

Argument held March 17, 2017

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

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

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

v.

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

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

**JOINT PETITION FOR
PANEL REHEARING**

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The City of Phoenix, the Historic Neighborhood Petitioners, the Federal Aviation Administration (“FAA”), and Michael Huerta, Administrator of FAA, the parties to this proceeding, respectfully petition this Court for rehearing and request that the Court modify its August 29, 2017, order to reflect the language proposed on page 16 of this Petition, regarding the appropriate remedy in this case. The parties do not seek any other modification of this Court’s August 29, 2017 order.

INTRODUCTION

Petitioners in these consolidated cases asked this Court to review the Federal Aviation Administration’s compliance with federal environmental laws prior to publishing and implementing “certain flight departure routes” for aircraft departing Phoenix Sky Harbor International Airport (“Phoenix Sky Harbor”).¹ While there are only nine departure procedures at issue in this case, each of which was separately published in FAA’s *Terminal Procedures Publication* (“TPP”) on September 18, 2014, FAA’s publication on that date addressed a

¹ See Corrected Petition for Review in No. 15-1158 at 1; Petition for Review in No. 15-1247 at 1.

much larger group of procedures at Phoenix Sky Harbor and the surrounding area.² This Court's August 29, 2017, opinion "grant[ed] the petitions, vacate[d] the September 18, 2014 order implementing the new flight routes and procedures at Sky Harbor International Airport, and remand[ed] the matter to the FAA for further proceedings consistent with this opinion." *City of Phoenix, Arizona v. Huerta*, 869 F.3d 963, 974 (D.C. Cir. 2017). In so doing, the Court's opinion could be interpreted to grant relief that encompasses a wide variety of additional procedures at Phoenix Sky Harbor and the surrounding vicinity, most of which are not directly addressed in Petitioners' specific claims in this litigation. To require *vacatur* of these other procedures covered by the September 18, 2014 publication, would likely result in unintended consequences for these routes and procedures beyond addressing the environmental and noise issues in this litigation.

Moreover, as this petition for panel rehearing explains, FAA believes that vacating the challenged departure procedures without a

² The TPP is a 26-volume set of paper books containing, among other things, instrument procedure approach charts and departure procedure charts. It is available online at: http://www.faa.gov/air_traffic/flight_info/aeronav/digital_products/dtpp/.

valid replacement procedure may substantially delay operations at Phoenix Sky Harbor and increase safety risks by complicating airport operations. To avoid that outcome, FAA has proposed a process, agreed to by all parties, for the FAA to alleviate in the short term the Petitioners' specific concerns about aircraft noise created by the nine new departure procedures while the agency reconsiders the departure procedures remanded by this Court. This agreement is attached as Exhibit 1. This approach would avoid the potential for disruption and uncertainty posed by immediate implementation of this Court's August 29, 2017 order. Furthermore, the parties' agreement effectuates the Court's decision by reducing the immediate burden of aircraft noise and improving coordination between FAA and the affected community.

To implement this agreed-upon solution, the parties respectfully request that the Court alter the remand order in its August 29, 2017, opinion, to clarify that the Court is remanding only certain departure procedures published on September 18, 2014, and that those procedures are remanded without being vacated.

ARGUMENT

I. This Court's remand order should be limited to nine specific departure procedures published on September 18, 2014.

On September 18, 2014, the FAA published 17 new air traffic procedures for use at Phoenix Sky Harbor, 14 of which were next-generation “RNAV” procedures. RNAV procedures are an element of FAA’s implementation of “NextGen” Performance-Based Navigation. Petitioners did not challenge all of these procedures, however. Instead, each of the two petitions for review stated that it was challenging “certain flight departure routes,” and the briefing made clear that the procedures of concern were those with the potential to cause adverse noise impacts to historic properties and parks. The City repeated in its opening brief that it was challenging only departure routes, Opening Br. of Phoenix at 1, and the Neighborhood Petitioners’ briefing referenced “low-flying” departures over specific historic neighborhoods, Opening Br. of Historic Neighborhoods at 1. This Court then focused on departure routes from Phoenix Sky Harbor in evaluating FAA’s compliance with the relevant federal environmental statutes. Consistent with the petitions for review and the briefs, the parties have agreed that only nine specific departure procedures published on

September 18, 2014, are at issue in this proceeding. These procedures are identified in the Memorandum Regarding Implementation of Court Order (“Memorandum”), attached as Exhibit 1, as MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZO, JUDTH, and KATMN (“the Western RNAV Routes”).

Part IV of this Court’s opinion, however, does not state whether it is limited only to vacating these nine specific departure procedures. This Court’s opinion “vacate[s] the September 18, 2014 order implementing the new flight routes and procedures at Sky Harbor International Airport.” *Phoenix*, 869 F.3d at 875. During briefing and argument, the parties described the September 18, 2014, publication of multiple procedures as an “order” as a shorthand description that comports with the language of 49 U.S.C. § 46110. But each new procedure published on September 18, 2014, was individually and separately published on that date. *See, e.g.*, J.A. 433-520. They were not contained in a single document, and the publication also includes hundreds of procedures for use throughout the National Airspace System for many other airports. In the regional airspace around

Phoenix alone, the FAA published 84 new procedures, most of which are for use at satellite airports and are not at issue in Petitioners' claims.

There are also other procedures and routes at Phoenix Sky Harbor that fall outside the scope of Petitioners' claims and for that reason are not necessary for remand. For example, Petitioners did not address the five new arrival procedures published on September 18, 2014, which are at higher altitudes than the departures. Three of the new procedures published that day were not RNAV or "NextGen" procedures at all. Two of them were Instrument Landing System amendments. The other is an Obstacle Departure Procedure that is necessary for the continued operation of Phoenix Sky Harbor.

Other new procedures published on that same date include transitions to other satellite airports in the area. The procedures, as designed, allow the air traffic in the surrounding area to utilize the same flight routes but with differing "exit ramps" based on the designated airport. Vacating all of these procedures would impact not only Phoenix Sky Harbor, but these satellite airports as well. These satellite airport procedures were never identified by Petitioners as the basis for their alleged injuries in this case.

For the reasons outlined above, the parties request that the Court not remand the obstacle departure procedure, the instrument landing system amendments, and the arrival procedures into Phoenix Sky Harbor published on September 18, 2014. This Court also should not remand procedures that apply to satellite airports and not to Phoenix Sky Harbor. To do otherwise would have a substantial adverse effect on airport operations beyond the scope of the petitions for review and would impair the parties' collaborative solution to the underlying problem. Accordingly, to address these concerns and to implement the agreement reached by the parties in their Memorandum the parties respectfully request that the Court clarify the scope of its remand order by limiting it to the nine pertinent departure procedures described above as the Western RNAV Routes and replacing the language of the Court's ordering paragraph with language that is proposed on pages 16 of this Petition.

II. This Court should remand the nine specific departure procedures *without* vacating them, to facilitate the parties' jointly-negotiated resolution of the issues presented by this litigation.

After this Court issued its opinion, the parties discussed the most appropriate means of addressing this Court's concerns in an expeditious manner. The attached document describes in more detail the approach that FAA proposes to take on remand. Exhibit 1. The FAA proposes to direct planes to depart Phoenix Sky Harbor along routes similar to those in use prior to September 2014. However, implementing this solution requires that the remanded departure procedures remain valid so they can be used in later legs of those flights and connect with other routes outside of the Phoenix airspace.

Although remanding without vacating is not "the standard remedy," *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001), the parties jointly agree that in this case, remanding without vacating is in the best interest of all parties involved. The proposed remand in this case achieves the objectives of *vacatur* by returning aircraft to positions similar to where they were prior to the challenged agency action, but in a fashion that reduces disruption and risk. Such a remedy is "consistent with this Court's precedent." *North Carolina v.*

EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (citing *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (noting this Court’s practice of remand without *vacatur*)); *see also* Stephanie Tatham, Administrative Conference of the United States, *The Unusual Remedy of Remand Without Vacatur: Final Report* at 21 & Appendix A (2014) (identifying 41 cases between 2000 and 2013 in which this Court has remanded agency action without vacating). The parties therefore respectfully request that the remanded departure procedures not be vacated, so long as the attached Memorandum is followed.

In considering whether to vacate an agency action, this Court considers two factors: (1) “the seriousness of the order’s deficiencies” and (2) “the disruptive consequences” of agency actions in the interim. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993) (citing *International Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)). Here, in FAA’s view, both factors fully support remand without *vacatur*. Petitioners disagree as to the first factor, but agree that the proposed solution is less disruptive and more certain than *vacatur*.

In this petition, filed jointly by all parties in furtherance of a negotiated resolution, we ask this Court to remand without *vacatur* based on the second factor of the *Allied-Signal* test. “There is no rule requiring either the proponent or opponent of *vacatur* to prevail on both factors.” *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015). Either factor may independently support this Court’s decision not to vacate an agency action. *See, e.g., North Carolina*, 550 F.3d at 1177-78 (remanding a rule without vacating it when *vacatur* would be particularly disruptive, without relying on the first *Allied-Signal* factor).

