

No. 13-1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SHERYL FLEITMAN; BARBARA BAXTER; ROSALEE CARLSON;
CINDY L. CHRISTIANSEN; VIRGINIA CORCORAN; BETH FLEITMAN;
VIVIAN FLEITMAN; PHILIP JOHENNING; CRAIG MARTIN;
TIM MCCARTHY; and MARTHA MCDONOUGH,

Petitioners,

-v.-

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition for Review of an Order of the Federal Aviation Administration

BRIEF OF RESPONDENT FEDERAL AVIATION ADMINISTRATION

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GLOSSARY

33L	Runway 33 Left
APA	Administrative Procedure Act
dB	decibel
DNL	Day-Night Average Sound Level
EA	Final Environmental Assessment for an Area Navigation Standard Instrument Departure procedure for Logan Airport Runway 33 Left
FAA	Federal Aviation Administration
NEPA	National Environmental Policy Act
NextGen	Next Generation Air Transportation System
Noise Study	Boston Logan Airport Noise Study/Boston Overflight Noise Study
RNAV	Area Navigation
SID	Standard Instrument Departure

STATEMENT OF JURISDICTION

Sheryl Fleitman and nine other residents of Milton, Massachusetts, and the Hyde Park area of Boston (collectively, “Fleitman”) filed a petition for review of a Finding of No Significant Impact and Record of Decision issued by the Federal Aviation Administration (“FAA”). The decision authorized the FAA to implement a new navigation procedure for aircraft departing from Runway 33 Left (“33L”) at Boston-Logan International Airport. Appendix (“A”) 6–18.¹ The agency issued its decision on June 4, 2013, and Fleitman filed a timely petition for review on August 2, 2013. *See* 49 U.S.C. § 46110(a). This Court has jurisdiction under 49 U.S.C. § 46110(c) to consider petitions for review of FAA final orders.

STATEMENT OF ISSUES

1. Did the FAA act arbitrarily or capriciously when it employed the noise measurement metric required under longstanding agency guidance?
2. Did the FAA act arbitrarily or capriciously by modeling noise impacts of the proposed action using the agency’s approved noise model?
3. Did the FAA address cumulative noise impacts from Runways 27 and 33L?
4. Did the FAA act contrary to an agency “Advisory Circular” that provides voluntary recommendations for pilots using visual flight rules?

¹ Fleitman did not file an appendix or addendum with her opening brief. All citations refer to the appendix the FAA filed concurrently with this response brief.

5. Did the FAA adequately consider departure procedure alternatives?
6. Did the FAA otherwise err in finding that a new departure procedure for Runway 33L would not have significant adverse noise impacts?
7. After the FAA concluded that its proposed action would not have a significant impact on any population, did the agency need to further analyze the potential for disproportionate impacts to minority or low-income populations?
8. Did the FAA act arbitrarily or capriciously in concluding that a change in Runway 33L's departure procedure would not lead to violations of National Ambient Air Quality Standards instituted pursuant to the Clean Air Act?
9. Did the FAA satisfy its legal obligations related to public participation?

STATEMENT OF THE CASE

A. Next Generation Air Transportation System (NextGen)

The President has directed the FAA “to establish and maintain a national air transportation system that meets the present and future civil aviation, homeland security, economic, environmental protection, and national defense needs of the United States, including through effective implementation of the Next Generation Air Transportation System (NextGen).” Exec. Order 13,479, § 1 (Nov. 18, 2008), *reprinted in* 49 U.S.C. § 40101. To achieve NextGen’s goal of modernizing the national airspace system by 2025, the FAA is implementing new performance-based navigation procedures at airports across the country. A31. In contrast to traditional,

ground-based navigation procedures, NextGen procedures use satellites to “facilitate more efficient design of airspace” and promote “safety, access, capability, predictability, operational efficiency and environmental benefits.” *Id.*

The NextGen procedure at issue in this case is an Area Navigation (“RNAV”) Standard Instrument Departure (“SID”). By relying on both ground-based and satellite-based navigation aids, RNAV SID procedures “permit[] aircraft operations on any desired flight path.” 14 C.F.R. § 1.1. Departing aircraft travel from the runway through a sequence of waypoints in space that are defined in advance by sophisticated software. A32. The FAA expects more than 80% of Logan Airport’s fleet to be equipped with technology and crew capable of flying RNAV SID procedures by 2015. *Id.* Prior to the decision under review, the FAA had established RNAV SID departure procedures for every major runway at Logan Airport other than Runway 33L—Runways 4R, 9, 15R, 22L, 22R, and 27. *Id.*

B. Environmental Assessment for a new Runway 33L departure procedure

In late 2012, the FAA announced plans to implement a new RNAV SID procedure for aircraft departing from Runway 33L. The proposal was designed “to increase the efficiency of [air traffic control] procedures at Logan Airport and in [the] adjoining/overlying airspace by using NextGen technology.” A41. NextGen technology, and RNAV procedures in particular, “improve[] safety, access, capacity, predictability, operational efficiency, reduce[] pilot and controller voice

communications and [have] environmental benefits, including reduced carbon dioxide emissions, reduced fuel use, and improved ability to address noise.” *Id.*

Because Runway 33L was the only major Logan Airport runway without an RNAV departure procedure, the proposed action would “enhance safety by eliminating the potential for flight deck confusion and subsequent radio frequency congestion ... between air traffic controllers and pilots as a result of changing departure procedures depending on the runway in use.” *Id.*

The FAA complies with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, when instituting air traffic control procedures. NEPA is a procedural statute that does not require an administrative agency to select a particular course of action or elevate environmental issues over other concerns. *See U.S. Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 756–757 (2004). Rather, NEPA directs agencies proposing “major Federal actions” that “significantly affect the quality of the human environment” to analyze the potential environmental impacts of those actions. 42 U.S.C. § 4332(C).

To determine whether NEPA requires an agency to prepare a detailed Environmental Impact Statement, the agency may prepare a shorter Environmental Assessment. 40 C.F.R. § 1501.4(c). An Environmental Assessment “[b]riefly provide[s] sufficient evidence and analysis” for the agency to determine whether it can make a Finding of No Significant Impact in lieu of preparing an Environmental

Impact Statement. *Id.* § 1508.9; *see Sierra Club v. Wagner*, 555 F.3d 21, 24 (1st Cir. 2009). In preparing these documents, FAA officials are guided by the Council on Environmental Quality’s NEPA regulations (40 C.F.R. pts. 1500–1508); Dep’t of Transportation Order 5610.1C, “Procedures for Considering Environmental Impacts” (July 24, 2012); and FAA Order 1050.1E, “Environmental Impacts: Policies and Procedures” (June 8, 2004), *as amended by* Change 1 (Mar. 20, 2006).

In January 2013, the FAA published a draft Environmental Assessment for an RNAV SID procedure for aircraft departing from Runway 33L. A15. The public had two months to comment on the draft document, and during this period, the FAA met with the Logan Airport Community Advisory Committee and separately with local, state, and federal officials. A15–16. The FAA received 384 comments on the draft document, including comments from some of the petitioners here. A16.

In May 2013, the FAA completed a Final Environmental Assessment (hereinafter, “EA”) for the Runway 33L project. The EA considered all of the environmental effects of the updated departure procedure within a 1,500 square-mile area surrounding Logan Airport. A56. The EA also listed every public comment received and the FAA’s response to each comment. A133– 253.

