No. 18-1173
ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MARYLAND,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL,
Acting Administrator of the Federal Aviation Administration,

Respondents

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL AVIATION ADMINISTRATION

PETITIONER'S OPENING BRIEF

Brian E. Frosh
Attorney General of Maryland

Louisa H. Goldstein
Robert J. Sager
Assistant Attorneys General
Maryland Aviation Administration
P.O. Box 8766
BWI Airport, Maryland 21240
lgoldstein@bwiairport.com
rsager@bwiairport.com
(410) 859-7066

John E. Putnam
W. Eric Pilsk
Nicholas A. DiMascio
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, DC 20036
jputnam@kaplankirsch.com
epilsk@kaplankirsch.com
ndimascio@kaplankirsch.com
(202) 955-5600

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. The Petitioner is the State of Maryland. The Respondents are the Federal Aviation Administration and Daniel Elwell, Acting Administrator of the Federal Aviation Administration.

Rulings under Review. This petition challenges all amendments to the Runway 19 south-flow approach procedures at Ronald Reagan Washington National Airport that FAA implemented in 2015 and that altered the way that aircraft fly those procedures. The State of Maryland is aware of the following amended flight paths, which are shown on schematic drawings in the Administrative Record ("AR") at A_i_03, LDA Z Amendment 3 (Apr. 30, 2015); A_i_02, LDA Z Amendment 3A (June 25, 2015); A_ii_06, RNAV (RNP) Amendment 2 (Apr. 30, 2015); A_ii_04, RNAV (RNP) Amendment 2A (Aug. 20, 2015); and A_iii_02, River Visual Amendment 5 (Dec. 10, 2015).

Related Cases. This case has not previously been before this Court or any other court. Counsel for Maryland is unaware of any other case that is related to this appeal within the meaning of Circuit Rule 28(a)(1)(B).

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GLOSSARY

AR	Administrative Record
CATEX	Categorical Exclusion
DCA	Ronald Reagan Washington National Airport
FAA	Federal Aviation Administration
LDA	Localizer-type Directional Aid, a type of approach procedure
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
RNAV	Area Navigation Route, a type of precision aircraft navigation route
RNP	Required Navigation Performance Route, another type of precision aircraft navigation route

STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Under Circuit Rule 28(a)(5), relevant statutes, regulations, and agency orders are submitted in an addendum attached to this brief.

INTRODUCTION

In 2015, the Federal Aviation Administration ("FAA") made a series of amendments to arrival flight paths for Runway 19 at Ronald Reagan Washington National Airport ("National" or "DCA"). Those amendments shifted flights out of northern Virginia and concentrated aircraft noise over resources and communities in Maryland. Before making those changes, the FAA provided no public notice of its plan, performed no noise analysis, and did not evaluate the potential impacts to historic resources, parks, or recreational areas.

Although the FAA asserts that it applied a categorical exclusion to avoid environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 to 4370m-12, the record contains no evidence that the FAA reached such a determination at the time it amended the flight paths. Nor is there any evidence that the FAA considered the impacts of its actions or undertook any consultation on historic resources, parks, or recreation areas protected by the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101-307108, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c).

The FAA violated NEPA, the NHPA, and Section 4(f) through its complete failure to perform the necessary environmental analyses.

Hoping to avoid adjudication on the merits, the FAA has moved to dismiss[1] the State of Maryland's petition as untimely. The State acknowledges that it filed its petition well after 60 days from the FAA's first use of the procedures, but the FAA drove the timing of this lawsuit by creating an expectation that changes to the new procedures were being evaluated. On the same day that the FAA first informed the Washington Reagan National Airport Community Working Group that it had revised the approach paths and explained what it had done, the FAA also publicly stated that it would consider development of an alternative procedure. On numerous subsequent occasions, the FAA reassured the Working Group that it would further collaborate on revisions to the flight paths. Those public statements created a reasonable expectation that the FAA "might fix the noise problem without being forced to do so by a court." *City of Phoenix v. Huerta*, 869 F.3d 963, 970 (D.C. Cir. 2017).

[1] A motions panel of this Court referred the FAA's motion to dismiss to the merits panel. *See* Mot. to Dismiss, Doc. No. 1745317 (Aug. 13, 2018); Order, Doc. No. 1758194 (Nov. 1, 2018).

Only much later, in two letters sent by the FAA on the same day in April 2018, did it become apparent that the FAA had not been fully transparent with the public and that it might no longer cooperate with Maryland and other local officials to further change the flight paths to address Maryland's noise concerns. The first letter admitted that, contrary to its previous statements made in response to repeated pubic and elected-official requests, the FAA had produced no environmental documentation before amending the flight paths. The second letter signaled that the FAA would invoke the statute of limitations should Maryland file suit. Maryland reasonably filed suit within 60 days of those two communications. *See id.* (refusing to "punish the petitioners for treating litigation as a last rather than a first resort" when petitioning earlier might "shut down dialogue" with the agency).

Accordingly, the Court should deny the FAA's motion to dismiss, hold that the FAA's amendments to the Runway 19 approach paths are arbitrary and capricious, vacate those decisions, and remand to the FAA for a proper analysis.

JURISDICTIONAL STATEMENT

Under 49 U.S.C. § 46110(a), this Court has jurisdiction over petitions for review of FAA orders implementing new or modified flight paths. *See City of Phoenix*, 869 F.3d at 968. Although § 46110(a) provides that a petition challenging an order issued by the FAA "must be filed not later than 60 days after the order is issued," that time limit is not jurisdictional. *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 518-19 & n.3 (D.C. Cir. 2011). Rather, "[t]he court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day." 49 U.S.C. § 46110(a). This Court therefore must review the facts and reach an equitable determination regarding whether there are reasonable grounds for the timing of the State's petition.

STATEMENT OF THE ISSUES

1. When "reasonable grounds" exist, this Court may review a petition filed outside the 60-day period stated in § 46110(a). Here, without prior notice, the FAA serially amended the Runway 19 approach paths. The FAA then repeatedly reassured the public that it would consider further revisions and said that it had performed an

environmental review when, in fact, it had not. Under those circumstances, are there reasonable grounds for the timing of Maryland's petition?

2. An agency may not invoke a categorical exclusion as a *post-hoc* rationalization to justify its failure to comply with NEPA. Rather, the record must show that the agency made a categorical-exclusion determination before it issued its decision. The record in this case contains no evidence that the FAA performed any environmental analysis before amending the Runway 19 approach paths. Is the FAA's decision arbitrary, capricious, or otherwise not in accordance with law?

3. The NHPA and Section 4(f) require the FAA to minimize impacts to historic resources, parks, and recreation areas. The FAA must identify all such properties that its actions could affect, assess the potential impacts, and consult with the appropriate stakeholders in state and local governments. The record contains no evidence that the FAA fulfilled any of those obligations. Is the FAA's decision arbitrary, capricious, or otherwise not in accordance with law?

STATEMENT OF THE CASE

A. Maryland has a fundamental interest in the operations of, and noise from, National Airport.

Congress has entrusted the FAA to manage the airspace, air traffic control, and aircraft operations throughout the United States, while for the most part leaving state and local entities to operate and control airport facilities and infrastructure. 49 U.S.C. § 40103. As part of the FAA's management of the airspace, it develops routes and procedures that pilots and controllers use to ensure safety and efficiency and reduce noise impacts. *See generally* AR C_01, FAA Order 7400.2J, Procedures for Handling Airspace Matters. In doing so, the FAA is subject to NEPA, the NHPA, Section 4(f) and other laws. *Id.*, Chp. 32, Environmental Matters; *see also City of Phoenix*, 869 F.3d at 971-72.

National is owned and operated by the Metropolitan Washington Airports Authority ("Authority"), which Congress created as an independent local authority to delegate control of these formerly federal airports. *See* 49 U.S.C. §§ 49101-49112. As part of the devolution of control of these airports, Congress recognized the critical interests of the State of Maryland and communities within it relating to airport

noise. *Id.* § 49101. "[A]ny change in status of the 2 airports must take into account the interest of nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the United States Government and State governments involved." *Id.* § 49101(6). Congress also found that "an operating authority with representation from local jurisdictions . . . will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports." *Id.* § 49101(8).

Accordingly, Congress provided that three of the 17 Authority board members are appointed by the Governor of the State of Maryland. *Id.* § 49106(c). Like all major airport proprietors, the Authority manages and seeks to mitigate aircraft noise from aircraft using National. *See* 49 U.S.C. § 47101(a)(1), (c) (stating policy of the United States to operate airports to minimize noise impacts); AR B_01, DCA Part 150 Noise Compatibility Update at 1 (Sept. 2004).

In doing so, one of the tools it has used is the Reagan National Airport Community Working Group, which the Authority created in October 2015 in coordination with the FAA "in response to increasing

community concerns regarding aircraft noise affecting residential areas in the District of Columbia, Virginia and Maryland along the Potomac and Anacostia rivers." Reagan National Airport Community Working Group Organizational Charter (Oct. 28, 2015).[2] "Recommendations approved and endorsed by the Working Group will be forwarded periodically by the Airports Authority to the Federal Aviation Administration for consideration and action." *Id.* The FAA encouraged and supported the formation of the Working Group, participated as a nonvoting member, and committed to evaluate recommendations from the Working Group.[3]

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[2] http://www.flyreagan.com/sites/default/files/reagan_national_working_group_organizational_charter_revised_29oct_2015.pdf. The Working Group was tasked with undertaking "a cooperative effort to identify practical solutions and recommend those solutions to the Metropolitan Washington Airports Authority for submission to the Federal Aviation Administration for consideration and action." *Id.*

[3] FAA, Roundtable Support Presentation (Oct. 27, 2015), http://www.flyreagan.com/sites/default/files/faa_presentation_faa_roundtable_support_lynn_ray_27oct2015.pdf; FAA, Summary of Organizational Meeting at 2 (Oct. 27, 2015), http://www.flyreagan.com/sites/default/files/reagan_national_working_group_meeting_summary_27oct2015.pdf.

B. The FAA amended the south-flow arrival procedures for Runway 19 without notifying the public of the substance of the changes.

Runway 19 is the main runway used by aircraft arriving into National from the north. The FAA provides a variety of different types of arrival routes to Runway 19, depending on the type of weather, navigation equipment on the aircraft, aircraft origin, and other factors. The FAA publishes these routes to the flying public and to air traffic control.

