Case Nos. 24-2477 and 24-2503

In the
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

CITY OF MALIBU, California
Petitioner

v.

FEDERAL AVIATION ADMINISTRATION, CHRIS ROCHELEAU, in his capacity as Acting Administrator, Federal Aviation Administration, U.S. DEPARTMENT OF TRANSPORTATION, and SEAN DUFFY, in his official capacity as Secretary, U.S. Department of Transportation,
Respondents

PETITIONER CITY OF MALIBU'S REPLY BRIEF

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INTRODUCTION

FAA's Final Agency Order approving the 2018 Amendments to the HUULL TWO, IRNMN TWO, and RYDRR TWO STARs suffers from multiple legal deficiencies that render it arbitrary, capricious, and contrary to law. Chief among these defects is FAA's reliance on a categorical exclusion (CATEX) derived from regulations that the D.C. Circuit has now held to be ultra vires. The agency compounded this error by disregarding extraordinary circumstances—such as widespread public controversy, adverse impacts on sensitive parklands, and outdated scientific thresholds—that preclude the use of a CATEX under its own guidance. Malibu's claims fall squarely within the ambit of NEPA and the APA, and are not time-barred.

Each of FAA's core defenses—whether premised on standing, timeliness, harmless error, or discretionary judgment—fails to account for the agency's obligation to take a hard look at real-world impacts and respond to judicially imposed remedial mandates. Malibu presents evidence of procedural and substantive harm traceable to FAA's deficient environmental review and its refusal to engage in meaningful consultation or work with updated scientific analysis. The arguments below demonstrate why FAA's CATEX/ROD must be vacated.

ARGUMENT

I. Malibu Timely Filed Its Petition For Review Within 60 Days Of FAA's

FAA states that its "February 20, 2024 Record of Decision for the environmental review of the May 2018 amendments to the three Flight Procedures (HUULL TWO, IRNMN TWO, RYDRR TWO) is an FAA order. ER-74." FAA Br. 3 ¶1. FAA's order issued on February 20, 2024, is the Final Agency Order regarding the 2018 amendments to these three flight procedures that Malibu is challenging. FAA Br. 3 ¶1. Within 60 days of the Final Agency Order, Malibu timely filed its Petition for Review of the three flight procedures amended in 2018. Malibu Br. 10-11. In its Opening Brief, Malibu collectively defines the three flight procedures amended in 2018 as the "Flight Procedures" and challenges them. Malibu Br.5. Malibu does not challenge the 2016 flight procedures denominated as version ONE (i.e., HUULL ONE, etc.). Since each FAA order may restart the limitations clock under §46110 (*City of Phoenix v. Huerta*, 860 F.3d 963, 971 (D.C. Cir. 2017), Malibu's Petition for Review was a timely challenge to FAA's February 20, 2024, order.

Even assuming that Malibu's arguments are also found to be relevant to the 2016 flight procedures, it is well within the 6-year statute of limitations applicable to an APA claim, which does not accrue until the plaintiff is injured by final agency

action. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2460 (2024). *See* Malibu Br. 10.

II. Malibu Has Standing Because It Meets the Requirements of Both Injury-in-Fact and Procedural Injury.

A. Malibu's Allegations Of Harm Resulting From FAA's 2018 Amendment Of Flight Procedures Are Not Attempts To Belatedly Challenge The Prior 2016 Flight Procedures.

At the outset of the Opening Brief, Malibu provides a brief background of the start of Malibu's dispute regarding the three flight procedures FAA implemented, culminating in FAA's amendment of the flight procedures in 2018. Towards that end, Malibu states in the first sentence of the brief "[t]his Petition for Review challenges the Federal Aviation Administration's ("FAA's") approval of three arrival procedures at Los Angeles International Airport ("LAX") under the National Environmental Policy Act ("NEPA"), the Noise Control Act of 1972, and the Federal Aviation Act. Malibu Br. 1; *See also*, Malibu's Petition for Review (Dkt Entry 1). FAA misinterprets this introductory sentence as an attempt to belatedly challenge the 2016 flight procedures. FAA Br. 28. However, in its Opening Brief, Malibu clearly defines the three flight procedures amended in 2018 as the "Flight Procedures" and challenges them. Malibu Br. 5.

1. Malibu Has Sufficiently Alleged Injury-in-Fact Cognizable Under Article III.

To satisfy the standing requirement, a plaintiff must show that (1) he has suffered an injury that is (a) concrete and particularized and (b) actual or imminent,

not conjectural or hypothetical, (2) the injury is fairly traceable to the defendant's challenged actions, and (3) it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–181 (2000).

Malibu owns real property, including parks, such as Malibu Legacy, Charmlee Wilderness, and Las Flores Creek, which are in the direct path of concentrated overflights. See Declaration of Steven McClary (hereinafter "McClary Decl.") ¶¶ 4, 5, 7, and 11.

Malibu has alleged in its Opening Brief that property interests have been harmed through degradation of environmental quality over the parklands and surrounding coastal prairies, vernal pools, woodlands, coastal bluffs, and wet meadows caused by CATEX/ROD FAA regarding the Flight Procedures issued as its Final Agency Order issued on February 20, 2024. Malibu Br. 12-13; McClary Decl. ¶¶ 6 and 8.