Among other issues, the EA considered the impact of a new Runway 33L departure procedure on noise levels from aircraft overflights. Noise (*i.e.*, unwanted sound) is an issue commonly associated with aircraft operations. A256. Fleitman’s

principal contention is that the FAA measured aircraft noise incorrectly. A few concepts of acoustic measurement will assist this Court in evaluating her claims.

1. Measuring noise from aircraft operations

Sound energy produced by a discrete source (like an airplane) is transmitted via sound waves—rapid oscillations of pressure slightly above and slightly below atmospheric pressure. A256. The strength of a particular sound is normally measured in decibels (“dB”). The reference point of the decibel scale (0 dB) corresponds to the quietest sound audible to the human ear. *Id.* The loudest sounds that we can hear without pain are approximately 120 dB. A257. Because decibels are logarithmic units, ten 50-dB sound sources operating together will produce a sound of only 60 dB (as opposed to 500 dB). *Id.*²

The total impact of a given noise on the listener depends on both the loudness and the duration of the event. For an airplane overflight, the decibel level rises as the plane approaches, peaks as the plane passes overhead, and falls as the plane recedes. Each overflight event generates a unique sound pattern, so acousticians need a common metric to assess their cumulative impact.

² A sound’s “loudness” is not merely a function of its decibel level. Loudness also depends on frequency, or “pitch.” A257. Our ability to hear decreases (and eventually disappears) at very high or very low frequencies. *Id.* Acousticians deemphasize those frequencies by “weighting” the decibel levels of different sounds depending on their pitch. *Id.* Consistent with the discussion in the EA, the decibel levels used in this brief are frequency-weighted. Fleitman does not contest the FAA’s practice of weighting aircraft noise levels to account for pitch.

That metric is Equivalent Sound Level—the constant sound level over a particular period (*e.g.*, a day) that contains the same amount of total sound energy as the actual time-varying sound level. A262–263. Equivalent Sound Level does not represent the sound level heard at any particular point in time, but it reflects the cumulative sound exposure for the entire period. Equivalent Sound Level properly values the intensity of loud but rapid aircraft overflights. Because Equivalent Sound Level is a logarithmic measure (expressed in decibels), those events tend to dominate the measurement. *Id.* For example, if a suburban community experiences 23 hours and 59 minutes of background noise (30 dB) interspersed with 1 minute of loud noise (100 dB), its Equivalent Sound Level for the day is 68 dB.

Equivalent Sound Level does not account for the added intrusiveness of noise at nighttime. Day-Night Average Sound Level (“DNL”) modifies Equivalent Sound Level by adding 10 dB to sound events occurring between 10 p.m. and 7 a.m. A263. Because DNL correlates strongly with the degree of community annoyance from aircraft noise, and numerous studies have failed to identify a superior metric, the FAA and other federal agencies have long used DNL to conduct NEPA noise analysis. A61, 263, 265–266; *see* Federal Interagency Committee on Noise; Report and Recommendations, 57 Fed. Reg. 44,170 (Sept. 24, 1992). In fact, FAA guidelines provide that “the cumulative noise energy exposure of individuals to noise ... *must be* established in terms of yearly [DNL].” A291 (emphasis added).

The federal government has invested substantial resources to determine the DNL decibel levels that correspond to significant adverse noise impacts from overflights. Based on that research, the FAA and other agencies have adopted 65 DNL (expressed as an annual average) as the threshold below which noise is generally considered to be compatible with all land uses. 14 C.F.R. pt. 150, app. A & tbl. 1 (FAA regulations); *see also* 24 C.F.R. § 51.103 (Department of Housing and Urban Development standards). Under FAA guidelines, a noise increase of at least 1.5 DNL in a “noise sensitive area” constitutes a “significant noise impact” if the expected DNL after the proposed action is at least 65 dB. A292.

It is impractical for the FAA to take on-the-ground yearly DNL measurements for more than a very limited number of data points. A263. More importantly, such measurements do not allow the agency to predict noise exposure levels of proposed actions under different future scenarios. A252. Thus, the FAA utilizes approved computer models to estimate the sound impact of proposed actions. These models accept detailed inputs on aircraft operations, including fleet mix information, arrival and departure times, trip distance, runway use, flight track location, and weather conditions. A61. The noise models consider impacts from all existing air traffic, not just flights affected by the proposed action. A62.

The Integrated Noise Model is the FAA-approved noise model for projects like the Runway 33L RNAV SID implementation. A291–292. In this case, the

Integrated Noise Model generated detailed output data for more than 84,000 locations within the 1,500-square mile study area. A61.

2. Noise impacts from a new Runway 33L departure procedure

For more than a decade, the FAA has worked closely with the Massachusetts Port Authority and the Logan Airport Community Advisory Committee on a comprehensive, multi-million dollar study of noise from aircraft operations at Logan Airport. A28. That study was originally called the Boston Overflight Noise Study and later renamed the Boston Logan Airport Noise Study; this brief refers to it simply as the “Noise Study.” *Id.* The FAA’s purpose in implementing a new Runway 33L departure procedure was not noise abatement, but the Noise Study (the largest FAA-funded noise study in the country) informed the agency’s selection of the route for the proposed action. During the Noise Study, the FAA had “analyzed several procedure designs for Runway 33L, but they were either not operationally feasible or did not reduce noise.” A31. In particular, the study revealed that routes straying substantially from the conventional Runway 33L departure procedure (LOGAN SIX) would be inconsistent with FAA operational requirements and/or expose substantially larger populations to significant adverse noise impacts. A33, 36.

Consequently, the departure route that the agency proposed in the EA was “designed to remain within the historical jet tracks that depart Runway 33L.” A39.

The two figures on page 11 compare the FAA's proposed Runway 33L departure route with existing aircraft routes (Figure 1) and other potential routes rejected during the Noise Study (Figure 2). In light of the Noise Study, the FAA determined that the proposed action and "no action" alternatives represented a reasonable range of alternatives to be evaluated in the EA. A46.

Consistent with FAA Order 1050.1E, the agency estimated noise impacts of each alternative using the Integrated Noise Model. A60. The model projected noise exposure levels for every "population centroid" within the study area from aircraft flying at or below 14,000 feet above sea level. A60–61. Population centroids are located at the center of each census block (the smallest geographical area for which the U.S. Census Bureau tabulates population data). A62. Normally, the FAA focuses on noise impacts only in noise-sensitive areas exposed to at least 65 DNL. *See supra*, at 8. In this case, however, the FAA voluntarily chose to model and disclose all impacts at or above 45 DNL, consistent with analysis in the Noise Study. A79. "[E]ven distant ambient noise sources and natural sounds such as wind in trees can easily exceed" 45 DNL. A78. The two figures on page 12 depict the projected aircraft noise exposure above 45 DNL in the greater Boston area under the no-action alternative (Figure 3) and the proposed action alternative (Figure 4).

The FAA concluded that the proposed RNAV SID procedure for Runway 33L would have no significant adverse noise impacts (increases of 1.5 DNL in noise

Figure 1. This graphic compares the proposed action route (in yellow) to existing departure routes (in blue and orange.) Modified from A40.

