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 REPLY BRIEF

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GLOSSARY

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), this brief does not cite any statutes, regulations, or agency orders not previously cited by another party or not contained in the Administrative Record.

INTRODUCTION

When the FAA revised the flight paths into Runway 19 at National Airport, it shifted 12,000 to 16,000 flights per year into Maryland to address noise complaints in Virginia. Opening Br. 11-15 (citing AR A_ii_20, DCA Runway 19 Noise Complaint Area (Feb. 24, 2012); AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017)). The FAA does not contest that, even though it purposely designed the revisions to move noise from one state to another, it did not notify the public of its plan. Rather, the FAA insists that "the public had no role in designing or implementing these minor adjustments to existing air-traffic procedures." Answering Br. 39.

The FAA cannot cure its violation of federal law by labeling the changes "minor adjustments." There is no evidence in the record to support that self-serving, after-the-fact characterization of the revised procedures. The FAA performed no noise analysis to assess the effect that shifting flights into Maryland would have on Maryland's communities, historic properties, parks, or recreation areas. The FAA's brief simply asserts, without citing to record evidence, that the noise impacts were "incremental" and therefore insignificant. Answering Br.

42-44. That is not reasoned decision making; it is *post hoc* rationalization.

Because the FAA cannot defend its actions on the merits, it urges this Court to dismiss Maryland's petition as untimely. But the FAA's failure to provide notice of its plan, the FAA's repeated public reassurances that it would collaborate with the Working Group on further changes, and the FAA's concealment of its lack of environmental analysis all constitute reasonable grounds for Maryland not having filed suit earlier than it did. This Court should find that Maryland's suit is timely, hold that the FAA's revisions to the Runway 19 flight paths are arbitrary and capricious, and vacate those revisions to ensure that the FAA performs a full analysis with appropriate opportunities for public input before changing flight routes into Runway 19.

ARGUMENT

I. Maryland's petition is timely.

A. The FAA's failure to notify the public of its plan tolled the limitations period on the April 2015 amendments.

When the FAA provides inadequate notice of an action, the 60-day limitations period is tolled until the "FAA provide[s] adequate notice." *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 485-86 (D.C. Cir.

1989). Here, the FAA provided inadequate notice of its April 2015 revisions to the RNAV RNP and LDA Z approaches. Those revisions moved the FERGI waypoint into Maryland. *See* Opening Br. 12-13. But the FAA did not disclose until December 2015 that it would incorporate those changes, including the new FERGI waypoint, into the River Visual procedure. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6.

The FAA's omission was material because 78% of aircraft approaching National from the north use the River Visual procedure. AR E_03, DCA South Flow Arrivals at 29 of 58 (Feb. 16, 2017).[1] Thus, it was not until the FAA incorporated the new routes with the FERGI

[1] The FAA cites an unauthenticated, extra-record video from YouTube to illustrate the River Visual approach. Answering Br. 6 n.1. The Court should disregard this impermissible extra-record evidence, particularly because it is inaccurate. The video does not show how pilots on the River Visual approach could choose to fly over land and communities in Virginia, which generated the very noise concerns that prompted the FAA to act here. AR A_iii_03, River Visual Amendment 4 (permitting pilots to fly the "148º inbound" over Virginia); AR A_ii_20, DCA Runway 19 Noise Complaint Area (Feb. 24, 2012) (highlighting area of noise complaints). Nor does the video show how pilots on the revised River Visual approach now proceed from waypoint FERGI, which puts the noise from thousands of flights per quarter over land and communities in Maryland. AR A_iii_02, River Visual Amendment 5 (Dec. 10, 2015); AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017).

waypoint into the River Visual approach that the public could have possibly known that the FAA was shifting most flights out of Virginia and into Maryland. No one could have guessed the FAA's plan in April 2015.