If this Court were to vacate all of the RNAV departure procedures from Phoenix Sky Harbor, FAA believes that the resulting disruption while the FAA prepares new replacement procedures would far outweigh any possible benefit. The development and implementation of new air traffic procedures is a long and complex process that often takes months to years. Much of this complexity stems from a procedure’s interrelationship with others in use in the same airspace or nearby. Flights arriving or departing from a particular airport are only one part of a much larger network of aircraft sharing the national airspace, with

their location at any given time subject to numerous rules and regulations and requiring real-time management by air traffic controllers.

For this reason, FAA's publication and implementation of an air traffic procedure is unlike other discrete final agency actions that this Court regularly reviews under the Administrative Procedure Act, such as promulgating a new rule or granting a license. Air traffic procedures are interwoven by design, and removing one or more procedures from the larger system may have unintended consequences. For several reasons, on the date this Court's mandate issues and its order becomes effective, FAA does not believe it can safely assign the procedures that were in place prior to September 2014: "the egg has been scrambled and there is no apparent way to restore the status quo *ante*." *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

Although the pre-2014 departure procedures at Phoenix Sky Harbor are still published, they cannot be safely flown at the present time with any real frequency.³ Some of them conflict with new arrival

³ These older procedures are occasionally assigned to aircraft not technologically-equipped to fly the newer procedures, but this occurs less than once a day.

procedures from September 2014 and subsequent decisions, and are inconsistent with the current airspace design, so that they are not wholly contained within a single controller's airspace.

If the current RNAV departure routes from Phoenix Sky Harbor were vacated, and FAA were to attempt to return to full-time use of the pre-2014 departure procedures, FAA believes that the time required for controller training, documentation, review, approval, and publication of those procedures could take the agency as much as two years. In the meantime, operations at the airport could be significantly delayed, as controllers might have to establish much greater separation between departing aircraft (therefore limiting the number of aircraft that can depart in any given period of time). Phoenix Sky Harbor is one of the nation's busiest airports, and a significant part of the local economy. While Petitioners disagree with FAA's assessment of the degree of disruption that vacating the RNAV departure routes would cause, all parties agree that the "disruptive consequences" of *vacatur* justify this Court modifying its remedy order to remand the procedures without vacating them so that the parties can pursue their preferred solution. *Allied-Signal, Inc.*, 988 F.2d at 150.

III. FAA and the Petitioners are jointly developing changes to procedures at Phoenix Sky Harbor that will address noise concerns in the short term in an orderly fashion.

The parties do not request an “open-ended remand without vacatur.” *In re Core Communications, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring). Instead, the parties have agreed upon a two-step process by which the FAA will implement procedures at the airport allowing planes to depart along routes substantially similar to those in use prior to the implementation of the challenged procedures. The parties anticipate that this “Step One” could be in place as early as March 2018, after public notice and meetings.

Contemporaneously, the FAA would work to design and implement replacement RNAV departure procedures from Phoenix Sky Harbor for use in the long term, including consideration of new RNAV designs based on the Step One procedures. This “Step Two” would involve a process for public input and comment, as described in Exhibit 1, as well as full compliance with all applicable federal environmental and other laws, consistent with this Court’s opinion.

However, Step One would alter only the beginning of the departure procedures at Phoenix Sky Harbor, requiring planes to

return to the RNAV procedures after the first legs of their departure.

Success of this approach therefore depends on the continued partial use of those RNAV procedures, which in turn requires that the RNAV procedures not be vacated by an order of this Court.

IV. The parties further request that this Court stay issuance of its mandate until June 15, 2018.

The Petitioners have expressed concern that the mandate should not be issued prior to implementation of the solutions described in Exhibit 1. They therefore request (and the FAA concurs with this request) that this Court stay its mandate until June 15, 2018, or until the parties notify this Court that the mandate should issue, whichever comes sooner.

This Court has, in prior cases, suggested that a short stay of the mandate is appropriate when invalidating an agency rule would have adverse consequences for public health and safety. *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001) (citing *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998)). In both *Cement Kiln* and *Columbia Falls*, this Court invited the Environmental Protection Agency to file a post-decision motion

requesting a stay of the mandate for a “reasonable time,” thereby allowing the agency to develop a new standard or rule that would comply with this Court’s ruling. The parties ask the same of this Court in this case. The parties believe that a stay until June 15, 2018, is both sufficient time for the FAA to implement its proposed interim solution and a reasonably short time for this Court to stay its mandate. While it exceeds the 90 days that this Court would “ordinarily” grant upon a showing of good cause, D.C. Cir. R. 41(a)(2), the parties respectfully ask this Court to grant a stay until June 15, 2018, to facilitate implementation of their jointly-negotiated solution.

The parties have agreed, as described in paragraph 2c of Exhibit 1, to promptly notify this Court when the FAA has completed implementation of its Step One solution so that the mandate may issue. The parties otherwise ask leave to provide this Court with brief status reports at least thirty days before June 15, 2018, to apprise this Court of any relevant developments that have occurred during the brief stay period.

CONCLUSION

All parties to these consolidated petitions for review respectfully request that this Court grant the petition for panel rehearing. The parties request that this Court amend its August 29, 2017, opinion by deleting the content of Section IV and replacing it with the following language:

For the foregoing reasons, we grant the petitions and remand to the FAA, without vacating, the portion of the September 18, 2014 order implementing the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN procedures at Phoenix Sky Harbor International Airport departing Runways 25L, 25R or Runway 26 for further proceedings consistent with this opinion and the Memorandum Regarding Implementation of Court Order filed with this Court on November 30, 2017. This Court will stay the issuance of its mandate until June 15, 2018, unless the parties notify this Court prior to that date that the mandate should issue. The parties may each file a status report of no more than 2,500 words on or before May 15, 2018, in the event the mandate has not yet issued.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the preceding Joint Petition for Panel Rehearing complies with the formatting rules of Fed. R. App. P. 32, and was prepared in double-spaced, 14-point Century font. The petition complies with the type-volume requirements of Fed. R. App. P. 40(b)(1) as it contains **2,981** words.

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ADDENDUM

CERTIFICATE OF PARTIES

Pursuant to D.C. Cir. R. 35(c)0, we provide here the list of all parties to this proceeding:

Federal Aviation Administration

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Story Preservation Association, Inc.

Robert A. Croft

Willo Neighborhood Association

Marilyn Rendon

Encanto-Palmcroft Historic Preservation Association, Inc.

Brent J. Kleinman

Roosevelt Action Association, Inc.

Karl G. Obergh

Judith Hilman-Butzine

Christin Puetz

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Twila Lake

869 F.3d 963
United States Court of Appeals,
District of Columbia Circuit.

CITY OF PHOENIX, ARIZONA, Petitioner

v.

Michael P. HUERTA and Federal
Aviation Administration, Respondents

No. 15-1158

|
Consolidated with 15-1247

|
Argued March 17, 2017

|
Decided August 29, 2017

Synopsis

Background: City and historic neighborhood association petitioned for review of Federal Aviation Administration's (FAA) change to longstanding flight routes in and out of airport.

Holdings: The Court of Appeals, Griffith, Circuit Judge, held that:

- [1] FAA's final order was issued when new routes were formally published and put into effect;
- [2] court would permit city and association to file their petition after 60-day deadline for challenging the order had passed;
- [3] FAA failed to fulfill its obligation under National Historic Preservation Act (NHPA) to consult with certain stakeholders in affected area;
- [4] FAA's finding that new routes were not likely to be highly controversial on environmental grounds was arbitrary and capricious;
- [5] FAA's consultation with city was arbitrarily confined and insufficient under Transportation Act; and
- [6] it was unreasonable for FAA to rely only on Part 150 guidelines that applied to analysis of whether new flight routes would substantially impair affected historic sites

unless a quiet setting was a generally recognized purpose and attribute of the historic properties.

Petition granted.

Sentelle, Senior District Judge, wrote dissenting opinion.

***965** On Petitions for Review of a Decision by the Federal Aviation Administration

Attorneys and Law Firms

John E. Putnam argued the cause for petitioner City of Phoenix, Arizona. With him on the briefs was Peter J. Kirsch, Denver, CO.

Matthew G. Adams, pro hac vice, argued the cause for petitioners Story Preservation Association, et al. With him on the briefs was Peter L. Gray, Washington, DC.

Lane N. McFadden, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief was John C. Cruden, Assistant Attorney General at the time the brief was filed.

Before: Rogers and Griffith, Circuit Judges, and Sentelle, Senior Circuit Judge.

Opinion

Dissenting opinion filed by Senior Circuit Judge Sentelle.

Griffith, Circuit Judge:

In September 2014, the Federal Aviation Administration changed longstanding flight routes in and out of Phoenix Sky Harbor International Airport. The city of Phoenix and a historic neighborhood association both petitioned for review, alleging that the FAA's action was arbitrary and capricious. We agree.

