ENTERED ON JUNE 10, 2009
In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 07-1363
(Consolidated with Nos. 07-1437, 07-1493, 07-1494, 07-1495, 07-1496, 07-1497, 07-1498, 07-1499, 08-1105, 08-1106, and 08-1107)

COUNTY OF ROCKLAND, NEW YORK, et al.,

Petitioners

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*

Respondents.

PETITION FOR REHEARING *EN BANC* AND REHEARING ON BEHALF OF CITY OF ELIZABETH, MAYOR J. CHRISTIAN BOLLWAGE, NEW JERSEY COALITION AGAINST AIRCRAFT NOISE, COUNTY OF UNION, BERGEN COUNTY BOARD OF CHOSEN FREEHOLDERS, UNION COUNTY FREEHOLDERS AIR TRAFFIC ADVISORY BOARD, BOROUGHS OF EMERSON, HILLSDALE, MONTVALE, OLD TAPPAN, ORADELL, PARK RIDGE, RIVER VALE, WESTWOOD, WOODCLIFF LAKE, AND TOWNSHIP OF WASHINGTON

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INTRODUCTION

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure (FRAP), Petitioners City of Elizabeth, New Jersey, Mayor J. Christian Bollwage of the City of Elizabeth, New Jersey Coalition Against Aircraft Noise, County of Union, New Jersey, Union County Freeholders Traffic Advisory Board, Bergen County (NJ) Board of Chosen Freeholders, Boroughs of Emerson, Hillsdale, Montvale, Old Tappan, Oradell, Park Ridge, River Vale, Westwood and Woodcliff Lake, and Township of Washington (collectively hereinafter "New Jersey Petitioners") seek a Rehearing *En Banc* and Rehearing of the June 10, 2009 Panel Decision which dismissed the consolidated petitions for review in this appeal from the Federal Aviation Administration's ("FAA") New York/New Jersey/ Philadelphia Metropolitan Area Airspace Redesign ("Redesign" or "Project").

FAA's Redesign affects 30 million people living in 31,180 square miles of five northeastern and midatlantic states near major airports, including those people represented by and/or comprising the New Jersey Petitioners, who are located in the vicinity of Newark Liberty International Airport ("Newark Airport") in New Jersey. The issues raised by the New Jersey Petitioners in this appeal and Rehearing Petition are of exceptional importance to these people and to FAA's airspace redesign efforts nationally. Rehearing *En Banc* and Rehearing is justified under FRAP Rules 35 and 40 for the following five reasons as more fully

explained in the Argument. **First,** the Panel's Decision failed to cite, and conflicts with, this Court's decision in *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) relating to FAA's failure to follow its own Rule, FAA Order 1050.1E, and project the Redesign's noise impacts for the 2012 year of Project implementation and five to ten years thereafter. **Second**, the Panel's Decision failed to address Petitioners' argument that FAA's failure to implement Night Ocean Routing, which was included as a fundamental part of its Selected Alternative in the Record of Decision ("ROD"), was a significant change in the Project requiring a Supplemental Environmental Impact Statement ("SEIS"). The Panel's failure to address this issue conflicts with other U.S. Court of Appeal decisions. **Third**, the Panel's Decision failed to address the exceptionally important question of the Redesign's disproportionate and significant noise impacts on environmental justice minority populations in areas surrounding Newark Airport. **Fourth,** the Panel's Decision failed to discuss the exceptionally important question of why FAA failed to conduct background noise monitoring in the City of Elizabeth, despite projecting significant and reportable noise impacts there. **Fifth,** the Panel's Decision effectively avoided addressing Petitioners' argument that FAA violated its own rules by failing to include a Noise Compliance Monitoring Plan in the ROD after explicitly and unambiguously committing to include the plan in the Final Environmental Impact Statement ("FEIS").

ARGUMENT

I. The Panel's Decision Failed to Cite, and Conflicts With, This Court's Decision in *Village of Bensenville v. FAA* Relating to FAA's Failure to Follow Its Own Rule, FAA Order 1050.1E, and Project the Redesign's Noise Levels for the 2012 Year of Project Implementation and Five to Ten Years Thereafter.

FAA stated in its FEIS that Project Implementation would occur by 2011 and amended that date to 2012 in its Record of Decision (ROD). ROD 5; AR 9762:11, JA 1763; Pet. Br. 56. FAA Order 1050.1E, App. A, Section 14.4g(2) states that time frames for Day-Night Average Sound Level (DNL) noise forecasts usually selected are the year of anticipated Project Implementation and five to ten years thereafter. FAA instead prepared noise forecasts for 2006 and 2011, both prior to the 2012 year of Project Implementation and provided no noise projections subsequent to 2012. FAA argued that its forecasts are "appropriate time frames" within the meaning of FAA Order 1050.1E, App. A, Section 14.4g(2), Resp. Br. 64.