Before the actions at issue in this case, flights arriving into Runway 19 from the north could follow several different approach paths southward along the Potomac.[4] Those paths included Rosslyn LDA,[5]

[4] As reflected in the administrative record, FAA refers to these procedures solely by acronyms and not English titles, so this brief uses FAA's terminology.

[5] FAA appears to have revised and renamed the Rosslyn LDA procedure LDA Y. *See* AR A_iii_01, Mem. for Record (Dec. 10, 2015); AR E_05, KDCA Approaches Presentation (Mar. 7, 2015). For ease of reference, this brief refers to both the Rosslyn LDA and LDA Y procedures as Rosslyn LDA.

DCA 328R,[6] LDA/DME,[7] RNAV RNP,[8] and River Visual.[9] As shown on the approach charts (often referred to by the FAA as "plates") for those procedures, many of the permissible arrival routes for Runway 19 traveled through parts of northern Virginia.

Without notifying the public in advance, the FAA decided to revise the Runway 19 arrival paths. The FAA has never issued a public decision document explaining why, when, or how it revised the Runway 19 approach procedures. Instead, the FAA published the revisions only on a technical website maintained by the FAA for pilots, airlines, and air traffic controllers.[10] This website publishes new maps and charts with no description of the change, explanation, justification, or discussion of environmental effects.

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[6] *See* AR A_iii_01, Mem. for Record (Dec. 10, 2015); AR A_iii_03, River Visual Amendment 4 (narrative description).

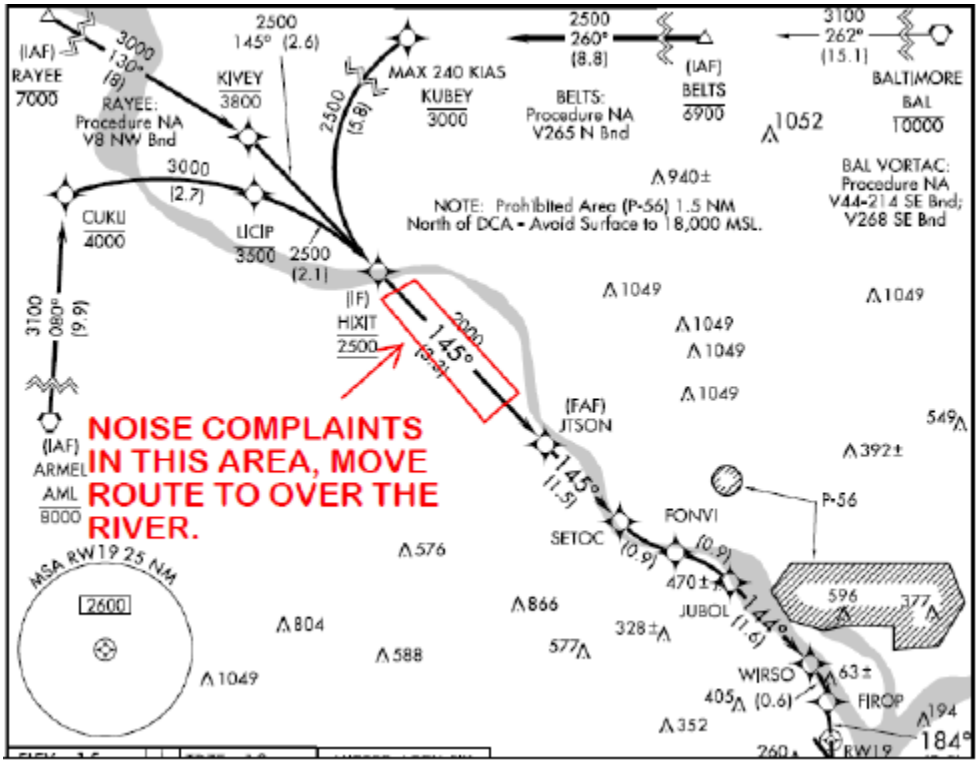
[7] AR A_i_09, LDA/DME Amendment 2A.

[8] AR A_ii_09, RNAV RNP Amendment 1A (May 29, 2014).

[9] AR A_iii_03, River Visual Amendment 4.

[10] *See, e.g.*, https://www.faa.gov/air_traffic/flight_info/aeronav/procedures/application/?event=procedure.results&tab=charts&nasrId=DCA#searchResultsTop (showing all procedures at National); https://www.faa.gov/aero_docs/dtpp/1901/00443RIVER_VIS19.PDF#nameddest=(DCA) (the published chart for the Runway 19 River Visual approach).

From a review of internal FAA documents in the administrative record, it appears that the FAA began developing changes to the procedures in 2012 due to "noise complaints" from certain communities in Virginia. AR A_ii_19, RAPT Consensus (June 28, 2012).



AR A_ii_20, DCA Runway 19 Noise Complaint Area (Feb. 24, 2012). Apparently, due to complaints from those communities, the FAA planned to implement a series of interrelated changes to the south-flow Runway 19 approach procedures that ostensibly would "keep the aircraft over the river more." AR A_iii_06, Hutto e-mail (Feb. 14, 2015);

AR E_05, KDCA Approaches Presentation (Mar. 7, 2015) (showing proposed changes to all approach paths).

Although the FAA's lack of public disclosure and explanation makes it difficult to explain the changes the FAA made, it appears that the FAA made three changes to the Runway 19 arrival procedures in 2015:

- First, the FAA issued the LDA Z approach procedure based on the original LDA/DME procedure. AR A_i_03, LDA Z Amendment 3 (Apr. 30, 2015); AR A_i_02, LDA Z Amendment 3A (June 25, 2015). This new procedure moved the starting point of the procedure, a point over Montgomery County called FERGI, one mile farther out and into Montgomery County north of the Potomac in the community of Potomac. *Id.*; AR A_ii_11, Proposed DCA RNAV (RNP) Rwy 19 Amendment - Minutes from 4/11/14 Telcon/Web Conference at 2-3 (Apr. 15, 2014).
- Second, the FAA amended the RNAV RNP approach procedure. AR A_ii_06, RNAV (RNP) Amendment 2 (Apr. 30, 2015); AR A_ii_04, RNAV (RNP) Amendment 2A (Aug. 20, 2015). This

revised procedure incorporated the new FERGI waypoint, putting aircraft on a path flying over Montgomery County and then following the Potomac River south to National.

- Third, the FAA amended the River Visual approach procedure to incorporate the new RNAV RNP procedure and eliminate pilots' ability to follow the Rosslyn LDA and DCA 328R approach procedures. AR A_iii_02, River Visual Amendment 5 (Dec. 10, 2015). This third and final change had the greatest effect on rerouting actual flights because approximately 78% of flights approaching National from the north follow the River Visual approach. AR E_03,[11] DCA South Flow Arrivals at 29 of 58 (Feb. 16, 2017).[12]

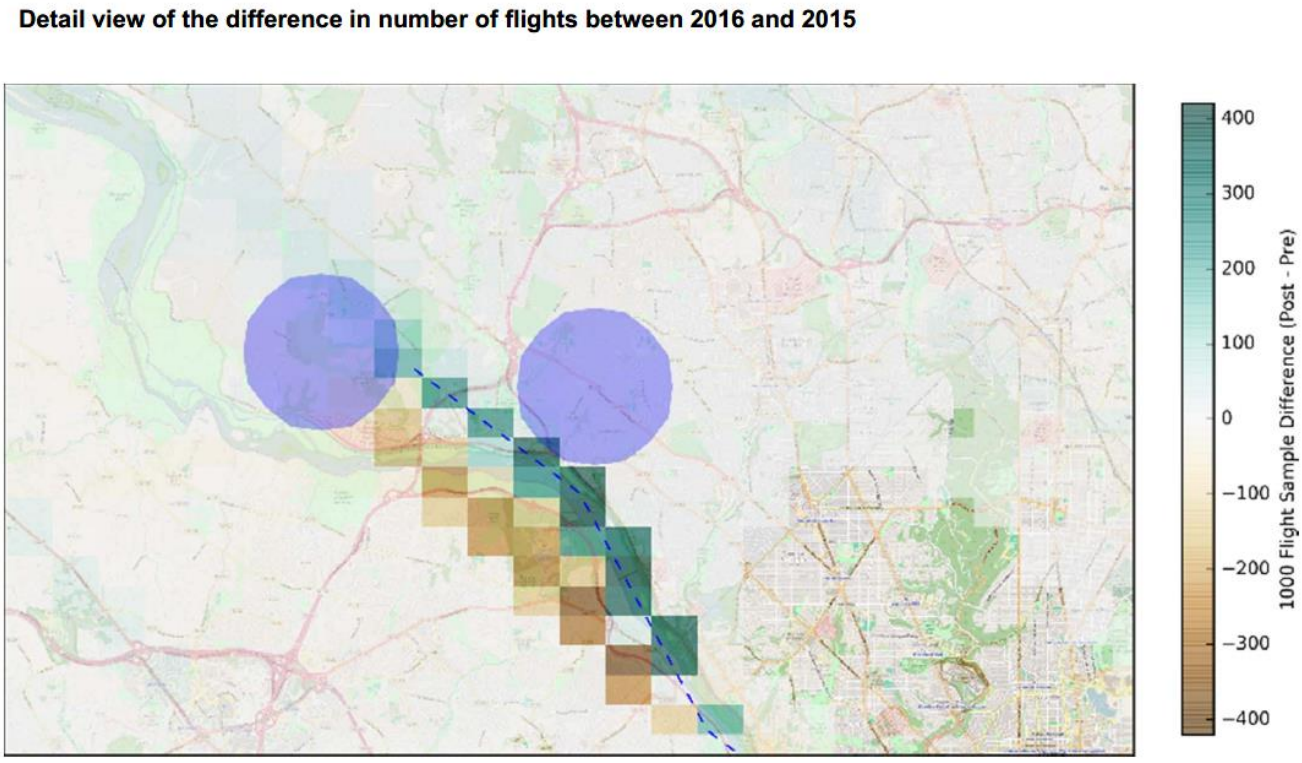
As explained in a December 10, 2015 memorandum to file that the FAA created on the date of the last of that series of amendments, the

[11] Whenever citing this presentation, this brief refers to the version attached as Ex. 2 to Federal Defendants' Motion to Dismiss, Doc. No. 1745317 at 8 (Aug. 13, 2018).

