No. 18-1173

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MARYLAND,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, et al.,
Respondents.

On Petition for Review of Actions Taken by
the Federal Aviation Administration

PROOF ANSWERING BRIEF OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

State of Maryland
Petitioner
Federal Aviation Administration
Daniel Elwell, in his official capacity as Acting Administrator of the Federal Aviation Administration
Respondents

B. Rulings Under Review

The petition for review identifies three specific amended air-traffic procedures published by the Federal Aviation Administration in 2015. The opening brief purports to challenge "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."

C. Related Cases

This case has not previously been before this Court or any other court. The Federal Aviation Administration 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

BWI	Thurgood Marshall Baltimore-Washington International Airport
DCA	Ronald Reagan Washington National Airport
DNL	Day-Night Level
FAA	Federal Aviation Administration
NEPA	National Environmental Policy Act
RNAV	Area Navigation

The brief also refers to air-traffic procedures and waypoints (such as "LDA Z" and "FERGI") that are conventionally written in all-capital letters, but are not acronyms.

INTRODUCTION

In 2015, Respondent Federal Aviation Administration ("FAA") amended three air-traffic procedures for aircraft arriving from the northwest into Ronald Reagan Washington National Airport. Two of the amendments were published and implemented in April 2015, and the third was published and implemented in December 2015. Petitioner State of Maryland opposes the amendments, and publicly announced in 2017 its intention to sue the FAA.

Maryland was required to file a petition for review within 60 days of the FAA's publication of the amended procedures. 49 U.S.C. § 46110(a). But Maryland waited almost *three years* and has offered no reasonable ground for its egregious delay.

In any event, Maryland's petition is meritless. The administrative record supports the FAA's reasonable conclusion that these minor amendments would cause neither "significant" impacts requiring further NEPA review nor harmful effects on historic properties or parks covered by other statutes. FAA's guidance did not require independent NEPA documentation of a categorically excluded action.

The petition should be dismissed for lack of jurisdiction, or denied on its merits.

STATEMENT OF JURISDICTION

Any "person disclosing a substantial interest in an order issued by the . . . Federal Aviation Administration" may petition this Court for review of that order. 49 U.S.C. § 46110(a). In circumstances like those of this case, publication of each individual air-traffic procedure or amendment is an "order issued by" by the FAA on

the date of publication. *City of Phoenix v. FAA*, 869 F.3d 963, 968-69 (D.C. Cir. 2017), *amended*, 881 F.3d 932 (D.C. Cir. 2018). This Court has jurisdiction over a timely petition for review of those procedures filed under 49 U.S.C. § 46110(a).

However, any petition for review "must be filed not later than 60 days after the order is issued." *Id.* The FAA issued the challenged amendments on April 30, 2015 and December 10, 2015. AR A_iv_01 at 2, A_iii_03. Maryland filed its petition for review on June 26, 2018, which is 929 days (nearly three years) after the later of those publication dates. Although this Court may permit the late filing of a petition for review if a petitioner demonstrates "reasonable grounds for not filing by the 60th day," 49 U.S.C. § 46110(a), Maryland has no reasonable grounds for this lengthy delay. This Court must therefore dismiss the petition for review as untimely.

STATEMENT OF THE ISSUES

1. Whether Maryland has "reasonable grounds" for purposes of 49 U.S.C. § 46110(a) for waiting almost three years to challenge FAA decisions subject to a 60-day limitations period.

2. Whether the FAA was arbitrary and capricious in concluding that its adjustments to pre-existing air-traffic procedures were categorically excluded from further NEPA review under FAA guidance applicable at the time.

STATEMENT OF THE CASE

A. Statutory and regulatory background

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(h), requires detailed consideration of the potential impacts of any "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(c). But many actions taken by federal agencies do not rise to this level of concern. Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, 75 Fed. Reg. 75,628 (Dec. 6, 2010). Regulations of the Council on Environmental Quality allow federal agencies to identify "a category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Once an agency has identified that category of actions pursuant to the agency's own procedures for implementing NEPA, *id.* § 1508.3(a), then "neither an environmental assessment nor an environmental impact statement is required" when the agency takes an action that falls into that category, *id.* § 1508.4. These categories are known as "categorical exclusions" from further NEPA analysis.

At each stage of the NEPA process, agencies are required to "reduce excessive paperwork," in part by "[d]iscussing only briefly issues other than significant ones," *id.* § 1500.4(c); "[u]sing the scoping process . . . to deemphasize insignificant issues," *id.* § 1500.4(g); and by "[u]sing categorical exclusions" wherever appropriate. *Id.* § 1500.4(p). Reliance on categorical exclusions can "reduce paperwork and delay," freeing up limited resources for assessing proposed actions that are likely to have "significant" environmental effects. 75 Fed. Reg. at 75,628. Neither NEPA nor the

governing regulations prescribe any specific process or procedures for an agency to follow when applying a categorical exclusion.

FAA's Order 1050.1E identifies several specific categorical exclusions, all of which were adopted after an opportunity for public comment. *See* AR C_07 at 3-1 to 3-15 (exclusions); 64 Fed. Reg. 55,526 (Oct. 13, 1999) (request for public comment); 69 Fed. Reg. 33,778 (June 16, 2004) (final rule). By definition, actions found to fall within a categorical exclusion have no likelihood of a "significant" environmental impact. Accordingly, FAA's guidance explained that the agency need not document each individual application of a categorical exclusion before taking an excluded action. AR C_07 at 3-4 ¶ 305.

B. Factual background

Congress has delegated authority over use of the Nation's civilian airspace to the FAA and has charged the FAA with ensuring the safe and efficient operation of aircraft. 49 U.S.C. §§ 40101(d)(4), 40103(b)(2). Although safety is the agency's primary mandate, the FAA also studies and addresses the impacts of aircraft noise. As this Court knows, Washington-Reagan National Airport is located in a densely populated region just outside the Nation's capital, and the FAA has long been aware of concerns about aircraft noise from operations at this airport.

In this case, Maryland challenges three amendments to procedures for aircraft arrivals into National Airport from the northwest, i.e., landings at the north end of Runway 19. These approaches occur when the airport is in "south-flow," meaning that flights arrive from the north and depart to the south. Ever since the first jet operations took place at National Airport in the 1960s, local communities have

encouraged use of the Potomac River corridor to reduce flights over noise-sensitive areas. AR B_02 at I-2. This recommendation was reflected in a Noise Compatibility Program voluntarily adopted by the Metropolitan Washington Airports Authority and approved by the FAA in 1997. *See* AR B_02 at VI-1. The Airports Authority, created in 1987 when National Airport was transferred from federal control, comprises representatives of the federal government and various area governments, including three directors appointed by the Governor of Maryland. AR B_05 at 1.

The Airport updated its Noise Compatibility Program in 2004, and it again recommended that flights adhere more closely to the Potomac River. AR B_02 at VI-2. Specifically, the new Noise Compatibility Plan recommended the formation of a working group focused on developing advanced-navigation procedures for all arrivals and departures to create "more predictable and precise flight tracks along the center of the Potomac and Anacostia River corridors." *Id.* at VI-3. For many years, voluntary noise-abatement procedures directed arrivals from the north to follow the Potomac River. *Id.* at VI-3 to VI-4. But public comments, including those of Maryland residents, indicated that pilots were still not following the river centerline satisfactorily. *Id.*

The advisory committee recommended using newer technologies to follow "the center of the Potomac River to the maximum extent possible." *Id.* at VI-4. Doing so would provide two benefits for south-flow arrivals: it would help avoid aircraft arriving along multiple flight paths within 10 miles of the airport, and it would locate more aircraft noise over the river (rather than over residences and businesses on either side). The committee approved this abatement measure, stating "that the

benefit to neighborhoods in Virginia justified the increases in noise of lesser magnitude" that might arise elsewhere. *Id.*

This goal was not yet achieved by 2013. In that year, most south-flow approaches into National Airport followed one of three procedures. First, properly-equipped aircraft could follow an approach procedure called RNAV (RNP) RWY 19, which uses next-generation navigational technology to follow the Potomac River when arriving into National Airport in south-flow. *See* AR A_ii_09. Second, the FAA continued using existing procedures for aircraft that could not be assigned advanced-navigation procedures, for lack of appropriate technology or pilot training. AR D_i_01 at 11. The primary route for those aircraft is known as the RIVER VISUAL RWY 19 Charted Visual Flight procedure ("River Visual"), a route that has existed for decades. As its name suggests, a pilot could fly the River Visual approach procedure by visually following the path of the Potomac River and other charted visual guides like bridges and reservoirs.[1] This path along the river's centerline was referred to as the "river leg" of the River Visual approach procedure, but it was not the only path available to pilots flying the River Visual. A pilot could instead choose to follow one of two different straight-line paths over Virginia (flying over Rosslyn) to the south and west of the river. AR A_iii_11 (see narrative description at bottom).

