

**No. 23-1067 September Term, 2022
FAA-01/10/23 ROD
Filed On: March 15, 2023 [1990280]
Marin Audubon Society, et al.,
Petitioners**

v.

**Federal Aviation Administration, U.S.
Department of Transportation and National
Park Service, U.S. Department of the
Interior,
Respondents**

O R D E R

**The petition for review in this case was filed and docketed on March 13, 2023,
and assigned the above number.**

STATEMENT OF ISSUES TO BE RAISED

In support of Petition for Review filed on Monday March 13

Judicial review of air tour management plans as provided for in the National Parks Air Tour Management Act, 49 USC § 40128(b)(5) has been initiated by filing a Petition for Review directly in the DC Circuit Court of Appeals, pursuant to 49 USC § 46110(a).

Petitioners: Public Employees for Environmental Responsibility (PEER), Marin Audubon Society; Watershed Alliance of Marin; and Laura Chariton.

Respondents: U.S. Department of Transportation, Federal Aviation Administration; and U.S. Department of the Interior, National Park Service (NPS).

Issues to be raised

The issues to be raised by Petitioner in the appeal will include whether the Respondents violated Federal laws, as outlined below, when they issued the Record of Decision (ROD), dated January 10, 2023, approving the first ever Air Tour Management Plan for Golden Gate National Recreation Area, Muir Woods National Monument, San Francisco Maritime National Historical Park, and Point Reyes National Seashore (hereinafter, collectively the “SF area ATMP”). That ATMP authorized up to 2,548 airplane and helicopter flights per year, which are now ongoing.

The Respondents issued the SF area ATMP ROD based on a Categorical Exclusion under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq. The justification for the Categorical Exclusion was that the Defendants were using the 3-year average number of air tour flights for 2017-2019 as the “baseline,” thus they basically argued that the lack of significant

additions to the pre-existing number of flights would result in “no or only minimal” additional impacts from approving the new ATMP.

- A. By relying on a Categorical Exclusion, the Respondents violated the National Parks Air Tour Management Act of 2020 (NPATMA, 49 USC § 40128). That law explicitly requires full NEPA compliance in the form of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) before the Respondents could approve the ATMP at issue,. (§ 40128(b)(2))
- B. Further, NEPA and the Council on Environmental Quality implementing regulations do not allow the use of past-allowed air tour levels, which were not previously assessed by FAA or the NPS under NEPA, as a “baseline” in order to justify a Categorical Exclusion for a decision to approve a later ATMP. This “bootstrapping” by the Respondents of an unassessed baseline of effects as the NEPA assessment starting point for the SF area ATMP was illegal.
- C. The Respondents issued the ROD while failing to conduct analysis through the “hard look” of an EA or EIS in violation of NEPA. They failed to consider any alternatives to their Proposed Action and their analysis of the Proposed Action was inadequate on key impacts of noise, human disturbance, and animal disturbance, including impacts to threatened and endangered species protected under the Endangered Species Act, (16 U.S.C. § 1531 *et seq.*) as well as to migratory birds protected under the Migratory Bird Treaty Act (16 U.S.C. §§ 703–712), and to species protected by other laws.
- D. The Respondents further violated NEPA by failing to determine that “extraordinary circumstances” under 43 CFR § 46.215 apply here to disqualify the novel, sweepingly impactful, and highly controversial SF area ATMP from approval through a Categorical Exclusion.
- E. The Respondents’ issuance of the NPS SF area ATMP ROD also was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), because –
 - It was based on misinterpretations of relevant statutory provisions of the NPATMA and NEPA;
 - It failed to consider important aspects of the proposed ATMP and the evidence in the record, and it was not supported by substantial evidence; and
 - It lacked specified administrative mechanisms to enforce the terms of the ATMP or to address illegal overflights not authorized by the ATMP.
- F. Other legal may arise based on the full Administrative Record.

Relief we will seek includes:

- A stay of the SF area ATMP ROD under 49 USC § 46110(c).
- An injunction against allowing continuing air tours in the NPS SF area (above the 50 tours per year *de minimis* threshold of the NPATMA, 49 USC § 40128(a)(5)) until the NEPA, NPATMA, and APA violations herein are remedied.

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