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United States Court of Appeals

for the

District of Columbia Circuit

No. 07-1363

(Consolidated with Nos. 07-1437, 07-1493, 07-1494, 07-1495, 07-1496, 07-1497, 07-1498, 07-1499, 08-1105, 08-1106, and 08-1107)

COUNTY OF ROCKLAND, NEW YORK, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,

Respondents.

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

PETITIONERS' JOINT REPLY BRIEF

LAWRENCE R. LIEBESMAN
D.C. Circuit Bar No. 24205
HOLLAND & KNIGHT LLP
Counsel for Petitioners
2099 Pennsylvania Ave. NW, Suite 100
Washington, DC 20006
202-955-3000 tel.
202-955-5564 fax
lawrence.liebesman@hklaw.com

Additional Counsel Continued Inside

March 6, 2009

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259

Counsel Continued

BARBARA E. LICHMAN, PH.D.
D.C. Circuit Bar No. 47065
blichman@calairlaw.com
BERNE C. HART
D.C. Circuit Bar No. 47062
bhart@calairlaw.com
STEVEN M. TABER
D.C. Circuit Bar admission pending
staber@calairlaw.com
CHEVALIER, ALLEN & LICHMAN, LLP
695 Town Center Drive, Suite 700
Costa Mesa, CA 92626
714-384-6520 tel.
714-384-6521 fax

JEFFREY L. KARLIN
D.C. Bar No. 458465
GRAY PLANT MOOTY
Jeffrey.karlin@gpmlaw.com
2600 Virginia Avenue, N.W.
Suite 1111 - The Watergate
Washington, DC 20037-1931
202-295-2207 tel.
202-295-2257 fax
Counsel for Petitioners
County of Delaware, et al.

MICHAEL P. KELLY
D.C. Circuit Bar No. 48897
mkelly@mccarter.com
CHRISTOPHER A. SELZER
D.C. Circuit Bar admission pending
CSelzer@McCarter.com
THEODORE W. ANNOS
D.C. Circuit Bar admission pending
tannos@mccarter.com
MCCARTER & ENGLISH, LLP
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, DE 19801
302-984-6317 tel.
302-984-6399 fax
Counsel for Petitioners
Timbers Civic Assoc. et al.

STEVEN F. PFLAUM
D.C. Circuit Bar No. 51885
spflaum@mwe.com
JEFFREY M. HAMMER
D.C. Circuit Bar No. 51881
jhammer@mwe.com
MCDERMOTT WILL & EMERY LLP
227 W. Monroe Street
Chicago, IL 60606
312-372-2000 tel.
312-984-7700 fax

STEVEN W. KASTEN
D.C. Circuit Bar No. 48394
skasten@mwe.com
MCDERMOTT WILL & EMERY LLP
28 State Street, 34th Floor
Boston, MA 02109-1775
617-535-4000 tel.
617-535-3800 fax
Counsel for Petitioners
Town of New Canaan, et al.

DONALD W. STEVER
D.C. Circuit Bar No. 27169
don.stever@klgates.com
K&L GATES LLP
599 Lexington Avenue
New York, NY 10022
212-536-4861 tel.
212-536-3901 fax
Counsel for Petitioner
Friends of the Rockefeller
State Park Preserve, Inc.

Counsel Continued

EDWARD J. FLORIO, ESQ.
D.C. Circuit Bar No. 51731
EJFlorio@floriokennylaw.com
FLORIO & KENNY, LLP.
100 Hudson Street
Hoboken, NJ 07030
201-659-8011 tel.
201-659-8511 fax
Counsel for Petitioner
Board of Chosen Freeholders
of the County of Bergen, New Jersey

JOHN F. KEATING, JR.
D.C. Circuit Bar No. 431867
keatinglaw@sbcglobal.net
LAW OFFICES OF JOHN F. KEATING
71 Route 39, Suite One
New Fairfield, CT 06812
203-746-1423 tel.
203-746-1637 fax
Counsel for Petitioner
John Hodge, First Selectman,
Town of New Fairfield, CT

GREGORY J. BEVELOCK
D.C. Circuit Bar No. 51566
GBevelock@decotiislaw.com
DECOTIIS, FITZPATRICK, COLE & WISLER, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, NJ 07666
201-928-1100 tel.
201-928-0588 fax
Counsel for Petitioners
County of Union, New Jersey and the
Union County Freeholders Air Traffic
and Noise Advisory Board

JOHN M. SCAGNELLI
D.C. Circuit Bar No. 51534
jscagnelli@njlegalink.com
SCARINCI & HOLLENBECK, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, NJ 07071-0790
201-896-4100 tel.
201-896-8660 fax
Counsel for Petitioner
City of Elizabeth

JOHN M. LOONEY, JR.
D.C. Circuit Bar No. 28265
John.Looney@po.state.ct.us
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860-808-5250 tel.
860-808-5386 fax
Counsel for Petitioner
Gina McCarthy, Commissioner,
Department of Environmental Protection,
State of Connecticut

PETER DICKSON
D.C. Circuit Bar No. 250399
dicksonpd@cs.com
POTTER AND DICKSON
194 Nassau Street
Princeton NJ 08542
609-921-9555 tel.
609-921-2181 fax
Counsel for Petitioners
New Jersey Coalition
Against Aircraft Noise
The Borough of Emerson, et al.

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GLOSSARY OF TERMS

4(f)	Section 4(f), below
Add.	Addendum
AGL	Above Ground Level
APA	Administrative Procedures Act, 5 U.S.C. § 551, *et seq.*
App.	Appendix
AR	Administrative Record
ATC	Air Traffic Control
BCA Guidance	FAA Airport Benefit Cost Analysis Guidance
CAA	Clean Air Act, 42 U.S.C. § 7506, *et seq.*
CEP	Capacity Enhancement Program at PHL
CEQ	Council on Environmental Quality
Conformity Rule	Final Rule for Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 40 C.F.R. § 93.150, *et seq.*
CTDOT	Connecticut Department of Transportation
Decl.	Declaration
DEP	Connecticut Department of Environmental Protection
DNL	Day-Night Average Sound Level

EDMS	Emissions and Dispersion Modeling System
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
Ex.	Exhibit
FAA	Federal Aviation Administration and all Respondents, collectively
FAA Report	"Consideration of Air Quality Impacts by Airplane Operations above 3,000 feet AGL," FAA-AEE-00-01 (Sept. 2000).
FEIS	Final Environmental Impact Statement
Fig.	Figure
Final Notice	Final Presumed to Conform Rule, 72 Fed. Reg. 41,565-580 (July 30, 2007)
Fuel Burn Report	MITRE Corp., *Effect of New York/New Jersey/Philadelphia Airspace Redesign on Aircraft Fuel Consumption.* FEIS App. R
Handbook	*Air Quality Procedures for Civilian Airports and Air Force Bases* (April 1997)
JA	Joint Appendix
JFK	John F. Kennedy International Airport
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
Newark	Newark Liberty International Airport
NY/NJ/PHL	New York/New Jersey/Philadelphia
Order 1050.1E	FAA Order 1050.1E CHG 1, *National Policy—Environmental Impacts: Policies and Procedures* (Mar. 20, 2006)
Part 150	14 C.F.R. Part 150, Airport Noise Compatibility Planning
Pet.	Petitioners

PHL	Philadelphia International Airport
Port Authority	Port Authority of New York and New Jersey
PM	Particulate Matter
Preserve	Rockefeller State Park Preserve
Project	New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign
PTC Rule	Final Presumed to Conform Rule, 72 Fed. Reg. 41,565-580 (July 30, 2007)
Record	Administrative Record
Resp.	Respondents
RJN	Request for Judicial Notice
ROD	Record of Decision issued on September 5, 2007, and corrected on September 28, 2007
Section 4(f)	Original section of the Department of Transportation Act dealing with protection of parks, now recodified at 49 U.S.C. § 303
SIP	State Implementation Plan

INTRODUCTION

The Federal Aviation Administration and all other Respondents (collectively, "FAA") assert the classic deference argument. Despite FAA's attempt to characterize Petitioners' arguments as "flyspecking" an otherwise stellar Administrative Record ("Record"), a probing and careful review of that Record reveals that FAA's path to selecting the Airspace Redesign with Integrated Control Complex ("the Project") as the preferred alternative was infected with major procedural errors in violation of Section 4(f) of the Department of Transportation Act, the Clean Air Act ("CAA"), and the National Environmental Policy Act ("NEPA").

These procedural errors have led to a tainted substantive result depriving the citizens of the five affected states covered by the Project from fully understanding and participating in a decision that affects the air they breathe, the noise they experience, and the parks they enjoy. Vacatur and remand are the only remedies for these violations. The agency must be held accountable to the public for the serious environmental consequences that flow from these violations.

SUMMARY OF ARGUMENT

Section 4(f)

Under Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, the Secretary of Transportation, acting through the FAA Administrator, has a heavy burden to analyze all potentially significant Section 4(f) resources at the federal, state and local level and may only approve a constructive "use" of such resources if there are no prudent and feasible alternatives. The Secretary may not take any "shortcuts." Yet the Record shows that is precisely

what occurred here because FAA failed to assess approximately 235 state and local parks covering a five state area. In fact, FAA never contacted numerous state and local park officials to obtain information on these parks in order to make the crucial threshold determination whether the Project could potentially result in a constructive use of those resources—in direct violation of the express language of FAA's own procedures. Therefore, FAA's "no constructive use" conclusion regarding any Section 4(f) resource in the five-state study areas was procedurally deficient. Further, FAA lacked adequate factual data to assess the Project's impacts for two especially noise sensitive sites it evaluated, Rockefeller State Park Preserve in New York and John Heinz National Wildlife Refuge near Philadelphia. Finally, FAA erred by not allowing the public to comment on a critical supplemental noise analysis covering certain noise sensitive sites. These violations go to the very heart of the Secretary's responsibilities under Section 4(f).

Clean Air Act

The Record here lacks any evidence to support FAA's claim that it is either exempt from the conformity provision of the Clean Air Act, 42 U.S.C. § 7506, or "presumed to conform," pursuant to the U.S. Environmental Protection Agency's ("EPA's") implementing regulations ("Conformity Rule"), 40 C.F.R. § 93.153, *et seq.* On the contrary, the evidence in the Record supports Petitioners' claims that:

(1) the Project's impacts are not *de minimis* and thus exempt. The Fuel Burn Report upon which FAA relies did not analyze or quantify emissions at all, let alone emissions of criteria pollutants and precursors, as required by §§ 93.153(c)(1) and (2) to determine a project's *de minimis* status; nor, as a result, could FAA have compared the unanalyzed criteria pollutants and precursors to the benchmark *de minimis* levels in § 93.153(b);

(2) the Project cannot be "presumed to conform," in accordance with § 93.153(f), where neither the face of FAA's Presumed to Conform Rule, 72 Fed. Reg. 41,578, nor the Record here contains any evidence that FAA conducted any analysis of conformity using either "the latest and most accurate emissions estimation techniques," as required by § 93.159, or "similar actions taken over recent years," required by § 93.153(g)(2);

(3) the Project's emissions are "not regionally significant," as required by 93.153(j). As FAA declined to calculate emissions, it had no choice but to impermissibly "defer action," 72 Fed. Reg. 41,580, on determining the Project's regional significance.