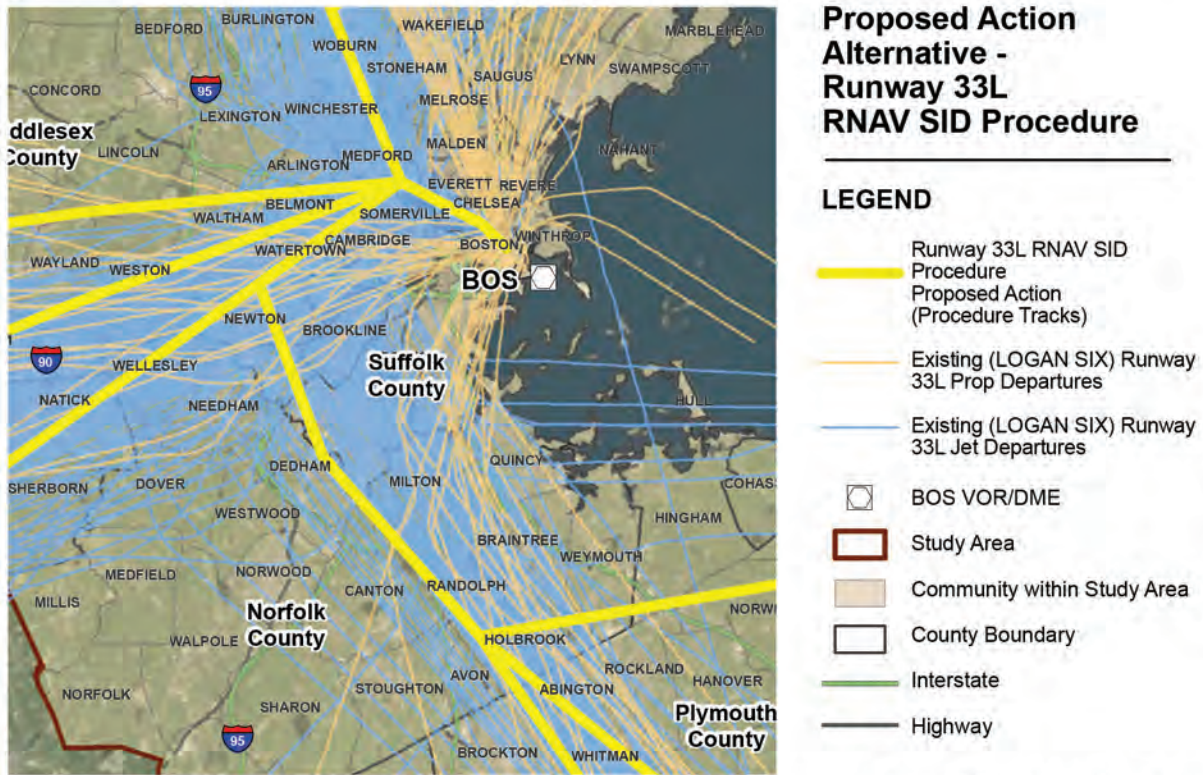


Figure 2. This graphic compares the proposed action route (in yellow) to the four alternative routes rejected during the Noise Study. Modified from A42.

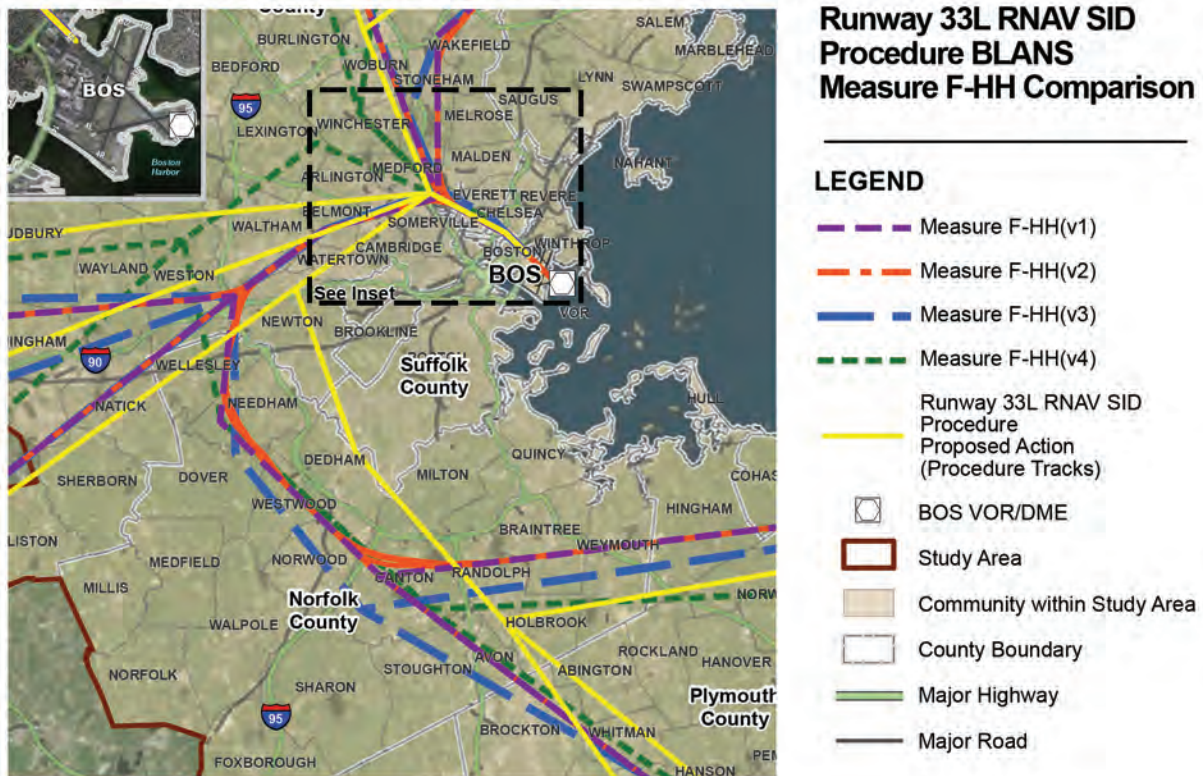


Figure 3. This graphic depicts noise exposure in 2015 at or above 45 DNL in populated centroids under the no-action alternative. Modified from A80.

