No. ________

In The
Supreme Court of the United States

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

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITION FOR WRIT OF CERTIORARI

LAWRENCE R. LIEBESMAN
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
202-955-3000

Counsel for Petitioner County of Rockland, New York

RICHARD BLUMENTHAL
Attorney General of Connecticut
Counsel of Record
ROBERT SNOOK
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860-808-5270

Counsel for Petitioner State of Connecticut

DONALD W. STEVER
K & L GATES LLP
599 Lexington Avenue
New York, NY 10022
212-536-4861

Counsel for Petitioner Friends of the Rockefeller State Park Preserve, Inc.

PETER DICKSON
POTTER AND DICKSON
194 Nassau Street
Princeton, NJ 08542
609-921-9555

Counsel for Petitioners City of Elizabeth, New Jersey, New Jersey Coalition Against Aircraft Noise

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that the FAA did not violate the National Environmental Policy Act (NEPA) by failing to include a critical noise analysis for public comment as part of the EIS process for the NY/NJ/Philadelphia Airspace Redesign Project, preventing the public from critically analyzing and commenting on an analysis that was central to the FAA's determination that the project would not "use" public trust resources protected under section 4(f) of the Transportation Act.

2. Whether the Court of Appeals erred in holding that the FAA did not violate the mandate of the National Environmental Policy Act (NEPA) by failing to implement night ocean routing, a fundamental element of the selected alternative, in the Record of Decision (ROD), and by failing to include a mitigation measure explicitly agreed to in the Final Environmental Impact Statement.

3. Whether the Court of Appeals erred in approving an FAA decision violating Section 4(f) of the Transportation Act and this Court's decision in *Overton Park* when the agency affirmatively failed to obtain the comments of relevant state and local officials regarding protected parks and public trust resources.

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Whether the Court of Appeals erred by holding that the Petitioners had "forfeited" their claim under section 4(f) of the DOT Act that the FAA had failed to contact state and local Park officials and give "individualized attention" to at least 236 sites because that specific issue had not been raised during the administrative process.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit, which is the court whose judgment is sought to be reviewed, were, as Petitioners, County of Rockland, New York, County of Delaware, Pennsylvania, Town of New Canaan, Connecticut, Timbers Civic Assoc., Friends of the Rockefeller State Park Preserve, Inc., Board of Chosen Freeholders of the County of Bergen, New Jersey, John Hodge, First Selectman, Town of New Fairfield, Connecticut, City of Elizabeth, New Jersey, County of Union, New Jersey and the Union County Freeholders Air Traffic and Noise Advisory Board, New Jersey Coalition Against Aircraft Noise, The Borough of Emerson, Commissioner Connecticut Department of Environmental Protection and the Respondent Federal Aviation Administration.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, County of Rockland, New York, the Connecticut Department of Environmental Protection, the Friends of Rockefeller State Park Preserve, the City of Elizabeth, New Jersey, and the New Jersey Coalition Against Aircraft Noise respectfully pray that this Court issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 10, 2009.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (D.C. Cir. June 10, 2009) is reprinted in the Appendix at App. 1. The Court denied Petitioners' request for rehearing or rehearing *en banc* on August 19, 2009. The Court's orders are reprinted in the Appendix at App. 146-149.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 10, 2009 and the Court denied petition for rehearing and rehearing *en banc* on August 19, 2009. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The relevant statutes in this case are the Transportation Act of 1966, 49 U.S.C. § 303, and the National Environmental Policy Act of 1970, 42 U.S.C. § 4321, *et seq*.

STATEMENT OF THE CASE

This case arises out of a decision of the Federal Aviation Administration (FAA) approving the FAA's Airspace Redesign Project for the New York, New Jersey and Philadelphia Metropolitan Areas to comprehensively redesign air traffic and control over a 31,000 square mile, five state region with 29 million affected residents. This massive project impacts populations throughout suburban New Jersey, New York, Connecticut, and Philadelphia as well as the public's use and enjoyment of numerous federal, state and local parks, recreation areas and historic sites, extending from Delaware to Connecticut.

In July, 2007, after a lengthy process, the FAA released its Final Environmental Impact Statement (EIS) under NEPA and allowed an additional 30 days for public comment. On September 28, 2007, the FAA released both its final corrected Record of Decision (ROD) and a new analysis of noise impacts to selected national parks and protected properties that were never made available for public comment during the NEPA process. Twelve groups of petitioners

challenged the decision in three separate courts of appeals alleging, *inter alia,* violation of NEPA, the Transportation Act, and the Clean Air Act. The cases were consolidated in the Court of Appeals for the District of Columbia Circuit.

On June 10, 2009, the United States Court of Appeals for the District of Columbia Circuit dismissed the challenge to the FAA's decision. App. 1. In so doing, the Court held that none of the FAA's challenged actions constituted a significant procedural deficiency under the National Environmental Policy Act. The Court also held that the Petitioners "forfeited" their opportunity to raise a claim under Section 4(f) of the Transportation Act that the FAA had failed to consult all state and local park officials and did not give individualized attention to at least 236 public trust park and recreation areas because that precise claim had not been raised during the administrative proceeding. The Court denied petitions for rehearing and rehearing *en banc* on August 19, 2009. App. 146-149.