I

Phoenix Sky Harbor International Airport is one of the nation's busiest airports. To minimize the impact of the sound of aircraft on residents, the FAA historically has routed flights over industrial and agricultural parts of the City, and the City has used zoning to minimize impact on

residential areas and either purchased or furnished with sound insulation the homes most affected by flight paths, at a cost of hundreds of millions of dollars.

*966 In response to a mandate from Congress to modernize the nation's air-traffic control system, *see* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, §§ 101(a), 213(a)(1)(A), 126 Stat. 11, 47, the FAA sought to alter the flight routes in and out of Sky Harbor and to employ satellite technology to guide planes. For consultation on its developing plans, the FAA formed the Phoenix Airspace Users Work Group with the City and others.

One of the new flight paths the FAA devised would route planes over a major avenue and various public parks and historic neighborhoods. The new route would increase air traffic over these areas by 300%, with 85% of the increase coming from jets. The FAA consulted on the environmental impact of this and other proposed changes primarily with a low-level employee in Phoenix's Aviation Department, who warned the FAA that he lacked the expertise and authority to discuss environmental matters on the City's behalf. The FAA never conveyed the proposed route changes to senior officials in the City's Aviation Department, local officials responsible for affected parks or historic districts, or elected city officials.

As plans progressed, the FAA used computer software to model the noise impact of the proposed route changes. This modeling predicted that two areas in Phoenix, which included twenty-five historic properties and nineteen public parks, would experience an increase in noise large enough to be "potentially controversial." But the agency concluded that these projected noise levels would not have a "[s]ignificant [environmental] impact" under FAA criteria. Joint Appendix 333, 334. Based on this conclusion, the FAA issued a declaration categorically excluding the new flight routes from further environmental review. The FAA shared these conclusions with the State Historic Preservation Officer, predicting that the new noise levels would not disrupt conversation at a distance of three feet and would be no louder than the background noise of a commercial area. The State Officer concurred in this prediction.

The FAA presented the finalized flight routes in an April 2013 meeting attended by a low-level project manager of the City's Aviation Department. The agency also sent

the proposed routes and maps showing affected areas to the other low-level Aviation Department employee, with the caveat that plans were "subject to change." J.A. 302. In May 2014, the FAA notified the Phoenix Airspace Users Work Group that the new routes would take effect in September. The FAA did not share its environmental conclusions with Airport management until the day before the routes were to go into effect. Management asked the FAA to delay implementation so the public could be informed. The FAA refused.

On September 18, 2014, the FAA published the new routes, and related procedures, and made them effective immediately. The public's reaction was swift and severe: the planes supplied the sound, the public provided the fury. In the next two weeks, the Airport received more noise complaints than it had received in all of the previous year.¹ Residents complained that the flights overhead were too loud and frequent and rattled windows and doors in their homes. Some claimed that they had trouble sleeping uninterrupted, carrying on conversations outdoors, or feeling comfortable indoors without earmuffs to mute *967 the noise.²

In response to the uproar, the FAA held a public meeting the next month that drew 400 attendees and hundreds of comments.³ There the agency promised to review the noise issue and update the City's Aviation Department. The FAA later claimed to have identified and corrected the problem: aircraft had been straying from the new routes. The agency said it was "teaming with the airport staff and industry experts" to see what more could be done about the noise levels. J.A. 609. But despite the FAA's assurances, the City continued to receive record numbers of noise complaints. In early December, the City told the FAA that public concern remained high.

That month the State Historic Preservation Officer also asked the FAA to reconsider the new routes in light of their impact on historic properties, which he said was far worse than he had been led to believe. He said he had originally concurred with the agency's optimistic projections only out of deference to the FAA's technical expertise.

Around the same time, the FAA's Regional Administrator met with Phoenix's City Council and publicly admitted, "I think it's clear that ... [our pre-implementation procedures

were] probably not enough because we didn't anticipate this being as significant an impact as it has been, so I'm certainly not here to tell you that we've done everything right and everything we should have done." J.A. 773.

A week after this concession, the City asked the agency to reopen consultation and restore the old routes until the City and the agency could engage the public in discussions. In response, the FAA said it would work with the airport and airlines to investigate additional changes to the flight paths. To that end, the FAA promised to reconvene the original Working Group, assuring the City that it was "an important player in this process." J.A. 750-51. But the agency also said it could not reinstate the routes in place before September 18, 2014, because that would require a time-consuming series of related changes to air-traffic control and aircraft automation systems, as well as additional safety and environmental reviews. The FAA also declined the Preservation Officer's request to reopen environmental review of the new routes.

In mid-February and again in early April the following year, the City submitted data to the FAA purporting to show that the agency's assertions to the Preservation Officer regarding the noise impact of the new routes were "massive[ly] and material[ly]" incorrect. J.A. 814. The City also alleged that computer modeling the FAA was required to use under its own regulations showed that 40,000 additional residents would be exposed to noise loud enough to disrupt speech compared to before the new routes were implemented. And the City renewed its request that the FAA reopen a statutorily mandated consultation process with the State Preservation Office, in order to provide the City *968 with data from the FAA's modeling, conduct an environmental review of the route changes, and find ways to either minimize the noise impact of those changes or restore the old routes.

In mid-April the FAA responded with a letter to the City that included the Working Group's final report. The report evaluated alternative routes and amended some existing routes but reaffirmed the agency's decision not to conduct further review of the new flight paths' environmental impact. And though the accompanying letter expressed the FAA's frustration that the City had offered no alternative route proposals, the letter also conveyed the agency's promise to consider further modifications as it "continue[d] to support a collaborative approach towards addressing the community's concerns."

J.A. 1036. The letter did not address the City's data, modeling, or requests. In fact, the accompanying documents disclosed that noise level reduction was not among the Working Group's stated objectives.

The City's response expressed frustration that despite initial promises, the FAA had organized the Working Group so that it would *not* address the noise issue, and had even excluded the City from meetings for fear of confrontation between the City and the airlines. Indeed, the City was not listed as a Working Group member. The City also protested that it *had* provided an alternative plan to the FAA—namely, reinstating the original routes but continuing to use satellite technology—which the City claimed would eliminate the 69% increase in residents exposed to higher noise levels and cost airlines only \$700,000 more per year in fuel compared to the new routes.

In late May, the City met with the FAA and the airlines to again discuss ways to fix the noise issues. The FAA characterized these discussions as "productive" in a follow-up letter sent on June 1. J.A. 1109. The letter also listed short-term adjustments the agency could make within six months, as well as some "longer term" possibilities, which the agency could implement within a year following additional environmental review. *Id.* The letter said nothing about the City's data submissions, previous requests to reopen consultation and environmental review, proposal to return to the old routes while still using satellite technology, or exclusion from the Working Group.

Also on June 1, the City sought review in our court, characterizing the FAA's last letter as a final order. The Historic Neighborhoods filed their own petition for review in late July. The FAA moved to dismiss these petitions as untimely.

II

[1] [2] We must first determine whether these petitions are untimely. A petition for review of an FAA order must be filed in the Court of Appeals "not later than 60 days after the order is issued." 49 U.S.C. § 46110(a). The parties disagree over when this sixty-day clock began to run—i.e., when the FAA's decision regarding the new flight routes crystallized into final agency action. The answer is

relevant because only a final action can be a reviewable “order” within the meaning of section 46110’s sixty-day deadline. *See Flytenow, Inc. v. FAA*, 808 F.3d 882, 888-89 (D.C. Cir. 2015). A final order is one that “mark[s] the consummation of the agency’s decisionmaking process” and that either determines “rights or obligations” or is a source of “legal consequences.” *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)).

[3] The FAA contends that its final “order” regarding the new routes issued *969 on September 18, 2014, when the routes were formally published and put into effect. We agree. The September 2014 publication was a final order because it satisfies both prongs of the finality test.

First, the September publication marked “the consummation of the agency’s decisionmaking process,” *id.*, because it put the new routes into effect following extensive testing and evaluation intended to ensure that those routes would be safe and consistent with air traffic requirements, *see* Fed. Aviation Admin., Order No. 7100.41, Performance Based Navigation Implementation Process §§ 2-3 to 2-6 (2014).

Petitioners respond that although the new routes went into effect in September, the agency’s decisionmaking process regarding those routes had not yet concluded. *See Friedman*, 841 F.3d at 541. Petitioners note that the FAA’s process for developing new routes actually has five steps, of which publication of the new routes was only the fourth. The fifth step provides for post-implementation monitoring and review, which, petitioners contend, could have led to further route changes.

But this final step is not part of the agency’s “decisionmaking process.” *Id.* (emphasis added). Rather, it consists of “Monitoring and Evaluation” of decisions already “[i]mplement[ed],” *see* Order 7100.41, *supra*, § 2-7, “to ensure” that those decisions play out “as expected,” *id.* To be sure, that monitoring *might* lead to adjustments to the new routes, but by then the primary development of those routes has already happened. *Cf. Friedman*, 841 F.3d at 543 (explaining that “a vague prospect of reconsideration” does not defeat a finding of finality).