Furthermore, Malibu has alleged that as a result of FAA's Final Agency Order (CATEX/ROD), FAA has injured Malibu's ability to carry out its responsibilities and authority to protect and enhance Malibu's environmental quality and natural resources. *City of Sausalito*, 386 F.3d 1186, 1198 (9th Cir. 2004). Malibu Br. 8 ¶1. Therefore, Malibu has standing to sue to protect its own "proprietary interests," in

real and personal property it owns, and responsibilities, powers, and assets it has as a municipality. *City of Sausalito*, 386 F.3d at 1198. Malibu Br. 6-7.

Nevertheless, FAA argues that Malibu has an "insurmountable hurdle in Article III standing" because "the 2018 amendments made no material changes over the Cities—the only change was to increase altitude over Malibu—so they cannot have caused them any harm, such as increased noise impacts." FAA Br. 19 b. However, this argument is disingenuous because FAA concedes that it made only "minor" changes, even though this Court rejected the Flight Procedures implemented in 2018 and remanded it back to FAA to conduct consultation and perform a proper NEPA analysis. Suffice to say, had FAA conducted a sufficient consultation and performed a proper NEPA analysis taking a "hard look" at the data, such as whether the 2018 Amendments have caused substantially more aircraft to be vectored to use the Flight Procedures, it would have undoubtedly identified and made at least one material change that are necessary to correct the statutory violations this Court found with the Flight Procedures. FAA Br. 16. However, by FAA's own admission, it "made no material changes." FAA Br. 19(b).

FAA argues that Malibu is barred from challenging small changes FAA made to the current Flight Procedures because *Save Our Skies v. FAA*, 50 F.4th 854 (9th Cir. 2022) permits FAA to make small changes without fulfilling its obligation under NEPA since the small, non-material changes fall within the scope of categorical

exclusion. FAA Br. 26-27. FAA also argues that Malibu is prohibited from challenging prior orders by blending it with the current order containing small changes. These arguments are meritless for the following reasons.

Unlike the instant case, the issue in *Save Our Skies* was about "minor editorial changes." *Id.*, at 857-58. The change involved making a "minor wording change" to two departure procedures, which did not affect the flight path or altitudes flown. *Id.,* at 859. However, FAA states that the change it made was to "increase altitude over Malibu – so they could not have caused them any harm, such as increased noise impacts." FAA Br. 19 b. This is simply not true because raising the altitude could result in more vectored aircraft that fly lower than the established Flight Procedures. Malibu Br. 70-71.

Moreover, in *Save Our Skies*, this Court found that the petitioner attempted to blend all previous orders bearing the names, HARYS and SLAPP, together with the amended orders, HARYS FOUR and SLAPP TWO, as a way to overcome the time limitation that 49 U.S.C. § 46110 imposes on challenging the prior orders. *Save Our Skies LA*, 50 F.4th at 861. Here, Malibu is not seeking to challenge the 2016 flight procedures. Therefore, Save Our Skies is not analogous to the instant case. Malibu is challenging the Flight Procedures that FAA amended to include only the changes, which it termed as "minor," in defiance of the remedy the Court ordered. FAA concedes in its Answering Brief that the Court found FAA "violated NEPA, the

National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act when it issued the amended Flight Procedures." FAA Br. 16 (citing *City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586, at *3 (9th Cir. July 8, 2021). Therefore, it is a foregone conclusion that Malibu's procedural injuries would have been resolved if FAA had complied with the Court's order and provided a proper NEPA analysis to show that it took a hard look at the Flight Procedures by articulating adequate or plausible rationale between the facts FAA found and its decision. After years of struggle over the Flight Procedures, these minor changes finalized through CATEX/ROD, greatly underscore Malibu's procedural injuries.

2. Even "Minor Changes" That Invade Malibu's Cognizable Interests Constitute Injury Sufficient To Satisfy The Requirement For Article III Standing.

In its Answering Brief, FAA contends that it has no legal duty to protect Malibu from airplane noise. FAA Br. 22 ¶ 3. However, it is common knowledge that Malibu is located in the vicinity of Los Angeles. In addition, FAA concedes that the Flight Procedures provide certain flight paths (e.g., IRNMN TWO) for aircraft to fly over Malibu. FAA Br. 13 ¶1. Moreover, when FAA's decision to only make "minor changes" became the final changes in CATEX/ROD, Malibu's injuries, such as environmental degradation and procedural injuries, discussed in the preceding paragraph, became fixed, or otherwise unavoidable. Malibu Br. 11; *See*

also FAA Br. 73 ¶ 1. (FAA's representation that it "made *minor* safety and efficiency changes to preexisting Flight Procedures"). Because Malibu is within the vicinity of Los Angeles, and it is in the path of the Flight Procedures, the FAA's refusal to effect the Court's remedies applies to harm to Malibu's cognizable interests as a landowner and municipality.

