From the JDA Journal

Out of the Ashes of the DC Circuit Court on the NEPA review of the FAA NextGen at PHX implementation, some better approach must RISE

FAA Nextgen Implementation at PHX

A More Involved Approach to Introducing These ATC Advances is Needed

The FAA had a long history of favorable reviews by US Courts of Appeals of its final actions, especially affirmations of airport EAs/EISs. That record was dealt a nasty reversal in the case of is ***City of Phoenix v. FAA*** **(D.C. Cir No. 15-1158) (August 28, 2017)**. Actually, this most recent defeat makes a new streak—of three straight losses: In **Flyers Rights Education Fund, Inc., d/b/a Flyersrights.org and Paul Hudson, Petitioners v. Federal Aviation Administration**, and **Taylor v. Huerta**.

While losing any appellate decision is not a good idea for a regulator, the Flyers Rights and Taylor opinions can be cured in time and without any diminution of real authority. The City of Phoenix appears to require substantial immediate revisions to a number of pending and soon-to-be initiated NextGen implementation NEPA reviews, OR the FAA's timetable to gain the benefits from this massive investment in improved ATC infrastructure will be deferred. The mythological Phoenix must make an appearance soon within the FAA ATC NEPA team, procedures and guidelines.

First, it is important to note that the FAA convinced the Congress that NextGen was a net net net positive gain for the environment. The objective numbers showed that with more direct routes that lower greenhouse gases, that noise exposure would be reduced and that the aircraft would fly more fuel-efficient routes. The number one advantage is

safety. In recognition of those pluses, the House and Senate enacted § 213(c)(1) of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11, 49, which provided an expedited environmental review for NextGen implementation under these terms:

- 213 (c) COORDINATED AND EXPEDITED REVIEW. —

(1) **IN GENERAL. —Navigation performance and area navigation procedures developed, certified, published, or implemented under this section shall be presumed to be covered by a categorical exclusion (as defined in section 1508.4 of title 40, Code of Federal Regulations) under chapter 3 of FAA Order 1050.1E unless the Administrator determines that extraordinary circumstances exist with respect to the procedure.**

In most cases, Congress would allow the FAA to utilize the quasi-summary process of categorical exclusion.

What was lost in the translation was that the FAA's valid numbers were based on MACRO impacts; while **the new NextGen routes, due to the precision of RNAV, concentrates the noise on a MICRO basis**. The PHX is a prime example of this **MACRO/MICRO problem**.

As the famous Roman leader Caeli Negotiationis once posited, "quis det unciam capiam et mille"[iii]. The facts in this case appear to suggest that the team assigned to this NEPA review were driven to implement that PHX Metro Plan by a dealing. The petitioners alleged and **Judge Griffith**, writing for the Court, found:

- "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." [p.3]
- "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." [p.3]
- "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**." [p.3]

- "This modeling {FAA's} 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."** [p.3]
- "But the agency concluded that these projected noise levels would **not have a "[s]ignificant [environmental] impact"** under FAA criteria. Joint Appendix 333, 334." [p.3]
- "Based on this conclusion, the FAA issued a **declaration categorically excluding the new flight routes from further environmental review**." [p.3]
- "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." [p.3]
- "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**." [p.5] {**this is a most unfortunate comment for the FAA**.}
- "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**." [p.5]
- "… 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*. …the FAA **promised to reconvene the original Working Group**, assuring the City that it was "**an important player in this process**." …But the agency also said it could not reinstate the routes in place before September 18, 2014 …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** …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." [p.6-7]

- "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.."[p.7]
- "*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*." [p.7]
  - **Based on those facts, the Court ruled in the City's favor and ordered the FAA to reopen the review.**
  - The **first discussion** of the law by the Judge involved whether the Petition filed in June was on a timely basis. The FAA asserted that their implementation of the NextGen routes was September 18, 2014; the City disagreed. The Court's finding of facts was the basis for determining that the collaborative dialogue voided the September date for requesting review. Here is the Judge's paragraph on this issue:
  - 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.**
  - **NOTE: Judge Sentelle's dissent disagreed with this ruling. His views MIGHT be adopted by another court.**
  - **From the Ashes Lesson #1: If the FAA intends to continue to collaborate, it cannot "implement" the subject action. IMPLEMENT = FINAL ORDER; further collaboration [a good thing] defers the deadline for filing a petition for review.**

- The **next discussion** had to do with the FAA's consultation with lower officials in the City of Phoenix Aviation Department. Prior court decisions and the NEPA policies make it clear that

…the FAA failed to fulfill these obligations because it consulted only low-level employees in the City's Aviation Department… **Just the opposite: the agency must ask local governments who their authorized representatives are…** The FAA admits, however, that it did not make "local citizens and community leaders" aware of the proposed new routes and procedures…. 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.**
From the Ashes Lesson #2: educate, explain and publicize. The Court clearly found fault with the FAA's effort in PHX. The next NextGen project should aggressively address those steps with which the court criticized. {Why go beyond giving notice? Because SO MUCH is at stake for the Nation's ATC. The consequences of FAILURE are too great.}

→ NextGen and almost all of what the ATO does is not understood by the public. Human perception of sound is the most subjective of our senses. Any change, if unexpected, will be heard as bad. Educating the people to be impacted with honest, understandable information may not win over the people to be impacted; such an outreach MAY mitigate the reaction. Trying to hide a new ATC flight path will not fool anyone.

- **Extended lesson**: The **operations of an ATC system are not intuitive**; the average citizen has *no understanding of the demands and pressures of controlling an aircraft*. The architecture of flight patterns is even more obtuse**. The acumen needed to design a path which is safe, efficient and environmentally sound is found in advanced spatial calculus with multivariate collateral algorithms**. That said, it is PREPOSTEROUS to expect that community groups can derive positive alternatives. **Any outreach seeking win/win solutions must provide expertise to the public to try to formulate an acceptable alternative.**

The **third finding** of this opinion related to the FAA's use of a categorical exclusion when the agency recognized that the changes had a "potential for controversy" particularly when its outreach effort was as minimal as described. [The opinion repeats this analysis when it discusses the §4(f) issue.] Here is Judge Griffith's determination:

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. And the agency departed from its determinations.

From the Ashes Lesson #3: This may be a BIG hint that the use of the categorical exclusion may have limited applicability for future NextGen implementations. The Profusion of negative reactions to these local ATC routes and the Publicity attendant to those responses have increased the likelihood that controversy will precede future NextGen implementation.

This is **most unfortunate**; for the *swift implementation of these improved tracks is extremely important to aviation, the national economy and the environment*. **This PHX opinion seems to put the summary procedures authorized by Congress at risk**. **From the ashes, the FAA leadership needs to create a miraculous Phoenix composed of improved involvement in designing these tracks**. A more rigorous approach to introducing these ATC advances is needed to assure that NextGen will be implemented.