NEPA

FAA's environmental analysis fails to comply with the most fundamental requirements of NEPA, 42 U.S.C. § 4321 *et seq.*, and its implementing CEQ regulations, 40 C.F.R. § 1500, *et seq.*, where:

(1) FAA failed to analyze the additional flights that would be induced by any delay reductions achieved by the Project, despite uncontroverted evidence in the Record and FAA's own regulatory guidance establishing that the Project will have such growth-inducing impacts;

(2) FAA failed to complete a noise exposure analysis for the 2012 year of Project implementation or any year thereafter, much less five to ten years after implementation as provided in FAA Order 1050.1E, App.A, § 14.4g(2), and notwithstanding substantial evidence in the Record of significant noise impacts on vulnerable populations occurring after 2012;

(2) FAA impermissibly elevated the baseline for comparison with Project impacts by admittedly overestimating the number of 2006 flight operations at Newark, as well as other affected airports, in contravention of FAA Order 1050.1E, App.A, § 14.4e, thereby understating the Project's environmental impacts and creating inaccurate baselines for assessing impacts

associated with future operational scenarios at Newark and other airports;

(3) FAA failed to conduct background noise monitoring in Elizabeth, New Jersey, in violation of Order 1050.1E, App.A, § 14.4, and in spite of FAA's finding that Elizabeth is subject to significant noise impacts;

(4) FAA impermissibly altered the Selected Project Alternative after Project approval, by failing to implement night ocean routing, a critical component of the Alternative that FAA found to be "environmentally preferable," thereby requiring, at minimum, a supplemental environmental impact statement to assess the impacts of the new Alternative, without night ocean routing; and

(5) FAA failed to comply with Environmental Justice requirements where the Record contains no evidence that FAA analyzed the interrelated cultural, social, occupational, historical and economic factors throughout the impacted area that may amplify the severity of noise impacts on Environmental Justice populations.

ARGUMENT

I. FAA'S IDENTIFICATION AND ANALYSIS OF SECTION 4(f) RESOURCES VIOLATES CONGRESS'S MANDATE TO PROTECT ALL SIGNIFICANT FEDERAL, STATE, AND LOCAL PARK RESOURCES AS WELL AS FAA'S OWN PROCEDURES.

A. The Burden Was on FAA to Reach Out and Analyze All Potential 4(f) Resources for Significance, Including Resources at the State and Local Level.

Section 4(f) places a heavy burden on the Secretary of Transportation to analyze *all* potentially significant Section 4(f) resources at the federal, state, and local level. The Secretary, acting through the FAA Administrator, may "approve" a project involving a "use" of a Section 4(f) resource of "national, State or local significance . . . only if he first determines that "there are no prudent and feasible alternatives" and then only after finding that the project "includes all

possible planning to minimize harm." 49 U.S.C. § 303(c). As the Supreme Court held in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), Congress did not sanction any "shortcuts" in protecting parkland:

> Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Overton Park, 401 U.S. at 412-13 (footnotes omitted). While the language of Section 4(f) itself recognizes that significant federal, state, and local park resources are to be treated equally in the Secretary's analysis, the legislative history further clarifies the Secretary's responsibilities. As explained in *Overton Park*, "the legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision." *Id.* at 412 n.28 (quoting 114 Cong. Rec. 24036-24037). Thus, the initial process for screening all potentially significant Section 4(f) resources is critical.

Here, FAA asserts that the Court must give deference to its interpretation of its Section 4(f) procedures found in FAA Order 1050.1E (*National Policy—Environmental Impacts: Policies and Procedures* (Mar. 20, 2006)). FAA interprets its Section 4(f) procedures in Order 1050.1E Sections 6.2a and 6.2e as limiting consultation with federal, state, and local 4(f) resource managers only to those situations "where use is possible." Resp.Br. 90 n.61. FAA justifies its "selective" interpretation of Order 1050.1E by arguing that, given the volume of the "numerous federal, state, and local 4(f) resources," it was reasonable not to list every such

resource and, instead, to "specifically list . . . [only] illustrative federal and state 4(f)" resources and "those local parks that were in close proximity to major airports" **and only** when a "concern had been explicitly expressed in comments during the administrative process." Resp.Br. 87-88. FAA then relies on its application of its Part 150 Land Use Compatibility Guidelines to justify its selective screening process and avoid consultation with local park officials. However, FAA does not explain why its interpretation of its Order 1050.1E should be entitled to deference by this Court, in the face of the clear Congressional direction under Section 4(f) that the Secretary must reach out, even beyond state and local officials if necessary, to gather information necessary to make an independent decision to protect Section 4(f) resources.

FAA's reading of Sections 6.2a and 6.2e is contrary to the plain meaning of those Sections. Section 6.2a expressly states that FAA "assumes . . . [a]ny part of a publicly owned park, recreation area, refuge, or historic site is . . . significant unless there is a statement of insignificance relative to the whole park by the Federal, State, or local official having jurisdiction thereof." Order 1050.1E § 6.2a. Section 6.2e of that Order requires the responsible FAA official to "consult all appropriate Federal, State, and local officials having jurisdiction over the affected Section 4(f) resources when determining whether project-related noise impacts would substantially impair the resources" (emphasis added). This responsibility is especially important because FAA has committed to assess whether additional "heightened" analysis is necessary for 4(f) resources that would experience a Project-related change of 3.0 DNL. Local input is especially critical to inform FAA's decision-making.

B. Petitioners Have Not Waived Their Objections.

The law does not support FAA's argument that Petitioners waived their Section 4(f) claims. FAA relies on *City of Olmsted Falls v. FAA*, 292 F.3d 261 (D.C. Cir. 2002) ("*Olmsted*"), where this Court held that any Section 4(f) issues not raised before FAA are waived on appeal.

Resp.Br. 86-87. *See Olmsted* at 274, citing the relevant judicial review standard for air traffic and safety issues, 49 U.S.C. § 46110(d) ("court may consider an objection to an order of the . . . Administrator only if the objection was made in the proceeding conducted by the . . . Administrator or if there was a reasonable ground for not making the objection in the proceeding").

Olmsted is inapposite. Unlike the petitioner in *Olmsted*, and despite FAA's assertions to the contrary, Petitioners and others did in fact raise numerous Section 4(f) issues to FAA. *See, e.g.*, ROD App.D-57, AR9762:58, JA___ (Rockland County's discussion of 4(f) included request for full evaluation of noise-sensitive resources); AR6009, JA_____ (Friends of Rockefeller State Park Preserve stressed FAA's obligation to comply with all aspects of 4(f)). FAA itself backhandedly recognizes that Petitioners raised the "heightened analysis" issue—which thus preserves that issue on appeal. Resp.Br. 87 ("Moreover, with one exception [that of Ardens Historic District, part of Petitioner Timbers Civic Association], . . . no commenter recommended replication of the additional analysis for the non-federal properties that Petitioners now focus on").

Other stakeholders raised the issue of FAA's deficient 4(f) analysis as well. For example, Petitioners' Brief quotes the United States Fish and Wildlife Service comment in the Record highlighting FAA's inadequate 4(f) analysis: "There are still concerns related to insufficient data on noise impacts as they relate to National Park Service units and the other listed Section 4(f) resources, including units of the National Wildlife Refuge System in New York, New Jersey, and Pennsylvania." *See* Pet.Br. 81. That statement is sufficient to preserve the insufficient data issue on appeal, too.

The law of waiver is clear that one objection, *by any party*, puts FAA on notice of the issue and preserves that issue on appeal to this Court. *See* 49 U.S.C. § 46110(d); *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam).[1] FAA's argument that Petitioners failed to list the properties that FAA failed to consult misses the mark. Petitioners had no burden to provide a list of 4(f) parks and other resources. It was enough that the *legal issue* was raised at the administrative level. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 898-900 (9th Cir. 2002) (finding the issue of road density preserved for appeal when a party lodged a general objection during the administrative process without providing specific details).[2] According to case law, it is sufficient that FAA was on notice of its legal deficiencies. *See id.* at 899-900 (general objection was sufficient to preserve issue for appeal). Thus, FAA did not need a list of each and every factual error.[3]

C. FAA's "Screening Methodology" Was Flawed Because FAA Never Studied Most Local Parks.

Citing no authority, FAA asserts that "[g]iven this volume" of parks it did not have to assess every state or local park in the area to overcome the "assumption" in Order 1050.1E,

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[1] *See also Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 721 (D.C. Cir. 1997) (finding petitioner was "at liberty" to raise an issue on appeal raised by another party during administrative proceedings); *Cellnet Commc'n v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992) ("Consideration of the issue by the agency at the behest of another party is enough to preserve it"); *Northwest Airlines, Inc.*, 15 F.3d 1112, 1121 (D.C. Cir. 1994) (Northwest Airline's one-line argument during administrative hearings was sufficient to preserve issue for appeal).

[2] *See also Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1194-95 (8th Cir. 2001) (holding that where a party to the administrative process raises an issue by quoting the specific language of the statute, it had preserved the argument on appeal, even if the argument was not thorough at the administrative level).

[3] FAA cannot avoid judicial review by turning the tables and claiming, in effect, that Petitioners did not fulfill FAA's own obligations held under the law. *See, e.g., Tesoro Refining and Marketing Co. v. F.E.R.C.*, 552 F.3d 868, 873 (D.C. Cir. 2009) (recognizing the Court's discretionary authority to hear new claims on appeal under the "reasonable grounds" standard set forth in the Natural Gas Act, an equivalent standard to this Court's review under 49 U.S.C. § 46110(d)), *citing Arkansas Power & Light Co. v. FPC*, 517 F.2d 1223, 1236 (D.C. Cir. 1975).

§6.2a. Resp.Br. 87. FAA claims that its burden to list affected 4(f) resources "is neither reasonable nor required." *Id.* at 88. This assertion not only ignores the very language of its own procedures, it flies in the face of Congressional intent regarding FAA's duty to protect 4(f) resources from substantial impairment. Indeed, by only concentrating on federal and some state parks (and essentially ignoring local parks except those within 2-3 miles of a major airport), FAA lacked any rational basis to conclude whether the Project would result in constructive use of any significant 4(f) resource, and whether a more detailed site-specific noise analysis was required.

FAA does not dispute that it was fully aware of potentially significant parks because the FEIS acknowledged that the "Study Area includes numerous city, county, state, and national parks, wildlife refuges, and historic sites." FEIS 3-36, AR9301:196, JA___. In the pages that follow, however, FAA only describes "National Parks and Service [sic] Lands," "National Forest System," "National Wildlife Refuge System," "State Parks, Forests, and Other Areas of [State] Significance"—not local parks. FEIS 3-37 to 3-46, AR9301:197-206, JA___. FAA did, however, list 43 "local" parks in FEIS App.J, AR9304:4,21, JA___. These parks apparently were chosen simply by an employee with a map who noticed they were within 2-3 miles of a major airport—hardly a comprehensive method of identifying all affected parks. *See* AR1637, JA___ (email regarding the addition of parks to the Record).

FAA's failure to consult with all proper state and local officials to identify whether the requirements of Section 4(f) are even applicable leads to one inescapable conclusion: FAA failed to follow the legally required process. FAA has not rebutted the detailed declarations of Petitioners describing numerous noise sensitive parks and affirming that they were never contacted regarding those parks. Thus, FAA cannot argue that its "screening process"

reasonably allowed it to conclude that the Project will not result in the constructive use of any Section 4(f) resource within the five-state study area.

D. FAA's Reliance on Significantly Impacted Census Blocks as a Screening Tool Flies in the Face of its Regulations.

FAA advances a "no harm, no foul" argument—that under its Part 150 regulations, no local park would be "substantially impaired." Resp.Br. 88-89. FAA supports this argument by citing *Town of Cave Creek v. FAA*, 325 F.3d 320, 333 (D.C. Cir. 2003), asserting that Petitioners made no "serious argument" that the Project would have a significant adverse impact on their property. Resp.Br. 89. FAA misreads *Town of Cave Creek*. The burden is on FAA first to identify which resources are protected. "First, the FAA must identify which resources are protected." *Id.* at 333. FAA cannot do that without meeting its duty to contact and consult with all local officials with potentially affected properties in the study area. *See* Order 1050.1E § 6.2e.