[12] Maryland's petition for review challenges all changes that FAA made in 2015 to the south-flow approach procedures for Runway 19. *See* Petitioner's Unopposed Motion to Amend Petition, Doc. No. 1749089, (Sept. 6, 2018); Order, Doc. No. 1758194 (Nov. 1, 2018) (referring unopposed motion to merits panel).

combined result was to leave pilots using the River Visual approach only two paths to Runway 19 during south-flow operations: "flight following the Potomac River visually or navigating via the RNAV (RNP) RWY 19 approach." AR A_iii_01, Mem. for Record (Dec. 10, 2015). In bad weather conditions, the new LDA Z procedure routed pilots over Montgomery County near the town of Potomac and then along the northern shore of the Potomac River south to the District of Columbia boundary. AR A_i_03, LDA Z Amendment 3 (Apr. 30, 2015).

According to data that the FAA released two years later, the FAA's changes to the Runway 19 approach procedures shifted flights and noise from communities in Virginia to communities in Maryland. *See* AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017). The figure below shows the difference in the number of flights for the first quarter of 2015 versus the first quarter of 2016. The gold-shaded areas experienced a decrease in flights due to the FAA's new procedures, whereas the green-shaded areas experienced an increase in flights.



Virtually all the gold-shaded areas, where flights decreased, are in Virginia. The green-shaded areas, where flights increased, are almost entirely in Maryland, and they occur over land and over the river.[13]

The FAA's data shows a 300 to 400 flight increase in the first quarter of 2016 from north of the Washington Beltway in Potomac, Maryland, all the way down to Georgetown. AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017). The FAA's new procedures often put flights over the Potomac near the east bank, so that noise would be

[13] The Potomac River east of the Virginia-side low-water mark is part of the State of Maryland. *Virginia v. Maryland*, 540 U.S. 56, 62-63 (2003).

shifted from west to east away from Virginia and into Maryland. AR A_iii_02, River Visual Amendment 5 (Dec. 10, 2015). By eliminating several options to fly through northern Virginia and directing all flights along paths over or nearest to Maryland, the FAA's amended Runway 19 approach procedures concentrated the aircraft noise over Maryland communities and resources.

Yet, before imposing that result, the FAA provided no public notice of the substance of the changes it was contemplating, afforded no opportunity for public comment, engaged in no modeling or assessment of potential noise impacts, performed no analysis under NEPA, and made no effort to comply with the NHPA or Section 4(f). *See* AR A_a_a, Federal Respondents' Certified Index to Administrative Record (Aug. 13, 2018) (listing no such documentation).

C. After implementation, the FAA publicly committed to work with the community to modify the new Runway 19 arrival procedures.

The FAA did not explain or provide general public notice of the amended arrival procedures for Runway 19 until December 10, 2015—the effective date of the last amendment, which altered the River Visual approach and eliminated the ability of pilots to fly routes over northern

Virginia. On that day, the FAA explained how it had changed the River Visual approach to the Reagan National Airport Community Working Group. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6. Members of the Working Group suggested that "[a]nother option would be to develop an RNAV GPS procedure," and the FAA agreed that it "could review the development of an RNAV GPS procedure."[14] *Id.* Thus, well within 60 days of the FAA's completion of the amendments and well before the affected communities could possibly understand the full nature or impact of the amendments, the FAA already was providing the public with a reasonable belief that there might be changes to reduce impacts.

At its very next meeting, on February 25, 2016 the Working Group passed a formal motion requesting the FAA to "develop a feasibility plan, and an associated implementation plan, for a new, Area Navigation (RNAV) Approach Procedure to Runway 19" in order to mitigate "the impact of aircraft noise on communities along the

[14] A Global Positioning System procedure would take advantage of advanced technology to allow more precise navigation along the center of the river, as opposed to a series of straight lines that would cross land or portions of the river close to the shore.

Potomac River." *Id.*, Feb. 25, 2016, at 4/10, 10/10. The FAA again agreed to "come back with an update regarding FAA's discussion about the development of a RNAV Approach to Runway 19." *Id.* at 4/10.

Over the following months, the FAA began working on proposed changes to the Runway 19 arrival procedures. The FAA reassured the Working Group that it "understands the importance of developing" the revised procedures. *Id.*, Apr. 14, 2016, at 4/6. The Working Group also informed the FAA of increased noise complaints from Maryland communities, and the Metropolitan Washington Airport Authority agreed to work with the FAA "to investigate complaints and . . . identify operational changes, if any." *Id.*

In August and September 2016, the FAA gave presentations to the Working Group regarding proposed changes to the Runway 19 arrival procedures. Working Group members asked the FAA whether the proposed changes would improve conditions for the "thousands of Maryland residents" that had been impacted. *Id.*, Aug. 11, 2016, at 4-6/11; *id.*, Sept. 29, 2016, at 2-6/11. The FAA committed to provide a "pre-post River Visual change analysis" and to "develop a video" so the

Working Group could see the changes the FAA was proposing to the Runway 19 approach procedures. *Id.* at 5/11.

At a later meeting, the Working Group passed a motion requesting the FAA to "develop an approach procedure . . . that centers aircraft over the Potomac River from at least the American Legion Bridge to the Maryland state line, thus minimizing the amount of time aircraft overfly communities located adjacent to or near the Potomac River, as a way to mitigate existing aircraft noise impacts on residents." *Id.*, Nov. 3, 2016, at 5/11. The FAA agreed to "systematically study" the Working Group's proposals, to "attempt to design a Prototype RNAV (GPS) procedure with a waypoint near the American Legion Bridge," and to provide "modeling and possible alternatives for the Working Group to consider." *Id.* at 5/11, 9/11.

As the FAA began compiling that information, the Working Group reminded the FAA that "data indicates there are areas in Montgomery County that have experienced a 30% increase in flights" and that "alternative procedures need to be carefully analyzed before implemented." *Id.*, Dec. 15, 2016, at 5/12. The FAA stated that it was "committed to looking into those concerns." *Id.*

In February 2017, the FAA presented its analysis of the impact that the 2015 amendments had on flight traffic. *Id.*, Feb. 16, 2017, at 3-7/16. The data revealed, for the first time, that the amended procedures had shifted hundreds of flights per quarter out of Virginia and into Maryland. *See* AR E_03, DCA South Flow Arrivals (Feb. 16, 2017). Following that presentation and at subsequent meetings in April 2017 and March 2018, the Working Group continued to discuss with the FAA proposed changes to the arrival procedures for Runway 19. AR D_i_01, DCA Working Group Summary, Feb. 16, 2017, at 7-10/16; Apr. 27, 2017, at 6-9/10; Mar. 22, 2018, at 2-5/8.

D. The FAA did not reveal its lack of environmental analysis until responding to an inquiry by Senator Van Hollen.

While those discussions were ongoing, the Working Group also asked the FAA for a copy of any environmental reviews that it had performed before implementing the 2015 amendments. *Id.*, Apr. 27, 2017, at 7/10. The FAA responded to the Working Group that the "[a]nalysis was completed and environmental difference allowed for the action to be Categorically Excluded" from NEPA review, also referred to in the administrative record as a "CATEX." *Id.* at 8/10. The FAA

further stated that it was "trying to locate that environmental document to determine the level of analysis that was completed." *Id.*

When the FAA did not produce that documentation, one of the Working Group members, a Montgomery County, Maryland resident named William Liebman, submitted a Freedom of Information Act ("FOIA") request in August 2017 asking the FAA for all "environmental reviews or analyses" it conducted concerning the amended procedures. AR F_ii_06, Liebman Letter at i (Nov. 27, 2017). Although Mr. Liebman repeatedly inquired about the status of his FOIA request, the FAA did not timely produce the requested information. *Id.* at i-ii.

Consequently, U.S. Senator Chris Van Hollen sent the FAA a letter on behalf of Mr. Liebman in November 2017. AR F_ii_05, Van Hollen Letter (Nov. 29, 2017). In response to Senator Van Hollen's letter, the FAA promised to respond to Mr. Liebman's FOIA request "no later than December 29, 2017." AR F_ii_04, FAA Letter (Dec. 21, 2017).

Not until January 24, 2018, did the FAA send Mr. Liebman a compact disc allegedly "responsive to [his] request." AR F_ii_03, FAA Letter (Jan. 24, 2018). That disc, however, did not contain any environmental review documents. Because the FAA did not "explain

how the documents on the CD address [Mr. Liebman's] FOIA request," Senator Van Hollen's staff again wrote to the FAA asking it to clarify whether it is "correct that no environmental review was conducted before moving the RNAV-RNP Runway 19 approach procedure[.]" AR F_ii_02, Van Hollen e-mail (Mar. 8, 2018). The FAA responded that it would "look into this and prepare a response for Mr. Liebman." *Id.*

On April 27, 2018, the FAA sent a letter to Senator Van Hollen stating that "direct records of the type requested [by Mr. Liebman] are not available." AR F_ii_01, FAA Letter (Apr. 27, 2018). The FAA inferred that "[s]ince no CATEX document has been found under Mr. Liebman's FOIA request, an undocumented CATEX was *likely* utilized for the procedure." *Id.* (emphasis added). In other words, the FAA admitted that it has no record of performing any environmental review or analysis before amending the Runway 19 approach procedures, despite its legal obligation to perform and document that analysis.

E. Maryland filed its petition for review after the FAA indicated that it might no longer work cooperatively to revise the Runway 19 approach procedures.

In April 2018, Maryland sent a letter to the FAA explaining that "noise from . . . concentrated flight routes implemented both through

the D.C. Metroplex process *and stand-alone actions* has diminished quality-of-life and caused noise complaints in Maryland to skyrocket." AR F_i_02, Hogan Letter (Apr. 4, 2018). The D.C. Metroplex decision is a package of 41 new and modified flight procedures that the FAA issued in 2013 to guide arrivals and departures into National, Washington Dulles International Airport, and Baltimore/Washington International Thurgood Marshall Airport. *Citizen Ass'ns of Georgetown v. FAA*, 896 F.3d 425, 429 (D.C. Cir. 2018). The 2015 amendments to the Runway 19 approach procedures at issue in this petition "were not approved as part of the DC Metroplex decision," Mot. to Dismiss, Doc. No. 1745317 at 8 (Aug. 13, 2018), and are part of the "stand-alone actions" that Maryland mentioned in its letter.[15]

Maryland offered to enter into a Memorandum of Understanding with the FAA similar to those that the FAA has executed with "communities and airports in places like Northern California and Boston to evaluate and implement options to reduce noise." AR F_i_02,

[15] Nothing in the record explains why these Runway 19 arrival procedures were carved out and not included in the Environmental Assessment and public process for the Metroplex, despite being within the geographic scope of the Environmental Assessment and the same types of procedures covered in the Metroplex.