In response to FAA's contention that it has no legal duty to protect Malibu from airplane noise (FAA Br. 22 ¶ 3), Malibu points out that the harm to its environmental, aesthetic, and leisure interests in its real properties resulting from excessive noise generated by the Flight Procedures are within the zone of interests to be protected by NEPA. *See* Malibu Br. 12-13; McClary Decl. ¶¶ 6 and 8. Malibu's interests, as alleged in its Opening Brief and summarized here, are within the zone of NEPA's stated purposes.

FAA argues that the Flight Procedures (because they contain only minor changes) do not create a significant environmental effect resulting in injury-in-fact. That is not the standard for Article III standing. NEPA's stated purposes include: "To declare a national policy which will encourage *productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere* and stimulate the health and welfare of man...." (Emphasis added) *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998) (citing 42 U.S.C. § 4321). Thus, to the extent that Malibu

alleges and has presented evidence through a declaration and administrative records that it suffers a loss of environmental and aesthetic quality in the real properties due to the Flight Procedures, it has standing.

3. Malibu Suffered Procedural Injury-In-Fact When FAA Issued The Final Agency Order Without Complying With NEPA Or The Administrative Procedures Act.

When a statute affords a litigant "a procedural right to protect his concrete interests," the litigant may establish Article III jurisdiction without meeting the usual "standards for redressability and immediacy." *Dep't of Educ. v. Brown*, 600 U.S. 551, 561 (2023). *See also*, *Barnes v. DOT*, 655 F.3d 1124, 1134 (9th Cir. 2011) ("Procedural Injury is sufficient to establish standing under NEPA where the Plaintiff can demonstrate that the procedural omission increased the risk of environmental harm.").

Malibu's proprietary interest as a municipality to protect its real properties it owns and natural resources surrounding those properties was harmed when FAA issued the Final Agency Order, CATEX/ROD, without performing a sufficient NEPA review. Malibu Br. 9. In its NEPA review, before rendering its Final Agency Order, FAA turned a blind eye to the "Extraordinary Circumstances" regarding the environmental impact on Malibu's parklands and natural resources that are under the flight path before applying the Categorical Exclusion to the Flight Procedures. *Id. See also*, FAA Order 1050.1F §5-2.b (1)-(2) (Extraordinary circumstances exist

if the proposed has an adverse effect on cultural resources 4(F) properties, or natural resources.). One example of an extraordinary circumstance FAA refused to consider is whether the 2018 Amendments have caused substantially more aircraft to be vectored to fly through the Flight Procedures. Malibu Br. 70, ER-016.

In its Answering Brief, FAA contends that vectoring issues belong to flight procedures implemented in 2016, not to the Flight Procedures implemented in 2018, which are at issue in this petition for review. FAA Br. 49. Thus, when FAA issued the CATEX/ROD, there is no evidence that it considered whether the 2018 Amendments have caused substantially more aircraft to be vectored to fly through the Flight Procedures. Malibu Br. 70, ER-016. A decision that overlooks a significant environmental impact does not comply with NEPA. Based on the foregoing facts, Malibu's procedural injury flows directly from FAA's Final Agency Order, which is arbitrary, capricious, and not in accordance with the law, in violation of the APA. 5 U.S.C. § 706(2)(A).

B. Malibu's Injuries-In-Fact, Are Fairly Traceable To The FAA's Order Implementing The Flight Procedures In 2018.

FAA, by its own admission, stated that changes in Flight Procedures, such as establishing altitude changes, altitude restrictions, and speed restrictions, are "to enhance safety and efficiency in sequencing arriving aircraft." (ER-017). And, that "any changes to the original version of the Flight Procedures are not material." FAA Br. 19. As mentioned in earlier discussion above, FAA did not consider the number

of vectored overflights through Malibu or any other substantive matters in implementing the Flight Procedures in 2018. Consequently, increased aircraft noise over Malibu's environmentally sensitive parks and wildlife refuges subject to Section 4(f) can be fairly traceable to FAA's order implementing the Flight Procedures in 2018. McClary Decl. ¶¶7-10.

C. Malibu's Injuries Are Redressable By The Court's Favorable Decision Upon Review of CATEX/ROD.

The Court's favorable decision granting Malibu's petition for review can redress all the harm that Malibu alleged. Malibu's environmental and aesthetic injuries can be fully redressed if the Court vacates the current Flight Procedure and requires the FAA to conduct a comprehensive environmental review that properly considers the impacts of aircraft noise on communities like Malibu and implement flight procedures in compliance with its legal obligations.