In its answering brief, the FAA does not dispute that it designed the three amendments as a coordinated package of changes to address noise complaints in Virginia by moving flights elsewhere. The FAA also points to no place in the record where it gave advance notice to the public of that coordinated plan. The April 2015 Federal Register notice relied on by the FAA merely listed the RNAV RNP and LDA Z approaches with no discussion of the proposed changes, and the notice made no mention whatsoever of the River Visual approach. *See* AR A_iv_01, 80 Fed. Reg. 19,515, 19,516 (Apr. 13, 2015). Even if the public could have later found the revised RNAV RNP and LDA Z schematics, there was no explanation, analysis, or other material that would have informed the public what the FAA was doing and what it would mean for noise. *See* AR A_ii_06, RNAV RNP Amendment 2 (Apr. 30, 2015); AR A_i_03, LDA Z Amendment 3 (Apr. 30, 2015). The FAA kept its plan secret until December 10, 2015, when it finally told the Working

Group about the changes to the River Visual approach. AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6.

The FAA mischaracterizes its mistake as a simple "lack of explanation." Answering Br. 16. The problem is much worse. The FAA segmented its plan into discrete components, undertook the first two changes, and then waited eight months to announce the *coup de grace*. The FAA cannot use that tactic to evade judicial review. *See City of Phoenix v. Huerta*, 869 F.3d 963, 970 (D.C. Cir. 2017) (explaining that the FAA cannot stall "long enough for sixty days to lapse and then . . . argue that the resulting petitions were untimely."). This Court should hold that the FAA's defective notice tolled the limitations period on the April 2015 changes until December 2015. *See McArtor*, 866 F.2d at 485-86; *Aviators for Safe & Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 226 (1st Cir. 2000) (holding that limitations period was tolled until the FAA issued enforcement policy clarifying scope and effect of ambiguous regulation).

B. Maryland reasonably expected that the FAA would revise the procedures to address the noise problems without the need for a lawsuit.

Even after the FAA's December 10, 2015 announcement to the Working Group, the limitations period on the FAA's actions remained tolled because the FAA's "serial promises" led Maryland to believe 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. As soon as the FAA revealed how it had changed the River Visual approach, the Working Group suggested that "[a]nother option would be to develop an RNAV GPS procedure," and the FAA said that it "could review the development of an RNAV GPS procedure." AR D_i_01, DCA Working Group Summary, Dec. 10, 2015, at 2-3/6. The FAA's answering brief entirely omits any mention of that crucial exchange, instead asserting (inaccurately) that the Working Group raised "no objections to the changes." Answering Br. 9; *see also id.* at 21-22.

The FAA also notes that no Maryland representatives attended the December 10, 2015 Working Group meeting. That is true, but as the FAA also admits, Maryland was monitoring those discussions. Answering Br. 29 n.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 December 2015."). It does not matter *who* asked the FAA to change the procedures; it only matters that the FAA's public statements confused "reasonable observers," such as Maryland, about whether a lawsuit was necessary because the FAA said it might revise the procedures and fix the noise problem. *City of Phoenix*, 869 F.3d at 970.

A Maryland representative (Ken Hartman) also attended the next Working Group meeting and voted in favor of a unanimous resolution asking the FAA to develop an alternative procedure. AR D_i_01, DCA Working Group Summary, Feb. 25, 2016, at 4/10, 10/10. The FAA agreed to and did in fact begin to develop such a procedure. *Id.*; *see also id.*, Aug. 11, 2016, at 4-6/11; *id.*, Sept. 29, 2016, at 2-6/11. Those events undermine the FAA's suggestion that it was unclear whether any changes were in the works. The overall picture that the FAA's repeated reassurances presented to the public was that the revisions it had just announced were not set in stone and could change based on discussions with the Working Group. *See* Opening Br. 16-20.

The FAA also argues that, by the end of 2016, it was clear that "no adjustment to Runway 19 approaches were imminent." Answering Br. 23. But neither the FAA nor Maryland or its representatives on the Working Group gave up on the discussions at the end of 2016. The FAA points to no statement that work to adjust the Runway 19 approaches was abandoned at that time, despite the many Working Group meetings in which the FAA participated. To the contrary, in November of 2016, the Working Group, which was unwilling to endorse the FAA's initial proposed changes, asked the FAA to develop an approach that "centers aircraft over the Potomac River from at least the American Legion Bridge." AR D_i_01, DCA Working Group Summary, Nov. 3, 2016, at 5/11. The FAA agreed to "systematically study" that proposal and to provide "modeling and possible alternatives for the Working Group to consider." *Id.* at 5/11, 9/11.