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning judicial review of DOT actions under NEPA and Section 4(f) of the Transportation Act as interpreted by this Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970). NEPA provides the right of public review and comment on the environmental

impacts of major government projects. Yet, in this case, the FAA released and relied upon a critical noise analysis of 12 federal parks and historic sites only *after* the period of public comment was over, thus denying the public the opportunity to review and comment on that important analysis. The Court of Appeals never examined the importance of that analysis and its omissions and simply stated that the public's opportunities to comment on other unrelated aspects of the project were sufficient. Further, the Court of Appeals failed to address Petitioners' argument that the FAA's decision not to implement Night Ocean Routing – a fundamental part of the FAA's selected alternative in the Record of Decision – was a significant change in the Project requiring a Supplemental Environmental Impact Statement ("SEIS") and failed to address the FAA's decision not to include a noise compliance monitoring plan in the ROD after explicitly committing to include that plan in the FEIS.

Section 4(f) of the Transportation Act prohibits the Secretary of Transportation from adopting a project requiring the use of a public park unless "there is no prudent and feasible alternative." 49 U.S.C. § 303(c). That section and DOT's own regulations required the FAA to affirmatively contact state officials regarding the potential impacts to parks and historic properties to assess whether a "constructive use"[1] will result – an obligation forcefully supported

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[1] For a project to result in constructive use, a substantial impairment must occur. FAA Order 1050.1E defines "substantial

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in *Overton Park*. The Court of Appeals improperly rejected that argument as not having been raised before the Agency and never addressed the *Overton Park* decision.

These procedural failures constitute serious violations of federal law. The decision below ignored these violations and did not engage in a "searching and careful review" mandated by *Overton Park* as to whether an Agency's actions followed proper procedural requirements. *Id.* at 417. This decision constitutes an extreme departure from this Court's long-established precedent on issues of vital importance to Petitioners and the public they represent.

I. THE COURT OF APPEALS HOLDING PERMITTING THE FAA TO DEFER A CRITICAL SUPPLEMENTAL NOISE ANALYSIS FROM THE SCRUTINY OF THE EIS PROCESS UNDERMINES FUNDAMENTAL NEPA LAW.

The Court of Appeals erred by allowing the FAA to defer a critical supplemental noise analysis to avoid the scrutiny of the NEPA process. The agency relied on this in making a final determination in meeting its underlying statutory duty that its Air Space Redesign project will not violate the strong

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impairment" as "when the activities, features, or attributes of the resource that contribute to its significance or enjoyment are substantially diminished. . . ." Order 1050.1E, App. A § 6.2f. App. 197-198.

Congressional mandate under Section 4(f) of the DOT Act to avoid use of any federal, state or local park or historic property unless there are no "prudent or feasible" alternatives. If the Court of Appeals decision is allowed to stand, any federal agency may decide to exclude important studies from public scrutiny of the NEPA process even where those studies are central to the final agency decision. That result is contrary to NEPA, the CEQ regulations, the FAA's implementing NEPA procedures and the Court of Appeals for the District of Columbia Circuit's prior holdings.[2]

Indeed, this decision violates the twin goals of NEPA, as articulated by this Court in *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted), "plac[ing] upon the agency the obligation to consider every significant aspect of the environmental impact of a proposed action. . . . [and], ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." To accomplish these twin aims, NEPA requires that federal agencies prepare draft and final environmental impact statements that thoroughly analyze

[2] As stated by the Court of Appeals, "NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions and had decided that the public benefits flowing from the actions outweighed their environmental costs." *Illinois Commerce Comm. v. Interstate Commerce Comm.*, 848 F.2d 1246, 1259 (D.C. Cir. 1988).

all environmental impacts from its decision. *See id; Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council,* 435 U.S. 519, 553 (1978).

Here, despite the fact that the FAA had undergone a lengthy EIS process, with considerable public comment, the Agency decided to include a *post hoc* supplemental noise analysis of 12 parks and historic properties studied at the specific request of the National Park Service to determine whether the project would "substantially impair" the public's use and enjoyment of those resources due to noise impacts from increased overflights. Without any analysis of the importance of the study in the FAA's decision making process, the Court excused FAA's decision to append this study to the Record of Decision – hiding that analysis from undergoing scrutiny in environmental review process – because the FAA otherwise performed an "extensive public outreach effort" and "thorough process of environmental review." *County of Rockland, New York v. F.A.A.*, No. 07-1363, 2009 WL 1791345, *8 (D.C. Cir. June 10, 2009) ("As indicated by FAA's extensive public outreach effort and its thorough environmental review process, the agency complied with the CEQ regulation" that direct the agency to make diligent efforts to involve the public in preparing and implementing its NEPA procedures.") App. 9.

A. The FAA's *Ad Hoc* Supplemental Noise Analysis Was Critical to the Public's Understanding of the Project and the FAA's Reliance on the Analysis Without the Benefit of Public Comment Violated NEPA.

The importance of this analysis to the public's understanding of the project's impacts to noise sensitive parks and for fully informing the FAA decision makers is clear from the record. On October 20, 2005, FAA released a Draft EIS (DEIS) that included a 4(f) noise analysis. The DEIS' 4(f) analysis received extensive comments and criticisms. Significantly, DOI harshly criticized FAA's 4(f) analysis, commenting that "[i]nformation presented in the DEIS regarding *noise* and visual changes, federally listed species, and aircraft-bird collisions is currently insufficient."[3] With respect to FAA's 4(f) analysis, the letter continued: "It is difficult to determine potential impacts to the 30 national park units within the study area with the data provided."[4] DOI explained:

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[3] App. 232 (emphasis added). Under FAA's Order 1050.1E, DOI retains an important role in ensuring FAA's compliance with 4(f), in part, because it has jurisdiction over many 4(f) resources. *See* FAA Order 1050.1E 6.1e, j. App. 196-197, 200-201.

