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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE; SIERRA CLUB; TEAMSTERS LOCAL 1932; SHANA SATERS; MARTHA ROMERO, Petitioners, v. FEDERAL AVIATION ADMINISTRATION; STEPHEN M. DICKSON, in his official capacity as Administrator of the Federal Aviation Administration, Respondents, EASTGATE BLDG 1, LLC; SAN BERNARDINO INTERNATIONAL AIRPORT AUTHORITY, Intervenors.	No. 20-70272 Federal Aviation Admin ORDER AMENDING OPINION
STATE OF CALIFORNIA, by and through Rob Bonta, in his official capacity as Attorney General, Petitioner, v.	No. 20-70464

FEDERAL AVIATION ADMINISTRATION; STEPHEN M. DICKSON, in his official capacity as Administrator of the Federal Aviation Administration; SAN BERNARDINO INTERNATIONAL AIRPORT AUTHORITY,

Respondents.

Before: SILER,* RAWLINSON, and BUMATAY, Circuit Judges.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY[**]

Federal Aviation Administration / Environmental Law

The panel an order amending the opinion filed on November 18, 2021; denying the petitions for rehearing en banc as moot; and allowing further petitions for rehearing. In the amended opinion, the panel denied a petition for review challenging the Federal Aviation Administration ("FAA")'s Record of Decision, which found no significant environmental impact stemming from the construction and operation of an Amazon air cargo facility at the San Bernardino International Airport (the "Project").

To comply with their duties under the National Environmental Policy Act (NEPA), the FAA issued an Environmental Assessment (EA) that evaluated the environmental effects of the Project. In evaluating the environmental consequences of the Project, the FAA generally utilized two "study areas" – the General Study Area and the Detailed Study Area. Petitioners are the Center for Community Action and Environmental Justice and others (collectively "CCA"), and the State of California.

In attacking the parameters of the study areas, the CCA asserted that the FAA did not conform its study areas to the FAA's Order 1050.1F Desk Reference. The panel held that the FAA's nonadherence to the Desk Reference could not alone serve as the basis for holding that the FAA did not take a "hard look" at the environmental consequences of the Project. Instead, the CCA must show that the FAA's nonadherence to the Desk Reference had some sort of EA significance aside from simply failing to follow certain Desk Reference instructions. The panel held that the CCA had not done so here.

CCA next asserted that the FAA failed in its obligation to sufficiently consider the cumulative impacts of the Project. CCA first argued that the FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have expanded its assessment to include an additional 80-plus projects. The panel held that the record showed that the FAA specifically

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

accounted for the traffic generated by these 80-plus projects for purposes identifying cumulative traffic volumes. The fact that CCA could not identify any potential cumulative impacts that the FAA failed to consider suggested that there were none. The CCA did not show that the FAA's cumulative impact analysis on air quality would have been potentially different if it considered the 80-plus projects. Thus, the CCA did not carry its burden to show why the FAA was required to consider the 80-plus projects in conducting the cumulative impacts analysis on air pollution. CCA additionally argued that the EA did not disclose specific, quantifiable data about the cumulative effects of related projects, and it did not explain why objective data about the projects could not be provided. The panel held that CCA's belief that the FAA must provide quantifiable data was based on a misreading of this court's precedent. The panel concluded that the CCA and the state's conclusory criticisms of the EA's failure to conduct a more robust cumulative air impact analysis amounted to disagreements with the results, not procedures. The panel found no reason to conclude that the FAA conducted a deficient cumulative impact analysis.

California chiefly argued that the FAA needed to create an environmental impact statement (EIS) because a California Environmental Impact Report prepared under the California Environmental Quality Act (CEQA) found that the proposed Project could result in significant impacts on air quality, greenhouse gas, and noise. First, California argued the FAA should have refuted the CEQA findings regarding air quality impacts. The thresholds discussed in the CEQA analysis that California pointed to are those established by the South Coast Air Quality Management District (SCAQMD). The panel held by the SCAQMD's own assessment, the Project will comply with federal and state air quality standards. Second, California argued that the FAA should have refuted the CEQA findings regarding greenhouse gas impacts. The panel held that California did not refute the EA's rationale for why it found no significant impact of the Project's greenhouse gas emissions on the environment, and did not articulate what environmental impact may result from the Project's emissions standards exceeding the SCAQMD threshold. The panel also rejected California's noise concerns. The panel concluded that California failed to raise a substantial question as to whether the Project may have a significant effect on the environment so as to require the creation of an EIS.

