No. 21-71426

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BACKCOUNTRY AGAINST DUMPS, et al.,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION; U.S. DEPARTMENT OF TRANSPORTATION,

Respondents.

Petition for review of final decisions of the Federal Aviation Administration

BRIEF FOR THE RESPONDENTS

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STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 49 U.S.C. § 46110(a). *See Sandell v. FAA*, 923 F.2d 661 (9th Cir. 1990). Petitioners filed a timely petition for review from the letters that are the subject of the petition on December 13, 2021.

STATEMENT OF THE ISSUES

If the Federal Aviation Administration (FAA) determines that a proposed structure will not pose a hazard to air navigation, eligible persons and entities may seek discretionary administrative review of that determination if they satisfy certain regulatory requirements. Persons "disclosing a substantial interest" in the order may also proceed directly to the court of appeals pursuant to 49 U.S.C. § 46110(a).

Petitioners attempted to seek discretionary administrative review of certain No Hazard Determinations, but FAA dismissed the administrative petition as invalid. Although petitioners timely sought judicial review before this Court—and therefore could have raised substantive challenges to the No Hazard Determinations—petitioners instead seek review based solely on their claim that FAA violated its procedural rules in determining that petitioners did not satisfy the prerequisites for filing an administrative petition. The issues presented are the following:

1. Whether petitioners have identified any substantial procedural errors and whether any such errors prejudiced them.

2. Whether there exists any other reason not to deny the petition for review.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes, regulations, and FAA Order provisions are reproduced in the addendum to the opening brief. Additional FAA regulations and Order provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

FAA reviews "[s]tructures interfering with air commerce" pursuant to 49 U.S.C. § 44718(a). Under that section, the Secretary of Transportation "shall require a person to give adequate public notice, in the form and way the Secretary prescribes, of the . . . proposed construction[] . . . of a structure" when the notice will promote "(1) safety in air commerce; [and] (2) the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports." 49 U.S.C. § 44718(a). If the Secretary determines that a proposed structure "may result in an obstruction of the navigable airspace[or] an interference with air or space navigation facilities and equipment or the navigable airspace," he must "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or

equipment." *Id.* § 44718(b)(1). After completing an aeronautical study, the Secretary must issue a report "disclosing the extent of the[] . . . adverse impact on the safe and efficient use of the navigable airspace that the Secretary finds will result from constructing or altering the structure." *Id.* § 44718(b)(2).

a. The FAA regulations governing this process are codified at 14 C.F.R. part 77. Under these regulations, anyone who proposes to build certain structures, including those more than 200 feet tall, must notify FAA. 14 C.F.R. § 77.9(a). The regulations also define standards under which a structure will be considered an obstruction to air navigation. *Id.* § 77.15(a). A structure that satisfies these standards is presumed to be a hazard to air navigation unless further aeronautical study concludes that the object is not a hazard. *Id.* § 77.15(b).

An aeronautical study is an extensive process by which FAA determines the structure's effect on existing and planned aeronautical operations, air traffic control procedures, airport traffic patterns, and helicopter routes. *See* 14 C.F.R. §§ 77.25, 77.29; FAA, U.S. Dep't of Transp., *Procedures for Handling Airspace Matters*, FAA Order JO No. 7400.2N § 6-3-6(a)(1)-(3) (Order)[1]. The sole factors and standards FAA has authority to consider in conducting the aeronautical study are

[1] The No Hazard Determinations reference FAA Order JO No. 7400.2L, which has been replaced by the current version JO No. 7400.2N. Except where otherwise noted, the government's brief refers to the current version of the provisions, which are generally identical to the prior version, for consistency with petitioners' opening brief and addendum.

set out in the regulations in 14 C.F.R. part 77 and the relevant Order provisions. Order §§ 6-3-1 through 6-3-17; *cf.* 14 C.F.R. § 77.25(c) ("The obstruction standards in subpart C of this part are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration.").

The relevant experts within FAA identify the structure's effect on landings and departures conducted with and without instruments, and its effect on the altitudes at which aircraft must fly. Order § 6-3-6(a)-(f). The Order further specifies the relevant potential impacts for different types of aircraft, including both visual flight rules aircrafts that use routes based on visual cues, and instrument flight rules flights that primarily use instruments, rather than visual cues, to operate. *See id.* §§ 6-3-8, 6-3-9. FAA's air traffic and technical operations services evaluate the effects on radar from proposed wind turbine farms. *See id.* at App. 12-1 through 12-2. "Military personnel are responsible for evaluating the effect on airspace and routes used by the military." *Id.* § 6-3-6(h).

"When the FAA needs additional information," the agency also "may circulate a study to interested parties for comment." 14 C.F.R. § 77.25(c); *see also* Order § 6-3-17(a) ("Circularizing a public notice allows the FAA to solicit information that may assist in determining what effect, if any, the proposed structure would have to the navigable airspace."). If FAA "determines . . . it is

necessary to distribute a public notice," it will distribute the notice to the "sponsor" of the project, as well as those most likely to have relevant information, *i.e.*, "known aviation interested persons." Order § 6-3-17(a), (c)(1)-(2). The relevant Order provisions at the time defined known aviation interested persons as:

> [S]tate, city, and local aviation authorities; airport authorities; various military organizations within the DOD; flying clubs; national, state, and local aviation organizations; flight schools; fixed base operators; air taxi, charter flight offices; and other organizations or individuals that demonstrate a specific aeronautical interest such as county judges and city mayors.

FAA Order JO No. 7400.2L § 6-3-17(c)(2); *see also* Order § 6-3-17(c)(2) (defining "known aviation interested persons" as including "state, city, and local aviation authorities; airport authorities; various military organizations within the DOD; and other organizations or individuals that demonstrate a specific aeronautical interest"). In addition, "[a]s appropriate, state and local authorities; civic groups; organizations; and individuals who do not have an aeronautical interest, but may become involved in specific aeronautical cases, must be included in the notice distribution, and given supplemental notice of actions and proceedings on a case-by-case basis." Order § 6-3-17(c)(6).

Certain "types of studies," however are generally not circularized. *See* Order § 6-3-17(a)(2). For example, section 6-3-17(a)(2)(h) of the Order provides that "[a] structure that would affect IFR [*i.e.*, Instrument Flight Rules flight] operations . . . would only need FAA comment" where it "[w]ould raise a MVA [*i.e.*, minimum

vectoring altitude].” Likewise, Appendix 12 of the Order provides that analysis of “radar services over wind turbine farms” is performed by FAA and the relevant air traffic controllers, rather than the public. *See id.* App. 12-1 to 12-2. And, if a proposed project is “withdraw[n],” “FAA may terminate the study,” thereby obviating the need for any circularization public or otherwise. 14 C.F.R. § 77.29(b).

b. After an aeronautical study is complete, FAA issues a determination regarding whether the proposed structure would be a hazard to air navigation. 14 C.F.R. § 77.31(a). FAA recognizes that “[t]here are many demands being placed on the use of the navigable airspace.” Order § 6-3-1(a). At virtually every stage of the aeronautical study process, FAA attempts to mitigate adverse effects and find ways to accommodate proposed construction. *Id.* § 6-3-6(a)(2), (c)(2), (c)(3), (e), (f), (g). FAA does not reach a conclusion until it has attempted negotiations with the project sponsors. *Id.* §§ 6-3-6(a)(5), 6-3-16.

FAA will determine that a structure constitutes a hazard to air navigation only when it would have a “substantial aeronautical impact,” 14 C.F.R. § 77.31(c), which FAA has clarified is a “substantial adverse effect” that cannot be eliminated through negotiations with the project sponsor or adjustment to the affected aeronautical operations or procedures, Order § 7-1-3(e). To have a “substantial adverse effect,” the structure must affect a “significant volume” of flights, which

"would indicate regular and continuing activity." *Id.* §§ 6-3-4, 6-3-5. FAA generally considers an average of one flight per day to be a "significant volume." *Id.* § 6-3-4. If a structure exceeds the obstruction standards but does not result in a substantial adverse effect, FAA will issue a "Determination of No Hazard" (No Hazard Determination). *Id.* § 7-1-3(d); *see also* 14 C.F.R. § 77.31(d).