The FAA again omits from its brief those crucial representations and other subsequent events that undermine its position. After making the commitment to continue working on the proposed changes, the FAA presented detailed information to the Working Group showing how the revised Runway 19 procedures had shifted thousands of flights per

quarter into Maryland. Discussions about changes to the procedures later continued all the way through March 2018, albeit at less frequent intervals. *See* Opening Br. 19-20. When those discussions finally broke down, Maryland followed up with its April 2018 letter requesting the FAA to enter into a formal memorandum of understanding, which the FAA refused, prompting Maryland to file suit. *Id.* at 22-24.

This Court's holding in *City of Phoenix* supports Maryland's decision to refrain from filing suit until that time. If Maryland had filed suit earlier, it would have risked "shut[ting] down dialogue" between the FAA and the Working Group. *City of Phoenix*, 869 F.3d at 970. To be sure, the FAA and the Working Group here collaborated on possible changes over a longer period than occurred in *City of Phoenix*, and in some instances, more than 60 days elapsed between Working Group sessions. But the critical fact is that, in recognition of its total failure to provide the public with advanced notice of the revised procedures, the FAA publicly committed to collaborate with the Working Group on further changes, and the collaborative process remained in effect throughout the entire period that Maryland forestalled filing suit. As this Court has explained, the "key" factor is that "the agency left parties

'with the impression that [it] would address their concerns' by replacing its original order with a revised one . . . [and] the agency's comments 'could have confused the petitioner and others'" about the need for a lawsuit. *Id.* (quoting *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 596, 603 (D.C. Cir. 2007)).

The FAA urges the Court to disregard the Working Group discussions because they were about the "possibility of a *new* procedure, not about further modifications to any of the existing procedures." Answering Br. 23. That distinction makes no difference. If the FAA had implemented a GPS procedure centering aircraft over the river starting at the American Legion Bridge, the FAA also would have had to consider revoking or revising the three problematic procedures at issue here, including by eliminating or moving the FERGI waypoint in Maryland.

The entire point of the proposed new GPS procedure was to rely on satellite navigation rather than less-precise manual navigation in the River Visual procedure. The new procedure also would have put planes over the river at a point farther from National Airport, thereby reducing noise from the FERGI waypoint in Maryland. As a practical

matter, those revisions would have fundamentally altered how FAA routes aircraft through the corridor. The proposed new procedure therefore necessarily contemplated modifications to the previous procedures. *See* Answering Br. 15 (air-traffic instrument procedures "are rarely developed and used in isolation; they build on one another, becoming part of a complex, interdependent network of procedures").

The FAA also cites a newspaper article to assert that Maryland publicly announced its intention to sue the FAA in September of 2017. Answering Br. 11. That newspaper article has nothing to do with Runway 19 at National Airport. The article instead concerns an increase in "noise complaints in previously unaffected neighborhoods around *Baltimore/Washington International Thurgood Marshall Airport*" caused by "lower flight paths [that] were phased in at *BWI Marshall* in 2015." AR_G_02 (emphasis added). The article about suing the FAA over the new flight paths at BWI Marshall Airport has no bearing on whether Maryland had reasonable grounds to refrain from filing suit over flights into Runway 19 at National Airport.

The FAA's brief also frequently conflates discussions regarding its "DC Metroplex" decision with discussions over its separate decision to

revise the flight paths into Runway 19. Answering Br. 10-11, 28-29. To be clear, as the FAA admits elsewhere, the Runway 19 "procedures challenged in this case were *not* part of the Metroplex." Answering Br. 31 (emphasis added); *see also* Opening Br. 23 (quoting FAA Mot. to Dismiss, Doc. No. 1745317 at 8 (Aug. 13, 2018)). The BWI Roundtable's efforts regarding the FAA's DC Metroplex decision were entirely separate from the DCA Working Group's efforts to address the revised routes into Runway 19 at National Airport. *Id.*

