

ORAL ARGUMENT REQUESTED

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)

**In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit**

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

Petitioners

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,

Respondents.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES, INTERVENORS AND AMICI

1. Petitioners - County of Rockland, New York; County of Delaware, Pennsylvania, *et al.*; Borough of Emerson, New Jersey, *et al.*; New Jersey Coalition Against Aircraft Noise (“NJCAAN”); Board of Chosen Freeholders of Bergen County, New Jersey; County of Union, New Jersey, *et al.*; Friends of the Rockefeller State Park Preserve, Inc.; City of Elizabeth, New Jersey, *et al.*; Town of New Canaan, Connecticut, *et al.*; Connecticut Department of Environmental Protection; Town of New Fairfield, Connecticut; and Timbers Civic Association, *et al.*

2. Respondents - U. S. Department of Transportation; Mary E. Peters; Federal Aviation Administration; Marion C. Blakey and William C. Withycombe; Bobby Sturgell; Manny Weiss

3. Intervenors - None

4. Amici - United States Senators, Christopher J. Dodd and Arlen Specter; Anne Milgram, Attorney General of the State of New Jersey

B. RULING UNDER REVIEW

U.S. Department of Transportation, Federal Aviation Administration (“FAA”) Record of Decision (“ROD”) for the New York/New Jersey/Philadelphia (“NY/NJ/PHL”) Metropolitan Area Airspace Redesign issued on September 5, 2007, as corrected in the September 28, 2007 Corrected ROD.

C. RELATED CASES

<u>Case</u>	<u>Court/Docket No.</u>	<u>Date Filed</u>
<i>County of Delaware, Pennsylvania, et al. v. U. S. Department of Transportation, et al.</i>	U.S. Court of Appeals, District of Columbia Circuit No. 07-70121	September 26, 2007

Respectfully submitted,


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Corporate Disclosure Statement
[FRAP 28(A)(1); 26.1; CIR.R. 28(A)(1)(A)]

1. Petitioner Friends of the Heinz Wildlife Refuge at Tinicum, Inc. is a Pennsylvania non-profit corporation that is not publicly held and does not have a parent organization.
2. Petitioner Friends of the Rockefeller State Park Preserve is a not-for-profit corporation, not publicly held, and has no parent. It is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.
3. NJCAAN is a non-profit corporation, not publicly held, and does not have a parent organization.

TABLE OF CONTENTS

Certificate as to Parties, Rulings, and Related Cases.....	ii
Corporate Disclosure Statement	iv
Table of Authorities	ix
Glossary	xiii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE.....	1
STATEMENT OF ISSUES	2
STATEMENT OF FACTS	4
I. ORIGINS OF THE PROJECT.....	4
II. THE DRAFT ENVIRONMENTAL IMPACT STATEMENT.....	5
III. THE FINAL ENVIRONMENTAL IMPACT STATEMENT.	8
A. Basis of FAA’s Approval and Environmental Review of the Project.	8
B. The Congestion Management Alternative.	11
C. Noise and Environmental Justice Impacts.	12
D. Impacts on Parks.	14
E. Air Quality Impacts.....	14
IV. THE RECORD OF DECISION AND ENSUING LITIGATION.....	15
STANDARD OF REVIEW	16
SUMMARY OF ARGUMENT	17
STANDING	19
A. Individual Standing.....	19
B. Public Entity Standing.	20
C. Associational Standing.....	21
D. Standing for One Petitioner Confers Standing for All Petitioners.....	22
ARGUMENT	23
I. FAA VIOLATED NEPA BECAUSE THE PROJECT WAS APPROVED ON THE BASIS OF AN INADEQUATE ENVIRONMENTAL IMPACT STATEMENT.....	23
A. NEPA Background.....	23
B. FAA Ignored the Growth-Inducing Effects of the Proposed Action.	25

1.	An Increase in Aircraft Operations Is a Reasonably Foreseeable Consequence of the Project Because, According to FAA, the Project Will Significantly Reduce Delay and Cost to System Users.....	26
2.	The FEIS Assumes the Same Number of Flights With and Without the Project Despite Statements in the FEIS and ROD Indicating That Additional Flights Will Result from the Proposed Project.	28
3.	FAA Cannot Avoid Assessing Induced Growth With Conclusory, Unsupported Assertions.	30
4.	FAA’s Failure to Account for Additional Flights Induced by the Project Undermines Its Assessment of Environmental Impacts.	31
C.	FAA Improperly Ignored Congestion Management as a Project Alternative.....	33
D.	FAA Misrepresented Its Data to Justify the Operational Forecasts on Which Its Environmental Impact Conclusions Depend.....	36
E.	The FEIS Analysis of the Project’s Cumulative Impacts Was Inadequate.....	38
1.	FAA Failed to Disclose the Cumulative Impacts of its Capacity Enhancement Program at PHL.	39
2.	FAA Failed to Address the Cumulative Impacts of Expansion of Service at Stewart International Airport.....	40
F.	The FEIS Contains an Inadequate Analysis of Noise Impacts.	42
1.	FAA Failed to Include Noise Contours as Required by Order 1050.1E.....	42
2.	FAA Failed to Project Future Scenarios with Suggested 5- and 10-Year Time Frames, As Required By Order 1050.1E.	43
3.	Route Changes and Noise Impacts Have Not Been Disclosed or Presented in a Manner Understandable to the Public.....	46
4.	The FEIS Fails to Adequately Present and Analyze the Noise Impacts of FAA’s Fanned Departure Headings Off Runways 22L/R at Newark Airport upon the Residents of the City of Elizabeth.....	47
G.	FAA Should Have Prepared a Supplemental Draft EIS Addressing an Eleventh-Hour Change to the Project That Would Significantly Affect the Rockefeller State Park Preserve.....	55
H.	FAA Failed to Properly Assess the Project’s Impact on Minority and Low-Income Populations.....	56
1.	The FEIS Failed to Contain the Requisite Analysis of Whether the Severity of Significant Noise Impacts on Environmental Justice Communities Would Be Exacerbated by Interrelated Social and Economic Effects.	58

2.	The FEIS Fails to Disclose the Unmitigated Significant Noise Impacts on Environmental Justice Populations Attributable to FAA’s Indefinite Deferral of a Key Mitigation Measure.....	59
I.	FAA Violated NEPA by Failing to Include a Compliance Monitoring Plan for Noise Mitigation.....	62
II.	FAA VIOLATED SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT.....	65
A.	FAA Failed to Properly Identify Parklands Protected by Section 4(f).	67
B.	FAA Failed to Properly Analyze Noise Impacts at John Heinz National Wildlife Refuge.....	80
C.	FAA Failed to Provide Adequate Opportunity For Notice And Comment On Supplemental Noise Studies Of Park Land.....	82
III.	FAA’s ANALYSIS OF AIR QUALITY IMPACTS WAS INADEQUATE.....	83
A.	Background of Air Quality Conformity.....	85
B.	This Project Is Not Exempt from the CAA or EPA Regulations.....	88
C.	FAA’s Presumption of Conformity for ATC Procedures Is Equally Inapplicable.....	89
1.	The Presumption of Conformity is Inconsistent with the Express Provisions of the CAA.	90
2.	The Presumption of Conformity is Inconsistent With Congressional Intent.....	91
3.	FAA Failed to Take the Necessary First Step in a Presumption of Conformity of Determining the Project’s Regional Significance.	92
4.	FAA’s Presumption Applies Only to ATC Procedures Above 1,500 feet AGL.....	94
D.	Neither FAA’s Governing Regulations Nor the Record Supports FAA’s Fuel Burn Study.	96
1.	The Fuel Burn Analysis Does Not Comply with FAA Regulations Requiring the Use of FAA’s EDMS.....	96
2.	The Record Lacks Evidence to Support FAA’s Preliminary Determination of the Project’s “De Minimis” Status.....	97
3.	The Record Lacks Evidence of Emissions Impacts Below the Mixing Height.	99
4.	The Record Even Lacks Evidence the Project Will Reduce Fuel Burn.	99
	CONCLUSION.....	103
	CERTIFICATE OF COMPLIANCE.....	107

ADDENDA

ADDENDUM A	ADDITIONAL STATUTORY AND REGULATORY DOCUMENTS
ADDENDUM B	PETITIONERS' STANDING STATEMENTS
ADDENDUM C	DOCUMENTS FOR WHICH PETITIONERS REQUEST JUDICIAL NOTICE
ADDENDUM D	SECTION 4(f) MATERIALS
ARGUMENT	

CERTIFICATE OF SERVICE	108
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TABLE OF AUTHORITIES

Cases

<i>Adler v. Lewis</i> , 675 F.2d 1085 (9th Cir. 1982).....	71
<i>Allison v. Dep't of Transp.</i> , 908 F.2d 1024 (D.C. Cir. 1990)	70
<i>Am. Bird Conservancy, Inc. v. FCC</i> , 516 F.3d 1027 (D.C. Cir. 2008)	84
<i>Am. Library Ass'n v. FCC</i> , 401 F.3d 489 (D.C. Cir.2005)	21, 22
<i>Am. Maritime Ass'n. v. United States</i> , 766 F.2d 545 (D.C. Cir. 1985).....	27
<i>Am. Radio Relay League, Inc. v. FCC</i> , 524 F.3d 227 (D.C. Cir. 2008).....	16
<i>Andrus v. Sierra Club</i> , 442 U.S. 347 (1979).....	24
<i>Animal Def. Council v. Hodel</i> , 840 F.2d 1432 (9th Cir. 1988).....	66
<i>Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.</i> , 462 U.S. 87 (1983)	23
<i>Bullcreek v. Nuclear Regulatory Comm'n</i> , 359 F. 3d 536 (D.C. Cir. 2004)	22
<i>California v. Block</i> , 690 F.2d 753 (9th Cir. 1982).....	56
<i>Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n</i> , 449 F.2d 1109 (D.C. Cir. 1971)	23
<i>Chevron USA, Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	91
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281, 295 (1979)	69
<i>Citizens Against Burlington, Inc. v. Busey</i> , 938 F.2d 190 (D.C. Cir. 1991)	24
<i>*Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971).....	67
<i>City of Dania Beach v. FAA</i> , 485 F.3d 1181 (D.C. Cir. 2007)	19, 97
<i>*City of Grapevine v. Dep't of Transp.</i> , 17 F.3d 1502 (D.C. Cir. 1994)	34, 68
<i>City of Los Angeles v. Nat'l Highway Traffic Safety Admin.</i> , 912 F.2d 478 (D.C. Cir. 1990)	21
<i>City of Olmsted Falls v. FAA.</i> , 292 F. 3d 261 (D.C. Cir. 2002).....	20
<i>City of Waukesha v. EPA</i> , 320 F.3d 228 (D.C. Cir. 2003).....	22
<i>Cmtys. Against Runway Expansion, Inc. v. FAA</i> , 355 F.3d 678, 689 (D.C. Cir. 2004).....	58
<i>Continental Air Lines v. Civil Aeronautics Bd.</i> , 522 F.2d 107 (D.C. Cir. 1974)	27
<i>Corridor H Alternatives, Inc. v. Slater</i> , 166 F.3d 368 (D.C. Cir. 1999).....	69, 70
<i>Ctr. for Auto Safety v. NHTSA</i> , 793 F.2d 1322 (D.C. Cir. 1986).....	22
<i>Davis v. Mineta</i> , 302 F.3d 1104 (10th Cir. 2002).....	30
<i>Dubois v. U.S. Dep't of Agric.</i> , 102 F.3d 1273 (1st Cir. 1996).....	34, 56
<i>Envtl. Action v. FERC</i> , 996 F.2d 401 (D.C. Cir. 1995)	22
<i>Envtl. Def. Fund v. Army Corps. of Eng'rs</i> , 492 F.2d 1123 (5th Cir. 1974).....	49
<i>Envtl. Def. Fund v. EPA</i> , 167 F.3d 641 (D.C. Cir. 1999)	86, 87
<i>Envtl. Def. Fund v. Marsh</i> , 651 F.2d 983 (5th Cir. 1981).....	56
<i>*Envtl. Def., Inc. v. EPA</i> , 509 F.3d 553 (D.C. Cir. 2007).....	91, 92, 103
<i>Flint Ridge Dev. Co. v. Scenic Rivers Ass'n</i> , 426 U.S. 776 (1976)	23
<i>Found. on Econ. Trends v. Heckler</i> , 756 F.2d 143 (D.C. Cir. 1985).....	34
<i>Friends of Yosemite Valley v. Kempthorne</i> , 520 F.3d 1024 (9th Cir. 2008).....	35
<i>Fritiofsen v. Alexander</i> , 772 F.2d 1225 (5th Cir. 1985)	39
<i>Grand Canyon Trust v. FAA</i> , 290 F.3d 339 (D.C. Cir. 2002).....	38, 84
<i>GTE Serv. Corp. v. FCC</i> , 205 F.3d 416, 422 (D.C. Cir. 2000).....	81
<i>Horsehead Res. Dev. Co. v. Browner</i> , 16 F.3d 1259 (D.C. Cir. 1994).....	22
<i>Hughes River Watershed Conservancy v. Glickman</i> , 81 F.3d 437, 446 (4th Cir. 1996)	66
<i>*I-291 Why? Ass'n v. Burns</i> , 372 F. Supp. 223 (D. Conn. 1974).....	36
<i>In re Louisiana Energy Servs., L.P. (Claiborne Enrichment Center)</i> , 47 NRC 77 (1998).....	59

<i>Int'l Brotherhood of Teamsters v. Transp. Security Admin.</i> , 429 F.3d 1130 (D.C. Cir. 2005)	19
<i>*Kleppe v. Sierra Club</i> , 427 U.S. 390, 410 (1976).....	39
<i>Marsh v. Ore. Natural Res. Council</i> , 490 U.S. 360 (1989)	16, 65
<i>Minn. Pub. Interest Res. Group v. Butz</i> , 541 F.2d 1292 (8th Cir. 1976)	24
<i>Morall v. DEA</i> , 412 F.3d 165 (D.C. Cir. 2005)	16, 30, 60
<i>Morongo Band of Mission Indians v. FAA</i> , 161 F.3d 569, 583 (9th Cir. 1998)	70
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	1
<i>*Muckleshoot Indian Tribe v. U.S. Forest Serv.</i> , 177 F.3d 800 (9th Cir. 1999).....	41, 42
<i>*Mullin v. Skinner</i> , 756 F. Supp. 904 (E.D. N.C. 1990).....	31
<i>N.C. Alliance for Transp. Reform v. Dep't of Transp.</i> , 151 F. Supp. 2d 661 (M.D. N.C. 2001)..	30
<i>N.Y. Cross Harbor R.R. v. Surface Transp. Bd.</i> , 374 F.3d 1177 (D.C. Cir. 2004)	16
<i>Nat'l Ass'n of Home Builders v. Norton</i> , 340 F.3d 835 (9th Cir. 2003).....	53
<i>Nat'l Mining Ass'n v. U. S. Dep't of Interior</i> , 70 F.3d 1345 (D.C. Cir. 1995).....	22
<i>*Nat'l Parks and Conservation Ass'n v. FAA</i> , 998 F.2d 1523, 1531 (10th Cir. 1993)	70
<i>Natural Res. Def. Council v. U. S. Forest Serv.</i> , 421 F.3d 797 (9th Cir. 2005).....	62
<i>Nevada v. Dep't of Energy</i> , 457 F.3d 78	46
<i>Or. Env'tl. Council v. Kunzman</i> , 817 F.2d 484 (9th Cir. 1987).....	46
<i>*Ragsdale v. Wolverine Worldwide, Inc.</i> , 535 U.S. 81, 91 (2002).....	103
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	23, 64
<i>*Save Our Heritage, Inc. v. FAA</i> , 269 F.3d 49 (1st Cir. 2001).....	71
<i>Sierra Club v. EPA</i> , 129 F.3d 137, 138 (D.C. Cir. 1997).....	87, 92, 93
<i>Sierra Club v. EPA</i> , 292 F. 3d 895 (D.C. Cir. 2002)	19, 21
<i>Sierra Club v. Marsh</i> , 976 F. 2d 763 (1st Cir. 1992).....	25
<i>Simmons v. U.S. Army Corps of Eng'rs</i> , 120 F.3d 664 (7th Cir. 1997).....	35
<i>*South Coast Air Quality Mgmt. Dist. v. EPA</i> , 472 F.3d 882 (D.C. Cir. 2006)	9
<i>*Town of Cave Creek v. FAA</i> , 325 F.3d 320, 333 (D.C. Cir. 2003).....	68
<i>Utahns for Better Transp. v. Dep't of Transp.</i> , 305 F.3d 1152 (10th Cir. 2002).....	26
<i>Vt. Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978).....	65
<i>Warth v. Seldin</i> , 422 U.S. 490, 511 (1975).....	22
<i>West Virginia v. EPA</i> , 362 F.3d 861 (D.C. Cir. 2004).....	21

Statutes

5 U.S.C. 1251 <i>et. seq.</i>	1
5 U.S.C. § 706(2)(A).....	16,66
28 U.S.C. § 2112(a)	16
42 U.S.C. § 4331(b)(2)	17
42 U.S.C. § 4332(2)(C).....	23, 24, 46
42 U.S.C. § 4906.....	6
42 U.S.C. § 7401(b)(1)	92
42 U.S.C. § 7409 (1994)	85
42 U.S.C. § 7410.....	84, 85
<i>*42 U.S.C. § 7506(c)(1)</i>	1,3,14,17,84,85,86,90
44 U.S.C. § 1507.....	12
49 U.S.C. § 303(c)	14, 66, 67,68
49 U.S.C. § 1301	6
49 U.S.C. § 46110(a)	1

49 U.S.C. 47501 <i>et seq.</i>	6
--------------------------------------	---

Regulations

14 C.F.R. Pt. 150 App. A, Part B, Section A150.101	43
Appendix A of 14 C.F.R. Part 150.....	43
40 C.F.R. §1500 <i>et seq.</i>	23, 24, 25,39,40, 42, 63, 65, 84,
40 C.F.R. § 1500.1	23
40 C.F.R. § 1500.3	24
*40 C.F.R. § 1502.1	65
*40 C.F.R. § 1502.8	65
*40 C.F.R. § 1502.9	65
40 C.F.R. § 1502.14	34
*40 C.F.R. § 1505.2	71
*40 C.F.R. § 1505.3	63
*40 C.F.R. § 1508.7	28
*40 C.F.R. § 1508.8	29
40 C.F.R. § 1508.25(a).....	24, 39, 42
*40 C.F.R. § 93.153	98,99,100,102,104,105,107,110,114
40 C.F.R., Pt. 51, App. W, § 6.2.4(c).....	98
40 C.F.R §1502.1	46
40 C.F.R §1502.8	46, 49
40 C.F.R. § 1508.27(b)(7).....	62

Federal Register

46 Fed. Reg. 18026 (Mar. 23, 1981).....	64
58 Fed. Reg. 13,843(Mar. 21, 1993).....	89
*72 Fed. Reg. 41,566 (2007)	102
73 Fed. Reg. 29550 (May 21, 2008)	11, 33
73 Fed. Reg. 29626 (May 21, 2008)	11, 12, 34

Other Authorities

2002 Scoping Report.....	4
2005 MITRE Study.....	8
* <i>Air Quality Procedures for Civilian Airports and Air Force Bases</i> , April 1997 ... 94,97,98,100,105,106,107,108,109	
Barry Hill and Nicholas Targ, <i>The Link between Natural Resources and the Issue of Environmental Justice</i> , 28 B.C. ENVTL. AFF.L.REV. 1, XX (Dec. 2000).....	59
CEQ Guidance	59
Conn. Gen. Stat. § 22a-67.....	75
EPA, Final Guidance for Consideration of Environmental Justice in Clean Air Act 309	

Reviews, § 2.3.1 (1999)	62
Executive Order 12898, <i>Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations</i> , § 1-101 (Feb. 11, 1994).....	57
FAA Office of Aviation Policy and Plans Airport Benefit Cost Analysis Guidance (Dec. 15, 1999)	27, 33
*FAA Order 1050.1E App. A, Section 14.4g	4,13,14,44
Fact Sheet, <i>available at</i> http://www.panynj.gov/AboutthePortAuthority/PressCenter/PressReleases/PressRelease/index.php?id=908 (last visited July 21, 2008).....	41
Fuel Burn Report.....	15
<i>General Conformity Guidance for Airports, Questions and Answers</i> , FAA, 2002	100
Guidance Under the National Environmental Policy Act,” (CEQ Dec. 10, 1997).....	58
H. Rep. No. 108-243 – Departments of Transportation and Treasury and Independent Agencies Appropriations bill, 2004, at 20-21 (July 30, 2003)	5
H. Rep. No. 109-153 - Departments of Transportation, Treasury and Housing and Urban Development, The Judiciary, District of Columbia and Independent Agencies Appropriations Bill, 2006, at 16 (June 24, 2005).....	6
H. Rpt. No. 109-307, Conference Report for Making Appropriations For The Departments of Transportation, Treasury and Housing and Urban Development, The Judiciary, District of Columbia and Independent Agencies For the Fiscal Year Ending September 30, 2006, at 136 (Nov. 17, 2005)	6
Judy Rife, Times Herald-Record, <i>Port Authority approves Stewart Airport buyout</i> (Jan. 26, 2007), <i>available at</i> http://www.recordonline.com/apps/pbcs.dll/article?AID=/20070126/NEWS/701260321/-1/NEWS (last visited July 21, 2008).....	41
Order 1050.1E, App. A, §2.4(c).....	31
Order 1051.1E ”Environmental Impacts: Policies and Procedures” (Mar. 2006)	24, 25, 42, 43
Order 5050.4B, ”National Environmental Policy Act Implementing Instructions For Airport Actions” (Apr. 2006)	24
Port Authority Strategic Plan (2006)	44
Press Release, Congressman Steve Rothman, Congressman Steve Rothman’s Statement on the Project (Apr. 6, 2006), <i>available at</i> , http://rothman.house.gov/news_releases/2006/apr6_airspaceredesign.htm	5
S. Rep. No. 108-146 – Transportation, Treasure and General Government Appropriations Bill, 2004.....	5
S. Rep. No. 109-293 – Transportation, Treasury, Housing and Urban Development, The Judiciary, and Related Agencies Appropriations Bill, 2007	6
Spreadsheet of Newark operations, <i>see</i> FAA’s website, http://aspm.faa.gov/opsnet/	38

*** Principal Authorities**

GLOSSARY

Add.	Addendum
AGL	Above Ground Level
APA	Administrative Procedures Act, 5 U.S.C. § 551, <i>et seq.</i>
App.	Appendix
APU	Auxiliary Power Units
AR	Administrative Record
ATC	Air Traffic Control
BCA Guidance	FAA Airport Benefit Cost Analysis Guidance
CAA	Clean Air Act, 42 U.S.C. § 7506
Caps	Congestion management measures such as limits on hourly take-off and landing slots
CEP	Capacity Enhancement Program at PHL
CEQ	Council on Environmental Quality
DEIS	Draft Environmental Impact Statement
DNL	Day-Night Average Sound Level
DOT	Department of Transportation
EDMS	Emissions and Dispersion Modeling System
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
EWR	Newark Liberty International Airport
Fig.	Figure

Final Notice	Final Presumed to Conform Rule, 72 Fed. Reg. 41,565-580 (July 30, 2007)
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
General Conformity Rule	Final Rule for Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 40 C.F.R. § 93.150, <i>et seq.</i>
GPS	Global Positioning System
GSE	Ground Support Equipment
Handbook	<i>Air Quality Procedures for Civilian Airports and Air Force Bases</i> (April 1997)
HPN	Westchester County Airport
ICC	Integrated Control Complex
FACT II Report	MITRE Corp., <i>Capacity Needs in the National Airspace System: 2007-2025</i> (May 2007).
FHWA	Federal Highway Administration
Fuel Burn Report	“Effect of New York/New Jersey/Philadelphia Airspace Redesign on Aircraft Fuel Consumption,” FEIS App. R
JA	Joint Appendix
JFK	John F. Kennedy International Airport
LGA	LaGuardia Airport
MITRE Study	Appendix C to the FEIS
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 <i>et seq.</i>
Newark	Newark Liberty International Airport
NJCAAN	New Jersey Coalition Against Aircraft Noise

NMR	Noise Mitigation Report, FEIS, AR 9304 at App. P
NMS	Noise Mitigation Study
NY/NJ/PHL	New York/New Jersey/Philadelphia
OPSNET	FAA's Air Traffic Operations Network database containing data on airport traffic counts and other air traffic activity
Order 1050.1E	FAA Order 1050.1E CHG 1, <i>National Policy—Environmental Impacts: Policies and Procedures</i> (Mar. 20, 2006)
Order 5050.4B	FAA Order 5050.4B, <i>National Environmental Policy Act (NEPA) Implementing Instructions For Airport Actions</i> (April 2006)
PHL	Philadelphia International Airport
Port Authority	Port Authority of New York and New Jersey
Project	New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign
Record	Administrative Record
RJN	Request for Judicial Notice
ROD	Record of Decision
SAFETEA-LU	Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users, 49 U.S.C. § 303(d)(3), as amended by Pub. L. No. 109-59 § 6009(a) (2005)
Section 4(f)	Original section of the Department of Transportation Act dealing with protection of parks, now recodified at 49 U.S.C. § 303
SEIS	Supplemental EIS
SIP	State Implementation Plan
SWF	Stewart International Airport
TAAM	Total Airspace and Airport Modeler

JURISDICTIONAL STATEMENT

These consolidated petitions challenge the Record of Decision (“ROD”) for the New York/New Jersey/Philadelphia Area Metropolitan Area Airspace Redesign (“Project”), as issued by the Federal Aviation Administration (“FAA”) on September 5, 2007, and corrected on September 28, 2007.¹ The ROD “constitutes an order of the [FAA] Administrator which is subject to review by the Courts of Appeal of the United States in accordance with the provisions of 49 U.S.C. § 46110.” ROD at 59, AR 9762:65, JA___. For purposes of the National Environmental Policy Act (“NEPA”), 42 U.S.C. 4321 *et seq.* and the Administrative Procedure Act (“APA”), 5 U.S.C. § 1251 *et. seq.* the ROD constitutes final agency action. All consolidated petitions were filed within 60 days following issuance of the ROD, as required by 49 U.S.C. § 46110(a).