Town of Cave Creek did not deal with a situation like ours where FAA simply failed to contact local park officials. As Petitioners' declarations indicate, numerous park officials would have presented "serious arguments" about the significance of the local 4(f) resources if given the chance. Indeed, Petitioners used FAA's own data to identify a number of parks that would experience significant impact and FAA appears to accept that data. Resp.Br. 91-92. Yet, FAA dismisses these serious points by simply asserting that it may ignore that information by hiding behind the "veil" of agency discretion.

In fact, FAA does not refute data demonstrating that some parks (Monsey Glen, Kakiat Park, and Schwartz Nature Preserve in Rockland County; Ward Pound Ridge in Westchester

County; and Devil's Den[4] and Centennial Watershed State Forest in Fairfield County[5]) would experience greater than 3.0 DNL increase—the threshold for a more careful evaluation under Part 150 guidelines. Resp.Br. 91-92. FAA cannot find lack of constructive use in the absence of site-specific information for each of these resources. If FAA had contacted proper state and local officials, they would have presented site-specific information that would have informed FAA's decision-making under 4(f).

FAA next faults Petitioners for "overlooking" its second method of determining potentially significant 4(f) impacts—the use of census blocks with a 1.5 DNL increase or more in the 65 DNL range and the identification of the 4(f) properties' location within those blocks by using an FAA database. Resp.Br. 88-89. FAA claims that this is a "foolproof" method for ensuring identification and consideration of 4(f) resources that would potentially suffer substantial impairment and would be constructively used.

FAA's assertion (Resp.Br. 88) that it may use a census block analysis as applied to properties it has identified within each block, even though it had not actually reviewed all potential 4(f) properties within the Study Area, misses the point. FAA cannot justify such a selective approach in the face of Congressional intent in enacting section 4(f). Indeed, FAA's admission that the project area "encompasses 64 counties and 490 independent cities" as well as other municipal areas which "includes numerous city, county, state and national parks, wildlife

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[4] Contrary to Respondents' claims (Resp.Br. 92), the Devil's Den Preserve is rightly listed as a publicly owned 4(f) resource. The "conservation restrictions" that allow the Nature Conservancy to run the area as a preserve are owned by the Town of Weston, Connecticut.

[5] FAA claims that noise increases in Centennial Watershed State Forest have been improperly calculated by the Petitioners. Resp.Br. 93-94. FAA's brief, however, misidentifies this State Forest. Centennial Watershed State Forest is not the single small site identified by FAA in Appendix D to its brief but is made up on numerous parcels in several towns totaling 15,000 acres. This is precisely the kind of factual inaccuracy that demonstrates why FAA should have complied with Section 4(f): to receive input from state agencies early in this process and not nearly a decade after the proposal was initiated.

refuges and historic sites" (FEIS ES-8, 3-36, AR9301:12,196 , JA____) is an admission that its selective approach most likely missed potentially significant 4(f) resources. That is hardly the result that Congress envisioned when it directed the Secretary to even "go beyond information" provided by state and local officials and "reach his own independent decision." 114 Cong. Record 24036-24037.

Even assuming that none of Petitioners' parks would be significantly impacted under FAA's "census block" approach, it is not the "end result" of the analysis that defines the agency's legal obligations; rather, it is whether the rigorous process has been followed. As this Court recently held, a litigant who "alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure, the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result." *County of Del., Pa. v. DOT*, 554 F.3d 143, 147 (Feb. 3, 2009). Thus, it was not Petitioners' burden to prove a "substantial impairment" of Section 4(f) resources if the process had been followed, only that the procedural steps here (that is, affirmatively contacting and consulting with all local officials having jurisdiction over potential 4(f) resources) had not been followed.

Surely FAA cannot claim that contacting local officials was too difficult or burdensome. Given the scope and magnitude of this Project, it is not unreasonable for FAA to reach out to local officials with jurisdiction over these parks to ensure the integrity of the screening process. FAA could have easily identified the state and local jurisdictions subject to potential overflights under the plan and contacted these officials.

E. FAA Lacked Adequate Factual Data for Determining that Rockefeller State Park Preserve and John Heinz National Wildlife Refuge Would Not Be Significantly Impaired.

FAA's "analysis" of Rockefeller State Park Preserve ("the Preserve") and John Heinz National Wildlife Refuge illustrates FAA's failure to make a proper determination that there was no constructive use, even where FAA purported to study Section 4(f) resources for possible constructive use. FAA had no factual basis on which to premise a conclusion that the 3.0 DNL threshold was not exceeded at the Preserve. Indeed, FAA's argument (Resp.Br. 94-96) amounts to little more than an attempt at obfuscation. First, it is noteworthy that FAA admits that the noise impacts on the Preserve will increase. *Id.* at 96. Second, FAA purports to quantify both the existing noise conditions and the increase that will result from the rerouting of aircraft over the Preserve, so as to characterize them as being "slight and less than 3.0 DNL" (Resp.Br. 96) without having any actual field measurements (on-ground baseline monitoring) of the noise to back up these assertions. Decl. of Alix Schnee, Pet.Br. Add. D. 47-48.

In the absence of actual noise data, FAA relies on its claim of insufficient impact to warrant a Section 4(f) analysis on noise modeling, which it also did not disclose in the Record, and on the standards adopted many years ago in 14 C.F.R. Part 150 and its Order 1050.1E. In the absence of data, FAA cannot make a determination that the "attributes of the resource that contribute to its significance or enjoyment are substantially diminished." Order 1050.1E § 6.2(f).

This omission is especially egregious with respect to the Preserve—an idyllic area "30 miles from the hustle and bustle of New York City" known for its strolling, jogging,

horseback riding, cross-country skiing, snowshoeing, and bird watching,[6] and specifically designated by state law as limited to "passive recreation uses . . . compatible with the long-term protection of the ecological and historical resources that merited designation of the park preserve" McKinney's Consolidated Laws of New York Annotated, Parks Recreation and Historic Preservation Law, Title C, Art. 20, Sec. 20.02 Subsec. 6. Pet. Request for Judicial Notice ("RJN") Ex. A. FAA regulations provide in essence that for places that are supposed to be quiet the normal metrics are not binding, and supplemental analysis needs to be undertaken. Order 1050.1E §§ 14.5g, 14.3. No such analysis was done here. In order to establish the significance of the impact for a place in which a "quiet setting is a generally recognized purpose and attribute," FAA has to make a specific determination of how much of a noise increase is sufficient for that area to constitute a constructive use. Remarkably, FAA asserts that there is no factual predicate for the Preserve being a quiet place notwithstanding the clear import of the New York statute that authorizes park preserves and the State's published description of the Rockefeller State Park Preserve as a place of quiet passive recreation.

Another problem with FAA's census block approach is that it only provides data for populated census blocks; impacts on unpopulated census blocks like those found at the John Heinz National Wildlife Refuge are not recorded. *See* FEIS Fig. 5.18 (originally misidentified by Petitioners as Fig. 4.25)("2011 Mitigated Preferred Alternative Change In Noise Exposure - PHL Metropolitan Area" indicates that "[c]hange in noise exposure is shown for populated census blocks only"). AR9302:157, JA___. In any case, FAA still fails to respond in both the ROD and their Brief to the U.S. Fish & Wildlife Service's concern over FAA's "insufficient data on noise impacts as they relate to National Park Service units" in Pennsylvania, and

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[6] New York State Office of Parks, Recreation and Historic Preservation, http://nysparks.state.ny.us/parks/info.asp?parkId=60. Pet.RJN. No. 16.

recommendation that "FAA perform a more thorough analysis of impacts to National Park Service units . . . using the correct guidelines and appropriate metrics." AR9762:127-30, JA___.

F. FAA is Wrong on the Facts Regarding its Efforts to Contact Park Officials.

FAA's assertion that it reached out to all appropriate state park officials is incorrect. The State of Connecticut provides a particularly glaring example of the distortions surrounding FAA's claims. FAA did not contact the Connecticut Department of Environmental Protection ("DEP") and did not receive information from DEP regarding 4(f) properties in the State. Pet.Br. 74, citing Decl. of Thomas Morrissey, Add. D.

FAA, however, asserts that "in fact the FAA contacted the Department on several occasions and actively solicited its input." Resp.Br. 93. However, none of the letters and emails referenced in FAA's Brief support its claim that it has met its duty under Section 4(f).The April 2001 letter cited by FAA informed DEP in general terms of upcoming Environmental Impact Statement ("EIS") meetings in New Jersey, Pennsylvania, and New York. AR1593:1-3, JA___. The two 2003 emails (one of which was sent to Connecticut Department of Transportation ("CTDOT")) again refers only to NEPA and primarily discusses alternatives. AR8158:7, JA___; AR2565:2, JA___. Several other letters were also sent to CTDOT, an agency whose Project-related involvement is mainly confined to air traffic impacts to Bradley International Airport. CTDOT has no authority over state parks. AR2599:1-5, JA___. The 2007 comment letter from the Connecticut Attorney General's Office noted by FAA refers to noise issues generally—but that Office, like CTDOT, has no involvement with 4(f) matters and no jurisdiction over state parks. FEIS App.Q, AR9304:3509, JA___. Not once does FAA cite to a single letter, email or communication to DEP regarding Section 4(f). In fact, the one comment from DEP in 2002 that FAA does cite specifically refers to DEP's "Interest[] in impacts of noise pollution with changes in air patterns and altitudes" and complaint that "[i]dentification of specific impact evaluation is

limited due to undefined operational changes." AR1656:29, JA___. Thus, far from supporting FAA's claim that DEP was notified as required by Section 4(f), the Record in this case unambiguously shows that DEP notified FAA as early as 2002 of two points: 1) that DEP was interested in noise pollution impacts; and 2) that DEP's identification of specific impacts was constrained by FAA's not giving DEP enough information. FAA, therefore, was fully aware that DEP was focused on potential noise impacts and needed the sort of data only FAA possessed. FAA failed to involve DEP in the 4(f) process as required by law.

G. FAA Failed to Allow for Public Notice and Comment on its Additional Noise Analysis.

The record contradicts FAA's argument that it was not required to allow public notice and comment on the agency's additional 4(f) analysis because that analysis "reinforced and confirmed FAA's prior conclusion on no constructive use". Resp.Br. 98. Here, Petitioners were not seeking a chance to comment on just another study that was a "logical outgrowth" of prior studies; they wanted a chance to comment afresh on FAA's conclusion of no constructive use of some of the region's most precious parks.

FAA's reliance on *Building Industry Ass'n v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001)("*BIA*"), is inapposite. In *BIA*, this Court found that no additional comment was necessary when a new study merely "confirmed the findings delineated in the proposal." *BIA* at 1246. In contrast, FAA did not delineate all of its findings in the FEIS. FAA could not possibly be using the ROD to *confirm* its findings in the FEIS because it had not yet made any findings.[7] Consequently, FAA is simply wrong in asserting that there was no need to seek public comment

[7] In the Upper Delaware Scenic and Recreational River, for example, FAA noted that it planned to consult with the Department of the Interior and conduct "further evaluation of the potential noise increases in applicable areas . . . ." FEIS 5-95

on the supplemental noise analysis because it "reinforced and confirmed FAA's prior conclusion of no constructive use." Resp.Br. 98.

II. FAA'S APPROVAL OF THE PROJECT VIOLATES THE CLEAN AIR ACT AND EPA'S CONFORMITY RULE.

A. Introduction.

FAA makes two claims: (1) the Project's air quality impacts are *de minimis* and, thus, the Project is exempt from the conformity provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7506 *et seq.*; or (2) the Project is "presumed to conform." FAA is wrong on both counts.