Hogan Letter (Apr. 4, 2018). Maryland also offered, "before proceeding with litigation," to meet with the FAA to "evaluate the possible benefits and feasibility of changes at BWI Marshall and DCA." *Id.*

The FAA responded to Maryland's inquiry on April 27, 2018—the same day that the FAA revealed its lack of environmental records for the Runway 19 changes to Senator Van Hollen. The FAA's letter discussed only the "D.C. Metroplex" decision and stated that "[w]ith regard to the Metroplex, our December 2013 decision is final and will not be reopened." AR F_i_01, FAA Letter (Apr. 27, 2018). According to the FAA, the time to assert a legal challenge to the "December 2013 findings and record of decision is long past." *Id.*

The FAA's response did not mention its "stand-alone actions," such as the Runway 19 approach procedures. Nor did it discuss the ongoing DCA Working Group process to evaluate options for the Runway 19 arrivals. Given the uncertainty caused by the FAA's lack of response, and to preserve its ability to challenge the FAA's lack of environmental analysis before amending the Runway 19 approach procedures, Maryland filed a petition for review with this Court on June 26, 2018. Ex. 1, Hilliard Decl. ¶¶ 4-8. Maryland remains open to

cooperating with the FAA on solutions to the noise problems caused by the FAA's changes to the Runway 19 approach procedures. The FAA, however, informed Maryland that because it filed a petition for review with this Court, the FAA will no longer "discuss the three approaches into DCA at issue." Petitioner's Opp. to Mot. to Dismiss, Doc. No. 1748610, Ex. 24, Solomon Letter (July 25, 2018).

SUMMARY OF ARGUMENT

The FAA's actions provide reasonable grounds for Maryland having filed its petition more than 60 days after the FAA amended the Runway 19 approach procedures. The scope and effect of those amendments remained hidden at least until December 10, 2015, when the FAA revealed that it had revised the River Visual approach to eliminate all flight paths over Virginia and incorporate the new RNAV RNP and LDA Z approaches over Maryland. Concurrently with that announcement, the FAA agreed that it would "review the development" of an alternative procedure proposed by the Reagan National Airport Community Working Group. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6.

Thereafter, not only did the FAA further reassure the public that it would collaborate with the Working Group on possible revisions to the approach paths, the FAA also misinformed the public that it had performed an environmental analysis before issuing the amended procedures. The FAA then failed to timely respond to requests for the environmental documentation. The record contains no evidence that the FAA performed any such environmental analysis prior to acting. The FAA's repeated reassurances of possible revisions, combined with the FAA's concealment of its lack of environmental compliance, constitute reasonable grounds for the timing of Maryland's petition.

On the merits, the lack of analysis in the record shows that the FAA violated NEPA, the NHPA, and Section 4(f). After the fact, the FAA inferred from the absence of NEPA documentation that it "likely" categorically excluded the amendments from NEPA review. AR F_ii_01, FAA Letter (Apr. 27, 2018). But forensic reconstruction of administrative procedure is not permitted. Courts have roundly rejected past agency attempts to invoke categorical exclusions as a *post-hoc* rationalization for the agency's lack of analysis. The FAA's own operating procedures require it to document, at a minimum, that it

considered whether a categorical exclusion applied and concluded that it did. The FAA has supplied no such documentation here.

The FAA also knew or should have known that shifting hundreds of flights out of Virginia and into Maryland was likely to be controversial due to noise concerns. Yet, before implementing those changes, the FAA did not identify historic, park, or recreational resources in Maryland that could be affected by the changes. Nor did the FAA consult with state or local government officials regarding the potential impacts to such resources and their surrounding communities.

Because the FAA did not comply with NEPA, the NHPA, or Section 4(f), this Court should vacate the Runway 19 amendments. The FAA must perform the required analysis *before* it subjects Maryland's resources and communities to increased overflights and noise. To fulfill that essential statutory requirement, this Court should vacate the new routes and remand to the FAA for performance of the required analyses. For all those reasons, Maryland's petition for review should be granted.

STANDING

To establish standing, a petitioner must show that it has suffered an injury in fact caused by the defendant agency's action that is likely

to be redressed by a favorable decision from the Court. *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014). When a petitioner alleges a "procedural injury," the petitioner must show that "the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *City of Dania Beach v. FAA*, 485 F.3d 1181 (D.C. Cir. 2007) (citation omitted). Here, the FAA's failure to follow the procedural requirements of NEPA, the NHPA, and Section 4(f) have increased flights and noise in a manner that (1) adversely impacts Maryland's proprietary interests in managing the Potomac River for noise-sensitive uses, and (2) harms Maryland's interests in protecting historic, park, and recreational resources in the vicinity of the new flight paths.

"Like any private landowner, a State suffers concrete injury if its property is despoiled." *Idaho v. Interstate Commerce Comm'n,* 35 F.3d 585, 591 (D.C. Cir. 1994). Maryland owns the bed and waters of the Potomac River east of the Virginia-side low-water mark. *Virginia v. Maryland*, 540 U.S. 56, 62-63 (2003). Maryland manages the Potomac River, including the areas overflown by Runway 19 arrivals, for

recreational, wildlife, and fisheries purposes.[16] Ex. 2, Blazer Decl. ¶¶ 5-7. Many of these recreational and wildlife purposes, such as non-motorized boating, birding, and wildlife preservation are sensitive to noise from increased overflights, such as those implemented by FAA in 2015. *Id.* The increased overflights from the Runway 19 arrival procedures approved in 2015 have harmed Maryland's interests in managing the River for those noise-sensitive uses. *See Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1178 (9th Cir. 2011) ("A political body may . . . sue to protect its own proprietary interests that might be congruent with those of its citizens, including responsibilities, powers, and assets." (internal quotation marks omitted)).

Additionally, the FAA's amendments to the Runway 19 arrival procedures have adversely affected Maryland's interests in protecting historic, park, and recreational resources under the NHPA and Section 4(f). *See City of Jersey City v. CONRAIL*, 668 F.3d 741, 744-46 (D.C. Cir. 2012) (holding harm to City's "historic and environmental" interest

[16] *See e.g.*, State of Maryland Department of Natural Resources, *Safety on the Upper Potomac River* (Nov. 2015) (https://dnr.maryland.gov/nrp/Documents/BoatingSafety/upperpotomac.pdf).

due to NEPA and NHPA violations sufficient to confer standing). The NHPA and Section 4(f) recognize Maryland's right to be consulted before the FAA takes any action that might affect or use such resources. *See* 36 C.F.R. § 800.2(a)(4), (c)(1), (c)(3); *City of Phoenix*, 869 F.3d at 971, 973. Due to the FAA's amended flight paths, various noise-sensitive historic, park, and recreational resources have been subjected to increased overflights without State consultation, which impairs the State's interests in protecting those resources. Ex. 3, Hughes Decl. ¶¶ 6-10; Ex. 2, Blazer Decl. ¶¶ 5-7.

Vacating the amended procedures and ordering the FAA to perform the required analysis and consultation would redress Maryland's injuries. If the FAA had followed the proper procedures, it might not have adopted the new flight paths, or it might have adopted different procedures with less impact to historic, park, and recreational resources. Maryland therefore has standing. *See, e.g., Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (holding that plaintiff had standing because, after performing proper analysis, agency might take steps to "ameliorate[] what plaintiffs see as damage to an historic site").

ARGUMENT

I. The FAA's lack of disclosure and its repeated assurances regarding further changes to the Runway 19 approach paths constitute reasonable grounds for the timing of Maryland's petition.

A person seeking review of an FAA order must file a petition with the Court "not later than 60 days after the order is issued." 49 U.S.C. § 46110(a). When there are "reasonable grounds for not filing by the 60th day," however, the Court may review a petition filed outside the 60-day period. *Id.* Here, reasonable grounds exist because—without informing the public of its plan—the FAA issued an interrelated series of amendments to the Runway 19 approach paths. The full scope and effect of those amendments remained hidden until the FAA publicly unveiled the final amendment, at which point the Working Group raised concerns and the FAA immediately reassured the public that it was open to working collaboratively on further revisions. Maryland filed suit when those talks faltered and the FAA revealed that it had misinformed the public regarding its lack of prior environmental review. This Court therefore should hold that Maryland has reasonable grounds for the timing of its petition.

A. Without explaining its plan to the public, the FAA issued an interrelated series of amendments whose full scope and impact were unclear until the final amendment dropped.

If the FAA deprives the public of information regarding the true scope and effect of an action by issuing a defective notice, this Court tolls the 60-day limit until the FAA clarifies its action. For example, in *National Air Transportation Association v. McArtor*, 866 F.2d 483 (D.C. Cir. 1989), the FAA published a rule with inaccurate headings and summaries indicating that the rule was inapplicable to the petitioner, but later issued an advisory circular clarifying the rule's applicability. *Id.* at 485-86. This Court held that the defective notice "tolled the 60-day limit . . . until the FAA provided adequate notice." *Id.*; *accord Americopters, LLC v. FAA*, 441 F.3d 726, 733 n.5 (9th Cir. 2006); *Blitz v. Napolitano*, 700 F.3d 733, 742-43 (4th Cir. 2012).

