Case No. 18-71705

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF BURIEN, WASHINGTON

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION and
MICHAEL HUERTA,

Respondents.

CORRECTED PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner the City of Burien, Washington, is a municipal government. It is not a "nongovernmental corporate party" within the meaning of Federal Rule of Civil Procedure 26.1.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 5
STATEMENT OF ISSUES PRESENTED FOR REVIEW 6
STATEMENT REGARDING PERTINENT AUTHORITY 7
STATEMENT OF THE CASE 7
A. Legal Framework 7
B. Statement of Facts 9
1. Seattle-Tacoma International Airport 9
2. Airport Growth 11
3. Initial Implementation Of The New Route 14
4. Environmental Review Of The New Route 15
5. Approval of the New Route and Petition for Review 16
SUMMARY OF ARGUMENT 17
STANDING 17
A. Injury 18
B. Causation 20
C. Redressability 20
STANDARD OF REVIEW 21
ARGUMENT 22
A. The FAA's Reliance On A Categorical Exclusion Was Arbitrary And Capricious 22
1. The FAA Arbitrarily and Capriciously Concluded the New Route Falls Within a Categorical Exclusion 22
2. The FAA Arbitrarily and Capriciously Relied on a Categorical Exclusion Despite the Existence of Extraordinary Circumstances 23
B. The FAA's Consideration Of Alternatives Was Arbitrary And Capricious 31
CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Bird Conservancy v. Fed. Commc'n Comm'n,
516 F.3d 1027 (D.C. Cir. 2008).....9

California v. Norton,
311 F.3d 1162 (9th Cir. 2002).....24

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971).....22

City of Dania Beach v. Fed. Aviation Admin.,
485 F.3d 1181 (D.C. Cir. 2007).....21

City of Las Vegas v. Fed. Aviation Admin.,
570 F.3d 1109 (9th Cir. 2009).....19, 20

City of Phoenix v. Huerta,
869 F.3d 963 (D.C. Cir. 2017), *modified in part by* 2018 U.S. App. Lexis 7273 (D.C. Cir. Feb. 7, 2018).....6, 25, 32

City of Sausalito v. O'Neill,
386 F.3d 1186 (9th Cir. 2004).....19, 20, 21

Found. for N. Am. Wild Sheep v. Dep't of Agric.,
681 F.2d 1172 (9th Cir. 1982).....31

Friends of the Earth v. Laidlaw,
528 U.S. 167 (2000).....19

Grand Canyon Trust v. Fed Aviation Admin.,
290 F.3d 339 (D.C. Cir. 2002).....29

Great Basin Res. Watch v. Bureau of Land Mgmt.,
844 F.3d 1095 (2016).....27

Kern v. U.S. Bureau of Land Mgmt.,
284 F.3d 1062 (9th Cir. 2005).....27, 28

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....19

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....23, 26

Nat'l Parks & Conservation Ass'n v. Babbitt,
241 F.3d 722 (9th Cir. 2001).....31

Ocean Advocates v. United States Army Corps of Eng'rs,
402 F.3d 846 (9th Cir. 2004).....22, 28

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989).....8

Safe Extensions v. Fed. Aviation Admin.,
509 F.3d 593 (D.C. Cir. 2007).....6

Sierra Club v. Bosworth,
510 F.3d 1016 (9th Cir. 2007).....22

Statutes

5 United States Code §706(2).....22

42 United States Code §4332(2)(C).....8, 9

49 United States Code §46110(a).....6

Rules and Regulations

40 Code of Federal Regulations
§ 1500.3.....9
§ 1506.1.....8
§ 1507.3.....9
§ 1508.4.....9, 24
§ 1508.7.....27
§ 1508.9.....9
§ 1508.27.....30

Ninth Circuit Rule 28-2.7.....8

STATEMENT OF JURISDICTION

In this Petition for Review, the City of Burien, Washington ("City" or "Burien"), challenges a decision by the Federal Aviation Administration ("FAA") to approve a new flight path (the "New Route") at Seattle-Tacoma International Airport. This Court has jurisdiction pursuant to 49 U.S.C. §46110(a), which provides for judicial review of FAA decision-making through the filing of a Petition for Review within 60 days of the issuance of the agency's decision.[1] The FAA's decision to approve the New Route is memorialized in a Categorical Exclusion, which was issued on April 16, 2018. *See* SAR 243.[2] The New Route became effective on June 6, 2018. ER 136. The City timely filed its Petition for Review on June 11, 2018. *See* Dkt. 1-2.

[1] A later filing date may also justified by "reasonable grounds." 49 U.S.C. §46110(a); *City of Phoenix v. Huerta*, 869 F.3d 963, 969-70 (D.C. Cir. 2017), *modified in part by* 2018 U.S. App. Lexis 7273 (D.C. Cir. Feb. 7, 2018); *Safe Extensions v. Fed. Aviation Admin.*, 509 F.3d 593, 603-04 (D.C. Cir. 2007).