Third, in bad weather, pilots may be assigned a different approach altogether. The LDA Z RWY 19 approach procedure is a straight-line path that can be flown using the instrumentation aboard all modern jet aircraft that use National Airport. AR

[1] A video of this approach taken from the cockpit of a McDonnell-Douglas MD-80 can be seen at https://youtu.be/sfM7TQf6dtA (last visited Mar. 27, 2019).

A_i_03. This procedure was, and is, regularly assigned to aircraft that cannot fly the other procedures when visibility is limited. AR D_i_01 at 217. This limited-visibility approach takes planes over parts of Maryland to the north and east of the river.

1. The 2015 amendments to Runway 19 approach procedures

In 2015, the FAA amended these south-flow approaches into National Airport., and these amendments are the basis of Maryland's petition for review. The first two changes, published on April 30, 2015, amended both the next-generation approach and the limited-visibility approach procedures. AR A_i_03, A_ii_06. The RNAV (RNP) RWY 19 procedure was moved to mimic the "river leg" of the River Visual procedure, in keeping with the longstanding requests of various stakeholders to keep aircraft over the river. A_ii_11 at 1. In order to accomplish this goal within the highly-detailed design parameters for a next-generation air-traffic procedure, the FAA had to make several adjustments. The FAA moved a "waypoint" named FERGI backwards (farther from the airport) along the same approach line, resulting in better alignment between the beginning of the next-generation approach procedure and the limited-visibility approach procedure (which also used the same waypoint). *Id.* These changes also better aligned the procedures with other south-flow arrival paths, including those approved in 2013 as part of the "DC Metroplex," a package of new and revised next-generation air-traffic procedures at National Airport and other airports in the region. *See* AR D_i_01 at 16, 217.

The FAA made an additional change on December 10, 2015. The FAA deleted two of the optional paths for the River Visual approach, leaving only the "river leg"

(in which the pilot visually follows the center of the Potomac River). *See* AR E_04 at 3. Eliminating the other options reduced the chance that two arriving aircraft would follow different paths (one in a straight line and one curving along the river), causing one to catch up to the other and lose the required separation between aircraft. AR D_i_01 at 11.

2. The DCA Working Group

Throughout this period, concerns about aircraft noise persisted. As the D.C. Metroplex procedures were implemented in 2014 and 2015, aircraft noise impacts changed in some areas. *See Citizens' Ass'n of Georgetown v. FAA*, 896 F.3d 425, 430-31 (D.C. Cir. 2018). In October 2015, the Airports Authority established the Reagan National Airport Community Noise Working Group ("DCA Working Group") "to move the noise discussion beyond the airing of individual and neighborhood complaints toward a cooperative effort to identify practical solutions." Reagan National Airport Community Working Group Organizational Charter (Oct. 28, 2015).[2] This group was to include community representatives from D.C., Virginia, and Maryland, with elected officials choosing citizen representatives from each jurisdiction. *Id.* The group's charter designated the FAA as a "non-voting advisory member." *Id.*

At one of the first meetings, on December 10, 2015, the FAA explained to the DCA Working Group p the changes it had made that year to south-flow approaches

[2] The charter is publicly available at https://www.flyreagan.com/sites/default/files/reagan_national_working_group_organizational_charter_revised_29oct_2015.pdf (last visited March 17, 2019).

into Runway 19. AR D_i_01 at 10. The FAA explained that it had eliminated the previously available overland arrival paths and had raised recommended altitudes. *Id.* at 10-11. The Airports Authority noted that following the Potomac River "has been strongly supported by neighboring communities" since the 1960s. *Id.* The meeting minutes record not objections to the changes that the FAA described.

3. Further consideration of possible flight path changes

A couple of months after the December 2015 presentation, the DCA Working Group asked the FAA to consider developing another procedure, using GPS technology, which would bring even more flights over the river. AR D_i_01 at 15-16. The group's goal was "maximizing the time aircraft spend flying directly over the Potomac River and minimizing the time aircraft spend flying over land." *Id.* at 24. A GPS-based procedure would follow a path similar to the pre-existing RNAV (RNP) RWY 19 procedure, but it could be flown by nearly all aircraft arriving into National Airport. The FAA invested considerable resources in developing conceptual versions of the proposed GPS-based procedure.[3] *See, e.g.*, AR D_i_01 at 66-67, 82-84. But the representatives of counties in Maryland did not support it, stating that "[t]his proposed change doesn't improve anything" and "does nothing for us." *Id.* at 68-69 (statements of Ken Hartman from Montgomery County).

By the end of 2016, a year after the DCA Working Group first proposed a GPS-based approach to Runway 19, the FAA had completed its design work and was ready to move forward to implementation. *Id.* at 90. But when the FAA asked for an

[3] *See* https://www.flyreagan.com/dca/dca-reagan-national-community-working-group (containing presentations and video about this procedure) (last visited Mar. 28, 2019).

official endorsement, the group balked. *Id.* at 84, 90. Rather than approve or reject the FAA's newly designed proposal, members from Maryland continued to ask the FAA to "roll back" existing procedures to those that had been in place several years before. *Id.* at 117. They also asked in mid-2017 for documentation of the FAA's environmental review of the procedure changes made nearly two years earlier; the FAA explained that those changes had been categorically excluded from detailed NEPA review. *Id.* at 122. As of this writing in 2019, the DCA Working Group has still not endorsed the conceptual GPS-based procedure.

Instead of pursuing a new GPS-based procedure that could reduce usage of the LDA Z approach procedure that flies over some of its territory, Maryland instead urged the FAA to effect a wholesale redesign of the metropolitan Washington air-traffic system. Maryland formed a community roundtable, focused on procedures used at Baltimore-Washington International Airport. At its first meeting in March 2017, nearly two years after the FAA made the first challenged changes to Runway 19 approaches at National Airport, the DC Metroplex BWI Community Roundtable ("BWI Roundtable") passed a resolution requesting the FAA both to "immediately revert to flight paths and procedures that were in place" in prior years, and to redesign the entire DC Metroplex. *See* AR F_i_05.

By this time, more than three years had passed since the FAA's December 2013 approval of the DC Metroplex, and Maryland knew full well that the FAA had no intention of undoing that entire decision. *Id.* Indeed, the FAA explicitly said as much to the BWI Roundtable, which the Governor of Maryland acknowledged in a subsequent letter. *Id.* at 2. Nevertheless, the Governor repeated the same request a

few months later. The FAA again explained that "reverting to the flight paths and procedures that existed prior to the implementation of the DC Metroplex project is not possible." AR F_i_03.

The Governor of Maryland then directed the Attorney General of Maryland in September 2017 to sue the FAA, and the State retained its counsel of record in this case. AR G_02. At this point, in October 2017, almost two-and-a-half years had passed since the FAA changed the RNAV (RNP) RWY 19 and LDA Z approach procedures into National Airport. Yet even then, Maryland did not file a petition for review.

Instead, after waiting another six months, Maryland sent another letter repeating the requests made, and rejected, in correspondence between the Governor and the FAA the previous year. In this new letter, sent in April 2018, the Governor purported to offer the FAA "one last chance" to change its mind to revise "NextGen procedures" at both BWI and National Airport. AR F_i_02. The FAA responded that although it welcomed "a dialogue about how to make progress for communities and identify opportunities to advance potential solutions," any solutions would require new environmental reviews and approvals by the FAA. AR F_i_01. The FAA also observed that the chance to seek judicial review of its earlier decisions had long since passed. *Id.*

4. This petition for review

Undeterred, Maryland filed a petition for review in this Court on June 26, 2018. As "FAA's final decisions" being challenged by Maryland, the petition identified the

three published air-traffic procedures changed in 2015 and discussed above.[4] The FAA moved to dismiss the petition as untimely. In an order dated November 1, 2018, this Court deferred the motion to the merits panel and asked the parties to address its jurisdiction in the merits briefing.