FAA "will advise all known interested persons" when it "issue[s] a determination stating whether the proposed construction or alteration would be a hazard to air navigation." 14 C.F.R. § 77.31(a). A No Hazard Determination generally expires 18 months after the effective date, subject to a one-time extension by FAA "for a period not to exceed 18 months." *See id.* §§ 77.33(b), 77.35(b). The agency's determination does not itself permit or prevent construction, although it may be considered in permitting and zoning procedures conducted by other entities. *See Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979).

c. The airport's sponsor, along with an individual or entity who "provided a substantive aeronautical comment on a proposal in an aeronautical study" or "ha[s] a substantive aeronautical comment on the [proposed construction] but w[as] not given the opportunity to state it," may petition FAA for "discretionary review" of a No Hazard Determination within 30 days. 14 C.F.R. §§ 77.37(a), 77.39(a). Any such petition "must contain a full statement of the aeronautical basis on which the

petition is made, and must include new information or facts not previously considered or presented during the aeronautical study, including valid aeronautical reasons why the determination[] . . . should be reviewed." *Id.* § 77.39(b). Regardless of whether they have filed for discretionary administrative review, "person[s] disclosing a substantial interest" in a No Hazard Determination may file a petition for review within 60 days of when that determination issues. *See Sandell v. FAA*, 923 F.2d 661 (9th Cir. 1990) (allowing petition from No Hazard Determinations); 49 U.S.C. § 46110(a).

B. Factual Background and Prior Proceedings

This case involves a proposed wind farm with 72 turbines (originally proposed with 76 turbines) located in Campo, California. *See, e.g.*, 2-ER-104. Petitioners, Donna Tisdale, Joe E. Tisdale, and Backcountry Against Dumps (of which the Tisdales are members), are members of the general public who live near the site of the proposed project and have claimed that it would interfere with the enjoyment of their property.

1. 2020 No Hazard Determinations

a. Notice for Public Comment. Because the proposed turbines would exceed a height of 200 feet above ground level, the sponsors of the windfarm informed FAA of the project. On October 21, 2019, FAA circulated a notice for

public comment, including by making the proposal available on the agency's public website. *See* 2-ER-104, 108.

Petitioners responded to this public notice by objecting to the project. 4-ER-444 to 6-ER-1111. They asserted that the windfarm would cause an "increase in minimum flight altitude in this mountainous area [which] will pose aviation burdens on and hazards to military as well as commercial and private aircraft that utilize the air space overlying the Project." 4-ER-448; *see also* 4-ER-447. They also commented that ten individuals had been killed between 2003 and 2016 as a result of collisions with wind energy turbines and their towers; that "[t]urbulence from wind turbines can impact aeronautic operations"; that "radar systems may be impaired or disrupted by wind energy facilities"; that the turbines could be a source of wildfire ignition; that the turbines would interfere with emergency service responders, including aerial firefighting; and that requiring lighting would not mitigate these risks. *See* 4-ER-448-51.

b. Government Consultation. The FAA Obstruction Evaluation Group also consulted with Southern California Terminal Radar Approach Control Facilities (TRACON), which provides radar air traffic approach control in the relevant area, on potential impacts on various minimum altitudes and a potential "primary radar impact" (where there was no secondary radar impact) on the San Clemente, CA (NSD) ARSR-4 radar facility. *See* 4-ER-434.

Southern California TRACON initially objected because four of the proposed turbines would have had a "significant impact" on certain minimum altitudes used by air traffic control because they would have led to a "loss of a cardinal altitude" and, in one case, might have resulted in alterations to a "commonly used" airway that would have raised icing concerns in the winter months. 4-ER-431-33. After negotiations with the sponsor, FAA confirmed that "[t]he sponsor for this wind project agreed to terminate the turbines that would create the loss of a cardinal altitude" to address Southern California TRACON's objections. 4-ER-430; *see also* 2-ER-104 (confirming that the four turbines were terminated). In addition, Southern California TRACON had previously confirmed that potential changes to the other minimum vectoring altitudes would only have a "small impact" and that the potential change to the minimum obstruction clearance altitude would have "[n]o impact." 4-ER-431-32. Southern California TRACON likewise did not object based on any primary radar impact. *Cf.* 4-ER-430-33. Southern California TRACON thanked FAA for the update regarding the withdrawal of four turbines without raising further objections. *See* 4-ER-430.

The military branches likewise did not object to the proposed windfarm, and there was no conflict with any Department of Homeland Security program. *See* 6-ER-1112-17, SER-29-95.

c. No Hazard Determination. On July 16, 2020, FAA issued a No Hazard Determination for the 72 turbines in the proposal, which included responses to petitioners' comments. *Compare* 4-ER-414-21, *with* 4-ER-448-51.

With respect to petitioners' objection that the proposed obstruction lighting would be insufficient, FAA observed that the lighting recommendations were "made in accordance with" FAA guidance; that the recommendation was made "with input from each o[f] the ten divisions and air traffic facilities responsible for the airspace," as well as the "military services"; and that the use of "red obstruction lights provide the most conspicuity to pilots." 4-ER-418.

Addressing petitioners' concerns about radar interference, FAA explained that "[i]mpacts to radar facilities are not circularized to the public for comments as they only require review by the military services and responsible Air Traffic Control (ATC) facility" and that such "[f]urther review determined" that the impact on primary radar for the San Clemente, CA (NSD) ARSR-4 radar facility "would not cause an unacceptable adverse impact on [Air Traffic Control] or military operations in the area of the turbines." 4-ER-419.

In response to petitioners' concerns about alterations to minimum flight altitudes, FAA first explained that "[f]urther study of the proposal by the responsible air traffic facilities and negotiations with the project sponsor, eliminated the MOCA [*i.e.*, minimum obstruction clearance altitude] and MEA

[*i.e.*, minimum en route altitude] increases." 4-ER-419. And FAA confirmed that the alteration to the minimum vectoring altitudes—which "are solely used by [Air Traffic Control" and "therefore are not circulated for public comment"—had been "review[ed] by the controlling facility" and that it had been determined that the alteration "would not have a substantial adverse effect on air traffic operations." 4-ER-419.

FAA also responded to petitioners' various objections related to prior collisions and the potential impact on low-flying aircraft. First, FAA noted that consultation with the military branches and the Department of Homeland Security "revealed no significant impact to military operations." 4-ER-418. And FAA explained that other low-flying operations raised by petitioners—including "agricultural" flights and "[e]mergency flight operations"—"are not regular and continuous flight operations and therefore are not considered in determining the extent of adverse effect" under the regulations. *See* 4-ER-418, 419. FAA concluded that there would not be a "substantial adverse effect" on aircraft flying with visual flight rules because there was no evidence the wind farm was "located near a regularly and continuously used" visual flight rules aircraft path. 4-ER-419.

Finally, FAA explained that some of petitioners' objections went "beyond the scope of" the issues to be considered under Part 77, and therefore were not

considered during the aeronautical study, including "[t]he effects of wind turbine vortex, vortices, turbulence or severe weather phenomenon." 4-ER-419.

d. Petition for Discretionary Review. On August 17, 2020, petitioners timely filed an administrative petition for discretionary review based on the issues raised in their comments. 3-ER-180-86. Petitioners identified four objections.[2]

First, petitioners asserted the project would have an adverse impact on low-flying aircraft. 3-ER-181-84. Petitioners pointed out that the project would be "situated directly between several airports used by general aviation pilots flying under visual flight rules." *See* 3-ER-181. They also argued that FAA had not adequately considered the potential impact on firefighting and agricultural operations (including the Jacumba airport located 10 nautical miles away from the proposed site) and reiterated the risk of collision with turbines based on ten prior collisions between 2003 and 2016. 3-ER-182-84.

Second, petitioners objected on the basis of the degradation of radar function projected to be caused by four of the turbines to the San Clemente ARSR-4 radar facility, asserting that FAA's explanation that it "would not cause an unacceptable

[2] Petitioners also sought to challenge the Bureau of Indian Affairs' Final Environmental Impact Statement for the project because FAA was consulted in that separate decision-making process. *See* 3-ER-180, 186-205. Petitioners are currently challenging the Bureau of Indian Affair's determination in a separate appeal pending before this Court. *See Backcountry Against Dumps v. U.S. Bureau of Indian Affairs*, No. 21-55869 (9th Cir.).

adverse impact on [air traffic control] or military operations in the area at this time" was insufficient. 3-ER-184-85 (alteration in original) (quotation marks omitted). Third, petitioners objected that the lighting mitigation would be insufficient. 3-ER-185-86. Finally, petitioners contended that FAA should have considered the turbulence from the turbines. 3-ER-186.

On December 2, 2020, FAA granted the petition solely as to the objection that FAA had not adequately validated the visual flight rules en route traffic count in light of the project's proximity to airports where pilots used visual flight rules and the absence of data on this issue in the case file. 2-ER-173. FAA also observed that there was no record of circularization to certain subsets of "known aviation interested persons" in "[p]aragraph 6-3-17 3 (c)" of the Order, such as "flying clubs, flight schools or local aviation organizations." *See* 2-ER-173-74.