[2] "SAR" refers to the Supplemental Administrative Record items identified in Petitioner's *Corrected* Motion to Correct the Record, Or, In The Alternative, For Consideration Of Extra-Record Evidence, filed herewith.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the FAA arbitrarily and capriciously conclude the New Route fits within an existing Categorical Exclusion from National Environmental Policy Act ("NEPA") review, where (a) the Categorical Exclusion relied upon by the agency applies to "modification of currently approved procedures"; (b) the New Route is not a "modification"; and (c) there was no "currently approved procedure" in place at the time of the New Route's approval?

2. Did the FAA arbitrarily and capriciously rely on a Categorical Exclusion from National Environmental Policy Act review, where (a) applicable NEPA procedures stipulate that "extraordinary circumstances" render Categorical Exclusions inapplicable; and (b) the agency failed properly to evaluate whether "extraordinary circumstances" were present?

3. Did the FAA arbitrarily and capriciously conclude that there is no reasonable alternative to the New Route, where (a) the conclusion rests on an incomplete application of one of its own Orders; and (b) the agency's alternatives analysis is premised on assumptions contrary to those employed in the agency's analysis of environmental consequences?

STATEMENT REGARDING PERTINENT AUTHORITY

Pertinent statutes, ordinances, regulations, and rules are set forth verbatim in an Addendum.

STATEMENT OF THE CASE

A. Legal Framework

The National Environmental Policy Act ("NEPA") requires federal agencies to identify, evaluate, and disclose to the public the environmental impacts of, and alternatives to, their proposed actions. 42 U.S.C. §4332(2)(C),(E); 40 C.F.R. parts 1500-1508; [Order 1050.1F, ¶1-7]. This review process has two primary purposes: (1) it "ensures that the agency…will have available, and will carefully consider, detailed information" regarding environmental concerns; and (2) it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of [the] decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). Consistent with those Congressionally-defined objectives, agencies must fully comply with NEPA *before* taking any action that could have adverse environmental consequences or limit their 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); 40 C.F.R. part 1502. Proposed actions with

environmental impacts that are less than significant or 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. §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 previously been found, in properly-adopted agency procedures, to present no possibility of a significant environmental impact. *See* 40 C.F.R. §1508.4. NEPA requires agencies to strictly comply with all requirements of their Categorical Exclusion procedures. *See, e.g., Am. Bird Conservancy v. Fed. Commc'n Comm'n*, 516 F.3d 1027, 1033-34 (D.C. Cir. 2008).

Agency NEPA compliance is subject to multiple layers of regulations and guidance. The Council on Environmental Quality ("CEQ") has promulgated NEPA regulations which are binding on all federal agencies. *See* 40 C.F.R. §1500.3. Among other things, CEQ's regulations direct each federal agency to adopt its own NEPA "procedures." 40 C.F.R. §1507.3. At all times relevant to this Petition, the FAA's NEPA procedures were memorialized in FAA Order 1050.1F.[3] The FAA has also published a *1050.1F Desk Reference*,[4] which provides interpretive guidance.

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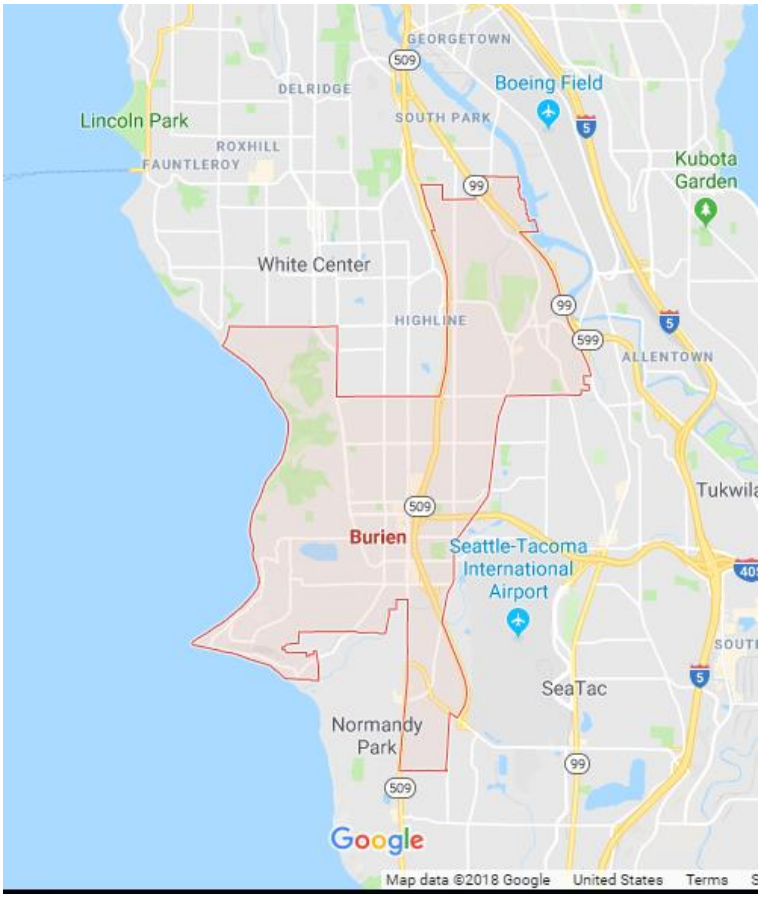
[3] FAA Order 1050.1F is set forth in its entirety at Administrative Record 3. Relevant excerpts appear in Petitioner's Excerpts of Record at ER 215-249.