SUMMARY OF ARGUMENT

1. The petition is untimely and must be dismissed. Maryland concedes that it failed to meet the 60-day deadline for filing suit established by 49 U.S.C. § 46110(a). Maryland's failure to meet that deadline deprives this Court of jurisdiction.

Although the statute permits this Court to extend the filing deadline when there are "reasonable grounds" for doing so, *id.*, Maryland has no "reasonable grounds" for its delay of three years. In each of the rare cases in which this Court has found reasonable grounds under the applicable statute, the FAA led parties to believe for a short period of time after issuing the challenged decision that the decision would be changed. This case is very different; the FAA was always clear that its actions in 2015 were final and that any future actions would involve a new and different air-traffic procedure. Unlike cases in which parties have spoken repeatedly with the FAA during the original 60-day timeframe, Maryland sometimes let months at a time lapse between communications with the FAA. Whatever the reason for Maryland's delay, that delay is in no way attributable to the FAA's actions, and Maryland's failure to meet the 60-day filing deadline requires dismissal of the petition.

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[4] The original petition for review identified amendments that were only notational in nature, i.e., changes made to language on the charts but not to the way the procedures were flown. This Court allowed Maryland to amend its petition to identify the two changes made on April 30, 2015.

2. The FAA was not arbitrary and capricious in concluding both that the amendments to air-traffic procedures made in 2015 were categorically excluded from NEPA and that no specific documentation of that decision was required. Neither general NEPA regulations nor the FAA's own NEPA guidance requires separate documentation of each individual application of a categorical exclusion. To require it in this case would not serve the purposes of NEPA. Moreover, all available evidence confirms the FAA's initial conclusion that the small shifts in air traffic resulting from the 2015 changes would not result in anything approaching a "significant" increase in aircraft noise in Maryland, or anywhere else. Although Maryland observes that more flights are occurring closer to Maryland as a result, it points to no evidence that would undermine the FAA's conclusions that the resulting noise levels are still below any threshold of legal concern. Even if the petition for review were timely, Maryland has presented no basis for this Court to remand the challenged air-traffic procedures for further consideration.

The petition for review should be dismissed or denied.

STANDARD OF REVIEW

This Court reviews de novo Petitioners' compliance with the filing deadline established by 49 U.S.C. § 46110(a). *See Seed Co., Ltd. v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016).

This Court reviews the FAA's compliance with NEPA under the standard set out in the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). *Karst Environmental Education and Protection, Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007). Under

that standard, this Court asks only whether the agency's decision was arbitrary and capricious; it must defer to the agency's decisions and not substitute its own judgment for the agency's. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). All findings of fact by the FAA are "conclusive" if supported by "substantial evidence," 49 U.S.C. § 46110(c)—an evidentiary "threshold" that "is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

ARGUMENT

I. The petition for review is untimely and must be dismissed.

"Filing deadlines, replete throughout the United States Code, promote prompt and final judicial review of agency decisions and ensure that agencies and affected parties can proceed free from the uncertainty that an action may be undone at any time." *Citizens Ass'n of Georgetown*, 869 F.3d at 436-47. Maryland concedes that "it filed its petition well after 60 days" from the publication dates of the challenged procedures. Op. Br. at 2. But Maryland understates the magnitude of its willful delay: Maryland waited more than *three years* after the first of the 2015 amendments (and more than two-and-a-half years after the most recent amendment) before filing suit.

When a party files a late petition for review, this Court may still consider it, but "only if there are reasonable grounds for not filing by the 60th day." 49 U.S.C. § 46110(a). This Court has "rarely found reasonable grounds under section 46110(a)," *Electronic Privacy Information Center v. FAA*, 821 F.3d 39, 43 (D.C. Cir. 2016), allowing a late-filed petition for review in only three cases. *City of Phoenix v. Huerta*, 869 F.3d 963, 968-69 (D.C. Cir. 2017), *on reh'g*, 881 F.3d 932 (D.C. Cir. 2018); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593 (D.C. Cir. 2007); *Paralyzed Veterans of America v. Civil Aeronautics*

Bd., 752 F.2d 694 (D.C. Cir. 1986), *rev'd on other grounds*, 477 U.S. 597 (1986). Maryland has, in this case, waited far longer and been far more dilatory in pursuing its rights to judicial review than any of the petitioners in those three cases.

This Court has been hesitant to use the "reasonable grounds" exception broadly, and for good reason. Congress provided only 60 days for judicial review of FAA orders to promote the FAA's mission to provide the safest, most efficient aerospace system in the world. The FAA is continuously implementing or amending air-traffic instrument procedures that account for new technology and evolving safety criteria, among other reasons. These procedures are rarely developed and used in isolation; they build on one another, becoming part of a complex, interdependent network of procedures. Delayed challenges like Maryland's disrupt that carefully crafted system. Vacating a procedure years after its implementation can jeopardize the safety of the national airspace through unintended effects on other air-traffic instrument procedures that were developed in reliance on the earlier procedures.

Maryland's purposeful and lengthy delay should not be rewarded, and the petition for review should be dismissed.

A. Maryland's 60 days for challenging the amended procedures began on the publication dates of the amendments.

When the FAA creates or amends an air-traffic procedure that is categorically excluded from further NEPA review, and therefore not subject to advance public comment or published in an environmental decision document, that procedure is "issued" for purposes of 49 U.S.C. § 46110(a) on the date that it is "published" and able to be flown. *City of Phoenix*, 869 F.3d at 969. On that date, both aspects of finality

for purposes of judicial review are established: publication marks "the consummation of the agency's decisionmaking process" and produces the "legal consequences" relevant here. *Id.* (citing, *inter alia*, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Here, Maryland seeks review of amended procedures published on April 30, 2015 and on December 10, 2015 (with further notational changes made in June and August 2015). Op. Br. at 12-13. Maryland's 60-day deadline for petitioning for judicial review of each of those procedures began to run on each of their publication dates. *Phoenix*, 869 F.3d at 969. By failing to file within that timeframe, Maryland has forfeited its right to judicial review of these procedures. *Citizens' Ass'n of Georgetown*, 869 F.3d at 435.

Maryland disputes that it was required to challenge the April 2015 amendments within 60 days of publication, arguing that some defect in the notice provided by publication of those procedures prevented the 60-day filing period from beginning. Op. Br. at 32. But the only "defect" that Maryland identifies in the FAA's publication of the amended procedures is that Maryland did not understand the "true scope and effect" of the changes at the time they were published. *Id.* But the 60-day filing period begins to run on the date of *publication*, not the date of subsequent explanations by the FAA to the satisfaction of a potential petitioner. If a "lack of actual notice neither delays the start of the sixty-day filing period nor provides reasonable grounds for a petitioner's failure to timely file for review under section 46110." *Citizens Ass'n of Georgetown*, 869 F.3d at 435 (citing *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 520 (D.C. Cir. 2011)), then a (purported) lack of explanation has the same non-effect.

The charts published by the FAA April 30, 2015 are exactly the same as those that this Court held in *City of Phoenix* must be challenged within 60 days. 869 F.3d at

969. Maryland identifies no relevant legal distinction. In addition, advance notice of these procedures was also published in the Federal Register. AR A_iv_01 at 2. Maryland simply failed to challenge the April 2015 in a timely fashion, and it now hopes to link them together with the December 2015 amendment to a different procedure in order to make its "reasonable grounds" arguments apply equally to all three procedures. But the facts do not support this approach. Whether or not Maryland has timely challenged the December 2015 changes to the River Visual procedure, it is undoubtedly too late to challenge the amendments made seven months prior.

Maryland's attempt to analogize the facts of this case to those of *National Air Transportation Ass'n v. McArtor*, 866 F.2d 483 (D.C. Cir. 1989), does not withstand scrutiny. That case involved the FAA's publication of a rule about the flammability of seat cushions. *Id.* at 485. The original publication of the rule contained headings that could reasonably have led the petitioners to believe that the rule did not apply to them. *Id.* The petitioners were therefore unaware that the rule applied to them until the FAA issued a clarified version of the rule. *Id.* This Court found that the 60-day deadline for filing suit began on the date of the subsequent clarification. *Id.* Notably, though, the petitioner's *further* delay of more than a year meant that their petition was untimely and must be dismissed. *Id.* The outcome of that case supports the FAA here.