FAA asks this Court to ignore the procedures established in EPA's Final Rule for Determining Conformity of General Federal Actions to State or Federal Implementation Plans ("Conformity Rule"), 40 C.F.R. § 93.150 *et seq.*, and assume that "because the project would decrease emissions as compared to the Future No Action Alternative, and therefore emissions would be below the *de minimis* thresholds established in 40 C.F.R. 93.153(b), FAA found the project exempt from conformity requirements." Resp.Br. 105. FAA relies entirely on an analysis of the change in the amount of aircraft fuel burned as a result of the Project ("Fuel Burn Report"), FEIS, App.R; AR9304, JA___. The Record, however, contains no evidence that the Fuel Burn Report meets the "*de minimis*" test established in EPA's regulations, 40 C.F.R. §93.153(c)(1) and (b):

(1) FAA never calculated the Project's net emissions of criteria pollutants and precursors ("Criteria Pollutants") as required by §93.153(c)(1). Although FAA calculated the saving in fuel purportedly resulting from the Project, it did not address the relationship between fuel burn and resulting emissions of criteria pollutants. Resp.Br. 116;

(2) Because FAA did not calculate the Project's net emissions, it could not make the required comparison between the Project's net emissions and the "*de minimis*" thresholds in

§93.153(b). *See also* Order 1050.1E, App.A, §2.1n at A-6 ("If the project's emissions are below annual threshold levels (*de minimis* levels) and are not regionally significant, then the requirements of the general conformity regulation do not apply to the federal action, . . .").

FAA fails to support its argument[8] that it complied with the procedure mandated by EPA's Conformity Rule, and required to create a presumption of conformity for Category 14,[9] changes in Air Traffic Control ("ATC") procedures. 72 Fed. Reg. 41,565 ("Final Notice" or "PTC Rule"). Despite the unequivocal requirements of §93.153(h) that "in addition to meeting the requirements of paragraphs (g)(1) and (g)(2) of this section . . . (1) the federal agency must identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the basis for the presumptions" (emphasis added), FAA failed to provide any evidence on the face of the Final Notice or in the Record here that:

(1) FAA used methods specified in the Conformity Rule, which requires the use of "the most accurate emissions estimation techniques available," §93.159(b) and EPA-approved models, §93.159(c), to establish that the total of direct and indirect emissions created by changes in ATC procedures will not cause or contribute to any new violation, interfere with a State Implementation Plan ("SIP"), increase the frequency or severity of an existing violation, or delay timely attainment of a National Ambient Air Quality Standard ("NAAQS"), §93.153(g)(1); or

(2) FAA established that ". . .[e]missions from such future [changes in ATC procedures] would be below emissions rates for a conformity determination that are established

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[8] *See* Resp.Br. 112 ("both as a general matter and specifically with regards to the presumption on which FAA relied in this case, the specific type of activity was evaluated and determined not to interfere with the achievement of the NAAQS or the SIP goals").

[9] FAA's PTC Rule contains 15 categories of activities considered to be "presumed to conform." This case concerns Category 14, "air traffic control activities and adopting approach, departure and enroute procedures for air operations." 72 Fed. Reg. at 41,578. Pet.RJN, Ex. E.

in paragraph (b) of this section, based, for example on similar actions taken over recent years." §93.153(g)(2).[10]

Finally, even if for argument's sake, FAA had established a presumption of conformity for ATC procedures, which it did not, FAA has not shown that the Project falls within the scope of the Conformity Rule because FAA failed to show that the Project will not be regionally significant. 40 C.F.R. §93.153(j).

In the final analysis, the burden of affirmatively proving the *de minimis* status of ATC procedures is on FAA, not on Petitioners. "Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing." *Ass'n of Admin. Law Judges v. Fed. Labor Relations Auth.*, 397 F.3d 957, 963 (D.C. Cir. 2005). FAA utterly failed to meet its burden here.

B. The Record Contains No Evidence to Support the Existence of an Exemption from Conformity.

FAA bases its case largely on the claim that "because the Project would reduce emissions, it was exempt from further conformity analysis. ROD 56; 40 C.F.R. §93.153(c)(1)." Resp.Br. 106. However, there are only two ways that a federal action may be exempted from conformity: (1) if the Federal action is listed in §93.153(c)(2), as expressly determined by EPA to be exempt from the requirements of conformity; or (2) absent inclusion in §93.153(c)(2), a project's *de minimis* status and, thus, exemption from conformity may be affirmatively established by complying with procedures set forth in §93.153(c)(1).

[10] At best, the PTC Rule applies only at altitudes in excess of 1,500 feet Above Ground Level ("AGL"), far above the level where a substantial portion of pollutants from ATC procedures occur. 72 Fed. Reg. at 41,575.

Here, FAA does not claim that the Project is expressly exempt pursuant to §93.153(c)(2). Any such argument has been foreclosed by EPA. *See* Pet.Br. 89. Thus, FAA seeks to rely entirely on its putative compliance with the requirements of § 93.153(c)(1).

Section 93.153(c)(1) exempts from conformity "actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section." §93.153(c)(1). Section 93.153(b), in turn, states that "a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section," *i.e.*, the thresholds specified in §93.153(b).

The Fuel Burn Report (FEIS, App.R, AR9304, JA___), on which FAA rests its claim to *de minimis* status, does not meet these predicate procedural requirements for exemption under §93.153(c)(1) for at least three reasons: (1) it does not quantify emissions of criteria pollutants at all, but only the difference in the amount of fuel burned between the Project and the Future No Action Alternative; (2) it cannot, therefore, compare the Project's emissions of criteria pollutants to those of the Future No Action Alternative, as required to determine the Project's net impacts; and (3) it does not compare the net emissions caused by the Project to the thresholds set forth in §93.153(b).

1. FAA Never Calculated the Emissions of Criteria Pollutants from the Project.

The first step in determining a project's *de minimis* status must be to ascertain that project's potential direct and indirect emissions of criteria pollutants[11] so that they can be

[11] EPA lists six criteria pollutants: carbon monoxide, lead, nitrogen dioxide, particulate matter ("PM") smaller than 10 microns (PM_{10}), particulate matter smaller than 2.5 microns ($PM_{2.5}$), ozone and sulfur dioxide. http://www.epa.gov/air/criteria.html; *see also*, 40 C.F.R. § 93.152.

compared with the *de minimis* thresholds expressly set forth in §93.153(b). To do that, FAA must go through at least three steps. FAA has failed to complete even the first.

First, emissions of criteria pollutants should be inventoried for each reasonable project alternative. Order 1050.1E, App.A., §2.1c; 40 C.F.R. §93.153(b). The Record here documents only the purported reduction in fuel burn resulting from the Project. *See*, Fuel Burn Report, ("This paper has estimated the effect on fuel consumption of the Preferred Alternative and the Mitigated Preferred Alternative"). AR9304:3750. Emissions of criteria pollutants resulting from the purported reduction in fuel burn have not been quantified.

FAA admits that the Fuel Burn Report "does not quantify this connection [between the burning of jet fuel and resulting air emissions], because [FAA] never seriously considered that anyone would contest the linkage between jet fuel combustion and the emission of pollutants." Resp.Br. 116. Nor do Petitioners contest that linkage here. What they contest is FAA's admitted failure to quantify emissions of criteria pollutants, which is a necessary predicate to the determination of a project's *de minimis* status, and, thus, conformity, where, as here, no conformity applicability analysis or determination has been performed.

Second, the Project's net emissions of criteria pollutants must be determined by a comparison of the emissions caused by the Project with those of the Future No Action Alternative within each relevant nonattainment or maintenance area. The result is "the proposed project's net annual emissions [proposed Federal action emissions levels minus the No Action emissions levels] which is the sum of direct (including construction) and indirect emissions." Handbook 13, Pet.Br. Add. C, Ex. N at 10. Because the Record does not contain the requisite

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Pet.RJN, No. 15. The term "precursors" refers to the precursors of criteria pollutants ozone, PM_{10} and $PM_{2.5}$. 40 C.F.R. § 93.150.

quantification of criteria pollutants, FAA likewise failed to comply with the second step of comparing the Project's potential emissions with the future emissions without the Project.

Finally, the Fuel Burn Report fails to address not only the Project's emissions impacts in general, but also its emissions impacts within individual nonattainment and maintenance areas as required by §93.153(c)(1). As FAA acknowledges in the FEIS, the "project area" here encompasses several nonattainment and maintenance areas including, but not limited to, those encompassed within the states of New York, New Jersey and Pennsylvania. FEIS 3-48 to 3-54, AR9301:208-214, JA___. However, neither the FEIS, nor Fuel Burn Report,[12] nor the Record contains any evidence of the Project's net emissions within the nonattainment or maintenance areas to establish that the Project would be *de minimis* within each of the nonattainment and maintenance areas in the Study Area. Thus, state and local authorities are left to guess not only the level of the Project's emissions of criteria pollutants, but where those emissions will eventually fall, and what effect they will have on those jurisdictions' compliance with the CAA, the relevant SIP, and state law.

2. FAA Failed to Compare the Project's Emissions of Criteria Pollutants to the *de Minimis* Thresholds in §93.153(b).

Because FAA never calculated the Project's net emissions, it never took the next required step of comparing the Project's emissions to the thresholds set forth in 93.153(b). In fact, the *de minimis* thresholds set forth in §93.153(b) are not mentioned anywhere in the Record, although FAA acknowledges that in order to find that a project would be below *de minimis* levels, "agencies first determine whether such emissions thresholds will be exceeded." Resp.Br.102.

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[12] Fuel Burn Report breaks out fuel consumption by major airport (App. R at 7, 9, AR9304:3746, 3748, JA___) but does not mention either criteria pollutants emitted or nonattainment or maintenance areas.

Instead, FAA asks this Court to leap to three unsubstantiated conclusions: (1) because the Project would decrease fuel burn, it would also decrease emissions of criteria pollutants as compared to the Future No Action Alternative; (2) as a result of that alleged decrease, emissions in each of the relevant nonattainment and maintenance areas would also be below the *de minimis* thresholds established in 40 C.F.R. §93.153(b); and (3) therefore, the Project is exempt from the requirements of conformity. *See, e.g.*, Resp.Br. 105.

This Court has consistently held that "an agency's declaration of fact that is capable of exact proof but is unsupported by any evidence is insufficient to make the agency's decision nonarbitrary." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007). As FAA's undocumented assumptions of conformity are not only matters capable of exact, mathematical proof, but expected by law to be the subject of such proof, its failure to provide the required proof is arbitrary and capricious.

C. The Record Contains No Evidence that ATC Procedures Should Be Presumed to Conform.

As an alternative to the claim of exemption under §93.153(c)(1), FAA claims it need not make a conformity determination because the Project is "presumed to conform," as the subject of Category 14 of FAA's PTC Rule. 40 C.F.R. §93.153(f); ROD 56, AR9762:62, JA___ (citing 72 Fed. Reg. 41,566); Resp.Br. 108.

Contrary to FAA's arguments (Resp.Br. 112), Category 14 is inconsistent with both the face of, and procedures required by, the CAA and EPA's Conformity Rule. Therefore, it cannot be relied upon to excuse compliance for at least two reasons: (1) neither the CAA, nor Congress's intent in enacting it allows for "presumptions" such as those at issue here; and (2) in order to comply with the procedural requirements for establishing a presumption of conformity for an action, a federal agency must provide evidence that it either conducted an analysis based

on methods that comport with 40 C.F.R. Part 93, Subpart B, that the action will be *de minimis* (§93.153(g)(1)), or it has documentation of recent, similar events that show that the action is likely to be *de minimis* in the future (§93.153(g)(2)). The Record lacks evidence to support a conclusion that FAA complied with either subsection.