The Acting Manager of the Rules & Regulation Group therefore ordered that FAA "[r]escind" the 2020 No Hazard Determination"; "[i]nitiate a new public notice with dissemination to all entities listed in FAAO 7400.2, paragraph 6-3-17 3 (c)"; and "[r]estudy the proposal with any new comments." 2-ER-174. The order further instructed FAA to obtain the necessary data on the visual flight rules aircraft paths by "[c]ontact[ing] the local air traffic facilities for feedback concerning [visual flight rules] flyways and operations in the vicinity of the

proposed wind farm," which "can provide traffic counts and radar data to evaluate [visual flight rules] traffic in the area of the planned construction." 2-ER-174.

2. 2021 No Hazard Determinations

a. Notice for Public Comment. On April 7, 2021, FAA circularized a new public notice for comment, including by making the notice available on the agency's public website. *See* 2-ER-104, 108. In addition, FAA sent personal notices to airports "beyond the required 13[nautical miles] for public use airports and 5[nautical miles] for private use airports," sent "[p]ost card mailers and email notifications . . . for those having registered accounts," and contacted airport managers for airports that were not registered or had provided insufficient information. 2-ER-110. In response to the administrative review order's instructions, FAA also confirmed that there were no flying clubs or flight schools for airports within 30 nautical miles of the project (including Octillo Airport, Agua Calient Springs Airport, and Jacumba Airport) based on searches of airport master records and the internet. 2-ER-110. No new comments were submitted.

b. Government Consultation. Consistent with the administrative review order, FAA also assessed the potential impact on visual flight rules aircrafts. On March 11, 2021, a member of FAA's Flight Standards group, commented "No Objection with provision." *See, e.g.*, 6-ER-1112 (comment included in Division Responses Record for each turbine). He explained that the proposed structures

"will have an adverse effect upon [visual flight rules] pilotage navigation, especially during periods of ceiling and visibility conditions at or near the minimum allowed for [visual flight rules] flight" based on three "[visual flight rules] Route[s]" based on "Interstate 8, State Route 94, and railroad tracks." *See, e.g.*, 6-ER-1112. He therefore advised that FAA evaluate whether there "is a significant volume of aircraft using the [visual flight rules] route" to determine whether the adverse effect would rise to the level of a "substantial adverse effect." *See, e.g.*, 6-ER-1112.

FAA completed this evaluation based on twelve months of historical data on visual flight rules aircraft in the relevant area and determined that there would not be a substantial adverse effect because only "an average of less than one [visual flight rules] aircraft per day may be affected by the proposed wind farm." *See, e.g.*, 2-ER-110; *see also* SER-8-28. Southern California TRACON, the relevant air traffic controller, "concur[red]" with this assessment. *See* 2-ER-110; *see also* SER-6.

c. No Hazard Determination. On August 31, 2021, FAA issued No Hazard Determinations for all of the turbines, except for the four that had already been withdrawn from consideration based on prior negotiations with the sponsor. *See, e.g.*, 2-ER-101-14. Because "the 72 proposed wind turbines in this project . . . have similar impacts," FAA's determination letters analyzed the overall impacts of the

project in the determination letter for each turbine. *See* 2-ER-104. FAA explained that none of the proposed turbines would pose a "substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities." 2-ER-101. FAA described the results of its new consultation and evaluation and, in an abundance of caution, also explained why the comments responding to the prior notice for public comment did not raise any substantial aeronautical concerns. *See* 2-ER-108-11 (addressing comments related to obstruction lighting; impacts on radar; impacts on minimum altitudes; impacts on military, agricultural, and emergency flights, and other potentially low-flying visual flight rules aircrafts; historical collisions with wind turbines; and potential turbulence). Although there was substantial overlap with its prior explanations given that no new comments had been submitted, FAA also provided additional details where appropriate.

Specifically, FAA discussed its supplemental evaluation of the effect the wind turbines would have on visual flight rules aircraft routes. 2-ER-110-11. FAA reported that "[i]n coordination with [air traffic control], an analysis of available traffic data indicated that an average of less than one [visual flight rules] aircraft per day may be affected by the proposed wind farm." 2-ER-110. FAA also explained that "[t]he proposed structures would be located beyond the normal traffic pattern airspace for any known public use or military airports." 2-ER-111.

As a result, FAA concluded that, under the relevant Order provisions, the "proposed wind farm would not affect a significant volume of aircraft." 2-ER-111; *see also* 2-ER-110. FAA also noted that additional mitigation measures would be put in place, including that the "proposed turbine(s) would be charted on [visual flight rules] sectional aeronautical charts and appropriately obstruction marked/lighted to make them more conspicuous to airmen should circumnavigation be necessary." 2-ER-111.

d. Invalid Administrative Petition. On September 30, 2021, petitioners submitted a petition for administrative review. *See* 2-ER-4-99. The petition reiterated a subset of the issues raised in petitioners' comments responding to the 2019 Public Notice and in their 2020 administrative petition from the 2020 No Hazard Determinations. *Compare* 2-ER-4-28 (2021 petition), *with* 4-ER-446-51 (2020 comments), *and* 3-ER-179-205 (2020 petition). With the exception of one new exhibit consisting of internal FAA emails, *see* 2-ER-29, 35-42, petitioners submitted no new materials. *Compare* 2-ER-29 (listing exhibits in 2020 petition), *with* 4-ER-451 (listing exhibits to 2020 comments), *and* 3-ER-206 (listing exhibits in 2020 petition).

In the section of the petition on the alleged impact on aircraft safety and operations, petitioners raised three arguments, *see* 2-ER-6-9, each of which was founded on a fundamental misunderstanding of the record and Order provisions as

explained *infra* p. 30. Petitioners' primary objection was their disagreement with FAA's assessment that "the proposed wind farm would not affect a significant volume of [visual flight rules] aircraft." *See* 2-ER-7 (quotation marks omitted). Petitioners also argued that primary procedures for visual flight rules that depend on "minimum altitudes" would be affected and that such impacts need to occur only once a week to constitute a significant adverse effect. *See* 2-ER-7-8 (citing Order § 6-3-4). Petitioners' final objection in the aeronautical section of the petition was based on their belief that the wind farm would "forc[e] aircraft to fly higher, a 'significant negative impact' exposing them to dangerous wing and rotor blade icing conditions, according to Southern California TRACON, which therefore 'object[ed] to the proposed [Campo] wind farm.'" 2-ER-8 (alterations in original) (quoting FAA emails (2-ER-35-42)). Unlike the 2020 administrative petition, the 2021 administrative petition did not include any substantive sections on lighting, radar, or turbulence. *Compare* 2-ER-28 (2021 petition referencing these topics solely in the conclusion), *with* 2-ER-184-86 (2020 petition raising these topics in separate sections in the argument portion of the petition).

On October 15, 2021, FAA denied the petition because it did not meet the criteria in "14 CFR, part 77.37(a)," which restricts the filing of a petition for discretionary review to the sponsor of any proposed construction or alteration, or any person who stated a substantial aeronautical objection to it in an aeronautical

study, or any person who has a substantial aeronautical objection to it but was not given the opportunity to state it because "[t]here is no record of comments received from" petitioners. 2-ER-2.

e. Federal Petition.

On December 13, 2021, petitioners submitted their petition for review under 49 U.S.C. § 46110, which this Court docketed on December 14, 2021.

SUMMARY OF ARGUMENT

Petitioners object to a proposed wind turbine project in Campo, California. Rather than seek review of the merits of FAA's determination that the turbines pose no hazard, petitioners instead urge this Court to vacate FAA's denial of their administrative petition on procedural grounds and to order FAA to engage in "discretionary review" of the petition on the merits.

Although they failed to so argue to FAA in their original petition, petitioners now claim that FAA erred in rejecting their administrative petition for two reasons: (1) they claim to have "provided a substantive aeronautical comment on a proposal in an aeronautical study" by responding to an earlier public notice related to the Campo wind farm and (2) they claim they were "not given the opportunity to state" their comments because FAA did not give them personalized notice of the 2021 Public Notice related to the Campo wind farm. *See* 14 C.F.R. § 77.37(a).

Petitioners' contentions provide no basis upon which to grant their petition for review. FAA substantially complied with all applicable procedural requirements in rejecting the administrative petition. And, in any event, petitioners cannot show that any alleged procedural deficiencies substantially prejudiced them.