As for the second prong of the finality test, it was the September publication, and not the June 1 letter or any

of the agency’s other reports or communications, that determined “rights [and] obligations” and produced “legal consequences.” *Id.* at 541. And it was the September publication that led to the effects petitioners now seek to reverse: increased noise in certain areas of Phoenix. We also note that the relief requested by petitioners is “vacat[ur] and remand [of the] FAA’s decision to implement the [new flight] routes”—that is, of the September order. Phoenix Br. 61. Thus, petitioners implicitly recognize that the September publication, and only that publication, determined the legal consequences they wish to challenge. We therefore conclude that the September 18, 2014 publication of the new flight routes was the relevant final “order.”

The petitions thus came more than half a year too late. The review statute, however, provides that a court may allow a petition to be filed after the usual deadline “if there are reasonable grounds for not filing by the 60th day.” 49 U.S.C. § 46110(a). While we “rarely [find] ‘reasonable grounds’ under section 46110(a),” *Elec. Privacy Info. Ctr. v. FAA*, 821 F.3d 39, 43 (D.C. Cir. 2016), we have done so in cases quite similar to this one.

For instance, in *Paralyzed Veterans of America v. Civil Aeronautics Board*, the Board promulgated a final rule but “explicitly left its rulemaking docket open in order to receive additional comments from the public.” 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), *rev’d on other grounds sub nom. U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986). “Aware that the rule might be undergoing modification, and unable to predict how extensive any modifications would be, petitioners elected to wait until the regulation was in final form before seeking review,” six months after the final rule had been published. *Id.* We found that petitioners had shown “reasonable grounds” for late filing under a *970 review statute materially the same as the one at issue here.⁴ *See id.* (citing 49 U.S.C. § 1486(a) (1976)). In doing so, we observed that “[a]ny delay simply served properly to exhaust petitioners’ administrative remedies, and to conserve the resources of both the litigants and this court.” *Id.*

Similarly, in *Safe Extensions, Inc. v. FAA*, after the FAA’s publication of an advisory circular establishing certain requirements for manufacturing products provoked a “significant uproar in the industry,” the FAA told the industry to ignore the existing order pending a revision.

509 F.3d 593, 603 (D.C. Cir. 2007). The petitioner, “[b]ased on these representations, and hoping to avoid litigation,” decided to wait and see if the agency would address the petitioner's concerns voluntarily. *Id.* As a result, we found reasonable grounds for the petitioner's late filing. *Id.* at 604.

To be sure, in *Safe Extensions* the FAA had expressly directed the petitioner to ignore the final order, whereas here the FAA merely promised to look into possible modifications. But the key in *Safe Extensions* was that the agency left parties “with the impression that [it] would address their concerns” by replacing its original order with a revised one. *Id.* at 596. There we were concerned that the agency's comments “could have confused the petitioner and others.” *Id.* at 603.

[4] Those same concerns are present here. The FAA repeatedly communicated—in an October public meeting, in a November letter, in a December public meeting, in a January letter, in a February decision to reconvene the Working Group, in an April letter, and in a May meeting with city officials—that the agency was looking into the noise problem, was open to fixing the issue, and wanted to work with the City and others to find a solution. This pattern would certainly have led reasonable observers to think the FAA might fix the noise problem without being forced to do so by a court. And given the FAA's serial promises, petitioning for review soon after the September order might have shut down dialogue between the petitioners and the agency. *See Oral Arg. Tr.* 58:8-13. We do not punish the petitioners for treating litigation as a last rather than a first resort when an agency behaves as the FAA did here. *See Paralyzed Veterans*, 752 F.2d at 705 n.82.

While we rarely find a reasonable-grounds exception, this is such a rare case. We hold that petitioners had reasonable grounds for their delay in filing. To conclude otherwise would encourage the FAA to promise to fix a problem just long enough for sixty days to lapse and then to argue that the resulting petitions were untimely. We therefore reach the merits of the petitions.

III

The petitioners argue that the FAA's approval of the new flight routes was arbitrary and capricious and

violated the National Historic Preservation Act, the National Environmental Policy Act, the Department of Transportation Act, and the FAA's Order 1050.1E. We agree.⁵

*971 A

[5] Under the National Historic Preservation Act, federal agencies must “account [for] the effect of their actions on structures eligible for inclusion in the National Register of Historic Places.” *Ill. Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988). In fulfilling this obligation, agencies must consult with certain stakeholders in the potentially affected areas, including representatives of local governments. *See* 36 C.F.R. § 800.2(a)(4), (c)(3). If an agency determines that no historic structures will be adversely affected, it still has to “notify all consulting parties”—including a representative of the local government—and give them any relevant documentation. *Id.* § 800.5(c).

[6] Here the FAA failed to fulfill these obligations because it consulted only low-level employees in the City's Aviation Department, whom the City had never designated as its representatives. True, the City never informed the FAA that low-level Aviation Department employees were inadequate points of contact, but that is irrelevant. Neither statute nor regulation imposes a duty on local governments to affirmatively inform the agency of their chosen representatives. Just the opposite: the agency must ask local governments who their authorized representatives are. *See id.* § 800.3(f), (f)(1). The FAA never took that step here. And the FAA's failure to notify and provide documentation to the City of the agency's finding of no adverse impact violated regulations under the Preservation Act, and denied the City its right to participate in the process and object to the FAA's findings. *See id.* §§ 800.2(c)(3), 800.5(c)(2).

Additionally, unless confidential information is involved, agencies must “provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” *Id.* § 800.2(d)(2) (emphasis added). The FAA admits, however, that it did not make “local citizens and community leaders” aware of the proposed new routes and procedures, J.A. 364, and it does not claim that any confidentiality concerns applied.

Further, by keeping the public in the dark, the agency made it impossible for the public to submit views on the project's potential effects—views that the FAA is required to consider. *See* 36 C.F.R. § 800.5(a); *see also Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) (“Interested persons cannot request an [environmental assessment] for actions they do not know about, much less for actions already completed.”).

B

Under the National Environmental Policy Act (NEPA), federal agencies must assess and disclose the environmental impacts of “major” actions prior to taking those actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. This process “ensures” that *before* an agency acts, it will “have available” and “carefully consider[] detailed information concerning significant environmental impacts.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). The process also “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.” *Id.*

NEPA's requirements vary based on the type of agency action in question. Actions with significant environmental effects require a full environmental-impact statement. Actions with impacts that are not *972 significant or are unknown require a briefer environmental assessment. And actions “which do not individually or cumulatively have a significant effect on the human environment” can be categorically excluded from any environmental review. 40 C.F.R. § 1508.4.

[7] However, the FAA may not categorically exclude an action from environmental review if “the Administrator determines that extraordinary circumstances” would counsel otherwise. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 213(c)(1), 126 Stat. 11, 49. Under the FAA's own regulations, extraordinary circumstances exist when an action's effects “are likely to be highly controversial on environmental grounds.” Fed. Aviation Admin., Order No. 1050.1E, Environmental Impacts: Policies and Procedures ¶ 304i (2004). Here, the FAA found that the new routes were “not likely to be highly controversial on environmental grounds,” and thus

determined that no extraordinary circumstances existed. That determination was arbitrary and capricious.

The FAA's determination was arbitrary in light of the agency's admitted failure to notify “local citizens and community leaders” of the proposed new routes before they went into effect. J.A. 364, 367. This failure made it impossible for the FAA to take into account “[o]pposition on environmental grounds by a ... State, or local government agency or by ... a substantial number of the persons affected by the [FAA's] action.” Order 1050.1E, *supra*, ¶ 304i; *cf. Am. Bird Conservancy*, 516 F.3d at 1035 (faulting the agency for its lack of diligence in informing and involving the public since “[i]nterested persons cannot request an [environmental assessment] for actions they do not know about, much less for actions already completed”).

The FAA argues that it was reasonable simply to assume that its proposal would not be controversial on environmental grounds, given that the agency had “confirmed that no significant noise impacts were anticipated at all, received the concurrence of the State Historic Preservation Officer[,] who expressed no concerns, and then further discussed the finding with the Airport Authority [,] [which] also expressed no concerns.” FAA Br. 80. Common sense reveals otherwise. As noted, the FAA's proposal would increase by 300% the number of aircraft flying over twenty-five historic neighborhoods and buildings and nineteen public parks, with 85% of the new flight traffic coming from jets. The idea that a change with these effects would not be highly controversial is “so implausible” that it could not reflect reasoned decisionmaking. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The FAA also erred by deviating from its usual practice in assessing when new flight routes are likely to be highly controversial, without giving a “reasoned explanation for ... treating similar situations differently.” *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014). In assessing proposed route changes at airports in Boston, Northern California, Charlotte, and Atlanta, the FAA has relied on its general observation that a proposal is likely to be highly controversial if it would increase sound levels by five or more decibels in an area already experiencing average levels of 45-60 decibels. But here the agency said exactly the opposite and never explained its about-face.