B. Statement of Facts

1. Seattle-Tacoma International Airport

The City of Burien, Washington, is a residential community of approximately 50,000 people located south of Seattle that is known for its shoreline, its parks, and scenic Lake Burien. The City surrounds Seattle-Tacoma International Airport ("Sea-Tac") on two sides. *See* **Figure 1**. Central Burien, including the City's downtown area, is due west of the airport, while Northeast Burien is due north of the airport. *Id*.



[4] The *1050.1F Desk Reference* is set forth in its entirety at Administrative Record 6. Relevant excerpts appear in Petitioner's Excerpts of Record at 250-291.

Sea-Tac has three runways, which are oriented in a north-south alignment. ER 8. As a general matter, aircraft take off and land into the wind. *Id*. When winds are from the north aircraft depart northward in a pattern commonly referred to as "North Flow." For many years, the standard Sea-Tac North Flow departure route has used a 340-degree heading, which directs aircraft north from the airport before they are eventually turned toward their ultimate destinations. ER 17.

Sea-Tac is not the only airport in the area. A smaller facility known as "Boeing Field" is located approximately 5 miles away. The 340-degree North Flow departure heading from Sea-Tac passes over Boeing Field, but there is no record evidence that this route is considered to preclude operations at either airport.

Commercial airlines serve Sea-Tac with both jet and turboprop aircraft. ER 7, 13. Different airplanes accelerate and climb at different rates, and, for that reason, it is sometimes desirable to separate turboprops from jets after departure from Sea-Tac. ER 13, 17. For southbound turboprops[5] in North Flow conditions, this is often done by turning turboprops to the west. ER 12, 15.

For decades, southbound turboprops in North Flow were turned by Sea-Tac's Air Traffic Control Tower ("ATCT") after coordination with Seattle Terminal Radar Approach Control (known as "S46"). ER 18. This was important

[5] Alaska Air Group, for example, operates turboprop flights from Sea-Tac to Portland, Oregon and Reno, Nevada. *See* https://www.alaskaair.com/content/route-map?lid=nav:explore-routeMap (last visited Nov. 29, 2018).

because ATCT operates independently from the control tower at Boeing Field. ER 14, 88. Consultation with S46 ensured that there would be no conflict between turboprops turning southbound and Boeing Field operations. ER 88.

Consultation between ATCT and S46 also served to minimize the impacts of southbound turboprop flights. The coordination resulted in "multiple headings being used" for the turboprops, each one "provided to the pilots at different points" after takeoff. ER 55; *see also* ER18 ("multiple westerly headings…and the planes receiving instructions to turn westerly at different points"). Because the turn was issued on an as-needed, case-by-case basis, turboprop overflights were distributed across a relatively broad area and no single neighborhood or community bore the brunt of their impacts. *See* **Figure 2**.

2. Airport Growth

In recent years, Sea-Tac has grown quickly and somewhat unexpectedly. The FAA reports that "there has been approximately a 33% increase in operations at [Sea-Tac] since 2010, most of which has occurred since 2014." ER 7. In 2014, Sea-Tac was the fourteenth busiest airport in the United States; by 2016 it had become the ninth busiest. ER 6. This growth includes a 20% increase in use of the Bombardier Q400, the principal turboprop turned west in North Flow conditions. ER 7. Although Sea-Tac is "essentially at capacity during daytime hours," additional growth is expected. ER 25; SAR 146.

To accommodate this growth, the FAA created an internal workgroup "to determine how to best manage southbound turboprops departing [Sea-Tac] in north flow." ER 15. Although the record contains little information about the workgroup's participants and proceedings, two things are clear: first, the focus of the group was on increasing throughput and capacity (ER 15, 203); and second, the New Route was developed as part of the group's activities (ER 15).

The New Route eliminates the traditional coordination between ATCT and S46 regarding southbound turboprops in North Flow. ER 17. Instead, it calls for turboprops to be "automatically" turned to a 250-degree heading by ATCT. *Id.* The automatic turn was intended to allow ATCT to turn southbound turboprops more efficiently. But eliminating S46 from the process also raised the prospect of conflict with Boeing Field. *See* ER 88.

The FAA "solved" this issue — a problem of its own making — by requiring southbound turboprops departing Sea-Tac to turn onto the 250-degree heading immediately upon takeoff. ER 17. This helped eliminate safety concerns regarding Boeing Field. *Id.*; ER 88. But it also meant that aircraft would have to make the turn at a much lower altitude. *See, e.g.*, ER 57 ("the change is felt as soon as the aircraft is off the runway"). And it effectively concentrated those low-flying turboprops in a narrow band directly over central Burien. See **Figure 3**.