As FAA explained in concluding that the administrative petition was invalid, petitioners' comments on an earlier public notice did not suffice as comments to the separate 2021 public notice. Petitioners also cannot show that they lacked the "opportunity to state" their objections to FAA. The 2021 public notice was available on FAA's website, and there was no requirement that the public notice be sent directly to petitioners. Moreover, the 2021 administrative petition reiterated a subset of petitioners' comments that FAA had already considered and rejected on three prior occasions: (1) when responding to petitioners' comments to the earlier public notice; (2) when responding to petitioners' administrative petition from the earlier no hazard determinations; and (3) when including analysis of why such comments did not raise substantial aeronautical concerns in the 2021 No Hazard Determinations themselves. Petitioners thus cannot show that they were deprived of the opportunity to present any "new information or facts not previously considered" in their administrative petition, as necessary to qualify for discretionary review under 14 C.F.R. § 77.37(a) and 14 C.F.R. § 77.39(b).

In sum, petitioners have not shown that FAA fell short, much less substantially short, of any applicable procedural requirements or that any of the procedural violations petitioners allege caused them any prejudice. This Court should accordingly deny the petition for review and leave undisturbed FAA's 2021 No Hazard Determinations. No other barrier to affirmance remains. Having relied solely on purported procedural errors in the argument section of their brief, petitioners have waived any other ground for remand.

STANDARD OF REVIEW

Agency action may be set aside under 49 U.S.C. § 46110 only when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also, e.g.*, *Reno v. National Transp. Safety Bd.*, 45 F.3d 1375, 1377 (9th Cir. 1995) (applying arbitrary and capricious standard to suit under section 46110). Purely legal issues are reviewable de novo, *see Reno*, 45 F.3d at 1377, and FAA's findings of fact, "if supported by substantial evidence, are conclusive," 49 U.S.C. § 46110(c).

ARGUMENT

PETITIONERS HAVE NOT IDENTIFIED ANY VALID GROUND UPON WHICH TO GRANT THEIR PETITION FOR REVIEW

A. FAA Substantially Complied With the Relevant Procedural Requirements

1. FAA Properly Denied the Petition

FAA properly denied the administrative petition submitted by petitioners challenging the 2021 No Hazard Determinations.

As explained *supra* pp. 8-9, 15, after being informed of the proposed wind farm in 2019, FAA decided it would be helpful to circulate a public notice for comment, including by posting the notice on the agency's public website on two separate occasions. Petitioners responded to the 2019 public notice posted on the website by objecting to the wind farm, and FAA explained why petitioners' objections were unfounded in its 2020 No Hazard Determinations. *See supra* pp. 9, 11-13. The Acting Manager of the Rules & Regulation Group subsequently granted petitioners' request for administrative review from these determinations and agreed with petitioners that their objections as to one issue—the potential impact on visual flight rules routes—required additional study. *See supra* p. 14. FAA therefore informed petitioners that FAA would "reissue the public notice" "and restudy the proposals with any new comments." 2-ER-175; *see also* 2-ER-174.

Although FAA posted a new notice for comment on the agency's public website, petitioners failed to submit any comments. *See supra* p. 15. FAA then issued the 2021 No Hazard Determinations, repeating where relevant the explanations for why petitioners' earlier comments did not change the result. *See supra* pp. 16-18.

Despite having failed to submit any new comments to the 2021 public notice, petitioners filed a second petition for discretionary FAA review. That petition did not, however, explain why petitioners were eligible to seek discretionary review under 14 C.F.R. § 77.37(a), which only extends the possibility of such review to three types of persons: (1) the project "sponsor," (2) someone who has "provided a substantive aeronautical comment on a proposal in an aeronautical study," or (3) someone "ha[s] a substantive aeronautical comment on [the proposed construction] but w[as] not given an opportunity to state it." Based on the record before FAA, the agency reasonably concluded that the petition was invalid under section 77.37(a) because petitioners had not submitted any comments responding to the "[p]ublic notice of this aeronautical study [which] was issued on 04/07/2021, with a request for comments to be submitted no later than 05/15/2021." 2-ER-2.

2. None of the Bases Petitioners Now Propose Indicate That FAA Erred

Petitioners now claim that they were eligible to file an administrative petition from the 2021 No Hazard Determinations on one of two alternate grounds provided in section 77.37(a): (1) they had "provided a substantive aeronautical comment on a proposal in an aeronautical study" by responding to a 2019 notice for public comment related to the Campo wind farm or (2), they were "not given the opportunity to state" their comments because FAA had not given them personalized notice of the 2021 notice for public comment. *See* Pet'rs' Br. 37-38 (emphasis omitted) (quoting 14 C.F.R. § 77.37(a)). Both of those contentions fundamentally misunderstand the relevant procedural requirements. First, these eligibility clauses operate as threshold requirements that petitioners must satisfy, rather than imposing affirmative procedural duties on FAA: FAA's review remains "discretionary." *See infra* pp. 34-35. Second, FAA has substantially complied with any duty conceivably imposed. [3]

a. FAA correctly concluded that section 77.37(a)'s reference to those who have "provided a substantive aeronautical comment on a proposal in an aeronautical study" does not include petitioners. *See* 2-ER-2. Petitioners'

[3] Because FAA substantially complied with any potentially applicable procedures, this Court need not address petitioners' arguments about the degree to which particular orders are binding, *see* Pet'rs' Br. 29-32.

contentions that their comments responding to a public notice issued in October 2019 should count as comments to a different public notice issued in April 2020 find no basis in law or logic. *See* Pet'rs' Br. 37-38.

As an initial matter, petitioners never informed FAA of this basis for review either in their original petition or in the letter petitioners sent to FAA after denial of their petition in which they belatedly explained their theory of how they satisfied section 77.37(a)'s prerequisites. *See* Ex. 1 to Unopposed Mot. to Augment Agency Record. In any event, the second public notice was a distinct event that required petitioners to provide new aeronautical comments to preserve the option of filing an administrative petition on this ground, *see supra* pp. 14-15; *see also infra* pp. 33-34. That the two proceedings were distinct is confirmed by the fact that FAA had previously granted discretionary review based on petitioners' earlier comments, concluded that further study was required with respect to one issue, and ordered a "new public notice" for "restudy [of] the proposal with any new comments," *see supra* pp. 14-15.

b. Similarly failing to persuade, petitioners claim to fall within the category of "any person who has a substantial aeronautical objection to [proposed construction] but was not given the opportunity to state it." Pet'rs' Br. 37-43

(alteration in original) (emphasis omitted) (citing 14 C.F.R. § 77.37(a)).[4] But that argument fundamentally misunderstands the relevant requirements and record.

Petitioners cannot satisfy this prerequisite because they cannot point to a new aeronautical objection they were "not given an opportunity to state." *See* 14 C.F.R. § 77.37(a). Their 2021 petition for discretionary administrative review mirrored a subset of the comments they raised in response to the 2019 Public Notice and in their 2020 petition for administrative review. *Compare supra* p. 9 (2020 comments), *and supra* pp. 13-14 (2020 petition), *with supra* pp. 18-19 (2021 petition). FAA considered these comments at all administrative levels as part of the 2019 public notice and 2020 administrative petition process, and even discussed them again when issuing the 2021 No Hazard Determinations. *See supra* pp. 11-14, 17. Because the 2021 petition merely reiterated points that FAA had already considered, petitioners cannot demonstrate that they were "not given the opportunity to state" these concerns.

Petitioners' contention that FAA violated its procedures by not personally notifying petitioners of the public notice in 2021 similarly fails to advance their

[4] To the extent that this Court grants petitioners' motion to supplement the administrative record, the correspondence petitioners sent after the denial of their administrative petition does not alter the relevant analysis. *See* Unopposed Mot. to Augment Agency Record Ex. 1. The argument raised in that letter is wrong for the reasons identified in this brief and, moreover, such a letter is not a valid procedural basis for reopening the discretionary administrative petition process.

case. As an initial matter, as explained *supra* p. 27, petitioners had an opportunity to state their objections and for that reason alone FAA did not err in rejecting the administrative petition. Nor were petitioners denied sufficient opportunity to provide any new aeronautical objection even though they lacked personalized notice from FAA: the agency's website announced the 2020 public notice. And FAA had already informed petitioners—who were represented by counsel—that FAA was going to "reissue the public notice for the subject aeronautical studies and restudy the proposals with any new comments," *see* 2-ER-175, which put petitioners on notice to review FAA's website for the new public notice.