III. FAA's Application of a Categorical Exclusion Was Improper Because Categorical Exclusions Are *Ultra Vires*

In *Marin Audubon Society v. FAA*, 121 F.4th 902 (D.C. Cir. 2024), the D.C. Circuit held that the CEQ lacks statutory authority to promulgate binding regulations under NEPA. The court emphasized that NEPA does not explicitly grant the CEQ rulemaking power, and executive orders cannot substitute for congressional authorization. The court stated: "[t]he CEQ regulations, which purport to govern how all federal agencies must comply with the National Environmental Policy Act,

are *ultra vires*." 121 F.4th at 908.[1] This decision underscores that only Congress can confer rulemaking authority, and the CEQ's reliance on executive orders does not suffice. When a federal agency bases an action on an *ultra vires* regulation, that action is arbitrary and capricious. See 5 U.S.C. §706; see also *Motor Vehicle Mfrs Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 S.Ct. 2856, 2867 (1983); *City and County of San Francisco v. United States Citizenship and Immigration Services*, 981 F.3d 742, 758-759 (9th Cir. 2020). Since FAA's action in this matter is based on the *ultra vires* CEQ regulations the 2018 Amendments are arbitrary, capricious, and not in accordance with law.

A. NEPA Does Not Authorize Categorical Exclusions

NEPA requires federal agencies to prepare a "detailed statement" (i.e., an Environmental Impact Statement) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). If a proposed action may not have a significant impact, agencies may prepare an Environmental Assessment. See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757–

[1] See also *State of Iowa v. Council on Environmental Quality*, - F.Supp.3d -, 2025 WL 598928 (D.N.D., Feb. 3, 2025), appeal docketed, No. 25-1705 (8th Cir. April 11, 2025), ¶32-¶61, ("[t]he issue of CEQ authority is clear: NEPA gives CEQ authority to promulgate non-binding guidelines, but CEQ may not issue rules that have the force and effect of law") ¶60.

58 (2004). Until the recent 2023 amendments, there was no mention of a third class of exempt action or "categorical exclusion" NEPA. The CEQ invented this concept through regulation—specifically 40 C.F.R. §1508.4 (1978)—later redesignated at §§1501.4, 1507.3, and related sections. *See Marin Audubon Soc'y v. FAA*, 121 F.4th 902, 914 (D.C. Cir. 2024) ("CEQ—coining a phrase—called a 'categorical exclusion' ... No statute confers rulemaking authority on CEQ.").

Nor can FAA claim that FAA Order 1050.1F gives it separate authority to institute categorical exclusions. As *Marin Audubon* pointed out, federal agencies "have neither adopted the content of the CEQ regulations nor incorporated those rules by reference. Instead, they obeyed CEQ's command and accepted the CEQ regulations as a stand-alone body of law that they must obey and the courts must enforce." 121 F.4th at 915. Indeed, 1050.1F expressly derives its authority from CEQ's NEPA regulations. Its cover page states: "[t]his Order serves as the Federal Aviation Administration's (FAA) policy and procedures for compliance with the National Environmental Policy Act (NEPA) and implementing regulations issued by the Council on Environmental Quality (CEQ)." FAA Order 1050.1F, Cover Page. The CATEX/ROD also states that it is relying on the CEQ regulations for its authority: "[t]he environmental review fulfills FAA's compliance with NEPA*;* implementing regulations issued by the Council on Environmental Quality (40 CFR, parts 1500-1508, updated May 2022) …" ER014, p.10; see also ER028, n.13 (directs

the reader to refer to the CEQ's definition of categorical exclusions. Because FAA's CATEX policy depends on CEQ's regulations—and CEQ lacked authority to create categorical exclusions—FAA's reliance on the framework in 1050.1F is also *ultra vires*.

B. Mere Statutory Reference to "Categorical Exclusion" Does Not Constitute Delegated Authority

FAA asserts that its use of categorical exclusions is validated by later-enacted statutes, including 49 U.S.C. §4336(b)(2), which references "categorical exclusions." FAA Br.39, n.5. But this argument conflates mention with delegation. The Supreme Court has made clear that agencies may not claim sweeping regulatory power based on vague or incidental statutory references. In *West Virginia v. EPA*, 597 S.Ct. 2587 (2022) the Court rejected EPA's claim of regulatory authority to reshape the nation's energy mix, explaining that the "Agency must point to 'clear congressional authorization' for the power it claims." 142 S. Ct. at 2609. Likewise, in *Utility Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427 (2014) the Court struck down EPA's expansion of permit requirements, finding the "agency had no power to 'tailor legislation' to bureaucratic policy goals by rewriting unambiguous statutory terms." 134 S.Ct. at 2445; see also *Chevron U.S.A. Inc. v. NRDC*, 104 S.Ct. 2778, 2781(1984)("the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). Thus, agencies must defend regulations based on the

authority and rationale on which they were promulgated—not post hoc litigation theories.

None of the sections in the recent NEPA amendments that mention "categorical exclusions" give any agency the express authority to develop categorical exclusions. Nor is there any definition of what a categorical exclusion is or how it is created or whether the public should be able to comment on the promulgation of a categorical exclusion. While the sections may permit categorical exclusions to be used, they do not grant agencies the statutory authority to create them. As mentioned by the court in *Iowa v. CEQ,* "[t]he truth is that for the past 40 years all three branches of government operated under the erroneous assumption that CEQ had authority. But now everyone knows the state of the emperor's clothing and it is something we cannot unsee." *Iowa v. CEQ*, ¶132. Moreover, the court in *Marin Audubon Society* – in which categorical exclusions were at issue – was fully aware of those amendments to NEPA that mentioned categorical exclusions, and yet the court did not hold that those "mentions" of categorical exclusion gave CEQ – or any other federal agency – the authority to develop and use categorical exclusions.

