

Case No.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY OF NEWPORT BEACH, CALIFORNIA,

Petitioner,

v.

UNITED STATES FEDERAL AVIATION ADMINISTRATION and
MICHAEL P. HUERTA, in his official capacity as Administrator;
UNITED STATES DEPARTMENT OF TRANSPORTATION and
ANTHONY FOXX, in his official capacity as Secretary,

Respondents.

PETITION FOR REVIEW OF AGENCY ACTION
(49 U.S.C. § 46110)

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Pursuant to 49 U.S.C. Section 46110, and Rule 15(a) of the Federal Rules of Appellate Procedure, City of Newport Beach (“Petitioner”), hereby respectfully petitions this Court for review of the August 31, 2016, Federal Aviation Administration’s Finding of No Significant Impact (“FONSI”), Record of Decision (“ROD”) and related Environmental Assessment (“EA”) adopted for the Southern California Metroplex Project. A true and correct copy of the FONSI, obtained from http://www.metroplexenvironmental.com/socal_metroplex/socal_docs.html, is attached as Exhibit A.

INTRODUCTION

1. This case involves the Federal Aviation Administration’s (“FAA”) failure to adequately analyze the environmental impacts of implementing new departure, arrival, and approach procedures at airports located within the Southern California Metroplex.

2. The FAA is in the process of implementing the Next Generation Air Transportation System (“NextGen”)—the agency’s plan to modernize the National Airspace System through 2025. As part of transitioning to NextGen, FAA is implementing a mid-term step, referred to as the Metroplex initiative.

3. At issue is the FAA’s approval of the Southern California Metroplex Project (“Project”).

4. In 2015, the FAA circulated for public comment a Draft EA, designed to assist the agency in deciding whether the Project may significantly affect the quality of the environment, and thus whether the Project requires a comprehensive, thorough analysis of such impacts in the form of an Environmental Impact Statement (“EIS”).

5. Numerous state, federal, and local agencies, including Petitioner, in addition to private citizens and organizations, submitted comments and evidence concerning potentially significant environmental impacts, including impacts related to noise and air quality.

6. Notwithstanding the voluminous specific concerns expressed in these comments, and notwithstanding the FAA’s legal obligation to take a “hard look” at the environmental consequences of the Project under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., the FAA concluded that the Project would have no significant impacts. The FAA issued the FONSI, and approved the Project by a ROD on August 31, 2016, without evaluating environmental impacts through the preparation and circulation of a comprehensive EIS.

7. The FAA’s abdication of its duty to disclose and adequately analyze the significant impacts that may result from the Project is the basis for this action. The FAA’s August 2016 EA, FONSI, and ROD approving the Project are

deficient. The EA, FONSI, and the ROD failed to adequately consider, disclose, and evaluate the significant impacts arising from the Project.

8. By this Petition for Review of Agency Action, Petitioner seeks review of the FONSI/ROD in its entirety, including but not limited to, the matters raised in this Petition and in Petitioner's comment letter. Petitioner requests that this Court set aside the FAA's conclusion that the Project would not have any significant impacts and order the FAA to fully analyze the potential environmental impacts of the Project.

JURISDICTION

9. This Court has jurisdiction over this Petition for Review of Agency Action under 49 U.S.C. § 46110(a) (orders issued by the FAA regarding "aviation duties and powers designated to be carried out by the Administrator") and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

10. This Court has "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the ... [FAA] Administrator to conduct further proceedings." 49 U.S.C. § 46110(c).

11. The FAA has issued a final order that is subject to review under 49 U.S.C. § 46110.

PARTIES

12. Petitioner City of Newport Beach is a municipal corporation

organized and existing under and by virtue of the laws of the State of California.

Petitioner is located in Orange County. Petitioner, as a party to the JWA Settlement Agreement, which restricts development and operations at John Wayne Airport (“SNA”), has a substantial interest in the effects of changes to aircraft operations at SNA on its residents, visitors and businesses. This interest includes changes in flight operations that may result in new or more severe noise impacts.

13. Respondent United States Department of Transportation is the federal agency responsible for the activities of the Respondent FAA.

14. Respondent Anthony Foxx, the Secretary of the Department of Transportation, is responsible for the Department of Transportation’s activities and is sued in his official capacity.

15. Respondent FAA is the federal agency responsible for the EA, FONSI and ROD that are challenged by Petitioner.

16. Respondent Michael P. Huerta, the Administrator of the FAA, is responsible for the FAA’s activities and is sued in his official capacity.