STATEMENT OF THE CASE

Simply put, this case is about what FAA failed to do in approving the Project in its September 2007 ROD. The Project’s history is infected with a long list of legal shortcomings that includes glaring gaps in the Administrative Record (“Record”) and repeated failures to meet express statutory duties. These violations have prevented some 30 million people living throughout the 31,180 square miles in five states covered by the Project area from fully understanding how the Project will affect the air they breathe, the noise they experience, and the parks they enjoy. FAA’s unauthorized short-cuts around the requirements of NEPA, Section 4(f) of the Department of Transportation (“DOT”) Act, 49 U.S.C. 303 (“Section 4(f)”), and Section 176 of the Clean Air Act, 42 U.S.C. 7506 (“CAA”) can lead to only one conclusion—that the

¹ All references to the ROD in this brief will be to the corrected version, AR 9762, JA___.

Record fails to provide a “rational connection between the facts found and choice made” by FAA in approving the Project. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 53 (1983).

STATEMENT OF ISSUES

NEPA Statement of Issues

1. Was FAA obligated to analyze the environmental impacts of additional aircraft operations that by FAA’s own admission would occur with implementation of the Project?
2. Was FAA obligated to analyze congestion management, which it is now implementing as a delay reduction measure at Newark and Kennedy airports, as an alternative to the Project?
3. Was it proper for FAA to rely on forecasts of aircraft operations in assessing environmental impacts, knowing that such forecasts were based on substantially overstated activity at Newark Airport?
4. Did FAA adequately address the cumulative impacts of the proposed Project associated with planned capacity enhancements at the Philadelphia airport, and planned expansion of facilities and service at Stewart International Airport in New York?
5. Did FAA adequately disclose, assess, and mitigate the impacts of the Project with respect to noise?
6. Was FAA obligated to prepare a supplemental draft EIS to assess the impacts of late-adopted “mitigation” flight routes substantially impacting the Rockefeller State Park Preserve?
7. Did FAA adequately assess the Project’s impact on minority and low-income populations affected by Newark Airport operations, as required by the Executive Order on Environmental Justice?

Section 4(f) Statement of Issues

1. Did FAA properly determine that the Project would not result in a “constructive use”² of any publicly owned parks of national, state, or local significance, despite not having assessed numerous state and local parks?
2. Did FAA comply with Section 4(f) and its own regulations by not having contacted numerous state and local park officials?
3. Was it permissible for FAA to scrutinize, for potential constructive use, some noise-sensitive parks exposed to significant noise increases while ignoring other parks exposed to comparable noise increases?
4. Did FAA properly analyze noise impacts at the John Heinz National Wildlife Refuge?
5. Did FAA violate Section 4(f) by not providing an opportunity for public comment on a supplemental noise study prepared after the Final Environmental Impact Statement (“FEIS”) and appended to the ROD?

Air Quality Statement of Issues

1. Was FAA obligated under NEPA and the CAA to analyze air quality impacts using FAA’s Emissions and Dispersion Modeling System, in light of applicable FAA regulations?
2. Was it proper for FAA to rely on an exemption from the CAA requirement that all Federal transportation projects conform to relevant state implementation plans for achieving compliance with national ambient air quality standards, 42 U.S.C. § 7506?

² DOT regulations state that constructive use occurs “when the transportation project does not incorporate land from a section 4(f) resource, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.” 23 C.F.R. § 774.17 (previously 23 C.F.R. § 771.135(p)(2), but reorganized according to 73 Fed. Reg. 13367).

3. Was it proper for FAA, in determining whether the Project complies with the CAA conformity requirement, to rely on a putative presumption of conformity contained in an FAA regulation? If so, did FAA comply with required procedures in promulgating the presumption?
4. Was FAA's Fuel Burn Analysis adequate to establish that the Project complies with the CAA conformity requirement?

STATEMENT OF FACTS

I. ORIGINS OF THE PROJECT.

FAA developed the Airspace Redesign “to address congestion and delays at some of our nation’s busiest airports.” Corrected Record of Decision (“ROD”) at 1, AR 9762:7, Joint Appendix (“JA”)__. The Project entails changes in air traffic control procedures and flight paths affecting aircraft operations at airports in a five-state region in the New York-New Jersey-Philadelphia metropolitan area. *Id.*

The Project officially started in 2001 when FAA issued a Notice of Intent to prepare an Environmental Impact Statement (“EIS”). FEIS at 1-1, AR 9301:49, JA __. By then, the agency had already completed a pre-scoping document which listed among the benefits of a major redesign “*reduced adverse environmental impacts such as noise and air emissions.*” FEIS App. L, § L.2 at 2, AR 9304:192, JA __ (emphasis added).

A 2002 Scoping Report specifically noted that “[m]any of the comments listed air emissions as a concern that should be addressed” FEIS App. L, § L.3 at 6, AR 9304:239, JA __. Apparently alluding to the Emission and Dispersion Modeling System (“EDMS”) analysis required by its regulations, FAA Order 1050.1E CHG 1, *National Policy—Environmental Impacts: Policies and Procedures* § 2.4(d)(Mar. 20, 2006)(“Order 1050.1E”), FAA promised that “the required air quality analysis will be done.” *Id.*

II. THE DRAFT ENVIRONMENTAL IMPACT STATEMENT.

The Draft EIS (“DEIS”) was issued in December 2005. AR 2692, JA __. Despite FAA’s assurance that the Project would reduce noise, the DEIS dropped noise reduction from the Purpose and Need for the Airspace Redesign. *See, e.g.*, DEIS at 1-24, AR 2692:66, JA __. This drew harsh criticism from members of Congress.³ The Transportation Appropriations Committee Reports for Fiscal Years 04,⁴ 06,⁵ and 07⁶ reflected Congress’s concern that FAA

³ Congressman Steve Rothman (NJ-9) voiced complaints echoed by other representatives as follows:

The Congress directed the FAA to consider both noise abatement and ocean routing in their plan for the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign. Instead of taking the Congress and New Jerseyans seriously, the FAA decided to make the lives of an estimated 500,000 people more difficult by significantly increasing the amount of noise that already erodes the quality of life for those of us who hear planes flying over our homes and places of work around the clock.

Press Release, Congressman Steve Rothman, Congressman Steve Rothman’s Statement on the Project (Apr. 6, 2006), *available at*, http://rothman.house.gov/news_releases/2006/apr6_airspace redesign.htm. Petitioners’ request for judicial notice (“RJN”) Ex. A, Add. C.

⁴ The FY04 Senate and House Transportation Appropriations Reports each provided in pertinent part:

The Committee also directs FAA to submit, not later than April 1, 2004 a report to the House and Senate Committees on Appropriations on the New York/New Jersey airspace redesign effort. This report should include details on all planned components and elements of the redesign project, including details on aircraft noise reduction and any ocean routing modeling that has been conducted.

See H. Rep. No. 108-243 – Departments of Transportation and Treasury and Independent Agencies Appropriations bill, 2004, at 20-21 (July 30, 2003); S. Rep. No. 108-146 – Transportation, Treasury and General Government Appropriations Bill, 2004.

⁵ The FY06 House Transportation Appropriation Report went a step further, conditioning funds for the Airspace Redesign on FAA consideration of noise mitigation:

was improperly downplaying noise abatement during the planning process for the Project. The FY06 Transportation Conference Report even directed that “no funds made available under this appropriation may be used to prepare the Environmental Impact Statement . . . as long as the FAA fails to consider” noise mitigation. H. Rpt. No. 109-307, Conference Report for Making Appropriations For The Departments of Transportation, Treasury and Housing and Urban Development, The Judiciary, District of Columbia and Independent Agencies For the Fiscal Year Ending September 30, 2006, at 136 (Nov. 17, 2005). These efforts to ensure that noise reduction did not receive short shrift are consistent with longstanding Congressional initiatives designed to limit noise from aircraft operations.⁷

As foreshadowed by the dropping of noise reduction from the discussion of Purpose and Need, the DEIS did not conclude that noise reduction would be a benefit of the Project. And despite FAA’s promise to perform “the required air quality analysis” (FEIS App. L, § L.3 at 6,

New York/New Jersey airspace redesign.—No funds made available for national airspace redesign may be used to prepare the environmental impact statement for the redesign of the New York/New Jersey/Philadelphia regional airspace, or to conduct any work as part of the review of the redesign project conducted under the National Environmental Policy Act and related laws, as long as the FAA fails to consider noise mitigation.

H. Rept. No. 109-153 - Departments of Transportation, Treasury and Housing and Urban Development, The Judiciary, District of Columbia and Independent Agencies Appropriations Bill, 2006, at 16 (June 24, 2005).

⁶ S. Rep. No. 109-293 – Transportation, Treasury, Housing and Urban Development, The Judiciary, and Related Agencies Appropriations Bill, 2007.

⁷ Congressional directives requiring FAA to protect exposed populations from harmful aircraft noise include: the *Aircraft Noise Abatement Act of 1968*, (P.L. 90-411) (49 U.S.C. § 1301); the *Noise Control Act of 1972*, (P.L. 92-574) (42 U.S.C. § 4906); the *Aviation Safety and Noise Abatement Act of 1979* (P.L. 96-143) (49 U.S.C. §§ 47501 *et seq.*); the *Airport and Airway Improvement Act of 1982* (49 U.S.C. §§ 47101-47131); the *Airport Noise and Capacity Act of 1990* (49 U.S.C. § 47521); and the *Federal Aviation Reauthorization Act of 1996* (P.L. 104-264).

AR 9304:239, JA__) in the DEIS, “FAA indicated that no air quality analysis would be undertaken.” *See* DEIS at 4-57, AR 2692:265, JA __.

The DEIS purported to study five main alternatives:

1. A Modification to Existing Airspace alternative that tweaked existing air traffic control flight paths and procedures. DEIS at 2-24 to 2-30, AR 2692:96-100, JA __.
2. An Ocean Routing Airspace alternative that directed departures from Newark Airport over Raritan Bay to the Atlantic Ocean. *Id.* at 2-31 to 2-35, AR 2692:101-05, JA __.
3. An Integrated Airspace without Integrated Control Complex (“ICC”) alternative. This two-phased project would add or modify various departure headings and flight paths, keep aircraft closer together than is currently permitted, reallocate airspace “sectors” among air traffic control (“ATC”) facilities, and use new technologies. *Id.* at 2-37 to 2-43, AR 2692:103-09, JA __.
4. An Integrated Airspace with ICC alternative that is based on the preceding alternative, but in the second phase (2011) would add a common automation platform intended to facilitate coordination between air traffic controllers by providing shared displays on screens, radar data processing, and communications. The ICC consolidates in one Air Route Traffic Control Center various sectors of airspace currently handled by other ATC facilities. *Id.* at 2-43 to 2-53, AR 2692:109-19, JA __.
5. A No Project Alternative that is essentially identical to present day operations, except for the type and quantity of aircraft operations. *Id.* at 2-13, AR 2692:83, JA __.

In March, 2007, FAA announced the Integrated Airspace Alternative with ICC as its preferred alternative. ROD at 21, AR 9762:27, JA_. On April 6, 2007, the MITRE Corporation Center for Advanced Aviation System Development, which operates a federally funded research and development center sponsored by FAA, published a Noise Mitigation Report. FEIS App. P, AR 9304:3018, JA _ (“NMR”). One of MITRE’s noise reduction proposals was a new “mitigated preferred alternative” departure routing which concentrated all northbound and westbound departures from Westchester County Airport (“HPN”) in a narrow corridor directly over the Rockefeller State Park Preserve, New York. NMR at 54-58, AR 9304:3076-80, JA _; FEIS at Fig. 5.2, AR 9302:141, JA _. FAA’s DEIS had not disclosed any changes to departure procedures from HPN. DEIS at 4-22, AR 2692:230, JA _.

III. THE FINAL ENVIRONMENTAL IMPACT STATEMENT.

A. Basis of FAA’s Approval and Environmental Review of the Project.

FAA’s environmental review culminated with the issuance of the FEIS in August 2007. The asserted justification for FAA’s approval of the Project, as well as its assessment of air quality and noise impacts, is based on the modeling of future aircraft operations contained in a report by MITRE Corporation presented in Appendix C to the FEIS. FEIS App. C, AR 9303:125, JA _ (“2005 MITRE Study”). That modeling reveals that the Project actually requires the average flight to fly an *additional* 3.7 miles. *Id.* at 10-2, AR 9303:361, JA _; *see also id.* at 9-34 to 9-35, AR 9303:354-55, JA _; FEIS at 2-78 to 2-80, AR 9301:156-58, JA _. According to MITRE, the longer time in the air required to travel the extra distance can be offset by delay reduction benefits at flight levels in excess of the median day for the “extremely-high demand levels forecast for 2011.” 2005 MITRE Study at 9-34, AR 9303:354, JA _. MITRE cautioned, however, that unless such high-demand conditions materialize, “there is a risk that this

alternative will not reach the break-even point” where delay reductions equal the longer flight time due to the greater distance traveled. *Id.*

The reduction in flight delay predicted under high-demand future conditions occurs principally at Newark Airport. The following chart from the 2005 MITRE Study shows the delay reductions or increases experienced at each of the eight airports for which operational modeling was conducted. 2005 MITRE Study at 9-36, AR 9303:356, JA __. “Block time” refers to the “average time a flight takes to fly from gate to gate in a 24 hour period.” FEIS at 7-9, AR 9301:475, JA __. The circles depict the mean (average) delay reduction or increase for each alternative. The “Integrated w/ ICC” alternative depicts the Project:

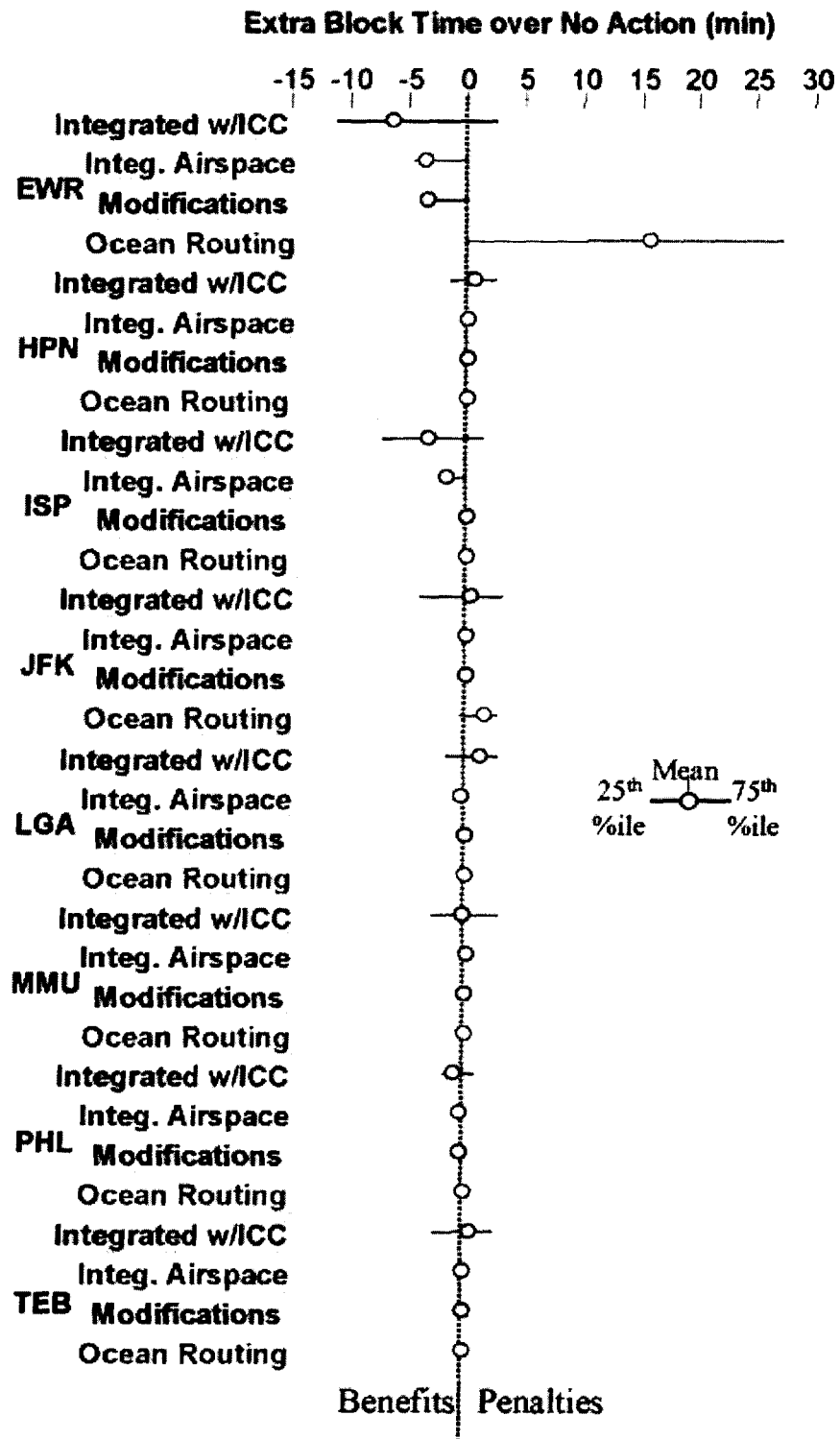


Figure 9-23. Block Time Changes

This chart reveals that, at the high demand levels forecast for 2011, Newark would experience an average reduction in flight time of more than six minutes per flight. However, none of the other major airports would experience significant delay reductions. There would be a slight decrease at Philadelphia, and *increases* in average flight times at both LaGuardia and John F. Kennedy International Airport (“JFK”).

B. The Congestion Management Alternative.

The FEIS briefly explored then dismissed a “congestion management” alternative involving administrative or economic measures intended to reduce delay, such as limits on the number of hourly operations during peak hours at congested airports. FEIS at 2-3 to 2-6, AR 9301:81-84, JA __. FAA had previously implemented and continues to impose limits on the number of hourly operations at LaGuardia and O’Hare airports in an effort to combat airline scheduling practices that produce congestion and delay during peak hours. *Id.* at 2-4, AR 9301:82, JA __. The FEIS rejected congestion management because it is an “artificial restraint” on operations which will “constrain the ability of air traffic to grow in accordance with market forces and [has] the potential to impede the use of emerging technologies or other capacity enhancement measures.” *Id.*

Shortly after issuing the FEIS rejecting congestion management as a feasible alternative, FAA imposed hourly operational caps at Newark and Kennedy Airports, and proposed long-term caps at those airports through March 2019. *See* 73 Fed. Reg. 3519 (Jan. 18, 2008) (capping hourly operations at JFK through October 2009); 73 Fed. Reg. 29550 (May 21, 2008) (capping hourly operations at Newark through October 2009); 73 Fed. Reg. 29626 (May 21, 2008).

(proposing caps at JFK and Newark through March 2019).⁸ FAA expects caps to reduce average delay per operation by 25 percent at JFK and 23 percent at Newark. *See* 73 Fed. Reg. 29626-29637.

C. Noise and Environmental Justice Impacts.

The FEIS purported to analyze noise impacts for the years 2006 and 2011. Although FAA regulations recommend analyzing impacts five to ten years after implementation of a project, the FEIS did not contain any such analysis. Order 1050.1E, App. A, § 14.4g.

Under the 2011 “Preferred Alternative,” the Project will expose an additional 29,816 people to noise levels above 60 DNL, an increase of 10.5%. *See* FEIS Table 5.7 at 5-34, AR 9301:354, JA __.⁹ Neither these figures nor any other information in the FEIS disclose cumulative noise impacts associated with the Capacity Enhancement Program (“CEP”) at Philadelphia International Airport or the planned expansion of commercial operations at Stewart International Airport by the Port Authority of New York and New Jersey (“Port Authority”). FEIS at 1-28, AR 9301:76, JA __.

The FEIS disclosed that the Project would subject residents of the City of Elizabeth, New Jersey to direct overflights from new departure headings off Runways 22L/R at Newark Airport. *See* FEIS Table 5.4 at 5-17, 5-21, AR 9301:337,341, JA __. The new headings shift overflights from sparsely populated industrial areas immediately south of Newark Liberty International Airport (“EWR”) to heavily populated residential areas of the City of Elizabeth, New Jersey,

⁸ Petitioners respectfully request this Court to take judicial notice of all Federal Register documents, without further authority or explanation, as is allowed under 44 U.S.C. § 1507.

⁹ “DNL” stands for Day-Night Average Sound Level. DNL is a single value, expressed in decibels, that attempts to describe the overall noise level during an average day. To represent the greater annoyance caused by nighttime noise, the DNL metric adds a ten-decibel “penalty” for each nighttime noise event. *See* FEIS at 3-20, AR 9301:180, JA __.

including portions of the City which have a minority population in excess of 80%. *See* FEIS App. I, AR 9303:1594, JA __. Without mitigation, the new headings would subject residents to significant noise impacts and “would result in disproportionate impacts to minority populations and, therefore, would result in significant environmental justice impacts.” FEIS at 4-46, AR 9301:278, JA __; *see also* ROD at 28, AR 9762:34, JA __.

The FEIS purported to reduce the significant noise and environmental justice impacts on Elizabeth residents to a level of insignificance by adopting a mitigation measure routing nighttime departures off Runways 22L/R over the ocean. FEIS Table 5.1 at 5-4, AR 9301:324, JA __. However, when the ROD was issued FAA suggested that nighttime ocean routing might be determined as operationally infeasible.¹⁰ Even though the assertion of no significant adverse impacts was premised on immediate implementation of that mitigation measure, FAA has begun using the fanned departures at Newark without nighttime ocean routing. ROD at 50, AR 9762:56, JA __; *see also* Jan. 8, 2008 FAA letter to City of Elizabeth at 10, n. 16 (denying City of Elizabeth’s Request for Administrative Stay), RJN Ex. J, Add. C.

¹⁰ To a comment from Mr. Tim Stull, manager of Air Traffic Systems at United Parcel Post, FAA responded:

As to increased fuel consumption, FEIS Appendix R shows that night-time ocean routing causes the fleet to burn (on average) seven metric tons per day of extra fuel. This reduces the fuel-consumption benefit of the preferred alternative by some 3.5%. The FAA will carefully monitor traffic levels at JFK after we implement this mitigation measure to determine whether there are new circumstances that make it operationally infeasible. If it is necessary to revise or eliminate this measure then we will reevaluate the FEIS, undertake appropriate environmental review, and amend this ROD.

ROD at 49.

D. Impacts on Parks.

The FEIS purported to address FAA's responsibility under Section 4(f) of the DOT Act (codified at 49 U.S.C. § 303(c)) to determine whether the Project would result in the constructive use of protected lands or historic properties. ROD at 31, AR 9762:37, JA __. FAA regulations require consultation with all federal, state, and local officials who are responsible for parks that could be affected by a proposed project. FAA Order 1050.1E, § 6.2e. Unfortunately, FAA failed to contact many state and local officials. *See* Declarations, Add. D. As a result, FAA overlooked scores of parks that could be potentially affected by the Project.

For the parks that it did consider, FAA did not make any conclusions regarding "constructive use" in the FEIS. After publication of the FEIS, FAA conducted a further evaluation to determine whether parks that would be subjected to an increase of 3.0 DNL would experience a constructive use. That analysis was included in the ROD. ROD at 34, App. B at B-1 to B-15, AR 9762:40, 86-101, JA __. However, FAA failed to analyze impacts on at least nine of Petitioners' parks that would likewise be subjected to an increase of at least 3.0 DNL. Addendum D.

FAA released its post-FEIS analysis of impacts on parks as a fait accompli without inviting any public comment. Based on that analysis, FAA concluded that the Project would not result in a constructive use of any 4(f) properties. ROD at 36, AR 9762:42, JA __.