1. FAA's Reliance on the Presumption of Conformity Is Inconsistent with CAA and Congressional Intent in Enacting It.

FAA cites *Environmental Defense Fund v. EPA*, 82 F.3d 451, 466-67 (D.C. Cir. 1996) in response to Petitioners' argument that Congress did not intend for the CAA to give FAA the authority to promulgate a rule that creates a *de minimis* exception. FAA states "this Court has expressly upheld EPA's identification of categories of federal action that would produce, at most, a *de minimis* level of emissions, and are therefore exempt from the requirement to perform a full conformity analysis." Resp.Br. 100. FAA, however, misses the point. The question is *not* whether *EPA* has the authority to presume that governmental actions are conforming. Instead, the question here is whether Congress gave that authority under CAA to *FAA*.

The PTC Rule is a regulation, promulgated by FAA, that purports to allow FAA to presume certain of its actions to conform with the CAA. Congress, however, was very specific as to who may promulgate rules and regulations under the CAA. In § 7601(a), Congress specifically states that the authority to prescribe regulations rests with the EPA Administrator. 42 U.S.C. § 7601(a). The EPA Administrator's authority cannot be delegated to other federal agencies.[13] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) ("while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, *they may not subdelegate to outside entities*—private

[13] 42 U.S.C. § 7601(a) does allow the EPA Administrator to delegate her rulemaking authority to "any officer or employee of the Environmental Protection Agency," but that is not at issue here.

or sovereign—absent affirmative evidence of authority to do so"). Since no "affirmative evidence of authority" in the CAA permits FAA to promulgate the PTC Rule, the PTC Rule "affects an impermissible alteration of the statutory framework" and is, therefore, arbitrary and capricious. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 96 (2002).

2. No Evidence in the PTC Rule or the Record Shows That FAA Complied with § 93.153(g)(1).

Section 93.153(g)(1) states in relevant part that "[t]he Federal agency must *clearly demonstrate using methods consistent with this subpart* that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not" affect the surrounding area's compliance with its State Implementation Plan. 40 C.F.R.§ 93.153(g)(1) (emphasis added). *See also*, 42 U.S.C. § 7506(c)(1)(B). "This subpart" refers to Subpart B, "*Determining Conformity of General Federal Actions to State or Federal Implementation Plans*," § 93.150, *et seq.* Neither the Final Notice nor the Record provides any evidence of compliance with §93.153(g)(1).[14]

The Court need not labor long on this aspect of presumed to conform analysis, since FAA has already conceded that it did not rely on § 93.153(g)(1) when promulgating the PTC Rule. In their Brief in *County of Del., Pa. v. DOT*, 554 F.3d 143 (Feb. 3, 2009), FAA stated that "although § (g)(1) might require the performance of new air quality analyses, thus triggering the requirement of 40 C.F.R. 93.159, FAA did not purport to base its inclusion of activities on the list on subsection (g)(1)." Resp. PTC Brief 40, Pet.RJN Ex. C.[15] However, even if FAA had not

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[14] The Court owes no deference to FAA's interpretation of the Conformity Rule. *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1015-16 (D.C. Cir. 2002) ("deference is inappropriate when [an agency] interprets regulations promulgated by a different agency").

[15] "As a rule, '[t]he allegations asserted in an earlier lawsuit may be introduced by the adversary as evidence in [a] second action[.]'" *W.V. Realty Inc. v. Northern Ins. Co.*, 334 F.3d 306 (3rd Cir. 2003); *see also, Jelleff v. Braden*, 233 F.2d 671, 676 (D.C. Cir. 1956).

so conceded, the Record here contains no evidence to support a presumption of conformity for ATC procedures.

a. The Record Contains No Evidence of the Conformity of ATC Procedures Below 1,500 Feet AGL.

The PTC Rule mentions an article,[16] two reports,[17] and two FAA circulars[18] to support the inclusion of Category 14.[19] None of the referenced documents, however, contains any data, calculation or conclusions concerning the emissions impacts of ATC operations occurring below 1,500 feet AGL. As ATC operations below 1,500 feet, including taxiing and departure procedures, represent a substantial portion of aircraft emissions; and as the PTC Rule reflects that ATC operations below 1,500 feet AGL are one of the "type of activities which would be presumed to conform" the absence of any documentation concerning the emissions impacts of ATC procedures below 1,500 feet AGL is a fatal flaw in FAA's presumption of conformity under §93.153(g)(1).

FAA has repeatedly asserted that the PTC Rule "formally defines these types of actions [*i.e.*, ATC procedures] above 1,500 feet [AGL] as *de minimis*." FEIS ES-10, AR9301:15, JA___ (emphasis added). The FEIS Executive Summary states "recently, the FAA has determined that it can not rely on the preamble and on February 12, 2007 issued a [Draft PTC Rule] which formally defines these types of actions above 1,500 feet [AGL] as de minimis." *Id.* This is not the only place in the FEIS where FAA states the PTC Rule only applies to operations over 1,500 feet: FAA's Responses to Comments 2815, 2946, 3339, 4100, 4174, 4265, 4266, 4639, 4669, 4937, 4975, and General Response GR-6 (AR9304:1470, 1633, 1727, 1760, 1778, 1786, 2351,

[16] 72 Fed. Reg. 41,578, n.50, Pet.RJN Ex. I.

[17] 72 Fed. Reg. 41,578, n.49, 51, Pet.RJN Exs. H, J.

[18] 72 Fed. Reg. 41,578, n.52, Pet.RJN Exs. K, L.

[19] 72 Fed. Reg. 41,578, n.51. Pet.RJN, Ex. J.

2381, 2473, 2510, 2520, 2579, 2593, 2748, JA___) all state "since the issuance of the [Draft EIS], the FAA was advised by EPA that it should not use the preamble and on February 12, 2007 issued a [Draft PTC Rule] which formally defines these types of actions [*i.e.*, ATC procedures] above 1500 feet [AGL] as de minimis."

FAA's sole argument,[20] puts the agency in a dilemma. On the one hand, with respect to Category 14, the Final PTC Rule is not substantively different than the Draft PTC Rule. *Compare* 72 Fed. Reg. 41,578 (Pet.RJN, Ex. E) *with* 72 Fed. Reg. 6654 (Pet.RJN, Ex. D). Thus, the statements in the FEIS apply equally to both the Draft and Final PTC Rule. On the other hand, if FAA now wishes to claim that the statements in the FEIS, are in error, it will have affirmatively misled the public to believe that only actions above 1,500 feet AGL would be considered *de minimis*, throughout the Project's entire environmental review process, thereby depriving the public of opportunity to comment on the applicability of the PTC Rule to operations below 1,500 feet AGL, in patent violation of NEPA.

b. The Record Contains No Evidence that the PTC Rule was Promulgated in Accordance with §93.159.

Even if FAA had not acknowledged (1) its non-reliance on §93.153(g)(1) in the development of the PTC Rule, and (2) the PTC Rule's non-application below 1,500 feet AGL, FAA's attempt to escape conformity fails because the PTC Rule was not promulgated in accordance with the strict procedural requirements of §93.159.

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[20] FAA's sole argument in support of its position is to dismiss Petitioners' contest as a joke. "Petitioners cannot seriously maintain that [the statement in the FEIS that the Draft Presumed to Conform List that 'formally defines these types of actions above 1,500 feet AGL as *de minimis*'] is intended to alter FAA's validly promulgated Presumed to Conform List (which was published after the FEIS) and the ROD's reliance on it. Resp.Br. 115. FAA errs. The PTC Rule was published in the Federal Register on July 30, 2007, 72 Fed. Reg. 41,565. Pet.RJN Ex. E. The FEIS was released to public on July 31, 2007. 72 Fed. Reg. 43,271 (Aug. 3, 2007); Resp.Br. 22. *See*, Pet.RJN Ex. F.

Section 93.159 requires, in pertinent part, that the "analyses required under this subpart be based on . . . (2) the latest and most accurate emissions estimation techniques available," §93.159(b); (3) "the applicable air quality models, databases, and other requirements specified in the most recent version of [EPA's] *Guideline on Air Quality Models (Revised)* (1986)," § 93.159(c); and (4) "the total of direct and indirect emissions from the action which must reflect emission scenarios that are expected to occur," §93.159(d). Any exceptions to these specific requirements may be made "only with the written approval of the EPA Regional Administrator." §§ 93.159(b), (c)(2); *see also*, 42 U.S.C. § 7506(c)(1)(B).

The supporting documents cited in the PTC Rule do not qualify as either "the latest and most accurate emission estimation techniques," as required by §93.159(b), or the most recent listed air quality models as required by §93.159(c). The earliest document dates back to 1975, with the latest no more recent than 2000. Therefore, three of the four alleged supporting documents were created before the promulgation of the Conformity Rule (in 1993), which sets forth the procedures required to create a presumption of conformity. *See* §93.153(f), (g)(1), (g)(2) and (h). Moreover, since 2000, FAA has issued 12 new versions of its air quality model, the Emissions and Dispersion Modeling System ("EDMS"),[21] the only air quality model sanctioned by EPA for use in aviation-related analyses. Order 1050.1E, App.A at 7, §2.2c; Pet.Br. Add. C, Ex. M.

On the contrary, the documents cited in the PTC Rule as support for Category 14 confirm what FAA has consistently acknowledged: that if such a presumption still exists in the face of FAA's procedural failures, it exists only for ATC procedures above 1,500 feet AGL.

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[21] http://www.faa.gov/about/office_org/headquarters/aep/models/edms_model/previous_edms. Pet.RJN, No. 14.

3. The Record Contains No Evidence Showing That FAA Complied with §93.153(g)(2) Either.

Neither can FAA rely on §93.153(g)(2) to supply the basis for its presumption. Subsection 93.153(g)(2) requires that the "federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emissions rates for a conformity determination that are established in paragraph (b) of this section, *based, for example, on similar actions taken over recent years*." 40 C.F.R. §93.153(g)(2) (emphasis added).

The PTC Rule notes that surveys were sent which formed the basis of support for other categories of activity on the PTC List. 72 Fed. Reg. 41,567.[22] However, those surveys were not mentioned in support of Category 14. *Id.* Despite the purported comprehensiveness of the survey effort, only four of the about 600 completed projects referred to ATC procedures.[23] For none of those four projects was a conformity applicability analysis, determination or any air quality analysis of any kind performed. Instead, all four relied on "exemption" from the Conformity Rule derived from the Federal Register Preamble that EPA has since deemed inapplicable. *See* Pet.RJN Ex. M.

4. The Record Contains No Evidence Supporting FAA's Claim That the Project is Not "Regionally Significant."

FAA does not dispute that a project that is "presumed to conform" must also be determined not to be "regionally significant" in order to avoid the mandatory procedures associated with conformity, §93.153(j). FAA claims instead that "FAA explicitly found that the Project would not be regionally significant." Resp.Br. 114. ROD 44, n.18, AR9762:50, JA___.

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[22] Information compiled from these surveys described about 600 completed projects at over 100 airports." 72 Fed. Reg. 41,567.

[23] Three projects from Boston Logan and one project from Providence Rhode Island's T.F. Green Airport. Pet.RJN Ex. M.

This response does not constitute compliance with the requirements of §93.153(j). As set forth in detail above, the Record contains no evidence that FAA calculated baseline emissions inventories for the Project area nonattainment or maintenance areas either individually or collectively. The Record is, therefore, devoid of any support for FAA's claim that "the total emissions inventories for the relevant areas all exceed 1,000 tons per year for these four pollutants [of concern]." *Id.*

Nor does the Record contain any evidence that an analysis of regional significance was performed at the time the PTC Rule was promulgated. 72 Fed. Reg. 41,580 ("FAA has decided to defer action on this aspect of the Draft Notice based on consultation with the EPA"). Instead, the statement in the ROD appears to have been taken verbatim from the Final Notice, which itself is based on boilerplate from the Handbook:

> The FAA Air Quality Handbook states that an airport project that is presumed to conform is unlikely to have emissions levels that are regionally significant [cites omitted]. This is because, based on the highest *de minimis* threshold level (100 tons per year), in order for an action's net emissions to represent 10% or more of a maintenance or nonattainment area's total emissions of a particular pollutant, the area's total emissions inventory for any pollutant must be less than 1,000 tons, which is unlikely.