Ruling in Maryland's favor also would not have a "chilling effect" on the FAA's participation in other community roundtables, as the FAA suggests. Answering Br. 24. The FAA's lack of transparency and the subsequent commitments that it made in this case are exceptional. Indeed, it was *at* a Working Group meeting that the FAA first announced, with no prior public notice, that it had already revised the River Visual approach. Simultaneously, the FAA said that it was open to creating alternative procedures, and it did in fact collaborate with the Working Group on the design of such alternatives. It should come as no surprise to the FAA that its communications and actions fostered an expectation that it would further revise the procedures. The FAA can

easily avoid this type of situation in the future by providing public notice and opportunity for comment *before* it implements changes to flight paths that subject surrounding communities to increased noise. The FAA also knows how to make clear whether it believes the 60-day period has expired or not.[2]

C. Maryland sued when the FAA's letters revealed that it had misinformed the public and was unlikely to cooperate on revisions to the procedures.

The FAA also misled the public to believe that it had performed an environmental analysis when it had not. In April 2017, the FAA told the Working Group that an environmental "[a]nalysis was completed" for the revised procedures. AR D_i_01, DCA Working Group Summary, Apr. 27, 2017, at 8/10. It took an entire year, repeated inquiries, and the intervention of a United States Senator to prompt the FAA to admit that it could not locate any record of such an analysis and it merely was

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[2] *E.g.*, Letter from Dennis E. Roberts, FAA Regional Administrator, to Denny Schneider, LAX Community Noise Roundtable, July 27, 2018 ("As a legal matter, the FAA's decision became final on September 2, 2016, and will not be revisited."), *available at* https://www.lawa.org/-/media/lawa-web/environment/lax-community-noise-roundtable/noise_management_correspondence/noise_management_correspondence/noisert_180727_-faa-response-on-pv-overflights.ashx?la=en&hash=CD57ADEDD933EF8C386FC733ADE2235AAC4A2064 (last visited May 6, 2019).

inferring that it "likely" had applied a categorical exclusion. AR F_ii_01, FAA Letter (Apr. 27, 2018).

The problem here is not just the absence of formal "NEPA documentation," as the FAA puts it. Answering Br. 26. The problem is the total lack of *any* contemporaneous records—memoranda to file, notes, e-mail communications, marked up versions of code, etc.—showing that the FAA reached a considered decision regarding the applicability of a categorical exclusion before it acted. The FAA's inability to provide any such records seriously calls into question its representation to the Working Group that an "[a]nalysis was completed." AR D_i_01, DCA Working Group Summary, Apr. 27, 2017, at 8/10.[3]

A government entity cannot invoke the statute of limitations when it takes "'some misleading, deceptive or otherwise contrived action' to conceal information material to the plaintiff's claim." *Sprint*

[3] The FAA cannot undermine the minutes by arguing that they "are not transcripts." Answering Br. 25. The Working Group formally approved the minutes after providing an opportunity for participants to request revisions, including the FAA. AR D_i_01, DCA Working Group Summary, May 25, 2017, at 1-2/12 (approving minutes of April 27, 2017 meeting); *see also id.* at 8/12 (showing that the FAA was present).

Commc'ns Co., L.P. v. FCC, 76 F.3d 1221, 1226-27 (D.C. Cir. 1996) (quoting *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984). As the FAA likely knew, its lack of contemporaneous records would have been highly material to a possible NEPA claim. But rather than come forward with such information, the FAA reassured the Working Group that an analysis had been performed, continued collaborating on redesigning the Runway 19 approach procedures, and concealed its lack of previous documentation by dragging its feet in response to a Freedom of Information Act request. Under such circumstances, equity dictates that the FAA be estopped from asserting the limitations period. *See Goldman v. Bequai*, 19 F.3d 666, 673 (D.C. Cir. 1994).

Maryland was not using that process to "strengthen its position prior to filing suit." Answering Br. 27. Maryland was allowing discussions with the Working Group to unfold before deciding whether a lawsuit would be necessary. *See City of Phoenix*, 869 F.3d at 970.[4]

[4] Because any challenge to the FAA actions at issue would be based on the administrative record, there is nothing Maryland could have been doing to strengthen its legal position, other than simply trying to determine what the agency actually did. This should be encouraged, rather than discouraged, before lawsuits are filed.