Figure 2: 60 random days August 2015 - January 2016
White Center
Burien
SEA
BFI
Key:
Westerly turned north flow turboprops
Burien City Boundary
Study Area

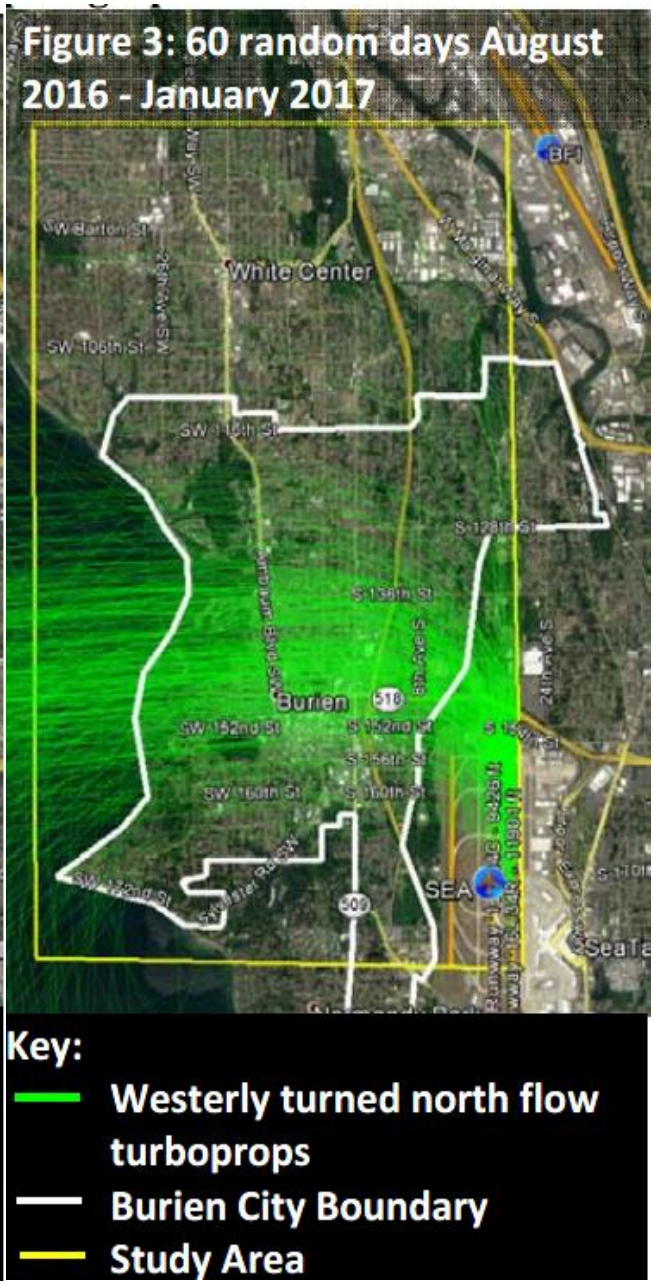


Figure 3: 60 random days August 2016 - January 2017
White Center
Burien
SEA
BFI
Key:
Westerly turned north flow turboprops
Burien City Boundary
Study Area

ER 55, 56.

In July, 2016, the FAA finalized the New Route and added it to a pre-existing Letter Of Agreement ("LOA") between ATCT and S46.[6] ER 186.

3. Initial Implementation Of The New Route

The FAA began implementing the New Route during the summer of 2016. ER 15; SAR 147. It did so without any notice to the City or its residents and without conducting any environmental review. *Id*.

The New Route imposed substantial noise impacts on City parks, schools, residential neighborhoods, and other noise-sensitive areas. SAR 147. The City and its residents spent considerable time and effort trying to obtain from the FAA information about the New Route and its impacts. *Id*.; ER 171, 177. The FAA did not provide a formal, substantive response until December 16, 2016, at which point it refused to reconsider the New Route. SAR 147.

Faced with no other option, the City filed a Petition for Review in this Court. *See City of Burien v. Fed. Aviation Admin*. (No. 17-70438). Rather than defend its actions, the FAA agreed to withdraw and rescind the New Route. ER 174; SAR 145-46. The agency announced this decision in an April 10, 2017, letter stating that the New Route would be withdrawn and removed from the LOA. SAR 145-46. The letter placed no conditions on the withdrawal. *Id*. But it did note FAA's

[6] The LOA governs coordination between ATCT and S46. ER 181-202. Although not itself a "procedure" or "flight path," it does contain a list of some of the approved procedures relevant to Sea-Tac. *Id*.

continued interest in the New Route as a means of accommodating future capacity and demand: "[Sea-Tac] has witnessed a nearly 9% increase in operations between 2015 and 2016" and "[t]his increase in operations is projected to continue, due to greater demand and additional air carriers entering the market." *Id.*

4. Environmental Review Of The New Route

In the spring of 2017, the FAA prepared a short Preliminary Environmental Analysis ("PEA") for addressing "automation of a westerly heading for turboprop aircraft separating [Sea-Tac] in north flow." ER 162-70. The eight-page document stated the FAA's intent to re-adopt the New Route. ER 162. It also listed a series of 16 environmental impact categories required to be addressed under NEPA and provided brief overviews of some (but not all) of them. ER 162-70. The PEA said nothing about the number of turboprops expected to fly the New Route, the altitude at which those aircraft would pass over the City of Burien, or the FAA's plans for NEPA review. *Id.*

On June 8, 2017, the FAA announced the availability of the PEA for review and comment. ER 48, 170. The agency originally planned to provide just 14 days for interested parties to review and comment on the document. ER 170. United States Representative Pramila Jayapal sent a letter to the FAA noting the "significant public controversy" surrounding the New Route and the inadequacy of

the comment period. ER 159. The FAA subsequently extended the comment period for an additional 14 days.