SUMMARY OF NEPA’S STATUTORY AND REGULATORY FRAMEWORK

17. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. NEPA’s purpose is to ensure “public officials make decisions that are based on understanding of environmental consequences, and to take actions to protect, restore, and enhance the environment,” and to

“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)-(c).

NEPA is designed to “encourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2(d).

“Human environment” is interpreted “comprehensively to include the natural and physical environment and the relationship of people with that environment.”

40 C.F.R. § 1508.14.

18. To achieve these purposes, NEPA requires all federal agencies to prepare a “detailed statement,” known as an EIS, regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

19. If an agency does not know whether the effects of its proposed action will be “significant,” then the agency may prepare an EA. 40 C.F.R. § 1501.4(b). An EA consists of an analysis of the need for the proposed action, of alternatives to the proposed action, and of the environmental impacts of both the proposed action and the alternatives. 40 C.F.R. § 1508.9. If the EA indicates that the federal action *may* significantly affect the quality of the human environment, then the agency *must* prepare an EIS. 40 C.F.R. § 1501.4(c) (emphasis added).

20. Under Ninth Circuit precedent, an agency must prepare an EIS if substantial questions are raised as to whether a project may have significant

effects. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1185 (9th Cir. 2008).

21. If an agency decides not to prepare an EIS, then the agency must prepare a Finding of No Significant Impact providing a statement of reasons to explain the basis for the agency's decision. 40 C.F.R. § 1508.13.

FACTUAL BACKGROUND

22. The FAA is tasked with implementation of NextGen operational improvements for the nation's air transportation system. NextGen is FAA's long-term plan to modernize the national airspace from a ground-based system of air traffic control to a GPS-based system of air traffic management. The Metroplex initiative is a key step in the overall process of transitioning to NextGen.

23. The Project, as approved, would replace dozens of existing conventional air traffic control procedures with new satellite-based procedures at 21 airports in Southern California.

24. One of the affected airports is SNA in Orange County. Many residential communities in Newport Beach are located under or near the arrival and departure patterns of commercial and general aviation aircraft operating out of SNA. Operations and development at SNA are the subject of the JWA Settlement Agreement—which is designed to control the adverse impacts of SNA and protect the interests of the community. Petitioner has a substantial interest in ensuring

aircraft operations at SNA do not significantly affect its residents. In particular, Petitioner has a substantial interest in ensuring any changes in aircraft operations at SNA are consistent with protections provided for in the JWA Settlement Agreement.

25. On June 10, 2015, the FAA released and made available for public review and comment the Draft EA for the Project.

26. The FAA received more than 4,000 comments from private citizens and organizations, elected officials, municipalities, and local, state, and federal agencies raising substantial concerns about the Project and the adequacy of the information contained in the Draft EA. The public comment period ended on October 8, 2015.

27. Petitioner submitted a 26-page comment letter, dated September 4, 2015, summarizing the inadequacies of the Draft EA. A true and correct copy of Petitioner's comment letter is attached hereto as Exhibit B. Included as attachments to Petitioner's letter were expert comment letters summarizing the inadequacies of the Draft EA's noise analysis and air quality analysis. In its letter, and as described more fully below, Petitioner raised NEPA violations including: the FAA's predetermination of the outcome, inadequate analysis of noise, air quality and greenhouse gas emissions, and cumulative impacts, as well as significant cybersecurity risks related to the Project.

28. **Predetermination:** Given the pressure FAA is under to implement NextGen on an accelerated basis, Petitioner raised concerns that the adequacy of the EA had been predetermined in violation of NEPA.

29. **Project Description:** Petitioner commented that the EA does not clearly explain or show in diagrams what the FAA specifically proposes for SNA, making it difficult, if not impossible, to understand the ways in which the Project would affect Petitioner's residents and the environment generally. Petitioner noted that the vague description of the Project failed to provide sufficient detail to allow the public a meaningful opportunity to comment on the Project.

30. **Noise:** Petitioner retained an independent noise expert, who explained that including arrival and departure tracks for all 21 airports for the various modeling conditions makes it impossible to consider individual airports, such as SNA, and the potential effects from changes to operations at each airport.

31. Petitioner's expert also noted that the use of standard operating procedures was inappropriate for noise modeling at SNA because this approach did not reflect current conditions due to single-event noise exposure level limits for certain classes of aircraft and Orange County regulations, including the General Aviation Noise Ordinance.