Maryland acknowledges that on December 10, 2015, the FAA presented to the DCA Working Group the changes it had made both on that date and earlier in the year. Op. Br. at 32. Thus any alleged deficiency in the notice provided by the earlier publication of the air-traffic procedures was cured on that day, and the State's

deadline for filing suit was no later than February 8, 2016 (60 days after December 10, 2015). Maryland missed this date by nearly two-and-a-half years. Even if Maryland had reasonable grounds for tolling the *original* 60-day period (which we dispute), it was still required to file its petition within 60 days after the circumstances justifying that tolling have ended. *McArtor*, 866 F.2d at 485. Maryland has failed to justify its extensive delay even under its own theory.

B. The FAA's subsequent statements to Maryland and to community working groups did not toll Maryland's deadline for filing.

Because Maryland failed to file a petition for review within 60 days, this Court's jurisdiction rests entirely on Maryland's argument that it had "reasonable grounds" for filing late. 49 U.S.C. § 46110(a). No such grounds exist. Maryland's only explanation for failure to file between 2015 and mid-2017 is that it relied on statements made by the FAA to the DCA Working Group. Op. Br. at 37-43. That group's discussions about different procedures are not reasonable grounds to delay suit. But even if they were, Maryland *publicly announced* in September 2017 its intention to file a suit—clearly indicating that it knew the time to talk had passed—and then waited another six months before sending the FAA a "last chance" letter and nine months before actually filing. Its only explanation for this additional delay is that it was waiting on a response letter from the FAA, but that response merely repeated information that Maryland had known for at least a year at that point.

This Court has found "reasonable grounds" for delay under 49 U.S.C. § 46110(a) only where the FAA's affirmative actions during the original 60-day time

period for judicial review led to a misunderstanding about the effect or timing of the challenged rule. This Court should not deviate from that principle here. Because the facts of this case are clearly distinguishable from those in which this Court has found "reasonable grounds," Maryland's petition must be dismissed.

1. This case is not like those where this Court found "reasonable grounds" because petitioners in those cases actively engaged with the FAA over a short period of time.

This Court's three published opinions finding "reasonable grounds" for delay under 49 U.S.C. § 46110(a) all share certain common facts that are absent from Maryland's case. In *Safe Extensions*, the FAA published an advisory circular that "produced a significant uproar" in the regulated industry, and the FAA "told industry virtually immediately" that it would produce a new draft of the circular. 509 F.3d at 603. The regulated parties commented on the draft revisions, and they ultimately sued to challenge the revised rule that FAA published six months later. *Id.* at 596. This Court allowed the suit to proceed because some FAA employees had affirmatively disavowed the enforceable effect of the earlier rule, and the party challenging the rule was actively engaged with the FAA throughout that time period. *Id.*

Similarly, in *Paralyzed Veterans*, the petitioners did not challenge the agency's final rule on time, but they did petition for review within 60 days of the agency's promulgation of an amended final rule six months later. 752 F.2d at 705 n.82. Crucial to allowing the subsequent suit to proceed was the fact that the petitioners sued within 60 days of another judicially reviewable final order. *Id.* In both cases, the petitioners promptly initiated discussions with the agency and were led to believe that

a change was imminent. In both cases, the agency *did* amend the rules at issue within approximately six months. In both cases, this Court allowed the petitioners to seek review outside of the 60-day window for the *original* action, but only in a timely challenge to the *amended* action. Maryland does not rely on these cases in its brief, as the facts here are not analogous.

Maryland instead relies exclusively on *City of Phoenix*, but that too was a very different case. There, city officials contacted the FAA within days of publication of the challenged procedures to discuss a rise in noise complaints. Within two weeks of publication, the FAA agreed to hold a public meeting in the City to discuss the new procedures. At the meeting, the FAA explained that some "aircraft had been straying from the new routes," and that the agency would give new direction to pilots and air-traffic controllers. 869 F.3d at 968. The City and the FAA were in frequent contact, holding meetings and exchanging correspondence over the next few months, before the City of Phoenix filed a petition less than nine months after implementation of the challenged procedures. *Id.* No 60-day period within those nine months passed without some meeting or exchange of correspondence between the City and the FAA. This Court concluded that the City had "reasonable grounds" for its delay in filing suit, because the City could reasonably have believed that the FAA was going to change the air-traffic procedures in the near future. *Id.*

The contrast between *City of Phoenix* and the case now before this Court is obvious. Maryland waited two years after the April 2015 amendments before contacting the FAA directly, and even then it did not explicitly mention the Runway 19 approach procedures amended in 2015. Maryland then let months lapse between

contacts before finally filing suit. In *City of Phoenix*, this Court worried that "petitioning for review soon after the September order might have shut down dialogue between the petitioners and the agency." *Id.* But here, there was no dialogue shortly after the FAA amended its procedures. Following the April 30, 2015 amendments to two approach procedures, Maryland said nothing at all. Nor did it say anything directly to the FAA about the December 10, 2015 changes made to the River Visual approach, until well into 2017. For the two years prior, Maryland can point only to a handful of statements made at meetings of the DCA Working Group through 2016, which are summarized in the administrative record. AR D_i_01. Nothing the FAA said at those meetings could reasonably have led the State to believe that the FAA was just about to amend the challenged procedures further. And even if the State believed that at first, it could no longer have reasonably expected those changes once a year-and-a-half elapsed with no established timeline for implementation. Maryland's public statement that it was suing the FAA demonstrates that by 2017 it no longer expected imminent changes to the 2015 amendments.

The petition must be dismissed as untimely.

2. The FAA's statements to the DCA Working Group could not have led Maryland to believe that the 2015 amendments were not final and need not be challenged.

Maryland indisputably missed its chance to petition for review of the two April 2015 amendments. Maryland now claims that it could not have known about these amendments until the December 2015 meeting of the DCA Working Group. Op. Br. at 38. But despite Maryland being a member of that group, Maryland did not even

send a representative to that meeting. AR D_i_01 at 9. At the meeting, some members (representatives of the airlines and of the Airports Authority) asked about the possibility of a GPS-based arrival procedure, which the FAA cautioned could "move flight tracks over land." *Id.* at 11. From this brief and limited exchange, Maryland now extrapolates that "the FAA began assuring the public that it would work cooperatively to implement further changes to address noise concerns." Op. Br. at 37. No one from Maryland followed up with the FAA about this in the following month, nor did the State ever contact the FAA about any of the three amended procedures during 2015.

The DCA Working Group next met more than 60 days later. AR D_i_01 at 15. This was the first meeting to include any members from Maryland (Ken Hartman of Montgomery County). *Id.* The minutes of that meeting do not reflect that he made any statements at all about approaches into Runway 19, nor did Maryland contact the FAA about those approaches through any other channels during this two-month period at the beginning of 2016. The DCA Working Group formally asked the FAA to try to develop a GPS-based approach procedure, *id.* at 32, and another two months passed with no communications at all from Maryland. At the following meeting two months later, the FAA reported several "challenges" associated with the working group's proposal, and the Montgomery County representative indicated that some Maryland residents had made noise complaints about unspecified air-traffic procedures. *Id.* at 38. Then all parties adjourned for another month.

In the ensuing months, the FAA continued to report difficulties in developing the requested new procedure. The procedure would, for example, violate a number of

design criteria to which air-traffic procedures must normally adhere. *Id.* at 50. Meanwhile, the DCA Working Group was working on another issue: departures to the northwest along the Potomac River. The FAA had developed a prototype departure procedure, known as "LAZIR B," that would more closely track the river (in many ways, the reverse of the arrival tracks at issue in this case) in hopes of reducing noise impacts. The representative from Montgomery County, alone among the group, moved to reject this proposal. *Id.* at 52. By January 2017, the FAA discontinued the implementation of LAZIR B. The DCA Working Group similarly refused to endorse the FAA's development of a new GPS-based approach procedure into Runway 19, instead asking the FAA in November 2016 to design yet another different procedure that "centers aircraft over the Potomac River from at least the American Legion Bridge to the Maryland state line." *Id.* at 86.