The FAA received more than 700 comments on the PEA. ER 96-105. The City provided extensive comments identifying defects in the PEA, as well as a technical analysis cataloguing missing environmental information. ER 109-126. The United States Environmental Protection Agency ("EPA") disputed the environmental assumptions underlying the PEA and recommended additional analysis. ER 106-108. And numerous other community stakeholders registered environmental objections of their own. ER 96-105.

5. Approval of the New Route and Petition for Review

Notwithstanding this outpouring of concern, the FAA proceeded to issue a Categorical Exclusion (ER 1-129) and approve the New Route. The City timely filed its Petition for Review on June 11, 2018. *See* Dkt. 1-2.

SUMMARY OF ARGUMENT

1. The FAA arbitrarily and capriciously relied on a Categorical Exclusion that applies to "modification of currently approved procedures." The New Route is not a "modification," and, at the time of its approval, there was no "currently approved procedure" addressing southbound turboprops in North Flow.

2. "Extraordinary circumstances" render Categorical Exclusions inapplicable. The FAA arbitrarily and capriciously concluded that the New Route presents no "extraordinary circumstances." The agency's conclusion is based on erroneous assumptions and is squarely contradicted by the record.

3. The FAA arbitrarily and capriciously concluded that there were no feasible alternatives to the New Route. The agency's conclusion was based on an incomplete application of its own Orders. In addition, the assumptions used in the agency's alternatives analysis cannot be reconciled with those used in its evaluation of environmental impacts.

STANDING

A petitioner demonstrates standing by showing that (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged

action; and (3) it is likely that the injury will 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). The City meets each of these requirements.

A. Injury

The City has been injured by the FAA's failure to comply with the procedural requirements of the Administrative Procedure Act ("APA") and NEPA. A procedural injury confers standing where the injured party can show "that it was accorded a procedural right to protect its interests and that it has concrete interests that are threatened." *City of Las Vegas v. Fed. Aviation Admin*., 570 F.3d 1109, 1114 (9th Cir. 2009).

Burien satisfies the first requirement because NEPA and the APA provide procedural rights to municipalities seeking to protect their environmental and socioeconomic resources. *Id*.; *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004).

Burien satisfies the second requirement because the New Route "directs flights over densely populated parts of the city, which threatens the city's interests in the environment and in land management." *City of Las Vegas*, 570 F.3d at 1114. The City has invested considerable effort and regulatory resources on noise mitigation within existing noise corridors. ER 112-13. At the same time, it has

exercised its land-use planning and regulatory powers to direct noise-sensitive uses (including residential development required to meet state-mandated shares of regional housing needs) into areas outside of those corridors. *Id.* For example, one of Burien's recent efforts has been to rehabilitate and revitalize its downtown. Declaration of Lisa Marshall ("Marshall Dec."), ¶5. To that end, the City has helped develop, fund, and maintain public spaces, parks, a regular farmer's market, a public library, a new City Hall, and other noise-sensitive uses in the downtown area, all in the reasonable expectation that departure routes from Sea-Tac would remain consistent with existing noise corridors. *Id.* The New Route would direct low-flying aircraft straight over this downtown area, adversely affecting the City's economic, environmental, aesthetic, proprietary, and regulatory interests. *Id.* In addition, the New Route will lead to an increase in jet departures over northeast Burien, where the City has invested substantial resources in addressing already-elevated noise levels. Marshall Dec., ¶4. These impacts not only harm Burien residents, but also injure the City *qua* city. *City of Las Vegas*, 570 F.3d at 1114; *City of Sausalito*, 386 F.3d at 1197. Indeed, Burien was originally incorporated for the very purpose of protecting community resources from the impacts of Sea-Tac. Marshall Dec., ¶3.[7]

[7] For most of its modern history, Burien was an unincorporated area of King County, Washington. Marshall Dec., ¶3. Incorporation initiatives were defeated on four

B. Causation

There is no reasonable dispute that the low-flying turboprop aircraft and increased jet departures described above are fairly traceable to the FAA's approval and implementation of the New Route. For example, prior to the New Route, southbound turboprop departures in North Flow were given a variety of headings and turn locations, resulting in more dispersion and fewer noise impacts. ER 18, 55. The New Route has concentrated those same turboprop departures in a narrow corridor over central Burien, eliminating dispersion and substantially increasing noise impacts. *See* **Figures 2 and 3**. The stated purpose of this change was to permit more aircraft — jets as well as turboprops — to depart Sea-Tac in North Flow conditions. ER 17.

C. Redressability

The City's injuries can readily be redressed by a decision requiring the FAA to comply with NEPA and the APA. *City of Sausalito*, 386 F.3d at 1199; *see also City of Dania Beach v. Fed. Aviation Admin.*, 485 F.3d 1181, 1185-87 (D.C. Cir. 2007) ("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").

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different occasions between 1950 and 1984. *Id*. Not until the early 1990s, when Sea-Tac unveiled plans to build an additional runway, did residents vote to become a city. *Id*. The incorporation vote was an explicit effort to secure a voice in airport expansion decisions. *Id*.