This Court interpreted this same FAA Order, FAA Order 1050.1E, in *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006). There, Petitioners challenged a delay savings projection of five years after the year of Project Implementation. In *Bensenville*, this Court interpreted and applied FAA Order 1050.1E, holding that a projection of five years after Project Implementation was consistent with FAA

Order 1050.1E's requirement for a projection "five to ten years after implementation." *Id.* at 71.

The Panel's Decision accordingly failed to cite and apply this Court's decision in *Bensenville* which interpreted and applied FAA Order 1050.1E's requirement for a projection five to ten years after Project Implementation. Without citing *Bensenville*, or any other decision, the Panel impermissibly shifted the burden to Petitioners to show that it was arbitrary for FAA to fail to apply its own rule, FAA Order 1050.1E, and fail to project noise impacts for the year of Project Implementation and five to ten years thereafter.

The Panel Decision's failure to cite and apply this Court's decision in *Bensenville* and enforce FAA Order 1050.1E's requirement that noise impacts be projected for the year of Project Implementation and five to ten years thereafter means that significant and serious noise impacts for the area around Newark Airport, including the City of Elizabeth and North Central New Jersey, will not be properly reviewed and addressed. FAA concluded that significant and reportable noise will impact areas of Elizabeth and that in 2011 there will be an approximately one square mile area of Elizabeth which will receive an increase of 3.0 DNL or more to the 60-65 DNL level affecting some 16,803 people, and a slightly larger area (19,357 people) that will receive an increase of 5.0 DNL or more to the 45-60 DNL level (along with a comparatively sized area of North

Central New Jersey). Resp. Br. 69-70. FAA's 2006 and 2011 noise forecasts further fail to account for the very substantial air traffic growth beyond the year 2011 projected by the Port Authority of New York and New Jersey, the Newark Airport operator. Pet. Br. 56-58; JA 46.

If the Panel's Decision is allowed to stand, it will mean that FAA's Order 1050.1E requirement for projection for the year of Project Implementation and five to ten years thereafter will be rendered null and void and this Court's decision in *Bensenville*, interpreting and applying FAA Order 1050.1E, will be rendered meaningless.

II. The Panel's Decision Failed to Address Petitioners' Argument that FAA's Failure to Implement Night Ocean Routing, Which was Included as a Fundamental Part of Its Selected Alternative in the ROD, was a Significant Change in the Project Requiring a Supplemental Environmental Impact Statement. The Panel's Failure to Address This Issue Conflicts with Other U.S. Court of Appeal Decisions.

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 22; AR 9762:28, JA 1780. 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 50; AR 9762:56, JA 1808.

FAA advised the City of Elizabeth that night ocean routing has not been, and may never be, implemented and stated that night ocean routing is not among the initial steps FAA will take in the first stage of Project Implementation. FAA January 8, 2008 Letter to Scagnelli at 10, fn. 16. (*See* October 7, 2008 Order Granting Petitioners' Requests for Judicial Notice.)

Without night ocean routing, FAA's Selected Alternative approved in the ROD is not the Project being implemented and the public has been denied the opportunity to review and evaluate the fundamental change to that alternative caused by the failure to implement night ocean routing. 40 C.F.R. Section 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. Such a change in the Redesign's implementation essentially invalidates much of the noise impact data contained in the FEIS and upon which the ROD is in large part based. FAA's failure to implement night ocean routing, particularly given its commitment to re-evaluate the FEIS, undertake appropriate environmental review, and amend the ROD if it revised or eliminated it (ROD 50) constitutes a "substantial change in proposed action" triggering the requirement for a Supplemental Environmental Impact Statement. 40 C.F.R. 1502.9(c). *See also*

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).[1]

The Panel Decision's failure to address the night ocean routing issue at all allows FAA to retreat from its own commitment in the ROD to institute night ocean routing as a critical noise mitigation measure without undertaking the legally mandated appropriate environmental review and conflicts with decisions of other U.S. Courts of Appeals which have ruled that substantial changes in proposed agency action trigger the requirement for a Supplemental Environmental Impact Statement.

III. The Panel's Decision Failed to Discuss the Exceptionally Important Question of the Project's Disproportionate and Significant Noise Impacts on Environmental Justice Minority Populations.