[4] *Id.* The letter went on to state:

> "For example, Fire Island National Seashore, Delaware Water Gap National Recreation Area, and Upper Delaware Scenic and Recreational River are within the airspace of Islip and Newburgh/Stewart airports. These park units may be subject to impacts

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"The main metric used for noise analysis in the DEIS (i.e., Day/Night Average Sound Level (DNL)) is not appropriate as the only metric for determining noise impacts to national parks. Additional metrics, such as time above ambient and percent time audible, provide a more complete and accurate description of potential noise impacts on national parks and other noise sensitive receptors. The Department finds that the noise analysis presented in the DEIS for [National Park Service] units and other noise-sensitive receptors in the study area is inadequate, and recommends revising the impact analysis to follow the correct FAA guidelines for noise-sensitive receptors and to include audibility and other more appropriate metrics in the assessment of impacts." DOI Comment, FEIS App. N. App. 234-235.

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from routing more traffic over them. However, information in the DEIS is insufficient to evaluate such impacts because the airspace of the various airports, the proposed reroutes of flights, and the locations of parks, historic sites and other noise-sensitive receptors are not clearly illustrated. Historic resources and parks, including the park units listed above, should be added to the Alternative Flight Track Change Illustrations located in Appendix E, Attachment C. It is not clear how determinations regarding impacts to NPS resources were made. Data required to make such determinations were either not available or not clearly identified."

App. 232-233.

Thus, DOI believed the exclusive use of the DNL metric for such noise sensitive sites was inadequate for determining whether 4(f) resources would be put to "use" by FAA's airspace redesign. *Id.*[5] App. 234. DOI further commented that

> "[b]ased on the above uncertainties, the Department cannot concur with the conclusion in the DEIS that there is no use of a Section 4(f) resource. We recommend that the FAA perform a more thorough analysis of impacts to National Park System units and the other listed Section 4(f) resources, using the correct guidelines and appropriate metrics, then re-evaluate the issue of 4(f) use."

Appendix N to FEIS, DOI Comment Letter. App. 236.

In response to DOI's comments, FAA provided assurances that the Final EIS would include additional noise analysis that would satisfy DOI and other stakeholders. *See* Appendix N, Response to Comments App. 241; Appendix Q to FEIS. App. 226. The FAA even subsequently kept the public comment period open for 30 days after the issuance of the FEIS. *See* Corrected Record of Decision (ROD) at p. 50. App. 125). However, despite FAA's assurances,

[5] "DNL" stands for Day-Night Average Sound Level. DNL is a single value, expressed in decibels, that attempts to describe the overall noise level during an average day. To represent the greater annoyance caused by nighttime noise, the DNL metric adds a ten-decibel "penalty" for each nighttime noise event. App. 169.

FAA deferred the additional analysis until after the Final EIS was completed and the public comment period closed. That deferred analysis covered twelve sensitive 4(f) resources. In fact, the FAA's explanation for conducting the additional analysis[6] – that it only need to consult with appropriate federal and state officials outside the light of the public and open EIS process – directly contradicted the FAA's recognition in the Draft and Final EIS that it needed to make 4(f) noise analysis available as part of the EIS process. *See* FAA Order 1050.1E, App. 241-248, 163.

Petitioner County of Rockland, in commenting on the FEIS, even urged the FAA to "make its noise impact analyses available for additional public comment so that the impacts to these sensitive resources may be fully evaluated by decision-makers prior to issuing the ROD." App. 220. In so urging, Rockland noted that the FAA's own NEPA procedures recognize that the agency "will consider use of appropriate supplemental noise analyses in consultation with officials having jurisdiction for national Parks, national wildlife refuges and historic sites including traditional cultural properties where a quiet setting is a

[6] "In Section 5.3.5.1 of the FEIS the FAA committed to conduct further evaluation, in consultation with appropriate federal and state officials, to determine whether predicted noise increases or visual changes over affected areas of the 4(f) resources listed in Table B.1 of Appendix B in the Record of Decision would result in a constructive use." Corrected ROD at B-1. App. 163.

generally recognized purpose." Part 1050. App. 220.[7] The Agency's only response was that "[t]he letter raises issues that have already been addressed by FAA during the public comment process. As such, FAA is not providing additional responses to this letter." ROD at 54. App. 133-134.

The FAA's refusal to make this post-FEIS analysis available for public comment is especially important because the analysis was not merely an insignificant additional study. *It was central to FAA's final determination that the Project would not "use" any 4(f) resources*. While the additional analysis studied 12 additional parks requested by DOI, the FAA still concluded that it could rely on its DNL metric and not use a supplemental noise metric to provide a more complete and accurate description of potential noise impacts as DOI recommended. DOI Comments FEIS App. N. App. 241-247; App. 235-236. FAA's Record of Decision (ROD) stated that "[a]s to constructive use of other 4(f) properties, the analysis in the EIS and the *additional analysis included in the ROD in response to DOI comments*, confirm that the selected project would not cause increases in noise or

[7] The County of Rockland even submitted a report from its expert stressing that "No technical rationale supports use of DNL to predict noise impacts in outdoor recreational settings. Additional metrics such as time above ambient level and percent audible time provide a more complete and accurate description of potential noise impacts on national parks and other noise sensitive receptors." Corrected ROD at D-57. App. 219-220.

other proximity impacts sufficient to impair the value of those resources." Corrected ROD at 55. App. 136 (emphasis added). The "*additional analysis included in the ROD in response to DOI comments*" is the *post-EIS* 4(f) noise analysis that FAA assured DOI and others it would include in the Final EIS in response to comments. *See* Appendix Q to FEIS. App. 226.

In short, the FAA relied on this post-EIS noise analysis to reach its ultimate conclusion but without permitting additional public and agency comments on the adequacy of this critical late report.[8]

B. The Court of Appeals Reference to the FAA's "Extensive Public Outreach" to Justify the FAA's Failure to Make the Post-EIS Supplemental Noise Analysis Available for Public Comment Violates NEPA.