Maryland and the Working Group presumed that, as an agency of the federal government, the FAA was proceeding with those discussions in good faith. The FAA's April 27, 2018 revelation that it had no record of performing any environmental analysis called that presumption into question for the first time. AR F_ii_01, FAA Letter (Apr. 27, 2018).

Perhaps not coincidentally, on April 27, 2018, the FAA also declined Maryland's request to execute a memorandum of understanding regarding flight paths into National. AR F_i_01, FAA Letter (Apr. 27, 2018). Given those two communications, Maryland reasonably concluded that it must file suit. Maryland filed suit within 60 days of having received those communications. *See* Pet. (June 26, 2018). For all the reasons explained above, this Court should hold that Maryland had reasonable grounds for not filing earlier and proceed to review the merits of Maryland's claims.

II. The FAA's actions were arbitrary and capricious.

A. The FAA violated NEPA.

1. There is no evidence that the FAA considered whether the amended procedures qualified for a categorical exclusion.

The FAA asserts that it applied three different categorical exclusions to revise the RNAV RNP, River Visual, and LDA Z approach

procedures. But the FAA does not identify a single document in the record showing that it considered the applicability of those exclusions before it acted. Just as the FAA previously inferred that it "likely" had applied a categorical exclusion, AR F_ii_01, FAA Letter (Apr. 27, 2018), the FAA now infers that it must have completed an environmental review simply because it submitted the procedures for a final safety check. Answering Br. 37. Such guesswork is entirely insufficient.

It is "practically determinative" that, although the FAA relies on categorical exclusions before this Court, it has "provided no evidence whatsoever of such a determination being made before" it acted. *Edmonds Inst. v. Babbitt*, 42 F. Supp. 2d 1, 18 (D.D.C. 1999). The case law is clear that categorical exclusions cannot "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); *accord Wilderness Watch v. Mainella,* 375 F.3d 1085, 1094-96 (11th Cir. 2004); *California v. Norton*, 311 F.3d 1162, 1175-77 (9th Cir. 2002). These cases are not distinguishable because "the factual applicability of a particular categorical exclusion was being challenged," as the FAA contends. Answering Br. 35. Each case cited above held that the lack of any

contemporaneous records was an independent ground for setting aside the agency's action. *See, e.g.*, *Russell*, 518 F.3d at 825 n.4 (explaining that the lack of documentation rendered the agency's action invalid "even if" the categorical exclusion otherwise applied).

The FAA argues that its invocation of the categorical exclusions is not *post hoc* rationalization because it informed the Working Group and Senator Van Hollen that the procedures were categorically excluded. Answering Br. 35 (citing AR D_i_01 at 122; AR F_ii_01). But those communications took place in 2017, well after the FAA completed amending the procedures in late 2015. The FAA points to no record evidence showing that it considered the applicability of the categorical exclusions it now invokes in its brief *before* amending the procedures. Furthermore, the categorical exclusions that the FAA invokes do not apply here according to their own terms.

***RNAV RNP*:** For the RNAV RNP procedure, the FAA cites a categorical exclusion applicable to the "establishment of procedures that use Radio Navigation System (RNAV), or essentially similar systems, to fly an overlay of existing procedures." Answering Br. 32 (quoting AR C_07 at 3-14, ¶ 311g). The FAA says that exclusion applies because,

under the revised RNAV RNP procedure, planes are flying "the same path but using next-generational navigational technology to do so." *Id.* That assertion is demonstrably false.

In response to noise complaints, the FAA sought to amend the RNAV RNP procedure to eliminate a portion of the route that flew over land in northern Virginia. *See* Opening Br. 11 (citing AR A_ii_20, DCA Runway 19 Noise Complaint Area (Feb. 24, 2012) (highlighting area of "noise complaints")); *compare* AR A_ii_09, RNAV RNP Amendment 1A (May 29, 2014) (old procedure), *with* AR A_ii_06, RNAV RNP Amendment 2 (Apr. 30, 2015) (new procedure). To accomplish that result, the FAA had to redesign the procedure to "begin at a new waypoint using previous name FERGI." 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). The FAA placed that new FERGI waypoint farther into Maryland communities. *Id.*; *see also* Answering Br. 7 (admitting that FAA moved the FERGI waypoint "backwards (farther from the airport)").