Here, the FAA deprived the public of information regarding the true scope and effect of the changes it planned for the Runway 19 arrival procedures at least until December 10, 2015. The record shows that the FAA amended the Runway 19 approaches three times in 2015. The FAA issued the first two amendments, which created the LDA Z approach and revised the RNAV RNP approach, on April 30, 2015. AR

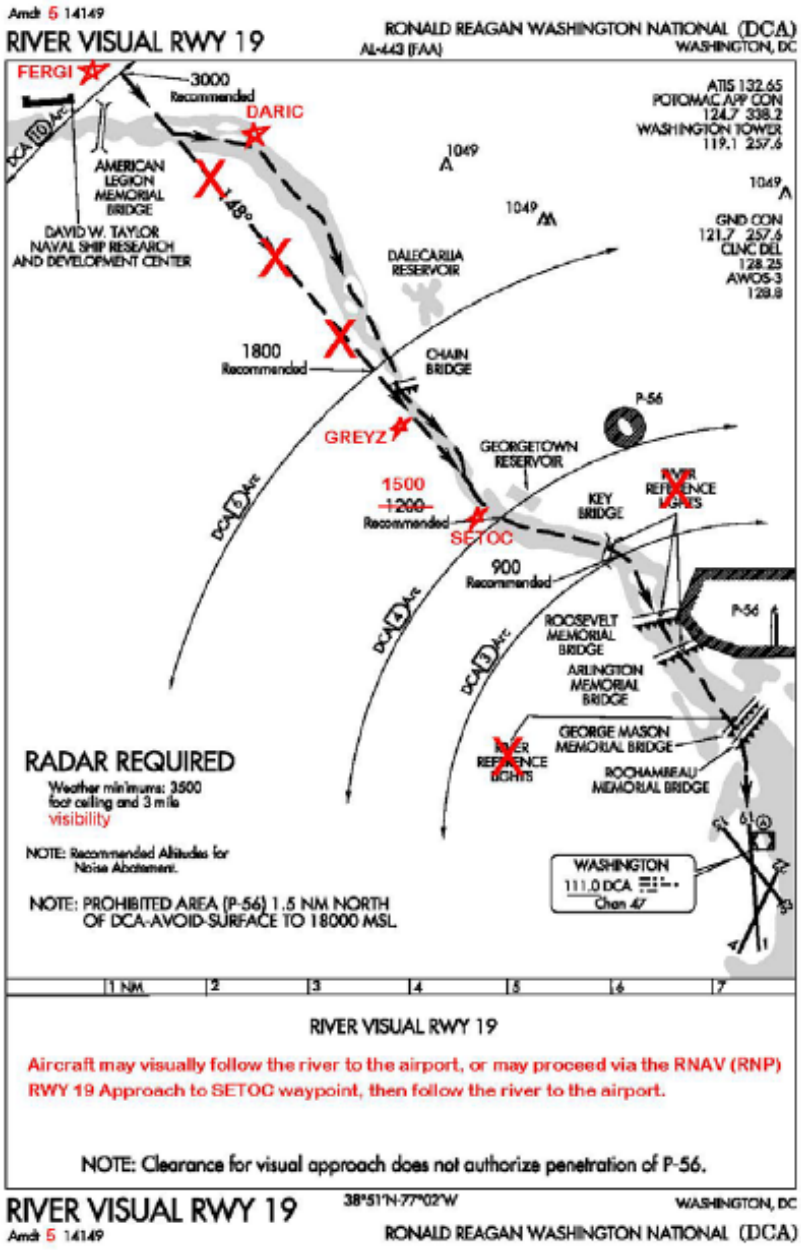
A_i_03, LDA Z Amendment 3 (Apr. 30, 2015); AR A_ii_06, RNAV (RNP) Amendment 2 (Apr. 30, 2015). The 60-day clock to challenge those amendments did not begin ticking on that date, however, because the FAA did not engage in any public discussion or explanation and the public did not yet know about the third and related amendment.[17]

The FAA revised the River Visual approach on December 10, 2015. AR A_iii_02, River Visual Amendment 5 (Dec. 10, 2015). The FAA first notified the public of that amendment via a presentation to the Reagan National Airport Community Working Group on December 10, 2015—the same day that the FAA put that change into effect. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6. By amending the River Visual approach, the FAA altered the entire suite

[17] FAA published the procedure charts on the same days it began using them on a web-based technical page for pilots and air traffic controllers called the Instrument Flight Procedures Information Gateway. https://www.faa.gov/air_traffic/flight_info/aeronav/procedures/. The Gateway published only the highly technical procedure charts and no explanation of the changes, reasons for the changes, effects of the changes, or explanation for the dense technical information. This is unlike general public notice for environmental assessments or other community outreach that FAA provides for other flight procedures, including the D.C. Metroplex. *See Georgetown*, 896 F.3d at 430-32.

of flight paths that pilots arriving into National from the north may fly during typical weather.

Previously, pilots on the River Visual approach could follow the river visually *or* the Rosslyn LDA or DCA 328R approaches over northern Virginia, which are marked with red Xs in the diagram below.



AR A_iii_01, Mem. for Record (Dec. 10, 2015). After the FAA amended the River Visual approach, during typical weather, pilots could follow the river visually or use the RNAV RNP approach, which passes over Montgomery County, Maryland, at waypoint FERGI, marked with a red star above.

Although the FAA had altered the RNAV RNP approach to move waypoint FERGI farther into Maryland on April 30, 2015, the FAA did not disclose at that time its plan to incorporate the new RNAV RNP approach into the River Visual approach. *See* AR A_iv_01, 80 Fed. Reg. 19,515, 19,516 (Apr. 13, 2015). Internal FAA documents show that the FAA conceived of those changes as an interrelated suite of amendments designed to address noise concerns in northern Virginia. *See* AR A_ii_19, RAPT Consensus (June 28, 2012); AR A_ii_20, DCA Runway 19 Noise Complaint Area (Feb. 24, 2012); AR A_iii_06, Hutto e-mail (Feb. 14, 2015); AR E_05, KDCA Approaches Presentation (Mar. 7, 2015) (showing proposed changes to all approach paths); AR A_iii_09, River Visual Arrival Route Form 7110 (June 5, 2015) (listing incorporation of RNAV RNP and deletion of Virginia routes). Yet the FAA revealed its plan to the public only *after* it had already amended the River Visual

approach on December 10, 2015. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6.

The FAA therefore gave no indication in April 2015 that it planned to alter the River Visual approach to eliminate the northern Virginia routes and incorporate the new RNAV RNP approach over Maryland. The River Visual approach is by far the most frequently used flight path for aircraft approaching National from the north. Approximately 78% of such aircraft follow the River Visual approach. AR E_03, DCA South Flow Arrivals at 29 of 58 (Feb. 16, 2017). Thus, the FAA's amendment of the River Visual approach was far more consequential in terms of shifting flights and noise into Maryland than its amendments to the RNAV RNP and LDA Z approaches alone.

Only when the FAA announced the change to the River Visual approach could the public possibly understand that the FAA was shifting most flights and noise out of Virginia and into Maryland. The FAA cannot evade judicial review by segmenting an undisclosed plan into discrete actions, each of which took effect more than 60 days apart. *Cf. Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988) (explaining that agencies cannot evade NEPA by segmenting "one

project into multiple individual actions"); *City of Phoenix*, 869 F.3d at 970 (holding that the FAA cannot "promise to fix a problem just long enough for sixty days to lapse and then . . . argue that the resulting petitions were untimely"). The FAA's failure to disclose its overall plan tolled the 60-day period at least until December 10, 2015. *McArtor*, 866 F.2d at 485-86; *see also Aviators for Safe & Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 226 (1st Cir. 2000) (finding "reasonable grounds" when scope and effect of regulation was unclear until the FAA issued later enforcement policy).

B. The FAA repeatedly reassured the public that it would consider further changes to the Runway 19 approach paths in order to address noise concerns, and it misinformed the public regarding its lack of environmental review.

On the same day that it unveiled the change to the River Visual approach, the FAA began assuring the public that it would work cooperatively to implement further changes to address noise concerns. Under this Court's precedent, such reassurances constitute reasonable grounds to file suit outside of the normal 60-day period. Most recently, in *City of Phoenix*, this Court explained that it does not "punish . . . petitioners for treating litigation as a last rather than a first resort,"

particularly when petitioning earlier might "shut down dialogue" with the agency. 869 F.3d at 970.

In *City of Phoenix*, like here, the FAA had met with the City and residents immediately (within 60 days) after the implementation of its new flight procedures and committed to working to address noise concerns. *Id.* at 967. This Court held that the City reasonably refrained from filing suit because the FAA "repeatedly communicated . . . that the agency was looking into the noise problem, was open to fixing the issue, and wanted to work with the City and others to find a solution." *Id.* at 970. Given those "serial promises," the Court held that the FAA's comments "could have confused the petitioner and others" about whether a lawsuit was necessary. *Id.* (quoting *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 603 (D.C. Cir. 2007)).

A similar fact pattern exists here. The FAA told the public that it would "review the development" of an alternative procedure the same day that it implemented the revised River Visual procedure. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6. The FAA's reassurance is particularly significant here because the FAA had provided no prior notice or opportunity to comment on the changes.

Instead, the FAA waited until it had already implemented the new procedures to inform the Reagan National Airport Community Working Group, and then it immediately signaled that it was willing to work with the Group on possible revisions.

The FAA's total lack of prior disclosure makes this an even stronger case than *City of Phoenix*, where the FAA had "notified the Phoenix Airspace Users Work Group that the new routes would take effect" several months in advance. 869 F.3d at 966. Here, the FAA announced the revised procedure for the first time and immediately signaled its willingness to talk. This Court should not expect a petitioner to "shut down dialogue" by rushing into court to sue over changes that the FAA had just announced and expressed a willingness to consider revising. *Id.* at 970.[18]

At the very next meeting, in February 2016, the Working Group formally requested that the FAA develop an alternative procedure. The FAA agreed to and, in fact, began to develop such an alternative. Over

[18] Indeed, as soon as Maryland filed this petition, FAA did shut down all communications regarding the Runway 19 approach procedures and other noise concerns. Petitioner's Opp. to Mot. to Dismiss, Doc. No. 1748610, Ex. 24, Solomon Letter (July 25, 2018).

the course of the next two years, the FAA repeatedly reassured the Group that it was considering the Group's proposals and was committed to addressing the Group's concerns. *See supra* Factual Background Part C. The FAA's actions led "reasonable observers" such as Maryland (whose residents and counties were part of the Working Group) to think that the FAA "might fix the noise problem without being forced to do so by a court." *City of Phoenix*, 869 F.3d at 970; *see also* Hilliard Decl. ¶¶ 4-8.

This case is stronger than *City of Phoenix* in another respect. In *City of Phoenix*, the FAA had performed an environmental analysis and shared the results with the airport working group the day before the routes went into effect. 869 F.3d at 966. Here, on the other hand, the FAA misinformed the Working Group that an "[a]nalysis was completed and environmental difference allowed for the action to be Categorically Excluded" when, in fact, the FAA had performed no such analysis. AR D_i_01, DCA Working Group Summary, Apr. 27, 2017, at 8/10. As explained in Argument Part II below, the record contains no evidence that the FAA ever performed even the preliminary review necessary to reach a categorical exclusion decision.