In any event, no regulation or Order provision entitles petitioners to personalized notice. Petitioners' reliance on section 77.31(a)'s provision that "[t]he FAA will issue a determination stating whether the proposed construction or alteration would be a hazard to air navigation, and will advise all known interested persons," *see* Pet'rs' Br. 30, 36-37, is entirely misplaced. By its plain terms, section 77.31(a) concerns the issuance of the Hazard / No Hazard determination, rather than circulation of a notice for public comment. That discretionary process is instead described by section 77.25(c), which provides that, "[w]hen the FAA needs additional information, it *may* circulate a study to interested parties for comment." 14 C.F.R. § 77.25(c) (emphasis added).

Nor does either regulation define the term "known interested persons" in the way petitioners urge. Instead, this is a term of art that refers to providing personal notice to the "sponsor" of the project; "known aviation interested persons"; certain types of airport owners within prescribed geographical ranges; the "specific FAA approach facility, en route facility (ARTCC), and Flight Service Station (FSS) in whose airspace the structure is located"; and "[a]n adjacent [FAA] regional/service area office" if it is sufficiently proximate. Order § 6-3-17(c)(1)-(5). FAA further defined "known aviation interested persons" as including, for example, "aviation authorities; airport authorities; various military organizations within the DOD; [and] flying clubs." FAA Order JO No. 7400.2L § 6-3-17(c)(2); Order § 6-3-17(c)(2) (similar). That enumerated list does not include members of the non-aviation public like petitioners.

Petitioners instead rely on section 6-3-17(c)(6) of the Order to assert that FAA was required to send them personalized notice because their previous comments indicate they were persons who "may become involved in specific aeronautical cases." *See* Pet'rs' Br. 41-42 (emphasis omitted) (quoting Order § 6-3-17(c)(6)). But that provision is of no assistance to petitioners: it expressly requires personal notice only "[a]s appropriate." Order § 6-3-17(c)(6). Here, petitioners cannot show that FAA was required to find that it was "appropriate" to provide personalized notice to petitioners when issuing a new public notice, given that

petitioners had previously demonstrated that they knew how to respond to FAA's general public notices posted on the agency's website and FAA had already alerted petitioners to the fact that a new notice would be issued. *See supra* pp. 9, 27-28.

In addition, FAA's requirements for circulation to the public are not unlimited. Two of the primary objections in petitioners' 2021 administrative petition—those relating to minimum altitudes and those relating to icing—involve issues that the relevant Order provisions clarify are not meant for public comment and are instead reserved for FAA comment. First, petitioners' mistaken objection to the remaining alterations to the minimum vectoring altitudes, *see* 2-ER-9, raised issues that are reserved for and had been approved by "FAA comment," and, in any event, pertain solely to instrument flight rules aircraft and so are irrelevant to the issue potential impacts on visual flight rules aircraft that petitioners were attempting to raise. *See* Order § 6-3-17(a)(2)(h); *see also supra* p. 19. Second, petitioners' mistaken objection that the proposed construction would cause dangerous icing, *see supra* p. 19, raised concerns that had been raised about four turbines that had already been "withdraw[n]," and for which FAA therefore "terminate[d] the study," thereby obviating the need for any further comment. *See* 14 C.F.R. § 77.29(b); *see also supra* pp. 9-10, 16.[5]

[5] Although petitioners' passing reference to radar in the concluding paragraph of their 2021 administrative petition was so cursory as to have failed to

Continued on next page.

Indeed, several of the issues petitioners raised involved issues also not properly the subject of a no hazard analysis. For example, the shadow flicker issue that petitioners raised in the section of their petition devoted to purported National Environmental Policy Act (NEPA) irregularities, *see* 2-ER-24-25, is beyond the bounds of what should be considered in an aeronautical study. *Cf. Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) ("Because the FAA 'simply lacks the power to act on whatever information might be contained in the [environmental impact statement ("EIS")],' NEPA does not apply to its no hazard determinations" (alteration in original) (citation omitted)); *Tuscola Area Airport Auth. v. Dickson*, 831 F. App'x 511, 512-13 (D.C. Cir. 2020) ("As for the petitioners' argument that the FAA failed to consider relevant factors, the FAA is not required to consider local economic impacts or grant assurances when determining whether a structure will affect aeronautical safety.").

B. In Any Event, Petitioners Have Not Shown That They Were Prejudiced By Any Alleged Procedural Deficiencies

As demonstrated above, FAA satisfied any procedural requirements that arguably applied, and the petition for review should be denied. The petition for review may also be denied because even assuming arguendo the existence of

present that argument to FAA, *cf.* 14 C.F.R. § 77.39(b), Appendix 12 to the Order likewise reserves such analysis for FAA's air traffic and technical operations services when evaluating the effects on radar from a proposed wind turbine farm. *See* Order at App. 12-1 to 12-2.

procedural deficiencies, petitioners have not shown how they were prejudiced. *See*, *e.g.*, *The Steamboaters v. FERC*, 759 F.2d 1382 (9th Cir. 1985); *see also American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970); *City of Las Vegas v. FAA*, 570 F.3d 1109, 1115 n.3 (9th Cir. 2009).

1. Where, as here, the primary purpose of a procedural provision is for the agency's benefit, a petitioner has the burden of demonstrating both that a procedural violation occurred and that the violation substantially prejudiced them. This Court's decision in *Steamboaters* is instructive.

The petitioners in that case argued that FERC should not have granted an exemption from its licensing procedures for hydropower projects because the applicant had not updated its application with details as to all of the planned modifications before the final exemption orders were issued. *Steamboaters*, 759 F.2d at 1390. This Court explained that to succeed in their petition for review alleging a procedural violation, petitioners would have to demonstrate "substantial prejudice" because the procedural requirement's "primary purpose . . . is to provide FERC with the requisite information to determine whether to grant an exception," even though a "secondary purpose is to give the public adequate notice of and opportunity to comment on the proposed hydropower project." *Id.* at 1391 (quoting *American Farm Lines*, 397 U.S. at 539). The Court concluded that both purposes were satisfied as a practical matter because both FERC and the parties had an

opportunity to comment on these modifications before the exemptions were granted. *See id*. As in *Steamboaters*, the record here confirms that petitioners cannot demonstrate that they were prejudiced by any lack of personalized notice because they had ample opportunity to present any substantial aeronautical objections to FAA, and FAA, in fact, responded to those objections.

Like the provisions at issue in *Steamboaters*, the primary purpose of the notice requirements invoked by petitioners is to provide FAA with the information it needs to make its decision. The regulations vest with FAA the decision of whether to circulate at all, providing that FAA "may circulate a study to interested parties for comment" "[w]hen the FAA needs additional information." 14 C.F.R. § 77.25(c). The FAA Order provisions supplementing this regulation likewise focus on the groups most likely to provide useful information to FAA. When FAA decides that circularization to the public would be helpful, the Order specifies that the "sponsor" of the proposal, "known aviation interested persons," and nearby airport owners and FAA facilities and offices should also receive personalized notification. *See* Order § 6-3-17(c)(1)-(5). It further defines "known aviation interested persons" as those most likely to have specialized aviation knowledge, such as "state, city, and local aviation authorities; airport authorities; various military organizations within the DOD; and other organizations or individuals that demonstrate a specific aeronautical interest through subscription to notifications."

Order § 6-3-17(c)(1)-(2).The Order also explains that personalized notice should be sent only "[a]s appropriate" to additional entities, including those who "may become involved in specific aeronautical cases." Order § 6-3-17(c)(6).

The petition for discretionary review is likewise for FAA's benefit, as made clear by section 77.39(b)'s requirement that a petition not only "must contain a full statement of the aeronautical basis on which the petition is made" but also "must include new information or facts not previously considered." 14 C.F.R. § 77.39(b). Section 77.37(a)'s prerequisites for persons seeking to file the petition likewise ensures at the outset that only those who are most likely to provide useful new information are eligible to seek discretionary review: namely, the sponsor of the project, a person who has already submitted a "substantive aeronautical comment," or a person who was actually deprived of the opportunity to do so.

By contrast, the discretionary review provisions do not vest would-be petitioners with any right to administrative review nor impose any barrier to judicial review for failure to first undergo administrative review. Although section 77.37(a) provides that certain persons "may petition the FAA for a discretionary review of a determination" provided that those persons also satisfy the timing and substantive requirements in section 77.39, nothing in these regulations mandates that FAA undertake that review, which after all is expressly described as "discretionary." *See* 14 C.F.R. §77.37(a). And unlike many administrative review

schemes, FAA has not issued any regulations requiring exhaustion of this optional administrative review process before parties may file a petition with the relevant court of appeals. Read together, these provisions demonstrate that the discretionary review process is intended to benefit FAA by affording the agency an opportunity to consider any new information or facts.