The FAA replies that “[e]ach airport is different and the potential effects of any changes at those airports will differ as well.” FAA Br. 81. But that does not explain how the Phoenix plan could be less likely to stir controversy than other plans that had *the same* projected impact. Thus, *973 the agency acted arbitrarily in departing from its usual determinations regarding when a projected noise increase is likely to be highly controversial.

In short, the FAA had several reasons to anticipate that the new flight routes would be highly controversial: The agency was changing routes that had been in place for a long time, on which the City had relied in setting its zoning policy and buying affected homes. The air traffic over some areas would increase by 300%—with 85% of that increase attributed to jets—when before only prop aircraft flew overhead. The FAA found a “potential [for] controversy” but did not notify local citizens and community leaders of the proposed changes as the agency was obligated to, much less allow citizens and leaders to weigh in.⁶ And the agency departed from its determinations in materially identical cases. Thus, the FAA acted arbitrarily in finding under Order 1050.1E that the new routes were unlikely to be highly controversial and could thus be categorically excluded from further environmental review.

C

Petitioners also raise two claims related to the Transportation Act’s section 4(f). First, they argue that the FAA violated its duty to consult with the City in assessing whether the new routes would substantially impair the City’s parks and historic sites. Second, petitioners claim that the FAA was wrong to find that the routes would *not* substantially impair these protected areas. We agree on both points.

i

Section 4(f) of the Transportation Act calls for “special effort[s] to preserve the natural beauty of ... public park and recreation lands ... and historic sites.” 49 U.S.C. § 303(a). To that end, the FAA’s regulations require it to consult “*all* appropriate ... State[] and local officials having jurisdiction over the affected section 4(f)” areas when assessing whether a noise increase might substantially

impair these areas. Order 1050.1E, *supra*, ¶ 6.2e (emphases added). According to the City, the agency violated this requirement by not consulting the proper city officials about the proposed flight routes in Phoenix. *Cf. Nat’l Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980) (“Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.”).

The FAA responds that it *did* consult employees in the City’s Aviation Department, and that at the time the City didn’t tell the agency what the City now asserts: that those employees lacked authority to speak for the City regarding the new flight routes. Thus, the FAA contends, its failure to consult other local officials was not arbitrary.

[8] We are not persuaded. As noted, the FAA spoke mainly with one low-level employee in the City’s Aviation Department and occasionally with other low-ranking members of the department. But it was unreasonable for the agency simply to assume that low-level Aviation Department employees had jurisdiction over the historic sites and public parks protected by section *974 4(f), much less that these employees (along with the State Historic Preservation Officer) represented *all* the local officials with such jurisdiction, as the agency’s consultation duties required. Besides, the FAA cites no evidence that it consulted with these City officials on historic sites and public parks in particular. Thus, the FAA’s consultation process was arbitrarily confined.

ii

Section 4(f) also provides that a federal transportation project may “use” a public park or historic site only if “there is no prudent and feasible alternative to using that land.” 49 U.S.C. § 303(c)(1). A project makes “constructive use” of a protected area if the project would “substantially impair” that area. Order 1050.1E, *supra*, ¶ 6.2e. And a project substantially impairs an area if it “substantially diminish[es]” the “activities, features, or attributes ... that contribute to its enjoyment.” *Id.* ¶ 6.2f. For instance, a project would make constructive use of a park if it subjected the park to aircraft noise “at levels high enough to have negative consequences of a substantial nature that amount to a taking.” *Id.* In that case, the project could lawfully proceed only if there was no prudent and feasible alternative to using the park.

In determining whether a transportation project would substantially impair an area protected under section 4(f), the FAA may rely on guidelines set forth in 14 C.F.R. pt. 150 (the Part 150 guidelines), including the directive “to evaluate impacts on historic properties that are in use as residences.” Order 1050.1E, *supra*, ¶ 6.2h. But the Part 150 guidelines “may not be sufficient to determine the noise impact” on historic residences if “a quiet setting is a generally recognized purpose and attribute” of those residences. *Id.* (emphasis added). Here the FAA found that a quiet setting was not a recognized purpose of the affected historic homes, neighborhoods, and sites, so the agency relied only on the Part 150 guidelines in assessing the noise impact on those sites. And on that basis, it concluded that the increased noise would not substantially impair the historic buildings and areas in question.

[9] The City contends that it was unreasonable for the FAA to rely only on the Part 150 guidelines, because the agency didn't have enough information to tell if the areas affected here were generally recognized as quiet settings. We agree.

As evidence that these sites were not “generally recognized” as quiet settings, the FAA pointed to the sites' urban location. *Id.* But that isn't enough: even in the heart of a city, some neighborhoods might be recognized as quiet oases. The agency also observed that planes were flying over the affected historic sites even before the new routes took effect. But those earlier flights involved propeller aircraft that flew far less often, so the homes beneath them might still have been generally recognized as “quiet setting[s].” *Id.*

Thus, it was unreasonable for the agency to rely only on the Part 150 guidelines in concluding that noise from the new flight routes would not substantially impair the affected historic sites. As a result, that conclusion lacks substantial supporting evidence. For both these reasons, we find that the agency's substantial-impairment analysis was arbitrary and capricious. *See BFI Waste Sys. of N. Am. v. FAA*, 293 F.3d 527, 532 (D.C. Cir. 2002) (observing that an agency's action is arbitrary and capricious if it is “ ‘not supported by substantial evidence’ in the record as a whole” (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983))); *see also State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (“We may not supply *975 a reasoned basis for the agency's

action that the agency itself has not given.” (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947))).

IV

For the foregoing reasons, we grant the petitions, vacate the September 18, 2014 order implementing the new flight routes and procedures at Sky Harbor International Airport, and remand the matter to the FAA for further proceedings consistent with this opinion.

So ordered.

Sentelle, Senior Circuit Judge, dissenting:

I respectfully dissent from the majority's opinion in this case, not because I disagree with the merits but because I believe the court should not reach them. I therefore express no opinion on the merits and instead disembark at the question of timeliness.

As the majority acknowledges, petitions for review of an FAA order must be filed “not later than 60 days after the order is issued.” 49 U.S.C. § 46110(a); *see* Maj. Op. at 968. Nevertheless, as my colleagues note, the petitions in this case were filed “more than half a year too late.” Maj. Op. at 969. Such late filing is excused “only if there are reasonable grounds for not filing” within the 60-day period. § 46110(a); *see* Maj. Op. at 969. The majority relies on two cases, *Paralyzed Veterans of America v. Civil Aeronautics Board*, 752 F.2d 694 (D.C. Cir. 1985), *rev'd on other grounds sub nom. U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986), and *Safe Extensions, Inc. v. FAA*, 509 F.3d 593 (D.C. Cir. 2007), for its conclusion that reasonable grounds exist in the present case. *See* Maj. Op. at 969-71. Both cases, however, are distinguishable.

As my colleagues in the majority acknowledge, in *Paralyzed Veterans*, “the Board promulgated a final rule but ‘explicitly left its rulemaking docket open in order to receive additional comments from the public.’” Maj. Op. at 969 (citing *Paralyzed Veterans*, 752 F.2d at 705 n.82). This unusual circumstance, prompting the petitioners to wait for further changes to the rule before filing for review, constituted reasonable grounds within the meaning of § 46110(a). And, as the majority acknowledges

in discussing *Safe Extensions*, that case involved the FAA instructing parties to ignore an order as it would be modified and revised. *Safe Extensions*, 509 F.3d at 603; Maj. Op. at 969-70. The petitioner accordingly waited to file and, given that unique context, we concluded reasonable grounds existed for delayed filing. *Safe Extensions*, 509 F.3d at 604. These factual contexts are distinguishable from the present case, in which the FAA never promised to suspend the existing order and explicitly had the new flight paths continue while it considered the possibility of future changes. Mere agency acknowledgment of the possibility of future modification is not a rare circumstance; *Paralyzed Veterans* and *Safe Extensions* are instead the truly rare circumstances of an agency explicitly inducing warranted delay by a putative petitioner. Agencies are often welcome to re-initiate the decision-making process at some future point and to follow the necessary procedures to change their minds—this mere possibility, or even the mention of it, cannot be enough to excuse a petitioner's failure to file within the statutorily mandated 60-day period. Otherwise, the statutory limit would cease to have meaning.