Nor did the FAA timely respond when the Working Group submitted a FOIA request to see a copy of the environmental documentation. Only Senator Van Hollen's repeated inquiries finally prompted the FAA to reveal, on April 27, 2018, that it lacked any environmental documentation for its decision. AR F_ii_01, FAA Letter (Apr. 27, 2018). Upon the FAA's revelation of that procedural injury, Maryland timely acted to preserve its rights by filing this petition on June 26, 2018.

By analogy, the doctrine of equitable estoppel provides that "a defendant is estopped from asserting the statute of limitations as a bar to plaintiff's action if he has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him." *Goldman v. Bequai*, 19 F.3d 666, 673 (D.C. Cir. 1994) (quotation marks omitted). Here, the FAA lulled Maryland and the public into inaction by offering possible changes to the Runway 19 approach paths and by concealing its total lack of previous environmental analysis or documentation.

The FAA did not simply remain silent. The FAA told the Working Group that it would cooperate to develop potential revisions; the FAA

inaccurately asserted that it had previously performed an environmental analysis; and the FAA delayed responding to a FOIA request for the documents. Given those actions, the FAA cannot equitably invoke the statute of limitations to bar Maryland's suit, and equitable principles show that the timing of Maryland's suit was reasonable. *Cf. Sprint Commc'ns Co., L.P. v. FCC*, 76 F.3d 1221, 1226-27 (D.C. Cir. 1996) (the government may be estopped from asserting a limitations defense if it took "some misleading, deceptive or otherwise contrived action to conceal information material to the plaintiff's claim") (internal quotation marks omitted).

This case is nothing like *Georgetown*, where this Court held that the petitioner lacked reasonable grounds for missing the 60-day deadline. Unlike here, the petitioner in *Georgetown* did "not argue that it delayed filing its petition for review because FAA led it 'to think the [agency] might fix the noise problem without being forced to do so by a court.'" 896 F.3d at 425 (quoting *City of Phoenix*, 869 F.3d at 970). Rather, the petitioner complained only that it had not received direct notice of the FAA's environmental analysis or decision before the final action. *Id.*

The Court rejected that argument because, unlike here, the FAA had published notice of its environmental analysis and decision in local newspapers and had sent those documents to numerous members of the public. *Id.* at 429-31, 436. The petitioners in *Georgetown* also provided no evidence that the FAA had withheld information from the public. *Id.* at 436-37. Here, on the other hand, the FAA misinformed the public that it had performed an environmental analysis, and only Senator Van Hollen's repeated inquiries finally prompted the FAA to reveal that it lacked any environmental documentation for its decision.

In April 2018, Maryland made a final attempt to ask the FAA to cooperate on revisions to the "stand-alone actions" that had "diminished quality-of-life and caused noise complaints from Maryland residents to skyrocket," including Runway 19. AR F_i_02, Hogan Letter (Apr. 4, 2018). The FAA responded on April 27, 2018—the same day it responded to Senator Van Hollen—but it mentioned only its separate D.C. Metroplex decision, and it invoked the statute of limitations with respect to that decision. AR F_i_01, FAA Letter (Apr. 27, 2018). The FAA's response created additional uncertainty and reasonably prompted Maryland to preserve its rights by filing this petition.

In combination, the FAA's repeated reassurances regarding possible revisions to the Runway 19 approach paths, together with its April 27, 2018 letters to Maryland and Senator Van Hollen, fully justify Maryland's decision to file its petition on June 26, 2018, and not before. This Court should hold that Maryland had reasonable grounds for filing its petition on that date and review the merits of its claims.

II. The FAA's amendments to the Runway 19 approach paths are arbitrary and capricious because the record contains no evidence that the FAA conducted any environmental review.

This Court reviews "decisions of federal agencies, including the FAA, under the standards set forth by the Administrative Procedure Act." *D&F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1194 (D.C. Cir. 2000). "The FAA's determinations are arbitrary and capricious if, *inter alia*, they are 'not supported by substantial evidence' in the record as a whole." *BFI Waste Sys. of N. Am., Inc. v. FAA*, 293 F.3d 527, 532 (D.C. Cir. 2002) (quoting *Motor Vehicle Mfrs. Ass'n v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983)). If the record shows that the FAA "entirely failed to consider an important aspect of the problem," the Court should set aside the FAA's decision as arbitrary and capricious.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The FAA's amendments to the Runway 19 approach procedures are arbitrary and capricious because the FAA did not consider how those changes would affect noise over Maryland resources and communities. The record contains no evidence that the FAA performed any environmental analysis under NEPA. Nor is there any evidence that the FAA considered the impacts to historic resources, parks, or recreation areas under the NHPA and Section 4(f). This Court therefore should set aside the amendments and require the FAA to perform those statutorily required analyses before implementing any new arrival paths for Runway 19.

A. There is no evidence that the FAA assessed whether it could categorically exclude the amendments from NEPA review.

NEPA requires federal agencies to assess and disclose the environmental impacts of major federal actions before taking those actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. NEPA thereby ensures "that *before* an agency acts, it will 'have available' and 'carefully consider[] detailed information concerning significant environmental impacts.'" *City of Phoenix*, 869 F.3d at 971 (quoting

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)). The NEPA process also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of [the] decision." *Robertson*, 490 U.S. at 349.

1. The FAA may not invoke a categorical exclusion as a *post-hoc* rationalization for its failure to comply with NEPA.

The FAA contends that its amendments to the Runway 19 approach procedures were "categorically excluded" from NEPA review. Mot. to Dismiss, Doc. No. 1745317 at 2 (Aug. 13, 2018). Under the Council on Environmental Quality's ("CEQ") regulations, an agency may categorically exclude actions that "do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Categorical exclusions cannot, however, "be summoned as *post-hoc* justifications for an agency's decision." *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 825 n.4 (10th Cir. 2008). The record must show that—at the time the agency acted—the "agency indeed considered whether or not a categorical exclusion applied and concluded that it did." *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1094-96 (4th Cir.

2004); *accord California v. Norton*, 311 F.3d 1162, 1175-77 (9th Cir. 2002) (setting aside agency action when there was "no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion"); *Edmonds Inst. v. Babbitt*, 42 F. Supp. 2d 1, 18 (D.D.C. 1999) (same).

Here, there is no evidence that the FAA considered whether to apply any of the categorical exclusions listed in its regulations before or in conjunction with implementing the new flight paths. The record does not contain even a "short statement that a categorical exclusion has been invoked." *Wilderness Watch*, 375 F.3d at 1095. Rather, the record merely contains copies of two FAA orders that list the universe of categorical exclusions potentially applicable to FAA actions: Order No. 1050.1E and its successor, Order No. 1050.1F. Maryland can only guess which of the numerous categorical exclusions listed in those orders the FAA contends that it applied. AR C_07, FAA Order No. 1050.1E ¶¶ 307-311; AR C_04, FAA Order No. 1050.1F ¶¶ 5-6.

The FAA is guessing, too. In its letter to Senator Van Hollen, the FAA inferred that "[s]ince no CATEX document has been found under Mr. Liebman's FOIA request, an undocumented CATEX was *likely*

utilized for the procedure." AR F_ii_01, FAA Letter (Apr. 27, 2018) (emphasis added). The FAA's inference is precisely the kind of *post-hoc* justification that courts have rejected. *Utah Envtl. Cong.*, 518 F.3d at 825 n.4; *Wilderness Watch*, 375 F.3d at 1094-96; *Norton*, 311 F.3d at 1175-77; *Edmonds Inst.*, 42 F. Supp. 2d at 18.

2. The FAA failed to follow its own binding procedures, which require the FAA to document its use of a categorical exclusion.

Even assuming, for purposes of argument, that the FAA decided to rely on an undocumented categorical exclusion at the time it amended the flight paths, such reliance contradicts Order No. 1050.1F, which became effective in July 2015, approximately five months before the FAA amended the River Visual approach to incorporate the RNAV RNP approach. AR C_04, FAA Order No. 1050.1F (July 16, 2015).[19] The new order updated the FAA's procedures "regarding CATEX documentation to be consistent with CEQ's Guidance on Establishing, Applying, and

[19] CEQ's regulations require agencies to follow notice and comment procedures to promulgate rules for adopting and applying categorical exclusions. 40 C.F.R. §§ 1507.3, 1508.4. FAA promulgated Order No. 1050.1F to meet that requirement, and it is internally binding on FAA staff. *See* AR C_04, FAA Order No. 1050.1F ¶ 1-1. *Cf. BFI Waste Sys.*, 293 F.3d at 529 (stating that the FAA Handbook is "a binding set of FAA guidelines").

Revising Categorical Exclusions," which had been in effect since December 2010. *Id.* ¶ 1-10.16 to .17. Under the FAA's updated procedures, FAA personnel *must* include in the file "a simple written record . . . that a specific CATEX was determined to apply to a proposed action." *Id.* ¶ 5-3.a.

The updated procedures require additional documentation for actions that "involve greater potential for one or more extraordinary circumstances," including, as here, "changes to the routine routing of aircraft that have the potential to result in significant increases in noise over noise sensitive areas." *Id.* ¶ 5-3.b(2). In those circumstances, "the documentation should cite the CATEX(s) used, describe how the proposed action fits within the category of actions described in the CATEX, and explain that there are no extraordinary circumstances that would preclude the proposed action from being categorically excluded." *Id.* ¶ 5-3.d.

Here, the record contains none of that documentation. The absence of *any* such documentation cannot be justified because the FAA changed the flight paths specifically to address noise complaints in Virginia. AR A_ii_19, RAPT Consensus (June 28, 2012); AR A_ii_20,

DCA Runway 19 Noise Complaint Area (Feb. 24, 2012); AR A_iii_06, Hutto e-mail (Feb. 14, 2015). Shifting flights out of Virginia and into Maryland had the "potential" to significantly increase noise over resources and communities in Maryland. AR C_04, FAA Order No. 1050.1F at ¶ 5-3.b(2). Either the FAA entirely failed to consider whether it could properly apply a categorical exclusion, or the FAA failed to explain its departure from its own procedures. In either case, the FAA's decision is arbitrary and capricious. *See Nat'l Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures."); *Utahns v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (applying the same principle to invalidate agency action in a NEPA case).

3. The FAA also failed to explain why its amendments to the Runway 19 approach paths were not likely to be highly controversial on environmental grounds.