2. Petitioners have not identified any basis upon which any purported procedural violation caused them any prejudice given that they had sufficient notice and ample opportunity to present their views to FAA. As an initial matter, FAA provided petitioners with notice of the proposed project by posting a notice for comment on the Campo turbines on the agency's public website on two occasions. Petitioners were able to present their objections to FAA in their comments responding to the 2019 notice and their 2020 administrative petition, and FAA weighed in on these comments in three determinations. Petitioners thus have no basis to argue that they were prejudiced in their ability to present their views to FAA.

That petitioners ultimately disagree with FAA's No Hazard Determinations is a question of the merits of FAA's aeronautical assessment—an issue that petitioners failed to raise in the argument section of their brief and have therefore abandoned. *See infra* pp. 38-39. And, in any event, petitioners' disagreement with FAA's rejection of their objections is immaterial to the question of prejudice raised

in this petition—*i.e.*, whether petitioners were deprived of the opportunity to present those objections to FAA in the first place. Petitioners cannot point to any new information raised by their petition that might have changed FAA's views. That petition failed to raise any "new information or facts not previously considered or presented during the aeronautical study," and therefore was ineligible for administrative rehearing under 14 C.F.R. § 77.39(b) and thus cannot have led to a different result.

To the contrary, FAA had already addressed those comments on three occasions. FAA first addressed those comments in the 2019 No Hazard Determinations. *See supra* pp. 11-13. And, when petitioners properly invoked the discretionary administrative review process in 2019 based on those comments, FAA reviewed those comments again and found that only the one related to potential visual flight rules aircraft routes merited further consideration. *See supra* pp. 14-15. Finally, after performing that additional analysis of the visual flight rules aircraft routes, FAA addressed petitioners' comments for a third time in the 2020 No Hazard Determinations. *See supra* p. 17.

Petitioners also cannot show they were prejudiced for the independent reason that the objections raised in their 2021 petition were premised on fundamentally flawed interpretations of the Order provisions as applied to the record. First, the Order expressly reserves the issue of impact on military

operations and alterations to the minimum vectoring altitudes raised by petitioners for the military and air traffic control respectively. *See supra* p. 30. Second, the Order entirely excludes from consideration potential impacts from structures that have been withdrawn from the aeronautical study (as with the icing issue) or topics that are outside of the scope of factors described as part of the aeronautical study (as with the shadow flicker issue). *See supra* p. 31.

Finally, petitioners cannot base any claim of prejudice on any issues that they did not substantively discuss in their administrative petition and therefore did not adequately raise for purposes of the discretionary administrative review process. *See* 14 C.F.R. § 77.39(b) (requiring that "[t]he petition must contain a full statement of the aeronautical basis on which the petition is made, and must include new information or facts not previously considered or presented during the aeronautical study, including valid aeronautical reasons why the determination[] . . . should be reviewed"). Thus, petitioners cannot show that they were prejudiced from presenting their views on "turbulence," "degrading radar function" and the insufficiency of "FAA-required lighting" because they made only the most cursory reference to these topics in the concluding paragraph of the 2021 petition, without any attempt to provide any analysis, much less new information or facts. Likewise, they cannot show that they were prevented from submitting their theory that a significant volume of visual flight rules aircraft would be impacted based on

seasonal variation, which they raise for the first time in the background section of the opening brief.[6]

C. Petitioners Present No Other Basis from Which to Conclude That This Court Should Not Deny the Petition

1. Petitioners Have Not Raised Any Substantive Challenges to FAA's No Hazard Determinations in the Opening Brief and so Have Waived Them

As explained, petitioners' procedural challenges provide no basis for granting the petition for review. And petitioners have waived any substantive challenges by failing to raise them in the argument section of their opening brief. *See, e.g.*, *Martinez-Serrano v. Immigration & Naturalization Serv.*, 94 F.3d 1256, 1259 (9th Cir. 1996).

Petitioners had sixty days from the date that FAA's No Hazard Determinations were deemed issued to file a petition in this Court. *See* 49 U.S.C. § 46110(a); *cf.* 14 C.F.R. § 77.33(a). Having done so, it was incumbent on petitioners to raise any substantive challenges they had to those determinations in the argument section of their opening brief. That petitioners also had a procedural

[6] Before the agency, petitioners instead based this objection on its erroneous description of FAA's No Hazard Determination as "admit[ing]" that "[visual flight rules aircrafts] route over the project may be used daily." *Compare* 2-ER-7 (citing No Hazard Determination 11 (2-ER-111)), *with* 2-ER-111 (stating that "[i]n coordination with [air traffic control], an analysis of . . . available traffic data indicated that an average of *less than* one [visual flight rules] aircraft per day may be affected by the proposed wind farm" (emphasis added)).

argument for remand does not alter that bedrock requirement: nothing in the statutory provisions or in the regulations requires petitioners to have first brought a valid administrative petition before seeking judicial review on the merits of their objections or otherwise bars them from raising those merits issues before this Court. *Cf.* 49 U.S.C. § 46110; 14 C.F.R. §§ 77.37, 77.39, 77.41.[7] Having failed to challenge the merits of FAA's determination in the argument section of their opening brief, any such challenges are waived.

2. This Court's Decision in *Diné* Does Not Affect This Petition

In addition to the present petition, petitioners also have challenged the Bureau of Indian Affairs' Final Environmental Impact Statement for this wind farm in a suit that is currently on appeal in this Court. *See Backcountry Against Dumps v. Bureau of Indian Affairs*, No. 21-55869 (9th Cir. filed Aug. 13, 2021). The Campo Band of Diegueno Mission Indians, on whose reservation the wind farm would be constructed, previously intervened in that litigation for the limited purpose of filing a motion to dismiss, arguing that it was a required party under Rule 19(a) that could not be joined because it was shielded by tribal sovereign

[7] Petitioners also mention issues in the background section of their opening brief that were not the subject of the 2021 administrative petition. *Compare* Pet'rs' Br. 16-21, *with supra* p. 37-38 & n.6. Even were this Court to remand to the agency to consider the issues raised in the 2021 petition, those new issues would not properly be before the agency.

immunity, and that equity and good conscience demanded that the lawsuit be dismissed in its absence under this Court's decision in *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) (*Diné*).

In light of the indispensable-party doctrine question that has been raised in that environmental appeal and in an abundance of caution, the government notes its position that this Court's decision in *Diné* does not affect this petition. The Court need not address that doctrine in the present petition because it is not a jurisdictional issue here and no party has raised the issue.

Diné is not, in any event, controlling precedent in the distinct direct-petition-for-review context. *Diné* construed the particular text in Federal Rule of Civil Procedure 19 as governing indispensable parties in general civil district court litigation, which differs from the relevant language in Federal Appellate Rule 15 governing direct petitions from agency orders in the courts of appeals. The D.C. Circuit has recognized this distinction, explaining that "as an appellate court reviewing an agency action, we look to Fed. R. App. P. 15. Rule 15 [which] only requires the respondent federal agency as a necessary party to a petition for review—joinder of no other party is required." *See Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n*, 913 F.3d 1099, 1103 (D.C. Cir. 2019).

In general and as applied to this case, the government agrees with the D.C. Circuit's view that the government is the only necessary party under Rule 15. As the D.C. Circuit reasoned, such actions involve "*a federal agency's order*, a matter explicitly within the purview of this Court when petitioned by an aggrieved party," *Hoopa Valley Tribe*, 913 F.3d at 1103 (citing 16 U.S.C. § 825*l*(b)), and therefore the relief runs solely against the federal government and not against any non-federal defendants. So too here as petitioners seek relief only against FAA under 49 U.S.C. § 46110, and FAA is defending its decision. As a result, FAA is the only necessary party for the resolution of this petition.

In any event, this Court need not reach the question of whether to extend *Diné* to the distinct Rule 15 context for the independent reason that the present petition would satisfy the public-rights exception to joinder that *Diné* itself recognized. *See Diné*, 932 F.3d at 858-60. Petitions from FAA determinations that a project would not constitute a hazard to navigable airspace clearly qualify for this exception.