The Court of Appeals excused FAA's failure to make the additional analysis available for public comment as part of the NEPA process because FAA conducted an "extensive public outreach effort" and a "thorough environmental review process." *County of Rockland, New York*, 2009 WL 1791345 at *8. App. 9. But extensive public outreach and an otherwise

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[8] *Cf. Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 343-44 (D.C. Cir. 2002) (explaining how FAA completed a detailed site specific supplemental noise analysis beyond just using DNL levels, regarding noise impacts to Zion National Park in Utah from a proposed replacement airport).

adequate environmental review do not excuse FAA's violations. The Court of Appeals' circular rationale does injustice to the basic principles of NEPA, and the procedural requirements of CEQ regulations and FAA's Order 1050.1E. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. at 97, *supra* (citations omitted). Compliance with NEPA is required "to the fullest extent possible," 42 U.S.C. § 4332(2)(C), a command which this Court has admonished is "neither accidental nor hyperbolic." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). By deferring decisive portions of the 4(f) analysis until the EIS was completed, the FAA made it impossible to consider every significant aspect of the environmental impact during the environmental review process. *See id.*

The Court of Appeals' rationale is also inconsistent with CEQ regulations, which this Court has held are entitled to substantial deference.[9] CEQ regulation 40 C.F.R. § 1506.6(a) requires the agency to make diligent efforts to involve the public during the environmental review process. *Id.* Under that regulation, the FAA should have allowed a public comment period on the post-EIS 4(f) study. As noted above,

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[9] NEPA created the Council on Environmental Quality ("CEQ"); CEQ promulgated regulations governing NEPA's implementation ("CEQ Regulations") in 1978. 40 C.F.R. § 1500, *et seq.* The CEQ Regulations are applicable to and binding on all federal agencies. 40 C.F.R. § 1500.3. Courts are to give those regulations "substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

Petitioner County of Rockland demanded that FAA do so. *See* ROD App. D. App. 219-220. But the FAA simply rejected that request "out of hand." *See* Corrected ROD at p. 54. App. 133-134.

Had Petitioners and other members of the public been allowed to comment on the post-EIS study, they could have not only challenged the analysis of these 12 federal parks, but they would likely have questioned why the FAA did not conduct an analysis of other overlooked state and local parks, including Centennial Watershed State Forest in Connecticut and several parks in County of Rockland that will have more than a 3.0 DNL increase – the threshold for a more careful evaluation under the Part 150 guidelines.[10] Petitioners would have also likely focused on the need for a supplemental noise analysis for Rockefeller State Park Preserve (RSPP) in New York, a Park that was established by New York law for passive use where motorized vehicles, sporting activities and picnicking are not permitted and which the FAA's own noise screening analysis indicated

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[10] Centennial Watershed State Forest, located in Fairfield, Connecticut, in an area most affected by changing air routes, includes more than 15,000 acres of land specifically set aside for watershed protection and noise sensitive, passive recreational uses like hiking. Pet. Br. at 97. The Rockland County Parks "are examples of county parks known for their passive recreational activities such as hiking, experiencing the local ecology and viewing wildlife." Decl. of Alan Beers at Add. D to Pet. Br.

would experience an increase in noise as a result of the project.[11] App. 264-268.

Here, the Court of Appeals even cited Section 1506.6(a) of CEQ regulations, and its recent decision of *Am. Bird Conservancy Inc. v. F.A.A.,* 516 F.3d 1027, 1035 (D.C. Cir. 2008) (holding that CEQ regulations requiring "diligent efforts to involve the public in preparing and implementing their NEPA procedures" requires, in part, that agencies give the public a comment period before making a final decision). Yet, the Court attempts to distinguish that decision as "inapposite" because, in appending additional analyses to the ROD in this case, the FAA did not "'evade' implementation of any FAA regulation requiring additional notice or public comment." *County of Rockland, New York*, 2009 WL 1791345 at *6. App. 9. However, that is a false distinction in light of the "FAA's Community Involvement Policy Statement" (dated April 17, 1995), affirming FAA's commitment to make complete, open and effective public participation an essential part to its actions, programs and decisions. Section 208a of Order 1050.1E. App.

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[11] RSPP was designated by New York state law as limited to passive recreation uses compatible with the long term protection of ecological and historical resources that merited designation of the park preserve. App. 264-268. *See* Decl. of Alix Schnee, Add. to Pet. Br. 47 ("Neither the Rockefeller Park Preserve as a whole nor the portion of the Park Reserve most impacted by the Redesign Project . . . was subjected to any baseline noise monitoring or assessment or was analyzed by noise modeling or by any other means to assess the noise impact of the Project.").

190-191. Because the FAA did not have procedures similar to the FCC's regarding the public's right to challenge a license decision, that does not permit the FAA to rely on the Agency's FAA's overall public outreach effort to meet NEPA's and its own exacting public participation requirements while also concealing this critical study from public scrutiny.

C. If Allowed to Stand, the Court of Appeals Decision Effectively Grants Federal Agencies "Carte Blanche" to Exclude Important Studies and Data from the NEPA Process by Relying on the Agency's "Overall" NEPA Record.

The consequences of the Court of Appeals decision are serious. If allowed to stand, the Court of Appeals decision would permit a federal agency to pick which studies an agency will offer the public for comment, and which studies it will not. That holding stands in marked contrast to the Court of Appeals recent holding that "it would appear to be a fairly obvious proposition that studies upon which an agency relies on in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comments." *Am. Radio Relay League v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (remanding the Commission's rule for its failure to make available for notice and comment unredacted "technical studies

and data that it has employed in reaching its decision")[12]; *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) (holding that "[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it."). Public participation is an extremely important aspect of the NEPA; it provides the feedback that agencies need to make an informed decision.