Instead, as we observed in *976 *Electronic Privacy Information Center v. FAA*, 821 F.3d 39, 43 (D.C. Cir. 2016), “[w]e have rarely found ‘reasonable grounds’ under section 46110(a).” *Safe Extensions* (and, by comparison, *Paralyzed Veterans*) is the “rare instance[]” of such reasonable grounds, not the rule. *Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.*, 827 F.3d 51, 57 (D.C. Cir. 2016). Because reasonable grounds are so infrequent, the onus is almost always on the petitioners to protect themselves and file within the 60-day timeframe. The FAA's failure to act with perfect clarity is not sufficient to remove petitioners' duty to protect themselves. See, e.g., *Nat'l Fed'n of the Blind*, 827 F.3d at 57-58; *Elec. Privacy Info. Ctr.*, 821 F.3d at 42-43; *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 521 (D.C. Cir. 2011). Mere confusion over where or when to file, lack of clarity by the FAA in its communications,

ignorance, and lack of notice do not suffice, at least independently, to qualify as reasonable grounds for delay under § 46110(a) and our precedent. See *Nat'l Fed'n of the Blind*, 827 F.3d at 57-58; *Elec. Privacy Info. Ctr.*, 821 F.3d at 42-43; *Avia Dynamics*, 641 F.3d at 521. Such grounds are rare and found in unique circumstances, such as *Safe Extensions* and agency procurements of delay by promising a new order and instructing parties to ignore the prior one, or *Paralyzed Veterans* and an agency leaving its rulemaking docket open during the modification process, where delay “simply served properly to exhaust petitioners' administrative remedies,” 752 F.2d at 705 n.82. No such unusual facts are in the present case. I would determine that petitioners lacked reasonable grounds for untimely filing.

I note in passing the majority's references to petitioners' notice and knowledge of the FAA's proceedings having come through “low-level” employees. See Maj. Op. at 966-67, 971. I do not see that this can help establish reasonable grounds for any delay, let alone one stretching six months beyond the 60-day statutory provision. There was ample time for the higher-ups to gain and act on adequate knowledge.

In concluding that petitioners did not have reasonable grounds for waiting six months to file for review, I do not contend that the FAA acted with perfect clarity at all times. However, the record does not suggest to me that petitioners had a clear reason, akin to those rare instances present in *Paralyzed Veterans* and *Safe Extensions*, to forego at the very least a protective filing. For this reason, I would decide this case on the question of timeliness, deny the petitions for review, and decline to reach the merits of their arguments.

All Citations

869 F.3d 963

Footnotes

- 1 See Brittany Hargrave, *Phoenix Neighbors Protest Sky Harbor Flight-Path Change*, THE ARIZONA REPUBLIC, Sept. 30, 2014 (updated Oct. 1, 2014), <http://azc.cc/YQlWu5>.
- 2 See Ashley Thompson, *Neighbors Upset at FAA's New Flight Patterns Hold Day of Protest*, KNXV, Oct. 24, 2015, <http://www.abc15.com/news/region-phoenix-metro/centralphoenix/neighbors-upset-at-faas-new-flight-patterns-hold-day-of-protest>.
- 3 See Miriam Wasser, *Sound and Fury: Frustrated Phoenix Residents Are Roaring Ever Since the FAA Changed Sky Harbor Flight Paths*, PHOENIX NEW TIMES, Mar. 4, 2015, <http://www.phoenixnewtimes.com/news/sound-and-fury-frustrated-phoenix-residents-are-roaring-ever-since-the-faa-changed-sky-harbor-flight-paths-6654056>; Caitlin McGlade,

FAA Will Study Solution to Flight-Path Noise, THE ARIZONA REPUBLIC, Oct. 16, 2014 (updated Oct. 17, 2014), <http://azc.cc/1waaUm9>.

- 4 In *Paralyzed Veterans*, the petitioners had filed a petition for review within sixty days of an amended final order. But the *Paralyzed Veterans* court treated that fact as a *distinct* reason to review the petition, considering “[m]ore important[]” the fact that petitioners had shown reasonable grounds for delaying their petition for review of the *original* order. See 752 F.2d at 705 n.82.
- 5 Petitioners also claim that the FAA violated the agency's own Order 7100.41 by excluding the City from the Working Group re-convened in the wake of the controversy over the new routes. We do not reach that argument, however, because our review is limited to the agency's September order.
- 6 Although at times it may be difficult to identify precisely who must be notified, the FAA's regulatory acknowledgment of its obligation has narrowed the field. Here, given the changes about to occur, it was unreasonable to ignore elected local officials once the FAA was on notice that the Aviation Department employee lacked authorization to speak for the City of Phoenix. See *infra* Part III.C (discussing FAA regulations under section 4(f) of the Transportation Act).

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EXHIBIT

CERTIFICATE OF SERVICE

I hereby certify that the preceding Joint Petition for Panel Rehearing was served on all counsel of record on November 30, 2017, by use of this Court's CM/ECF system, as all counsel are registered to receive electronic service.

s/ LANE N. MCFADDEN
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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF PHOENIX, ARIZONA,)	
et. al.)	
)	
Petitioners,)	
)	
vs.)	
)	
MICHAEL P. HUERTA, in his official capacity)	Civ. Nos. 15-1158,
)	15-1247
as Administrator, Federal Aviation Administration,)	(consolidated)
et al.)	
)	
Federal Respondents.)	
_____)	

**MEMORANDUM REGARDING IMPLEMENTATION OF COURT
ORDER**

The City of Phoenix and the Historic Neighborhood Petitioners (collectively, “Petitioners”) and the Federal Aviation Administration and Michael Huerta, in his official capacity as Administrator (collectively the “FAA”) (together with Petitioners, “the Parties”), have reached an agreement for implementation of this Court’s August 29, 2017, judgment, with the Parties agreeing to undertake and perform the measures set forth in this stipulated Memorandum Regarding Implementation of Court Order (“Agreement”).

Whereas, on September 18, 2014, the FAA published new flight routes and air traffic procedures at Sky Harbor International Airport (“PHX”), including west flow area navigation (“RNAV”) Standard Instrument Departures from Runways 25L, 25R and 26 of PHX referred

to as BNYRD, KATMN, FTHLS, JUDTH, IZZZO, MAYSA, LALUZ, SNOBL, and YOTES (the “Western RNAV Routes”);

Whereas, prior to September 18, 2014, and through today, FAA had and has published Standard Instrument Departures from Runways 25L, 25R and 26 of PHX known as CHILY, ST. JOHN’S, SILOW, MAXXO, STANFIELD, and BUCKEYE (the “Pre-RNAV Western Routes”);

Whereas, Petitioners filed petitions for review challenging certain procedures from PHX published on that date;

Whereas, on August 29, 2017, the U.S. Court of Appeals for the District of Columbia issued a judgment vacating and remanding those departure procedures to FAA; and

Whereas, the FAA and Petitioners have reached an agreement specifically relating to certain initial departure instructions for the Western RNAV Routes.

THEREFORE, the Parties agree and stipulate as follows:

1. The Parties agree that the Western RNAV Routes should be remanded by the Court without *vacatur*, consistent with this Memorandum, to permit the FAA to address Petitioners’ concerns in a manner that allows for PHX to be operated safely and efficiently as described herein. The parties further agree that no other routes shall be remanded or vacated by the Court.
2. The Parties agree to the following process for implementation of this Agreement and the Court’s August 29, 2017, Order.
 - a. Following execution of this Agreement, the Parties shall file a joint petition for panel rehearing that includes:

- i. The agreement of the Parties that amendment of the relief identified in Section IV of the D.C. Circuit's August 29, 2017, opinion is appropriate to avoid uncertainty and assure safety and immediate noise relief.
- ii. A request to amend and replace the D.C. Circuit's opinion and order of August 29, 2017, Section IV with the following text:

“For the foregoing reasons, we grant the petitions and remand to the FAA, without vacating, the portion of the September 18, 2014 order implementing the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN procedures at Phoenix Sky Harbor International Airport departing Runways 25L, 25R or Runway 26 for further proceedings consistent with this opinion and the Memorandum filed with this Court on November 30, 2017. This Court will stay the issuance of its mandate until June 15, 2018, unless the parties notify this Court prior to that date that the mandate should issue. The parties may each file a status report of no more than 2,500 words on or before May 15, 2018, in the event the mandate has not yet issued.”

- b. In order to provide time for FAA to complete all necessary processes to implement “Step One” (which is described in Paragraph 5.a of this Agreement), the parties shall jointly request that the D.C. Circuit stay issuance of its mandate until June 15, 2018.

- c. When FAA implements the Letter of Agreement identified in Paragraph 5.a of this Agreement and begins use of the Step One procedures, the Parties shall promptly notify the Court that the mandate should issue consistent with the relief requested in the petition for panel rehearing filed pursuant to Paragraph 2.a.
 - d. If the Letter of Agreement has not been implemented by April 1, 2018, the parties shall meet and work in good faith to determine if there are amendments to this Agreement that would meet the needs of the Parties and avoid a contested rehearing before the Court.
 - e. If the Letter of Agreement has not been implemented by May 15, 2018, the Parties shall file status reports of no more than 2,500 words on May 15, 2018, advising the Court regarding how they believe it should proceed.
3. The Parties agree to carry out the obligations set forth hereunder.

FAA's Obligations

4. **Short- and Long-Term Relief.** FAA will address Petitioners' concerns in two steps, hereafter referred to as "Step One" and "Step Two." The purpose of Step One is to provide Petitioners some short-term relief from aircraft noise as soon as practicable. The purpose of Step Two will be to develop longer-term procedure changes that will involve the implementation of new or modified Performance Based Navigation ("PBN") procedures at PHX, including RNAV procedures. An estimated schedule and list of

tasks for implementing Step One and Step Two is attached as Appendix A.