E. Air Quality Impacts

The Clean Air Act provides that no agency "shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an implementation plan. . . ." 42 U.S.C. § 7506(c)(1). FAA regulations provide that "[i]n conducting air quality analysis for purposes of complying with NEPA or conformity, the

FAA requires use of the Emissions and Dispersion Modeling System (EDMS) model for aviation sources.” FAA Order 1050.1E, § 2.2c (emphasis added). The FEIS did not contain an EDMS analysis. Instead, FAA relied on an additional MITRE report prepared after issuance of the DEIS and provided to the public contemporaneously with the FEIS on July 30, 2007. FEIS, AR 9301, App. R, “Effect of New York/New Jersey/Philadelphia Airspace Redesign on Aircraft Fuel Consumption.” FEIS App. R, AR 9301:3736, JA __. This so-called “Fuel Burn Report” purported to translate the operational modeling described in the prior 2005 MITRE Study into units of fuel consumption. *See id.* at 1, AR 9301:3742, JA __.

The Fuel Burn Report concludes that the modeled delay reduction at high levels of operational demand for the year 2011 would produce a reduction in fuel consumption of less than 1%. *See id.* at 7, 9, AR 9301:3748, 3750, JA __. Although the Report contains calculation errors, the Report does not mention any margin of error associated with that calculation. Nor does it analyze whether the Project would reduce fuel consumption before the high demand levels forecast for 2011 are achieved.

IV. THE RECORD OF DECISION AND ENSUING LITIGATION

FAA issued a ROD on September 5, 2007, and a corrected ROD on September 28, 2007. AR 9762, JA __. The ROD contained, among other things, a decision that the FEIS complied with NEPA, a conformity determination under the Clean Air Act, and findings that the Project did not involve the constructive use of any parks under Section 4(f) or any disproportionately high or adverse environmental justice impacts. ROD at 55-59, AR 9762:61-65, JA __.

Twelve sets of petitioners, comprising municipalities, elected officials, environmental organizations, and citizens groups, filed petitions for review. Originally filed in the D.C.,

Second, and Third Circuits, the various petitions were ultimately consolidated in this Court pursuant to 28 U.S.C. § 2112(a).

STANDARD OF REVIEW

In reviewing compliance with NEPA, the CAA, and the DOT Act, courts apply the arbitrary and capricious standard found in the APA, 5 U.S.C. § 706(2)(A). *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 375-76 (1989). That standard considers whether the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005), quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

The Court’s determination in a challenge to an administrative action must be made on the basis of the administrative record before the agency at the time its decision to approve the action was made. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008), quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (“review is to be based on the full administrative record that was before the Secretary at the time he made his decision. . . .”) This Court is obligated to uphold FAA’s determinations only so long as the agency “engaged in reasoned decision making” and its decision is “adequately explained and supported in the record.” *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1181 (D.C. Cir. 2004).

SUMMARY OF ARGUMENT

FAA's environmental review of the Project violated both the letter and the spirit of three critically important federal statutes enacted to protect the public's health, safety, and welfare: the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331(b)(2); Section 4(f) of the Department of Transportation ("DOT") Act, 49 U.S.C. § 303 ("Section 4(f)"); and Section 176 of the Clean Air Act, 42 U.S.C. § 7506 ("CAA").

First, FAA understated the Project's environmental impacts by failing to assess the increase in aircraft operations induced by any delay reductions achieved by the Project. This contravened not only FAA's own policy guidance, but also its admission in the ROD that the Project will facilitate a substantial increase in operations at Newark Airport. ROD at 53.

Second, FAA failed to analyze the reasonable alternative of "congestion management" measures—such as limits on the number of hourly operations—that FAA implemented at Newark and JFK Airports after rejecting them in the FEIS. The congestion management alternative achieves the fundamental objective of the Project of reducing delays and, unlike the Project, will not require aircraft to fly longer distances and consume more fuel. Addressing this alternative fairly and with an open mind is essential to comply with the purpose of NEPA to "inform decisionmakers and the public of the reasonable alternatives which would or minimize adverse impacts or enhance the quality of the human environment."

Third, FAA failed to evaluate the Project's cumulative impacts by declining to disclose the "reasonably foreseeable" future air quality, noise, and other impacts of the Project combined with those of the long-anticipated Capacity Enhancement Program ("CEP") at Philadelphia International Airport ("PHL") and the planned expansion of Stewart International Airport ("SWF").

Fourth, FAA failed to properly assess and inform the public about the prospect of anticipated noise impacts, particularly on low income and minority populations, in direct contravention of the requirements of the DOT's Order regarding Environmental Justice.

Fifth, FAA selected mitigation measures without considering the adverse environmental impacts of those measures, and without providing adequate information from which to assess the impacts of the Project as mitigated. FAA has now "retreated" from its firm commitment to implement ocean routing for nighttime departures from Newark—a key mitigation measure that FAA relied on in concluding that the Agency's favored alternative was also the environmentally preferable alternative.

Sixth, FAA failed to meet critical procedural and substantive duties imposed by Section 4(f) to analyze, and avoid, significant impacts to sensitive public parkland, recreational areas, and historic sites within the Project's study area. FAA instead failed to identify and assess numerous affected state and local 4(f) sites and failed to contact and consult with appropriate state and local parks officials, in clear violation of the statute and the agency's own regulations.

Seventh, FAA failed to disclose the Project's impacts on air quality or to establish that the Project conforms to the relevant state implementation plans for achieving compliance with applicable air quality standards, as required by the CAA and by FAA's own governing environmental regulations contained in Order 1050.1E.

For all of the above reasons, Petitioners request that FAA's environmental review be remanded to the agency, and that the Project be halted pending compliance with all applicable statutes and regulations.

STANDING

Petitioners previously filed statements of the basis for their respective claims of standing (“Standing Statements”) along with their Docketing Statements in this case, as required by Circuit Rule 15(c)(2). The Standing Statements are accompanied by detailed affidavits establishing the evidentiary basis for each Petitioner’s standing. Copies of Petitioners’ Standing Statements are provided in the “Standing Addendum to Joint Brief of Petitioners” filed concurrently with this Joint Brief, pursuant to Circuit Rule 28(a)(7) and the Court’s May 30, 2008 Order. *See* Add. B. The Standing Statements show that Petitioners—comprised of public entities, associations and individuals—have all suffered, and continue to suffer injury sufficient to establish standing in this case. The following discussion summarizes the legal principles applicable to the facts set forth in the Standing Statements.

A. Individual Standing.

The irreducible constitutional minimum of standing contains three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Int’l Brotherhood of Teamsters v. Transp. Security Admin.*, 429 F.3d 1130, 1133 (D.C. Cir. 2005). In order to demonstrate standing, a petitioner must “show a substantial probability that it has been injured, that the defendant caused its injury, and that the court could redress that injury.” *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) citing *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000). “In order to satisfy the ‘irreducible constitutional minimum of standing,’ a litigant must show that it has suffered a ‘concrete and particularized’ injury that is actual or imminent, caused by or fairly traceable to the act being challenged in the litigation, and redressable by the court.” *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007), citing *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc).

In cases of procedural injury, the standard is somewhat less restrictive. Where, as here, “a party has been accorded a procedural right to protect his concrete interests, ‘the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury.’” *Id.* citing *Fla. Audubon*, 94 F.3d at 664, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

“To establish injury-in-fact in a ‘procedural injury’ case, petitioners must show that ‘the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.’” *Id.* quoting *Fla. Audubon*, 94 F.3d at 664. “In other words, petitioners must be seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.” *Id.*, quoting *Lujan*, 504 U.S. at 572. “We have held that ‘[a] violation of the procedural requirements of a statute is sufficient to grant a plaintiff standing to sue, so long as the procedural requirement was designed to protect some threatened concrete interest of the plaintiff.’” *Id.*, quoting *City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003).

B. Public Entity Standing.

Most of the Petitioners are public entities. This Court has held that public entities have standing to sue a Federal agency when the public entity alleges harm to itself (*e.g.*, as city *qua* city and Astates as states), and where a Federal action makes it more difficult for the public entity to comply with or enforce mandatory statutes and regulations: “We have found standing for a city suing an arm of the federal government when a harm *to the city itself* has been alleged.” *City of Olmsted Falls v. FAA.*, 292 F. 3d 261, 268 (D.C. Cir. 2002) (emphasis in original).

In *West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004), this Court held that states had standing to challenge an EPA rule requiring states to revise state implementation plans, which in turn lowered states emission budgets. The Court found that “the states [were] suing as states . . . [claiming that] . . . the lower the emissions budget, the more difficult and onerous is the states task of devising and adequate [state implementation plan] . . . caus[ing] injury to the states as states.” *Id.* at 868. This Court held that “[t]his injury is sufficient to confer standing.” *Id.* See also, *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 485-486 (D.C. Cir. 1990) (Cities of New York and Los Angeles and State of California had standing to challenge agency rule setting miles-per-gallon standard based on claims that the standard adversely affects air quality in their urban areas, making it more difficult for them to comply with Clean Air Act’s air quality standards).

C. Associational Standing.

Some of the Petitioners are associations. An association has standing to sue on behalf of its members if three conditions are met: “(1) at least one of its members would have standing to sue in his own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.” *Sierra Club v. EPA*, 292 F. 3d 895, 898 (D.C. Cir. 2002); accord, *Am. Library Ass’n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). “With regard to the injury-in-fact prong of the standing test, petitioners need not prove the merits of their case in order to demonstrate that they have Article III standing . . . Rather, in order to establish injury in fact, petitioners must show that there is a substantial probability that [a Federal agency rule] will

harm the concrete and particularized interests of at least one of their members” *Am. Library*, 401 F. 3d at 492-493.¹¹

D. Standing for One Petitioner Confers Standing for All Petitioners.

As long as the Court finds that at least one Petitioner has standing, this consolidated case can move forward. *See Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1328-29 n.41 (D.C. Cir. 1986) (where one petitioner has standing, a “lack of standing” in others “does not require dismissal of the case”). On review of agency actions, “because once one petitioner has demonstrated standing we may permit the participation of others, all petitioners are properly before this court.” *Env’tl. Action v. FERC*, 996 F.2d 401, 406 (D.C. Cir. 1995); *see also, Nat’l Mining Ass’n v. U. S. Dep’t of Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995) (“[s]ince we conclude that one party has standing, we need not decide whether [co-appellant] also has standing”); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (having concluded that one petitioner has standing to challenge agency regulations, it is unnecessary for the Court to evaluate the standing of other petitioners). Moreover, “inasmuch as the petitioners have filed a joint brief the court need not decide whether the other petitioners have standing to challenge the [agency order].” *Bullcreek v. Nuclear Regulatory Comm’n*, 359 F. 3d 536, 540 (D.C. Cir. 2004) (citation omitted).

¹¹ *See also, Warth v. Seldin*, 422 U.S. 490, 511 (1975) (for an association to have representational standing, “[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action that would make out a justiciable case had the members themselves brought suit”); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994) (EPA’s failure to regulate used oil as hazardous waste constituted injury-in-fact to members of environmental group who live in communities potentially impacted by oil, therefore environmental group had standing to challenge EPA rule).

ARGUMENT

I. FAA VIOLATED NEPA BECAUSE THE PROJECT WAS APPROVED ON THE BASIS OF AN INADEQUATE ENVIRONMENTAL IMPACT STATEMENT.

A. NEPA Background.

NEPA establishes a “broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). NEPA is our country’s “basic national charter for protection of the environment,” establishing an environmental policy, setting goals, providing an interdisciplinary framework for environmental planning by Federal agencies, and containing action-forcing procedures to ensure that Federal agency decision makers take environmental factors into account. 40 C.F.R. § 1500.1(a). “NEPA has twin aims. First, it places upon the agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.” *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted). Compliance with NEPA is therefore required “to the fullest extent possible,” 42 U.S.C. § 4332(2)(C), a command which the Supreme Court has admonished is “neither accidental nor hyperbolic.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 787 (1976).

As this Court declared in a seminal case interpreting NEPA, “[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.” *Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). The provisions of NEPA and its implementing regulations “are not highly flexible . . . [and] establish a strict standard of compliance.” *Id.* at 1112. Federal agencies *must* “prepare environmental impact statements when they contemplate

‘major Federal actions significantly affecting the quality of the human environment.’” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991) *cert. denied*, 502 U.S. 994 (citing 42 U.S.C. § 4332(2)(C)). An environmental impact statement (“EIS”) must be a “detailed statement . . . [on] the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(i)-(iii). The EIS thus serves as an “environmental full disclosure tool” for major federal actions significantly affecting the quality of the human environment. *Minn. Pub. Interest Res. Group v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 922 (1977).

The statute requires that agencies assess the environmental consequences of federal projects by following certain procedures during the decision-making process. NEPA created the Council on Environmental Quality (“CEQ”); CEQ promulgated regulations governing NEPA’s implementation (“CEQ Regulations”) in 1978. 40 C.F.R. § 1500 *et seq.* The CEQ Regulations are applicable to and binding on all Federal agencies. 40 C.F.R. § 1500.3. Courts are to give those regulations “substantial deference.” *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

In addition to the CEQ Regulations, FAA has published two Orders governing NEPA compliance for aviation projects: Order 1050.1E, “Environmental Impacts: Policies and Procedures” (Mar. 2006); and Order 5050.4B, “National Environmental Policy Act (NEPA) Implementing Instructions For Airport Actions” (Apr. 2006). The list of potential impact categories required to be analyzed in an EIS includes, but is not limited to, noise and air quality impacts of the project when taken together with other “past, present and reasonably foreseeable future projects,” *see* 40 C.F.R. §§ 1508.7-8, and impacts needed to comply with the substantive provisions of independent statutes such as Section 4(f) of the DOT Act and the CAA.

As is set forth in this section and in Section III, *infra*, with respect to air quality, FAA has failed to reasonably consider, or candidly inform the public about, all of the environmental impacts of the Project it is proposing.

B. FAA Ignored the Growth-Inducing Effects of the Proposed Action.

A linchpin of the environmental analysis in the FEIS is the assumption that the same number of aircraft will operate whether or not FAA implements the Project. *See, e.g.*, ROD at 42, AR 9762:48, JA ___. In making this assumption, FAA acted arbitrarily, in violation of NEPA and contrary both to facts acknowledged in the FEIS and ROD, and to FAA's own stated policies. As a result, FAA failed to disclose the full extent of the noise and air quality impacts of the Project, and it understated those impacts in relation to those of the other alternatives considered.

To properly identify and assess the Project's potential environmental impacts, FAA was required to consider "indirect effects, which are caused by the action and are later in time . . . but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Transportation projects often induce growth, as when adding lanes to a highway encourages its use by additional traffic. These indirect effects are what the CEQ regulations call "growth inducing effects." *Id.* FAA's regulations recognize that aviation projects "often involve the potential for induced or secondary impacts on surrounding communities." Order 1050.1E, App. A, § 15.

Growth-inducing effects are reasonably foreseeable, and therefore must be analyzed in an EIS, if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *Sierra Club v. Marsh*, 976 F. 2d 763, 767 (1st Cir. 1992). Like other environmental impacts, growth-inducing effects must be addressed regardless whether the project sponsor intends to produce them. Under Section 1508.8(b) of the CEQ Regulations, "purpose and intent respecting a project's impacts are irrelevant. Agencies must evaluate all

reasonably foreseeable project impacts regardless of whether they are intentional.” *Utahns for Better Transp. v. Dep’t of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002), *modified by* 319 F.3d 1207 (10th Cir. 2003).

Here, FAA approved an action that it believes will produce the greatest reduction in delay relative to the No Action Alternative. FEIS at 2-73, AR 9301:151, JA __. As a matter of basic economic principles on which FAA ordinarily relies, the Project, by reducing delay, is apt to induce additional aircraft operations. FAA admits as much in the FEIS, conceding both that additional operations in the high-demand New York metropolitan area will be the result of any action that might reduce delay, and that operations at Newark cannot increase appreciably without the Project. Yet FAA failed to analyze the environmental consequences of these growth-inducing effects. Instead, it based the environmental analysis in the FEIS, and explained its failure to perform the customary air quality analysis required by its own regulations (*see* Section III.D.1, *infra*), on its assertion that the Project “will not increase the total number of operations at airports in the study area.” ROD at 42, AR 9762:48, JA __. This assertion finds absolutely no support in the Record. By ignoring the fact that more aircraft will fly to and from the airports in the study area as a reasonably foreseeable (and contemplated) result of the Project, FAA violated its responsibility under NEPA to identify and assess the environmental consequences of its actions.

1. **An Increase in Aircraft Operations Is a Reasonably Foreseeable Consequence of the Project Because, According to FAA, the Project Will Significantly Reduce Delay and Cost to System Users.**

FAA proposes a fundamental redesign of aviation routes and airspace management in the New York-New Jersey-Philadelphia metropolitan areas for the principal purpose of reducing future air traffic delay. *See* ROD at 1, 9-10, AR 9762:7, 15-16, JA __. FAA claims that implementing the Project will decrease average delay by one minute and twenty-four seconds

(1.4 minutes) per operation by 2011. *See* FEIS at ES-7, AR 9301:11, JA __. At Newark Airport, which handles approximately 25% of the air traffic among the airports in the study area and more than any other single airport, *see* FEIS Table 1.2 at 1-20, AR 9301:68, JA __, the Project is projected to reduce delay by more than six minutes per operation. FEIS App. C, Fig. 9-23 at 9-36, AR 9303:356, JA __. FAA claims that these average metrics understate the true delay reduction benefits of the Project, and that more substantial delay reduction will occur on flights accessing Newark Airport during peak travel times. *See* FEIS App. O at 73-78, AR 9304:3007-12, JA __. By reducing travel times, FAA concludes that the Project “would, conservatively estimated, yield benefits to airlines, passengers, and businesses of \$7 billion to \$9 billion in 2011.” ROD at 10, AR 9762:16, JA __.

FAA well understands that reduced delay and the attendant reduction in air travel cost would induce higher user demand for services and, accordingly, a higher level of aircraft operations. FAA’s regulatory guidance governing benefit-cost analysis of airport projects explicitly recognized this bedrock economic principle of the airline industry. *See* FAA Office of Aviation Policy and Plans Airport Benefit Cost Analysis Guidance (Dec. 15, 1999) (“BCA Guidance”).¹² The BCA Guidance, which is intended to help FAA weigh the relative merits of airport projects in making discretionary funding decisions, relies on this principle to help FAA

¹² Petitioners have filed under separate cover request that the Court to take judicial notice of the BCA Guidance document (and certain other materials). *See* RJN Ex. B, Add. C. Although the BCA Guidance document does not appear in the Record, it is offered to enable the Court to review FAA’s decisions within the context of facts and circumstances known to FAA. *See generally Am. Maritime Ass’n. v. United States*, 766 F.2d 545, 554 n.14 (D.C. Cir. 1985) (taking judicial notice of administrative regulation); *Continental Air Lines v. Civil Aeronautics Bd.*, 522 F.2d 107, 127 1 (D.C. Cir. 1974) (taking judicial notice of application of policy of Civil Aeronautics Board). Relevant portions of the BCA Guidance are included in the Addendum C to this brief for convenient reference.

and airport proprietors justify, and quantify the benefits of, investments in aviation projects that reduce airport delays. *Id.*, § 1.1 at 1, § 10.4.1.3 at 41.

According to FAA, transportation projects “often” induce higher levels of operations. *Id.* § 10.4.1.3 at 41. FAA notes that this common-sense relationship between transportation projects and higher levels of operations applies with special force to aviation projects that reduce flight delays. In FAA’s own words:

Allowance for Induced Demand. It is often the case with transportation projects that an improvement in service attributable to an investment at a facility will induce greater use of the facility than would have occurred without the investment. For instance, *an investment that lowers average delay at an airport will induce some potential customers who formerly avoided the airport to use it.*

Id. (emphasis added). FAA ignored this principle when it based the FEIS on the assumption, unsupported by any study or analysis, that the lower average delay associated with the Project would not induce additional operations.

2. **The FEIS Assumes the Same Number of Flights With and Without the Project Despite Statements in the FEIS and ROD Indicating That Additional Flights Will Result from the Proposed Project.**

Although the FEIS does not address FAA’s BCA Guidance, the economic principles underlying the Guidance are echoed in statements in the FEIS indicating that the Project’s delay reductions would lead to additional flights. In the FEIS, FAA discussed the suggestion that it consider administrative demand management measures designed to encourage airlines to use larger aircraft so as to absorb passenger demand with fewer aircraft, less burden on airspace and runway capacity, and therefore less delay. FAA rejected detailed environmental and operational analysis of such measures because, according to FAA, airlines would respond to such measures by scheduling additional flights in response to the region’s extraordinary pent-up demand for air travel:

The demand for air travel to all three major airports in the New York metropolitan areas, EWR, JFK, and LGA [LaGuardia Airport], is high. Assuming traffic is reduced using larger aircraft, more aircraft would quickly be scheduled to use the capacity that becomes available and the benefit of fewer aircraft would disappear.

FEIS at 2-5, AR 9301:83, JA __. Just as delay reductions achieved by using larger aircraft would lead to additional flights to satisfy the region's high demand for air travel, delay reductions produced by the Airspace Redesign would likewise induce additional flights.

FAA also acknowledges a specific attribute of the Project that will lead to additional flights at Newark Airport. According to FAA, delay reductions will be achieved at Newark because the Project permits "dual arrivals" there, *i.e.*, two streams of arriving aircraft rather than the one stream that currently exists. In response to a public comment questioning whether FAA's forecast level of operations at Newark was unrealistically high, *see* ROD App. D at D-2, AR 9762:133, JA __, FAA stated as follows:

The forecast growth in demand between 2006 and 2011 can not be refuted by pointing to counts of traffic actually handled, since the traffic actually handled is limited by inefficiency of the current system. [Newark] was not forecast to be able to run dual arrivals in 2006, so actual counts match the forecast fairly well. *Without dual arrivals, actual traffic at [Newark] may remain at the current plateau (with small increases for improved technology)*

ROD at 51, AR 9762:57, JA __ (emphasis added). This statement undermines the analysis of the No Project Alternative in the FEIS, which is based on the assumption that the same number of operations will be handled at Newark without dual arrivals as would occur under the Project. *See* ROD at 43 , AR 9762:49, JA __. The FEIS should have assumed that Newark operations "remain at the current plateau (with small increases for improved technology)," which would reveal that the Project would produce additional flights and, therefore, additional environmental impacts.

3. **FAA Cannot Avoid Assessing Induced Growth With Conclusory, Unsupported Assertions.**

FAA never comes to grips with the growth-inducing implications of its own statements in the FEIS. FAA purported to address “Secondary or Induced Impacts” in Section 4.3 of the FEIS, but made no mention of the potential for the Project to lead to increased operations. FEIS at 4-48, AR 9301:280, JA ___. Instead, the ROD insists that, “based upon FAA’s experience the proposed air traffic procedural changes will not induce growth in air . . . traffic” ROD at 43, AR 9762:49, JA ___. This conclusion is based on a vague reference to “FAA’s experience” rather than any study of what can be expected in light of the “high demand” for air travel in the New York metropolitan area or the effect of dual arrivals at Newark. As such, it “runs counter to the evidence before the agency.” *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005)(quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983)).

Nor can FAA evade its responsibility to analyze growth-inducing effects by noting that aircraft operations will increase with or without the Project. “A conclusory statement that growth will increase with or without the project, or that development is inevitable, is insufficient; the agency must provide an adequate discussion of growth-inducing impacts.” *Davis v. Mineta*, 302 F.3d 1104, 1122-23 (10th Cir. 2002) (holding that DOT inadequately analyzed growth-inducing effect of highway project). The requisite analysis will consider the extent to which the Project will induce a *greater* increase in the number of aircraft operations. See *N.C. Alliance for Transp. Reform v. Dep’t of Transp.*, 151 F. Supp. 2d 661, 696-97 (M.D. N.C. 2001) (rejecting DOT’s assertion, unsupported by any “definitive evidence,” that development would occur to the same extent without construction of highway).

Simply put, FAA’s mantra that “this is not a capacity enhancement project” does not answer its legal obligation to consider reasonably foreseeable growth-inducing effects.

Regardless whether the Project would increase capacity or better utilize existing capacity, what matters for purposes of the growth-inducing effects issue is that the Project would result in more aircraft operations than would otherwise occur. “It is an irrefutable reality that the easier it is to get somewhere, the more people will be inspired to do so.” *Mullin v. Skinner*, 756 F. Supp. 904, 921 (E.D. N.C. 1990) (holding that failure to disclose growth-inducing effects violated NEPA. FAA’s refusal to recognize this “irrefutable reality”— that reducing airspace delays in the New York-New Jersey-Philadelphia area will inspire more people to fly to or from there—likewise violated NEPA.

4. FAA’s Failure to Account for Additional Flights Induced by the Project Undermines Its Assessment of Environmental Impacts.