Further, by permitting FAA to defer analysis so critical to its 4(f) determination, the Court of Appeals gives agencies the right to violate their own NEPA implementing orders. *See* FAA Order 1050.1E.[13] App.

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[12] *See also Gerber v. Norton*, 294 F.3d 173, 182 (D.C. Cir. 2002) (holding that the federal agency violated the ESA by failing to release map that "was indispensable if [public interest groups] were to have meaningful opportunity to comment on Winchester's permit application"); *Portland Cement Ass'n v. EPA*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("it is not consonant with the purpose of a rule making proceeding to promulgate rules on the basis of inadequate data or that [to a] critical degree is known only to the agency.").

[13] Lower courts treat the Order as having the force of law. *See Town of Winthrop v. F.A.A.*, 535 F.3d 1, 7-8 (1st Cir. 2008) (treating FAA Order 1050.1E as binding); *Town of Marshfield v. F.A.A.*, 552 F.3d 1, 3 (1st Cir. 2008) (same). The Order provides in relevant part:

> "This order provides Federal Aviation Administration (FAA) policy and procedures to ensure agency compliance with the requirements set forth in the Council on Environmental Quality (CEQ) regulations for

(Continued on following page)

189-201. In relevant part, FAA's implementing Order provides that "[t]he EIS should thoroughly analyze and document prudent and feasible alternatives that would avoid the use of Section 4(f) property and provide detailed measures to minimize harm." *Id.* App. 201-202. That Order does not grant FAA discretion to defer critical studies such as the post-FEIS analysis at issue here from the NEPA process. In fact, the opposite is true. The Order requires a thorough analysis and, by implication, thorough study in the Final EIS, not afterwards. *See* FAA Order 1050.1E. App. 201-202. By upholding the FAA's decision, the Court of Appeals permits a federal agency to choose when to follow its own NEPA implementing procedures, in violation of NEPA's strict procedural mandate. *Am. Bird Conservancy*, 516 F.3d at 1033 (remanding an agency decision for failure to follow its own NEPA implementing regulation).

Finally, the NEPA violations sanctioned by the Court of Appeals are especially serious in the context of this project. The FAA developed the Airspace Redesign "to address congestion and delays at some of our nation's busiest airports." Corrected ROD at p. 1.

> implementing the provisions of the National Environmental Policy Act of 1969 (NEPA), 40 Code of Federal Regulations (CFR) parts 1500-1508; Department of Transportation Order DOT 5610.1C, Procedures for Considering Environmental Impacts; and other related statutes and directives."

FAA Order 1050.1E at 1.

App. 20. The project entailed profound changes in air traffic control procedures and flight paths affecting 30 million people living throughout 31,180 square miles in a five state region. It is being implemented in four stages through 2012. Public involvement was critical in this process to meet the environmental goals set forth under Section 4(f) and NEPA. The FAA was under a duty not to take any "shortcuts" that would deprive the public of their right to participate in order to fully inform the FAA in making such a far reaching decision. Yet, the Court of Appeals has approved a process that prevents state and local officials (and the public they represent) from participating fully in the FAA's vital decision making process.

II. THE COURT OF APPEALS ERRED IN UPHOLDING FAA'S SYSTEMIC VIOLATION OF THE MANDATES OF NEPA.

In addition to withholding an important environmental impacts analysis from public review and comment, FAA also violated NEPA by repeatedly informing the public and decision-makers of elements of its mitigation plan which it then failed to implement. Thus, the public was not only never informed of all potential project impacts, but it was then mislead as to the nature and extent of FAA's mitigation efforts.

A. The FAA Violated NEPA By Failing To Implement Night Ocean Routing Which Was a Fundamental Element of Its Selected Alternative in the Record of Decision.

FAA selected night ocean routing as a fundamental part of its Selected Alternative in the ROD to mitigate Project noise impacts on the areas surrounding Newark Airport. ROD at p. 22. App. 65-66; App. 249-255. FAA admitted that noise mitigation was essential to eliminate significant noise impacts on those areas by 2011. *Id*. FAA committed in the ROD to re-evaluate the FEIS, undertake appropriate environmental review, and amend the ROD if it revised or eliminated night ocean routing. ROD at p. 50. App. 125.

Night ocean routing has not been, and may never be, implemented. Without night ocean routing, FAA's Selected Alternative approved in the ROD is not the Project being implemented. The public has accordingly been denied the opportunity to evaluate and comment on the Selected Alternative without one of its most essential components. 40 C.F.R. § 1502.14(b). Moreover, FAA's noise modeling data for a large portion of the Project area are based upon and assume the existence of night ocean routing. Thus, the failure to implement night ocean routing invalidates much of the noise impact data contained in the FEIS and upon which the ROD is largely based. As FAA essentially conceded when it committed to re-evaluate the FEIS if this essential mitigation measure was not

adopted, FAA's failure to implement night ocean routing and failure to undertake appropriate environmental review constitutes a "substantial change in proposed action" triggering the requirement for a Supplemental Environmental Impact Statement. 40 C.F.R. § 1502.9(c).

The Court of Appeals decision conflicts with decisions of other circuits holding that a SEIS is required if a significant impact on the environment will result from subsequent project changes. *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767 (11th Cir. 1983). Indeed, the FAA even admitted that without mitigation "significant and reportable impacts were projected in areas of Elizabeth." Resp. Br. 69. *See also* Pet. Br. 59, n.46. Thus, because the FAA has acknowledged that night ocean routing was a critical component of its mitigation plan proposed in the FEIS. FEIS App. Q. App. 260-262. The FAA is required to prepare an SEIS to consider the impacts that such a fundamental change to the project will have on the public health and welfare.