Even under the previous Order No. 1050.1E regime, the FAA cannot apply a categorical exclusion if an action's effects are "likely to be highly controversial on environmental grounds." *City of Phoenix*,

869 F.3d at 972 (quoting FAA Order No. 1050.1E ¶ 304i); *see also* AR C_04, Order No. 1050.1F ¶ 5-2.b.10. In *City of Phoenix*, the FAA expressly determined that no extraordinary circumstances existed because the new flight paths were not likely to be highly controversial. *Id.* This Court set aside that decision because the FAA provided no advanced notice of the changes and therefore did not consider "[o]pposition on environmental grounds by a . . . State, or local government agency or by . . . a substantial number of the persons affected." *Id.*

Similarly here, where the FAA concentrated flights along a new route over Maryland precisely *because* of noise concerns from traffic on the previous routes over Virginia, the FAA should have considered the possibility of noise impacts on Maryland residents and resources. The FAA nevertheless provided no advanced notice to Maryland or its communities regarding those changes. The FAA therefore never considered whether the changes were likely to be highly controversial on environmental grounds due to opposition by the State of Maryland, its local governments, and communities. At a minimum, the FAA's decision was arbitrary and capricious because it failed to explain its

reasons for concluding that exceptional circumstances were absent. "Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions." *Norton*, 311 F.3d at 1177.

B. There is no evidence that the FAA considered impacts to historic resources, parks, or recreation areas before amending the flight paths.

"[I]n addition to making the appropriate determination regarding the use of a CATEX" under NEPA, FAA also must "document compliance" with its NHPA and Section 4(f) obligations, including "any required consultations, findings, or determinations." AR C_04, FAA Order No. 1050.1F ¶ 5-5; *see also* AR C_07, FAA Order No. 1050.1E ¶ 306. Here, the record contains no findings, determinations, or evidence of consultation under the NHPA or Section 4(f).

The NHPA "requires Federal agencies to take into account the effects of their undertakings on historic properties." 36 C.F.R. § 800.1(a). For any undertaking that has the potential to affect historic properties, the FAA must identify the project's "area of potential effect," locate all historic properties in that area listed or eligible for listing on

the National Register, and assess the effect of the undertaking on those properties. 36 C.F.R. §§ 800.3(a), 800.4(a)–(c), 800.5. In fulfilling those requirements, the FAA "must consult with certain stakeholders in the potentially affected areas," including the SHPO and representatives of local governments. *City of Phoenix*, 869 F.3d at 971; 36 C.F.R. § 800.2(a)(4), (c)(1), (c)(3). If the FAA determines that no historic structures will be adversely affected, "it still has to 'notify all consulting parties'"—including the SHPO and representatives of local governments—"and give them any relevant documentation." *City of Phoenix*, 869 F.3d at 971 (quoting 36 C.F.R. § 800.5(c)).

Section 4(f) provides that the FAA may approve a project "requiring the use of publicly owned land of a public park, recreation area . . . or land of an historic site 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 . . . resulting from the use." 49 U.S.C. § 303(c). Under the FAA's procedures, it first must "identify as early as practicable in the planning process section 4(f) properties that implementation of the

proposed action and alternative(s) could affect." AR C_04, FAA Order No. 1050.1F ¶ B-2.1.

The FAA then makes an "initial assessment . . . to determine whether the proposed action and alternative(s) would result in the use of any of the properties." *Id.* ¶ B-2.2.[20] The FAA must consult "'all appropriate . . . State[] and local officials having jurisdiction over the affected section 4(f)' areas when assessing whether a noise increase might substantially impair these areas." *City of Phoenix*, 869 F.3d at 973 (quoting FAA Order No. 1050.1E, App. A, ¶ 6.2e) (emphasis omitted); *see also* AR C_04, FAA Order No. 1050.1F ¶ B-2.2.2.

There is no evidence in the record that the FAA considered, much less fulfilled, any of those requirements. The FAA did not inventory historic, park, or recreational resources in Maryland that could be affected by the change in flight paths. The FAA did not conduct an initial assessment of the potential effect of the proposed changes on any such resources. And the FAA did not consult with the SHPO, local

[20] "[N]oise 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. Dept. of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

government, or National Park Service representatives regarding its (lack of) findings. This is despite the fact that there are many listed historic, park, recreational, and other resources in the area. Ex. 3, Hughes Decl. ¶¶ 6-10; Ex. 2, Blazer Decl. ¶¶ 5-7. The FAA's decision is arbitrary and capricious because it failed to comply with the NHPA, Section 4(f), and its own procedures. *See City of Phoenix*, 869 F.3d at 971, 973-74 ("[B]y keeping the public in the dark, the agency made it impossible for the public to submit views on the project's potential effects [on historic and Section 4(f) resources]—views that the FAA is required to consider.").

RELIEF SOUGHT

Maryland respectfully requests that the Court vacate and remand the FAA's decisions to amend the Runway 19 approach paths and require the FAA to (1) adequately consider the noise impacts of the routes under NEPA, (2) enter into consultation with Maryland in compliance with the NHPA and Section 4(f), and (3) analyze and determine measures that could avoid, minimize, or mitigate adverse effects on NHPA and Section 4(f) properties.

Vacatur of the FAA's action is appropriate. *See New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 473 (D.C. Cir. 2012) (vacating rulemaking due to deficient NEPA review). Under *Allied-Signal v. Nuclear Regulatory Commission*, vacatur "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation and quotation marks omitted).

Both *Allied-Signal* factors support vacating the FAA's implementation of the amended routes. First, the FAA's failure to perform any environmental analysis of the new routes or consult with Maryland led to an action that the FAA's own data shows has substantially increased flights and noise over Maryland's resources and communities. The FAA's compliance with NEPA, the NHPA, and Section 4(f) will likely result in a modification of the new routes to address noise impacts. Second, vacatur would not disrupt the FAA's operations at the Airport. During the FAA's reevaluation of the Runway 19 approach paths, the FAA can safely and efficiently revert to the previous versions of those approach paths.

CONCLUSION

For the foregoing reasons, this Court should deny the FAA's motion to dismiss, vacate the FAA's amendments to the Runway 19 approach paths, and remand to the FAA to conduct the appropriate review and consultation under NEPA, the NHPA, and Section 4(f).

Respectfully submitted,

January 16, 2019

Brian E. Frosh
Attorney General of Maryland

s/ *Nicholas A. DiMascio*
Nicholas A. DiMascio
ndimascio@kaplankirsch.com
John E. Putnam
jputnam@kaplankirsch.com
W. Eric Pilsk
epilsk@kaplankirsch.com
KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, DC 20036
(202) 955-5600
(202) 955-5616 (fax)

Attorneys for Petitioner State of Maryland

Louisa H. Goldstein
lgoldstein@bwiairport.com
Robert J. Sager
rsager@bwiairport.com
Assistant Attorneys General
Maryland Aviation Administration
P.O. Box 8766
BWI Airport, Maryland 21240
(410) 859-7066

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,666 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ *Nicholas A. DiMascio*
NICHOLAS A. DIMASCIO

ADDENDUM OF LEGAL AUTHORITIES

TABLE OF CONTENTS

49 USCS § 49101

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 49. TRANSPORTATION > SUBTITLE VII. AVIATION PROGRAMS > PART D. PUBLIC AIRPORTS > CHAPTER 491. METROPOLITAN WASHINGTON AIRPORTS

§ 49101. Findings

Congress finds that--

(1)the 2 federally owned airports in the metropolitan area of the District of Columbia constitute an important and growing part of the commerce, transportation, and economic patterns of Virginia, the District of Columbia, and the surrounding region;

(2) Baltimore/Washington International Airport, owned and operated by Maryland, is an air transportation facility that provides service to the greater Metropolitan Washington region together with the 2 federally owned airports, and timely Federal-aid grants to Baltimore/Washington International Airport will provide additional capacity to meet the growing air traffic needs and to compete with other airports on a fair basis;

(3)the United States Government has a continuing but limited interest in the operation of the 2 federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government;

(4)operation of the Metropolitan Washington Airports by an independent local authority will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978 (Public Law 95-504; 92 Stat. 1705);

(5)all other major air carrier airports in the United States are operated by public entities at the State, regional, or local level;

(6)any change in status of the 2 airports must take into account the interest of nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the United States Government and State governments involved;

(7)in recognition of a perceived limited need for a Federal role in the management of these airports and the growing local interest, the Secretary of Transportation has recommended a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the United States;

(8)an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports;

(9)a commission of congressional, State, and local officials and aviation representatives has recommended to the Secretary that transfer of the federally owned airports be as a unit to an independent authority to be created by Virginia and the District of Columbia; and

(10)the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

History

49 USCS § 46110

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 49. TRANSPORTATION > SUBTITLE VII. AVIATION PROGRAMS > PART A. AIR COMMERCE AND SAFETY > SUBPART IV. ENFORCEMENT AND PENALTIES > CHAPTER 461. INVESTIGATIONS AND PROCEEDINGS

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title [49 USCS § 41307 or 41509(f)], a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part [49 USCS §§ 40101 et seq.], part B [49 USCS §§ 47101 et seq.], or subsection (l) or (s) of section 114 [49 USCS § 114] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate. The Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court. When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

History

49 USCS § 303

Current through PL 115-281, approved 12/1/18

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of programs and projects. Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) 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.

(d) De minimis impacts.

(1) Requirements.

(A) Requirements for historic sites. The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges. The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria. In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites. With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

36 CFR 800.2

This document is current through the January 10, 2019 issue of the Federal Register. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY > CHAPTER VIII -- ADVISORY COUNCIL ON HISTORIC PRESERVATION > PART 800 -- PROTECTION OF HISTORIC PROPERTIES > SUBPART A -- PURPOSES AND PARTICIPANTS

§ 800.2 Participants in Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

40 CFR 1508.4

This document is current through the January 10, 2019 issue of the Federal Register. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2019, I electronically filed the foregoing brief, together with its addendum and exhibits, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Nicholas A. DiMascio*
NICHOLAS A. DIMASCIO

Exhibit 1

Declaration of Dale Hilliard (January 11, 2019)

No. 18-1173

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MARYLAND,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL, Acting Administrator of the Federal Aviation Administration,

Respondents

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL AVIATION ADMINISTRATION

DECLARATION OF DALE HILLIARD IN SUPPORT OF PETITIONER STATE OF MARYLAND

I, Dale Hilliard, being competent to make this statement, do swear and affirm the following:

1. I am the Chief, Policy and Governmental Affairs for the Maryland Aviation Administration (MAA), a modal agency of the Maryland Department of Transportation, a principal department of the State of Maryland. This Declaration is based on my personal knowledge and information from

business records which are maintained in the ordinary course of business and from entries made therein at or near the time of the events so recorded. I am authorized to testify to the matters herein.