FAA is not an environmental agency, and Congress has never delegated to it general rulemaking authority under NEPA. Like all federal agencies, FAA must comply with NEPA's statutory framework—but may not invent exceptions to it absent clear delegation. FAA's argument that it may "bootstrap" authority from

CEQ's now-invalid framework fails under both separation of powers and *State Farm*-style arbitrary and capricious review. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because FAA's invocation of a CATEX lacks statutory foundation and is inconsistent with NEPA, FAA's decision is arbitrary and capricious and the CATEX/ROD must be vacated and remanded.

IV. FAA's Reliance on Outdated Scientific Thresholds Violates NEPA's Scientific Integrity Mandate

FAA's continued reliance on a Day-Night Average Sound Level of 65 dB ("65 DNL") as the threshold for noise significance fails to satisfy NEPA's core requirement of scientific integrity. Courts have long held that NEPA demands agencies base their analyses on "high-quality" data and "accurate scientific analysis." 42 U.S.C. §4332(2)(D); 40 C.F.R. §§1500.1(b), 1502.24. The Ninth Circuit has further emphasized that agencies have a duty to "ensure the scientific integrity of the [NEPA document's] discussions and analyses." *Save the Peaks Coal. v. U.S. Forest Serv.,* 669 F.3d 1025, 1037-38 (9th Cir. 2015); see also *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1073–74 (9th Cir. 2012)(an agency must "ensure the 'scientific integrity' of the discussions analyses in an EIS"). The Ninth Circuit in *McNair* stated that the federal agency "must acknowledge and respond to comments by outside parties that raise significant scientific uncertainties and reasonably support that such uncertainties exist." *The Lands Council v. McNair,* 537 F.3d 981, 1001 (9th Cir.

2008). Malibu did exactly that. See ER 142-147. But FAA failed to respond to Malibu's raising of significant scientific uncertainties claiming that addressing such scientific uncertainties fall "outside the scope of this action." See ER148.

A. The 65 DNL Threshold Is Scientifically Obsolete

The 2018 FAA Neighborhood Environmental Survey (NES) shows that over half of the people surveyed report being highly annoyed at noise levels below the 65 DNL threshold. Malibu Br. 32, see also ER144. In contrast, when the 65 DNL threshold number was established, the percentage of "annoyed" people was 6.5%. *Id.* The World Health Organization recommends, after conducting research, outdoor noise limits of 45 dB DNL for residential and recreational areas to protect human health and well-being. Malibu Br. 33; see also ER144, n.19.

NEPA's "hard look" doctrine requires that agencies consider credible and current science, especially when public health impacts are involved. See *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964–65 (9th Cir. 2005). But despite *its own* research showing that the 65 DNL threshold being obsolete, FAA never explained in the CATEX/ROD why it used the 65 DNL standard when its own data show that it no longer reflects how people actually experience aircraft noise. Malibu is not asking for FAA to change its threshold of significance, it is simply asking FAA to explain why the 65 DNL is still an acceptable measure in light of FAA's findings in the NES.

B. Scientific Integrity Requires FAA to Explain and Justify Methodological Choices

NEPA requires agencies to identify and explain the methodologies they use, the assumptions they rely on, and the scientific sources that support their conclusions. 40 U.S.C. §4332(2)(D), 40 C.F.R. §1502.24. FAA provided none of these when it adhered to the 65 DNL threshold. For example, FAA did not disclose why it disregarded its own more recent survey results or why it assumed uniform flight paths and omitted vectored traffic in noise modeling.

These omissions are legally fatal. "[C]ourts increasingly are looking past the agency's science-based conclusions and are probing deeper into the data, models, methodologies, and assumptions that underlie the agency's assessment." Feldman & Nichols, *NEPA's Scientific and Information Standards—Taking the Harder Look*, 6 Rocky Mt. Min. L. Inst. 6-1 (2017). This reflects the Ninth Circuit's evolving doctrine of a "harder look" where the integrity of scientific information is directly at issue. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1160 (9th Cir. 2006)("Agencies have wide discretion in assessing scientific evidence, but they must 'take a hard look at the issues and respond[ ] to reasonable opposing viewpoints" *citing Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291 (9th Cir. 2003); see also *Natural Resources Defense Council, inc. v. Winter*, 518 F.3d 658, 688-689 (9th Cir. 2008).

C. FAA's Inflexible Use of 65 DNL Defeats NEPA's Purpose

By continuing to apply the 65 DNL threshold as a significance cut-off—rather than a contextual indicator—FAA precluded meaningful analysis of real-world noise impacts to communities like Malibu. Courts have invalidated similar modeling shortcuts where agencies ignored obvious uncertainty, failed to consider new data, or rejected opposing scientific views without reason. See *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1103 (9th Cir. 2016); *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559–60 (9th Cir. 2011).