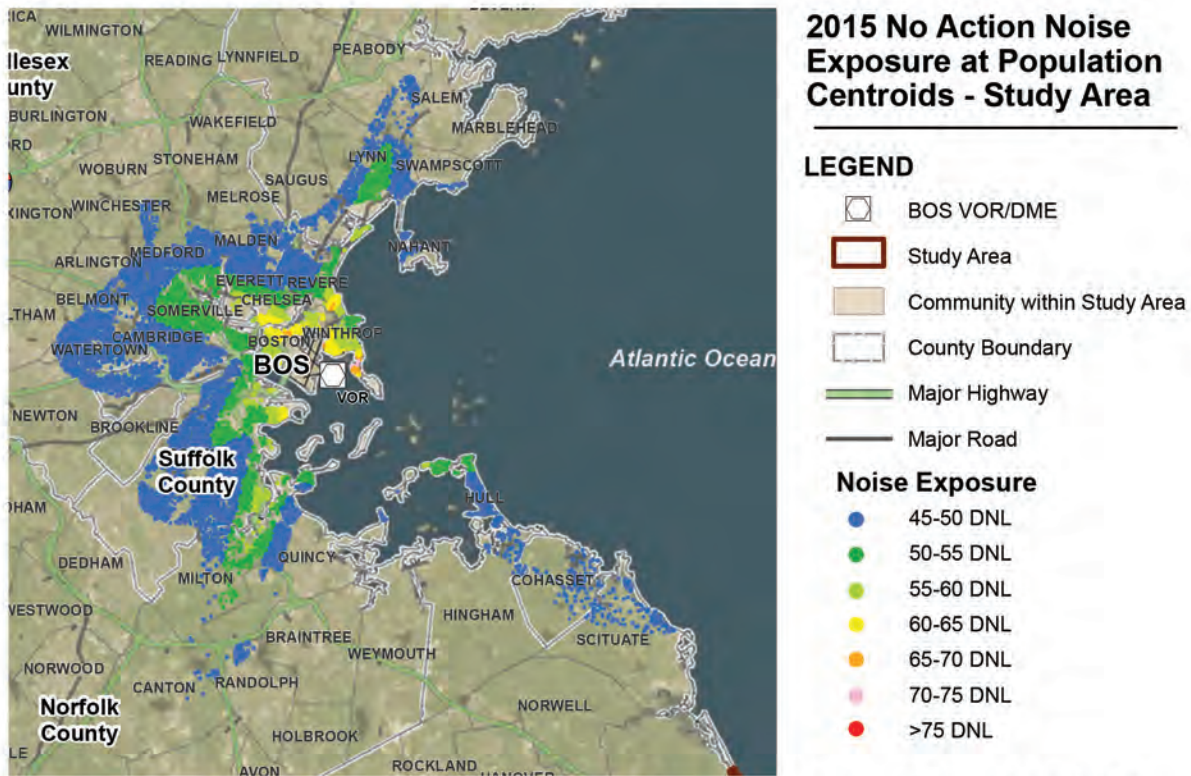
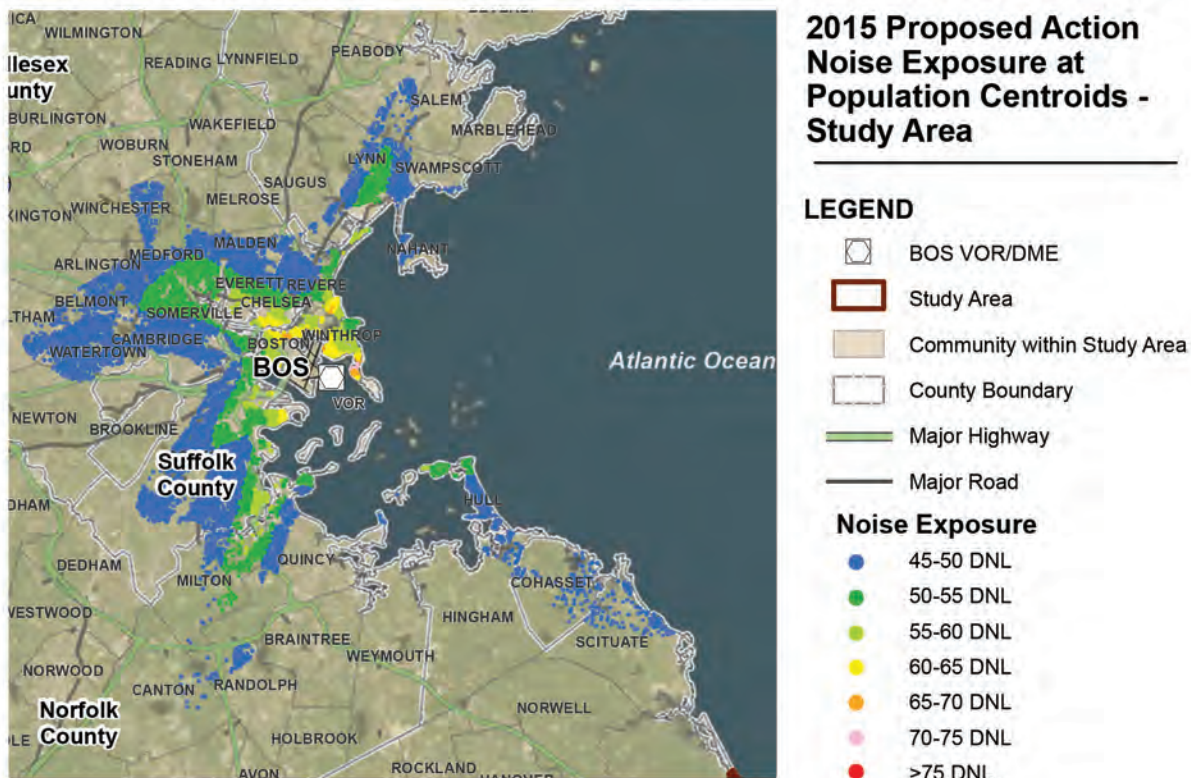


Figure 4. This graphic depicts noise exposure in 2015 at or above 45 DNL in populated centroids under the proposed-action alternative. Modified from A82.



sensitive areas that would experience 65 DNL or greater) in any populated centroid. A79. Indeed, the proposed action would not move noise levels higher than 65 DNL in any part of the study area. A85. As relevant to these petitioners, the proposed action was not expected to change the maximum DNL level experienced at populated centroids in Milton (56.8 DNL), and it would decrease the maximum DNL level experienced in the Hyde Park section of Boston from 45.4 to 45.2 DNL. A86. No Milton or Hyde Park residents would experience a noise level increase of more than 0.5 DNL, and several residents would experience less noise because aircraft would attain higher altitudes before flying over those communities.¹ A86, 138, 248.

Overall, the proposed action would expose nearly 68,000 fewer residents in the study area to aircraft noise levels above 45 DNL. A88. In sum, the FAA found that the proposed action would not have a significant adverse noise impact when compared to the no-action alternative. A10.

C. Finding of No Significant Impact and Record of Decision

The FAA similarly found that the proposed action would not significantly impact other environmental resource categories. A11–14. As relevant to this case,

¹ Aircraft departing from Runway 33L fly over Milton and Hyde Park at much higher altitudes than aircraft arriving to or departing from other runways. A138.

the agency determined that an RNAV departure procedure for Runway 33L “would have a negligible effect on [air] traffic” and thus would not have a significant impact on air quality in the region. A13. And because the proposed action would not have a significant environmental impact on any population in the region, the FAA reasoned that “no persons of low income or minority populations would be affected at a disproportionately higher level than would other population segments.” A11. The FAA issued a formal Finding of No Significant Impact and incorporated that finding into a record of decision authorizing the new departure procedure on June 4, 2013. A17–18.

Petitioners filed a *pro se* challenge to the FAA’s action on August 2, 2013. A1. Several petitioners were later dismissed for lack of diligent prosecution. A2–5.

STANDARD OF REVIEW

This Court reviews FAA action under the terms of the Federal Aviation Act and the Administrative Procedure Act (“APA”). *Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 717 (1st Cir. 1999). Judicial review of the FAA’s decision is limited to the administrative record compiled by the agency. *Atieh v. Riordan*, 727 F.3d 73, 75 (1st Cir. 2013); *see also* Fed. R. App. P. 16(a). This Court can only consider objections made during the FAA’s decisionmaking process. 49 U.S.C. § 46110(d); *cf. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978) (“NEPA places upon an agency the obligation to consider every

significant aspect of the environmental impact of a proposed action, [but] it is still incumbent upon intervenors who wish to participate to structure their participation so that it ... alerts the agency to the intervenors' position and contentions.”).