B. FAA Violated NEPA By Failing to Include a Noise Compliance Monitoring Plan in the ROD When it had Explicitly Committed to do so in the Final Environmental Impact Statement.

FAA unequivocally committed in the FEIS to include a noise compliance monitoring plan in the ROD.

FEIS App. Q. App. 257-259. FAA's ROD did not contain a noise compliance monitoring plan. FAA Order 1050.1E, Paragraph 512b states that any mitigation measure made a condition of approval of the FEIS must be included in the ROD. App. 257-259; Pet. Br. 62. The FEIS and ROD state that noise mitigation is required to avoid significant environmental justice impacts to minority communities in the City of Elizabeth. ROD at pp. 21-22. App. 63-67; App. 249-255. FAA ignored its own rule by failing to include a noise compliance monitoring plan in the ROD. FAA Order 1050.1E, Paragraph 512b. App. 257-258.

The Court of Appeals decision dismissed FAA's binding commitment in the FEIS to include a noise compliance monitoring plan in the ROD as a "stray comment." App. 7. This was neither a proper application of the law nor accurate. Elsewhere in the FEIS, in response to a comment expressing concern regarding whether the modeled noise results would be achieved in practice, FAA again cited FAA Order 1050.1E, Paragraph 512b and reiterated that, with respect to each mitigation measure selected, a "monitoring and enforcement program shall be adopted. . . ." FEIS App. Q. App. 256-259. The Court then concluded that "[a]bsent a *firm commitment* to such monitoring, neither NEPA nor the agency's regulations require it." App. 7 (emphasis added). The Court did not define what would constitute a "firm" commitment as opposed to any other commitment. The panel cited to this Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), but that

opinion does not support the panel's conclusion. In this case, unlike *Robertson*, FAA unqualifiedly committed to a specific noise mitigation plan in the FEIS. FEIS App. Q. App. 259. If left standing, the Court of Appeal's decision effectively modifies *Robertson v. Methow Valley* by extending that decision to cases where an agency explicitly reneges on its EIS commitment to implement specific mitigation measures.

III. THE FAA'S FAILURE TO FOLLOW THE MANDATES OF SECTION 4(f) OF THE TRANSPORTATION ACT BY NOT OBTAINING THE COMMENTS OF STATE AND LOCAL OFFICIALS IS A MATTER OF VITAL IMPORTANCE TO PETITIONERS THAT WAS ERRONEOUSLY IGNORED BY THE PANEL.

Certiorari is further warranted because the Court of Appeals approved an action of the FAA that completely failed to follow the requirements of Section 4(f) of the Transportation Act. Section 4(f) and *Overton Park* impose on the FAA a mandatory duty to communicate with state officials regarding the protection of public parks and historic properties. *See*, 49 U.S.C. § 303(c); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-412 (1971). The FAA never contacted Connecticut or County of Rockland officials regarding the potential 4(f) impacts to public trust parks and properties. By not contacting relevant state and local officials, the FAA unlawfully deprived these officials of their right to comment on

and fully inform the FAA of the impact of the agency's project on these important public trust properties. Yet, the court below has approved the FAA's doing precisely that by upholding the agency's decision not to contact local officials (and effectively the public they represent) and allow them to participate fully in the FAA's vital decision making process. This error involves a question of federal law of vital importance to all states and local governments.

Public involvement is a fundamental element in meeting the environmental goals set forth under Section 4(f). Section 4(f) expressly "prohibit[s] the Secretary of Transportation from adopting a project . . . requiring the use of . . . a public park . . . " unless "there is no prudent and feasible alternative. . . ." 49 U.S.C. § 303(c).[14] As this Court noted more than thirty years ago in its only case interpreting Section 4(f) in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 411-412 (1971):

> Section 4(f) of the Department of Transportation Act and § 138 of the Federal-Aid Highway Act are clear and specific directives. Both . . . provide that the Secretary 'shall not approve any program or project' that requires the use of any public parkland 'unless (1) there is no prudent and feasible alternative to the use of such land, and (2) such

[14] Note that 49 U.S.C. § 301(8) states that the FAA is to "consult and cooperate with State and local government."

> program includes all possible planning to minimize harm to such park . . . '

In *Overton Park*, the United States Department of Transportation argued, as the FAA does here, that it had discretion to decide how to determine the extent of the impact of its project. This Court, however, noted that "no such wide-ranging endeavor was intended" under the Act and that "[i]t is obvious that in most cases" it would be less expensive and more direct to use public parkland than to disrupt residential or commercial land. *Id*. at 412-13. The Court then concluded that "very existence of the statutes indicates that protection of parkland was to be given paramount importance." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 412-413 (1971) (footnotes omitted).[15] The Court added that "Congress . . . specified only a small range of choices that the Secretary can make [and that] a reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems." *Id*. at 416. The *Overton Park* Court also explicitly held that the court's inquiry "is to be searching and careful" and that such review includes

[15] As the Court stated, "the legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision." 114 Cong. Rec. 24036-24037. *Id.* at 413 n.28.

"whether the Secretary's actions followed the necessary procedural requirements." *Id*. at 416-417.

This case does not involve a question of the insufficiency or inadequacy of the FAA's efforts to communicate. Rather, in defiance of a clear mandate, the FAA never communicated with officials of Connecticut's Department of Environmental Protection and County of Rockland park officials regarding impacts to State and County parks and properties protected by Section 4(f). That failure directly conflicts with the FAA's own regulation implementing *Overton Park* stating that the FAA "assumes . . . that any part of a publicly owned park, recreation area, refuge or historic site is significant unless there is a statement of insignificance relative to the whole park by the federal, state or local official having jurisdiction thereof" and that "the responsible FAA official must consult all appropriate Federal, State and local officials having jurisdiction over the affected Section 4(f) resources when determining whether project-related noise impacts would substantially impair the resources." Order 1050.1E sect. 6.2(a) and (e). App. 195-197.