32. Most glaringly, the EA lacked detailed information regarding the potential changes in aircraft patterns and intensity at SNA that could result from

the Project. The EA contained no evidence to support a conclusion of no significant impacts from changes in flight patterns resulting from the Project.

33. **Air Quality and Greenhouse Gas Emissions:** The South Coast Air Basin is in extreme nonattainment with federal national air quality standards for ozone, and in non-attainment with the federal particulate matter (both PM₁₀ and PM_{2.5}) standards. Petitioner retained an independent air quality expert who opined as to the inadequacies of the air quality analysis.

34. Petitioner raised concerns about the EA's reliance on the Clean Air Act's de minimis exception citing a lack of factual support for the conclusion that operational changes resulting in increased fuel consumption would only occur at or above 3,000 feet above ground level ("AGL"). Petitioner pointed out that changes in air traffic flows during departures, descents and approaches of flights all occur near ground levels.

35. To support the conclusion of no significant impacts on greenhouse gas ("GHG") emissions related to climate change, the FAA reasoned that the Project-related GHG emissions represented only a slight increase—0.33 percent under the Project when compared to the No Action Alternative. In its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, the Council on

Environmental Quality (“CEQ”) expressly rejected the de minimis approach taken by FAA.

36. **Cybersecurity Risks:** Petitioner cited a report prepared by the U.S. Government Accountability Office (“GAO”) which raised concerns of increased risks to safety and security associated with information-system breaches and failures. The EA did not address these increased safety and security risks associated with the Project.

37. **Cumulative Impacts:** The EA did not even mention cumulative noise impacts, let alone analyze such impacts. The EA’s purported cumulative impacts analysis is limited to energy, air quality, and climate change impacts. The EA simply reiterates that the Project would not have significant indirect or direct impacts in these areas when compared to the No Action Alternative. This conclusion is based on the EA’s flawed assumptions that the Project itself would not have significant air quality or climate change impacts.

38. The EA merely discloses the existence of several proposed projects within the immediate vicinity that may impact the same resources as the Project, but does not analyze the combined impacts of these projects.

39. Following the close of the comment period, the FAA prepared a Final EA and signed a FONSI/ROD for the Project on August 31, 2016. The FAA posted the Final EA and FONSI/ROD documentation on the Project website on

September 2, 2016. Responses to comments received on the Draft EA were included as an appendix to the Final EA.

40. Petitioner’s comment letter was not included in the Final EA. The FAA did not respond to Petitioner’s letter as part of the Final EA process or before adopting the ROD. On September 8, 2016, the FAA acknowledged that it had received Petitioner’s comment letter, and requested ten business days to determine the best way to handle the FAA’s admitted oversight. On October 25, 2016, the FAA acknowledged in written correspondence that the FAA had received Petitioner’s letter during the public comment period—citing administrative inadvertence for failing to include Petitioner’s letter in the Final EA. As a result of that administrative inadvertence, the FAA indicated that it did not consider Petitioner’s comments in reaching its decision on the Project. The FAA further indicated that it would provide detailed responses to Petitioner’s comments by November 11, 2016.

41. In failing to consider Petitioner’s concerns in reaching its conclusions about the impacts of the Project and failing to respond to substantive comments raised by Petitioner, the FAA abdicated its duties under Order 1050.1E, which requires EAs to “reflect FAA’s consideration of public concerns.”

42. The Final EA, like the Draft EA, suffers from the same inadequacies raised by Petitioner in its comment letter.

FIRST CAUSE OF ACTION
OUTCOME OF NEPA ANALYSIS PREDETERMINED

43. Petitioner hereby realleges and incorporates each and every paragraph above.

44. By its statements and actions, the FAA predetermined the outcome of the NEPA analysis before the analysis has been concluded.

45. The FAA's decision is shown by, among other things, its commitment to implementing NextGen nationwide on an accelerated schedule.

46. The FAA has engaged in repeated, rapid processing and adoption of EAs and FONSI's in other regions. For example, the FAA has issued six FONSI's, to date, out of eleven Metroplex projects.

47. That FAA made its decision regarding the Project without considering the important concerns raised in Petitioner's comment letter further demonstrates the agency's predetermination of the outcome of the NEPA analysis. FAA failed to include Petitioner's comments in the Final EA and has acknowledged that Petitioner's comment letter was not considered in reaching its decision on the Project. This violates Order 1050.1E, which requires EAs to "reflect FAA's consideration of public concerns."