Maryland cannot reasonably claim now that it believed in 2016 that the FAA was about to make substantial changes to existing procedures around National Airport as a result of these conversations. Whatever Maryland might have thought was going to happen in 2016, it was apparent by the end of that year that no adjustment to Runway 19 approaches were imminent. Maryland could not possibly have continued to believe otherwise through June 2018, when it finally filed its petition. Op. Br. at 37.

All the 2015 and 2016 discussions between Maryland and the FAA on which Maryland now relies were about the possibility of a *new* procedure, not about further modifications to any of the existing procedures challenged here. A new procedure, once implemented, would be a new, independent "order" of the FAA subject to its

own environmental and safety reviews and subject to its own 60-day deadline for judicial review. *See*, *e.g.*, AR F_ii_07 at 2 ("Any changes to procedures would be a new action and must be subjected to safety and environmental reviews."). Thus, the mere possibility of the FAA's putting a new procedure in place could cause Maryland no confusion about whether the earlier amendments were ripe for judicial review. The FAA never told Maryland that the amendments made to procedures in 2015 were not final or that they would soon be changed—or anything else that Maryland can now plausibly claim led to its confusion about the finality of those published procedures. This Court has never held that the FAA's voluntary participation in a community roundtable or working group could toll an otherwise-applicable filing deadline, and a ruling to that effect would have a chilling effect on the FAA's attempts to engage with the public through these types of groups at airports around the country.

3. The FAA's responses to Senator Van Hollen provided no "reasonable grounds" for Maryland's lengthy delay.

Even if this Court were to accept Maryland's arguments that the FAA's participation in the DCA Working Group was grounds for delay, the most generous version of that theory would have extended Maryland's deadline only by a year or so. It was clear to all involved by the beginning of 2017 that further changes to the 2015 amendments were not soon forthcoming. Maryland cannot justify its additional year-and-a-half of delay. Maryland now suggests that it was simply waiting to see documentation from the agency regarding the categorical exclusion of the 2015 amendments. Op. Br. at 40-42. Notably, Maryland identifies no analogous case that supports this basis for "reasonable grounds," nor is there one. The FAA never

"misinformed the public" about those documents, Op. Br. at 43, nor did it mislead the State of Maryland into thinking that the FAA was about to amend the arrivals into Runway 19 in the near future.

Maryland relies on the April 27, 2017 meeting minutes of the DCA Working Group, alleging that the FAA claimed to have performed a non-existent "environmental analysis." Op. Br. at 40, citing AR D_i_01 at 121. These minutes are not transcripts, nor are they prepared by the FAA. The minutes report that two FAA officials informed the group that the Runway 19 approach procedures were categorically excluded from NEPA review when amended in 2015. *Id.* Maryland cannot now claim confusion on that point. This meeting (in April 2017) is not relevant for purposes of calculating Maryland's filing deadline, but even if it were, Maryland failed by a year to meet the hypothetical 60-day deadline of June 27, 2017.

In its brief, Maryland identifies this statement by the FAA, fails to note its relevance to the statute of limitations, and then jumps ahead in time to a Freedom of Information Act request filed by a Maryland citizen months later, in August 2017. Op. Br. at 21, 41. Neither that request nor the agency's responses gave Maryland reason to further delay the filing of a petition for review. The request was very broad, seeking "all documents that relate to FAA's statutory or regulatory authority underlying the changes the agency made to the DCA RNAV (RNP) RWY 19 approach." AR F_ii_16 at 1. The FAA worked to compile these records, and over the course of the next three months, communicated with the requester or with Senator Van Hollen (who was monitoring the request) 13 separate times. AR F_ii_06 at 3-4.

In January 2018, the FAA provided all of the responsive records it had. AR F_ii_03. Because no NEPA documentation was required for this categorically excluded action, none was included. Senator Van Hollen's office emailed the FAA two months later to confirm whether any documents were missing, and the FAA followed up with another letter explaining that no additional documents regarding environmental review of that procedure were available. AR F_ii_01.

Maryland filed its petition for review within 60 days of the FAA's letter explaining that no further environmental review documents were available. But this letter is not an "order" of the FAA, as the letter states explicitly. AR F_ii_01 at 2. The letter responds to a Freedom of Information Act request that does not mention the two other Runway 19 approach procedures also amended in 2015. And Maryland's claim that this letter to Senator Van Hollen was the first time it had ever learned that the FAA had categorically excluded that procedure is contradicted by the April 2017 meeting minutes of DCA Working Group.

Of course, even if Maryland were correct that it could sue in response to the FAA's letter about the Freedom of Information Act request, the petition for review would still be untimely. This Court has squarely rejected the notion that timeliness under 49 U.S.C. § 46110(a) is based on the date that a party first experiences the direct "real-world impacts" of an order. *Citizens Ass'n of Georgetown*, 896 F.3d at 434. The FAA's order must be challenged when it is first "issued." *Id.* In any event, if Maryland seeks redress from aircraft noise, then those injuries began in April 2015, and any alleged procedural injuries stemming from the categorical exclusion of those procedures also occurred on the dates of publication in 2015. Although this Court has

permitted a petition to wait while it has a reasonable expectation that the FAA is going to change its procedures, *City of Phoenix*, 869 F.3d at 968, that is not Maryland's argument here. Instead, Maryland relies on its hope that the FAA might produce more documents in response to another party's Freedom of Information Act request. Rather than indicating that Maryland thought litigation would be unnecessary, Maryland's actions here suggest it anticipated litigation and wanted to strengthen its position prior to filing suit. Those are not "reasonable grounds" for delay.

4. The Governor's belated correspondence to the FAA did not justify the state's delay in filing suit.

Maryland failed to file a timely petition for review after *all* of the inflection points in its highly selective history of the three years since the FAA first amended arrival procedures into Runway 19, and its petition must now be dismissed. Maryland did not sue within 60 days after the FAA told the DCA Working Group how it had changed south-flow arrival procedures along the Potomac River. Maryland did not sue within 60 days after the FAA told the same group in December 2016 that it would only proceed with implementing a different, GPS-based arrival procedure if the group would formally endorse it, and after the group declined. Maryland did not sue within 60 days after the FAA gave a presentation to that group in April 2017 that demonstrated some aircraft operations were now nearer to Maryland as a result of those 2015 changes. Maryland did not sue within 60 days after that same meeting, where FAA officials explained that those 2015 amendments were categorically excluded from NEPA. And Maryland did not even sue even within 60 days of publicly announcing that it would take immediate legal action against the FAA.

Maryland's final attempt to establish timeliness focuses on the FAA's response to a 2018 letter from the Governor as the basis of this Court's review. AR F_i_01. But this letter was not a final decision of any kind, and it only repeated what the FAA had been telling the State for more than a year. Maryland's representatives had previously complained to the FAA about aircraft noise both at the DCA Working Group and at the BWI Roundtable. When the BWI Roundtable asked the FAA to vacate its DC Metroplex decision and to use procedures at National Airport, Dulles, and BWI that were flown before 2013, the FAA clearly declined. AR F_i_05 at 2 (May 2017 letter from the Governor of Maryland recounting the FAA's explanation that it "would not return to the pre-NextGen flight paths"). The Governor then waited another two months before sending another letter requesting that the FAA address "flight path changes at Ronald Reagan Washington National Airport." AR F_i_04 at 1. That letter referred to the previous exchange, which had been about the DC Metroplex, so the FAA understood this request to be a repeated attempt to have the FAA undo that decision. The FAA replied two days later to say again that undoing the DC Metroplex "is not possible." AR F_i_03 at 2.

The Governor did not write back. At this point in fall 2017, the DCA Working Group was not moving forward with the proposed GPS-based arrival procedure into Runway 19, and no other proposals to change the procedures amended back in 2015 were being discussed. The BWI Roundtable was still trying to get the FAA to revert back to flight paths that pre-dated the DC Metroplex, and it was focused only on procedures at BWI. *See* AR F_ii_07. No one reasonably expected a substantial change to south-flow arrivals into National Airport in the near future.