STANDARD OF REVIEW

The FAA's approval of the New Route is reviewed under the "arbitrary and capricious" standard of the APA, which requires the Court to "hold unlawful and set aside agency action, findings and conclusion" that are "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" or adopted "without observance of procedure required by law." 5 U.S.C. §706(2).

The "arbitrary and capricious" standard mandates a "thorough, probing, in-depth review" of agency decision-making. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although courts do not substitute their judgment for that of an agency, neither do they "rubber stamp" agency decisions. *Ocean Advocates v. United States Army Corps of Eng'rs,* 402 F.3d 846, 859 (9th Cir. 2005). Thus, "to withstand review, [an] agency must articulate a rational connection between the facts found and the conclusions reached." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007).

An agency's decision-making is "arbitrary and capricious" if it is based on "factors which Congress has not intended [the agency] to consider," if the agency has "failed to consider an important aspect of the problem," if the agency offers "an explanation for its decision that runs counter to the evidence," or if the agency's conclusions are "so implausible that [they] could not be ascribed

to…agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

A. The FAA's Reliance On A Categorical Exclusion Was Arbitrary And Capricious

1. The FAA Arbitrarily and Capriciously Concluded the New Route Falls Within a Categorical Exclusion

The FAA found that the New Route qualifies for the Categorical Exclusion set forth in Order 10501.1F, ¶5-6.5i, which applies to four classes of actions:

> [1] Establishment of new or revised air traffic control procedures conducted at 3,000 feet or more above ground level (AGL); [2] procedures conducted below 3,000 feet AGL that do not cause traffic to be routinely routed over noise sensitive areas; [3] modifications to currently approved procedures conducted below 3,000 feet AGL that do not significantly increase noise over noise sensitive areas; and [4] increases in minimum altitudes and landing minima.

ER 247. Although the record is not entirely clear (*see* ER 2), the FAA appears to have concluded the New Route falls within the third classification — namely, "modifications to currently approved procedures conducted below 3,000 feet AGL that do not significantly increase noise over noise sensitive areas." ER 93.

That conclusion is clearly erroneous. At the time of its approval, the New Route was just that — a new procedure, not a "modification" to a "currently approved procedure." The FAA first approved and implemented a 250-degree turn

procedure for southbound turboprops in July, 2016. ER 179, 186. It did so without any NEPA compliance or notice to the community, and, when the agency refused to reconsider or mitigate the effects of its decision, the City filed suit. SAR 147. In March, 2017, the FAA explicitly withdrew its approval of the 250-degree turn procedure and removed it from the LOA. ER 174; SAR 145-46. That withdrawal was complete and unconditional. *Id*.. Thus, at the time of the New Route's approval, there was no "currently approved procedure" governing southbound turboprops in North Flow. *Id*.; *see also* ER 16. And because there was no "currently approved procedure," the New Route could not have been a "modification." Therefore, the FAA's reliance on the "modifications to currently approved procedures" Categorical Exclusion was arbitrary and capricious.

2. The FAA Arbitrarily and Capriciously Relied on a Categorical Exclusion Despite the Existence of Extraordinary Circumstances

Even if the New Route fit within the "modifications to currently approved procedures" Categorical Exclusion — and it did not — the FAA's NEPA analysis would not pass muster. Reliance on an otherwise-applicable Categorical Exclusion is improper where "extraordinary circumstances" indicate that the proposed action may have a significant environmental impact. 40 C.F.R. §1508.4; ER 233; *see also California v. Norton*, 311 F.3d 1162, 1168 (9th Cir. 2002) ("In [ ] extraordinary circumstances, a categorically excluded action would nevertheless

trigger preparation of an EIS or EA"); *City of Phoenix*, 869 F.3d at 972 (invalidating FAA Categorical Exclusion based on extraordinary circumstances).

FAA Order 1050.1F identifies 12 extraordinary circumstances in which an EIS or EA is required for actions that would normally qualify for a Categorical Exclusion. ER 233-35. The FAA concluded that the New Route did not implicate any of them. ER 71-75. That conclusion was arbitrary and capricious in each of the following respects.

Potential for Additional Airport Operations

The FAA's entire environmental analysis regarding extraordinary circumstances was premised on an assumption that there will be no increase in the number of flights (or, to use the agency's term, "operations") at Sea-Tac. *See, e.g.*, ER 27 (air quality analysis); 30 (analysis regarding impacts to parks); *see also* ER 26 ("no increase in the number of airport operations"), 44 ("will not change the levels of airport operations"), 114 ("not expected to increase operations"). That assumption does not withstand scrutiny.

The New Route was developed by an FAA workgroup that "looked at ways to increase the departure flow" ER 203 and sought to "maximize throughput in a north flow" ER 204. The FAA's stated purpose and need for the Project includes accommodating additional flights at Sea-Tac. ER 16-17. The FAA eliminated from consideration several alternatives to the New Route based, in whole or in

substantial part, on their perceived inability to accommodate additional departures. ER 23, 25. And the FAA has admitted that the New Route will "allow[ ] more aircraft to depart SEA within a given window of time" (ER 19) and permit ATC to "increase the rate at which aircraft may depart SEA" (ER 53). On this record, the FAA's unsupported "no increased operations" assumption was arbitrary and capricious.