72 Fed. Reg. 41,580, n.71.

In short, because FAA conducted no analysis of Project emissions, Record lacks evidence that ATC procedures, meet any of the requirements of § 93.153(g)(1) which, in turn, mirror provisions of the CAA, 42 U.S.C. § 7506(c)(1)(B)(i)-(iii). FAA has not, therefore, satisfied the predicate regional significance requirement without which a presumption of conformity cannot apply.

III. FAA FAILED TO COMPLY WITH NEPA.

A. FAA Continues to Ignore the Growth-Inducing Effects of the Project.

It is undisputed that the FEIS is premised on the assumption that the same number of aircraft operations will occur with or without implementation of the Project. That assumption is fatally flawed because it ignores the additional flights that would be induced by any delay reductions produced by the Project.

1. FAA's Own Statements and Regulations Establish that the Project Would Induce More Aircraft Operations.

The ROD acknowledged that the Project would facilitate significant increases in operations at Newark by creating a dual arrival stream of aircraft that would not exist under the No Project Alternative. "Without dual arrivals, actual traffic [at Newark] may remain at the current plateau (with small increases for improved technology)...." ROD 51, AR 9762:57, JA___. The FEIS failed to analyze the Project's growth-inducing impacts by assuming, contrary to evidence, that Newark would handle the same number of flights with or without the Project.

FAA characterizes its own statement as "inartfully drafted" and offers a *post-hoc* reinterpretation that ignores its statement was offered to dispute a commenter's suggestion that the FEIS forecast for Newark was too high. Resp.Br. 47. The ROD clearly asserted FAA's belief that the forecast was correct because the increases would be achieved only with dual arrivals. ROD 51, AR 9762:57, JA___. NEPA required FAA to analyze a No Project Alternative based on a forecast level without dual arrivals and then to analyze the additional flight operations induced by the dual arrivals associated with the Project.

FAA is likewise unable to explain away its cryptic acknowledgement (Resp.Br. 42 n.26) that if larger aircraft were used to accommodate the forecast passenger levels, additional flights would be scheduled and desired delayed reductions would be eliminated. FEIS 2-5. But as FAA

emphasizes elsewhere in its brief, the tremendous demand for air travel in the region results in airlines and air travelers accepting levels of delay that would normally be intolerable. *See* Resp.Br. 40-41. Thus, to the extent the Project reduces delays, unmet demand for air travel would lead to additional flights despite delays that would entail.

This conclusion is corroborated by FAA regulatory guidance acknowledging delay reductions induce additional passengers and flights. FAA attempts to dismiss its Airport Benefit Cost Analysis Guidance ("BCA Guidance") by arguing it does not apply to air traffic projects. Resp.Br. 42. However, the significance of the BCA Guidance is FAA's acknowledgement of the basic economic reality of the airline industry that delay reductions induce additional operations. *See* Pet.RJN Ex. B, Add. C, § 1.1 at 1, § 10.4.1.3 at 41.

FAA acknowledges the BCA Guidance statement: "the phenomenon of 'induced demand' [due to delay reductions] is real...." Resp.Br. 43. Accordingly, for purposes of FAA's NEPA obligations, it is irrelevant that the BCA Guidance allows but does not require airport proprietors to include an induced demand analysis when they apply for FAA discretionary funding. NEPA requires analysis of the Project's induced demand in the FEIS because those impacts are, by FAA's own admission, "reasonably foreseeable." 40 C.F.R. § 1508.8(b).

2. NEPA Requires an Analysis of the Project's Growth-Inducing Effects.

Without discussing any of the cases cited by Petitioners on the growth-inducing effects issue (*see* Pet.Br. 25-26, 30-31), FAA attempts to dismiss those cases to the extent they involve anything other than aviation projects. But the same NEPA requirements apply equally to all projects.

None of FAA's cases support the conclusion that growth-inducing impacts can be ignored when, as here, an aviation project will reduce delays in a region with pent-up demand for air travel and an extraordinary tolerance by passengers and carriers for delays "that they do not

accept elsewhere." Resp.Br. 40. In two Ninth Circuit cases relied on by FAA, the courts simply held that airspace redesigns might *allow* future increases in flights, but would not *induce* those impacts. Unlike here, there was no evidence in those cases of any unmet demand for air travel in the region or that passengers and carriers would accept delays produced by additional flight increases. *Morongo Band of Mission Indians v. FAA,* 161 F.3d 569, 580 (9th Cir. 1998); *Seattle Community Council Fed. v. FAA,* 961 F.2d 829, 835-36 (9th Cir. 1992). Neither of the forecasting cases relied on by FAA address growth-inducing impacts attributable to reductions in delay. *City of Los Angeles v. FAA,* 138 F.3d 806 (9th Cir. 1998); *City of Olmstead Falls v. FAA,* 292 F.3d 261 (D.C. Cir. 2002).

B. FAA Failed to Justify Deviating from the Procedure in Order 1050.1E, Where it Failed to Project Noise Levels for the Year of Project Implementation (2012) and Five to Ten Years Thereafter.

FAA stated in the FEIS that Project Implementation would occur by 2011, and amended that date to 2012 in the ROD. FEIS 2-48, AR9301:126, JA___; ROD 5, AR9762:11, JA___; Pet.Br. 44. FAA argues that its future conditions forecasts for 2006 and 2011 are "appropriate timeframes" within the meaning of Order 1050.1E, App.A, Section 14.4g(2). Resp.Br. 64, despite the instruction of Section 14.4g(2) that time frames for forecasts are usually selected for the year of anticipated project implementation and five to ten years after that date. On this Record, FAA failed to justify why it deviated from this procedure despite undisputed evidence of significant noise impacts on vulnerable populations after 2012. FAA failed to conduct and include a noise exposure analysis for the 2012 year of Project Implementation and for five to ten years after implementation (2017 and/or 2022) as instructed by Order 1050.1E, App.A, Section 14.4g(2). In fact, FAA failed to conduct a noise exposure analysis for any year after 2011.

There is no justification for FAA failing to prepare noise exposure forecasts for the 2012 year of Project Implementation and five to ten years after 2012. Section 14.4g states, and FAA

acknowledges, that timeframes "usually selected are the year of anticipated project implementation and 5 to 10 years after implementation." Resp.Br. 33. FAA's only explanation for its failure to follow Order 1051.1E is that providing a noise analysis for the years 2006 and 2011 are "the appropriate time frames." Resp.Br. 64. Given that the forecast years FAA used for the Project are *before* Project implementation even begins and *before* the scheduled completion of Project implementation, FAA cannot credibly claim that 2006 and 2011 are "appropriate time frames." FAA's position is made even more incredible in light of projected future increases in air traffic and FAA's own admission that there are significant and reportable noise impacts in Elizabeth and disproportionate and significant noise impacts on minority populations.[24] Resp.Br. 68-70.

The Record shows that the Port Authority and FAA are projecting and planning for future increases in air traffic after the 2012 Project implementation date. The Port Authority, operator of the New York metropolitan airports, issued a Strategic Plan in 2006 which projected a 40% increase in air passenger traffic and a 70% increase in air cargo traffic from 2005 to 2020. Pet.Br. 44, n.22. FAA has publicly stated that it will implement capacity improvement projects after 2011, including replacement of the Teterboro Airport instrument landing approach procedure and institution of new arrival procedures at Newark Airport which will yield increased capacity and bring arrival traffic over new areas not disclosed in the FEIS. Pet.Br. 45, n.24-26.

FAA's reliance upon *Town of Cave Creek* is misplaced. In *Cave Creek,* FAA modeled noise effects for five years into the future to 2005. Petitioners there argued that noise effects

[24] FAA concluded that disproportionate noise impacts on minority populations near Newark and LaGuardia would result from the Project, and that there would also be a significant (though not disproportionate) noise impact on minority populations near Philadelphia. Resp.Br. 78. FAA acknowledges that significant noise impacts were projected in noise-impacted residential areas of Elizabeth located within about a three-mile radius of the south end of Newark's primary departure Runway 22L/R. Resp.Br. 68-70.

should be modeled to 2010 or 2015. However, in that case, the highest noise level projected from FAA's modeling was 48.7 DNL, there was no significant increase in noise levels in the 65 DNL contour and no reportable increase of noise levels within the 45-60 DNL contour. This Court noted in *Cave Creek* that the noise levels concerned were so far below the 65 DNL curve that even if aircraft related noise were hypothetically to triple between 2005 and 2010, the resulting noise levels would still be consistent with all existing land uses. *Id.* at 326.

Here, unlike *Cave Creek*, FAA has concluded that significant and reportable noise will impact areas of Elizabeth and that in 2011 there will be an approximate one-square-mile area of Elizabeth which will receive an increase of 3.0 DNL or more to the 60-65 DNL level, affecting some 16,803 people and a slightly larger area (19,357 people) that will receive an increase of 5.0 DNL or more to the 45-60 DNL level (along with a comparatively sized area near Philadelphia and larger areas in North Central New Jersey). Resp.Br. 69-70. As it should have done here, FAA, in *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006), followed Order 1050.1E by evaluating delay savings five years after Project implementation. This Court noted in *Bensenville* that a build-out-plus-five-year timeframe is consistent with Order 1050.1E's calling for timeframes "5 to 10 years after Implementation." *Id.* at 71. As in *Bensenville*, FAA should have provided forecasts for the 2012 date of Project implementation and five to ten years after 2012 (2017 and/or 2022), as required by Order 1050.1E, App.A., § 14.4g. Without those forecasts, FAA's analysis of noise impacts is arbitrary and capricious.

C. FAA Failed to Adjust its Newark Airport Noise Impacts Baseline, Despite Knowing that It Had Overestimated Flight Operations.

Order 1050.1E, § 14.4e requires that FAA's noise analysis be conducted to reflect current conditions. Nevertheless, in establishing the baseline for current and projected future levels of air traffic from which the FEIS's analysis of various impacts, including noise, were calculated,

FAA overestimated the number of 2006 Newark Airport flight operations by approximately 14%.[25] FEIS App.B-2 at 3, AR9303:67, JA___; Pet.Br. 49. FAA acknowledges that its consultant used wrong information that resulted in the erroneous statement that Newark traffic had leveled off at the forecast 2006 level rather than at the lower 2005 actual level. Resp.Br. 47, n.31. FAA uses a 10% threshold as a rule-of-thumb for accepting five-year forecasts from local airport operators. Resp.Br. 34, n.19. *See also* FEIS 1-18, n.23, and 1-19, AR9301:66, 67, JA___.[26] FAA arbitrarily decided not to hold itself to this 10% rule-of-thumb in this case.

By admitting that without dual arrivals, actual traffic at Newark may remain at its current plateau[27], FAA acknowledges that not only could Newark not support 2011 forecasted traffic levels, but that it modeled an unattainable baseline scenario—a fundamental flaw that invalidates any FAA analysis comparing impacts with the baseline. FAA's use of an inflated Newark Airport 2006 traffic level as a baseline diminished or eliminated the projected increase in noise levels that Elizabeth would experience from the Project. Even using FAA's inflated 2011 noise impact baseline, the New Jersey Coalition Against Aircraft Noise notes that approximately

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[25] In addition to Newark Airport, FAA failed to adjust its baseline for overstated 2006 airport flight operations at JFK (17%) and Philadelphia (13%) Airports. FEIS App. B-2 at 3, AR 9303:67, JA___. FAA projected 506,985 flight operations at Newark Airport in 2006 despite the fact that annual traffic had peaked at 467,688 flight operations at Newark Airport in 1997 and at the time of FAA's forecast had not returned to the 1997 level. FEIS 1-20, NJCAAN May 10, 2007 letter at p. 18, Fig. 1, AR 9304:3640, JA___.