FAA’s failure to analyze increased flights induced by the Project, and their associated noise and air pollution, produced an FEIS that obscured the full scope of the Project’s potential environmental impacts and the relative merits of potential alternatives. One of the most glaring examples of how this distorted the FEIS is provided by the air quality analysis.

It is undisputed that FAA failed to perform an ordinary air quality assessment, utilizing the Emissions and Dispersion Modeling System (“EDMS”) required by FAA’s own regulations. *See* Order 1050.1E, App. A, §2.4(c) (“The EDMS is FAA’s required methodology for performing air quality analysis modeling for aviation sources”). FAA justified cutting this corner on the basis of its bald assertion that the Project “would not increase the total number of operations at airports in the study area; and the purpose and need for the project includes increasing efficiency and reducing delay which would serve to reduce fuel burn and air pollutant emissions.” *See* ROD at 41, AR 9762:47, JA ____.

In response to public concern regarding the failure to conduct an air quality analysis, FAA directed MITRE Corporation to perform a study “to obtain estimates of the impact on fuel

consumption of the Preferred Alternative and the Mitigated Preferred Alternative.” FEIS App. R, at 1, AR 9304:3742, JA __ (emphasis added). The underlying assumption was that if the Project reduced fuel consumption, it would not have any adverse air quality impacts. *Id.* at 11, AR 9304:3750, JA __. But the Fuel Burn Analysis is also a prime example of the so far undisclosed adverse impacts of induced growth. According to FAA, this fuel burn analysis “demonstrated that the selected alternative would result in a reduction in fuel consumption of 194.4 metric tons, compared to the No Action Alternative.” ROD at 42, AR 9762:48, JA __; *see also* FEIS at ES-10, AR 9301:15, JA.¹³ The self-described “estimates” in the fuel burn analysis forecast a decrease in fuel consumption of less than one percent. The Project’s asserted reduction of 194.4 metric tons, in comparison to fuel consumption of 23,450 metric tons under the future No Action Alternative, merely constitutes a 0.83 percent reduction. *See* FEIS App. R at 7, 9, AR 9304:3746, 3748, JA __.¹⁴

Thus, even a modest allowance for the Project’s potential to induce additional operations—or simply accounting for the margin of error in the Fuel Burn Analysis, which was

¹³ In fact, MITRE Corporation acknowledged in its operational efficiency analysis that the Project would require aircraft to fly longer routes, and that delay reduction would compensate enough to reach a “break even point” producing an overall decrease in flight time at the “extremely-high demand levels forecast for 2011.” 2005 MITRE Study at 10-2, AR 9303: 361, JA __. It is apparent that FAA’s interpretation of the Fuel Burn analysis is based on what may occur once the same “break even point” is reached, and is not based on any evidence that the Project is benign as to air quality before then.

¹⁴ Table 2 of the Fuel Burn Analysis, reporting estimated fuel consumption under the Preferred and No Action alternatives, contains a computational error in which the last row, reporting total fuel consumption, omits estimated fuel consumption at Newark Airport. The actual totals for the No Action and Preferred Alternatives are 23,449,818 kg and 23,244,899 kg, respectively. *See* FEIS App. R, Table 2 at 7, AR 9304:3746, JA __. The 204,919 kg reduction associated with the Preferred Alternative is reduced by 10,482 kg due to the effect of mitigation measures, *see* FEIS App. R, Table 3 at 9, AR 9304:3748, JA __, resulting in a net reduction of 194,437 kg. Dividing that figure by the 23,449,818 kg for the No Project Alternative indicates that the reduction claimed by FAA is 0.829 percent.

never disclosed—could alter this conclusion. *See* BCA Guidance, § 10.4.1.3 at p. 41 (recommending analysis of induced operations if delay savings are more than one minute, with two percent incremental increases in operations for each three minutes of delay savings). By assuming no induced growth in contravention of its own regulatory guidance and statements in the FEIS, FAA undermined its reliance on the Fuel Burn Analysis as an excuse for not conducting the standard EDMS air quality assessment required by its own regulations.

C. FAA Improperly Ignored Congestion Management as a Project Alternative.

FAA also violated NEPA by failing to analyze a project alternative involving congestion management measures such as limits on hourly take-off and landing slots (“caps”) similar to those at LaGuardia and O’Hare Airports. *See* FEIS § 2.3.3 at 2-4, AR 9301:82, JA __. FAA conceded that such measures may reduce delay, but asserted that they “fail to address the inefficiencies in the current NY/NJ/PHL Airspace.” ROD at 11, AR 9762:17, JA __. Then, within months of issuing the ROD, FAA concedes that such measures may reduce delay, but asserted that they “fail to address the inefficiencies in the current NY/NJ/PHL Airspace.” ROD at 11. Then, barely one year later, FAA imposed caps at JFK and Newark airports, adopting the very alternative it had previously dismissed. 73 Fed. Reg. 3519 (Jan. 18, 2008) (capping hourly operations at JFK through October 2009); 73 Fed. Reg. 29550 (May 21, 2008) (capping hourly operations at Newark through October 2009); 73 Fed. Reg. 29626 (May 21, 2008) (proposing caps at JFK and Newark through March 2019).

Because congestion management was eliminated as an alternative, the FEIS failed to assess how much delay reduction is achievable through congestion management programs that, unlike the Project, avoid wholesale changes in flight paths with attendant noise exposure shifts, environmental justice impacts, and increased flying distances. Strong evidence suggests that the delay reduction benefits of congestion management are substantial. FAA expects caps to reduce

average delay per operation by 25 percent at JFK and 23 percent at Newark. *See* 73 Fed. Reg. 29626, 29637. Would the Project reduce delays beyond what is achievable by caps? Would any incremental delay reductions from the Project be sufficient to offset its admitted increases in flying distance and fuel consumption, or other impacts? By omitting the analysis of a congestion management alternative required to answer these questions, the FEIS fails to satisfy either prong of NEPA’s “dual mission” of enabling FAA to make an environmentally informed decision and permitting the public to scrutinize FAA’s consideration of environmental concerns. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 147 (D.C. Cir. 1985).

The importance of this defect in the FEIS cannot be overstated. The rigorous and objective evaluation of reasonable alternative courses of action is often said to constitute the “heart” of NEPA environmental impact review. *See* 40 C.F.R. § 1502.14; *City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994). *See also Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286-87 (1st Cir. 1996) (citations omitted) (characterizing as “absolutely essential” and “the linchpin of the entire impact statement” that the decisionmaker be presented with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives). The existence of viable but unexamined alternatives renders an EIS inadequate. *See, e.g., Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

In applying a “rule of reason” to evaluate the adequacy of the analysis of alternatives in an EIS, courts guard against the risk that project proponents may frustrate the purposes of NEPA by doing what FAA did here—artificially framing the statement of project objectives in a manner that avoids consideration of reasonable alternatives. *See, e.g., Simmons v. U.S. Army Corps of*

Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997) (alternatives analysis was invalidated by improper assumption that a single solution was required to satisfy multiple project objectives).

Here, FAA asserted that congestion management measures did not meet the entire purpose of the Project, which it defined as “increas[ing] the efficiency and reliability of the airspace structure and [air traffic control] system, thereby accommodating growth while enhancing safety and reducing delays in air travel.” FEIS at 1-25, AR 9301:73, JA __. The problem with that articulation of the Project’s objective is its redundancy. Efficiency and reliability, and even accommodating growth, ultimately translate to an overall reduction in flight delays at the forecast levels of operations. As evidenced by the very first sentence of the ROD, reducing delays at current and forecast levels of operation constitutes the fundamental purpose of the Project: “This Record of Decision (ROD) represents the culmination of over nine years of study and evaluation by FAA *to address congestion and delays* at some of our nation’s busiest airports.” ROD at 1, AR 9762:7, JA __ (emphasis supplied). FAA acted arbitrarily in eliminating from consideration congestion management measures that, by FAA’s own admission, present an effective strategy for attacking the same problem of delay.

The failure of the FEIS to analyze a demand management alternative would violate NEPA even if the Project is considered to have secondary purposes that are unrelated to reducing delays. NEPA requires consideration of alternatives that would achieve important, but not all, project objectives. “[S]ingle purpose’ alternatives must nevertheless be described and discussed in the EIS for a multipurpose project, at least where the single purpose served is significant.” *I-291 Why? Ass’n v. Burns*, 372 F. Supp. 223, 252 (D. Conn. 1974). Given that the primary purpose of the Project is to reduce delays, and that a demand management alternative would

effectively achieve that purpose, the failure to analyze demand management in the FEIS violated NEPA.

D. FAA Misrepresented Its Data to Justify the Operational Forecasts on Which Its Environmental Impact Conclusions Depend.

NEPA fundamentally requires a fair, hard look at environmental impacts. Data manipulation and implausible arguments in defense of a pre-determined outcome are incompatible with NEPA's core values and principles. Here, however, FAA did not fairly address undisputed developments calling into question a key determinant of the conclusions set forth in the EIS—FAA's claim that the "extremely high demand" scenario forecast for 2011 remains reasonable.

FAA adopted the Project, and declined to conduct ordinary assessment of the Project's impact on air quality, based on the prediction that the Project will reduce operational delay, almost exclusively at Newark Airport, under "extremely-high-demand" conditions forecast for 2011. *See* FEIS 2-78 to 2-80, AR 9301:156-58, JA _; 2005 MITRE Study at 9-35 and 10-2, AR 9303:355, 361, JA _; FEIS App. O at 73-78, AR 9304:3007-12, JA _ ("Interpreting Average Delay"); FEIS App. R, AR 9304:3736, JA _ ("Fuel Burn Report"). By FAA's own admission, the forecasts were called into question because of reduced demand, increased fuel costs, and related aviation industry changes post-September 11, 2001. FEIS 1-20 through -21; FEIS 1-20 to 1-21, AR 9301:68-69, JA _; FEIS App. B.2 at 1, AR 9303:65, JA _. FAA commissioned MITRE to compare actual aviation operations at the Study Area airports in 2005 with what had been forecast for 2006 for purposes of the FEIS, in order to determine whether the original forecast remained valid for purposes of the environmental and operational assessments. *Id.*

In a 2005 Study, MITRE had acknowledged that future operational demand at Newark is the critical variable that will determine whether (or when) the Project will cause a net reduction

in flight times in the region. 2005 MITRE Study at 10-2, AR 9303:361, JA __. In its subsequent assessment of the forecast, MITRE disclosed that the number of daily operations forecast for Newark in 2006 was approximately 14% higher than actual observed operations at Newark. FEIS App. B-2 at 3, 27, AR 9303:67, 91, JA __. MITRE nevertheless concluded that the comparison showed that the forecast remained valid to support the prior operational and environmental assessments. FEIS at 1-21, AR 9301:69, JA __; FEIS App. B.2 at iii, AR 9303:58, JA __. It did so without ever specifically addressing Newark, relying instead on averages for the entire Study Area. *See* FEIS App. B.2, AR 9303:56-124, JA __. No effort was made to explain how a forecast that substantially over-predicted operations at Newark Airport “remained valid” to support operational and environmental conclusions that were based in large part on the forecasts for Newark.

When challenged on this point, FAA dissembled. A commenter asserted that the operational demand forecast for Newark in 2011 was unrealistically high, rendering FAA’s conclusions regarding fuel consumption unsupported and unreliable. *See* ROD App. D at D-2, AR 9762:133, JA __. FAA responded that the operational analysis underlying MITRE Study assumed 1575 arrivals and departures on the 90th percentile day in 2006 (*i.e.*, a day in which the level of flight operations exceeded that of 90 percent of the days in the year). ROD at 51, AR 9762:57, JA __. FAA then claimed that its own Operations Network (“OPSNET”) data demonstrated that in July 2006, the 90th percentile day at Newark involved 1572 arrivals and departures, such that “[t]he forecast was right on.” *Id.*

FAA, which publishes the OPSNET data on-line, simply misrepresented it in the ROD. On the 90th percentile day in July 2006 (4th busiest out of 31 days) there were 1561 total

operations, *including overflights that did not take off or land at Newark Airport.*¹⁵ Excluding overflights, there were 1402 actual operations on the same day in 2006, well below the 1575 in the 2011 forecast used in the MITRE Study. *See* 2005 MITRE Study, Table 3-6 at 3-18, AR 9303:177, 361, JA _.

FAA's contrivances do not change the simple fact that the agency's decisions—to select the Project for its potential delay reduction benefits—were based on the equivocal conclusion of the 2005 MITRE Study, a conclusion that depended on a now discredited operations forecast for Newark. Nothing in the administrative record suggests that FAA seriously and honestly evaluated whether the operations forecast for Newark—the basis of MITRE's previous conclusion that the Project would reduce overall flight times—remains valid.

E. The FEIS Analysis of the Project's Cumulative Impacts Was Inadequate.

NEPA's implementing regulations require an agency to evaluate “cumulative impacts” along with the direct and indirect impacts of a proposed action. *See Grand Canyon Trust v. FAA*, 290 F.3d 339, 341, 345 (D.C. Cir. 2002). A “cumulative impact” is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions.” 40 C.F.R. § 1508.7. *See also* 40 C.F.R. § 1508.8 (“effects” and “impacts” as used in these regulations are synonymous and include cumulative impacts). Similarly, Order 1050.1E,

¹⁵ “The *Operations Network (OPSNET)* is the official source of historical [National Airspace System] air traffic Delays and Operations. Daily Data is available on a next day basis. Monthly and annual counts are also available from the system either by facility, state, region, service area, or nationally.” <http://aspm.faa.gov/information.asp> (last viewed August 28, 2008). A spreadsheet of Newark operations is available at FAA's website, <http://aspm.faa.gov/opsnet/>. The spreadsheet adds one column showing total operations excluding overflights. Petitioners are moving to supplement the Record with this data, which FAA cited in the ROD but did not publish.

§ 500c(2) requires that cumulative actions be discussed in an EIS where “a proposed action would contribute to cumulative impacts when its effects are added to those of past, present and reasonably foreseeable future actions, whether Federal or non-Federal.” “[W]hen several proposals for . . . actions that will have cumulative or synergistic environmental impact on a region are pending concurrently before an agency, their environmental consequences must be considered together.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

As the Fifth Circuit has observed:

Meaningful cumulative impact analysis should identify the area in which the effects of the proposed project will be felt; anticipated impacts there; other past, present and reasonably foreseeable actions that can be expected to have impacts in that area; the expected impacts from those actions, and the overall impact that can be expected if individual impacts are allowed to accumulate.

Fritiofsen v. Alexander, 772 F.2d 1225, 1245 (5th Cir. 1985). Here, FAA’s FEIS failed to analyze cumulative impacts associated with two present, or, at a minimum, reasonably foreseeable projects, the Capacity Enhancement Program (“CEP”) at PHL and the planned expansion of Stewart International Airport.

1. FAA Failed to Disclose the Cumulative Impacts of its Capacity Enhancement Program at PHL.

The FEIS ignores the synergistic impacts of the Project and the Capacity Enhancement Program (“CEP”) at PHL. The purpose of the CEP is to increase the airfield capacity at PHL. ROD at 47, AR9762:53, JA____. FAA acknowledges that “the CEP has the potential for cumulative impacts,” but asserts “there is insufficient information to evaluate cumulative impacts at this time.” ROD at 47, AR 9762:53, JA____. However, in the March 2005 FEIS for the PHL Runway 17-35 Extension Project, FAA stated that “[r]easonably foreseeable future actions are those that are currently planned or proposed within the planning horizon of this FEIS,” PHL Runway FEIS, § 4.18.4 at 4-204, RJN Ex. C, Add. C; identified construction of the CEP as a

“foreseeable future action[] at PHL,” *id.* at 4-205; and included the CEP cumulative impacts analysis. Given that there was sufficient information for FAA to analyze cumulative impacts associated with the CEP in an FEIS it completed in 2005, there is no basis for FAA’s assertion that there was insufficient information to analyze cumulative impacts from the CEP when the FEIS was completed in 2007.¹⁶

2. FAA Failed to Address the Cumulative Impacts of Expansion of Service at Stewart International Airport.

The FEIS and ROD ignore the cumulative impacts of the Project and the impending expansion of service at SWF located in Newburgh, New York. One of the key purposes of the Project is to “accommodate growth” in air service to airports in the study area. *See, e.g.*, ROD at 7, AR 9762:13, JA __. Here, FAA completely discounts the planned growth of SWF and its concurrent environmental impacts in its cumulative impacts analysis by finding that SWF’s proposed expansion is “not reasonably foreseeable.” This finding is contradicted by the Record and inconsistent with NEPA.

FAA was put on notice that the growth at SWF was going to be significant, months before the release of the ROD. In January, 2007, the Port Authority of New York and New Jersey (“Port Authority”) approved a 93-year lease for the operation of the airport and announced plans to turn the “sleepy, underutilized facility into a dynamic transportation hub” and to invest

¹⁶ Although FAA stated it would consider cumulative impacts in the FEIS for the CEP, NEPA generally does not allow deferral of cumulative impacts analysis to a later time unless both projects are part of the same “program.” *See* 40 C.F.R. §§ 1508.28(a); 1508.25(a)(2). The Project and the CEP are not part of the same program. NEPA also allows deferral of the cumulative impacts analysis in a “tiered” EIS, *i.e.*, where the first broad EIS covers “general matters” (such as a national program) with subsequent narrower statements that are more regional or site-specific. 40 C.F.R. § 1508.28. Tiering also does not apply here, where the CEP is not a subpart of the Project and has independent utility. ROD at 47, AR9762:53, JA____.

\$150,000,000 in the airport.¹⁷ A fact sheet accompanying an official Port Authority press release eight months before the ROD noted how the current infrastructure at Stewart could handle 1.5 million passengers annually, a five-fold increase from the 300,000 passengers the airport was then handling.¹⁸ The FEIS even cites to the January 25, 2007 Port Authority announcement of the purchase of the operating lease at SWF along with then-Governor Spitzer's statement that "Stewart Airport will provide much needed relief for our three major airports, greatly reduce delays and help us prepare for the inevitable population and passenger growth." FEIS, AR 9301 at 4-83, AR 9301:316, JA _.

Subsequently, however, FAA referred to the growth of SWF as "not reasonably foreseeable" because "it is unclear whether the airlines will be willing to operate at SWF" *Id.* FAA's determination flies in the face of both reason and case law. The Ninth Circuit, for example, found that the U.S. Forest Service should have considered cumulative impacts for a land swap even though the deal was not yet finalized. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800 (9th Cir. 1999). Similar to the Governor's announcement of the Port Authority takeover eight months before the ROD, the Ninth Circuit found that a press release announcing the land swap five months before the FEIS made the transaction "not remote or highly speculative. Rather, it was reasonably foreseeable and it should have been considered in the EIS." *Id.* at 812. Indeed, the court found that the Forest Service was "all but certain" that the

¹⁷ See, e.g., Judy Rife, Times Herald-Record, *Port Authority approves Stewart Airport buyout* (Jan. 26, 2007), available at <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20070126/NEWS/701260321/-1/NEWS> (last visited July 21, 2008). RJN Ex. D, Add. C.

¹⁸ See Fact Sheet, available at <http://www.panynj.gov/AboutthePortAuthority/PressCenter/PressReleases/PressRelease/index.php?id=908> (last visited July 21, 2008), RJN Ex. E, Add. C.

land in question was going to be traded and eventually logged. *Id.* Here, FAA was “all but certain” that the new airport operators would increase operations in and out of SWF.

FAA also justified its failure to consider SWF’s cumulative impacts on the ground because SWF is “50 miles north of LGA as the crow flies. That is enough distance to isolate it from the biggest changes to the airspace in the Preferred Alternative . . . it can expand greatly without putting stress on the Preferred Alternative.” FEIS App. Q at 7, AR 9304:3107, JA __. FAA’s statement misses the point of cumulative impact analysis. The issue is not whether expansion of SWF will “put stress” on the Project; rather, the point is that the Airspace Redesign and expansion of SWF will create environmental impacts that may be cumulatively significant. *See* 40 C.F.R. § 1508.25(a)(2)(agencies shall consider cumulative impacts in the same EIS).

The Stewart expansion is not simply a “pipe dream” that may or may not occur—it is a reality that the Governor himself felt could provide meaningful relief to LGA and the other major airports. Here, FAA’s refusal to consider SWF expansion prevented FAA and the public from understanding the reasonably foreseeable, tangible effects of that expansion, including impacts to among other things: air traffic, noise, air quality, land use, and safety. *See* ROD at D-54, AR 9762:185, JA __ (Rockland County’s Aug. 31, 2007 comments on the FEIS). This was a violation of FAA’s NEPA duty to “Rigorously analyz[e] the reasonably foreseeable direct, indirect, and cumulative environmental impacts of the proposed action and alternatives.” Order 1050.1E, § 200d.3.

F. The FEIS Contains an Inadequate Analysis of Noise Impacts.

1. FAA Failed to Include Noise Contours as Required by Order 1050.1E.

Order 1050.1E Appendix A, Section 14 specifies procedural requirements for analyzing and presenting environmental impacts due to noise, with guidance supplied by Appendix A of 14

C.F.R. Part 150.¹⁹ When reviewing for significant impact, noise exposure contours must be produced at the DNL 75, DNL 70 and DNL 65 levels.²⁰ A noise exposure contour is a line on a map that shows areas exposed to a specified DNL level. Noise exposure contours and maps contain critical information essential to enabling the public to understand noise impacts, yet were not presented in the FEIS. Additionally, noise exposure maps must be depicted “over a land map of sufficient scale and quality to discern streets and other identifiable geographic features.”²¹ 14 C.F.R. Part 150 App. A, Part B, § A150.101(e).

Non-compatible land uses within the noise contours must be identified, and the locations of noise-sensitive public buildings (such as schools, hospitals, and health care facilities) and properties on or eligible for inclusion in the National Register of Historic Places.²¹ These data were omitted, denying the public and decision-makers fundamental information necessary to fully grasp and adequately understand the environmental impacts of the proposed action.

2. FAA Failed to Project Future Scenarios with Suggested 5- and 10-Year Time Frames, As Required By Order 1050.1E.

FAA’s own rules direct that, “DNL contours, grid point and/or change of exposure analysis will be prepared for the following:

- (1) Current conditions; and (2) Future conditions both with and without (no action) the proposal and each reasonable alternative.
- Comparison should be done for appropriate timeframes. Timeframes usually selected are year of anticipated project

¹⁹ 14 C.F.R. Pt. 150 App. A, Part B, Section A150.101 requires that “(c)ontinuous contours must be developed” for certain sound levels. Section 14.4b directs the use of 14 C.F.R. Pt. 150 App. A guidelines.

²⁰ FAA Order 1050.1E, App. A, § 14.4d(1) requires “(n)oise exposure contours at the DNL 65 dB, DNL 70dB, and DNL 65 dB levels.”

²¹ 14 C.F.R. Pt. 150 App. A, Part B § A150.101(e). *See also* FAA Order 1050.1E, App. A, § 14.4e.

implementation and 5 to 10 years after implementation.
Additional timeframes may be desirable for particular projects.

FAA Order 1050.1E App. A, § 14.4g (emphasis added). In the FEIS, FAA forecast implementation by 2011. FEIS at 2-48, AR 9301:126, JA __. Later in 2007, FAA estimated five years for completion of implementation, yielding an initial implementation in 2012. ROD at 5, AR 9762:11, JA __. FAA did not include noise exposure analysis for the year of implementation or for any future years beyond this.

Omission of the analysis of future impacts is a critical flaw. The Port Authority anticipates substantial growth in passenger and air cargo traffic.²² This additional air traffic will entail changes to fleet mix and flight operations with potential for creating more noise. FAA should have examined this predicted scenario by projecting and analyzing future fleet mix and operational traffic. FEIS noise modeling results with mitigation, which did not even count background noise, show that the Project barely avoided significant impact with 2011 traffic projections.²³ Fleet mix and operational changes to accommodate additional passenger traffic requires FAA's analysis to ascertain whether changes will increase noise impacts upon significantly impacted populations.

²² The Port Authority Strategic Plan projected a 40% increase in air passenger traffic and a 70% increase in air cargo traffic from 2005 to 2020. Port Authority Strategic Plan (2006) at 5. RJN Ex. F, Add. C.

²³ FEIS App. Q at 7-12, AR 9304:3629-34, JA ("NJCAAN May 10, 2007 letter"). FEIS modeling shows that the Project is accompanied by sharp increases in noise exposure at Newark Airport between 60 and 65 DNL that barely escape reaching the level of "significant impacts" because the final modeled noise falls just below 65 DNL. Tables 2 and 4 of NJCAAN's above cited letter examine the effect of slightly lowering the significance threshold, which yield the same effect as if additional passenger and air cargo traffic created more noise. Even a small increase in the noise generated by each aircraft would result in the modeling showing significant impact in Union and Essex Counties.

Future impact analysis would have also brought in the effects of induced growth and other projects that would increase capacity or impacts. EPA, in particular, expressed concerns about growth in an August 31, 2007 comment on the Project: “We are particularly concerned about the air quality, noise and other impacts this potential growth could have on the Environmental Justice areas in the vicinity of the airports.” ROD at 118-19, AR 9762:124-25, JA ____.