NEPA does not permit the agency to use outdated assumptions or data, without explanation, to justify a decision that is inconsistent with current knowledge. *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015)("NEPA requires more" than an agency asking the court "to assume the adequacy and accuracy of partial data without providing any basis for doing so"); see also *City of Los Angeles v. FAA*, 63 F.4th 835, 851-852 (9th Cir. 2023); *Kern v. BLM*, 284 F.2d 1062, 1072 (9th Cir. 2002) ("an agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear"). Agencies cannot simply invoke "expertise" as a shield; they must explain how their conclusions follow from their data. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

FAA's adherence to an obsolete 65 DNL threshold, in disregard of its own data, violates NEPA's duty of scientific integrity. It also violates the Ninth Circuit's evolving "harder look" standard in cases where methodological failures obscure real environmental consequences. Because FAA failed to disclose the limitations of its assumptions or respond to current science, its noise analysis must be set aside under 5 U.S.C. §706(2)(A) as arbitrary and capricious.

V. FAA Has a Statutory Duty to Protect Against Aircraft Noise

A. FAA Is Wrong to Claim It Has No Enforceable Duty to Address Aircraft Noise

FAA is mistaken in asserting that the Vision 100 Act, the Noise Control Act, and the Federal Aviation Act impose no discrete, judicially enforceable duties related to aircraft noise. Contrary to FAA's contention, each of these statutes contains specific, action-forcing provisions that require the agency—at a minimum—to consider and mitigate noise impacts when exercising its core statutory authority to design and amend flight procedures. And the 2018 Amendments are no exception. FAA's argument reflects an unduly narrow reading of *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("SUWA"), and ignores both the plain text and structure of the statutes at issue, as well as longstanding case law and FAA's own historical interpretation of its mandates. It also ignores the Supreme Court's ruling in *Loper Bright* which establishes that it is the court's duty to determine the meaning of laws, not FAA. Malibu Br. p.38.

B. Vision 100 Directs FAA Address the Possibility of Noise and Emission Reduction For All Changes To Flight Procedures

FAA's attempt to dismiss Section 709(c) of the Vision 100 Act as a nonbinding policy goal mischaracterizes the statute's text and purpose. Section 709(c) directs that, in exercising its authority under 49 U.S.C. §40103(b), FAA "shall take into consideration, to the greatest extent practicable, design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents." 49 U.S.C. §40101 note, Vision 100 §709(c)(7). This is not a mere aspirational policy, it is a qualified, but mandatory directive that satisfies the *Southern Utah Wilderness Alliance* standard for a discrete duty: a specific, unequivocal command ("shall take into consideration" reduction of noise) tied to concrete agency action (flight procedure design). When FAA amended the design of the flight procedures in 2018 and issued a new final agency action, it triggered this obligation to evaluate whether noise and emisssions can be reduced through the design of the flight paths, not simply whether there will be "significant" increases in noise and emissions.

The "greatest extent practicable" language qualifies the duty, but it does not negate it. Courts have enforced similarly qualified duties. See *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114-5 (D.C. Cir. 1971). FAA has not shown that when they designed the 2018 Amendments they took into consideration how they could reduce exposure of noise

and emissions pollution on affected residents through the design of the flight paths. The term "to the greatest extent practicable" generally implies a high standard of effort within practical limits, but it describes the quality of the action, not whether the action is discretionary. The specific context and statutory language determine whether the duty is discretionary. For example, if the criteria are open-ended or if the statute uses permissive language like "may," the duty may be considered discretionary. *National Wildlife Federation v. Secretary of the United States Department of Transportation*, 960 F.3d 872, 876 (6th Cir. 2020). Conversely, if the statute uses mandatory language like "shall" and sets specific criteria – as it does in §709(c) – the duty is non-discretionary. *Alabama v. Bozeman,* 533 U.S. 146, 153 (2001).

That FAA must balance this duty with other objectives does not nullify it; nor does *City of North Miami* hold otherwise—it simply affirms FAA's discretion in how, not whether, to address these statutory goals. *City of North Miami v. Federal Aviation Administration,* 47 F.4th 1257, 1268 (11th Cir. 2022). Moreover, the 2018 Amendments, though derivative of the 2016 procedures, involved updated flight path designs and a new CATEX determination, triggering the duty to consider noise impacts anew. FAA's failure to show how it considered noise and emissions reduction in its new design of the flight procedures violates Section 709(c)'s

mandate and reflects an abandonment of its obligation to protect affected communities like Malibu.

C. Noise Control Act Requires FAA to Ensure in its Actions that the Public's Health and Welfare Are Not Jeopardized

FAA's claim that the Noise Control Act of 1972 ("NCA") imposes no discrete duty to address aircraft noise mischaracterizes both the statute's text and its relationship to FAA's governing mandates. While 42 U.S.C. §4901(b) declares national policy, §4903(a) goes further: it "authorizes and directs that all Federal agencies shall, to the fullest extent consistent with their authority under Federal laws administered by them, carry out the programs within their control in such a manner as to further the policy declared in section 4901(b)." 42 U.S.C. §4903(a) (emphasis added). This language is not aspirational, it is a mandatory command. FAA, which has express authority to regulate aircraft noise under 49 U.S.C. §44715(a), must therefore carry out its programs in a way that furthers the NCA's policy of protecting the public from noise that "jeopardizes their health or welfare." 42 U.S.C. §4901(b). The Supreme Court's decision in *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004), does not foreclose this duty. Malibu does not seek wholesale programmatic change; it challenges a specific agency action—the 2018 flight procedure amendments—for failure to comply with an integrated statutory obligation.