The issue is not abstract. As noted above, the New Route concentrates turboprop aircraft and their impacts over central Burien, immediately west of Sea-Tac. But it also increases capacity for jet departures on the traditional 340-degree heading immediately north of the airport. In fact, *that is precisely what the it was intended to accomplish*. ER 16-17, 203-204. Increased jet departures impact northeast Burien, an area containing environmental justice communities and where noise levels already exceed 65 dBA on a regular basis. ER 41 (environmental justice), 47 (noise levels). The Categorical Exclusion does not explain how many additional jet departures can be expected to occur or whether the impacts of those departures have the potential to be significant, thereby failing to "consider an important aspect of the problem." *Motor Vehicle*, 463 U.S. at 43.

Cumulative Impacts

Even if the FAA's "no increased operations" assumption were reasonable for the New Route standing alone, the agency's analysis would nonetheless be

arbitrary and capricious for failing to properly evaluate the cumulative impact of the New Route together with other developments bearing on the number of operations at Sea-Tac.

FAA Order 1050.1F provides that "extraordinary circumstances" exist if the proposed action has the potential to create significant cumulative impacts. ER 33-35. Cumulative impacts refer to "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." 40 C.F.R. §1508.7. In other words, a significant cumulative impact "can result from individually minor but collectively significant actions taking place over a period of time," whether those actions are local or federal, public or private. *Id*.; *see also Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d 1062, 1078-79 (9th Cir. 2005). Therefore, "in a cumulative impact analysis, an agency must take a hard look at *all* actions that may combine with the action under consideration to affect the environment." *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (2016) (internal quotations omitted).

FAA's cumulative impacts analysis briefly discusses eight roadway and development projects in the general vicinity of Sea-Tac. ER 44-47. But it fails to address past, present, and reasonably foreseeable future actions at the airport itself.

Id. There has been a 33% increase in overall operations at Sea-Tac since 2010. ER 7. Use of the principal turboprop aircraft that would fly the New Route has increased 20%. *Id*. Further increases are expected, as are additional air carriers. SAR 145-46. In other words, the FAA's New Route concentrates turboprop flights in a narrow path over central Burien and creates additional capacity for jet departures over northeast Burien, while at the same time, other actors (airlines, Sea-Tac, etc.) have decided to dramatically increase both jet and turboprop operations. The Categorical Exclusion says nothing about the cumulative, synergistic impact of these developments. ER 44-47. That omission renders the agency's decision-making arbitrary and capricious. *See Kern*, 284 F.3d at 1078-79; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 866-67 (9th Cir. 2005).

The Categorical Exclusion also fails to address the cumulative impact of the New Route together with Sea-Tac's Sustainable Airport Master Plan ("SAMP"). The SAMP process is funded through a FAA grant. SAR 152-242. It has three "major goals," one of which is to achieve the Seattle Port Commission's "Century Agenda." SAR 193. The Century Agenda, in turn, calls for Sea-Tac to become a "west coast gateway of choice" by doubling the number of international flights and destinations, tripling air cargo volume, and encouraging expansion of both domestic and international passenger service. SAR 204. To reach these goals the

Port of Seattle (Sea-Tac's proprietor) has identified a series of "near-term projects," some of which are identified as "capacity improvements." SAR 159. Specific projects include new gates and terminals, taxiways, runway improvements, aircraft parking areas, and a series of "major cargo projects." SAR 165-70. All of these projects were reasonably foreseeable during the FAA's NEPA review. *Id.*[8] In fact, as part of its comments on the Preliminary Environmental Assessment, the City explicitly requested that the FAA's cumulative impact analysis be revised to address "capacity-enhancing future projects planned for the airport." ER 113. The agency's failure to do so was arbitrary, capricious, and contrary to NEPA. *See, e.g., Grand Canyon Trust v. Fed Aviation Admin.*, 290 F.3d 339, 345-47 (D.C. Cir. 2002) (failure to address cumulative impact of all reasonably airport projects was arbitrary and capricious).

Public Controversy

"Extraordinary circumstances" exist if the impacts of a proposed action are "likely to be highly controversial on environmental grounds." ER 233-34; *accord* 40 C.F.R. 1508.27(b)(4). Order 1050.1F defines "highly controversial on environmental grounds" to mean "a substantial dispute involving reasonable

[8] The final version of this document is dated "May 2018," but the Near Term Projects were planned, analyzed, and proposed beginning in 2017 — precisely the time when the FAA was conducting its NEPA review of the New Route. *See, e.g.*, SAR 160-63, 176 (maps of Near-Term Projects dated 2017); SAR 168-69 (project schedule dated 2017); SAR 177, 179 (analyses dated 2017).

disagreement over the degree, extent, or nature of a proposed action's environmental impacts or over the action's risks of causing environmental harm." *Id*. Order 1050.1F further directs that "[o]pposition on environmental grounds by a Federal, state, or local government agency…or by a substantial number of the persons affected by the action" helps determine whether or not there is a "reasonable disagreement regarding the impacts of the proposed action." *Id*.