Thus, contrary to the FAA's unsupported contention, the new RNAV RNP procedure was not simply an "overlay of existing

procedures," and planes were not flying "the same path" after the amendment. Answering Br. 32. The FAA's own data shows that the revised procedures shifted 3,000 to 4,000 flights per quarter out of Virginia and into Maryland. Opening Br. 14-15 (citing AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017)). Because the FAA purposely designed the new RNAV RNP procedure to shift flights and noise out of Virginia, it cannot reasonably claim that it believed flights would be on the same path after the amended procedure went into effect.

River Visual: A similar analysis shows that the FAA's revisions to the River Visual procedure did not qualify for the categorical exclusion for "[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." Answering Br. 33 (citing AR C_07 at 3-14, ¶ 311k). The FAA's revisions to the River Visual procedure did change the existing tracks and the concentration of aircraft on those tracks. Opening Br. 14-15 (citing AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017)). Specifically, for the very first time, the FAA permitted pilots flying the

River Visual approach to use the newly revised RNAV RNP procedure. It also added the new FERGI waypoint to the procedure and eliminated two alternative procedures that would have allowed planes to remain over Virginia. *Compare* AR A_iii_03, River Visual Amendment 4 (old chart and narrative description), *with* AR A_iii_02, River Visual Amendment 5 (Dec. 10, 2015) (new chart and narrative description). Again, moving flights out of Virginia was the FAA's goal, so it cannot now contend that it believed the concentration of flights on existing tracks would remain the same.

***LDA Z*:** The FAA's new categorical-exclusion analysis for the revised LDA Z procedure is equally flawed. The FAA contends that its change to that procedure did not affect "noise sensitive areas" because no area in Maryland is within the "65 Day-Night Level ('DNL') noise contour" for National Airport. Answering Br. 33 (citing AR C_07 at 1-8, ¶ 11b(8); AR C_07 at 3-14, ¶ 311i). But the FAA's definition of "noise sensitive areas" includes "residential [areas] . . . parks, recreational areas . . . and cultural and historical sites," and the definition acknowledges that "there are settings where the 65 DNL standard may not apply." AR C_07 at 1-8, ¶ 11b(8). In such areas, the "responsible

FAA official will determine the appropriate noise assessment criteria based on specific uses in that area." *Id.*

The FAA does not contest that areas in Maryland affected by the revised procedures contain numerous historic properties, parks, and recreation areas. *See* Opening Br., Ex. 2, Blazer Decl. ¶¶ 5-7; *id.*, Ex. 3, Hughes Decl. ¶¶ 6-10. Yet the FAA did not determine—and does not claim to have even considered—the "appropriate assessment criteria based on specific uses in [the] area." AR C_07 at 1-8, ¶ 11b(8). The FAA simply asserts *post hoc* that it did not need to consider the effects of its actions because the 65 DNL contour "touches no land within the boundaries of Maryland." Answering Br. 33 n.6. Thus, like the other two revisions, the FAA's revision to the LDA Z procedure did not automatically qualify for the categorical exclusion that the FAA now invokes for the first time in its brief.

In sum, there is no evidence that the FAA considered the applicability of any categorical exclusion before it acted, and no categorical exclusions apply to the FAA actions at issue. This Court therefore should hold that the FAA's revisions to the RNAV RNP, River Visual, and LDA Z procedures are arbitrary and capricious.

2. The FAA's own policies required it to document its application of a categorical exclusion.

The FAA's failure to follow its own policies constitutes a separate, independent ground for setting aside the revised procedures. *See Nat'l Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980). FAA Order Number 1050.1F went into effect in July 2015 and requires the FAA to prepare "a simple written record . . . that a specific CATEX was determined to apply to a proposed action." AR C_04, FAA Order No. 1050.1F ¶ 5-3.a. The policy expressly states that "[t]he procedures in this Order apply to the extent practicable to ongoing activities and environmental documents begun before the effective date." *Id.* ¶ 1-9.