Moreover, the NCA expressly provides a citizen-suit remedy against FAA Administrator for "failure of the Administrator to perform any act or duty under

section 44715 of title 49 … which is not discretionary." 42 U.S.C. §4911(a)(2)(B). This statutory right of action confirms that FAA's responsibilities under §44715, including its duty to abate noise "to relieve and protect the public health and welfare," are enforceable. Courts have long recognized that where a statute combines a clear congressional policy with a directive to federal agencies and a specific remedial mechanism, it creates judicially reviewable duties. See *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 439–40 (D.C. Cir. 2018) (distinguishing impermissible programmatic challenges from discrete claims tied to statutory obligations).

FAA's reliance on *Our Children's Earth Found. v. EPA*, 527 F.3d 842 (9th Cir. 2008), is misplaced. That case involved EPA discretion under a regulatory scheme that lacked a statutory analogue to §44715 or a citizen-suit provision equivalent to §4911. Here, Congress imposed a legal obligation on FAA to take specific action, namely, to regulate aircraft noise for the protection of public welfare and to conduct its programs accordingly. See 49 U.S.C. §44715(a)(1); 42 U.S.C. §4903(a).

Finally, Malibu's limited references to scientific literature do not convert its challenge into a broad policy argument or extra-record factual attack. Malibu's position rests on the statutory text, structure, and purpose of the NCA, which courts may consult regardless of the administrative record. See *Chevron U.S.A. Inc. v. Nat.*

Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Malibu's claim is not that FAA violated an abstract policy, but that FAA failed to perform a specific, nondiscretionary duty imposed by Congress: to regulate and mitigate the noise effects of its flight procedure amendments to the extent it is able. That duty is judicially enforceable and fully triggered here. While the Administrator has discretion in *how* to act, the duty *to act where noise harms are evident* is nondiscretionary.

D. Federal Aviation Act Requires FAA To Protect The Public From The Deleterious Effects of Noise

FAA's argument misstates both the plain language and intent of the Federal Aviation Act and disregards the interpretive weight of binding case law. First, contrary to FAA's narrow reading, 49 U.S.C. §40103(b)(2) imposes a qualified but affirmative duty on the Administrator to prescribe air traffic regulations "for navigating, protecting, and identifying aircraft, using the navigable airspace efficiently, preventing collisions, and protecting individuals and property on the ground." 49 U.S.C. §40103(b)(2) (emphasis added). FAA contends that the statute merely affords discretion and that "protecting individuals and property" is diluted by other objectives. But as the D.C. Circuit held in *Helicopter Ass'n Int'l, Inc. v. FAA*, this protection clause permits, and in context requires, FAA to act in a way that mitigates known harms from aircraft operations, including noise. 722 F.3d 430, 433–35 (D.C. Cir. 2013). FAA's claim that *Helicopter Ass'n* addresses only authority

and not duty ignores that the court upheld FAA's action precisely because it advanced the statutory goal of protecting the public from noise by rerouting helicopters, thus confirming that FAA's interpretation of §40103 encompasses noise-sensitive routing.

Moreover, 49 U.S.C. §44715(a)(1) requires the Administrator, "[a]s the Administrator considers necessary," to prescribe regulations "to relieve and protect the public health and welfare from aircraft noise and sonic boom." This language is not purely discretionary. The phrase "as the Administrator considers necessary" merely qualifies the manner or scope of regulation—not whether FAA must act when actual, documented noise harm is shown. See *City of Los Angeles v. FAA*, 63 F.4th 835, 845–46 (9th Cir. 2023) (agency violates NEPA when its environmental analysis does not reasonably address known noise impacts). FAA's invocation of *Save Our Skies v. FAA*, 50 F.4th 849 (9th Cir. 2022), is unavailing. That case held only that §44715 did not impose a specific outcome in response to a rulemaking petition, not that FAA can ignore real-world noise harms when amending procedures.

Finally, while FAA attempts to minimize the 2018 amendments as minor adjustments, they were subject to a new environmental review and Final Order, triggering a renewed obligation under the statutes to address the public's exposure to noise. Taken together, these statutes reflect a congressional scheme in which FAA

must weigh noise impacts as part of its statutory duties, not merely as a policy preference, when it designs flight procedures. And that duty is judicially reviewable and was not fulfilled here.

VI. FAA's Exclusion of Vectored Aircraft Impacts from NEPA Review Was Arbitrary and Legally Deficient

FAA argues that any claim related to vectoring is untimely because vectoring was already part of the 2016 flight procedures and unchanged in the 2018 Amendments. This defense misrepresents both NEPA's obligations and the City of Malibu's claim.