The FAA's failure to follow the *Overton Park* mandate and the Agency's own regulations undermines the FAA's ultimate conclusion as stated in the FAA's corrected Record of Decision that: "As to constructive use of other 4(f) resources, the analysis in the EIS and the additional analysis in the ROD in response to DOI comments confirm that the selected project would not cause an increase in noise or other

proximity impacts sufficient to impair the value of those resources." Corrected ROD at 52. App. 136 (emphasis supplied). This statement is clearly misleading because the FAA's statement was based on a record that is legally incomplete and may not support the FAA's ultimate conclusion that the project would not result in a "constructive use" of any Section 4(f) trust property anywhere in the five state project area.

Further, by ignoring *Overton Park* and the FAA's own regulations as applied to this record, the court failed to engage in the "searching and careful review" required by law. Without any analysis of the law and the facts, the court below has endorsed the FAA's "shortcuts" in meeting its 4(f) responsibilities. Under this ruling, the FAA need only consider a "subset" of selected potential 4(f) properties in making the crucial threshold determination of whether the project could result in a constructive use of any federal, state or local park and historic site without ever contacting state or local park officials. If such officials determine, after the close of comments, that important public properties in their jurisdictions were never evaluated for potential uses in violation of 4(f), they can never challenge FAA's arbitrary determination. They would forever be deprived of an opportunity to present evidence that the FAA overlooked important trust resources located in their jurisdiction where a quiet setting was a generally recognized feature or attribute of the site's significance.

IV. THE COURT OF APPEALS ERRED BY FINDING THAT PETITIONERS HAD "FORFEITED" THEIR SECTION 4(f) CLAIMS BY NOT PRECISELY RAISING THE SPECIFIC ISSUE OF FAA'S DUTY TO CONTACT STATE AND LOCAL OFFICIALS EVEN THOUGH THE ISSUE OF THE PROJECT IMPACTS ON TRUST PROPERTIES WAS RAISED DURING THE ADMINISTRATIVE PROCESS.

Certiorari is also warranted because the Court of Appeals misinterpreted its own precedent on the law of waiver and ignored numerous decisions from other circuits in holding that Petitioners had "forfeited" their right to challenge the clear failure of the FAA to affirmatively contact and seek input from state officials and other parties regarding affected parks.

The standard of review of the purely legal issue of the applicability of the doctrine of waiver is *de novo*. *See Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 461-462 (6th Cir. 2004) (waiver doctrine is the codified version of exhaustion.) *See Northern Michigan Hospitals, Inc. v. Health Net Federal Services, LLC*, 2009 WL 2869149, *4 (3rd Cir. 2009) (The standard of review under the doctrine of issue exhaustion is *de novo* review); *Diaz v. United Agric. Employee Welfare Ben. Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995) (*citing Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980)).

The record unequivocally reveals that the Petitioners and others repeatedly raised Section 4(f)

issues before the FAA. *See*, *e.g.*, ROD App. D-57. App. 219-223. For example, the County of Rockland's discussion of Section 4(f) included a request to the FAA for the full evaluation of noise sensitive resources. FEIS App. Q. App. 219-223. (Friends of Rockefeller State Park Preserve stressed FAA's obligation to comply with all aspects of 4(f)). Additionally, the Chair of the Rockland County Legislature commented on August 30, 2007, that "there will be a deleterious effect of the airplane noise over [County Parks]. Increased airplane noise will certainly have a negative effect on the enjoyment of our open spaces. . . ." App. 213. Rockland County also requested that the FAA delay its final decision until it conducted a full evaluation of noise sensitive park resources. App. 219-223.

In fact, the FAA itself backhandedly recognized that Petitioners raised the "heightened analysis" issue – which thus preserves that issue on appeal. Resp. Br. 87. "Moreover, with one exception [that of Ardens Historic District, part of Petitioner Timbers Civic Association], . . . no commenter recommended replication of the additional analysis for the non-federal properties that Petitioners now focus on"). It is hardly possible, therefore, for the FAA to claim that it was not on notice of the issue of the lack of Section 4(f) compliance in this case.

Further, other stakeholders raised the issue of FAA's deficient 4(f) analysis as well. For example, Petitioners' Brief quotes the United States Fish and Wildlife Service comment in the Record highlighting

FAA's inadequate 4(f) analysis: "There are still concerns related to insufficient data on noise impacts as they relate to National Park Service units and the other listed Section 4(f) resources, including units of the National Wildlife Refuge System in New York, New Jersey, and Pennsylvania." *See* Pet. Br. 81.

The above referenced comments show that the FAA was notified, at the appropriate time, of the legal issues involved with the proper statute identified and of the nature of the noise impacts of concern. The FAA, therefore, was given much more comprehensive notice than was the case in *Friends of Richards-Gebaur Airport v. F.A.A.,* 251 F.3d 1178, 1194-95 (8th Cir. 2001) or *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 898-900 (9th Cir. 2002), where much more abbreviated notice was given to the relevant agencies. In both of these later cases, however, the respective courts of appeals found that notice was sufficient and the issues raised not deemed waived.

Thus, various parties did raise the issue of the need to consider potential impacts to 4(f) properties but the FAA never followed up as required by soliciting the comments of state and local officials and evaluating these comments in its impacts analysis.