48. The FAA's predetermination violates 40 C.F.R. § 1505.1(d), which requires agencies to adopt procedures "[r]equiring that relevant environmental documents, comments, and responses accompany the proposal through existing

agency review processes so that agency officials use the statement in making decisions.” Predetermination, in which agency decisions precede preparation of NEPA documents, renders the NEPA process irrelevant and invalid. The FAA’s action based on predetermination is arbitrary and capricious and a violation of NEPA.

SECOND CAUSE OF ACTION
VAGUE AND INCOMPLETE PROJECT DESCRIPTION

49. Petitioner hereby realleges and incorporates each and every paragraph above.

50. NEPA requires agencies to “emphasize real environmental issues” so that the public can understand, and decisionmakers can use, the required environmental documents. 40 C.F.R. § 1500.2(b).

51. The EA violates NEPA because it fails to disclose potential changes in aircraft flight patterns and intensity at SNA resulting from the Project. Consequently, it is impossible to understand the ways in which the Project would affect Petitioner’s residents.

52. The EA lacks sufficient detail to allow the public a meaningful opportunity to comment on the Project, and to allow the FAA’s own experts to express an informed opinion. The EA also deprives the FAA decision makers of the opportunity to make an informed decision.

THIRD CAUSE OF ACTION
FAILURE TO ADEQUATELY ANALYZE NOISE IMPACTS

53. Petitioner hereby realleges and incorporates each and every paragraph above.

54. The EA violates NEPA because it lacks explanation and quantifiable information regarding the increase in noise levels expected to result from implementation of the Project.

55. The EA includes only cursory information regarding baseline conditions. The EA lacks detail of the assumed existing noise levels surrounding SNA, or noise assumptions regarding the Project or the No Action Alternative. Without such information there is no evidence supporting the EA's conclusion of no significant noise impacts from changes in flight patterns or, potentially, an increase in intensity from use of more concentrated departure routes under the Project.

56. The noise model relied upon by the FAA in preparing the EA uses standard aircraft operating assumptions. These assumptions are inconsistent with the unique operating requirements at SNA. Use of operating assumptions that are inapplicable to SNA does not reflect current conditions, and the resulting analysis does not accurately reflect whether the Project would result in any noise impacts to residential areas surrounding SNA.

57. The EA uses the outdated Noise Integrated Routing System model to analyze potential impacts. That model was replaced by FAA in March 2012—prior to the release of the Draft EA. Use of an outdated model renders the noise analysis deficient.

58. The EA’s conclusion that the Project would not have a significant impact on any affected community is arbitrary and capricious and skews the future baseline noise analysis. The EA assumes the number of aircraft flying into SNA and other airports within the Southern California Metroplex would increase at roughly the same pace over the future year scenarios regardless of whether the Project was implemented. However, the EA lacks substantial evidence to support this assumption. In particular, the EA fails to mention how it accounts for the JWA Settlement Agreement, which provides for limits on the number of flights and the total number of passengers per day at SNA. The raw number of overhead flights is a critical metric for determining noise levels under the EA’s analysis. Elevated and unsupported assumptions regarding the number of flights that would occur if the Project were not implemented improperly inflates the No Action noise baseline level.

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FOURTH CAUSE OF ACTION
FAILURE TO ADEQUATELY ANALYZE AIR QUALITY
AND GHG EMISSIONS

59. Petitioner hereby realleges and incorporates each and every paragraph above.

60. The EA violates NEPA because it fails to take a “hard look” at potentially significant air quality and GHG emissions of the Project.

61. The EA inappropriately relies on the Clean Air Act’s de minimis exemption to conclude the Project would not cause significant air quality impacts because operational changes that could result in increased fuel burn would occur at or above 3,000 feet AGL. The EA, however, provides no factual support for such a conclusion.

62. The EA fails to consider localized air quality impacts including the health effects on nearby sensitive receptors.

63. The EA fails to take a “hard look” at GHG emissions and climate change. In concluding that no significant impacts on GHG emissions related to climate change are anticipated, the EA relies on a “de minimis” rationale. Such rationale for concluding impacts would not be significant is not supported by NEPA—and has been expressly rejected by the CEQ.

64. The EA’s climate change analysis fails to assess whether the Project would have a disproportionate impact on the climate, in that aviation emissions

occur in the climatically sensitive upper troposphere and lower stratosphere.