FAA’s omission is also a serious error because the Agency plans to implement capacity improvement projects in the region that will have effects beyond the 2011 time frame.²⁴ Examples are: (1) the replacement of the current Instrument Landing approach procedure to Teterboro Airport that will facilitate the increased use of proposed alternative dispersal heading strategy for Newark Airport Runway 4 traffic (with potential severe effects on environmental justice areas in the City of Newark)²⁵; and (2) new arrival procedures for Newark Airport based on GPS navigation that will yield increased capacity and bring arrival traffic over new areas not disclosed in the FEIS.²⁶

Despite published FAA and airport operator plans extending well beyond 2011 which would alter and increase impacts of the proposed action, the FEIS fails to project impacts beyond the 2011 proposed implementation date, contrary to requirements of FAA Order 1050.1E.

²⁴ FAA, “Roadmap for Performance Based Navigation, Evolution for Area Navigation (RNAV) and Required Navigation Performance (RNP) 2003 – 2020”, Version 1.0, July, 2003 (“Roadmap for Performance”). Submitted on CD as part of the NJCAAN May 24, 2006 comments, FEIS App. N, AR 9304:2149, JA __, but not explicitly included by FAA in the Administrative Record. RJN Ex. G, Add. C.

²⁵ FEIS App. N, AR 9304:2171-72, JA __ (“NJCAAN May 24, 2006 letter”); FEIS App. N at 19, AR 9304:2368, JA __ (FAA Response no. 57).

²⁶ Appendix to NJCAAN May 24, 2006 letter at 28, FEIS App. N, AR 4100, JA __. *See also* FAA “Roadmap for Performance Based Navigation”, *supra* at 9.

3. **Route Changes and Noise Impacts Have Not Been Disclosed or Presented in a Manner Understandable to the Public.**

An FEIS must adequately inform the public of the significant impacts, including impacts from noise, of a proposed federal action by providing a “full and fair discussion” of those impacts. 40 C.F.R. § 1502.1; 42 U.S.C. § 4332(2)(C). NEPA regulations require that “environmental impact statements be written in plain language and may use appropriate graphics so that decision makers *and the public* can readily understand them.” 40 C.F.R. §1502.8 (emphasis supplied.) The purpose of the FEIS requirement of “understandability” is to adequately inform the public of potential environmental consequences of a proposed agency action. *Or. Env'tl. Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987). *See also Nevada v. Dept. of Energy*, 457 F.3d 78, 87-88 (D.C. Cir. 2006) (stating that agency must adequately disclose the environmental impacts of its actions.)

The FEIS fails to satisfy these requirements. The presentation of the noise impact data is inadequate, confusing and misleading to the ordinary layperson and is plainly not in the “readily understandable” form required by NEPA regulations. 40 C.F.R. § 1502.8. The decibel metric compresses large noise changes into numerically small numbers²⁷ and is capable of being understood by only a very small segment of the population with technical background. For most of the project area, noise information is presented only for areas subject to a relatively large 5 decibel noise change on maps severely reduced in scale. *See* FEIS Figs. 4.23 and 4.24, AR 9302:101-02, JA __.

FAA further disregarded NEPA’s disclosure requirements: Residents in many areas were simply not informed of the proposed changes or impacts resulting from the Project. As examples,

²⁷ FEIS App. E at 2, 9303: 446, JA__.

route change information for Morristown Memorial Airport in New Jersey and Gabreski and Republic Airports on Long Island, New York is presented in a manner incomprehensible to residents.²⁸ In an environmental justice area in Newark, New Jersey, implementation of dispersal headings for Runway 4 at Newark Airport results in an increase of 5,811 in the number of residents exposed, to noise impacts above 60 DNL (from 31,733 to 37,544), and 362 additional residents exposed to noise impacts above 65 DNL. NJCAAN May, 10, 2007 letter at 10-11, AR 9304:3632-33, JA __. Residents of Hillside, New Jersey, located immediately west of Runway 29 at Newark Airport, were not informed of FAA's planned increase use in Runway 29. FEIS App. Q at 95, AR 9304:3195, JA __. Nor were residents in the Newark Airport vicinity informed of FAA's planned implementation (post-2011) of parallel arrival flight path changes for the major runways, which will result in increased noise exposure to some of these areas.²⁹

4. The FEIS Fails to Adequately Present and Analyze the Noise Impacts of FAA's Fanned Departure Headings Off Runways 22L/R at Newark Airport upon the Residents of the City of Elizabeth.

a. The Disclosure of Noise Impacts Was Inadequate.

The fanned departure headings off Runways 22L/R result for the first time in aircraft flying directly over mostly residential areas of the City of Elizabeth. June 5, 2006 Port Authority letter to FAA at p. 6. FEIS App. N, AR 9304:2669-70, JA __ ("June 5, 2006 Port Authority letter to FAA"). *See also* FEIS at Fig. 5.5, AR 9302:144, JA __. The FEIS offers no data or comprehensible information as to the number or percentage of flight departures that will utilize

²⁸ 2005 MITRE Study at Figs. 8-30, 8-32, 8-36, AR 9303:308-12, JA __, FEIS App. E at Attachments C-58 to C-59, AR 9303:701-02, JA __ (Morristown); FEIS App. E at Attachments C-110 to C-115, AR 9303:753-58, JA __ (Gabreski); FEIS App. E at Attachments C-116 to C-121, AR 9303:753-58, JA __ (Republic).

²⁹ FAA "Roadmap for Performance Based Navigation", *supra* at 9.

these new fanned departure headings.³⁰ The lack of this critical information in the FEIS deprived the City of Elizabeth and its residents of information necessary for them to understand the true noise impacts of the Project.

FAA computer-generated noise spreadsheets published on FAA's website show that the number of residents in the Elizabeth vicinity that will be exposed to high noise levels of equal or greater than 60 DNL in 2011, even with all promised mitigation measures in place, almost doubles: rising from 20,459 to 40,715—an increase of 20,256 residents affected.³¹ In 2011, residents in one Elizabeth neighborhood are projected (with all mitigation measures) to receive a 7.2 decibel increase from the Project, which is the equivalent of a five-fold increase in over-flights of their homes.³² However, most of these residents are unable to access and understand this data.³³

An EIS must be “sufficient to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved.” *Env'tl. Def. Fund v. Army Corps. of Eng'rs*, 492 F.2d 1123, 1136 (5th Cir. 1974). The FEIS fails to comply with NEPA regulations, 40 C.F.R. §1502.8, obfuscating from the affected public the full extent and degree of the increased noise impacts which result from fanned departure headings off EWR Runways 22L/R.

³⁰ In FEIS App. Q at 32-33, AR 9304:3274-75, JA __, FAA only provided heading hours used in the computer simulation, without percentage or operation numbers or any commitment that these would be used in practice.

³¹ NJCAAN May, 10, 2007 letter at 5, AR 9304:3627, JA __.

³² See http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/noise_exposure_tables/ (FAA census noise spreadsheet for Union County). See also Sections I.B.2 and I.D, *supra* (discussing of FAA's flawed and result-oriented estimation of future flight operations for EWR).

³³ FAA could have provided information to help the average citizen try to better understand the magnitude of the Project's proposed noise increases simply by providing supplemental information for conversion of decibel increase values to equivalent over-flight change numbers.

b. FAA Understated the Increase in Noise Impacts Based on Artificially Inflated Baseline Conditions.

The FEIS understates the comparative noise exposure and impacts that will result to residents of the City of Elizabeth from FAA's fanned departure headings off Runways 22L/R at EWR because FAA unreasonably inflated the number of flight operations (takeoffs and landings) projected at EWR for 2011. FEIS at 1-20, Table 1.2. In fact, FAA overestimated the number of 2006 EWR flight operations by approximately 14% for its aircraft noise analysis.³⁴

The FEIS used the 2006 and 2011 EWR flight operations forecasts as the baseline for its NEPA required noise analysis for 2006 and 2011 conditions at Newark Airport. FAA's noise impact projections for the Project are based on a comparison with baseline noise impacts under its No Action Alternative.

By using an inflated forecast level for EWR flight operations, FAA significantly exaggerated baseline noise impacts forecast to occur in 2011 under FAA's No Action Alternative. FAA's use of an inflated EWR flight operations estimate as the baseline for FAA's noise impacts analysis misleadingly diminishes or altogether eliminates the projected increase in noise exposure levels presented in the FEIS that the City of Elizabeth and its residents would experience due to the Project.³⁵

For FEIS noise modeling to be accurate, the number of flight operations needs to be realistic. FAA's Office of Planning and Policy directs FAA to use realistic data in its BCA Guidance policy. BCA Guidance at 13. In addition, Order 1050.1E, relating to FAA NEPA

³⁴ FEIS App. B-2 at 3.

³⁵ Even using FAA's inflated baseline analysis for noise exposure, comparison of the Preferred Alternative with mitigation to the No Action Alternative indicates that in 2011 approximately 85,000 more people in Union and Essex Counties would experience noise exposure in the 55-65 DNL range under the Preferred Alternative than would were no action taken. NJCAAN May 10, 2007 letter, Tables 1 and 3 at pp. 5, 10, AR 6730.

compliance requires that noise analysis “reflect current conditions.” Order 1050.1E, at A-62, ¶14.4e. Once FAA had actual flight operations data for 2006 that differed substantially from its previously estimated numbers modeled as the baseline for Project related noise increases, FAA was required by its own policy to utilize such data and update its baseline noise modeling results accordingly. Yet it did not.

c. **FAA Failed to Perform Background Noise Monitoring or Other Noise Verification for Locations Most at Risk of Exceeding Significant Noise Impacts Thresholds for Cumulative Noise Impacts from the Project Thereby Improperly Avoiding the Requirements of FAA Order, § 500C(2) and 40 C.F.R. § 1508.25(a)(2).**

FAA acknowledged the need for background noise monitoring at selected locations in order to properly consider cumulative noise impacts of the Project:

The potential for cumulative noise impacts resulting from [the Project] may also be explored by looking at total noise, ambient noise and aircraft noise. . . . This analysis was conducted in order to provide a general understanding of the effects of the proposed project alternatives at each location. . . . Therefore aircraft noise from the modeled aircraft operations, as well as all other aircraft operations, can be considered.

FEIS at 4-83, AR 9301:315, JA __. The Record lacks any evidence that FAA used the noise monitoring results at all in assessing cumulative residential noise impacts. Nor did FAA measure existing ambient aircraft and/or total noise anywhere near the affected locations in the Elizabeth vicinity that would have enabled FAA to account for the cumulative noise at sites in Elizabeth, since existing noise varies with geographic location.

In preparing the EIS, FAA’s background noise monitoring was conducted at sixteen locations. FEIS at 3-23, AR 9301:183, JA __; FEIS at Figs. 3.10, 3.14, AR 9302:61, 65, JA __. FAA provided the criteria for noise measurement site selection in the Noise Measurement Report. “Areas that will [or] could potentially be over-flown by new procedures proposed by each airspace configuration” and “areas that have existing overflights but where the traffic

volume may change based on operation mode or utilization”. FEIS App. D at D-3, AR 9303:411, JA _.

Significantly, FAA admits that it did not conduct background noise level monitoring within the City of Elizabeth or at any other location proximate to Newark Airport. FEIS App. Q at 56-57, AR 9304:3156-57, JA _.. The City of Elizabeth is among the areas most impacted by the increased aircraft noise levels resulting from the Project. FEIS at 4-12 to 4-13, 4-34, 4-44, AR 9301:244-45, 266, 276, JA _; FEIS at Figs 4.9, 4.10, and Fig. 4.24, AR 9302:87-88, 102, JA _; FEIS App. P, Table 4 at 17, AR 9304:3039, JA _. The Projects fanned departure headings off Runways 22L/R at Newark Airport “will introduce many people in the City of Elizabeth to significant aircraft noise for the first time” June 5, 2006 Port Authority letter to FAA at 6, AR 9304:2669-70, JA _. The FEIS indicates that substantial areas in the Elizabeth vicinity are exposed to noise levels close to 65 DNL by the Project. FEIS App. P, Table 4 at 17, AR 9304:3039, JA _.³⁶ Yet, not one background noise measurement was taken from any of the affected areas of Elizabeth. The closest noise monitoring location in New Jersey to Newark Airport was approximately seven miles away.

The Project with mitigation clearly introduces substantial noise increases to areas such as Elizabeth located adjacent to Newark Airport. *Id.* However, FAA avoided having to designate the noise impacts to these areas as “significant” by failing to examine other aviation noise sources and other contributions to noise at the site other than the noise related to the Project. Such strategy resulted in lower cumulative noise impact levels being used in evaluating significant impact for areas such as Elizabeth.

³⁶ See also NJCAAN May, 10, 2007 letter at 7, Table 2, AR 9304:3629, JA _.

The addition of substantial aviation noise to areas with already existing high noise levels can bring these areas to 65 DNL and above, thereby exceeding FAA criterion for significant noise impacts and rendering the areas no longer compatible with residential use.³⁷ Had FAA measured background noise in the City of Elizabeth and considered all aviation traffic, the results would likely have showed that the Project's noise impacts would exceed the 65 DNL noise limits in significant portions of the City of Elizabeth. This finding gained from a proper cumulative impacts study would have triggered the requirements, including those under NEPA for FAA to consider and address significant impacts from its proposed action. Order 1050.1E § 500c(2) and 40 C.F.R. § 1508.25(a)(2).

Although background noise monitoring and the methodology for carrying it out may be within FAA's discretion, once it committed to this undertaking, that discretion is not unlimited. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Nor is FAA entitled to perform this critical task in an arbitrary manner without providing any scientific support or rational basis for such methodology—particularly where, as here, the chosen methodology seems intuitively illogical and appears designed to avoid reaching a conclusion that would obligate FAA to undertake additional review and potentially undermine the chosen alternative for the Project. *See, e.g., Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003). Particularly when the chosen methodology seems intuitively illogical and appears designed to avoid reaching a conclusion that would obligate FAA to undertake additional review and potentially undermine the chosen alternative for the Project.

Once noise modeling results were available to FAA showing where significant noise increases were being introduced, such as within the City of Elizabeth, where areas modeled were

³⁷ FEIS App. Q, AR 9304:3652-53, JA _ (NJCAAN June 27, 2007 letter at 5-6.).

very close to the 65 DNL significance level, FAA should have performed background monitoring to ascertain the cumulative noise impacts for those areas at risk of exceeding the significant impact threshold. This is what FAA's own regulation contemplates. *See* Order 1050.1E § 500C(2) ("If the proposed action causes the cumulative impacts of these non-project actions to exceed an applicable significant threshold, then the proposed action would be one causing the significant impact.") (citing 40 C.F.R. § 1508.25). Without this necessary step, FAA failed to ascertain whether the Project, in combination with existing noise levels, resulted in significant noise impacts in particular areas most at risk for exposure to such impacts and thus failed to comply with its own regulatory requirements and guidance³⁸ and evaded those of NEPA. *See* 40 C.F.R. § 1508.25(a)(2).

d. FAA Failed to Examine the Alternate Routing of Aircraft Off Runways 22L/R.

FAA also failed to consider routing aircraft departing Newark Airport Runways 22L/R to the east over less-populated areas which would significantly decrease aircraft noise impacts to the City of Elizabeth and its residents. The use of easterly departure headings off Runway 22L/R of less than 190 degrees was recommended by New Jersey Coalition Against Aircraft Noise ("NJCAAN").³⁹ However, FAA failed to seriously investigate use of departure headings less than 190 degrees for the light traffic (i.e., single heading) scenario. The 190 heading continues to significantly impact some 14,000 residents, a number which could be substantially reduced by the use of a more easterly heading direction.⁴⁰

³⁸ Order 1050.1E § 500C(2); FEIS App. D at D-3 , AR 9303:411, JA _.

³⁹ NJCAAN May, 10, 2007 letter at 6, AR 9304:3628, JA _.

⁴⁰ Analysis of census noise data presented on FAA's website shows that the "no-action" routes significantly impact some 14,000 largely environmental justice residents of Elizabeth at noise levels exceeding 65 DNL, while impacting only one Richmond County, New York resident

Additionally, the Port Authority, which operates the three major New York metropolitan area airports, stated:

FAA must look at expanding the Newark Airspace to the east to allow Newark controllers to run arrivals or departures along the Hudson corridor. This will greatly improve the efficiency of EWR and reduce conflicts with [Teterboro Airport] traffic. It would also provide much needed overall noise relief in the area around the airport.

June 5, 2006 Port Authority letter to FAA at 9, AR 9304:2672, JA __. Yet the FEIS does not reflect evidence that FAA gave any consideration to the Port Authority's advice concerning expansion of EWR airspace to the east, moving LaGuardia arrival traffic and use of the "Hudson corridor" for EWR south flow operations, which would also offer opportunities to reduce the significant noise impacts upon the residents of the City of Elizabeth without significantly impacting Staten Island residents. *Id.* at 8, AR 9304:2671, JA __ ("Currently LaGuardia traffic occupies the Hudson Corridor. If these aircraft are shifted east there may be additional benefits achieved").⁴¹ Nor does the Record demonstrate that FAA adequately weighed environmental advantages and fully evaluated all reasonable alternatives relating to easterly expansion of EWR airspace for north flow operations, which would have reduced future significant noise impacts from the Project upon nearly 13,987 Newark residents—many of whom likely reside in environmental justice communities.⁴²

FAA's failure to investigate either an alternative single departure heading or expansion of EWR airspace to the east violates NEPA's "hard look" requirements—in particular with respect

above 60 DNL. Unfortunately, the FEIS failed to include the 65 DNL noise contour information required by FAA Order 1050.1E, which would have made this noise reduction opportunity apparent.

⁴¹ See also NJCAAN May, 10, 2007 letter at 14, AR 9304:3636, JA __.

⁴² See NJCAAN May, 10, 2007 letter at 10-11, AR 9304:3632-33, JA __.

to the existence of alternatives that could reduce or eliminate significant noise impacts to environmental justice communities such as those located in the city of Elizabeth.⁴³

G. FAA Should Have Prepared a Supplemental Draft EIS Addressing an Eleventh-Hour Change to the Project That Would Significantly Affect the Rockefeller State Park Preserve.

Pursuant to CEQ regulations, NEPA requires the preparation of supplements to a draft or final EIS where “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts.” 40 C.F.R. § 1502.9(c). FAA Order 505.4B is in accord. A supplemental EIS (“SEIS”) is required when “significant new changes, circumstances or information relevant to the proposed action, its affected environment, or its environmental impacts becomes available.” *See also* Order 1050.1E, § 516a.

As is more fully explained in the Section 4(f) discussion, *infra* at Section II.A.2, the FEIS included a proposal by FAA to modify flight paths in and around Westchester Airport, including over the Rockefeller State Park Preserve, in an effort to mitigate Project impacts elsewhere. Selection of a new proposed routing for aircraft, whether as mitigation or otherwise, is a federal action the environmental consequences of which were not addressed in the DEIS. Proceeding with that action required NEPA review, with notice and public comment to be assessed by FAA before publication of the FEIS. 40 C.F.R. § 1502.9(c); *see Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1291-93 (1st Cir. 1996) (holding that an alternative that entails a different configuration of activities and locations, not mere modifications “within the spectrum” of prior alternatives, requires a SEIS); *California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982)

⁴³ *See* Section I.H, *infra* (discussing environmental justice).

(supplemental DEIS is the only way to satisfy the NEPA requirements of public participation in the evaluation of the environmental consequences of a major federal action if a proposed action differs from the alternatives canvassed in the DEIS so as to preclude “meaningful consideration” by the public); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981) (finding that various changes in a navigational project, including increase in barge traffic, necessitated the preparation of a SEIS).

FAA’s abrupt decision to re-route noisy aircraft over the Rockefeller State Park Preserve without providing a meaningful opportunity for public comment on an entirely new proposed action violates Section 553 of the APA and 40 C.F.R. § 1502.9(c).

H. FAA Failed to Properly Assess the Project’s Impact on Minority and Low-Income Populations.

In 1994 President Clinton signed Executive Order 12898 to “focus Federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice.” Executive Order 12898 requires “each Federal agency [to] . . . make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations” Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, § 1-101 (Feb. 11, 1994).

FAA violated NEPA by preparing an FEIS that contained an inadequate analysis of the Project’s impacts on minority and low income persons. Executive Order 12898 was accompanied by a Presidential memorandum that called out the importance of NEPA for addressing environmental justice concerns. The memorandum directs each Federal agency to analyze “the environmental effects, including human health, economic and social effects of

federal actions, including effects on minority communities and low-income communities, *when such analysis is required by [NEPA]*” Memorandum dated February 11, 1994, from President Clinton to the heads of all departments and agencies (emphasis added) (*available at* http://www.epa.gov/fedfac/documents/executive_order_12898.htm#memo1). RJN Ex. H, Add. C.

Pursuant to its responsibility for overseeing the Federal government’s compliance with Executive Order 12898 and NEPA, CEQ has issued formal Guidance to assist agencies in complying with their NEPA responsibilities to address environmental justice issues. “Environmental Justice: Guidance Under the National Environmental Policy Act,” (CEQ Dec. 10, 1997) (“CEQ Guidance”). FAA has also promulgated implementing regulations. Order 1050.1E, App. A, §§ 16.1a, 16.2a. While violations of Executive Order 12898 and the related regulations do not create an independent cause of action, the adequacy of an agency’s environmental justice analysis under NEPA is subject to the APA’s arbitrary and capricious standard of review. *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

As explained below, FAA failed to comply with applicable regulations requiring it to analyze whether the severity of the noise impacts inflicted by the Project on minority populations would be exacerbated by any cultural, social, occupational, historical, or economic factors. Moreover, FAA’s environmental justice analysis incorrectly asserted that impacts to minority and low-income communities such as Elizabeth would be mitigated to a level of insignificance, in that a key mitigation measure the FEIS assumed would be implemented immediately has, instead, been deferred, potentially indefinitely, by FAA. This modification fundamentally

changes the Project and deprived the impacted minority and low-income populations of the opportunity to meaningfully comment on the FEIS.

1. **The FEIS Failed to Contain the Requisite Analysis of Whether the Severity of Significant Noise Impacts on Environmental Justice Communities Would Be Exacerbated by Interrelated Social and Economic Effects.**

FAA's analysis of environmental justice impacts was legally inadequate because it failed to address "interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action." CEQ Guidance at 9. In other words, an environmental justice analysis is required to consider whether the severity of significant noise or other impacts on minority or low income populations would be exacerbated by the conditions in which the affected community is living or "the physical sensitivity of the community or population to particular impacts" *Id.*

Local conditions and health disparities that can amplify environmental effects are particularly important in the environmental justice context. "Attention to minority and low-income communities and the natural resources upon which they depend is necessary because actions that adequately protect the general population may not always protect discrete segments" ⁴⁴

Here, FAA, after discussing the extent to which minority and low-income populations would be subjected to significant noise impacts by the Project, concluded that the Project with mitigation "would not cause disproportionately high and adverse health or environmental

⁴⁴ Barry Hill and Nicholas Targ, *The Link between Natural Resources and the Issue of Environmental Justice*, 28 B.C. ENVTL. AFF.L.REV. 1, XX (Dec. 2000). See *In re Louisiana Energy Servs., L.P. (Claiborne Enrichment Center)*, 47 NRC 77 (1998) (EIS improperly failed to consider the effects of road closing on elderly or infirm African-American. population with low car ownership rates).

impacts upon minority or low income populations in 2006 or 2011.” ROD at 28, AR 9762:34, JA _ (citing FEIS Table 5.10). However, the FEIS failed to contain any analysis of “interrelated cultural, social, occupational, historical, or economic factors that may amplify” the severity of the noise impacts. CEQ Guidance at 9. Will the affected environmental justice population experience heightened noise impacts because, for example, many of them reside in substandard housing that does not attenuate aircraft noise to the same extent as newer or better built housing? Does the affected environmental justice population suffer from elevated rates of hypertension or other ailments that would be compounded by increased noise conditions?⁴⁵ These questions were asked of FAA, but went unanswered. See ROD App. D at D-53, AR 9762:184, JA _. By failing to address these and other conditions that could result in environmental justice populations experiencing impacts that are more severe than those disclosed in the FEIS, FAA “entirely failed to consider an important aspect of the problem” and thereby acted in an arbitrary and capricious manner. See *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005) (defining arbitrary and capricious standard of review).

2. **The FEIS Fails to Disclose the Unmitigated Significant Noise Impacts on Environmental Justice Populations Attributable to FAA’s Indefinite Deferral of a Key Mitigation Measure.**

The FEIS disclosed that the Project’s introduction of new departure headings off of Runways 22 L/R at Newark Airport would expose tens of thousands of predominantly minority residents of the City of Elizabeth to significant increases in noise.⁴⁶ FAA asserted that the

⁴⁵ See, e.g., Lars Jarup, et al., “Hypertension and Exposure to Noise Near Airports,” 113 *Envtl. Health Perspectives* 1 (Nov. 2005). RJN Ex. I, Add. C.