FAA actions are reviewed using the “highly deferential” arbitrary-and-capricious standard prescribed in the APA. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) (citing 5 U.S.C. § 706); *see also Safeguarding the Historic Hanscom Area's Irreplaceable Resources, Inc. v. FAA*, 651 F.3d 202, 207 (1st Cir. 2011) (*Historic Hanscom*) (explaining that judicial review under NEPA is governed by this standard); *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 447 (1st Cir. 2002) (same for the Clean Air Act). “Review under the arbitrary and capricious standard is narrow and this Court may not substitute its judgment for that of the agency, even if it disagrees with the agency’s conclusions.” *River Street Donuts*, 558 F.3d at 114. The FAA’s “actions are presumed to be valid,” and this Court must affirm them if they are “supported by a rational basis.” *Id.*

The FAA’s factual findings need only be “supported by substantial evidence,” 49 U.S.C. § 46110(c), meaning “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 217 (1938). Put another way, the reviewing court must decide whether “it would have been possible for a reasonable jury to reach the [same] conclusion” based on the facts before the agency at the time of its decision. *Allentown Mack*

Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 366–367 (1998). The substantial evidence standard is thus even more deferential than the “clearly erroneous” standard used to review a trial court’s factual findings. *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999); *see generally Penobscot*, 164 F.3d at 718. “Gauzy generalizations and pin-prick criticisms, in the face of specific findings and a plausible result, are not even a start at a serious assault” on an agency’s factual conclusions. *Save our Heritage, Inc. v. FAA*, 269 F.3d 49, 60 (1st Cir. 2001).

The FAA’s legal conclusions are reviewed *de novo*. *Penobscot*, 164 F.3d at 718. But where a statute is ambiguous, courts defer to the permissible interpretation of the administering agency. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984). And where a regulation is ambiguous, courts defer to the authoring agency’s construction unless it is clearly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

SUMMARY OF ARGUMENT

This Court should uphold the FAA’s decision to adopt an RNAV SID procedure for aircraft departing from Runway 33L. The record amply supports the agency’s finding of no significant impact, and Fleitman’s myriad challenges to that finding lack merit. Indeed, nearly all of her claims are vague, perfunctory, and completely unsupported.

The FAA reasonably found that its action would have no significant impact on noise exposure levels. In so finding, the FAA properly relied on the noise measurement metric (DNL) and airport noise model (Integrated Noise Model) required by longstanding agency guidance. This Court has previously upheld the FAA's use of these same noise measurement tools, and Fleitman does not present any feasible and superior alternatives. Instead, she faults the agency for not conducting on-the-ground field measurements of noise exposure levels in the areas of interest to petitioners (Milton and Hyde Park). The agency reasoned, however, that such a step would be both impracticable and insufficient to model the noise impacts of an updated Runway 33L departure procedure.

Fleitman also raises a slew of other arguments related to the FAA's noise analysis. She contends that the agency failed to analyze the cumulative impact of overflights from Runways 27 and 33L, but in fact, the EA expressly considered such impacts and determined that they would not be significant. She argues that the FAA violated a nonbinding Advisory Circular that asks pilots to use caution when flying over noise-sensitive areas. The memorandum's recommendations are expressly voluntary, and they do not apply to pilots flying RNAV procedures like the one at issue here. Fleitman also criticizes the FAA for failing to consider an alternative departure route that would reduce (as opposed to maintain) air traffic over Milton and Hyde Park. As the agency explained, however, such alternatives

were infeasible and/or would increase the overall noise burden in the study area.

The remaining challenges to the FAA's noise methodology are likewise unavailing.

The same is true of Fleitman's environmental justice, Clean Air Act, and public participation claims. Once the FAA determined that its proposed action would not have a significant environmental impact on anyone in the study area, the agency did not need to conduct further analysis to determine that the action would not impose disproportionate burdens on low-income or minority populations.

Governing regulations entitled the FAA to presume that a change in Runway 33L's departure procedure would not result in violations of National Ambient Air Quality Standards, and Fleitman offers no evidence suggesting otherwise. And Fleitman's argument that the FAA violated its public participation obligations is belied by the fifty-six pages of responses to public comments appended to the agency's EA.

ARGUMENT

I. THE FAA REASONABLY EMPLOYED THE DNL METRIC TO MEASURE NOISE LEVELS.

Fleitman principally challenges (Br. 7–12) the DNL metric used to assess the noise impacts of the proposed action. But she fails to carry her heavy burden to show that the FAA's use of DNL—the metric required by longstanding agency guidance—was arbitrary or capricious. A291.

“[C]ourts have good reason to take seriously the deference due to the agency in technical and scientific matters,” *Sierra Club v. Wagner*, 555 F.3d 21, 28 (1st Cir. 2009), and the FAA may select any “reasonable” metric to measure noise impacts from aircraft operations. *Town of Winthrop v. FAA*, 535 F.3d 1, 13 (1st Cir. 2008). DNL has been the federal government’s preeminent noise measurement metric for decades, and multiple studies have failed to identify a superior substitute. *See supra*, at 7; *see also* A61 (“DNL is the best measure of significant impact on the quality of the human environment [and] is the only noise metric with a substantial body of scientific data on the reaction of people to noise”). This Court has previously approved the FAA’s use of DNL as a reasonable noise measurement metric, and it should do so again in this case. *See Historic Hanscom*, 651 F.3d at 217; *see also City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994) (noting that the District of Columbia Circuit has “specifically approved” the use of DNL on multiple occasions).

Fleitman fails to identify “any alternative measure that seems both practical and superior” to DNL. *Valley Citizens for a Safe Env’t v. Aldridge*, 886 F.2d 458, 468 (1st Cir. 1989). Instead, she relies (Br. 8–9) on an extra-record report that recites some limitations of DNL. This Court cannot consider that report because Fleitman did not present it to the agency during the decisionmaking process. *See Fed. R. App. P. 16(a); Seacoast Anti-Pollution League v. Nuclear Regulatory*

Comm'n, 598 F.2d 1221, 1231 & n.8 (1st Cir. 1979). In any event, the report itself acknowledges that “little or no improvement in accuracy or precision of the prevalence of aircraft noise-induced annoyance may be expected from substitution of another noise metric for DNL.”¹ The question for this Court is not whether DNL is “a perfect, or even a very good, [metric] for predicting just how much noise there would be or how many people that noise would annoy”; the issue is whether DNL was a permissible metric for the FAA to use in light of the record before the agency at the time it made a decision. *Valley Citizens for a Safe Env't v. Aldridge*, 969 F.2d 1315, 1318 (1st Cir. 1992). Fleitman has not demonstrated that the FAA acted arbitrarily or capriciously when it used the DNL metric to assess the noise impacts of a new Runway 33L departure procedure.

II. THE FAA REASONABLY EMPLOYED THE INTEGRATED NOISE MODEL TO ESTIMATE NOISE IMPACTS.

In a related attack, Fleitman challenges (Br. 7–12) the FAA’s decision to use the Integrated Noise Model to conduct noise analysis. This Court has previously approved the agency’s reliance on that model, *e.g.*, *Town of Marshfield v. FAA*, 552 F.3d 1, 3 (1st Cir. 2008), and FAA guidelines require that the Integrated Noise

¹ Vincent Mestre, et al., *Technical Support for Day/Night Average Sound Level (DNL) Replacement Metric Research*, at 60 (June 14, 2011), available at https://www.faa.gov/about/office_org/headquarters_offices/apl/research/science_integrated_modeling/noise_impacts (last visited July 2, 2014) (click on “Part 2”).