Consequently, in September 2017, the Governor of Maryland directed the Attorney General to take "immediate legal action" against the FAA, claiming that "[a]ny further delay" would cause harm to Maryland residents. AR G_02. The next month, the Attorney General hired the law firm that now represents Maryland in this Court. *Id.* Even then, another few months passed without the State's taking any legal action or writing to the FAA. *Seven months* after directing the Attorney General to take "immediate legal action," the Governor wrote to the FAA again to complain of the FAA's "recent implementation of Next Generation Air Transportation System airspace changes in the vicinity" of BWI and National Airport. AR F_i_02. The letter references both "the D.C. Metroplex process and stand-alone actions" as the source of Maryland's concerns. *Id.* Maryland now focuses intently on this phrase in its brief, objecting that the FAA only mentions the Metroplex in its response. Op. Br. at 43. But these letters arose out of the BWI Roundtable's objections to the DC Metroplex, and this April 2018 letter was the very first one to allude, however obliquely, to any FAA decision other than the Metroplex. The letter begins by talking about "Next Generation" changes, which can mean RNAV procedures such as the RNAV (RNP) RWY 19 approach procedure, but in no way refers to other types of procedures like the LDA Z and River Visual approaches. Maryland never mentioned Runway 19 approaches in any of these letters, and complained only about the Metroplex and other next-generation procedures, so the FAA reasonably did not interpret the letter to also include Runway 19 approaches and other types of procedures.[5]

[5] Maryland was certainly aware of the issues around Runway 19 approaches, as the FAA had discussed those approaches with the DCA Working Group starting in

Maryland would like to make this letter an ultimatum, establishing the point in time at which "reasonable grounds" for delay ended and a new 60-day period to sue began. Op. Br. at 24. But that theory has nothing to do with "final agency action" under the Administrative Procedure Act or even a change of position on FAA's part. Instead, the letter purports to offer the FAA a "last chance" to revise "the NextGen procedures," or else litigation would follow. *Id.* The FAA explained in response that any petition filed in court would be much too late. AR F_i_01.

And it is. Maryland cannot extend its deadline to sue simply by sending a letter after the filing deadline that attempts to unilaterally reopen the judicial review period. This Court has held that a letter requesting "final" reconsideration of an agency decision after time to seek judicial review had expired could not itself establish a date of accrual. *Impro Products, Inc. v. Block*, 722 F.2d 845 (D.C. Cir. 1983). "This line of analysis is patently specious," and a "contrary rule would provide parties with an easy means to circumvent the statute of limitations . . . simply by writing a letter requesting reconsideration." *Id.* at 850. That principle also applies here, and the outcome should be no different.

Maryland says that the FAA's response to this final letter created "additional uncertainty," Op. Br. at 43, but does not say what the uncertainty was. The State did not ask the FAA to do anything about approaches to Runway 19 of National Airport. Instead, it threatened "legal action to address the shortcomings of FAA's NextGen

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December 2015. Maryland's brief includes a graphic from the FAA's November 2016 presentation to that group. Op. Br. at 15. But Maryland chose not to mention Runway 19 in its letters to the FAA.

implementation in the D.C. Metroplex." AR F_i_02 at 1. The procedures challenged in this case were not part of the Metroplex, and the FAA had already explained a year earlier that the Metroplex decision would not be reversed. The State otherwise never engaged the FAA *at all* about the approach procedures amended in 2015, and relies now on statements from county-government representatives at the DCA Working Group in 2015 and 2016. But that reliance is entirely misplaced.

Maryland was required to challenge the 2015 amendments to arrival procedures within 60 days of their publication date, and it failed to do so. This Court therefore lacks subject-matter jurisdiction over the petition for review. 49 U.S.C. § 46110(a). Although Maryland posits a number of different points in the intervening years at which it alleges it reasonably believed that a petition was still timely, this Court need not expressly determine whether any of those would provide a basis for suit. Maryland filed only within 60 days of the FAA's April 2018 letters to the Governor and Senator Van Hollen, neither of which provided new information or made any legally-relevant changes. Maryland otherwise failed to sue within 60 days of any of the other various statements or actions of the FAA that Maryland recounts at length in its brief.

The petition for review is untimely, Maryland has no reasonable grounds for its untimeliness, and the petition must be dismissed.

II. The FAA reasonably concluded that the challenged amendments to air-traffic procedures were categorically excluded from further NEPA review.

Should this Court nevertheless conclude that the petition for review is timely, it should deny the petition on its merits. Maryland does not allege that the changes in

aircraft noise resulting from the FAA's changes in 2015 arrivals would require an environmental impact statement under NEPA or that the changes would require mitigation or further action under the National Historic Preservation Act or Section 4(f) of the Department of Transportation Act. Maryland alleges only the procedural injury of not having documents that reflect the FAA's thought process during the decision to apply categorical exclusions to these air-traffic procedures. But the FAA reasonably concluded that these categorical exclusions were appropriate, and neither the law nor any applicable FAA guidance required the agency to further document that conclusion.

A. The FAA properly applied pre-existing categorical exclusions to each of the amended air-traffic procedures.

Each of the three changes made in 2015 fell neatly into pre-existing categories of actions that FAA had previously determined would not lead to "significant" environmental impacts and therefore required no further NEPA review.

The RNAV (RNP) RWY 19 procedure was amended in April 2015 to align more closely to the Potomac River, using next-generation navigational technology to mimic the longstanding "river leg" of the River Visual approach into National Airport. *Supra* p. 7-8. The FAA has established a categorical exclusion for the establishment of procedures that use "Radio Navigation System (RNAV), or essentially similar systems," to fly an "overlay of existing procedures." AR C_07 at 3-14, ¶ 311g. That categorical exclusion applies here, where the "river leg" was overlaid with traffic flying the same path but using next-generation navigational technology to do so.

The April 2015 amendments to the LDA Z RWY 19 approach procedure were "modifications to currently approved instrument procedures conducted below 3,000 feet [above ground level] that do not significantly increase noise over noise sensitive areas." *Id.* at ¶ 311i. The FAA defines a "noise sensitive area" to include those areas within the 65 Day-Night Level ("DNL") noise contour, meaning that they receive a weighted average of 65 decibels of aircraft noise (or more) over the course of a 24-hour period. *Id.* at 1-8, ¶ 11b(8). No area of Maryland under or near the adjusted LDA Z procedure receives such high levels of aircraft noise.[6] In addition, the LDA Z procedure is used for less than 10% of arrivals, and so the FAA reasonably concluded that amending the procedure would not significantly increase noise over noise-sensitive areas.

The final change, made to the River Visual approach procedure in December 2015, eliminated two of the optional over-land variations, meaning that all aircraft following this procedure would track the Potomac River. *Supra* p. 8. Publication of this amendment was also categorically excluded from NEPA, as a "[p]ublication of existing air traffic control procedures that do not essentially change existing tracks, create new tracks, change altitude, or change concentration of aircraft on these tracks." AR C_07 at 3-14, ¶ 311k. Instead of creating "new tracks," the amendment deleted two alternative tracks so that incoming arrivals would be streamlined into a

[6] The current 65 DNL contour around National Airport is depicted in Exhibit VI-5 of AR B-02. The contour is primarily over the airport and the Potomac River; it touches no land within the boundaries of Maryland.

single arrival path over the river. The remaining flight path (the "river leg") was not changed.

The adjustment to the River Visual approach procedure did not appreciably "change concentration of aircraft on these tracks." *Id.* South-flow approaches into National Airport follow a path along the Potomac River whenever weather permits. Representations of actual flight tracks confirm this. *Compare* AR E_03 at 8 with *id.* at 9. Whether those flights are following the RNAV (RNP) RWY 19, the River Visual, or another procedure altogether, is not readily discernible from these graphics because the difference in actual flight tracks (i.e., where the planes are located) is nearly imperceptible.