Such petitions satisfy the first prong of the public-rights exception because they involve an issue that "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right," *Diné*, 932 F.3d at 858 (alterations in original) (quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996))—*i.e.,* whether the project would constitute a hazard to the navigable airspace. And they also

satisfy the second prong because, although they may "adversely affect the absent parties' interests," they do not "*threaten*[] to destroy an absent party's legal entitlements." *See id.* at 859-60 (emphasis omitted) (quoting *Kescoli*, 101 F.3d at 1311). *Diné* found that second prong wanting where vacating the challenged agency approvals of leases and rights-of-way held by the absent tribe would render those leases and rights-of-way even temporarily invalid. *Id.* Here, by contrast, petitioners do not challenge approval of a lease, contract, or compact held by an absent party. Even if a remand eventually resulted in a Hazard Determination here, it would not threaten to destroy any legal entitlement because a "hazard/no-hazard determination has no enforceable legal effect" that would preclude construction of the turbines. *See Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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September 2022

STATEMENT OF RELATED CASES

This case is related to *Backcountry Against Dumps v. Bureau of Indian Affairs*, No. 21-55869 (appeal pending).

/s/ Caroline D. Lopez
Caroline D. Lopez

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,417 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Caroline D. Lopez
Caroline D. Lopez

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

/s/ Caroline D. Lopez
Caroline D. Lopez

ADDENDUM

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14 C.F.R. § 77.25

§ 77.25. Applicability

***

(c)The obstruction standards in subpart C of this part are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration. When the FAA needs additional information, it may circulate a study to interested parties for comment.

Chapter 7. Determinations

Section 1. Issuing Determinations

7–1–1. POLICY

All known aeronautical facts revealed during the obstruction evaluation must be considered when issuing an official FAA determination. The determination must be a composite of all comments and findings received from interested FAA offices. Should there be a disagreement in the findings, the disagreement must be resolved before issuance of a determination. The basis for all determinations must be on the aeronautical study findings as to the extent of adverse physical or electromagnetic interference effect upon navigable airspace or air navigation facilities. Evidence of adverse effect alone, either physical or electromagnetic, is not sufficient justification for a determination of hazard. However, a finding of a substantial physical or electromagnetic adverse effect normally requires issuance of a determination of hazard.

7–1–2. RESPONSIBILITY

a. OEG is responsible for issuing determinations.

b. If any division objects to a structure that does not exceed Part 77, and/or is not found to have a physical or electromagnetic radiation effect on the operation of air navigation facilities, an advisory statement may be submitted to OEG for inclusion in the determination. Examples would be:

1. Objections identifying potential airport hazards based on airport design criteria such as a structure within the runway protection zone (RPZ).

2. Objections identifying potential airport hazards such as structures which may not be above ground level (for example, landfills, retention ponds, and waste recycling areas) but may create an environment that attracts birds and other wildlife.

3. When the Airports Division or the Airports District Office (ADO) determines a Wildlife Hazard Assessment is required per Advisory Circular 150/5200–33, the Airports Division or ADO will provide the contact information for the appropriate US Department of Agriculture (USDA) or private biologist meeting the education and experience requirements set forth in the current Advisory Circular 150/5200–36 in the divisional response in the aeronautical study. This information will be incorporated by the OEG in the Notice of Preliminary Findings letter to the proponent.

7–1–3. DETERMINATIONS

Determinations issued by the FAA receive widespread public distribution and review. Therefore, it is essential that each determination issued is consistent in form and content to the extent practicable. To facilitate this and to achieve economy in clerical handling, automated correspondence through the OE/AAA automation program must be used in lieu of previously approved FAA forms. Determinations must be issued as follows:

a. Issue a "Does Not Exceed" (automated DNE letter) determination if the structure does not exceed obstruction standards, does not have substantial adverse physical or electromagnetic interference effect upon navigable airspace or air navigation facilities, and would not be a hazard to air navigation.

b. Issue an "Exceeds But Okay" (automated EBO letter) determination if the structure exceeds obstruction standards but does not result in a substantial adverse effect, circularization was not necessary, and meets one of the following conditions:

1. The structure is temporary;

2. The structure is existing; or

3. The structure involves an alteration with no physical increase in height or change of location such as a proposed decrease in height or proposed side mount.

NOTE–
The significant difference between an EBO determination and a "Determination of No Hazard to Air Navigation" (DNH) is that the EBO determination does not allow for petition rights.

c. Issue a "Notice of Preliminary Findings" (automated NPF letter) if the structure exceeds obstruction standards and/or has an adverse effect

upon navigable airspace or air navigation facilities and resolution or further study is necessary to fully determine the extent of the adverse effect. The NPF facilitates negotiation and is useful in preserving navigable airspace. Normally, the FAA should not automatically initiate further study (including circularization) without a request to do so by the sponsor. The intent of the NPF is to inform the sponsor of the initial findings and to attempt resolution. If the sponsor fails to contact the FAA after receiving the notice, terminate the case. No further action by the FAA is required unless the sponsor refiles. If negotiation is successful, and resolution is achieved, or further study is completed, an appropriate subsequent determination should be issued.

d. Issue a "Determination of No Hazard" (DNH) if the structure exceeds obstruction standards but does not result in a substantial adverse effect.

e. Issue a "Determination of Hazard" (DOH) if the structure would have or has a substantial adverse effect; negotiations with the sponsor have been unsuccessful in eliminating the substantial adverse effect; and the affected aeronautical operations and/or procedures cannot be adjusted to accommodate the structure without resulting in a substantial adverse effect. The obstruction evaluation may or may not have been circularized.

7–1–4. DETERMINATION CONTENT AND OPTIONS

Use the following items, as appropriate, to ensure that the necessary information is included in each determination:

a. All no hazard determinations must address or include:

1. FULL DESCRIPTION. A full description of the structure, project, etc., including all submitted frequencies and ERP must be included. Use exact information to clearly identify the nature of the project (for example, microwave antenna tower; FM, AM, or TV antenna tower; suspension bridge; four–stack power plant; etc.).

2. LATITUDE, LONGITUDE, AND HEIGHT. Specify the latitude, longitude, and height(s) of each structure. When an obstruction evaluation study concerns an array of antennas or other multiple–type structures, specific information on each structure should be included.

3. MARKING AND/OR LIGHTING. A marking and/or lighting recommendation must be a condition of the determination when aeronautical study discloses that the marking and/or lighting are necessary for aviation safety.

(a) If the OE notice was for an existing structure with no physical alteration to height or location (for example, a side mount or an editorial correction to coordinates and/or elevations due to more accurate data), and the structure was previously studied, the recommended marking and/or lighting may be in accordance with the prior study.

(b) If the notice is for a new structure, a physical alteration (height/location) to an existing structure, or an existing structure that did not involve a physical alteration but was not previously studied, the recommended marking and/or lighting must be in accordance with appropriate chapters of the current AC 70/7460–1, Obstruction Marking and Lighting.

(c) If the OE notice was for a change in marking and/or lighting of a prior study whether the structure exists or not yet built, the recommended marking and/or lighting must be in accordance with appropriate chapters of the current AC 70/7460–1.

(1) If it is an existing FCC–licensed structure, and the requested marking and/or lighting change is recommended, notify the sponsor to apply to the FCC for permission to make the change. Use the following specific language: "If the structure is subject to the authority of the Federal Communications Commission, a copy of this letter must be forwarded to them and application should be made to the FCC for permission to change the marking and/or lighting as requested." This language is available in the automated letters.

(2) If the marking and/or lighting change involves high intensity white obstruction lights on an FCC–licensed structure, the sponsor must be notified that the FCC requires an environmental assessment. Use the following specific language: "FCC licensees are required to file an environmental assessment with the Commission when seeking authorization for the use of the high intensity flashing white lighting system on structures located in residential neighborhoods, as defined by the applicable zoning law."

(3) If it is an existing structure and the requested marking and/or lighting change is

Appendix 12. Evaluating Air Traffic Impacts for Wind Turbine Farm Proposals

I. GENERAL

This appendix is for use by field Air Traffic facilities in analyzing Air Traffic operational impacts from items of concern identified by the FAA Obstruction Evaluation Group (OEG) package. The Air Traffic *Objection* or *No Objection* response will be used to issue an FAA Determination of Hazard to Air Navigation or an FAA Determination of No Hazard to Air Navigation back to the submitting proponent per 14 CFR Part 77.

II. BACKGROUND

A National Wind Turbine Farm Safety Risk Management Document identified impacts wind turbine farms have on Air Traffic surveillance and navigation. One hazard was determined as a loss of air traffic control situational awareness from degradation and/or loss of primary radar services over wind turbine farms. Although wind turbines have great impacts on conventional Very–high–frequency Omni–directional Range (VOR) Navigational Aids (NAVAID), existing controls can be leveraged to eliminate this concern as a hazard.