The FAA does not explain why, in the five months between the Order's effective date and the revision to the River Visual procedure in December 2015, it was not "practicable" for the FAA to create a "simple written record" memorializing which categorical exclusion it thought applied to its action. *Id.* ¶¶ 1-9, 5-3.a. Including such a simple written record in the file would not have required "substantial revisions to ongoing environmental documents" because the FAA generated *no* environmental documents for its decision. *Id.* ¶ 1-9. And because the

FAA had not yet issued the revised River Visual procedure when the Order became effective, the Order's exception for "decisions made . . . prior to the effective date of this Order" did not apply. *Id.*

Despite the clear requirements of the new Order, the FAA points to no document in the record showing that it considered the requirements of the new Order (or the previous Order) before it acted. The FAA merely infers that it must have decided that the Order was not applicable because it submitted the revised River Visual procedure for a safety check in June 2015. Answering Br. 37. This speculative, *post hoc* rationalization is insufficient to excuse the FAA's lack of compliance with its own Order. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Additionally, for the reasons stated in Maryland's opening brief, Opening Br. 49-52, the FAA's decision is arbitrary and capricious because it did not consider exceptions to the categorical exclusions. The FAA cannot utilize categorical exclusions for actions that "have the potential to result in significant increases in noise over noise sensitive areas" or actions that are "likely to be highly controversial on environmental grounds." AR C_07, FAA Order No. 1050.1E ¶¶ 304i,

304f; AR C_04, Order No. 1050.1F ¶¶ 5-2.b.10, 5-3.b(2). As explained above, the FAA did not consider whether the areas impacted by the revised routes qualified as "noise sensitive areas. *See* Argument Part II.A.1. And because the FAA gave no notice of its actions to affected communities in Maryland, the FAA also did not consider the potential for "[o]pposition on environmental grounds by a . . . State, or local government agency or by . . . a substantial number of the persons affected." *City of Phoenix*, 869 F.3d at 972.

The FAA's failure to consider and explain its reasoning regarding those exceptions was arbitrary and capricious. The FAA moved the routes at issue into Maryland to address noise concerns and high levels of community complaints in Virginia. It therefore should have anticipated that Maryland communities would have the same concerns and might disagree with the FAA's unstudied (and incorrect) assumption that moving the routes out of Virginia would not significantly increase noise levels in Maryland. "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." *See Norton*, 311 F.3d

at 1177 (emphasis added). The fact that the FAA decided to move the routes from Virginia because of noise triggered the need for the FAA to evaluate whether that same noise would cause problems in Maryland. The FAA provided no such explanation, so its decision should be set aside.

B. The FAA violated the NHPA and Section 4(f) because it did not consider the effect of its actions on historic properties, parks, and recreation areas.

The FAA also violated its own policies by failing to "document compliance" with the NHPA and Section 4(f). Opening Br. 52-55 (citing AR C_04, FAA Order No. 1050.1F ¶ 5-5; AR C_07, FAA Order No. 1050.1E ¶ 306). The FAA does not dispute that areas in Maryland impacted by the revised routes contain historic properties, parks, and recreation areas. Opening Br., Ex. 2, Blazer Decl. ¶¶ 5-7; *id.*, Ex. 3, Hughes Decl. ¶¶ 6-10. Nor does the FAA dispute that it did not meet its duty to inventory those resources, conduct an initial assessment of the potential effect on the resources, or consult with the State Historic Preservation Officer or local government officials. *See* Opening Br. 52-55 (detailing requirements).

Instead, the FAA asserts—without citation to any factual substantiation in the record—that "no significant [noise] increases were likely" and the changes caused only an "incremental increase in noise" in areas "already experiencing aircraft noise from existing flight tracks." Answering Br. 42-44. The record contains no evidence that the FAA ever performed any noise or other analysis to support those assertions, which are nothing more than *post hoc* rationalization by counsel. *State Farm*, 463 U.S. at 50. And even if the FAA had reached such a conclusion, it still would have had "to 'notify all consulting parties'—including a representative of the local government—and give them any relevant documentation." *City of Phoenix*, 869 F.3d at 971 (quoting 36 C.F.R. § 800.5(c)). The FAA failed to do so.