Model be used to assess the noise impact of actions like a change in Runway 33L's departure procedure. A291–292.

Fleitman contends (Br. 7) that “the level of imprecision in the noise estimates is so large that no conclusion can be made ... about whether the new Runway 33L procedure will cause significant increases or decreases in noise levels.” She relies on the fact that airport noise models typically “have a 95% confidence interval of ± 3 dB to ± 5 dB.” A272. This means that 95% of the time, a generic noise model will predict a DNL within 3–5 dB of the actual DNL. Confidence intervals reflect the uncertainty inherent in any model that estimates on-the-ground measurements. *Id.* (explaining that confidence intervals compare “model output to long-term cumulative noise levels from permanent noise monitoring systems.”). Noise models must account for several complex variables (*e.g.*, atmospheric conditions and topography), and the inevitable imprecision in modeling these variables leads to small differences between model projections and actual DNL values. A271–272.

Noise models do an even better job, however, when predicting *changes* in noise exposure levels due to incremental changes in the airspace environment. In this case, for example, the only difference between the proposed action and no-action alternatives was the modest shift in air traffic patterns due to the updated Runway 33L departure procedure. A79. All of the other variables that normally lead to uncertainty were held constant as between the two alternatives. Thus,

contrary to Fleitman's view (Br. 7–8), the confidence interval for an airport noise model does not reflect the degree of uncertainty in its prediction of noise level changes due to a proposed action. Substantial evidence supported the FAA's conclusion here that noise levels would not increase by 1.5 DNL or more in any noise sensitive location exposed to at least 65 DNL as a result of the proposed action. A79. Fleitman has not mounted the “detailed and cogent attack” that would be necessary for this Court to find the agency's factual conclusion “unsupported or irrational.” *Marshfield*, 552 F.3d at 4.

Fleitman does not argue that the Integrated Noise Model is less accurate than other airport noise models, nor does she proffer an alternative model that the FAA should have employed. Instead, she criticizes (Br. 10) the FAA's decision to model the noise impact of the proposed action rather than “actually measur[ing] the impact” *ex ante* using undisclosed means. Fleitman suggests (Br. 11) that the FAA should have taken annual DNL measurements in Hyde Park (and presumably throughout the 1,500-square mile study area) before updating the departure procedure for Runway 33L.² The agency explained, however, that installing “a vast array of microphones across the communities surrounding an airport” was

² Fleitman offers no support for her erroneous assertion (Br. 11) that the FAA's no-action alternative assumed that no aircraft flew over Hyde Park. The agency expressly recognized that Hyde Park already experienced overflights from several runways, A251, and it took those flights into account when modeling noise impacts in both the no-action and proposed action alternatives.

prohibitively expensive and would not permit the agency to model “future growth and ‘what-if’ scenarios.” A252. “[W]ithin wide limits, the final decision as to how much analysis is necessary in view of the available data must be the agency’s, subject to judicial review only for obviously incorrect results or methodology.”

Commonwealth of Massachusetts. v. Andrus, 594 F.2d 872, 886 (1st Cir. 1979).

Fleitman has not demonstrated that the FAA’s decision to use an approved noise model was arbitrary or capricious.

III. THE FAA ADDRESSED CUMULATIVE NOISE IMPACTS FROM AIRCRAFT DEPARTING FROM RUNWAY 27.

Fleitman incorrectly asserts (Br. 14–15) that the FAA did not analyze whether aircraft departing from Runway 33L using the new RNAV procedure would have a cumulative noise impact when coupled with aircraft departing from Runway 27.

The FAA instituted an RNAV departure procedure for Runway 27 in 1999, but that procedure stopped at Waypoint WYLYY (located over the Jamaica Plain area of Boston). A300–301. In early 2013, the FAA extended the Runway 27 RNAV procedure beyond that waypoint to one of several exit points depending on a particular aircraft’s destination. A300. In the decision under review, the FAA specifically found that a new RNAV departure procedure for Runway 33L would not have a significant cumulative noise impact when coupled with the newly-extended Runway 27 RNAV departure procedure. A99–100, 250.

Fleitman provides no evidence that the FAA's cumulative impact analysis was conducted improperly. Rather, she argues (Br. 15) that the agency should have prepared an Environmental Impact Statement for its extension of the Runway 27 RNAV departure procedure instead of using a NEPA categorical exclusion for that action. *See* 40 C.F.R. § 1508.4 (explaining that neither an Environmental Impact Statement nor an Environmental Assessment is required for certain "categorically excluded" actions "which do not individually or cumulatively have a significant effect on the human environment"). This Court cannot consider Fleitman's claim because the Runway 27 modification was a separate and independent action that her petition did not challenge. A1, 44.

In any event, the FAA reasonably used a NEPA categorical exclusion when it extended the preexisting RNAV departure procedure for Runway 27. A298. The extension merely "revised air traffic control procedures conducted at 3,000 feet or more above ground level," and the FAA categorically excludes such actions from further NEPA analysis. A287, 301. Fleitman misplaces reliance (Br. 14–15) on *Runway 27 Coalition, Inc. v. Engen*, 679 F. Supp. 95 (D. Mass. 1987), where the district court concluded that the FAA had to prepare an Environmental Assessment because the action "affected flight paths less than 3,000 feet above ground level." 679 F. Supp. at 103. By contrast, the RNAV *extension* that the agency approved for Runway 27 did not affect flight paths less than 3,000 feet above ground level.

Furthermore, the FAA applied a second, independent categorical exclusion to the Runway 27 RNAV procedure extension for new air traffic control procedures that “overlay ... existing procedures.” A287; *see* A301. Fleitman does not contend that the agency erred by applying that exclusion.

IV. THE FAA DID NOT VIOLATE VOLUNTARY GUIDANCE FOR PILOTS FLYING OVER NOISE-SENSITIVE AREAS.

Next, Fleitman argues (Br. 16–18) that the FAA did not meet its obligation to protect the population from aircraft noise in the Blue Hills Reservation, Stony Brook Reservation, and Camp Meigs Memorial Park. She cites (Br. 16) an Advisory Circular that encourages pilots operating under “visual flight rules” to avoid noise-sensitive areas or fly more than 2,000 feet above ground level in such areas on flight paths that will minimize aircraft noise. *See* FAA Advisory Circular No. 91-36D, at 2 (Sept. 17, 2004) , *available at* http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC91-36d.pdf (last visited July 2, 2014); *see also Hudson v. FAA*, 192 F.3d 1031, 1033 n.1 (D.C. Cir. 1999) (“An FAA advisory circular is akin to a policy statement.”). By its terms, that Circular does not apply to flights operating under formal air traffic control procedures like the RNAV procedure at issue here. *See* 14 C.F.R. pt. 91, subpt. B (contrasting visual flight rules with instrument flight rules like an RNAV SID). Furthermore, the Circular applies to *pilots* rather than the FAA, and aircraft departing from

Runway 33L fly over the areas in question at much higher altitudes than 2,000 feet above ground level. A53. Thus, even if the Circular was mandatory and binding on the agency itself (which it is not), the FAA did not violate it here.³