2. I have been employed by MAA since January 7, 2002. MAA has general supervision over aeronautics in Maryland. MAA encourages, fosters, and assists in the development of aeronautics in Maryland. MAA also encourages the establishment of airports, airport facilities, and air navigation facilities in Maryland. I am a transportation professional with over 40 years of experience dealing with transportation issues in Maryland.

3. In my role at MAA, I am responsible for policy issues, governmental affairs issues, and legislative matters. In this role, I was and am familiar with the activities of the Reagan National - DCA Community Noise Working Group ("Working Group"). The agendas, presentations and minutes of the Working Group have been made publicly available via its website since 2015 (http://www.flyreagan.com/dca/dca-reagan-national-community-working-group).

4. In 2016, the Governor's Office began receiving complaints from Maryland residents and communities regarding increased noise from flights approaching Reagan National's Runway 19.
5. In responding to those complaints on behalf of the Governor, the Maryland Department of Transportation explained to the residents that FAA had established a Community Working Group to discuss possible solutions to the noise issues and that the Working Group included representatives from Maryland.
6. Maryland's representatives on the Working Group included residents of Montgomery County, who requested that FAA develop an alternative approach to Runway 19 at Reagan National in order to address the increased noise caused by the changes that FAA had made in 2015.
7. The Governor's Office and Maryland Department of Transportation have monitored the progress of the Working Group's discussions with FAA.
8. In response to correspondence sent by FAA on April 27, 2018, Maryland made the difficult decision to file suit because it appeared that FAA had not

fully disclosed its lack of noise analysis and was no longer willing to cooperate regarding revisions to the Runway 19 approach paths.

I declare under penalty of perjury that the foregoing is true and correct.

Dale Hilliard, Chief

Policy & Governmental Affairs, MAA

Executed this 11th day of January, 2019, at BWI Airport, Maryland 21240.

Exhibit 2

Declaration of David Blazer (January 15, 2019)

No. 18-1173

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MARYLAND,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL, Acting Administrator of the Federal Aviation Administration,

Respondents

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL AVIATION ADMINISTRATION

DECLARATION OF DAVID BLAZER IN SUPPORT OF PETITIONER STATE OF MARYLAND

I, David Blazer, being competent to make this statement, do swear and affirm the following:

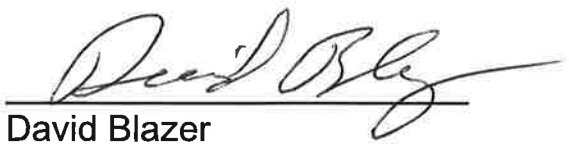
1. I am the Director of the Maryland Department of Natural Resources, Fishing and Boating Service. This Declaration is based on my personal knowledge and information from business records which are maintained in the ordinary course of business and from entries made therein at or near the time of the events so recorded. I am authorized to testify to the matters herein.

2. I have been employed by the Maryland Department of Natural Resources since September 2015 and have served in my current role as Director since 2015. The Maryland Department of Natural Resources is a government agency in the state of Maryland charged with maintaining natural resources including state lands, state waterways, fisheries, wildlife and recreation areas. The mission of the Fishing and Boating Service is to develop a management framework for the conservation and equitable use of fishery resources, manage fisheries in balance with the ecosystem for present and future generations. The Service also finances projects and activities that benefit the general boating public, monitors and assess the status and trends of fishing and boating resources, and provides high quality, diverse, accessible fishing and boating opportunities.

3. In my role as Director of the Maryland Department of Natural Resources, Fishing and Boating Service, I am responsible for leading the approximately 180 team members that manage the state's fisheries and boating units by assessing, protecting, conserving, fairly allocating and promoting the sustainable utilization of the fish resources. I also direct resources to benefit the boating public while providing high quality, diverse and accessible fishing and boating opportunities.

4. I have reviewed and am familiar with FAA-generated materials identifying the locations of the Runway 19 LDA Z, RNAV RNP and River Visual procedures that FAA implemented in 2015 that are the subject of this matter. These arrival procedures overfly portions of Montgomery County, Maryland, and the northern portion of the Potomac River near the Maryland shore.
5. The new and amended arrival procedures implemented by FAA in 2015 overfly important recreational and wildlife resources owned and operated by the State of Maryland.
6. Among the resources directly overflown or immediately adjacent is the Potomac River. Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore thereof.
7. Maryland manages the Potomac River, including the areas overflown by Runway 19 arrivals, for recreational boating and fisheries purposes. Many of these recreational purposes, such as non-motorized boating, fishing, birding and wildlife preservation are sensitive to noise, including noise from additional aircraft overflights like those that FAA approved in 2015.

I declare under penalty of perjury that the foregoing is true and correct.



David Blazer

Executed this 15th day of January, 2018, at Annapolis, Maryland.

Exhibit 3

Declaration of Elizabeth Hughes (January 15, 2019)

No. 18-1173

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MARYLAND,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL, Acting Administrator of the Federal Aviation Administration,

Respondents

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL AVIATION ADMINISTRATION

DECLARATION OF ELIZABETH HUGHES IN SUPPORT OF PETITIONER STATE OF MARYLAND

I, Elizabeth Hughes, being competent to make this statement, do swear and affirm the following:

1. I am the Director of the Maryland Historical Trust and the State Historic Preservation Officer ("SHPO") for the State of Maryland. This Declaration is based upon my personal knowledge and upon information from business records which are maintained in the ordinary course of business and from

entries made therein at or near the time of the events so recorded. I am authorized to testify to the matters herein.

2. I have been employed by the Maryland Historical Trust since 1995 and have served in my current roles as Director and SHPO since 2015. The Maryland Historical Trust serves as the State Historic Preservation Office for the State of Maryland pursuant to the National Historic Preservation Act ("NHPA"), as well as the agency responsible for protecting Maryland's historic resources under the Maryland Historical Trust Act ("MHT Act"), Title 5A, State Finance and procurement Article, Code of Maryland. I hold a Master's Degree in Architectural History from the University of Virginia and a Bachelor's Degree in American Studies from Georgetown University.

3. In my roles as Director of the Maryland Historical Trust and as SHPO, I am responsible for overseeing project reviews under the NHPA and the MHT Act, and for providing comments regarding whether proposed federal or state actions would have adverse effects on the State's historic resources. Such reviews consider all historic resources within the area of potential effect of a proposed project, regardless of whether the resource is owned by the State of Maryland, a political subdivision of the State, the federal government, any other public entity, or private person.

4. I am generally familiar based upon my review of documentation published or provided by the Federal Aviation Administration ("FAA") with the locations of the Runway 19 LDA Z, RNAV RNP and River Visual procedures that FAA implemented in 2015 that are the subject of this matter. These arrival procedures overfly portions of Montgomery County, Maryland, and the eastern portion of the Potomac River near the Maryland shore.

5. Maryland keeps and maintains extensive records and maps of properties and districts located in Maryland that are listed, or eligible for listing, in the National Register of Historic Properties (the "National Register"), including of those located in Montgomery County. These records include a publicly-accessible geographic information system database called MEDUSA, which is an interactive mapping system that shows the locations of National Register properties and districts, National Register-eligible properties and districts, and other State-inventoried historic resources; MEDUSA also includes links to underlying historic resource inventory documents. This database is found at https://mht.maryland.gov/secure/medusa/.

6. MEDUSA shows that there are many historic resources and districts within the vicinity of the arrival procedures implemented by FAA in 2015.

Resources and districts within this vicinity contained within MEDUSA include and are not limited to:

a. The Chesapeake and Ohio Canal National Park (note that the C&O Canal Historic District reaches across the Potomac to the Virginia shore near the District of Columbia border, and encompasses many of the islands in the Potomac and stretches of the River itself);

b. The Carderock Springs Historic District;

c. The Gibson Grove A.M.E. Zion Church;

d. Clara Barton House;

e. C&O Canal Lock #7 and Lock Keeper's House;

f. C&O Canal Lock #8, Lockhouse and Log House;

g. C&O Canal Lock #10 and Lockhouse;

h. Glen Echo Park Historic District;

i. Chautauqua Tower;

j. William Markowitz House;

k. National Imagery & Mapping Agency Structures;

l. The Sycamore Island Club, a privately owned canoe and fishing club on an island in the Potomac that is probably the oldest such club in the

region and includes historic cabins/structures and hosts ongoing recreation activities;

m. The Rock Run Gold Mines;

n. The Clara Barton School;

o. Stonehaven Estate;

p. Reading House;

q. Baltzley Castle;

r. Sycamore Store;

s. Potomac Overlook;

t. Inn at Glen Echo;

u. Saunders House;

v. Offutt House;

w. Cabin John Hotel Gas House;

x. William Dowling House.

7. The properties and districts identified in Paragraph 6.a-k are listed or eligible for listing on the National Register. The remainder are State-inventoried

properties that may be eligible for the National Register eligible, but have not yet been evaluated for listing.

8. Some of these resources are used for recreational, historic interpretation, religious, cultural, and educational purposes. The Maryland Historical Trust has not received information from FAA necessary to evaluate any of these resources for impacts due to increased aircraft noise caused by the changes FAA made to the Runway 19 flight paths in 2015. However, based upon my experience and knowledge of the practices of other SHPOs nationwide, it is likely that one or more of these resources is sensitive to increased aircraft noise.

9. The Maryland Historical Trust has no record that the Federal Aviation Administration notified or consulted with it regarding the three Runway 19 arrival procedures at issue in this case, including consultation regarding the area of potential effects, eligible properties/districts, particular noise sensitivity, and the effects of the procedures on historic properties. These issues would normally be addressed in NHPA consultation. The Federal Aviation Administration did consult with the Maryland Historical Trust for

other similar airspace procedures, including the DC Metroplex airspace project completed in 2013.

10. My office does not have information on detailed radar flight tracks, noise levels, or other important information associated with the new flight paths, which, presumably, we would have sought or obtained had consultation occurred. FAA's lack of consultation has impaired my office's interests, on behalf of the State of Maryland, in evaluating and providing comments on FAA's analysis of the effects of the new flight paths on historic properties and resources located within the vicinity of these new flight paths.

I declare under penalty of perjury that the foregoing is true and correct.

Elizabeth Hughes

Executed this 15th day of January, 2019, at Crownesville, Maryland.