[26] FAA's 10% "rule-of-thumb" for five-year forecasts (Resp.Br. 34, n.19; FEIS at 1-19, AR 9301:67, JA___) appears in FAA's Guidance Memorandum, "Revision to Guidance on Review and Approval of Aviation Forecasts" (Dec. 23, 2004), Pet.RJN, Ex. B. The rationale provided in the Memorandum for requiring that five-year forecasts have no more than a 10% margin for error exposes the principal flaw in FAA's analysis of the Project's impacts, particularly noise impacts: "It is important that airport forecasts of aviation activity be realistic so that informed decisions can be made . . . (I)ncreased attention must be placed on establishing an up-to-date baseline and estimating accurate short-term forecasts . . . Inaccurate baseline estimates and short-term forecasts will result in inaccurate long-term airport projections. *Id.* at 4 (emphasis added).

[27] ROD 51, AR9762:57, JA___; Pet. Br. 29, Resp.Br. 47.

85,000 more people in Elizabeth and in other areas near Newark Airport would experience noise exposure in the 55-65 DNL range under FAA's Preferred Alternative compared to FAA's No Action Alternative. Pet.Br. 49, n.35.

FAA's reliance on *Village of Bensenville* to attempt to justify its baseline and resulting forecast is misplaced. Resp.Br. 52. In *Bensenville*, this Court directed FAA to use the best information available in creating its models and to check the assumptions of those models when new information became available. *Bensenville*, *supra*, at 71. In this case, FAA knew in April 2006 it had overestimated the number of Newark Airport 2006 flight operations. FEIS App.B-2 at 3; AR9303:67, JA___. Despite knowing this well in advance of the FEIS's publication, FAA failed to check the assumptions of its model, as required in *Bensenville* and by its own rules which required that its noise analysis reflect current conditions. Order 1050.1E §14.4e. These facts are easily distinguishable from *St. John's United Church of Christ v. FAA*, 550 F.3d 1168 (D.C. Cir. 2008), a case that dealt with FAA's analysis of benefit-cost analysis data supporting its authorization of Passenger Facility Charges at Chicago O'Hare Airport and not with FAA capacity and demand forecasts. In *St. John's,* FAA relied upon available FAA data in its analysis and the Court noted that Petitioners offered no direct evidence that FAA acted arbitrarily or capriciously. In this case, FAA knew that its estimate for 2006 Newark Airport flight operations was inflated and outside of its own 10% forecast acceptable deviation. FAA proceeded to use the resulting inflated baseline anyway, without adjusting its model, as required in *Bensenville*. FAA is entitled to no deference in this situation.

FAA now attempts "post hoc" to overcome its failure to adjust its inflated noise impact baseline by referring to what it calls "more recent data" that led to the adoption of limited schedules for Kennedy and Newark Airports in 2008. This data is contained in a July 31, 2008

ROD (the "2008 ROD") that is not part of this Record.[28] *See* Resp.Br. 54. Even if the 2008 ROD is considered, it does not overcome FAA's failure. That ROD relates only to FAA's 2008 Congestion Management Orders limiting aircraft schedules at Kennedy and Newark Airports and concludes that those schedule changes did not require the preparation of new or supplemental environmental impact statement. FAA's attempt to rely "post hoc" on the 2008 ROD is tantamount to an admission that the FEIS did not adequately forecast current and future levels of Newark Airport flight operations.

D. FAA'S Failure to Conduct Background Noise Monitoring in Elizabeth, Despite Projecting Significant and Reportable Noise Impacts There, Was an Abuse of Discretion.

FAA admits that the Project will subject Elizabeth to significant noise impacts. Resp.Br. 69. FAA concluded that, in 2011, there will be approximately one square mile area of Elizabeth that will receive an increase of 3.0 DNL or more to the 60-65 DNL level, affecting some 16,803 people, most (if not all) of whom reside in environmental justice communities according to FAA census block data. *See* FEIS 4-44 to 4-46, Table 4.15, and 5-30, AR9301:276-278, 350, JA___; Resp.Br. 69, 70. Even these admitted DNL levels were only for Project noise and did not include ambient and other non-Project related noise. FEIS 1-21, 1-22 and App.E.2, AR9301:69, 70; AR9303:467-579, JA___; Resp.Br. 73.

FAA admits that Order 1050.1E, App.A, Paragraph 14.4j ("¶ 14.4j") states that noise monitoring should be conducted when a proposed FAA action (1) would result in a significant noise increase, (2) is highly controversial, and (3) inclusion of data on background or ambient

[28] FAA has moved to supplement the Record with the July 31, 2008 ROD. Petitioners oppose inclusion of this ROD in the Record as it merely serves as FAA's *post-hoc* rationalization for deficiencies in FAA's 2007 ROD which is the subject of this Petition. *See* Pet.Br. in opposition to FAA's Motion to Supplement the Record at 6-7.

noise may be helpful. Resp.Br. 73-74. Notably, FAA does not deny that all of these criteria are satisfied here.

Implicitly acknowledging the applicability of ¶ 14.4j, FAA conducted background noise monitoring at eighteen locations throughout the Project area but, failed to conduct noise monitoring in Elizabeth, where the agency itself concluded there were significant noise impacts. FAA's closest background noise monitoring location to Newark Airport was outside of Elizabeth, seven miles away from departure Runway 22L/R at the Airport (Pet.Br. 50-51; Resp. Br. 74), despite FAA's determination that aircraft departures from Newark Runway 22L/R would cause significant and reportable noise impacts in Elizabeth from its proposed action. Resp.Br. 69; FEIS 4-44 to 4-46, and 5-30, AR9301:276-278, 350, JA___.

Once FAA decided to conduct background noise monitoring, it was an abuse of discretion for not to do so in Elizabeth. FEIS 4-83, AR9301:315, JA___; Order 1050.1E, 500c(2) and App.A, §14.4j; 40 C.F.R. §1508.25(a)(2); Pet.Br. 50-53. FAA does not and cannot explain why it chose to conduct background noise monitoring outside of Elizabeth, at a location seven miles away from Newark Runway 22L/R, nor why it failed to assess cumulative noise impacts by methods other than monitoring.

Further, FAA contends that only Project-related noise impacts should be included in calculating whether the 65 DNL significant impact threshold has been exceeded, yet cites no authority for this proposition. Resp.Br. 73. FAA itself acknowledges that "total noise, ambient noise, and aircraft noise" should be considered for cumulative impacts. FEIS 4-83, AR9301:315, JA___; Pet.Br. 50. If this non-Project noise is included, compared to the Project No Action Alternative, more affected people in Elizabeth will likely experience noise increases of 1.5 DNL

or more to 65 DNL or more, or, alternatively, receive greater than a 3.0 DNL. increase between 60 and 65 DNL.

FAA attempts to justify its failure to conduct background noise monitoring in Elizabeth by arguing that its failure to do so was "methodology" entitled to deference. Resp.Br. 74-75. In this case, however, based upon FAA's own admission that there were significant noise impacts in Elizabeth, FAA's failure to conduct background noise monitoring there is arbitrary and capricious. It is axiomatic that agency determinations are not entitled to judicial deference where, as here, the agency's methodology is irrational, illogical, or lacking in coherence and unsupported by reasoned decision-making. *Tripoli Rocketry Ass'n v. BATF*, 437 F.3d 75, 77 (D.C. Cir. 2006). As Judge Wright observed in *Ethyl Corp. v. EPA*, judicial review of agency decisions is not so narrow as to merely be a "rubber stamp." 541 F.2d. 1, 16 (D.C. Cir. 1976). *See also Almay, Inc. v. Califano*, 569 F.2d 674, 678, 682 (D.C. Cir. 1977) (FDA regulation providing definition of hypoallergenic products vacated as objectionable because it was irrational, illogical, and based on a flawed survey).

E. Since Night Ocean Routing Was a Fundamental Part of the Selected Alternative, FAA's Failure to Implement It Constitutes a Significant Change in the Project in Violation of NEPA.

FAA included night ocean routing as part of its Selected Alternative, which is also the environmentally preferred alternative. ROD 22, AR 9762:28, JA___. It was included to mitigate the noise impact that the Project will have on areas around Newark Airport. FEIS App.Q at 87-90, AR 9301:3187-3190, JA___; Pet.Br. 60. The record demonstrates that night ocean routing was more than just a primary noise mitigation measure. FEIS App.Q at 87-90, AR 9301: 3187-3190, JA___; Pet.Br. 60. **It was a key part of FAA's Selected Alternative**. ROD at 22, AR 9762:28, JA___. In fact, as FAA admits, noise mitigation is essential in ensuring that significant noise impacts would be eliminated by 2011. ROD at 28, AR 9762:34, JA___, Night ocean

routing was deemed so important that FAA committed to reevaluate the FEIS, undertake appropriate environmental review, and amend the ROD if it revised or eliminated it. ROD 50, AR 9762:56, JA___; Pet.Br. 60.

However, following the close of the public comment period, FAA advised Elizabeth that night ocean routing has not been, and may never be, implemented and stated that night ocean routing is not listed among the initial steps that FAA will take in the first stage of Project implementation. FAA January 8, 2008 letter to City of Elizabeth at 10, n.16; Pet.Br. 61. While FAA claims it has made no decision not to implement night ocean routing Resp.Br. 81-82), FAA has also made no commitment to implement it. FAA may say it has not abandoned this measure, but the undisputed fact is that it has retreated from its commitment in the FEIS and ROD to implement a measure that was essential to its approving the selected alternative as environmentally preferable.

FAA attempts to minimize its failure to implement night ocean routing in the Selected Alternative by referring to use of the 190° departure heading during low demand hours, including at night. However, use of the 190° departure heading, without night ocean routing, was not part of FAA's Selected Alternative in the FEIS and ROD. *See* FEIS, App.Q 83, 90, AR9304:3183,3190, JA___; ROD 50, AR9762:56, JA___; Pet.Br. 60. Further, FAA acknowledges that night ocean routing will provide additional DNL reductions to Elizabeth beyond use of the 190° heading alone. FEIS, App.Q 83, 90, AR9304:3183,3190, JA___. FAA incorrectly suggests that under the current 190° departure heading, aircraft fly south 15 miles before turning, which has no effect on Elizabeth. Resp.Br. 79-80. As shown in FEIS Appendix P, under the current 190° departure heading aircraft travel for only 2.3 miles south before most traffic turns over Elizabeth. FEIS App.P, Fig. 3 at 16, AR9304:3038, JA___.

If night ocean routing is not implemented as part of the Project, then the Selected Alternative approved by the ROD is not the Project that is being implemented and the public had been denied the opportunity to review and evaluate a fundamental change to the federal action. 40 C.F.R. § 1502.14(b). In fact, having concluded that night ocean routing was a key element of its Selected Alternative, FAA's failure to implement it constitutes " a substantial change in the proposed action" triggering the requirement for a supplemental environmental impact statement. 40 C.F.R. §1502(9)(c); *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767 (11th Cir. 1983) (mitigation measure required supplemental impact analysis).

F. Despite Concluding That There Would Be Disproportionate and Significant Noise Impacts on Minority Populations, FAA Failed to Properly Address Environmental Justice Impacts.