5. **Step One.**

- a. ***Letter of Agreement.*** FAA will develop a Letter of Agreement between the Phoenix Terminal Radar Approach Control and the Phoenix Airport Traffic Control Tower that replaces the initial departure instructions for the Western RNAV Routes with alternate departure instructions that approximate, to the extent practicable, actual departure paths flown prior to September 18, 2014, using the Pre-RNAV Western Routes. Alternate departure instructions implemented in accordance with this Agreement are applicable to departing turbojet aircraft only and do not apply to aircraft conducting go-around or missed-approach operations. Specifically: Northwest departures MAYSA, LALUZ, SNOBL, and YOTES will be issued departure instructions to navigate along the extended runway centerline and then cleared to join the RNAV routes at the waypoint TWSND or some later waypoint. The southwest departures FTHLS, KATMN, BNYRD, and JUDTH will be issued departure instructions to a 240-degree course and then cleared to join the RNAV routes at the waypoint VANZZ or some later waypoint. West departure IZZZO will be issued departure instructions to a 240-degree course and then cleared to join the RNAV route at waypoint KEENS or some later waypoint. The instructions provided for in the Letter of Agreement will relate to instructions for PHX and

not for aircraft flying to or from satellite airports. Clearances or control instructions affecting initial departure instructions will not be issued any earlier than 43rd Avenue unless required for safety of flight purposes. Appendix B contains a graphical representation of intended corridors for these procedures.

- b. **Compliance.** Development and implementation of the Letter of Agreement must comply with federal law and FAA Orders and policy, more specifically as detailed in Appendix A. As part of this Agreement, FAA agrees to conduct a noise analysis to compare differences in noise between both (1) the Pre-RNAV Western Routes and the Step One Letter of Agreement instructions; and (2) the Western RNAV Routes and the Step One Letter of Agreement instructions. FAA also agrees to consult with necessary historic-property representatives to determine the appropriate level of environmental analysis required under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.* Any action taken by the FAA during Step One will be subject to and contingent upon complying with the authorities described in Paragraph 7 below.
- c. **Timing.** FAA agrees to use best efforts to develop and, subject to agreement by the City as to timing, implement the Letter of Agreement by April 1, 2018. This timing is contingent upon there being no findings related to safety issues in the Safety Risk Management process identified in Appendix A. Further, this timing is contingent upon the

FAA's completion of any environmental review required by NEPA and the consultation process required by the National Historic Preservation Act of 1966 as set forth in Paragraph 7 below.

- d. ***Community Outreach.*** FAA agrees to conduct at least three community outreach meetings with the general public in the Phoenix metropolitan area, including at least one general public meeting in Northeast Phoenix. The purpose of the meetings will be to inform the public regarding the measures being performed under Step One and to solicit any public comments regarding noise concerns with the existing airspace and procedures, as well as any proposals for airspace and procedures FAA should consider for Step Two.
 - e. ***Post-Implementation Coordination of Step One.*** FAA shall meet with representatives of the Petitioners at least once per quarter until the completion of Step Two to discuss implementation questions and radar tracks for the procedures in Paragraph 5.a, including aircraft conducting go-around or missed-approach operations, as well as aircraft turning prior to 43rd Avenue (if any).
6. **Step Two.** The FAA will develop PBN procedures to supersede the westerly departure routes in Step One and Western RNAV Routes. As the FAA develops the PBN procedures, it will use best efforts to design and consider routes that closely approximate the actual flight tracks for the Pre-RNAV Western Routes between the airport and a 15-mile radius, that occurred before the FAA's September 18, 2014 Order. Recommendations

received by the FAA from stakeholders during public outreach sessions and written comment periods, including recommendations outside the scope of the westerly departure procedures described above, will be fully and reasonably considered. However, the proposal and adoption of any procedure changes other than the replacement of the western departures described above as “Step One” will be made solely by the FAA within its discretionary authority, in accordance with all applicable laws. Any action taken by the FAA during Step Two will be subject to and contingent upon complying with the requirements described in Paragraph 7 below. As part of Step Two, FAA will conduct community outreach meetings with the public. The purpose of the meetings will be to inform the public regarding the alternatives being considered under Step Two and to solicit public comments regarding these alternatives.

7. **Compliance with Applicable Laws, Orders, and Policy.** FAA will perform its obligations under Step One and Step Two in accordance with the following authorities:¹ NEPA, 42 U.S.C. § 4321 *et seq.*; FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures*; FAA Order 7100.41, *Performance Based Navigation Implementation Process*; FAA Order 7400.2L, *Procedures for Handling Airspace Matters*; Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470 *et seq.*; Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c); and other applicable federal laws. In addition, the

¹ All references to FAA Orders shall be to the most recent applicable version of such Order at the time of use.

FAA will be guided by the principles in its February 2016 Community Involvement Manual.

- a. **NEPA.** The FAA will comply with the guidance and instructions provided for under FAA Order 1050.1F and FAA Order 7400.2L, in addition to all applicable federal regulations. FAA also agrees to conduct a noise analysis to compare any potential noise impacts for both (1) the Pre-RNAV Western Routes and the Step One Letter of Agreement instructions; and (2) the Western RNAV Routes and the Step One Letter of Agreement instructions.
- b. **Section 106.** The FAA will comply with Section 106 of the National Historic Preservation Act, the Advisory Council on Historic Preservation's implementing regulations at 36 C.F.R. Part 800, and FAA's internal policy when completing Steps One and Two. Compliance will include invitations to the local government, State Historic Preservation Officer, and Indian tribes to participate as consulting parties. During this process, Petitioners will identify who will serve as their authorized representatives. Petitioners may assist in identifying properties listed or eligible for listing on the National Register of Historic Places within the area of potential effects. In addition, FAA will provide them an opportunity to review and either concur or disagree with the FAA's proposed determination of effects to any historic properties within the area of potential effects.
- c. **Performance Based Navigation Implementation.** The FAA will follow the systematic process for developing and

implementing PBN procedures and routes set forth under FAA Order 7100.41. This process includes the following stages: (1) preliminary activities, (2) development work, (3) operational preparations, (4) implementation, and (5) post-implementation monitoring and evaluation.

- d. ***Community Involvement Manual.*** The FAA will be guided by the principles set forth in the FAA Community Involvement Manual during Steps One and Two above. These principles include involving the community early, facilitating inclusive participation through public meetings, and building trust through transparency.
- e. ***Other Applicable Federal Laws.*** Other applicable federal laws may be identified during the environmental review process for Step One and Step Two and will need to be addressed by FAA consistent with FAA Order 1050.1F.

Petitioners' Obligations

8. **Procedures at Issue.** Petitioners agree the RNAV procedures covered in this Agreement are the Western RNAV Routes.

Petitioners further agree that this Agreement does not require changes to any other existing procedures. Except as provided in paragraphs 5 and 6, this Agreement is limited to the Western RNAV Routes.

9. **Assist in Community Outreach.** Petitioners agree to cooperate with and the City of Phoenix agrees to cooperate with and assist the FAA in all community outreach efforts related to this Agreement. Such cooperation includes assisting the FAA with providing facilities, technical information, and advice regarding

public outreach and communications. City staff shall, in written and oral statements, support the implementation of Step One western departure procedures as providing the relief requested by the City of Phoenix during the course of the litigation.

10. **Consulting Parties in Section 106 Process.** Petitioners also agree to be consulting parties with the FAA in fulfilling the Section 106 requirements in implementing Step One and Step Two. This includes, but is not limited to, reviewing and commenting on any Determinations for Eligibility and consulting on the development of a Programmatic Agreement or Memorandum of Agreement (if necessary) pursuant to the regulations at 36 C.F.R. Part 800, *et seq.*

11. **Technical Consultation and Meetings.** The City of Phoenix agrees to identify an individual employed with the City of Phoenix Aviation Department who shall serve as a point of contact for the City during the process of PBN design and implementation identified in Paragraph 7.c for Step One and Step Two. The person identified as the City's point of contact or authorized representative shall attend all technical meetings called by FAA needed to implement Step One and Step Two, and the City agrees that any communication with the City's point of contact or authorized representative on Step One and Step Two shall be deemed to be actual and sufficient communication to the City regarding the PBN implementation process described in Paragraph 7.c and NEPA. The Historic Neighborhood Petitioners may also identify a point of contact to attend these meetings. If the Historic Neighborhood Petitioners identify no point of contact,

the City of Phoenix point of contact or authorized representative shall be deemed to be the point of contact for the Historic Neighborhood Petitioners and other neighborhoods in the City.

Miscellaneous Provisions

12. **Own Costs.** Each Party shall bear its own costs and fees, including attorney fees, in connection with this Agreement and the litigation giving rise to this Agreement.