A. FAA Ignored the Environmental Consequences of Increased Vectoring

FAA contends that vectoring issues are tied only to the original 2016 procedures. But that misses the point. Malibu challenges FAA's failure to analyze how the 2018 Amendments affected the frequency and impact of vectoring. In reality, vectoring has increased significantly since 2018, especially over Malibu and nearby communities.

FAA possesses radar data showing that nearly 90% of aircraft passing the GADDO waypoint—just before final approach—fly below 5,700 feet, some as low as 3,500 feet ER113-120. These vectored paths regularly deviate from published STAR altitudes and route structures. FAA knows this, but chose not to disclose or evaluate these operational impacts in its 2024 CATEX/ROD.

Instead, FAA asserts that once an aircraft is vectored off a STAR, it is "no longer on the procedure" and thus outside the scope of NEPA review. This reasoning is a semantic evasion, not a lawful environmental analysis. Vectoring is a foreseeable and frequent outcome of implementing STARs in congested airspace. NEPA requires agencies to analyze indirect effects—impacts that are later in time or further removed in space, but reasonably foreseeable. 40 C.F.R. §1508.1(g)(2) (2022). FAA's position ignores this foundational NEPA principle.

The Ninth Circuit has held that NEPA mandates consideration of the real-world environmental consequences of federal actions. See *Davis v. Coleman*, 521 F.2d 661, 676–77 (9th Cir. 1975). Malibu and the LAX Community Noise Roundtable both submitted evidence of low-altitude vectoring and FAA's failure to follow through on RNAV/RNP altitude commitments. FAA's refusal to acknowledge these changes or assess their impacts renders its finding of no significant impact arbitrary and capricious.

B. FAA Cannot Rely on the 2016 Metroplex EA to Avoid Updated Review

FAA's reliance on the 2016 SoCal Metroplex Environmental Assessment is misplaced. The operational baseline has changed. The 2018 STAR amendments resulted in new vectoring patterns and low-altitude flight paths over areas not previously affected.

FAA's argument that vectoring was already "analyzed" in 2016 and is not part of the "action" fails legally and factually. NEPA requires FAA to assess how changes to the 2018 Amendments affect real-world air traffic behavior, including vectoring. Where, as here, the agency has ample data showing extensive, low-altitude vectoring off the procedures, and those impacts are known and ongoing, FAA must analyze them as part of its NEPA obligations. By failing to do so, FAA has not taken the "hard look" required by law, and its CATEX/ROD should be vacated.

NEPA's hard-look requirement is triggered not by administrative convenience, but by the real-world effects of agency action. FAA has the data. It chose not to analyze it. Its failure to do so violates NEPA and requires that the CATEX/ROD be vacated.

VII. Vacatur Is Necessary to Vindicate NEPA's Procedural and Substantive Mandates

The appropriate remedy in this case is vacatur. Under the two-part test articulated in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, vacatur is warranted where (1) the agency's legal error is serious and casts doubt on the validity of its decision, and (2) vacating the rule would not cause disruptive consequences. 988 F.2d 146, 150–51 (D.C. Cir. 1993). The Ninth Circuit has expressly adopted this framework, holding that vacatur is proper where agency errors are significant and the interim consequences of vacating the rule are limited. *California Communities*

Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012). Here, both prongs are satisfied. First, FAA's reliance on an *ultra vires* regulatory framework to approve the 2018 Amendments through a categorical exclusion reflects a fundamental legal defect that undermines the legitimacy of its Final Agency Order. Second, FAA itself has characterized the changes as "minor" and has failed to demonstrate that vacatur would cause material disruption to air traffic operations. Given the seriousness of FAA's legal violations and the absence of evidence of disruptive impact, vacatur is not only appropriate—it is necessary to vindicate NEPA's procedural and substantive mandates.

CONCLUSION

For the reasons set forth above and in Malibu's Opening Brief, FAA's issuance of the CATEX/ROD approving the 2018 Amendments to the Flight Procedures violated the National Environmental Policy Act, the Administrative Procedure Act, and other applicable laws. The agency's reliance on invalid regulatory authority, its failure to assess extraordinary circumstances, and its exclusion of known environmental impacts, such as vectored aircraft and outdated noise thresholds, undermine the integrity of the decision-making process and frustrate the remedial purposes of NEPA.

Accordingly, Malibu respectfully requests that this Court vacate FAA's CATEX/ROD, and remand the matter to FAA for full compliance with NEPA,

including the preparation of a proper environmental assessment or environmental impact statement, and meaningful public consultation consistent with this Court's prior remand order

Dated: April 25, 2025

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(C) and Circuit Rule 28.1-1(d) because it contains 6,856 words. I further certify that this Reply Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14- point font.

Respectfully Submitted,

Dated: April 25, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

I certify that I served the foregoing document to all registered case participants on this date via filing and notice generated through the Appellate Electronic Filing system.

Description of Document(s): **Petitioner City of Malibu's Reply Brief**

Respectfully Submitted,

Dated: April 25, 2025

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