The FEIS and ROD also fail to comply with environmental justice requirements. Recognizing that certain communities may be especially susceptible to environmental impacts, both FAA and CEQ environmental justice guidance require explicit consideration of the "interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action." *Environmental Justice: Guidance Under the National Environmental Policy Act* 9, CEQ (Dec. 10, 1997), Resp.Br. 78. *See also* Executive Order 12898; DOT Order 5610.2. The FEIS failed to analyze interrelated cultural, social, occupational, historical, or economic factors that may amplify the severity of noise impacts for environmental justice populations as required by these directives. CEQ Guidance 9; Pet.Br. 59. Neither the FEIS nor the ROD discusses whether the affected environmental justice populations will experience heightened noise impacts due to factors such as residing in substandard housing or suffer from elevated rates of hypertension or other ailments

compounded by increased noise conditions. Pet.Br. 59. FAA does not deny that it has failed to conduct these analyses. Resp.Br. 79.

G. FAA Violated Its Own Rules by Failing to Include a Noise Compliance Monitoring Plan in the ROD After Committing to Include It in the FEIS.

FAA unequivocally committed in the FEIS to include a noise compliance monitoring plan in the ROD. FEIS App.Q 33, AR9304:3133, JA___; Pet.Br. 62. FAA's ROD does not contain such a plan. Order 1050.1E, Paragraph 512b plainly states that any mitigation measure made a condition of approval in the FEIS must be included in the ROD. Pet.Br. 62. In its Brief (Resp.Br. 80), FAA refers to Order 1050.1E, Paragraph 512b, but omits the first sentence of that paragraph which explicitly requires that the ROD include a compliance monitoring plan if, as here, FAA committed in the FEIS to include the monitoring plan in the ROD. While FAA now attempts to explain away its commitment to include a compliance monitoring plan as an "error" (Resp.Br. 80, n. 58), the fact remains that the FEIS committed to include a compliance monitoring plan and FAA therefore violated its own rules by failing to honor its commitment in the ROD. Pet.Br. 62-63.

One can hardly envision a situation in which noise compliance monitoring is more applicable. The FEIS and ROD both clearly state that mitigation is required to avoid significant impact. FEIS 4-44 to 4-46, AR9301:276-278, JA___; ROD 21-22; AR9762:27-28, JA___. The affected Elizabeth communities are subject to environmental justice protection and, according to FAA's census modeling data, are subject to significant noise impacts. FEIS 4-45, Table 4.15, AR9301:277, JA___.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989), is not to the contrary. Here, unlike *Robertson*, FAA unqualifiedly committed to a specific noise mitigation

plan in the FEIS. FEIS App.Q 33, AR9304:3133, JA___; Pet.Br. 62-63. FAA ignored its own rule by failing to include the plan in the ROD. Order 1050.1E, Paragraph 512b; Pet.Br. 62-63.

IV. THIS COURT SHOULD VACATE AND REMAND THE ROD TO FAA.

FAA argues that, should this Court find any violations of Section 4(f), the Clean Air Act, or NEPA, the Court should simply remand the ROD without vacatur. Resp.Br. 126. However, in view of the multitude and severity of the defects in the Record (*e.g.*, the potential damage that FAA has inflicted on Section 4(f) properties throughout the study area, the damage to citizens and municipalities through exposure to unmitigated and unknown emissions of criteria pollutants and precursors, and the failure of FAA to follow its own regulations and orders in analyzing and mitigating noise impacts), this Court should, upon a finding that the ROD was "arbitrary and capricious," vacate and remand the ROD to FAA.

Vacatur is clearly the appropriate remedy. The Administrative Procedures Act ("APA") , 5 U.S.C. 551 et seq., provides that where the Court has found final agency action "arbitrary, capricious, an abuse of discretion, [or] not in accordance with law," 5 U.S.C. § 706(2(A), or was adopted "without observance of procedure required by law," *id.* at § 706(2)(D), that action (here, the ROD and actions taken pursuant to it) "*shall*" be "set aside" pending completion of the remanded proceedings. *Id.* at § 706(2) (emphasis added). This Court has construed § 706 as providing that "[i]f [a party] has standing . . . prevails on its APA claim, it is entitled to relief under that statute, *which normally will be vacatur* of the agency's order." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (emphasis added) (citing *Ass'n of Battery Recyclers, Inc. v. EPA* 208 F.3d 1047, 1061 (D.C. Cir. 2000)).

Here, FAA's claim of harm from vacatur is contrary to the agency's prior statements that no disruptive consequences would result if the Court vacated the ROD. FAA asserts that because "FAA has already begun to implement the Project, committing a great deal of resources

to training air traffic controllers and restructuring air traffic in the Northeast . . . FAA cannot undo changes already made to the nation's airspace as part of the Project without seriously jeopardizing the long term viability of that airspace and its ability to adapt to future technologies." Resp.Br. 126. However, in FAA's Opposition to Motion for Stay Pending Review (at 17), FAA swore that a vacatur of the ROD would pose no problems because: "FAA's actions are not irreversible [*sic*] and therefore Petitioners' injuries are not irreparable."[29] FAA should be held to that position.

Since APA and case law from this Circuit state that vacatur is the normal procedure, especially in light of the seriousness of FAA's violations, and since FAA has already stated that there will be no disruptive consequences of vacating the ROD, upon a finding that FAA's ROD was in violation of APA § 706, the proper remedy is vacatur and remand.

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[29] FAA's letter to Delaware County denying its request for a stay, which was attached as an exhibit to Delaware County's motion, says essentially the same thing:

> Even if the County of Delaware ultimately prevails on the merits of its claims in a judicial proceeding, there is nothing operationally that prevents the FAA from changing back to the original procedures (i.e. - the no action alternative). No action does not reduce delays nor does it provide operational flexibility but as a purely factual matter, the FAA can revert back to its original procedures.

FAA's Letter to Counsel for Delaware County Denying Stay Pending Review, p.3, n.2.

CONCLUSION

Because of FAA's failure to fulfill its obligations under NEPA, Section 4(f), and the Clean Air Act, FAA's September 2007 action should be vacated and remanded to correct these violations of law. This Court should stay implementation of the Project until completion of the remand.

Respectfully submitted,

Date: 3/6/09

Lawrence R. Liebesman
For the Petitioners

Lawrence R. Liebesman
D.C. Circuit Bar No. 24205
Holland & Knight LLP
lawrence.liebesman@hklaw.com
2099 Pennsylvania Ave. NW, Suite 100
Washington, DC 20006
202-955-3000 tel.
202-955-5564 fax
Counsel for Petitioner
County of Rockland, New York

Barbara E. Lichman, Ph.D.
D.C. Circuit Bar No. 47065
blichman@calairlaw.com
Berne C. Hart
D.C. Circuit Bar No. 47062
bhart@calairlaw.com
Steven M. Taber
D.C. Circuit Bar admission pending
staber@calairlaw.com
Chevalier, Allen & Lichman, LLP
695 Town Center Drive, Suite 700
Costa Mesa, CA 92626
714-384-6520 tel.
714-384-6521 fax
Jeffrey L. Karlin
D.C. Bar No. 458465
Gray Plant Mooty
Jeffrey.karlin@gpmlaw.com

2600 Virginia Avenue, N.W.
Suite 1111 - The Watergate
Washington, DC 20037-1931
202-295-2207 tel.
202-295-2257 fax
Counsel for Petitioners
County of Delaware, et al.

John M. Looney, Jr.
D.C. Circuit Bar No. 28265
John.Looney@po.state.ct.us
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860-808-5250 tel.
860-808-5386 fax
Counsel for Petitioner
Gina McCarthy, Commissioner, Department of Environmental Protection, State of Connecticut

Steven F. Pflaum
D.C. Circuit Bar No. 51885
spflaum@mwe.com
Jeffrey M. Hammer
D.C. Circuit Bar No. 51881
jhammer@mwe.com
227 W. Monroe Street
Chicago, IL 60606
312-372-2000 tel.
312-984-7700 fax
Steven W. Kasten
D.C. Circuit Bar No. 48394
skasten@mwe.com
McDermott Will & Emery LLP
28 State Street, 34th Floor
Boston, MA 02109-1775
617-535-4000 tel.
617-535-3800 fax
Counsel for Petitioners
Town of New Canaan, et al.

Michael P. Kelly
D.C. Circuit Bar No. 48897
mkelly@mccarter.com
Christopher A. Selzer
D.C. Circuit Bar No. 51783

CSelzer@McCarter.com
Theodore W. Annos
D.C. Circuit Bar No. 51758
tannos@mccarter.com
McCarter & English, LLP
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, DE 19801
302-984-6317 tel.
302-984-6399 fax
Counsel for Petitioners
Timbers Civic Assoc. et al.

Donald W. Stever
D.C. Circuit Bar No. 27169
don.stever@klgates.com
Kirkpatrick & Lockhart Preston Gates Ellis LLP
599 Lexington Avenue
New York, NY 10022
212-536-4861 tel.
212-536-3901 fax
Counsel for Petitioner
Friends of the Rockefeller State Park Preserve, Inc.

Edward J. Florio, Esq.
D.C. Circuit Bar No. 51731
EJFlorio@floriokennylaw.com
Florio & Kenny, LLP.
100 Hudson Street
Hoboken, NJ 07030
201-659-8011 tel.
201-659-8511 fax
Counsel for Petitioner
Board of Chosen Freeholders of the County of Bergen, New Jersey

John F. Keating, Jr.
D.C. Circuit Bar No. 431867
keatinglaw@sbcglobal.net
Law Offices of John F. Keating
71 Route 39, Suite One
New Fairfield, CT 06812
203-746-1423 tel.
203-746-1637 fax
Counsel for Petitioner

John Hodge, First Selectman, Town of New Fairfield, CT

Gregory J. Bevelock
D.C. Circuit Bar No. 51566
GBevelock@decotiislaw.com
Decotiis, Fitzpatrick, Cole & Wisler, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, NJ 07666
201-928-1100 tel.
201-928-0588 fax
Counsel for Petitioners
County of Union, New Jersey and the
Union County Freeholders Air Traffic and Noise
Advisory Board

John M. Scagnelli
D.C. Circuit Bar No. 51534
jscagnelli@njlegalink.com
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, NJ 07071-0790
201-896-4100 tel.
201-896-8660 fax
Counsel for Petitioner
City of Elizabeth and Mayor J. Christian Bollwage

Peter Dickson
D.C. Circuit Bar No. 250399
dicksonpd@cs.com
Potter and Dickson
194 Nassau Street
Princeton NJ 08542
609-921-9555 tel.
609-921-2181 fax
Counsel for Petitioners
New Jersey Coalition Against Aircraft Noise
The Borough of Emerson, et al.

CERTIFICATE OF COMPLIANCE

FED. R. APP. P. 28(a)(11); 32(a)(7)(C); CIR. R. 32(a)(7)(C)
CASE NO. 07-1363

I certify, pursuant to *Fed. R. App. P.* 28(a)(11) and 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), that the foregoing brief is proportionately spaced, has a typeface of 12 points, and contains 14,350 words.

Dated: March 6, 2009

Lawrence R Liebesman
For the Petitioners

Lawrence R. Liebesman
D.C. Circuit Bar No. 24205
Holland & Knight LLP
lawrence.liebesman@hklaw.com
2099 Pennsylvania Ave. NW, Suite 100
Washington, DC 20006
202-955-3000 tel.
202-955-5564 fax

CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of March, 2009, two copies of the foregoing brief were served by electronic mail and first-class mail, postage pre-paid, upon all co-Petitioners listed above, and upon the following counsel of record for FAA and other Respondents:

Lane McFadden
Environment & Natural Resources Div.
United States Department of Justice
P.O. Box 23795
L'Enfant Station
Washington, DC 20026
lane.mcfadden@usdoj.gov

Lawrence R. Liebesman
For the Petitioners

Lawrence R. Liebesman
D.C. Circuit Bar No. 24205
Holland & Knight LLP
lawrence.liebesman@hklaw.com
2099 Pennsylvania Ave. NW, Suite 100
Washington, DC 20006
202-955-3000 tel.
202-955-5564 fax

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