Moreover, the only evidence before this Court shows that the revised procedures did significantly increase flight traffic in Maryland. *State Farm*, 463 U.S. at 43 (explaining that an agency decision is arbitrary and capricious when the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency"). The FAA shifted 12,000 to 16,000 flights annually into Maryland *due to noise complaints* in Virginia. Opening Br. 11-15 (citing AR A_ii_20, DCA

Runway 19 Noise Complaint Area (Feb. 24, 2012); AR E_03, DCA South Flow Arrivals at 28 of 58 (Feb. 16, 2017)). Given the expressly noise-related purpose of the revisions and the number of flights shifted into Maryland, the FAA cannot credibly contend that its actions had no potential to adversely affect historic properties, parks, and recreation areas in Maryland. If the "increment" of noise was a problem in Virginia requiring a change, the FAA should have assessed whether the relocated noise would be a problem over Maryland.

This Court should set aside the revised procedures because the FAA violated the NHPA and Section 4(f) by failing to consider how the revisions would affect noise-sensitive resources in Maryland.

III. This Court should vacate the amended procedures.

"Vacatur is the normal remedy" for an APA violation, including violations of NEPA. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *see also Humane Soc'y of the United States v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) ("Pursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy."). This Court may remand without vacatur in limited circumstances depending upon "the seriousness of

the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of [vacating the agency's action.]" *Humane Soc'y of the United States v. Zinke*, 865 F.3d 585, 614-15 (D.C. Cir. 2017) (quoting *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002)).

The FAA's violations were more than sufficiently serious in this case. This Court has held that "deficient notice is a 'fundamental flaw' that almost always requires vacatur." *Allina Health Servs.*, 746 F.3d at 1110 (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)). Here, not only did the FAA fail to provide public notice of its plan for an interstate noise transfer, it also performed no environmental analysis and engaged in no community consultation whatsoever. The FAA then hid its lack of environmental compliance while simultaneously reassuring the public that it would further revise the routes in coordination with the Working Group. "Given the serious and pervading role those deficiencies played in the agency's decisionmaking, there is substantial 'doubt whether the [FAA] chose correctly'" in revising the Runway 19 approach procedures. *Humane Soc'y*, 865 F.3d at 614-15 (D.C. Cir. 2017) (quoting *Sugar Cane Growers*,

289 F.3d at 98). There is no record reflecting any consideration of the balance of effects resulting from the interstate noise transfer. Vacatur therefore is appropriate. *Id.*

The FAA cannot fix those mistakes merely by "more fully document[ing]" its previous conclusions. Answering Br. 45. As explained above, the categorical exclusions that the FAA invokes in its brief do not apply to the changes it made. The FAA must perform a NEPA analysis through an environmental assessment or environmental impact statement, analyze effects on historic properties, parks, and recreation areas, provide an opportunity for public input, and consult with local governments and the State Historic Preservation Officer *before* it reaches a decision about how to route flights into Runway 19. The FAA's improper presumption and predetermination that it will "very likely reach [the] same conclusion" after engaging in all that required process counsels even more strongly in favor of vacating the FAA's previous actions. *See* Answering Br. 45.

The FAA fails to explain how vacating the revised procedures and reinstating the previous routes would cause any disruptions in the real world. The FAA frets that it "could take months" to republish the old

routes, and that vectoring aircraft into National in the meantime could "cause significant delays." Answering Br. 46. But the FAA does not support those assertions with anything other than the arguments of counsel. The FAA therefore has failed to make the showing necessary for this Court to depart from the normal remedy of vacatur.

CONCLUSION

For the foregoing reasons, this Court should find that Maryland's petition is timely, hold that the FAA's revisions to the Runway 19 approach paths are arbitrary and capricious, and vacate those revisions so that the FAA will conduct a full analysis with appropriate opportunities for public comment before deciding how to route flights into Runway 19.

Respectfully submitted,

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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 6,203 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/
W. ERIC PILSK

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

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