The Administrative Record reveals just such a "reasonable disagreement" here. Burien (a "local government agency") provided the FAA with robust comments identifying substantive defects in the FAA's PEA, as well as a technical memorandum identifying missing environmental information. ER 109-126.[9] The EPA (a "Federal" agency) disputed key assumptions presented in the PEA and recommended additional environmental analysis. ER 106-108. And more than 700 other commenters (a "substantial number" of affected persons) expressed environmental objections of their own. ER 96-105. This evidence is more than enough to establish public controversy on environmental grounds. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (finding public controversy where agency received 450 comments on Environmental Assessment); *Found. for N. Am. Wild Sheep v. Dep't of Agric*., 681 F.2d 1172,

[9] Indeed, the City's comments on the Preliminary Environmental Analysis were lengthier and more substantive than the Preliminary Environmental Analysis itself. *Compare* ER 109-126 *with* ER 162-70.

1182 (9th Cir. 1982) (finding public controversy where sister agencies and experts expressed environmental concerns).

The Categorical Exclusion admits that the New Route has produced "a high level of controversy," but concludes that the New Route is not "highly controversial on environmental grounds" because "there are no reportable or significant noise impacts." ER 74. The agency's wordplay is unconvincing. Under the plain language of Order 1050.1F, the fact that FAA has concluded there will be no significant impacts does not determine the existence or non-existence of public controversy. ER 234; *see also City of Phoenix*, 869 F.3d at 972 (rejecting similar FAA contention in the context of historic resources). What matters is whether other stakeholders — including, as relevant here, local agencies, federal agencies, or a substantial number of affected persons — reasonably and substantively dispute the FAA's analysis and conclusions regarding significance. *Id*.; *see also City of Phoenix*, 869 F.3d at 971-72. As described above, the City, the EPA, and the larger community have all done so here.

Moreover, the FAA's suggestion that (admitted) public controversy surrounding the New Route was not "environmental" rings hollow in light of the agency's own failure to disclose its NEPA analysis to the public. True, the FAA allowed the public to comment on the short Preliminary Environmental Analysis. *See* ER 162-70. But, as the City (ER 110-11), the City's technical expert (ER 119-

26), and the EPA (ER 106) all pointed out, the Preliminary Environmental Analysis was not a NEPA document and did not provide sufficient information to permit meaningful comment on matters required to be addressed in the NEPA process. In response to those comments, the FAA admitted that "the preliminary environmental analysis was not intended to be presented as a draft or final NEPA document." ER 106. The agency never made such a document available for public review and comment, however. Having failed to share its full environmental analysis with the public, it was unreasonable, arbitrary, and capricious for the agency to conclude that the public's comments lacked sufficient environmental substance.

B. The FAA's Consideration Of Alternatives Was Arbitrary And Capricious

The Categorical Exclusion discusses several alternatives to the New Route, all of which the FAA eliminated from detailed consideration after concluding they would not satisfy the agency's purposes and needs. ER 17-25. That conclusion was arbitrary and capricious in two fundamental respects.

First, the agency arbitrarily and capriciously eliminated alternative turboprop headings from detailed consideration based on an incomplete assessment of the requirements of Section 5-8-5 of FAA Order 7110.65W. The Categorical Exclusion describes the requirement as follows: "A minimum 30 [degree] separation is required between a departure and a missed approach heading per

FAA Order 7110.65W Section 5-8-5." ER 19. In the FAA's view, this precludes southbound turboprops from ever using any heading within 30 degrees of Sea-Tac's 290-degree missed approach path. But the text of Section 5-8-5 is not quite so categorical. It appears to require a 30-degree separation only "until separation is applied." ER 212. This clause is nowhere referenced or discussed in the Categorical Exclusion. Nor is there anything else in the record to suggest the FAA ever considered whether the "until separation is applied" clause might render alternatives to the New Route feasible.

Second, as briefly noted above, FAA eliminated from consideration several alternatives to the New Route based, in whole or in substantial part, on their perceived inability to accommodate increasing departures. At the same time, however, the agency has maintained that its analysis of environmental impacts need not account for any additional operations. ER 26, 27, 30; 44, 114. The FAA cannot have it both ways. If the Categorical Exclusion's alternatives analysis is properly premised on a need to accommodate additional operations, those additional operations were required to be addressed in the document's analysis of environmental consequences. Or, if the Categorical Exclusion's impacts analysis is properly premised on the notion that there will be no additional operations at Sea-Tac, the document's alternatives analysis was arbitrary and capricious for relying on the agency's need to accommodate such operations.

CONCLUSION

For the reasons set forth above, the City respectfully requests that this Court (1) find the FAA's approval of the New Route arbitrary, capricious, and in violation of law; (2) invalidate the New Route; and (3) and remand the matter to the FAA for further proceedings.

Dated: November 30, 2018

Respectfully submitted,

DENTONS US LLP

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STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, Petitioner City of Burien, Washington states that it is not aware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 6590 words. The text of the brief is in 14-point Times New Roman, which is proportionately spaced.

/s/Matthew G. Adams
Matthew G. Adams

CERTIFICATE OF SERVICE - CM/ECF

I certify that on November 30, 2018, I electronically filed ***CORRECTED*** **PETITIONER'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Counsel for all parties are registered to use that system and, to my knowledge, will receive copies of this document upon its filing.

/s/Matthew G. Adams
Matthew G. Adams