13. **Authority.** The representative of each Party hereby certifies that he or she is duly authorized to enter into this Agreement. Petitioners represent that they have the full authority to perform all of the acts and obligations they have agreed to perform under the terms of this Agreement. The United States, acting through the Department of Justice and the FAA, represents that the FAA has the full authority to perform all of the acts and obligations it and the United States has agreed to perform under the terms of this Agreement.

14. **Copies and Counterparts.** It is contemplated that this Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together constitute one and the same document. Facsimiles, hard copies, and scanned electronic copies of signatures including scanned electronic copies sent by email, shall constitute acceptable binding signatures for purposes of this Agreement.

15. **Defense of This Agreement.** The Parties agree to vigorously and actively defend this Agreement and all terms embodied therein as fair and reasonable, to vigorously and actively defend the same against any challenge by any individual or entity.

Petitioners may, but are not required to, intervene in support of this Agreement in any action brought by third parties against the FAA regarding this Agreement. The Parties further agree not to undermine directly or indirectly this Agreement or any terms set forth therein for as long as this Agreement remains in effect.

16. **Modification.** This Agreement may be supplemented, amended, or modified only by the mutual agreement of the Parties in writing. No supplement, amendment, or modification of this Agreement shall be binding unless it is in writing and signed by all duly authorized representatives of each Party.

17. **Release.** Upon the date on which the mandate in the above-captioned matters is issued, the Petitioners and their heirs, administrators, representatives, attorneys, successors, and assigns, hereby release, waive, acquit, and forever discharge the FAA and all its respective officers, employees, and agents from, and are hereby forever barred and precluded from prosecuting, any and all claims, causes of action, and/or requests for relief asserted in these consolidated actions, except that this release does not apply to actions taken to enforce this Agreement or taken in response to a request or order by the D.C. Circuit in these consolidated actions.

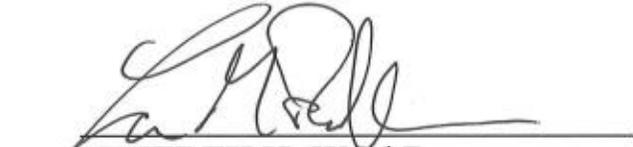
18. **No Third Party Rights.** This Agreement is not intended to create, and does not create, any third-party beneficiary right, confer upon any non-party a right to enforce or sue for an alleged breach of the Agreement or generate any other kind of right or privilege for any person, group, or entity other than the Parties.

19. **Anti-Deficiency Act.** Nothing in this Agreement may be construed to commit a federal official to obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

20. **Effective Date.** This Agreement shall be effective upon the date signed by all Parties. This Agreement's continued effectiveness is contingent on the Court's Order of August 29, 2017, being amended in a manner substantially consistent with the proposed language for amending the Order in Paragraph 2.a.ii of this Agreement. In the event that the D.C. Circuit issues its mandate and any of the Western RNAV Routes are vacated as a result, then the Parties shall immediately be relieved of their obligations under this Agreement.

For the Federal Aviation Administration and Michael P. Huerta:

Date: 11/28/17



JEFFREY H. WOOD
Acting Assistant Attorney General

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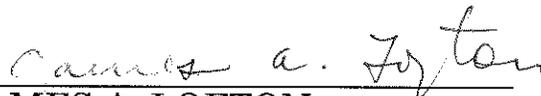
For the Federal Aviation Administration:

Date: Nov. 17, 2017



CHARLES M. TRIPPE, JR.
Chief Counsel
Federal Aviation Administration

Date: November 17, 2017



JAMES A. LOFTON
Assistant Chief Counsel for Airports &
Environmental Law
Federal Aviation Administration

11/27/17



JODI MCCARTHY
Deputy Vice President for Mission
Support Services
Air Traffic Organization
Federal Aviation Administration

For the CITY OF PHOENIX, an Arizona municipal corporation
Ed Zuercher, City Manager

By: 
James E. Bennett, A.A.E.
Director of Aviation Services

By: 
Brad Holm
City Attorney



ATTEST:


City Clerk

APPROVED AS TO FORM:


Acting City Attorney

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For the Historic Neighborhood Petitioners:

By: 
William Denney, President
Story Preservation Association, Inc.

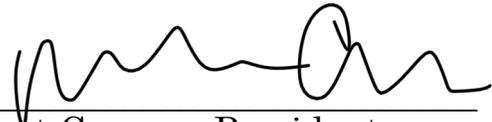
By: _____
Robert Cannon, President
Willo Neighborhood Association

By: _____
Brent J. Kleinman, President
Encanto-Palmcroft Historic
Preservation Association, Inc.

By: _____
Andie Abkarian, President
Roosevelt Action Association, Inc.

For the Historic Neighborhood Petitioners:

By: _____
William Denney, President
Story Preservation Association, Inc.

By: 

Robert Cannon, President
Willo Neighborhood Association

By: _____
Brent J. Kleinman, President
Encanto-Palmcroft Historic
Preservation Association, Inc.

By: _____
Andie Abkarian, President
Roosevelt Action Association, Inc.

City Clerk

APPROVED AS TO FORM:

Acting City Attorney

For the Historic Neighborhood Petitioners:

By: _____
William Denney, President
Story Preservation Association, Inc.

By: _____
Robert Cannon, President
Willo Neighborhood Association

By: 
Brent J. Kleinman, President
Encanto-Palmercroft Historic
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By: _____
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By: _____
William Denney, President
Story Preservation Association, Inc.

By: _____
Robert Cannon, President
Willo Neighborhood Association

By: _____
Brent J. Kleinman, President
Encanto-Palmcroft Historic
Preservation Association, Inc.

By:  VICE PRESIDENT
BY DIRECTION OF
Andie Abkarian, President
Roosevelt Action Association, Inc.

APPENDIX A

TABLE 1: STEP ONE FAA PROCESS FOR DEVELOPMENT AND IMPLEMENTATION OF LETTER OF AGREEMENT

Step/Task	Target Completion Date
Develop FAA Facility Letter of Agreement (LOA) Phase	April 1, 2018
Draft Letter of Agreement for Phoenix Terminal Radar Control and Phoenix Air Traffic Control Tower	Late November 2017
Secure National Air Traffic Controllers Association (NATCA) agreement on change	Early December 2017
Secure FAA Western Service Area Operations Support Group approval of Letter of Agreement revision.	Early January 2018
Complete Safety Risk Management process on change.	End January 2018
Provide NATCA formal notification of change for Impact & Implementation bargaining. (NATCA gets 30 days to determine Impact & Implementation accommodations.)	End February
Controller training	March 2018
Letter of Agreement implementation target date	April 1, 2018
Environmental Review Process Phase	End February 2018
Complete Initial Environmental Review Form (Appendix 5, FAA Order JO7400.2L) and supporting research, noise analysis, graphics/figures/exhibits. --Include noise modeling --Include environmental justice assessment --Include historic, parks, air, and other protected resources	End January 2018
Historic and other consultation with State Historic Preservation Office (SHPO), City Historic Preservation Office and other consulting parties (30-day comment period for historic and Tribal officials).	Middle February 2018
Publish environmental, noise, Step One description and Step Two scoping materials on FAA website prior to public meetings	February 2018
Community involvement meetings (same as Community Involvement Phase, below)	End February 2018
Determine and document level of NEPA review	End February 2018
Community Involvement Phase	End February 2018
Notification of community involvement meetings in local newspapers, outreach to contact list, City of Phoenix website, and FAA website	January/February 2018
Publish environmental, noise, Step One description and Step Two scoping materials on FAA website	February 2018
Hold three public meetings, including one in Northeast Phoenix	February 2018
Comment period in conjunction with public meetings	February 2018
Respond to public comments	March 2018

TABLE 2: HIGH-LEVEL STEP TWO FAA PROCESS FOR LONG-TERM PERFORMANCE-BASED NAVIGATION ROUTES AND PROCEDURES

Estimated start: May 2018

Step/Task	Expected Time
Phase 1 - Preliminary Activities	1-2 months
Consider Step One input and determine Step Two scope	
Notify public of Step Two scope and responses to comments from Step One	
Phase 2 - Design Activities	12-18 months
FAA route and procedure design process --City and Historic Neighborhood participation --Safety Risk Management and environmental reviews	
FAA public meetings and engagement regarding scope of alternatives	
Phase 3 - Development and Operational Preparation	12-18 months
FAA environmental analysis process	
Notification of community involvement meetings in local newspapers, outreach to contact list, City of Phoenix website, and FAA website	
Release draft environmental assessment for public comment	
Public meetings and engagement regarding scope of alternatives	
Consultation and coordination with SHPO, CHPO, Tribal representatives and other governments	
Finalize environmental assessment and determine final action	
Phase 4: Implementation of New Routes/Procedures	1-2 months
Public engagement and information consistent with Community Involvement Manual	
Phase 5: Post-implementation Monitoring and Evaluation	1-2 months
Public engagement and information consistent with Community Involvement Manual	

Appendix B

Step 1

Routing & Corridors