Petitioners alleged certain errors related to the FAA's calculations regarding truck trip emissions generated by the Project. First, the panel held that there was no authority to support petitioners' assertion that the EA had to use the same number of truck trips that the CEQA analysis used, or that the FAA was required to explain the difference. The panel held further that petitioners failed to show arbitrariness or

capriciousness in the EA's truck trip calculation method. Second, petitioners provided no reason to believe that the EA did not correctly analyze total truck trips emissions. Finally, the panel rejected petitioners' argument that the record contained an inconsistency concerning the number of daily truck trips calculated by the FAA.

Finally, petitioners asserted that the FAA failed to consider the Project's ability to meet California state air quality and federal ozone standards. First, the CCA argued that the EA failed to assess whether the Project met the air quality standards set by the California Clean Air Act. The panel held that CCA failed to articulate a potential violation of the Act stemming from the Project. More importantly, the EA did discuss California air quality law. Second, CCA provided no reason to believe that the Project threatened a violation of the federal ozone standards. Finally, the panel rejected petitioners' argument that the EA failed to assess whether the Project met California's greenhouse gas emissions standards.

Judge Bumatay concurred in order to address the dissent's discussion of environmental racism. He noted that no party raised accusations of racial motivation, and wrote that the dissent's assertions were unfair to the employees of the FAA and the Department of Justice who stood accused of condoning racist actions and who had no chance to defend themselves.

Judge Rawlinson dissented. She wrote that the case reeked of environmental racism, defined as "the creation, construction, and enforcement of environmental laws that have a disproportionate and disparate impact upon a particular race." San Bernardino County, California, is one of the most polluted corridors in the United States, and the site of the Project was populated overwhelmingly by people of color. Judge Rawlinson agreed with the petitioners that the difference between the State of California's conclusion of significant environmental impacts of the Project under CEQA and the FAA's conclusion of no significant impact could be explained by the FAA's failure to take the requisite "hard look" at the Project as required by NEPA. Judge Rawlinson wrote that the EA was deficient in numerous ways, and this EA would not prevail if the Project were located near the home of the multibillionaire owner of Amazon.

COUNSEL

Adriano Martinez (argued) and Yasmine Agelidis, Earthjustice, Los Angeles, California; Gregory Muren, Earthjustice, San Francisco, California; for Petitioners Center for Community Action & Environmental Justice.

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ORDER

The opinion filed on November 18, 2021, is amended as follows:

- On Slip Opinion page 10, line 10, replace "FAA approval of it" with "the FAA's approval".

- On Slip Opinion page 10, line 14, replace "FAA review" with "the FAA's review."

- On Slip Opinion page 10, line 23, replace "Here," with "After reviewing the Project's potential environmental impacts,".

- On Slip Opinion page 11, lines 15-16, replace "Agencies shall prepare an" with "An [environmental]"

- On Slip Opinion page 11, lines 19-20, replace "decision to proceed in this manner and its findings in that regard" with "finding of no significant impact."

- On Slip Opinion page 17, line 8, replace "CAA" with "CCA".

- On Slip Opinion page 21, line 20, to Slip Opinion page 26, line 31, replace Section II.C, "Cumulative Impacts," in its entirety, with the revised Section II.C as amended in the Attachment A.

- On Slip Opinion page 27, lines 6-7, replace "the California Environmental Quality Act (CEQA)" with "CEQA".

- On Slip Opinion page 30, lines 27-29, replace "because the SCAQMD emissions threshold was violated, a significant environmental impact can be expected" with "that a SCAQMD emissions threshold violation would even cause a significant environmental impact."

The Petitions for Rehearing En Banc are DENIED as moot. Dkt. No. 93, 94.
Further petitions for rehearing may be filed within the time periods specified by the applicable rules.

ATTACHMENT A

C. Cumulative Impacts

The CCA next asserts that the FAA failed to sufficiently consider the cumulative impacts of the Project. This court has discussed NEPA's requirement of a cumulative impacts analysis as follows:

> NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with "past, present and reasonably foreseeable future actions." Cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions." . . . [R]egulations specifically admonish agencies that cumulative impacts "can result from individually minor but collectively significant actions taking place over a period of time."
>
> We have recognized that even EAs, the less comprehensive of the two environmental reports envisioned by NEPA, must in some circumstances include an analysis of the cumulative impacts of a project. . . . An EA may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS [i.e., Environmental Impact Statement] that reflects such an analysis.

Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895–96 (9th Cir. 2002) (citations omitted) (emphasis removed). This court in *Bark* expounded on the requisite cumulative impact analysis:

> [I]n considering cumulative impact, an agency must provide some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided. This cumulative analysis 'must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects. We have held that cumulative impact

> analyses were insufficient when they discusse[d] only the direct effects of the project at issue on [a small area] and merely contemplated other projects but had no quantified assessment of their combined impacts.

958 F.3d at 872 (simplified).

Absent a cumulative impact approach, agencies could avoid required, comprehensive environmental review by undertaking many small actions, each of which has an insignificant impact but which together have a substantial impact; the process would be subject to "the tyranny of small decisions." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1078 (9th Cir 2002). The "rationale for evaluating cumulative impacts together is to prevent an agency from 'dividing a project into multiple actions' to avoid a more thorough consideration of the impacts of the entire project." *Tinian Women Ass'n v. U.S. Dep't of the Navy*, 976 F.3d 832, 838 (9th Cir. 2020) (quoting *Native Ecosystems Council*, 304 F.3d at 894). Cumulative impacts that result from individually minor but collectively significant actions are the crux of what the regulations implementing NEPA seek to avoid. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 645–46 (9th Cir. 2004) (citing 40 C.F.R. § 1508.7).

For cumulative impact analysis to be adequate, "an agency must provide some quantified or detailed information." *Bark*, 958 F.3d at 872. While the agency is required to take a "hard look" at the cumulative impacts of a project, that requirement is about whether the agency adequately explained the potential effects and risks, not whether a petitioner disagrees with those explanations. *See id.* ("General statements

about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." (simplified)). So a cumulative impact analysis is insufficient if it discusses only "the direct effects of the project at issue on [a small area]" or "merely contemplate[] other projects but had no quantified assessment of their combined impacts." *Id.* (simplified).

Petitioners alleging a failure to adequately consider cumulative impacts "do[] not face an 'onerous' burden" and they 'need not show what cumulative impacts would occur.'" *Tinian Women Ass'n*, 976 F.3d at 838 (quoting *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 605 (9th Cir. 2010)). Instead, petitioners "need[] to show 'only the potential for cumulative impact.'" *Id.* (quoting *Te-Moak Tribe*, 608 F.3d at 605).

The CCA first argues that the FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have expanded its assessment to include an additional 80-plus projects. But the only potential cumulative environmental impact resulting from these projects that the CCA asserts the FAA failed to consider is the fact that "these 80[-plus] projects taken together will result in a massive 168,493 average daily trips in the first year of project operations." However, the record shows that the FAA specifically "account[ed] for

the traffic generated by these 80-plus projects" for "purposes of identifying cumulative traffic volumes."

Seemingly conceding this point, the CCA pivots to its argument that the FAA should have considered the 80-plus projects' effects on unidentified "other impact areas." But the CCA fails to identify what "other" potential cumulative impacts that the FAA failed to consider with the 80-plus projects. Indeed, in other cases where we have ordered an agency to reconsider its cumulative impacts analysis, we have relied on the *petitioner* to raise the potential cumulative impact affected. *See Bark*, 958 F.3d at 872–73 ("The [agency]'s failure to engage with the other projects *identified by Appellants* leaves open the possibility that several small forest management actions will together result in a loss of suitable owl habitat. . . . [W]e have no basis in the record to assess whether the [agency] has taken the necessary steps to consider this possibility." (emphasis added)); *Klamath-Siskiyou*, 387 F.3d at 996–97 (holding that a cumulative impact analysis was inadequate where the EA did not address "the potential for a combined effect from the combined runoffs" from two separate minerals or the effect of the loss of the spotted owl's habitat on the region that the petitioner identified); *Kern*, 284 F.3d at 1066–67, 1078 (holding that a cumulative impact analysis was insufficient where the revised EA did not "analyz[e] the impact of reasonably foreseeable future timber sales within the District" that the petitioner identified).