⁴⁶ In the year 2011, 2,729 Elizabeth residents are expected to experience an increase in noise of at least 1.5 DNL above 65 DNL; 31,161 persons are expected to experience an increase in noise of at least 3.0 DNL between 60 and 65 DNL; and 33,340 persons are expected to experience an

Project would not impose any disproportionate impacts on minority populations because all noise impacts will be mitigated to a level of insignificance. ROD at 28, AR 9762:34, JA __; *see also* FEIS App. Q at 65, AR 9304:65, JA __ (responding to comment). With respect to the communities impacted by south flow departures from Newark Airport, this finding was predicated on implementation of a mitigation measure involving the routing of nighttime departures over the ocean. *Id.* at 89, AR 9304:3189, JA __. According to FAA, “Midnight ocean routing prevents significant noise increases Southwest of EWR. . . .” *Id.* Ocean routing is a backbone of FAA’s noise reduction scheme at Newark, because every night flight is equivalent to ten daytime flights in the calculation of noise impacts using the DNL (day-night average sound level) noise metric. Reducing noise at night offsets noise increases during the day in the DNL calculation.

Before it even issued the ROD, but after the public comment period closed, FAA retreated from its commitment to implement nighttime ocean routing as a noise mitigation measure. In response to a comment by United Parcel Service on the FEIS, FAA noted that recent increases in the number of nighttime arrivals at JFK were incompatible with nighttime ocean routing. FAA pledged to monitor traffic levels at JFK after nighttime ocean routing is implemented (which implementation would occur at some unspecified future time) to determine whether that mitigation measure has become operationally infeasible, stating “If it is necessary to revise or eliminate this measure then we will reevaluate the FEIS, undertake appropriate environmental review, and amend this ROD.” ROD at 50, AR 9762:56, JA __.

increase in noise of at least 5.0 DNL between 45 and 60 DNL. FEIS at 4-35, AR 9301:267, JA__.

Although the use of new flight paths which subject minority communities to significant noise impacts began shortly after issuance of the ROD, nighttime ocean routing has not been implemented. In a letter responding to the City of Elizabeth's concerns about FAA's failure to honor its mitigation commitment, FAA acknowledged that nighttime ocean routing was not being utilized, but promised to conduct additional environmental review if it becomes apparent that increased nighttime arrivals at JFK have made this approved mitigation measure operationally infeasible. Jan. 8, 2008 FAA letter to City of Elizabeth at 10, n. 16 (denying City of Elizabeth's Request for Administrative Stay), RJN Ex. J, Add. C.

In short, FAA's conclusion and broadcast message to the impacted public that the Project would not have any significant environmental justice impacts was premised on implementation of a mitigation measure which has been deferred indefinitely. The false premise of FAA's environmental justice analysis deprived the affected minority population and other of both immediate mitigation of significant noise impacts and a meaningful opportunity to comment on the adequacy of FAA's environmental justice analysis.⁴⁷ See DOT Environmental Justice Order 5610.2, ¶ 5(b)(1) (establishing that DOT agencies "must provide for meaningful public involvement by minority and low income populations."); *accord*, EPA, Final Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews, § 2.3.1 (1999). See also 40 C.F.R. § 1508.27(b)(7) (the significance of an impact "cannot be avoided by terming an action temporary").

⁴⁷ EPA, which is required to comment on EISs and on environmental justice issues, in particular, was similarly misled. Indeed, prior to FAA's late disclosure that nighttime ocean routing will not be immediately implemented and may not be feasible, EPA's regional office responsible for the residents of Newark praised FAA's public outreach effort, noting that FAA held several public hearings on its noise mitigation report. ROD App. C at C-10, , AR 9762:118, JA __. EPA, like the impacted environmental justice population, was given no basis to believe that the residents would suffer disproportionate and adverse impacts.

Under these circumstances, FAA should be required to prepare a legally adequate environmental justice analysis that addresses the misleading information in the FEIS, discloses the full extent of the Project's noise and environmental justice impacts, and explores alternative means of mitigating those impacts. *See Natural Res. Def. Council v. U. S. Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005) (finding that remand is required if “error was sufficiently significant that it subverted NEPA’s purpose of providing decision makers and the public with an accurate assessment of the information relevant to evaluate [the action]”).

I. FAA Violated NEPA by Failing to Include a Compliance Monitoring Plan for Noise Mitigation.

In another example of FAA’s failure to abide by its public commitments, FAA failed to follow its express commitment to include a “compliance monitoring specification” in the ROD. FEIS App. Q at 33, AR 9304:3133, at JA __. This failure was in direct contravention of FAA’s own regulations requiring FAA to adopt a mitigation monitoring and enforcement program:

Any mitigation measure that was made a condition of the approval of the FEIS must be included in the ROD. RODs can set forth the conditions for the action approval and state mitigation measures that will be taken. A monitoring and enforcement program shall be adopted and summarized where applicable for any such mitigation. Proposed changes in or deletions of mitigation measures that were a condition of approval of the FEIS must be reviewed by the same agency offices that reviewed the FEIS and must be approved by the FEIS approving official.

Order 1050.1E at ¶ 512b. Though the ROD summarizes mitigation measures, it makes absolutely no mention of any monitoring or enforcement program. ROD at 22, AR 9762:26, JA __. Rather, FAA merely “assumes” that the mitigation measures will be implemented in concluding that “in 2011, the mitigated preferred alternative would result in no significant impacts.” *Id.* Yet, FAA selected the Project as “environmentally preferable” only after it engaged in a mitigation development process undertaken after, and not before, it first chose the

Integrated Airspace Alternative with ICC as meeting the agency's objectives of reducing delay. Thus, the public—especially those citizens who would benefit from noise mitigation headings or procedures—has no assurance whether or how FAA will meet its mitigation commitment that was central to FAA's justification for its decision.

FAA's "about face" not only conflicts with its own NEPA regulations and its stated commitment in the EIS, it also directly conflicts with CEQ regulations and Guidance. The CEQ regulations state that "A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation," 40 C.F.R. § 1505.2 (c), and that "mitigation and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented." 40 C.F.R. § 1505.3. CEQ repeated this direction in its "40 Questions" document, stating that "The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they have been adopted as part of the agency's decision." CEQ Question 34c, 46 Fed. Reg. 18026 (Mar. 23, 1981).

Nothing in the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) lessens these critical NEPA obligations. The Court's holding in *Robertson*—that NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts—is eminently distinguishable from the facts and issues in this case. Here, unlike *Robertson*, the agency unqualifiedly committed to a specific mitigation and enforcement program in the FEIS and then ignored that commitment in the ROD itself—despite the fact its entire basis of selecting the Project as environmental preferable was premised on achieving that very commitment. Moreover, unlike in *Robertson*, the mitigation in question is wholly within the agency's control and is not dependent on third parties.

FAA’s “backsliding” on a key mitigation condition—a night use modified ocean routing procedure—typifies the agency’s failure to abide by its NEPA commitments. As made clear in the April 7, 2007 noise mitigation report (“NMR”) on ocean routing mitigation, FAA adopted nighttime ocean routing for EWR departures as one of the key components in the mitigation strategy. FEIS App. Q at 12-19, AR 9304:3112-19, JA __. The NMR concludes that “The primary result sought by mitigation of EWR Departures was a reduction in the total people potentially impacted by noise level changes caused by the Preferred Alternative.” *Id.* at 17, AR 9304:3117, JA __. Night-time ocean routing was central to that conclusion, and any retreat from that commitment could result in an increase in noise exposures under the Project. Thus, FAA’s commitment to include a monitoring plan appears to be central to ensuring that the projected noise reductions necessary to justify the mitigated preferred alternative are actually achieved. Now, the agency’s decision not to include a mitigation monitoring plan in the ROD along with its apparent pullback from nighttime ocean routing undermines FAA’s conclusion that the mitigated preferred alternative was also environmentally preferable.

Nighttime ocean routing was a significant, and firm, component of FAA’s Mitigated Preferred Alternative selected to address the significant noise impacts to residents of Elizabeth resulting from departures off EWR Runways 22L/R. FEIS Table 5-4 at 5-21, AR 9301:341, JA __; FEIS at Fig. 5-5, AR 9301:144, JA __; ROD at 22, AR 9762:28, JA __. FAA acknowledged the importance of night ocean routing in the FEIS: “FAA is obliged to mitigate significant noise increases, and [ocean routing] has the least deleterious effects.” FEIS App. Q at 88, AR 9304:3188, JA __. In its response to public comments on its April 2007 NMR, FAA concluded that “night ocean routing prevents significant noise increases southwest of EWR.” *Id.* at 89, AR 9304:3189, JA __. FAA has now retreated from that specific and unqualified commitment.

These undisputed facts in the Record serve to illuminate the fundamental flaws of FAA's mitigation analysis. This Court should remand to FAA and require an SEIS for either reconsideration of the mitigation analysis or for the agency to explain why such additional analysis is not necessary or feasible. 40 C.F.R. § 1502.9(c)(i), (ii); *see also, Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989) (stating that courts must ensure that an agency decision to supplement an EIS is founded on a reasoned evaluation "of the relevant factors"). FAA's dramatically altered position on night ocean routing shows that the agency failed to take the requisite "hard look" at noise impacts upon the residents of Elizabeth and the necessary mitigation to address such impacts. Consequently, the ROD was neither "fully informed" nor "well considered." *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). To the extent that FAA relied upon inaccurate data and information, the flawed FEIS impaired FAA's consideration of adverse environmental effects and skewed public evaluation of the Project. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) (where the information in the initial EIS was so incomplete or misleading that the decision maker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide "a reasonable, good faith, and objective presentation of the subjects required by NEPA).

II. FAA VIOLATED SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT.

FAA violated NEPA and Section 4(f) of the DOT Act of 1966 by approving the Project on the basis of an FEIS that failed to consider the Project's impacts on dozens of affected parks, and that did not provide a basis for FAA to make a reasoned determination whether the Project would constructively use any parks. Section 4(f) was intended to protect parks of national, state, and local significance from "use" by a transportation project. That provision states:

[T]he Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, . . . only if—(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c). For certain projects, like road construction, the use can be physical. The Project does not require new construction, so it will not result in the physical use of any Section 4(f) resources. FEIS at 4-53, AR 9301:258, JA ___. Noise, however, can significantly impair a park and can thus be a “constructive” use. For a project to result in constructive use, a substantial impairment must occur.⁴⁸

The Supreme Court has heard only one Section 4(f) case, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The Court explained the standard of review as follows:

For that we must look to 706 of the Administrative Procedure Act, 5 U.S.C. 706 . . . which provides that a ‘reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found’ not to meet six separate standards. In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.

Id. at 413-414.

⁴⁸ Order 1050.1E states:

Substantial impairment occurs only when the activities, features, or attributes of the resource that contribute to its significance or enjoyment are substantially diminished [w]ith respect to aircraft noise, for example, the noise must be at levels high enough to have negative consequences of a substantial nature that amount to a taking of a park or portion of a park for transportation purposes.

Order 1050.1E at § 6.2f.

FAA violated Section 4(f) in three ways: (1) by failing to identify or analyze impacts on all parkland, particularly at the state and local level, protected by Section 4(f); (2) by failing to conduct an adequate analysis under Section 4(f) for certain parks that it did purport to study, such as the John Heinz National Wildlife Refuge; and (3) by depriving the public of an opportunity to review and comment on a supplemental noise analysis that was completed after the close of the public comment period and appended to the ROD. Because of these failures, the many residents and visitors who value the peace and tranquility of the affected parks will now be subjected to noise impacts from the Project that could have been avoided or mitigated if FAA had followed Section 4(f)'s requirements.

A. FAA Failed to Properly Identify Parklands Protected by Section 4(f).

FAA violated the most basic requirement of Section 4(f) by failing to even identify scores of protected parklands. By failing to comply with this threshold requirement, FAA arbitrarily applied a heightened and individualized Section 4(f) analysis to some noise-sensitive parks while arbitrarily overlooking other similarly situated parks.

1. FAA Ignored Numerous Local Parklands.

FAA failed to comply with the clear Congressional mandate underlying Section 4(f) and its own regulations: to identify, analyze, and avoid the use of all public parkland, recreational areas, wildlife and waterfowl refuges and significant historic sites. 49 U.S.C. § 303(c). “For the purpose of [Section] 4(f), noise that is inconsistent with a parcel of land’s continuing to serve its recreational, refuge or historical purpose is a ‘use’ of that land.” *City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994). Section 4(f)’s requirements are straightforward:

First, the FAA must identify which resources are protected. Second, the FAA must determine whether a proposed project will ‘use’ the lands identified. Third, if the project uses the challenged area, the FAA may proceed with the project *only* if there is ‘no

prudent and feasible alternative’ and the agency undertakes ‘all possible planning to minimize harm.’

Town of Cave Creek v. FAA, 325 F.3d 320, 333 (D.C. Cir. 2003) (quoting 49 U.S.C. § 303(c)).

To ensure that all Section 4(f) properties are identified, FAA requires that “[t]he responsible FAA official must 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.” Order 1050.1E at § 6.2e.

Despite the clear requirements of Section 4(f) and Order 1050.1E, FAA failed to contact numerous park officials in order to determine whether those jurisdictions contained Section 4(f) resources. *See* Declarations, Add. D.⁴⁹ FAA recognized that the Project area “encompasses all or portions of 64 counties, 490 independent cities, as well as other municipal areas,” which “includes numerous city, county, state, and national parks, wildlife refuges, and historic sites.” FEIS at 3-2, 3-3, 3-36, Table 3.1, AR 9301:162-3, 196, JA ___. Yet FAA identified only 203 non-federal “public parks and open space areas, including forest preserves” that qualify as Section 4(f) resources, most of which are state properties. *Id.* at 3-37, AR 9301:197, JA ___. This group of 203 public parks and open space areas completely omits at least 236 state, county, and local parks. *See* “4(f) Properties Not Included in the FEIS,” Add. D.

FAA is not permitted to contravene the clear language of Section 4(f) and its governing regulations by ignoring protected parklands. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (“properly promulgated, substantive agency regulations have the ‘force and effect of

⁴⁹ The attached Declarations provide examples of state, county, and local officials associated with the Petitioners who FAA failed to contact and, consequently, the Section 4(f) resources that FAA ignored. These Declarations by no means document all of the overlooked officials and parks. The Section 4(f) properties identified by FAA are listed at FEIS at 3-38 through 3-46, Tables 3.17-19, AR 9301:198-206, JA __; FEIS App. J., Tables J.1-2, AR 9304:4-35, JA __.

law”). In *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999), this court held that the Federal Highway Administration (“FHWA”) violated Section 4(f) and FHWA regulations by failing to analyze protected resources prior to issuing the ROD in the case. The highway project at issue in *Corridor H Alternatives* would potentially affect a number of Section 4(f) properties in the project area. *Id.* at 372. Rather than analyze these properties prior to issuing its ROD, FHWA maintained that under its regulations it was permitted to prepare separate 4(f) evaluations after it issued its ROD. *Id.* This Court disagreed, holding that FHWA must follow the clear language of Section 4(f) and the governing regulations and complete the 4(f) process prior to issuing its ROD. *Id.* at 373-74.

FAA’s violation in this case is even more egregious than FHWA’s violation in *Corridor H Alternatives*. In that case, FHWA at least recognized that it was required to analyze all affected Section 4(f) properties; the agency only disputed the timing of the analysis. Here, FAA has attempted to altogether sidestep its obligation to contact all park officials and identify affected Section 4(f) resources. As in *Corridor H Alternatives*, the Court should “return the matter to [FAA] with instructions to complete the Section 4(f) process before proceeding further with the” Project. *Id.* at 374.

2. FAA Arbitrarily Scrutinized Some Noise-Sensitive Parks While Ignoring Others.

FAA’s arbitrary and selective approach to its Section 4(f) responsibilities was especially harmful to Petitioners because once FAA has identified all Section 4(f) properties that may be affected by the Project, the agency must determine whether the areas are “significantly, adversely affected” by the anticipated environmental impacts, including, noise levels, amounting to their constructive use. *Nat’l Parks and Conservation Ass’n v. FAA*, 998 F.2d 1523, 1531 (10th Cir. 1993) (quoting *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982)); accord *Morongo*

Band of Mission Indians v. FAA, 161 F.3d 569, 583 (9th Cir. 1998). “[A] project which respects a park’s territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and ‘take’ it in every practical sense.” *Allison v. Dep’t of Transp.*, 908 F.2d 1024, 1028 (D.C. Cir. 1990) (citation omitted).

As the first step in the required analysis, FAA may use the compatibility guidelines in 14 C.F.R. Part 150 to determine whether the projected noise levels associated with a project, measured in DNL, exceed the noise levels that are compatible with the type of Section 4(f) property.⁵⁰ Order 1050.1E at § 6.2g. Applying Part 150, FAA determined that the projected noise levels within the census blocks occupied by each property did not constitute the constructive use of any Section 4(f) properties. FEIS 5-42 to 5-43, AR 9301:362-63, JA ____.⁵¹

⁵⁰ According to 14 C.F.R. Part 150 guidelines, parks are compatible with DNL levels up to 75 decibels. 14 C.F.R. Part 150, App. A, Table 1.

⁵¹ FAA may not simply ignore parklands that do not experience noise increases in excess of the Part 150 thresholds. FAA may not avoid the strictures of Section 4(f) unless it makes a factually supported finding that the increase in overflight impacts on the protected area is *de minimis*, which it failed to do here. *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49 (1st Cir. 2001); *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982) Congress clarified these *de minimis* procedures in 2005 when it passed H.R. 3, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”). SAFETEA-LU added a *de minimis* exception to the use analysis—but only if two conditions are met:

1. The Secretary has determined, after public *notice and opportunity for public review and comment*, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and
2. The finding of the Secretary *has received concurrence* from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

49 U.S.C. § 303(d)(3), as amended by Pub. L. No. 109-59 § 6009(a) (2005).

The Section 4(f) analysis does not end with the application of Part 150. FAA must “carefully evaluate reliance on Part 150 guidelines” if the property is “located in a quiet setting and the setting is a generally recognized feature or attribute of the site’s significance.” Order 1050.1E at § 6.2i; *see also id.* at § 14.5a (“DNL analysis may optionally be supplemented on a case-by-case basis to characterize specific noise effects”). In this case FAA claims it consulted with the National Park Service and “other interested parties” to identify 4(f) properties where “the noise is very low and where Part 150 guidelines may not adequately address the expectations and purpose of people visiting areas within these parks and wildlife refuges.”⁵² FEIS at 5-43, AR 9301:363, JA __; *see also* ROD at 31, AR 9762:37, JA __. FAA then applied a more rigorous analysis to such selectively identified properties by first calculating the noise exposure levels at multiple points within each noise sensitive site. FEIS at 5-43, AR 9301:363, JA __; FEIS at App. J.3, AR 9304:43-52, JA __. If the noise level increased by more than 3.0 DNL,⁵³ FAA scrutinized the impact of the airspace changes to determine if the noise and visual impacts were incompatible with the unique attributes and uses of the particular property and therefore amounted to its constructive use.⁵⁴ ROD at 34-38, AR 9762:40-44, JA __. As a

⁵² The record is unclear as to which “interested parties” were actually consulted. Certainly, a number of county and local parks officials were never contacted. *See* Declarations of Petitioners’ park officials, Add. D. Such officials, charged with protecting the public’s enjoyment of such resources, qualify as “interested parties.”

⁵³ *See* FEIS at 5-43, AR 9301:363, JA __, citing to definition of constructive use in 23 C.F.R. § 774.15 (previously 23 C.F.R. § 771.135(p)(5)(iii), but reorganized according to 73 Fed. Reg. 13367). To put a 3.0 DNL increase in perspective, this number represents a doubling of sound energy. ROD at 34 n.12, AR 9762:40 n.12, JA __.

⁵⁴ For parks with “quiet settings,” the agency described the property, highlighted any information relating the level of use and visitor experience, reviewed management plans, calculated noise levels at points within each property, prepared graphics and tables showing the locations and values of the calculated noise levels, included the number of tracks and operations in a given area, and compared and evaluated the difference in noise exposure levels with and without the selected alternative. ROD at 33, AR 9762:39, JA __; FEIS at 5-43, AR 9301:363, JA __.

safeguard against disrupting the use of these areas, FAA committed to apply “adaptive management techniques.” ROD at 38, AR 9762:44, JA ____.

Had FAA followed the requirements of Section 4(f) and Order 1050.1E, it would have learned that it overlooked many noise-sensitive parks that will experience a noise increase in excess of 3.0 DNL and therefore qualify for the more detailed analysis contained in the ROD. Although courts defer to FAA’s expertise in determining which methodology to use in its Section 4(f) analysis, the methodology must be reasonable and may not be arbitrarily applied. *City of Grapevine*, 17 F.3d at 1507-08. No plausible rationale explains FAA’s decision to apply an individualized 4(f) analysis to some noise-sensitive parks while arbitrarily failing to apply it to other similarly situated parks.

Below are examples of noise-sensitive parks ignored by FAA that qualified for the more detailed Section 4(f) analysis:⁵⁵

⁵⁵ FAA provides a website specifically for calculating Project-related noise impacts: http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/ny_njphl_redesign/noise_exposure_tables/ (last visited Aug. 18, 2008). “Website visitors may use these tables to determine what the noise exposure levels would be at their location as a result of any of the proposed Airspace Redesign Alternatives.” FEIS at 6-9, AR 9301:465, JA _____. Accordingly, Petitioners input park addresses in the “U.S. Census Bureau Am. FactFinder website” in order to find the appropriate census tract and census block number (as identified by the “Census 2000” database). When census tract and block numbers were available, Petitioners used this same FAA website to first find the Noise Exposure Tables corresponding to the respective county in which each park is situated, then found the modeled noise levels under the “2011 No Action” and the “2011 Integrated Variation with ICC with Mitigation” for each census block that comprises each park. Then, the 2011 No Action value was subtracted from 2011 Integrated Variation with ICC with Mitigation value for each census block, which gives the change in noise due to the Project. This technique is similar to FAA’s method of inputting location data into the noise model and calculating noise values at specific 4(f) locations. FEIS at 5-42, AR 9301:362, JA _____. See also, FEIS at 5-43, AR 9301:363, JA ____ (“The next step was to screen the subject parks for further analysis by comparing the noise values (DNL) for the 2011 Future No Action Airspace Alternative and the mitigated Preferred Alternative”). Petitioners’ results are tabulated in Add. D, “Noise Sensitive 4(f) Resources Subject to 3.0 DNL Increase.”

Rockland County Parks

FAA ignored 16 County parks, at least six of which are near or under the proposed flight paths: the Samuel G. Fisher Mount Ivy Environmental Park, Kakiat Park, Monsey Glen Park, Gurnee Park & Amphitheater, South Mountain Park and the Lillian & Frank J. Schwartz Memorial Park. See R. Allan Beers Decl. filed with *County of Rockland, New York v. FAA*, Initial Submissions, No. 07-1363 (D.C. Cir. Oct. 17, 2007). Mr. Beers, Rockland County Coordinator of Environmental Resources, states that these six parks “are examples of County parks known for their passive recreational activities such as hiking, experiencing the local ecology, and viewing wildlife.” The passive recreation practiced on County parks is dependent by its very nature on peace and quiet. For example, Monsey Glen is a “peaceful area of hiking trails.” Beers Declaration, *supra*. Under FAA’s criteria, these parks are noise-sensitive areas where Part 150 guidelines are not sufficient to determine the significance of noise impacts and should have been analyzed in more detail. Mr. Beers—the County official responsible for parks—was never contacted by FAA as to impacts on County resources. Beers Decl. at Add. D.

Data from the agency’s noise calculation tool show the impacts on two particular parks. Mindful that quiet settings need a projected noise increase of 3.0 DNL to justify a heightened study, Petitioners calculated that Kakiat Park could experience noise increases of up to 6.3 DNL; Monsey Glen of up to 6.7 DNL; Schwartz Nature Preserve up to 7.0 DNL.

Ward Pound Ridge Reservation

The Ward Pound Ridge Reservation occupies 4,700 acres (more than seven square miles) in Westchester County, New York. The park is a mixture of streams, woodlands, and open fields. It was purchased in 1924 and set aside as a sanctuary for wildlife, and is used for such passive outdoor activities as bird watching, camping, and hiking. According to FAA’s noise

exposure tables, Ward Pound Ridge Reservation will experience increases of up to 4.9 DNL if the Project is implemented. Consequently, it is at least as deserving of the heightened analysis that FAA gave other noise-sensitive parks subjected to noise increases of at least 3.0 DNL—in excess of the threshold for other noise-sensitive parks that received a heightened constructive use analysis.

