on the factors that Congress intended it to consider; (2) the agency failed entirely to consider an important aspect of the problem; or (3) the agency offers an explanation which runs counter to the evidence. *See State Farm,* 463 U.S. at 43.

In *Vision 100,* § 709(c) [Addendum A, p. 82], Congress laid out in detail the goals of the Next Generation Air Transportation System ("NextGen"). Using the mandatory "shall," Congress directed FAA to "take into consideration, to the greatest extent practicable, design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents." 49 U.S.C. § 40101 note, *Vision 100,* § 709(c)(7) [Addendum A, p. 82]. There is no doubt that the SoCal Metroplex Project is intended to assist the FAA in implementing NextGen. The Record of Decision states "[t]his project will allow the FAA to begin to achieve its NextGen goals." ROD, p. 15. [AR 1-A-1 at 15; JA ____]. There is also no doubt that the Metroplex initiatives seek to reconfigure airspace around the country by designing "airport approach and departure flight paths." The sum and substance of the

SoCal Metroplex Project is the development and implementation of such flight paths.

Yet there is no indication in the Environmental Assessment or in the ROD that the FAA even took "into consideration," let alone to the "greatest extent practicable" to design airport approach and departure flight paths that would actually *reduce* exposure of noise and emissions pollution on affected residents. FAA ignored one of its congressionally mandated goals for NextGen. Instead, the EA and the ROD limit their focus on improving "the efficiency of the procedures and airspace utilization in the Southern California Metroplex." Final EA, § 2.2, p.2-15 [AR 1-B-3 at 15; JA ____]; *see also* ROD, p.3 [AR 1-A-1 at 3; JA ____] ("The SoCal Metroplex Project is intended to address specific issues to the efficient flow of traffic into and out of the Southern California Metroplex"). In the Introduction to the ROD, the FAA lists several statutory "considerations" that were part of the SoCal Metroplex Project, but fails to mention that reduction of noise and emissions were also to be considered by the FAA.

Several commenters on the Draft EA pointed out this lack of adherence to congressional mandate. In those comments, they pointed

out that the FAA had not given appropriate consideration to the *reduction* of noise and emissions in developing the approach and departure flight paths. Final EA, App. F, p. F-385. [AR 1-B-12 at 391; JA ____]. As a result, the comment continued, the proposed approach and departure flight paths do not meet the goals that Congress defined for NextGen. *Id.* That is, according to *Vision 100*, the FAA had a non-discretionary, congressionally-mandated duty when designing airport approach and departure flight paths to "take into consideration, to the greatest extent practicable … to *reduce* exposure of noise and emissions pollution on affected residents." (emphasis added).

However, even when given the opportunity to directly address the goals mandated by Congress, the FAA failed to tackle the issue head on. Instead, the FAA fell back on the fact that it defined the purpose of the proposed action as "optimiz[ing] procedures serving the Study Airports, while maintaining or enhancing safety, in accordance with the FAA's mandate under federal law." Final EA, App. F, p. F-385. [AR 1-B-12 at 391; JA ____]. Further, the FAA stated that it believed it was sufficient to conclude that "the Proposed Action, when compared to the No Action

Alternative, would not result in any significant environmental impacts." *Id.*

While "not resulting in any significant environmental impacts" may qualify as an acceptable result under NEPA, it is not sufficient under *Vision 100* and the Administrative Procedure Act. Congress specifically stated that the FAA must consider *reducing* noise and emissions, not simply assuring that no significant impact would occur. As such, the ROD does not address the factors that Congress intended FAA to consider.

The inescapable conclusion is that FAA's failure in its design of the SoCal Metroplex Project's approach and departure flight routes to consider "to greatest extent practicable" the reduction of noise and emissions pollution on affected residents was arbitrary and capricious. *See James V. Hurson Associates, Inc. v. Glickman,* 229 F.3d 277, 284 (D.C. Cir. 2000)) (an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" if "it failed to consider factors made relevant by Congress"). Indeed, FAA's failure to even attempt to gather the information necessary to make a claim that it had considered the reduction of noise and emissions when it designed

the flight routes is the very definition of arbitrary and capricious decision-making. *See Oregon Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1142 (9th Cir. 2008)) ("We cannot defer to a void" in record). The FAA has ignored Congress' mandate to, at the very least, consider the reduction of noise and emissions when developing NextGen flight routes like those in the SoCal Metroplex Project. Therefore, the FAA's decision in the SoCal Metroplex is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law and must be vacated and remanded.

CONCLUSION

This Court should not give FAA a "pass" on the inadequacies of: (1) the EA's noise analysis, which entirely ignores the relevant analytic tools, the model (AEDT) and metric (CNEL), prescribed by its own regulations, and applicable aircraft flight paths, belatedly defined in the TARGETS Distribution Packages; (2) air quality analysis which ignores required analysis of the SoCal Metroplex's air quality impacts in favor of a Presumption of Conformity, despite EPA's regulations to the contrary, and overwhelming evidence in the Record that some proportion of aircraft operations will occur below the 3,000 foot "mixing"

height, and result in an increase in fuel burn; (3) cumulative impacts analysis that entirely ignores the analysis of cumulative noise and air quality impacts where it omits to study major "present" and "reasonably foreseeable" runway, taxiway and terminal improvement projects, approved years ago at, among others, LAX, and that have demonstrable cumulative contributions to noise and emissions; and (4) finally, the EA's ultimate purpose which utterly fails to address the U.S. Congress' mandate to take into consideration "design of airport approach and departure flight paths to reduce exposure to noise and emissions. . .," when implementing NextGen.

The deference usually accorded to FAA that often allows it to escape the consequences of deficiencies in its environmental analyses is neither appropriate where, as here, FAA has thumbed its nose at its own regulations and those of its sister agency, EPA, nor justified where FAA has entirely failed to comply with the expressly stated Congressional mandate that it consider the "public interest," by alleviating the noise and pollution impacts on hundreds of thousands, even millions of affected residences and businesses throughout Southern California affected by the SoCal Metroplex Project.

For all the above reasons, Petitioners request this Court find FAA's actions in approving the FONSI/ROD arbitrary, capricious, and an abuse of discretion, and, on that ground, set its decision aside and enjoin any further implementation of the SoCal Metroplex Project unless and until requisite compliance with NEPA, the CAA, and FAA's own statutory and regulatory mandates has been achieved.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petitioners' Opening Brief complies with the word-length limitation of Fed.R.App.P. 32(a)(7)(B), as modified by this Court's Order of December 20, 2017 providing that Brief for Petitioners not to exceed 19,000 words, because, excluding the parts of the document exempted by Fed.R.App.P. 32(f) it contains 18,133 words.

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

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CERTIFICATE OF SERVICE

I certify that on March 16, 2018, I electronically filed the foregoing Petitioners' Opening Brief using this Court's CM/ECF system. All counsel of record are registered for electronic service.

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