III. POLICIES

When air traffic facilities receive a proposed wind turbine farm package from the OEG, the air traffic manager and NATCA facility representative (or their designees) need to analyze the items of concern as it relates to their local flight paths and operations. The following three (3) phases describe the process and responsibilities for the analysis when a sponsor proposes to build a new wind turbine farm. Only Phase 1 is required; subsequent phases are only to be followed based on response decisions as described.

IV. ACTIONS

Phase 1: (To be completed within 15 business days of receipt of OEG package.)
Air traffic facilities must analyze the effects contained in the OEG package for primary radar and NAVAID impacts along with their identified mitigations, and return a response based on the local operational impacts (*No Objection, Objection, or Has Concerns*).

Contact your OEG Specialist with any comments, concerns or questions.

The air traffic manager, with the Director of Operations (DO)/Terminal District Manager (TDM) concurrence, returns one of the following responses to OEG:

1. ***No Objection*:** Air Traffic review process will be complete.

2. ***Objection:*** Provide supporting data to OEG. Air Traffic review process will be complete.
Note: Supporting data must include significant volume of activity per FAA Order JO 7400.2, Paragraph 6–3–4.

3. ***Has Concerns:*** If package content doesn't provide enough data to determine impact, proceed to Phase 2.
Note: This response will be used to determine issuing a Notice of Presumed Hazard (NPH) to the sponsor/proponent.

Phase 2: (To be completed within 15 business days of receipt of Technical Operations (Tech Ops) In–depth Study.)
If the sponsor requests more information from the Notice of Presumed Hazard (NPH) issued by OEG, and an in–depth Tech Ops study is possible, OEG will notify the facility of expected date of completion. (*expect 3–6 months for study to be completed*).
Air Traffic facilities must analyze the in–depth Tech Ops study for primary radar impacts along with their identified mitigations.

Contact your OEG Specialist with any comments, concerns, or questions.

The air traffic manager, with the Director of Operations (DO)/Terminal District Manager's (TDM) concurrence, returns one of the following responses to OEG:

1. ***No Objection*:** Air Traffic review process will be complete.

2. ***Objection:*** Provide supporting data to OEG. Air Traffic review process will be complete.
Note: Supporting data must include significant volume of activity per FAA Order JO 7400.2, paragraph 6–3–4.

Phase 3: (To be completed 90 calendar days from completion of Phase 1 or Phase 2 as necessary.)
If unable to determine a response in Phase 1 or Phase 2, the air traffic facility may initiate the Safety Risk Management (SRM) process in order to determine the operational impact of any risk mitigation activities; specifically, those mitigations prescribed in the Tech Ops study, air traffic procedural mitigations, or other potential mitigations.

Contact your Service Center Quality Control Group (QCG) POC for guidance as necessary.

Note: Industry sponsors may present information for a limited time preceding the SRM Panel. They may not participate or observe the remainder of the panel.

1. An SRM document with or without hazards is completed and signed. The air traffic manager, with the Director of Operations (DO)/Terminal District Manager (TDM) concurrence, returns either an *Objection* or *No Objection* response with supporting data to OEG.

2. If the result is an SRM document with a high hazard:
- **a.** AJT–0 will forward a response to OEG per the OEG process.
- **b.** AJT–0 will forward the SRM document with Hazard to AJV–0 for review and processing per the ATO Safety Management System Manual.

installation and maintenance as considered appropriate.

6–3–16. NEGOTIATIONS

Negotiations must be attempted with the sponsor to reduce the structure's height so that it does not exceed obstruction standards, mitigate any adverse effects on aeronautical operations, air navigation and/or communication facilities, or eliminate substantial adverse effect. If feasible, recommend collocation of the structure with other structures of equal or greater heights. Include in the aeronautical study file and determination a record of all the negotiations attempted and the results. If negotiations result in the withdrawal of the OE notice, the obstruction evaluation study may be terminated. Otherwise, the obstruction evaluation must be continued to its conclusion.

6–3–17. CIRCULARIZATION

a. Circularizing a public notice allows the FAA to solicit information that may assist in determining what effect, if any, the proposed structure would have to the navigable airspace. The OEG determines when it is necessary to distribute a public notice.

1. If a structure first exceeds obstruction standards, then a public notice should be circularized if:

(a) An airport is affected;

(b) There is possible VFR effect; or

(c) There is a change in aeronautical operations or procedures.

2. Circularization is not necessary for the following types of studies:

(a) A reduction in the height of an existing structure.

(b) A structure that would be located on a site in proximity to another previously studied structure, would have no greater effect on aeronautical operations and procedures, and the basis for the determination issued under the previous study could be appropriately applied.

(c) A proposed structure replacing an existing or destroyed structure, that would be located on the same site and at the same or lower height as the original structure, and marked and/or lighted under the same provisions as the original structure (this does not preclude a recommendation for additional marking/lighting to ensure conspicuity).

(d) A proposed structure that would be in proximity to, and have no greater effect than, a previously studied existing structure, and no plan is on file with the FAA to alter or remove the existing structure.

(e) A structure that would be temporary and appropriate temporary actions could be taken to accommodate the structure without an undue hardship on aviation.

(f) A structure found to have substantial adverse effect based on an internal FAA study.

(g) A structure that would exceed Part 77.23(a)(2) and would be outside the traffic pattern.

(h) A structure that would affect IFR operations but would only need FAA comment. For instance a structure that:

(1) Would raise a MOCA, but not a MEA.

(2) Would raise a MVA.

(3) Would raise a MIA.

3. Circularization for existing structures will be determined on a case–by–case basis.

b. Each public notice (automated letter CIR) must contain:

1. A complete, detailed description of the structure including, as appropriate, illustrations or graphics depicting the location of the structure:

(a) On–airport studies. Use airport layout plans or best available graphic.

(b) Off–airport studies. Use the appropriate aeronautical chart. Additional illustrations may be included, as necessary.

2. A complete description of the obstruction standards that are exceeded, the number of feet by which the structure exceeds the standards.

3. An explanation of the potential effects of the structure in sufficient detail to assist interested persons in formulating comments on how the structure would affect aeronautical operations.

4. A date by which comments are to be received. The date established should normally allow interested persons 30 days in which to submit

comments, but a shorter comment period may be established depending upon circumstances.

c. Public notices should be distributed to those who can provide information needed to assist in evaluating the aeronautical effect of the structure. As a minimum, the following governmental agencies, organizations, and individuals should be included on distribution lists due to their inherent aeronautical interests:

1. The sponsor and/or his representative.

2. All known aviation interested persons and groups such as state, city, and local aviation authorities; airport authorities; various military organizations within the DOD; flying clubs; national, state, and local aviation organizations; flight schools; fixed base operators; air taxi, charter flight offices; and other organizations or individuals that demonstrate a specific aeronautical interest such as county judges and city mayors.

3. Airport owners as follows:

(a) All public–use airports within 13 NM of the structure.

(b) All private–use airports within 5 NM of the structure.

4. The specific FAA approach facility, en route facility (ARTCC), and Flight Service Station (FSS) in whose airspace the structure is located.

5. Flight Standards.

6. An adjacent regional/service area office if the structure is within 13 NM of the regional state boundary.

7. As appropriate, state and local authorities; civic groups; organizations; and individuals who do not have an aeronautical interest, but may become involved in specific aeronautical cases, must be included in the notice distribution, and given supplemental notice of actions and proceedings on a case–by–case basis. Those involved should clearly understand that the public notice is to solicit aeronautical comments concerning the physical effect of the structure on the safe and efficient use of airspace by aircraft.

8. A proposed structure that penetrates the 40:1 by 35 feet or more, departure slope must be circularized to the following:

(a) Aircraft Owners and Pilots Association;

(b) National Business Aviation Association;

(c) Regional Air Line Association;

(d) Department of Defense;

(e) Air Transport Association;

(f) Air Line Pilots Association; and

(g) Other appropriate persons and organizations listed in this section.

d. Document and place in the obstruction evaluation file the names of each person and/or organizations to which public notice was sent. Reference to a distribution code, mailing list, or other evidence of circularization is sufficient provided a printout or list of each coded distribution is maintained for future reference. Also record the time period during which each printout or list is used. The retention schedule is listed in Order 1350.15, Records Organization, Transfer, and Destruction Standards.

e. Consider only valid aeronautical objections or comments in determining the extent of adverse effect of the structure. Comments of a non–aeronautical nature are not considered in obstruction evaluation as described in Part 77.

f. If the sponsor agrees to revise the project so that it does not exceed obstruction standards and would have no adverse effect, cancel the public notice, advise interested parties, as necessary, revise the obstruction evaluation study, and proceed as appropriate.