Devil's Den Preserve

The Devil's Den Preserve occupies 1,756 acres in the Towns of Redding and Weston, Connecticut, and is home to over 500 types of trees and wildflowers and over 140 bird species. As its entrance sign announces, the Preserve is a place for “conservation education, scientific research, nature study, spiritual refreshment.”⁵⁶ FAA's noise exposure tables indicate that Devil's Den Preserve will experience increases of up to 3.2 DNL.

Connecticut State Parks

Like many other park agencies, the Connecticut Department of Environmental Protection never received any correspondence from FAA and was never formally informed about the potential impacts to its parks and forests. *See* Thomas Morrissey Decl., Add. D. This lack of communication and comity is of grave concern to a State that has passed special laws and spent tens of millions of taxpayer dollars to obtain the necessary land rights and protect its parks from outside impacts while preserving them for hikers, picnickers, and others to enjoy. Increasing population density, particularly in southwestern Connecticut, and urban sprawl have continually cut into the few remaining areas not under asphalt or divided into housing tracks. The state parks and preserves in that part of the state are among the last pristine and tranquil places in the area—

⁵⁶ *See* <http://www.rushyoung.com/usa/connecticut/devilsden/devilsden.html> (last visited Aug. 18, 2008). RJN Ex. K, Add. C.

islands of natural habitat in an otherwise modernized and mechanized world. To help protect these vestiges of tranquility, the State General Assembly has specifically identified noise as a form of pollution that has particularly pernicious effects on quality of life. Conn. Gen. Stat. § 22a-67 *et seq.*

It is in this context that the Connecticut Department of Environmental Protection, trustee of the environment for present and future generations, raises specific concerns in regards to its parks. The Department is especially concerned about impacts on Centennial Watershed State Forest. Located in part in Fairfield County in the area most affected by the changed air routes, the state forest includes more than 15,000 acres of land (nearly 25 square miles) specifically set aside for watershed protection and noise-sensitive, passive recreational uses like hiking. The creation of this state forest required the largest single purchase of open space land at that time in Connecticut's history. Acquisition of this land, including pristine forests, streams and upland ridges, required \$80 million of taxpayer funds as well as an additional \$10 million contribution from private groups.

Although Centennial Watershed State Forest includes areas that are projected to experience noise increases as high as 5.4 DNL, FAA never contacted the responsible State agency about this state forest and never analyzed the forest in the FEIS. This site, therefore, requires analysis by FAA.⁵⁷

⁵⁷ Other parks, such as the Sherwood Island State Park, were referred to in the FEIS but the failure of the FAA to communicate with the State severely limits the utility of the FEIS's analysis. The FEIS failed to recognize that the 9/11 Living Memorial on Sherwood Island State Park—where residents came to watch the tragic aftermath from the terrorist attacks on the World Trade Center—exemplifies a state park worth protecting from airplane noise. The Memorial offers visitors peace and strength to draw upon in their healing. In every way, this Memorial epitomizes a noise sensitive area where Part 150 guidelines may not be sufficient to determine the significance of noise impacts.

Union County Parks

FAA identified the Pruden section of the Elizabeth River Parkway as a Section 4(f) resource but failed to contact Union County officials to determine whether it is a noise-sensitive park. Alfred Faella Decl., Add. D. Had FAA contacted Union County representatives, it would have learned that the Parkway was acquired in the 1930s for use as a passive park and that quiet and tranquility are vital characteristics of the park. Consequently, the park is a noise-sensitive area where Part 150 guidelines are insufficient to determine the significance of noise impacts. According to FAA's Noise Exposure Tables, the Parkway will experience noise increases from 5.2 to 6.8 DNL—well above the 3.0 DNL cutoff for more detailed scrutiny. FEIS App. J at Table J.2, AR 9304:21-35, JA ___. FAA should have applied the heightened and individualized analysis described above.

Rockefeller State Park Preserve

The idyllic, peaceful atmosphere that makes the Preserve an invaluable open space resource and a quiet refuge for passive recreational pursuits is threatened by FAA's construction of what amounts to an airborne freeway directly over the most used portion of the Preserve. As a "Park Preserve" under the New York park characterization scheme, it is intended for passive public use for the enjoyment of nature. Motorized vehicles, sporting activities, and picnicking are not permitted; a park preserve cannot be noisy. As a quiet setting park, it qualifies for—but did not receive—FAA's additional analysis described above. Indeed, to preserve these peaceful qualities both Friends of Rockefeller State Park Preserve and the New York State Office of Parks, Restoration and Historic Preservation, neither of which had been consulted by FAA, voiced their concern about the proposal during the brief comment period provided by FAA in April of 2007. *See* FEIS App. Q, AR 9304:3528-33, 3660-61, JA ___.

A full understanding of the extent of FAA's failure to adequately analyze the impacts of its action on the Rockefeller State Park Preserve requires a brief but necessary summary of the facts. On December 30, 2005, FAA released its DEIS for public comment. *See Environmental Impacts Statements; Notice of Availability*, 70 Fed. Reg. 77380, 77381 (Dec. 30, 2005) (EIS No. 20050540); DEIS, AR 2692-2695, JA ___. Under the "no action" alternative for departures from the Westchester County Airport, aircraft leaving the airport scatter shortly after takeoff. *See* FEIS Vol. 2, Fig. 5.2, AR 9302:141, JA ___ (green departure tracks). FAA's original "preferred alternative" departure route for departures from HPN, which was proposed in the DEIS, required most departing aircraft to turn northwest after takeoff and follow a narrow corridor over the Village of Pleasantville, north of the Village of Ossining and just south of the City of Peekskill before beginning to scatter. *See* FEIS Vol. 2, Fig. 5.2, AR 9302:141, JA ___ (blue departure tracks). The DEIS did not include discussion of any third alternative departure routing. *See* DEIS at 2-58, AR 2692:128, JA ___. Under the "no action" alternative, a small percentage of departing aircraft utilize the airspace over the Rockefeller State Park Preserve. FEIS Vol. 2, Fig. 5.2, AR 9302:141, JA ___; *see also*, Friends of Rockefeller State Park Preserve Comments, FEIS App. Q, AR 9304:3528-33, JA ___. Under the original "preferred alternative," no departing aircraft would overfly the Park Preserve.

Subsequent to release of the DEIS, and during the comment period, FAA commissioned the MITRE Corporation to undertake a Noise Mitigation Study ("NMS"). This study was not announced to the public, and public comment was not solicited on drafts of the Noise Mitigation Report that resulted from this study. On April 6, 2007, FAA announced that it had revised its proposal as the result of the NMS and, for HPN, proposed a new "Mitigated Preferred Alternative" departure routing which concentrated all northbound and westbound departures in a

narrow corridor directly over the most heavily used portions of the Rockefeller State Park Preserve. FEIS Vol. 2, Fig. 5.2, AR 9302:141, JA ___ (red departure tracks); Friends of Rockefeller State Park Preserve Comments, FEIS App. Q, AR 9304:3528-33, JA ___; *see also*, Decl. of Alix Schnee, Add. D. No analysis of the impact on the use of the Park Preserve of the noise resulting from this concentrated overflight corridor was undertaken by FAA.

FAA gathered no baseline noise data for the Preserve, performed no noise analysis of the impact on the Preserve, and thus has no data upon which to premise an argument for categorical exclusion from Section 4(f). *See* Alix Schnee Decl., Add. D.

Ardens Historic District

State of Delaware Petitioners, Timbers Civic Association, *et al.*, have concerns about FAA's analysis of areas located within the Ardens Historic District ("Ardens"), which is within the Study Area in northern New Castle County, Delaware.⁵⁸ Founded in 1900 by followers of the economist and social reformer Henry George, the Ardens consist of the only villages in the United States on the National Register of Historic Places. While not entirely parkland, the Ardens do contain an outdoor "Field Theater" and "Sherwood Forest" which have been designated a "Critical Natural Area" by the Delaware Department of Natural Resources and Environmental Control. Yet, even though FAA was informed and acknowledged that the Ardens is a noise-sensitive area— Scoping Report at 12 (March 2002), FEIS at App. L, § L.3, AR 9304:245, JA ___—and was also advised by the Delaware DOT that any redesign must necessarily consider the Ardens, FEIS at App. L, § L.4.3, DELDOT Scoping Meeting (Mar. 12,

⁵⁸ FAA projected noise exposure levels for only the populated census blocks occupied by the Ardens Historic District. Although none of those census blocks will experience a noise increase of 3.0 DNL or greater, it is impossible to conclude that the unpopulated census blocks will not experience a 3.0 DNL increase that would have triggered the heightened analysis.

2003), AR 9304:453, JA _____. FAA ignored the Ardens entirely, and did not contact Ardens officials concerning any potential impacts which made it impossible for FAA to give any special considerations to this noise-sensitive resource. Steven A. Threefoot Decl., Add. D.

Bergen County

FAA ignored numerous parks and historical sites within Bergen County, New Jersey, that would be impacted by the Project. As set forth in the attached Declaration of Todd Cochran, Add. D, FAA did not contact the responsible Bergen County parks official. Bergen County owns 38 parks, historical sites, and golf courses. Two of those are noise-sensitive parks that would be subjected to an increase of more than 3.0 DNL and therefore should have received heightened analysis: Saddle River County Park and Wild Duck Pond, which according to FAA's noise analysis will experience noise increases of up to 4.0 DNL, and Wood Dale County Park, which will experience noise increases of up to 5.0 DNL. Because the required heightened scrutiny was not present here, the Project will likely expose their citizens to noise levels that will impair their enjoyment of those resources. Additionally, as also set forth in the Declaration of Todd Cochran, Add. D, FAA did not consult nor advise anyone at the County responsible for the operation of these areas of the proposed flight-paths and their impact on these areas.

* * *

Because FAA appears to have systematically ignored state and local parks officials, the foregoing parks are merely illustrative of the noise-sensitive parks overlooked by FAA. To the extent those parks would experience an increase of at least 3.0 DNL, they (and other similarly situated parks) are indistinguishable from those that received heightened scrutiny necessary to determine whether they would be constructively used by the Project. FAA should be required, in accordance with its own regulations, to contact *all* appropriate federal, state, and local parks

officials, and to subject all noise-sensitive parks subjected to an increase of at least 3.0 DNL to heightened scrutiny needed to make a constructive use determination.

B. FAA Failed to Properly Analyze Noise Impacts at John Heinz National Wildlife Refuge.

The John Heinz National Wildlife Refuge is located in Philadelphia and Delaware Counties, Pennsylvania, approximately one mile from PHL. It is part of the national park system and is the largest urban wildlife refuge in the United States, benefiting both wildlife and passive recreational users such as bicyclists, hikers, photographers, canoeists, and fishermen.⁵⁹ The FEIS shows the Refuge surrounded by areas which will be subjected to noise increases equal to or greater than 5.0 DNL, some of which will experience noise levels equal to or greater than 65 DNL. FEIS Vol. 2, Fig. 4.25, AR 9302:103, JA ___. Although FAA calculated exposure levels at 14 points within the Refuge, FEIS App. J at Ex. 35; AR 9304:144, JA ___, no noise increases are shown for any points within the Refuge itself. That creates an implausible situation in which aircraft departing PHL to the west would pass through areas with significantly increased noise, overfly the Refuge with no increased noise, and re-enter areas with significantly increased noise. FAA explains that noise increases and exposure levels in the Refuge are not shown in Figure 4.25 because “[c]hange in noise exposure is shown for populated census blocks only.” FEIS Vol. 2, Fig. 4.25, AR 9302:103, JA ___. On that basis, FAA concluded that “there is no constructive use of the property and no further analysis was conducted for [the Refuge].” FEIS at 5-108, AR 9301:428, JA ___. As a result, the Refuge is not included in the Section 4(f) properties listed in the ROD. ROD at 34-35, AR 9762:40-41, JA ___.

⁵⁹ See United States Fish and Wildlife Service, John Heinz National Wildlife Refuge at Tinicum, *available at* www.fws.gov/northeast/heinz/welcome.htm (last visited Aug. 18, 2008). RJN Ex. L, Add. C.

Not only is this logic hopelessly circular,⁶⁰ it falls directly within the meaning of the term “arbitrary and capricious,” *i.e.*, “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000). The FEIS not only fails to properly identify or analyze the Project’s inevitable increased noise impacts on the Refuge, but, as a result, it also fails to consider feasible alternatives and measures to mitigate the harm to the Refuge.

Finally, Petitioners’ position is not a mere disagreement with the results of FAA’s analysis, but is shared by the Federal agency with jurisdiction over the Refuge. In an undated response to FAA’s pre-ROD request for comments on the Project, the U.S. Fish and Wildlife Service stated,

[T]here 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. It was recommended in those comments that ‘FAA perform a more thorough analysis of impacts to National Park Service units and other listed Section 4(f) resources, using the correct guidelines and appropriate metrics, then re-evaluate the issue of 4(f) use’ and we do not believe this has been done yet specific to National Wildlife Refuges.

ROD App. C at C-19 to C-22, AR 9762:127-30, JA _____. No “more thorough analysis” has been performed. As a result of this absence of analysis, FAA has arbitrarily failed to meet Section 4(f)’s and NEPA’s minimum requirements to include or analyze the affected parkland before approving the Project.

FAA has discretion to adopt a reasonable methodology, but it is not permitted to arbitrarily apply that methodology. *See Nat’l Parks and Conserv. Ass’n*, 998 F.2d at 1533 (FAA

⁶⁰ Reminiscent of the philosophical riddle, “If a tree falls in a forest and no one is around to hear it, does it make a sound?”

does not receive deference for “irrational judgments” when applying its methodology). Here, FAA must analyze noise impacts in the Refuge—even if people do not reside in the relevant census blocks—and develop the noise data and other information needed to determine whether the Project would constructively use the Refuge.

C. FAA Failed to Provide Adequate Opportunity For Notice And Comment On Supplemental Noise Studies Of Park Land.

In addition to failing to assess numerous state and local parks, FAA violated public notice and comment requirements in its handling of the supplemental noise studies performed for 12 parks. FAA admitted in the FEIS that a substantial amount of work in assessing noise impacts was not yet done by stating that it would be conducting an additional noise evaluation to be appended to the ROD. *See, e.g.*, FEIS at 5-59, AR 9301:379, JA ___. FAA then evaluated the noise impacts to such national treasures as the Appalachian National Scenic Trail, the Delaware Water Gap National Recreation Area, and a small number of state parklands with inadequate public participation and concluded that no constructive use would occur. ROD App. B, AR 9762:86, JA ___. That important study was appended to the ROD without the benefit of any public comment.⁶¹

If the public had been given a chance to comment, it most certainly would have disagreed with FAA’s conclusions. Order 1050.1E notes that, while the agency’s use of a more sensitive

⁶¹ On September 5, 2007, the agency released the results of the study in the ROD—too late for public comment before the final agency action. *See* AR 9762. The twelve 4(f) resources studied in detail were: 1) the Appalachian Trail, FEIS at 5-46, AR 9301:366, JA __; 2) Delaware and Lehigh National Heritage Corridor, *id.* at 5-59; 3) Delaware Water Gap National Recreation Area, *id.* at 5-64; 4) Home of FDR National Historic Site, *id.* at 5-77; 5) Hopewell Furnace National Historic Site, *id.* at 5-79; 6) Upper Delaware Scenic & Recreational River, *id.* at 5-95; 7) Vanderbilt Mansion National Historic Site, *id.* at 5-99; 8) Weir Farm National Historic Site, *id.* at 5-101; 9) Wallkill River National Wildlife Refuge, *id.* at 5-117; 10) Big Indian Head-Beaverkill Range Wilderness Area, *id.* at 5-120; 11) Slide Mountain Wilderness Area, *id.* at 5-122; and 12) Indian Head and Westkill Mountain Wilderness Area, *id.* at 5-124.

supplemental noise analysis is optional, it is “most often used to describe aircraft noise impacts for specific noise sensitive locations.” Order 1050.1E at § 14.5b, A-64. FAA should have conducted an analysis more appropriate for the uses of these parks.⁶² By not doing so, FAA deprived the public of a chance to provide comments that might have led to a more complete and accurate Section 4(f) analysis and conclusion.⁶³ Such an end run is in marked contrast to FAA’s action in *Grand Canyon Trust v. FAA*, 290 F.3d. 339 (D.C. Cir. 2002) where the agency conducted a detailed supplemental noise analysis that addressed the natural quiet of Zion National Park from a proposed construction of a local replacement airport.

In sum, the Record clearly illustrates that FAA failed to meet critical procedural and substantive duties required by Section 4(f) to analyze and avoid significant impacts to sensitive public parkland within the Project area.

III. FAA’S ANALYSIS OF AIR QUALITY IMPACTS WAS INADEQUATE.

The FEIS’s air quality analysis violates both NEPA and the CAA. In so doing, it fails in its most basic mission: determining whether the Project complies with the unequivocal mandates

⁶² See Rockland County’s similar comments, ROD App. D at D-57, AR 9762:188, JA ___. In response, the agency simply retorted that “The letter raises issues that have already been addressed by FAA during the public comment process. As such, FAA is not providing additional responses to this letter.” ROD at 54, AR 9762:60, JA ___.

⁶³ Because FAA has integrated its Section 4(f) and NEPA procedures, *see* Order 1050.1E, § 6, it is appropriate to look to NEPA law in this instance. To release new information without giving the public a chance to comment violates NEPA’s requirements. NEPA requires FAA to “(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures; b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies that may be interested or affected.” 40 C.F.R. § 1506.6(a)-(b). Indeed, this Court recently affirmed the concept of “meaningful public involvement in implementing NEPA procedures” by remanding an agency order that had allowed approval of communication towers before the public had a chance to review the application. *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008).

of the CAA's conformity provisions, 42 U.S.C. § 7506 ("No department, agency, or instrumentality of the federal government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity that does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this Title").

To address the conformity determination, FAA first relies on an "exemption" from the conformity requirement that simply does not exist. It then falls back on a "presumption of conformity" theory which also fails, both because it violates the CAA and because it is unsupported by evidence in the Record.

Finally, FAA resorts to a the "Fuel Burn Analysis" that it developed at the last minute to cover the FEIS's analytic deficiencies. That analysis does not bear even a passing resemblance to the Emissions and Dispersion Modeling System ("EDMS"), which FAA's own NEPA and CAA regulations state "is FAA's required methodology for performing air quality analysis monitoring for aviation sources." Order 1050.1E, App. A, § 2.2c at A-7; RJN Ex. M, Add. C. *See also, Air Quality Procedures for Civilian Airports and Air Force Bases*, April 1997 ("Handbook")⁶⁴ ("An air quality assessment prepared for inclusion in a NEPA environmental document . . . should include an analysis and conclusions which addresses [sic] the attainment and maintenance of established air quality standards (e.g., National Ambient Air Quality Standards, air toxic requirements)," *id.*, § 2, at 7.⁶⁵ The air quality analysis relies instead on air quality analysis methodology not authorized by FAA's regulatory guidance, and omits critical

⁶⁴ The required analysis is virtually identical under both NEPA and CAA. *See*, Order 1050.1E, App. A, § 2.4c. RJN Ex. N, Add. C.

⁶⁵ *See also* Order 1050.1E, § 2.1c, App. A, at A-3 ("When a NEPA analysis is needed, the proposed action's impact on air quality is assessed by evaluating the impact of the proposed action on the NAAQS [National Ambient Air Quality Standards]").

data from the Record to support the Fuel Burn Analysis conclusions. Both the public and EPA—the governmental body charged with the enforcement of air quality standards—are therefore effectively precluded from verifying the accuracy of the Fuel Burn Analysis’ result.

In short, on remand, the FAA must revisit the Project’s air quality impacts, as required by NEPA, and establish the Project’s conformity, in the manner required by CAA. No further implementation should occur until that analysis is completed.

A. Background of Air Quality Conformity.

The CAA establishes a joint state/Federal program for regulating the nation’s air quality. *See* Clean Air Act Amendments, 1970, Pub.L. No. 91-604, 845 Stat. 1676 (1970). The CAA requires EPA to establish National Ambient Air Quality Standards (“NAAQS”) for various pollutants. 42 U.S.C. § 7409 (1994). Regions that do not comply with any NAAQS are called “nonattainment” areas. 42 U.S.C. § 7407(d)(1)(A)(i). The CAA also requires each state to adopt a State Implementation Plan (“SIP”) that “provides for implementation, maintenance and enforcement of [NAAQS] in each air quality control region (or portion thereof) within such state.” 42 U.S.C. § 7410(a)(1). SIPs must “include enforceable emissions limitations and other control measures, means or techniques . . . as well as schedules and time tables for compliance, as may be necessary or appropriate. 42 U.S.C. § 7410(a)(2)(A).

In 1977, Congress amended the CAA to add § 7506 (Pub.L. 95-95, Title I, § 129(b)) to ensure that transportation planning at the local level conforms to pollution controls contained in approved SIPs. *Env’tl. Def. Fund v. EPA*, 167 F.3d 641, 643 (D.C. Cir. 1999). Because Congress “offered little guidance” on the 1977 conformity requirement, and because Federal agencies “largely . . . ignored” it, Congress amended the Act again in 1990 to expand the content and scope of this requirement. *Id.* at 643, *quoting Clean Air Act Conference Report*, 136 Cong. Rec.

36,103, 36,105-106 (1990). The 1990 Amendments established general criteria for determining whether an activity conforms to a SIP:

- (1) . . . conformity to an implementation plan means -
 - (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the [NAAQS] and achieving expeditious attainment of such standards; and
 - (B) that such activities will not -
 - (i) cause or contribute to any new violation of any standard in any area;
 - (ii) increase the frequency or severity of any existing violation of any standard in any area; or
 - (iii) delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area.

42 U.S.C. § 7506(c)(1). Congress placed ultimate responsibility for assurance of each project's conformity on the head of each Federal agency, *id.* ("The assurance of conformity to [the SIP] shall be an affirmative responsibility of the head of such . . . agency . . ."); *see also*, *Env'tl. Def. Fund*, 167 F.3d at 643 (heads of federal agencies have an "affirmative responsibility" to assure conformity of any federally assisted or approved activity, to an applicable SIP).

In 1993, EPA promulgated regulations establishing detailed "criteria and procedures for determining conformity under the statute," *see*, 58 Fed. Reg. 62,188 (Nov. 24, 1993), pursuant to 42 U.S.C. § 7506(c)(4)(A), requiring EPA to promulgate regulations. Although the CAA "does not provide for any grace periods or other exemptions from the conformity requirements for areas designated as nonattainment areas, nor does it authorize the EPA to create such exemptions," *Sierra Club v. EPA*, 129 F.3d 137, 138 (D.C. Cir. 1997), EPA included exemptions in the conformity regulations at 40 C.F.R. § 93.153(c). Subsection (c)(1) exempts from conformity requirements "[a]ctions where the total of direct and indirect emissions are below the

emissions levels specified in paragraph (b) of this section,”⁶⁶ *i.e.*, “*de minimis*” in effect, as determined by a conformity applicability analysis aimed at determining the applicability of conformity in the first instance. Handbook, § 2.14, at 13. Subsection (c)(2) lists specific actions that are expressly exempt from conformity requirements without analysis.

Although it lacked express authority under the CAA to make exemptions, EPA also gave Federal agencies the green light to create a list of actions that they deem “presumed to conform,” as meeting specific “criteria set forth in either paragraph (g)(1) or (g)(2)⁶⁷ of [§ 93.153] and the procedures set forth in paragraph (h) of [§ 93.153].” 40 C.F.R. § 93.153(f). Before taking any action that has been deemed “presumed to conform,” however, the Federal agency must determine that its action will not be “regionally significant.” 40 C.F.R. § 93.153(j).

FAA promulgated procedures for determining and achieving conformity in Order 1050.1E, App. A, Section 2, “Air Quality” and Order 5050.4B, Table 7-1, at 7-17. RJN Ex. O, Add. C. Those regulations, and their supporting guidance, the Handbook, prescribe a sequence of events to be used in NEPA and CAA air quality analyses for projects located in nonattainment areas.

That sequence includes a preliminary determination of whether a project is “exempt” from conformity analysis, as included in those actions specifically designated as exempt in § 93.153(c)(2); or “presumed to conform” as defined in § 93.153(f). Handbook, § 2.1.4 at 13; *see also*, Fig. 2, at 10. If neither applies, then FAA must engage in a process which includes: (1) the development of emissions inventories for a project and no build alternatives, Handbook, § 2.1.2, at 11, which includes the total of direct and indirect emissions, *id.*; (2) a comparison of the total

⁶⁶ 40 C.F.R. § 93.153(b) contains tons/year standards the exceedance of which exposes a Federal action to the requirement for a conformity determination.

⁶⁷ *See* 40 C.F.R. § 93.153, Addendum.

of a project's direct and indirect emissions with those of the "no build" alternative to determine the "net emissions" projected to be caused by the project, *id.*; (3) a determination of whether the "net emissions" caused by the project exceed the *de minimis* thresholds prescribed in § 93.153(b), beyond which a full "conformity determination" is required,⁶⁸ Handbook, § 2.1.4, at 14, including comparison of a project's impacts with the relevant state SIP. Handbook, § 5, at 37.