While the petitioners in the aforementioned cases identified potential cumulative impacts that the agency did not address, the CCA here summarily concludes that the FAA needed to conduct a better cumulative impacts analysis. The fact that the CCA cannot identify any potential cumulative impacts that the FAA failed to consider suggests that there are none. While the burden on petitioners to identify potential cumulative impacts is not "onerous," *Tinian Women Ass'n*, 976 F.3d at 838, the CCA still "bears the burden of persuasion," *J.W. ex rel., J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 438 (9th Cir. 2010). And merely stating that the FAA needed to consider the 80-plus projects' effect on unidentified "other impact areas" does not carry the CCA's burden.

To the extent that the CCA implicitly suggests that the FAA should have considered the 80-plus other projects' cumulative impact on air emissions, it failed to provide support for that view. It is undisputed that the FAA considered 20-plus projects in analyzing the cumulative impacts of the Project on air quality. And so long as the agency provides a sufficient explanation, we generally "defer to an agency's determination of the scope of its cumulative effects review." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002). The only evidence that CCA points to is a California Environmental Quality Act (CEQA) report that found air pollutant emissions associated with the Project would result in "cumulatively considerable significant impact" with respect to construction activity

and operational activity. But the CEQA report does not expressly attribute its cumulative impact findings to the 80-plus projects identified by the CCA in reaching its conclusion. Nor does the CCA contend that the CEQA report found a cumulative impact on air quality *only because* it considered the 80-plus projects. Moreover, the FAA specifically considered the cumulative air impact of construction and operation of the Project. The FAA provided,

> [W]ith respect to NOx and VOC emissions, because the emissions are directly accounted for in the SIP [State Implementation Plan] emissions budget, the Propose[d] Project would conform to the SIP that allows for attainment of the ozone NAAQS. The estimated annual CO emissions for 2024 operations was found to exceed the de minimis thresholds. However, the 2012 AQMP does not provide conformity budgets for CO emissions. Therefore, air dispersion modeling was conducted to determine if the Proposed Project impacts would result in an exceedance of the 1- and 8-hour CO NAAQS. The air dispersion modeling found that the operation of the Proposed Project would result in ground level concentrations that do not exceed the relevant NAAQS. Additionally, emissions of SOx, PM, and Pb are below *de minimis* levels. Emissions associated with construction and operation of the Proposed Project would not cumulatively cause an exceedance of the NAAQS or contribute to an increase in frequency or severity of an existing NAAQS violation.

The CCA has not argued that the difference between the CEQA's and the FAA's analysis was caused by the 80-plus projects that the CCA claims FAA needed to analyze. In other words, the CCA has not shown that the FAA's cumulative impact analysis on air quality would have been potentially different if it considered the 80-plus projects. *See Te-Moak Tribe*, 608 F.3d at 605 (petitioners "*must show* . . . the potential for cumulative impact." (emphasis added)). Thus, the CCA hasn't carried

its burden to show why the FAA was required to consider the 80-plus projects in conducting the cumulative impacts analysis on air pollution.

The CCA also argues that "the EA does not disclose specific, quantifiable data about the cumulative effects of related projects, and it does not explain why objective data about the projects could not be provided." First, the CCA's belief that the FAA must provide quantifiable data is based on a misreading of our precedent. While the CCA suggests that *Klamath-Siskiyou* requires "an EA . . . [to] provide an 'objective quantification of the impacts,' or at the very least an explanation for 'why objective data cannot be provided[,]'" what "[a] proper consideration of the cumulative impacts of a project requires [is] some quantified *or* detailed information[.]" *Klamath-Siskiyou*, 387 F.3d at 993 (simplified). So despite what the CCA argues, quantified data in a cumulative effects analysis is not a per se requirement.

And in that vein, the FAA did provide "detailed information" about cumulative impacts here. The only specific deficiency with this information that the CCA alleges is the EA's cumulative air quality impact discussion. The CCA insists that the FAA did not sufficiently support its conclusion that "cumulative emissions are not expected to contribute to any potential significant air quality impacts" because the EA makes no "references to combined PM or NOx emissions from the 26 projects" falling within the General Study Area. Again though, the CCA points to nothing to support its assertion that the FAA needed to evaluate cumulative air

quality impact in this way. More importantly, the CCA offers no evidence to substantiate its suggestion that the FAA's rationale for its cumulative effects conclusions, which does include a discussion of PM and NOx emissions, is deficient. *See Bark*, 958 F.3d at 872.

Thus, the CCA and the state's conclusory criticisms of the EA's failure to conduct a more robust cumulative air impact analysis amount to disagreements with the results, not procedures. We find no reason to conclude that the FAA conducted a deficient cumulative impact analysis.