V. THE FAA ADEQUATELY CONSIDERED ALTERNATIVES TO THE PROPOSED ACTION.

Fleitman contends (Br. 19–22) that the agency did not sufficiently consider alternatives to the proposed Runway 33L departure procedure. She cites paragraph 405(d) of Order 1050.1E, which explains that “[t]here is no requirement for a specific number of alternatives or a specific range of alternatives to be included in an EA,” except that “[a]n EA must consider the proposed action and a discussion

³ Fleitman does not allege any violation of the National Historic Preservation Act, Pub. L. No. 89-665 (Oct. 15, 1966) (codified as amended at 16 U.S.C. § 470 *et seq.*); Section 4(f) of the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 934 (Oct. 15, 1966) (recodified at 49 U.S.C. § 303(c)); or Section 6(f) of the Land and Water Conservation Fund Act, Pub. L. No. 88-578, 78 Stat. 897 (Sept. 3, 1964) (codified as amended at 16 U.S.C. § 4601-4 *et seq.*). She has forfeited any such claims by not raising them in her opening brief. *See Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. 2009).

In any case, the FAA met its obligations under those statutes by thoroughly addressing relevant properties in the EA. A65–66, 68, 89, 94–95. For example, the agency modeled noise exposure at more than three hundred locations within the Blue Hills Reservation. A241. “Under the proposed action, DNL values ranged from less than 45 DNL to 52.9 DNL, and the greatest increase and decrease[] remain[ed] below 1 DNL.” *Id.* The EA did not specifically highlight impacts to the Stony Brook Reservation or Camp Meigs Memorial Park because neither petitioner nor any other commenter raised any noise concerns specific to those locations. *See* 49 U.S.C. § 46110(d) (“[T]he court may consider an objection ... only if the objection was made in the proceeding conducted by the [FAA].”).

of the consequences of taking no action.” A289. The FAA complied with that provision by considering the proposed action and no-action alternatives. A47, 52. In Fleitman’s view (Br. 19), the FAA “may not limit the range of alternatives to action or no action when there are no unresolved conflicts concerning alternative uses of available resources.” But longstanding FAA guidance states exactly the opposite: the agency *may* limit the range of alternatives in such circumstances. A289. It was reasonable for the FAA to limit the range of alternatives in this case because the agency had already considered and rejected several alternative routes during the Noise Study (because they were operationally infeasible and/or increased the overall noise burden within the study area).⁴ A33, 36, 39.

Fleitman argues (Br. 20) that “[t]here are better airline routes available that the FAA failed to adequately consider,” namely routes with southbound turns farther west (over the towns of Natick, Sherborn, or Holliston). Fleitman makes the puzzling assertion (Br. 21) that these other routes “would not cause as great a noise or exhaust impact ... since aircraft will reach a higher altitude by the time they fly over towns and people.” To the contrary, the Logan Airport Community Advisory Committee and the FAA considered and rejected more westerly routes in part

⁴ Fleitman also relies (Br. 19) on paragraph 102(2)(E) of Order 1050.1E, but no such provision exists. We can only assume that she is referring to Section 102(2)(E) of *NEPA*, which makes the general point that agencies must “study, develop, and describe appropriate alternatives to recommended courses of action.” 42 U.S.C. § 4332(2)(E). As described above, the FAA did so in this case.

because they exposed *larger* populations to adverse aircraft noise impacts.⁵ A33, 36, 39; *see* Fig. 1, *supra*, at 11. Shifting aircraft farther west might reduce the noise burden on Milton and Hyde Park from Runway 33L departures, but only at the (greater) expense of other towns. *See Seacoast Anti-Pollution League*, 598 F.2d at 1232 n.9 (“The question is always whether there is a significant Net environmental advantage if the [nuisance] is placed in one rather than the other spot.”).

Fleitman correctly points out (Br. 20) that the EA mislabeled waypoints COLYN and COUSY; the waypoint labels are reversed. Contrary to Fleitman’s argument, however, this minor error did not undermine the FAA’s alternatives analysis. The flight patterns modeled for the proposed action and no-action alternatives were exactly the same as they would have been if the waypoints had been given the proper names. The agency’s labeling error, which Fleitman failed to point out in comments on the draft Environmental Assessment, was harmless.

⁵ Fleitman faults the FAA (Br. 5 n.1) for using 2000 census data for departure routes examined during the Noise Study. The Noise Study began in 2002, so for ease of comparison, the study examined various noise abatement measures using 2000 census data (even as the Noise Study continued beyond 2010). A36. In the EA, however, the FAA used the latest available census data (from 2010) to compare the proposed action and no-action alternatives. It was not arbitrary or capricious for the agency to refrain from reanalyzing the alternatives rejected during the Noise Study, particularly when Fleitman offers no record evidence suggesting that the rejected alternatives would have been superior to the proposed action had the FAA used different census data. *See also Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999) (“[A]rguments raised only in a footnote or in a perfunctory manner are waived.”).

Fleitman contends (Br. 20) that the FAA “failed to consider other reasonable alternatives for SSOXS, BRUWN and CELTK routes.” Because Fleitman did not make this objection to the agency during the comment period, she cannot raise it now in this Court. 49 U.S.C. § 46110(d). Furthermore, her proposed alternatives are “singularly lacking in specifics,” and she offers no reason to think that shifting these waypoint locations would lessen overall noise exposure levels within the study area. *Seacoast Anti-Pollution League*, 598 F.2d at 1231.

Fleitman’s NEPA alternatives arguments are all variations on the same theme: the FAA should have used the Runway 33L project as a mechanism to shift air traffic patterns away from Milton and Hyde Park toward other communities that, in her view, are not equitably sharing the noise burden from Logan Airport. That is a policy argument, not a legal one, and it implicates issues well beyond the scope of the particular decision under review. *See Save our Heritage*, 269 F.3d at 56 (“Only to the extent that petitioners are actually seeking redress from the effects of the present order[] are their petitions timely, and this limitation must be borne in mind in considering the arguments.”). “It has been a longstanding policy of FAA to avoid shifting noise from one community to another solely for noise abatement purposes,” A240, particularly where (as here) noise abatement is not the driving force behind the agency’s action. For purposes of this case, the salient point is that Fleitman has not identified “a feasible and obviously superior alternative” that

would accomplish the FAA's purpose and need for a NextGen departure procedure for Runway 33L. *Seacoast Anti-Pollution League*, 598 F.2d at 1231.

VI. FLEITMAN'S OTHER NOISE ARGUMENTS ALSO LACK MERIT.

Fleitman incorrectly contends (Br. 5–7) that the FAA's use of household population data (as opposed to total population data) was arbitrary and capricious. Household population data excludes people living in group quarters (e.g., correctional facilities); such individuals are more likely to be double-counted and skew the agency's population analysis. A74.⁶ Furthermore, any error was harmless. *See* 5 U.S.C. § 706 (“[D]ue account shall be taken of the rule of prejudicial error.”). Population data is relevant when assessing the importance to a community of a significant noise impact. A294. But in this case, the FAA concluded that its proposed action would not have any significant adverse impact on noise levels in any populated census block. *See supra*, at 13. The agency's conclusion would be the same whether a given census block contained 20 or 20,000 people.