FAA's regulations did not originally designate activities "presumed to conform." However, FAA promulgated the Draft Presumed to Conform Rule on February, 12, 2007 (72 Fed. Reg. 6641-656, and the Final Rule on July 30, 2007 (72 Fed. Reg. 41,565-580)("Final Notice"). FAA is the first and only Federal agency that has, in the 14 years following promulgation of the EPA's Conformity Regulations, adopted a list of actions presumed to conform. FAA's Environmental Desk Reference (2007), Chapter 1, ¶ 6b at 11; RJN Ex. P, Add. C. Category 14 in that list is Air Traffic Control ("ATC") procedures, the activity at issue in this litigation.

B. This Project Is Not Exempt from the CAA or EPA Regulations.

FAA first construed ATC procedures as exempt from the strictures of the conformity rule, although such procedures are omitted from the list of actions EPA has designated as explicitly exempt from conformity analysis. 40 C.F.R. § 93.153(c)(2). Nevertheless, because EPA referred to "air traffic control activities and adopting approach, departure and en route procedures for air operations," in the Preamble to the Conformity Rule, 58 Fed. Reg. 13,843

⁶⁸ "[A] conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions . . . in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) [for nonattainment areas] or (2) [for maintenance areas] of this section." § 93.153(b).

(Mar. 21, 1993), FAA utilized “exemption” from conformity in the DEIS in place of conformity analysis for ATC procedures. DEIS § 4.9, AR 2692:265, JA__.⁶⁹

The FEIS, however, concedes that EPA disagrees with FAA’s use of exemptions for ATC procedures:

[FAA] should not use the Preamble to the final rule for Determining Conformity of General Federal Actions to State and Federal Implementation Plans to determine de minimis actions for “air traffic control activities and adopting approach, departure, and en route procedures for air operations.”

FEIS at ES-10, 4-70, 5-131 - 5-132; AR 9301:15, 302, 451, 452, JA__. Hoping for EPA’s change of heart, FAA requested “clarification” from EPA of the reference to ATC procedures in the Preamble to the Conformity Rule. However, instead of including ATC procedures in 93.153(c)(2)’s list of explicit exemptions as desired by FAA, EPA responded by proposing to revise the exemptions to include ATC operations only *above 3,000 feet Above Ground Level (“AGL”)*. 73 Fed. Reg. 1423 (2008) [to be codified at 40 C.F.R. § 93.153(c)(2)]. Since a substantial portion of aircraft operations and resulting emissions impacts from ATC procedures occur below 3,000 feet AGL, including “approach, taxi/idle-in, taxi/idle-out, take-off and climb out,” Handbook, § 3.2.1, at 24, EPA and the FEIS made clear that no exemption from the strict mandates of the CAA and Conformity Rule applies to this Project.

C. FAA’s Presumption of Conformity for ATC Procedures Is Equally Inapplicable.

It is axiomatic that an agency regulation cannot go outside the four corners of the statute. In *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme

⁶⁹ “EPA states in the preamble to [the General Conformity Rule] that it believes ‘air traffic control activities and adopting approach, departure, and en route procedures for air operations’ are illustrative of *de minimis* actions.” *Id.*

Court set out the now familiar two-step test for reviewing an agency's interpretation and application of a statute. First, the reviewing court asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If, however, "the statute is silent or ambiguous with respect to specific issues, the reviewing court must defer to the agency's construction of the statute if it is reasonable." *Id.* at 843.

1. **The Presumption of Conformity is Inconsistent with the Express Provisions of the CAA.**

Not only is the CAA both specific and definitive on the subject of conformity, 42 U.S.C. § 7506, but also the weight of authority requires that a project's emissions be evaluated independently, not collectively. *See, Env'tl. Def., Inc. v. EPA*, 509 F.3d 553, 560 (D.C. Cir. 2007).

More persuasive is petitioner's contention that EPA acted arbitrarily and contrary to law by not requiring conformity determinations for individual projects to meet the conditions of CAA section 176(c)(1)(B)(iii) at the local level. CAA section 176(c)(1) defines "conformity" as involving "activities" that occur "in any area" - a phrase that appears in each of subsection B's subparts.

Id. (emphasis added).

In *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), EPA attempted to justify the presumption of conformity in § 93.153(f) on the grounds that it was "to provide flexibility to states . . . on implementation approaches and control measures within the structure of the CAA." *Id.* at 894. This Court held that, because EPA's interpretation "cannot be squared with Congress's desire to limit EPA discretion . . . flexibility [was] not a sufficient

justification,” *id.* at 894, and granted the petition. The same purpose underlies FAA’s presumption of conformity:

[T]he provisions allowing federal agencies to establish categories of actions that are presumed to conform are “intended to assure that these Rules are not overly burdensome and Federal agencies would not spend undue time assessing actions that have little or no impact on air quality.

72 Fed. Reg. 41,566 (2007). This Court has consistently held, however, that “if this legislative scheme is too onerous, it is up to Congress to provide relief, not this court.” *Envtl. Def. Fund*, 167 F.3d at 651.

In the final analysis, FAA’s presumption of conformity is both theoretically and practically impermissible. From a legal perspective, FAA may not rely upon it because “[r]egardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 91 (2002), *quoting* *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

From a practical perspective, if FAA’s presumption were to be applied specifically to the Project, “[t]he statutory prohibition on projects that cause delays in attaining emissions standards would effectively be stripped of almost any impact and be inconsistent with Congress’ intent that pollution production be prevented by forward planning.” *Envtl. Def., Inc.*, 509 F.3d at 561.

2. The Presumption of Conformity is Inconsistent With Congressional Intent.

This Court has held that “Congress intended a strict and broad ban on nonconforming activities in all nonattainment areas” *Sierra Club*, 129 F.3d at 140. To achieve such a ban, the CAA “contemplates that the measures necessary to attain the NAAQS will be applied to individual sources of pollutants” *Id.* at 138 (emphasis added). This Court has also held that

“no transportation projects [may] proceed without assurance that they would not undermine attainment or maintenance of current air quality standards.” *Envtl. Def. Fund*, 167 F.3d at 648.

FAA’s blanket presumption of conformity for ATC procedures is even more remote from “current air quality attainment or maintenance goals” than were the projects at issue in *Environmental Defense Fund*. This is because the blanket presumption covers ATC operational changes in diverse parts of the United States, each of which area has a different attainment status, for different pollutants, under different SIPs, with widely differing air quality goals. Nevertheless, under FAA’s presumption, all will be treated identically, as fully compliant with “current air quality attainment or maintenance goals,” both now and in the future, and without the air quality conformity analysis Congress viewed as critical to maintaining the public health and welfare. *See, e.g.*, 42 U.S.C. § 7401(b)(1) (“The purposes of this subchapter are - (1) to protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population”).

3. FAA Failed to Take the Necessary First Step in a Presumption of Conformity of Determining the Project’s Regional Significance.

Section 93.153(j) states that “where an action otherwise presumed to conform under paragraph (f) of this section is a regionally significant action . . . that action shall not be presumed to conform” 40 C.F.R. § 93.153(j). Both FAA and EPA have interpreted this to mean that FAA must make an affirmative determination as to whether the action is, or is not, regionally significant. *See*, 1050.1E, App. A, § 2.1m (“The General Conformity Rule provides a provision that permits agencies to develop a list of actions presumed to conform which would be exempt from the requirements of the rule unless regionally significant. . . .”)(emphasis added); § 2.1q (“If a Federal action . . . is presumed to conform, it may still be subject to a general conformity determination”).

FAA, however, dismisses regional significance without analyzing it.⁷⁰ FAA's failure to analyze regional significance is notable. The definition of "regionally significant action" requires calculation of the total of direct and indirect emissions of criteria pollutants from the Project and, then, a comparison of those totals with the benchmarks for "*de minimis*" levels (not requiring full conformity analysis set forth in § 93.153(b).

[W]hen the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the [*de minimis*] rates specified in paragraph (b) of this section, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of § 93.150 and §§ 93.155 through 93.160 shall apply for the Federal action.

40 C.F.R. § 93.153(i) (emphasis added). FAA provides no data or analyses in the FEIS, ROD, or any other part of the Record memorializing the total emissions of criteria pollutants from the Project in any of the relevant non-attainment or maintenance areas. Nor does the Record contain any indication of the required comparison of the total direct and indirect emissions of criteria pollutants from the Project with the relevant standards in § 93.153(b)(1) or (b)(2) required to determine that a project's impacts are "*de minimis*." Handbook, § 2.1.4 at 13.⁷¹

The Fuel Burn Analysis cannot be relied upon to fill this void in the Record as the Fuel Burn Analysis excludes emissions from aircraft Ground Support Equipment ("GSE"), Auxiliary Power Units ("APUs"), and Ground Access Vehicles ("GAVs").⁷² FAA's rationale that "service

⁷⁰ "FAA has decided to defer action on this aspect [regional significance] in its Draft Notice based on consultation with the EPA." 72 Fed. Reg. 41,580 (2007).

⁷¹ "If the federal action is neither presumed to conform nor exempt, then the agency must determine whether for each pollutant the total direct and indirect emissions in a nonattainment area caused by the federal action is equal or exceeds any threshold emissions levels (rates) identified in 40 C.F.R. § 51.853 (b)(1) or (2) [93.153(b)(1) and (2)]."

⁷² "Fuel burned by service vehicles on the airport surface is typically part of an airport emissions analysis. It is not included here." FEIS, App. R, § 4.1 at 12; AR 9304:3751, JA__.

vehicles are assumed constant over all alternatives in this study because flight schedules do not change,” *id.*, is insufficient because its own guidance instructs that GSE and motor vehicles are, in addition to aircraft engines, “sources of emissions common to airports.” *See Handbook*, Chap. 3, § 3.2.3, at 25. Therefore, they are, by definition, to be included in the “total of direct and indirect emissions of any [criteria] pollutant” for purposes of the regional significance analysis. *Id.*

In sum, FAA’s “presumption” strategy runs counter to this Court’s interpretation of the CAA and Congressional intent in enacting it, and the Record is devoid of evidentiary support for the conclusion that the Project’s impacts should be “presumed” *de minimis*.

4. FAA’s Presumption Applies Only to ATC Procedures Above 1,500 feet AGL.

Even if FAA had analyzed the Project’s regional significance, which it failed to do, the presumption, by FAA’s own definition, applies only to ATC procedures taking place over 1,500 feet above ground level (“AGL”). As a first step, FAA’s Final Notice concludes that activities above the “mixing height”⁷³ (*i.e.*, 3,000 ft. AGL) “do not have an effect on pollution concentrations at ground level.” 72 Fed. Reg. 41,578 (July 30, 2007). The Final Notice then discusses air quality impacts of ATC changes below the mixing height but above 1,500 feet:

In addition, the results of FAA research on mixing heights indicate that changes in air traffic procedures *above 1,500 ft. AGL and below the mixing height* would have little if any effect on emissions and ground concentrations. [Footnote omitted.] *Such actions* in the vicinity of the airport are tightly constrained by runway alignment, safety, aircraft performance, weather conditions, terrain, and vertical obstructions.

⁷³ The “mixing height” is defined a “the height of the completely mixed portion of atmosphere that begins at the earth’s surface and extends to a few thousand feet overhead where the atmosphere becomes fairly stable.” *Handbook*, Glossary, at xx. FAA assumes the mixing height to be at about 3,000’ AGL. FEIS at 5-132; AR 9301:452, JA__.

Id. (emphasis added). FAA acknowledges that the Presumed to Conform Rule “formally defines [ATC procedures] above 1,500 feet above ground level (“AGL”) as *de minimis*.” FEIS at ES-10; AR 9301:15, JA__.

What about ATC procedures and aircraft operations, such as those associated with the Project, that take place below 1,500 feet AGL? Instead of taking into account the significant component of aircraft emissions that occur from operations on, or close to, ground level, FAA makes a bold conceptual leap from an absence of emissions impacts above 1,500 feet, to an absence of impacts below, based solely on the purported purpose of the procedures to reduce delay.⁷⁴

The fatal flaw is that FAA wrongly assumes that air quality impacts of ATC procedures, governed by the specific substantive mandates of the CAA, can be mitigated into a presumption of conformity by mere mentioning of the Act’s ultimate goal of reducing emissions. The CAA, on the contrary, requires an actual catalogue of emissions (the emissions inventory), Handbook, § 2.1.2 at 11; actual calculation of the total net increase in emissions caused by a project, *id.*, § 2.1.4 at 13; and actual implementation of mitigation measures for impacts above the *de minimis* levels mandated in 40 C.F.R. § 93.153(b), *id.*, § 2.1, Figure 2, at 10, to bring the impact below those levels. FAA’s attempt to catapult from a project’s putative environmentally friendly purpose directly to the assumption of an environmentally friendly result does not withstand scrutiny under the CAA.

⁷⁴ “Accordingly, air traffic actions below the mixing height are also presumed to conform when modifications to routes and procedures are designed to enhance operational efficiency, (*i.e.*, to reduce delay), increase fuel efficiency, or reduce community noise impacts by means of engine thrust reductions.” 72 Fed. Reg. 41,578 (July 30, 2007) (emphasis added).

D. Neither FAA's Governing Regulations Nor the Record Supports FAA's Fuel Burn Study.

In response to numerous comments on the paucity of air quality analysis in the DEIS, FAA performed a "Fuel Burn Analysis" in connection with the FEIS "to determine whether reduced delays and more efficient flight routes would reduce fuel burn." ROD at 43; AR 9762:49, FEIS, App. R, AR 9304, JA___. FAA's Fuel Burn Analysis does not adhere to any of the procedures required by FAA guidance. *See, e.g.*, Handbook, § 2.1, Figure 2, at 10 to establish conformity in the absence of a legitimate exemption from, or presumption of, conformity.⁷⁵ The Fuel Burn Analysis is based on the naked conclusion, unsupported anywhere in the Record, that, because "reduced fuel consumption is directly related to reducing air pollutant emissions, the fuel burn analysis further shows that the selected project is exempt because it would clearly reduce rather than increase emissions." ROD, § IX.D at 56; AR 9762:65, JA___. By failing to construct this analytic bridge, "FAA failed to follow the environmental review procedure required by NEPA and the agency's own environmental review policies." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1191 (D.C. Cir. 2007).

1. The Fuel Burn Analysis Does Not Comply with FAA Regulations Requiring the Use of FAA's EDMS.

Use of a "fuel burn" analysis does not comply with FAA's regulations which require use of FAA's EDMS in air quality analyses for purposes of compliance with both CAA and NEPA. *See, e.g.*, Order 1050.1E, App. A, § 2.4c ("The EDMS is FAA's required methodology for

⁷⁵ It thus violates NEPA as well. "This chapter discusses requirements to conduct air quality analysis for airport development projects under NEPA and Clean Air Act . . . although the requirements under NEPA and the Clean Air Act differ in certain respects, generally the same analysis fulfills requirements under both." Environmental Desk Reference, *supra*, Ch. 1, § 1.a, at 1.

performing air quality analysis modeling for aviation sources”). Moreover, EDMS, unlike FAA’s Fuel Burn methodology, is also sanctioned by EPA.⁷⁶

Further, the Fuel Burn Analysis, unlike EDMS, fails to account for emissions other than those from aircraft engines, (*see*, FEIS, App. R., at 12, § 4.1; AR Vol. 9304 at 3751) even though FAA’s guidance expressly calls GSEs, APUs and GAVs “sources of emissions common to airports.” Handbook Ch. 3, § 3.2.3, 25. The Record does not contain an “emissions inventory,” *i.e.*, “[a] complete list of sources and rates of pollutant emissions within a specific area and time interval” (Handbook, Glossary at xvi), as required by FAA’s own regulations (Order 1050.1E, App. A, § 2.1c, at A-3).⁷⁷ Accordingly, there is no evidence of the “total” direct and indirect emissions from the Project.⁷⁸ The Fuel Burn Analysis, therefore, lacks even the most basic predicate requirements to the establishment of the Project’s *de minimis* status.

2. The Record Lacks Evidence to Support FAA’s Preliminary Determination of the Project’s “De Minimis” Status.

FAA concludes that “reduced fuel consumption is directly related to reducing air pollution emissions,” and “therefore, it is concluded that the fuel consumption would be reduced with the mitigated Preferred Alternative and thus air pollution emissions would be reduced and presumed to be *de minimis*.” FEIS at 5-133; AR 9301:453, JA__ (emphasis added). If a Federal agency establishes that the “total of direct and indirect emissions [of the project] are below the

⁷⁶ EPA’s “Guideline on Air Quality Models” designates EDMS as “appropriate for air quality assessment of primary pollutant impacts at airports or air bases.” 40 C.F.R., Pt. 51, App. W, § 6.2.4(c). It does not mention Fuel Burn Analysis.

⁷⁷ “[T]he proposed action’s ‘build’ and ‘no-build’ emissions are inventoried for each reasonable alternative. The inventory should include both direct and indirect emissions that are reasonably foreseeable.”

⁷⁸ Ancillary emissions sources such as Auxiliary Power Units are operated during the time aircraft spend on the ground, *i.e.*, during delays, and thus are directly pertinent to analysis of emissions reduction from reduced delay.

emissions levels specified in paragraph (b) of this section [§ 93.153(b), which sets out the *de minimis* levels for each criteria pollutant]” then the agency need not perform a conformity determination. § 93.153(c)(1). The Record here not only lacks the requisite calculus of direct or indirect emissions, but also is devoid of evidence of any quantitative link between emissions and total fuel consumed .

The Fuel Burn Analysis states “the flight-time and delay savings described in the Operational Analysis appendix to the EIS relate directly to reductions in fuel consumption, and the related emission of pollutants,” App. R. at 11, AR 9304:3750, JA__ (emphasis added). The Analysis, however, contains no quantitative analysis or data to support the claimed relationship between fuel burn and emissions. In fact, Appendix R’s conclusion is the only place in Appendix R that purports to link fuel consumption and emissions. AR 9304:3750, JA__. While both the FEIS and ROD go further and state that “[t]he selected project will not cause a new violation of the NAAQS, worsen an existing violation, or delay meeting the [NAAQS] standards for criteria pollutants [as contained in the relevant SIP],” ROD at 44; AR 9762:50, JA__, the remainder of the Record, like Appendix R, lacks any evidence of the Project’s emissions relationship to the NAAQS, or any comparison between the Project’s projected emissions levels and emissions limits in § 93.153(b) which define base levels above which a project’s impact may not be considered *de minimis*.

In short, reliance on mere conclusory statements in the FEIS and ROD, without, at minimum, a quantitative comparison of the Project’s emissions with the levels prescribed in § 93.153(b), is inadequate to establish the Project’s *de minimis* status, upon which FAA totally relies for its approval of the ROD, or to meet NEPA’s disclosure mandate.

3. The Record Lacks Evidence of Emissions Impacts Below the Mixing Height.

The Record contains no evidence to support FAA's claim that the Project will not negatively impact emissions below the "mixing height." "This study did not attempt to distinguish fuel burned below the mixing layer at each airport from fuel burned above. Over such a large study area, the total fuel consumed was a more appropriate metric." App. R, § 4.1 at 12; AR 9304:3751, JA___. This omission is significant because a substantial proportion of airport operations take place below the mixing height, including not only the taxiing and idling of aircraft on runways and at gates, but also operations of GSE, surface motor vehicles and APUs. *See, General Conformity Guidance for Airports, Questions and Answers*, FAA, 2002, Question 25 at 18; RJN Ex. Q, Add. C. By failing to distinguish between areas above and below the mixing height, FAA effectively averages emissions across an area that extends up to and beyond the "mixing height," much larger than the area below the marking height which is actually exposed to undispersed emissions impacts. The "average" artificially minimizes the impacts of emissions closer to the "consumer," the "unmixed" portion closest to runway level. The Fuel Burn Analysis thus not only fails to analyze or disclose, but also affirmatively obscures, the Project's emissions impacts by an impermissible "averaging."

4. The Record Even Lacks Evidence the Project Will Reduce Fuel Burn.

The Fuel Burn Analysis even fails to achieve its state purpose of establishing that the Project will reduce fuel burn. First, the Record lacks complete evidence with respect to the model used to estimate fuel burn (in place of EDMS), the Total Airspace and Airport Modeler ("TAAM").⁷⁹ Appendix R does not include the specific data used in modeling (input files), or

⁷⁹ TAAM is used to simulate aircraft operations under various redesign alternatives. FEIS, App. R, § 2, "Modeling approach," at 3; AR 9304:3743, JA__.

complete results of the analysis (output files). AR 9154 provides a list of purported TAAM output files. Comparing that list to the output files in AR 9285 reveals 54 sets or 216 files missing.⁸⁰

Second, Appendix R describes the use of a secondary fuel burn analysis tool, the “Fuel-Flow Integrator.” FEIS App. R, § 2.2.1; AR 9304:3743, JA___. While it is mentioned in Appendix R as the tool required to “correct” certain data produced by use of the TAAM, App. R., § 2.3 at 4; AR 9304:3744, JA___, the Record contains no evidence of the way it was applied or its specific impact on the TAAM results. As a proprietary model, it is not publicly available. Combined with the lack of complete input and output files, the absence of an explication of the Fuel-Flow Integrator’s role in the Fuel Burn Analysis effectively prevents the public or interested governmental entities from replicating its results, and, thus, from verifying their accuracy.

Third, while FAA employed EDMS for the limited purpose of estimating fuel consumption rates for aircraft taxiing (FEIS, App. R, § 2.3.1; AR 9304:3744, JA___⁸¹) the Record omits any evidence of associated taxi times. Obviously, without estimating the time spent taxiing, fuel consumption rates are not determinable Appendix R’s conclusion regarding total fuel consumption are thus not verifiable.

Fourth, although the Project could not be assumed to conform to the SIPs if there is any period of time during which the Project would result in a net increase in emissions, the Fuel Burn Analysis does not even purport to demonstrate that the Project would consume less fuel and create less emissions before the year 2011. In its 2005 operational analysis of the Project, the

⁸⁰ Each set is made up of history, message, report and summary files.

⁸¹ FAA admits that EDMS was used only for that limited task and not as a comprehensive analytic model. *See*, FEIS, App. R, § 2.2.2 and § 2.3.1; AR 9304:3744, JA___.

same consultant (MITRE) that later performed the Fuel Burn Analysis noted that there is a “break-even point” somewhere between the median and 90th percentile day in 2011. FEIS, App. C at 10-2, AR 9303,361, JA____. At flight levels below that point, the time required for flights to travel the extra distance required by the Project would exceed the delay reductions. *Id.* The Record contains no evidence, nor even an assertion by FAA, that the Project would result in an overall decrease in fuel consumption and emissions before that break-even point is reached.

Finally, the self-described “estimates” in the Fuel Burn Analysis forecast a decrease in fuel consumption in 2011 of less than one percent. The Project’s asserted reduction of 194.4 metric tons, in comparison to fuel consumption of 23,450 metric tons under the future No Action Alternative, merely constitutes a 0.83 percent reduction. *See* FEIS App. R, pp. 7, 9. MITRE did not disclose the margin of error associated with its Fuel Burn Analysis. Unless the margin of error is less than 0.83 percent—which appears exceptionally unlikely, given the multitude of factors and assumptions that go into that analysis—there would be no scientific basis to claim a net reduction in emissions.

In that regard, it should be noted that the Fuel Burn Analysis references “some corrections” in the TAAM fuel consumption estimates. FEIS, App. R at 4, AR 9304:3744, JA____. Neither the Fuel Burn Analysis nor the rest of the Record contains any evidence of the magnitude of these “corrections” or their quantitative justification. Estimated corrections—*i.e.*, tweaking of a computer model—necessarily increase the margin of error associated with the resulting analysis.

The Record, therefore, reveals that FAA’s arguments to EPA and, ultimately, to this Court, are unsupported by any evidence that shows: (1) a direct link between the amount of fuel burned and the amount of pollutants emitted; (2) the Project reduces emissions by reducing fuel

burn; and (3) the Project does not offset that reduction by inducing additional operations. FAA has, therefore, failed to establish a rational connection between the facts found, *i.e.*, the purported reduction in fuel consumption, and the choice made, *i.e.*, approval of the Project on the grounds that the Project's air quality impacts are *de minimis*. Absent any legally supportable exemption, presumption of conformity, or conformity applicability analysis as required by EPA's Conformity Regulations, § 93.153(b) and (c), and FAA's own regulation, Order 1050.1E, § 2.1c, App. A, § A-3, FAA's determination of the project's *de minimis* status is arbitrary and capricious. *Env'tl. Def. Fund*, 509 F.3d at 561.

CONCLUSION

Because of FAA's failure to fulfill its obligations under NEPA, Section 4(f), and the Clean Air Act, FAA's September, 2008 action should be vacated and remanded to correct these violations of law. This Court should stay implementation of the FAA's Airspace Redesign until completion of the remand.

Date: 8/29/08


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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 27,495 words.

Dated: August 29 2008


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CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of August, 2008, two copies of the foregoing brief was 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 Respondents:

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