Each categorical exclusion applicable here applies because of the design characteristics of the relevant procedure.[7] Maryland's protestations that the FAA was required to engaged in additional study of the potential environmental effects of each procedure are misplaced. Promulgation of these categorical exclusions by the FAA *was* the point at which the potential environmental impacts of these types of actions was considered, and the agency concluded then that these actions are not likely to have any significant effect for NEPA purposes. As the Council on Environmental Quality observed, "for some activities with little risk of significant environmental effects, there may be no practical need for, or benefit from, preparing any documentation beyond

[7] An additional basis for categorically excluding amendments to the LDA Z arrival procedure, used in low-visibility conditions, is the fact that it did not "significantly" increase noise over noise-sensitive areas. AR C_07 at 3-14, ¶ 311i. But reliance on this fact is unnecessary for application of that categorical exclusion here, because the amended procedure did not take place over a "noise-sensitive area" at all.

the existing record supporting the underlying categorical exclusion and any administrative record for that activity." 75 Fed. Reg. at 75,630. Maryland has not challenged the validity of the underlying categorical exclusions in this case, and the FAA has done all that is required of it here.

Maryland suggests that application of these categorical exclusions is a post hoc rationalization that does not reflect the agency's reasoning at the time. Op. Br. at 46. The record is to the contrary. The FAA informed the DCA Working Group two years ago that these procedures were categorically excluded. AR D_i_01 at 122. The FAA also explained this to Senator Van Hollen in response to his inquiries in 2017. AR F_ii_01. Because both of these instances were responses to requests for contemporaneous documentation, the FAA did not fully detail the individual application of the categorical exclusions.

The case law cited by Maryland on this point is inapposite. Op. Br. at 46-48. The Tenth Circuit objected to a post hoc explanation of a categorical exclusion in the context of an agency's preparation of an environmental assessment under 40 C.F.R. § 1508.9. *Utah Environmental Congress. v. Forest Service*, 518 F.3d 817, 825 n.4 (10th Cir. 2008). In that case, the categorical exclusion made no mention of the type of action undertaken by the Forest Service, and so the court held that additional explanation was warranted. *Id.* Courts that have sought a "short statement" in the administrative record, Op. Br. at 47, have done so where the factual applicability of a particular categorical exclusion was being challenged, and they have been careful not to hold that the law requires such a statement in every case. *See, e.g.*, *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 & n.10 (11th Cir. 2004) (citing *Edmonds Institute v.*

Babbitt, 42 F. Supp. 2d 1, 18 n.11 (D.D.C. 1999)). In this case, the text of the relevant categorical exclusions makes their applicability clear.

B. No law or FAA guidance required the FAA to further document its application of these categorical exclusions.

1. The applicable FAA Order did not require the agency to document the categorical exclusion at the time.

"Once categorical exclusions are promulgated, with notice and public procedure, by the FAA," the FAA need not "repeatedly document that an activity is within a listed categorical exclusion and no extraordinary circumstances exist." AR C_07 at 3-4, ¶ 305. "The decision that a proposed action is within a categorical exclusion and that no extraordinary circumstances exist shall not be considered deficient if it is not supported by documentation verifying that the proposed action is categorically excluded." *Id.* Therefore, the applicable guidance unambiguously did not require further NEPA documentation of these categorical exclusions.

Maryland asks this Court to evaluate the FAA's decision based on a later revision to FAA's NEPA Order, which was finalized in July 2015. Op. Br. at 48, citing AR C_04. Order 1050.1F (which is the most recent version) changed the FAA's documentation practices to require "a simple written record" identifying which categorical exclusions were applied, if any, and whether any "extraordinary circumstances" existed. AR C_04 at 5-3. But that newly revised order did not apply to the changes being challenged here. That is self-evidently true with respect to the FAA's amendments to the RNAV (RNP) RWY 19 and LDA Z procedures, which were published and finalized in April 2015 (before the July publication of Order

1050.1F). Maryland implicitly concedes this, focusing exclusively on the documentation requirements of Order 1050.1F as applied to changes to the River Visual procedure in December 2015. Op. Br. at 48-49.

But that Order applied only "to the extent practicable to ongoing activities and environmental documents begun before the effective date" in July 2015. AR C_04 at 1-3, ¶ 1-9. The new procedural requirements of Order 1050.1F "should not apply to ongoing environmental reviews where substantial revisions to ongoing environmental documents would be required" or to "decisions made . . . prior to the effective date of this Order." *Id.* The record makes clear that the changes to the River Visual had been under consideration for a while by the time that Order 1050.1F took effect. The amendment was "in the process" of development by February 2015. AR A_iii_07. The proposed amendment was submitted for flight check in June 2015, on a form that indicates that review of the amendment was opened almost a year earlier. AR A_iii_14. Air-traffic procedures are not submitted to these final safety evaluations until all prior approvals, including any required environmental review, is complete. Thus by July 2015, when the FAA's newly revised NEPA Order took effect, the FAA reasonably did not apply it retroactively to this amended procedure that was almost ready for publication. *See Vaughn v. FAA*, 756 Fed. Appx. 8, 13 (D.C. Cir. 2018) (deferring to the FAA's interpretation of its own internal timelines when determining when environmental analysis of an air-traffic procedure began).

2. The purposes of NEPA would not be served by requiring more extensive documentation.

Once an agency has promulgated a categorical exclusion, it has satisfied the requirements of NEPA for all actions that fit within that category. Congress limited the procedural requirements of NEPA to those federal actions "significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), which by definition does not include any federal action that falls within a categorical exclusion. Imposing additional procedural requirements on categorically excluded actions does not further the purposes of the statute.

Congress did not explicitly discuss categorical exclusions in the text of NEPA; rather, they are described in the regulations promulgated by the Council on Environmental Quality for use by all federal agencies. *Supra* p. 3-4. Those regulations require documentation of the *creation* of a categorical exclusion, 40 C.F.R. § 1508.3, but not its *application*. In its most recent guidance for federal agencies, the Council emphasized that whether any documentation is required for an individual application of a categorical exclusion is at the discretion of the action agency. 75 Fed. Reg. at 75,631. The FAA has promulgated regulations governing compliance with NEPA and other environmental statutes, 14 C.F.R. Part 150, and guidance for its personnel to follow when evaluating the potential environmental impacts of its actions. AR C_07. The FAA applied the categorical exclusions outlined in that Order and followed all applicable procedures. Nothing more was required of the agency.

Maryland notes correctly that NEPA's primary purpose is to inform both the decisionmaker *and* the public about potentially significant effects on the human environment. Op. Br. at 45-46 (citing *Robertson v. Methow Valley Citizens Council*, 490

U.S. 332, 349 (1989)). But in *Robertson*, the Supreme Court was speaking specifically of significant federal actions that required an environmental impact statement and therefore were subject to requirements to solicit and respond to public comments on the proposed action. 490 U.S. at 349. Here, in contrast, the FAA was not subject to any public-notice requirements under NEPA, and the public had no role in designing or implementing these minor adjustments to existing air-traffic procedures.

To be sure, Maryland may prefer additional opportunities for public input and additional documentation to review any time that the FAA makes a decision. But the question for this Court is whether NEPA imposes any such requirements, and the answer is that NEPA does not. "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." 40 C.F.R. § 1500.1(c). Where no evidence exists that use of a particular categorical exclusion was improper, further documentation of the application of that categorical exclusion would have no impact on the outcome of the agency's decision-making process, and so it would not serve NEPA's primary purpose of adding information about environmental impacts to that process.

3. No "extraordinary circumstances" precluded use of these categorical exclusions.

Categorical exclusions promulgated by a federal agency "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. The FAA's categorical exclusions accordingly contain exceptions for extraordinary circumstances that might arise. AR C_07 at 3-3 ¶ 304. If such circumstances arise, an otherwise categorically

excluded action might require an environmental assessment to determine whether significant impacts are likely. *Id.* But further NEPA analysis is required only when extraordinary circumstances are present *and* when the proposed action "may have a significant effect." *Id.* (citing 40 C.F.R. § 1058.4).

Maryland identifies two circumstances that it believes required the FAA to prepare additional NEPA documentation. First, Maryland alleges that shifting flights over the Potomac River and therefore closer to Maryland "had the 'potential' to significantly increase noise over resources and communities in Maryland." Op. Br. at 50. Maryland cites here the requirements of FAA Order 1050.1F, which did not apply to the challenged procedures. *Supra* p. 37. But the applicable Order 1050.1E contains a similar provision, requiring additional NEPA analysis when an action has an "impact on noise levels of noise-sensitive areas" that may be "significant" for NEPA purposes. AR C_07 at 3-4, ¶ 304f. Neither factor was present here. The changes that the FAA made in 2015 did not occur over "noise-sensitive areas," which are areas experiencing the 65 DNL level of aircraft noise that identifies the threshold of potentially "significant" impacts. *Supra* p. 33. Nor did the FAA have before it any evidence that the small lateral shift in air traffic would increase aircraft noise in Maryland so much that the thresholds of concern established by regulation could potentially be crossed. 14 C.F.R. Part 150 at Appendix A.