The Court of Appeals also ignored established precedent that one objection, *by any party,* puts the FAA on notice and preserves that issue on appeal. *See* 49 U.S.C. § 46110(d); *N.E. Maryland Waste Disposal Authority. v. EPA,* 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam). As noted above, the County of Rockland's discussion of 4(f) issues included a request for

full evaluation of noise resources. App. 219-223. This was sufficient to preserve the issue for appeal. ("Consideration of the issue by the agency at the behest of another party is enough to preserve it"); *Northwest Airlines, Inc. v. DOT,* 15 F.3d 1112, 1121 (D.C. Cir. 1994) (Northwest Airline's one-line argument during administrative hearings was sufficient to preserve issue for appeal). *See also Friends of Richards-Gebaur Airport v. F.A.A.,* 251 F.3d 1178, 1194-95 (8th Cir. 2001) (holding that where a party to the administrative process raises an issue by quoting the specific language of the statute, it preserved the argument on appeal, even if the argument was not thorough at the administrative level). *See also Reytblatt v. U.S. Nuclear Regulatory Comm'n,* 105 F.3d 715, 721 (D.C. Cir. 1997) (finding petitioner was "at liberty" to raise an issue on appeal raised by another party during administrative proceedings); *Cellnet Commc'n v. FCC,* 965 F.2d 1106 (D.C. Cir. 1992) ("Consideration of the issue by the agency at the behest of another party is enough to preserve it"). It is enough that the *legal issue* of the FAA's 4(f) duty to assess the project's impacts on state and local parks was raised below. All that is required under the law of waiver is that the agency be on notice of the underlying issue, not that every possible technical objection was specifically raised. *Kleissler v. United States Forest Serv.*, 183 F.3d 196, 202 (3rd Cir. 1999); *Southwest Ctr. For Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 521-22 (9th Cir. 1998). In this case, as noted above, several parties highlighted 4(f)

compliance issues before the FAA. FAA clearly cannot claim that it was unaware of its 4(f) duties.

Further, not only has the Court of Appeals in this case incorrectly applied the doctrine of waiver under these facts, is has also created a split in the circuits by rejecting the notice-based approach used in the Eighth, Ninth, and Third Circuits in favor of a completely new standard that places an almost impossible burden of specificity on petitioners seeking to avoid losing the ability to raise an issue on appeal. In fact, because of the limited discussion of this issue by the Court of Appeals, it is not possible at this point for any petitioner in the District of Columbia Circuit to know what notice must be given at the agency level in order to preserve a claim for appeal. This problem is particularly acute because many federal statutes permit an appeal of an agency action to be taken either in the Court of Appeals in which the parties are located or the District of Columbia Circuit.

Ultimately, the FAA has an affirmative obligation to consult with state and local officials regarding impacts to parks and historic properties. Therefore it makes no legal or logical sense to state that the Petitioners have waived the FAA's obligations by failing to tell the FAA to comply with Section 4(f) when it is legally obligated to do so. In fact, one court has held that when an agency has a legal duty, such an obligation *cannot* be waived. *See Wilderness Society v. Salazar*, 603 F. Supp. 2d 52, 70 (D.D.C. 2009).

Finally, even if the various parties had not raised 4(f) compliance before the agency, and even if it was possible for the agency to waive its statutory duty to coordinate with state and local officials, the Court overlooked the alternative basis under 49 U.S.C. § 46110(d) ("reasonable grounds for not making the objection") for Petitioners not raising the specific 236 unstudied parks issue. *See Ark. Power & Light Co. v. FPC*, 517 F.2d 1223, 1236 (D.C. Cir. 1975) ("the exhaustion of remedies doctrine which is expressed in the statute is not inflexible; it allows for deviation where the interests of justice dictate . . . " (*citing FPC v. Colo. Interstate Gas Co.,* 348 U.S. 492, 498-99 (1955))). Here, the FAA never said during the administrative process that it would not contact certain state and local parks officials in conducting its Section 4(f) environmental review. *See Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 686 (D.C. Cir. 2004) (no waiver when petitioner "plausibly asserts that it has no reason to suspect alleged defects" in NEPA analysis.). Therefore, Petitioners could not have challenged such a position during the administrative process. Rather, Petitioners claim that the FAA omitted study of "at least" 236 parks only came to light *after* suits were filed, cases consolidated and the petitioners reviewed the massive FAA record to determine the aggregate number of parks within the jurisdictions of the eleven petitioners that were never studied.

In sum, even if it were possible for the Petitioners to waive the FAA's legal obligation to seek

state and local 4(f) input, which it is not, the record demonstrates, unequivocally, that the issue of section 4(f) compliance for state and local parks was presented to the FAA. Alternatively, it is not reasonable to require Petitioners to foresee that the FAA would fail to meet its 4(f) obligations when the FAA never informed either the public or responsible officials that it would not contact them as required. Under either analysis, the panel below has broken with every other circuit that has reviewed these issues and established a new and not well-defined standard that would require an essentially impossible level of specificity on the part of any party seeking to preserve an issue for appeal.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully submit that this Petition should be granted and a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

LAWRENCE R. LIEBESMAN
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
202-955-3000

Counsel for Petitioner County of Rockland, New York

RICHARD BLUMENTHAL
Attorney General of Connecticut

ROBERT SNOOK
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860-808-5270

Counsel for Petitioner State of Connecticut

DONALD W. STEVER
K & L GATES LLP
599 Lexington Avenue
New York, NY 10022
212-536-4861

Counsel for Petitioner Friends of the Rockefeller State Park Preserve, Inc.

PETER DICKSON
POTTER AND DICKSON
194 Nassau Street
Princeton, NJ 08542
609-921-9555

Counsel for Petitioners City of Elizabeth, New Jersey, New Jersey Coalition Against Aircraft Noise