65. The EA violates NEPA by failing to discuss reasonable mitigation measures to reduce the Project's air quality and GHG impacts. Mitigation includes considering the avoidance of the impacts, minimizing the impacts, rectifying the impacts, reducing or eliminating the impacts over time, or compensating for them.

40 C.F.R. §§ 1508.20.

FIFTH CAUSE OF ACTION
FAILURE TO ADEQUATELY ANALYZE CUMULATIVE IMPACTS

66. Petitioner hereby realleges and incorporates each and every paragraph above.

67. An EA must fully assess the cumulative impacts of a project. 40 C.F.R. § 1508.7. Ninth Circuit precedence requires “some quantified or detailed information; ... [g]eneral statements about the possible effects and some risk do not constitute the hard look absent a justification regarding why more definitive information could not be provided.” *Klamath-Siskiyou Wildlands Center v. U.S. Bureau of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004) (internal quotations omitted).

68. The EA violates NEPA by failing to even mention cumulative noise impacts.

69. The EA violates NEPA by simply assuming that the Project would not cause significant cumulative effects based on the assumption that the Project itself

would have relatively minor air quality and climate change impacts as compared to the No Action Alternative.

70. The EA violates NEPA by failing to quantify the effects of other past, present, and reasonably foreseeable future actions. Absent quantified data about the air quality, GHG/climate change, and noise effects of past, present and reasonably foreseeable future actions, it is impossible to conclude whether the combined effects of the Project and the projects identified in the EA would be cumulatively significant.

SIXTH CAUSE OF ACTION
ARBITRARY AND CAPRICIOUS INSSUANCE OF A FONSI IN
VIOLATION OF NEPA

71. Petitioner hereby realleges and incorporates each and every paragraph above.

72. The EA contains a noticeable lack of explanation and quantifiable information in the record to support the FAA's conclusions that the Project will result in no significant environmental impacts. The impact analyses contain conclusory statements without explanation or supporting evidence. The EA violates FAA Order 1050.1E, which requires EAs to "reflect FAA's consideration of public concerns."

73. The FAA's issuance of the FONSI for the Project was arbitrary, capricious, and in violation of NEPA because there is no substantial evidence to

support the FAA’s finding that the Project will not significantly affect the environment. The FAA’s decision was arbitrary and capricious based on all of the issues raised in the comments submitted.

SEVENTH CAUSE OF ACTION
FAILURE TO PREPARE EIS

74. Petitioner hereby realleges and incorporates each and every paragraph above.

75. NEPA requires the preparation of an EIS if the proposed federal action has the potential to significantly affect the quality of the human environment. 42 U.S.C. § 4332. In determining whether a federal action would “significantly” affect the environment, the agency should consider “[t]he degree to which the proposed action affects public health and safety.” 40 C.F.R. § 1508.27. An agency must evaluate the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” *Id.*

76. The EA does not meet these standards because it fails to include any analysis of heightened cybersecurity risks, including cyberterrorism risks posed by the Project.

77. As demonstrated by the GAO report, the Project has the potential for significant effects on public health and safety and environmental quality due to the increased risks associated with information-system breaches and failures.

78. FAA violated NEPA in failing to prepare an EIS prior to adopting the Project.

RELIEF REQUESTED

WHEREFORE, Petitioner requests that this Court:

1. Set aside the ROD approving the Project as in violation of NEPA;
2. Set aside the FONSI and all related findings as unsupported by substantial evidence;
3. Order FAA to conduct an environmental analysis and complete environmental documentation that complies with NEPA;
4. Stay the ROD and temporarily enjoin the FAA from implementing any portion of the Project until the FAA has taken all actions necessary to fully comply with NEPA;
5. Award Petitioner costs, expenses and reasonable attorney fees pursuant to the Equal Access of Justice Act, 28 U.S.C. § 2412 or other authority;

and

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6. For such other relief as this Court deems just and proper.

Respectfully submitted,

Dated: October 27, 2016

s/ Whitman F. Manley

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 27, 2016.

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

I further certify that some of the participants in the case may not be registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants.

United States Federal Aviation Administration and Michael P. Huerta c/o Agnes Rodriguez, Sr. Attorney 800 Independence Avenue, SW Washington, D.C. 20591	Respondents <i>VIA FEDERAL EXPRESS</i>
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United States Department of Transportation and Anthony Foxx c/o Paul M. Geier, Assistant General Counsel 1200 New Jersey Avenue, SE Washington, D.C. 20590	Respondents <i>VIA FEDERAL EXPRESS</i>
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s/ Judith A. Salas
Judith A. Salas