Maryland also suggests that the FAA's actions were so "highly controversial on environmental grounds" that a categorical exclusion could not be applied. Op. Br. at 50-51. In Maryland's view, the FAA should have anticipated "opposition by the State of Maryland, its local governments, and communities." *Id.* at 51. But that opposition is

not the type that would require the agency to prepare an environmental assessment. "The term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or *effect* of the major federal action rather than to the existence of opposition to a use." *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (emphasis in original) (quoting *Foundation for North American Wild Sheep v. U.S. Dep't of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982)). A "controversial" matter must involve a substantial dispute about the underlying basis of the agency's significance determinations. No such dispute exists here.

Maryland has heard complaints from its residents about aircraft noise, which they allege is caused by these challenged amendments. As the FAA's own presentation (reproduced in the opening brief) indicates, some operations are now closer to Maryland as aircraft fly over the Potomac River before arriving at National Airport. But what is missing is any indication that this small lateral shift in traffic that did not change the number of operations, in an area well outside 65 DNL contours, could have resulted in a "significant" increase in noise. AR C_07 at A-61 (requiring at least a 1.5 increase in DNL at or above a baseline of 65 DNL for a noise increase to be "significant"). Perhaps Maryland believes that the FAA's criteria for the development of air-traffic procedures should account differently for the effects of aircraft noise. But this petition is not an appropriate vehicle for addressing those concerns. "NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by an agency, as 'NEPA was not intended to resolve fundamental policy disputes.' " *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) (quoting *Foundation on Economic Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987)).

That some Maryland residents object to the change is not an indication that "extraordinary circumstances" precluded the application of a categorical exclusion. To impose additional NEPA obligations on the FAA's decisions, "something more is required besides the fact that some people may be highly agitated and be willing to go to court over the matter." *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 33 (D.D.C. 2016). The FAA reasonably concluded that its categorical exclusions applied to the three challenged air-traffic procedures at issue here.

C. The FAA's 2015 amendments caused no "adverse effects" under the National Historic Preservation Act and did not "use" any property under Section 4(f) of the Department of Transportation Act.

When the potential environmental impacts of a changed air-traffic procedure are caused by aircraft noise, subject to limited exceptions for resources characterized by their quiet settings, the significance threshold used for NEPA evaluation is used for determining whether an action has "adverse effects" on historic properties, or whether the action will "use" a property under Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c).[8] The FAA reasonably concluded that its 2015 amendments to pre-existing air-traffic procedures had no potential to cause effects to historic properties under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306018, and therefore would not "use" property under Section 4(f). The FAA's actions did not introduce aircraft noise over protected properties that were not

[8] The cited statute has been recodified, and so the relevant provisions are no longer actually found in "section 4(f)" of the statute. However, the current statute acknowledges that these requirements "are commonly referred to as section 4(f) requirements," 49 U.S.C. § 303(f)(1), and we continue to do so here, consistent with the applicable case law.

already experiencing aircraft noise from existing flight tracks. *Compare* AR E_03 at 7 with *id.* at 8.

First, the FAA's 2015 amendments to Runway 19 approaches did not "use" properties protected by Section 4(f) of the Department of Transportation Act. That statute imposes additional requirements on the approval of "a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance." 49 U.S.C. § 303(c). Air-traffic procedures implemented by the FAA generally are subject to these statutory requirements. But the statute does not prohibit all impacts on protected lands—it only prohibits those that "use" the land. *Id.* "With respect to aircraft noise, for example, the noise must be at levels high enough to have negative consequences of a substantial nature that amount to a taking of a park or portion of a park for transportation purposes." AR C_07 at A-20, ¶ 6.2f.

But even a "significant" increase in noise would not necessarily result in a taking of property. *See*, *e.g.*, 14 C.F.R. Part 150 Appendix A Table 1 (identifying "uses" of land that are compatible with varying levels of aircraft noise above 65 DNL); *see also* AR C_07 at A-13 to A-14. Accordingly, where no significant increases were likely, and where the resources below were already subject to aircraft noise from jets, there was no reason for the FAA to further document that no property would be taken for purposes of Section 4(f). *Contra City of Phoenix*, 869 F.3d at 974 (ruling that the FAA could not reasonably rely on its Part 150 guidelines where the action would increase air traffic over historic districts by 300% in an area not previously overflown by jets).

Similarly, the record demonstrates that no "adverse effects on historic properties" under the National Historic Preservation Act could be anticipated from the 2015 adjustments of Runway 19 approaches. 36 C.F.R. § 800.1(a). The regulations of the Advisory Council on Historic Preservation provide examples of the types of adverse effects to be assessed by federal agencies. *Id.* § 800.5(a)(2). For undertakings that would not cause direct physical effects to a historic resource, such as an amended air-traffic procedure, consideration must still be given to whether the undertaking will cause the "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." *Id.* § 800.5(a)(2)(v). Here, the record clearly demonstrates that Maryland is alleging an incremental increase in noise, not the "introduction" of new visual or audible impacts. Aircraft noise has been a longstanding concern for communities along the banks of the Potomac River, leading to the 2004 recommendation from the Metropolitan Washington Airports Authority to keep aircraft over the river. The FAA's attempts to follow that recommendation did not introduce new visual or audible impacts to Maryland's historic resources, nor cause an adverse effect.

The FAA did all that was required of it to comply with NEPA, the National Historic Preservation Act, and the Department of Transportation Act.

III. Vacating the amended Runway 19 approaches is not warranted.

Should this Court rule that the FAA was arbitrary or capricious in its amendment of any of the three approach procedures amended in 2015, the appropriate remedy is to remand *without* vacating that procedure. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (citing *NRDC v. EPA*, 489 F.3d 1250,

1262 (D.C. Cir. 2007) and "noting this Court's practice of remanding without vacatur"). In considering whether to vacate agency action, this Court weighs: (1) "the seriousness of the order's deficiencies" and (2) "the disruptive consequences" of agency actions in the interim. *Allied Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993). In the NEPA context, in particular, this Court conducts a "particularized analysis of the violations that have occurred," weighing "the possibilities for relief" and "any countervailing considerations of public interest." *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016).

As to the first factor, the only deficiencies alleged by Maryland are procedural and can be cured while the procedures are still in use. Were the FAA to revisit its determination that a categorical exclusion was appropriate here, it would very likely reach that same conclusion, given the evidence in the record. This Court will remand without vacating when an agency can show "at least a serious possibility" that the agency "will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151. Because the FAA is aware of no evidence of a "significant" impact that would require additional NEPA analysis, there is at least a "serious possibility" that the amended procedures would still be categorically excluded after remand. Similarly, there is no reason to believe that either the National Historic Preservation Act or the Department of Transportation Act would require further action in the circumstances of this case. The agency can more fully document these conclusions without a need for the procedures to be vacated in the interim.

The second factor also weighs in favor of not vacating these amended procedures. Although Maryland blithely suggests that during the remand "the FAA

can safely and efficiently revert to the previous versions of those approach paths," Op. Br. at 56, the reality is not so simple. The previous versions have been canceled or deleted, and they could not be used before they underwent a full review and publication process that could take months. Air traffic controllers would also have to be trained to use the replacement procedures. During that time period, the FAA could potentially have no viable approaches to assign aircraft, and would have to direct (or "vector") each aircraft independently. Vectoring requires frequent contact between the aircraft and the tower, which creates more opportunities for miscommunication and could cause significant delays at National Airport. The disruption these delays would cause is not justified by the procedural harms alleged in this case, and this Court should therefore not vacate the procedures if it decides the FAA committed a procedural error in its environmental review.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of subject-matter jurisdiction or denied on its merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 Garamond, 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 **12,781** words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word 2016.

s/ J. David Gunter II
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached document(s) with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the Appellate Electronic Filing system on April 11, 2019.

s/ J. David Gunter II
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