Fleitman also argues (Br. 6) that the FAA should have investigated noise from school buses and railroad activities in certain areas of Hyde Park. But a shift

⁶ The FAA reported noise levels only in populated census blocks, meaning that the analysis in the EA could be incomplete if a potentially significant noise impact occurred in a census block that the agency had mischaracterized as unpopulated. But Fleitman (Br. 5–6) does not identify any census block composed solely of individuals in “transient or temporary residential arrangements.”

in Runway 33L's departure procedure would have no effect on those ground-based activities. Moreover, the agency determined that the proposed action would not increase noise levels anywhere within Hyde Park. A86. In fact, the action would decrease noise levels in some areas. *Id.* Thus, regardless of the amount of Hyde Park background noise, the FAA reasonably concluded that the proposed action would not have a significant adverse impact on noise levels in that community.

Finally, there is no merit to Fleitman's argument (Br. 11) that the FAA should have addressed the possibility that isolated aircraft could fly below the minimum altitude authorized by agency regulations. The abstract possibility of illegal behavior on the part of individual pilots does not invalidate the FAA's noise analysis, particularly when Fleitman offers no reason why updating Runway 33L's departure procedure would prompt more airspace-floor violations. The FAA was entitled to assume for purposes of its noise analysis that aircraft in the study area would follow applicable airspace guidelines.

VII. THE FAA SUFFICIENTLY ANALYZED ADVERSE EFFECTS ON MINORITY AND LOW-INCOME POPULATIONS.

Fleitman asserts (Br. 4) that the FAA "failed to adequately consider adverse effects to minority or low income populations" from an updated Runway 33L departure procedure. Her argument fails as a matter of logic. "Because there are no significant impacts as a result of the Proposed Action, there are no adverse human

health or environmental effects associated with the Proposed Action As such, no persons of low income or minority populations would be affected at a disproportionately higher level than would other population segments.” A97. Because the updated Runway 33L departure procedure had no significant impact on *any* population, there was no danger that the action would disproportionately burden low income or minority populations. Thus, the FAA had no reason to “review the racial and economic compositions of areas beneath the Runway 33L departure route” before issuing its decision. *Fleitman Br. 5*.

In any event, *Fleitman* does not identify any particular provision of the U.S. Department of Transportation’s Order 5610.2(a) on environmental justice that the FAA allegedly violated here. *See also Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999) (“[A]rguments raised only ... in a perfunctory manner are waived.”).

VIII. THE FAA DID NOT VIOLATE THE CLEAN AIR ACT.

Under authority granted by the Clean Air Act, the U.S. Environmental Protection Agency has established National Ambient Air Quality Standards for ambient concentrations of several “criteria pollutants.” 42 U.S.C. §§ 7408–7409. The Act directs each State to adopt a “state implementation plan” to achieve and maintain every existing National Ambient Air Quality Standard within its borders.

Id. § 7410(a)(1). The Act then requires federal agencies to ensure that their actions “conform” to applicable state implementation plans. *Id.* § 7506(c)(1).

Regulations promulgated by the Environmental Protection Agency provide that agencies may designate certain types of actions as “presumed to conform” to state implementation plans. 40 C.F.R. § 93.153(f). Such designations are published in the Federal Register and undergo public notice and comment. *Id.* § 93.153(h). The FAA has identified several categories of actions that are presumed to conform, including “changes in ... departure procedures.” Federal Aviation Administration Presumed to Conform Activities Under the General Conformity Rule, 72 Fed. Reg. 41,565, 41,578 (July 30, 2007). Because the update to Runway 33L’s departure procedure fell within that category, the FAA permissibly presumed that its action conformed to applicable state implementation plans. A96.

Fleitman appears to concede that the FAA’s action here was a “change[] in ... departure procedure.” 72 Fed. Reg. at 41,578. However, she attacks (Br. 13) the FAA’s underlying presumption as “not supported by any facts.” That challenge to the agency’s 2007 rule is untimely, and in any case, it fails because the notice accompanying the presumption explained the FAA’s rationale and the facts on which the presumption was based. *Id.* at 41,578 & nn. 51–56.

Fleitman also asserts (Br. 13) that the presumption should not apply in this particular case due to “the substantial air traffic” over Milton and Hyde Park. The

presumption that an action conforms with applicable state implementation plans may be overcome where “[the Environmental Protection Agency] or a third party shows that the action would (1) Cause or contribute to any new violation of any [National Ambient Air Quality Standard] in any area; (2) Interfere with provisions in the applicable [state implementation plan] for maintenance of any standard; (3) Increase the frequency or severity of any existing violation of any standard in any area; or (4) Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area” 40 C.F.R. § 93.153(j). Fleitman has not shown that an update to the Runway 33L departure procedure would interfere with the attainment of any National Ambient Air Quality Standard. She does not even identify a standard that would allegedly be violated. Instead, she cites (Br. 13) the now-defunct Preferential Runway Advisory System, which is irrelevant to the FAA’s Clean Air Act compliance. A297 (letter from Community Advisory Committee abandoning Preferential Runway Advisory System in 2012).

IX. THE FAA PROVIDED SUFFICIENT OPPORTUNITY FOR PUBLIC PARTICIPATION.

Finally, Fleitman contends (Br. 22–23) that the FAA violated the public participation guidelines in Order 1050.1E. That document requires the agency to “obtain information from the public regarding environmental concerns surrounding an agency’s proposed action; fully assess and disclose potential environmental

impacts resulting from the proposed action and alternatives; and provide the public with this information and allow it to comment on these findings.” A284. The FAA complied with that guidance here: it published notice of the draft Environmental Assessment in major Boston-area newspapers; made the draft document and supporting material available on a public website; and solicited public comment on the draft Environmental Assessment for a two-month period. A15–16.

Order 1050.1E states that public comments on an Environmental Assessment “should be responded to, to the extent practicable.” A288; *see Penobscot*, 164 F.3d at 719 n.3 (explaining that the requirement to respond to public comments is not “particularly demanding”). The EA here included dozens of pages of responses to public comments, and Fleitman does not allege that any particular response was inadequate. In fact, the FAA went above and beyond its obligations by answering detailed questions and providing additional data to one of the petitioners. A232–233; *see Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 520 (D.C. Cir. 2010) (noting that agencies have significant “discretion to afford public participation in EA drafting”). The FAA also met multiple times with the Logan Airport Community Advisory Committee, which includes representation from Milton. A302. As Fleitman points out (Br. 22), some communities elected not to join the Advisory Committee, but the agency did not act unreasonably by meeting with representatives from communities that affirmatively expressed interest. A143.

Fleitman contends (Br. 22) that the FAA violated Order 1050.1E when it did not attend a Town of Milton Selectmens' meeting to discuss the agency's draft Environmental Assessment for the Runway 33L project. But she does not point to anything in Order 1050.1E that required the FAA to attend that meeting. Instead, she relies (Br. 22) on the FAA's "Community Involvement Policy," which generally states that the agency "is committed to complete, open, and effective participation in agency action." A296. That policy statement does not suggest that FAA officials must accept every invitation to discuss a proposed decision with the public, and the record as a whole reflects that the agency lived up to its policy commitment in this matter.

CONCLUSION

For the foregoing reasons, this Court should uphold the FAA's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 8,309 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point.

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2014, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Some participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

The following case participants are not registered CM/ECF users. I have served these participants with a copy of the foregoing by first-class mail, postage prepaid:

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