FAA concluded that there would be a disproportionate noise impact on minority populations near Newark Airport. ROD 28; AR 9762:34, JA 1786; FEIS

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[1] *National Wildlife* holds that a SEIS is required if a significant impact on the environment will result from subsequent project changes. *Id.* at 782 *citing EDF v. Marsh*, 651 F.2d 983, 992 (5th Cir. 1981). Here, there currently is no way of knowing whether the noise impacts resulting from the Selected Alternative without night ocean routing are (or will be) significant, because the FAA never modeled for such a scenario. Clearly, the omission of night ocean routing has an adverse affect on those impacted. FAA has admitted that without mitigation "significant and reportable impacts were projected in areas of Elizabeth." Resp. Br. 69. *See also* Pet. Br. 59, n. 46. FAA has acknowledged that night ocean routing was a critical component of its mitigation plan proposed in the FEIS. FEIS App. Q at 88, 89; AR 9304:3188-89, JA 1688-89. FAA is required to prepare a SEIS to demonstrate that these impacts are not significant.

4-44, 4-46; AR 9301:276, 278, JA 434, 436; Resp. Br. 78. FAA concluded that with noise mitigation, based on night ocean routing, significant noise impacts to those populations would be eliminated by 2011. ROD 28; AR 9762:34, JA 1786; FEIS 5-38, 5-39; AR 9301:350, 351, JA 508-09; Resp. Br. 78-79. As stated in Point II above, FAA has advised that night ocean routing has not been, and may never be, implemented leaving the disproportionate and significant noise impacts on minority populations near Newark Airport unmitigated.

FAA's failure to mitigate the disproportionate and significant noise impacts on minority populations near Newark Airport is further compounded by the fact that FAA's FEIS and ROD fail to comply with FAA and Council on Environmental Quality (CEQ) requirements to consider interrelated cultural, social, occupational, historic or economic factors that amplify the severity of noise impacts on the affected environmental justice populations and to discuss whether the affected environmental justice populations would experience heightened noise impacts due to factors such as residing in substandard housing and suffering from elevated rates of hypertension or other elements. Pet. Br. 59. FAA did not deny that it failed to conduct these required analyses in the FEIS and ROD. Resp. Br. 79. The Panel's Decision does not address FAA's failure to satisfy these exceptionally important environmental justice requirements.

IV. The Panel's Decision Failed to Discuss the Exceptionally Important Question of Why FAA Failed to Conduct Background Noise Monitoring in the City of Elizabeth, Despite Projecting Significant and Reportable Noise Impacts There.

FAA admitted that the Redesign would cause the City of Elizabeth to experience significant noise impacts: "Because significant and reportable impacts were projected in areas of Elizabeth, that City received particular attention for noise mitigation." Resp. Br. 69. FAA concluded that, in 2011, there will be an approximately one square mile of Elizabeth that will receive an increase of 3.0 DNL or more to the 60-65 DNL level, affecting some 16,803 people. Most of those people reside in environmental justice communities according to FAA's census block data. FEIS 4-44 to 4-46, Table 4.15; AR 9301:276-78, JA 434-36; Resp. Br. 69-70. These admitted DNL levels were only for project noise and did not include ambient and other non-project related noise. Resp. Br. 73.

FAA admitted that FAA Order 1050.1E, App. A, Paragraph 14.4j requires that noise monitoring be conducted when a proposed FAA action would (i) result in a significant noise increase, (ii) is highly controversial, and (iii) inclusion of data on background or ambient noise may be helpful. Resp. Br. 73-74. FAA also acknowledged the need for background noise monitoring at selected locations to properly consider the cumulative noise impacts of the Project. FEIS at 4-83; AR 9301:315, JA 465.

FAA failed to conduct background noise monitoring in the City of Elizabeth where it had concluded there were significant noise impacts. Resp. Br. 69-70. FAA's closest background monitoring location to Newark Airport was located in Staten Island, seven miles away from departure Runway 22L/R. Runway 22L/R, the main Newark Airport departure runway, extends into the City of Elizabeth itself and its flight path overflies the City. Pet. Br. 50-51; Resp. Br. 74. It is highly questionable and defies common sense that FAA would not conduct background noise monitoring in the City of Elizabeth, despite concluding that there were significant noise impacts there. The Panel's Decision failed to address or even discuss this exceptionally important issue.

V. The Panel's Decision Effectively Avoided Addressing Petitioners' Argument that FAA Violated Its Own Rules by Failing to Include a Noise Compliance Monitoring Plan in the ROD after Committing to Include the Plan in the FEIS.

FAA unequivocally committed in the FEIS to include a noise compliance monitoring plan in the ROD. FEIS App. Q at 33; AR 9304:3133, JA 1673. 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. 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 21-22; AR 9762:27-28, JA 1779-80; FEIS 4-44 to 4-46; AR 9301:276-78, JA 434-36. FAA ignored its own

rule by failing to include a noise compliance monitoring plan in the ROD. FAA Order 1050.1E, Paragraph 512b; JA 35; Pet. Br. 62-63.

The Panel's Decision dismissed FAA's binding commitment in the FEIS to include a noise compliance monitoring plan in the ROD as a "stray comment." Slip op. at 6. There is nothing in the record before the Court to support that characterization which effectively allowed the Panel to avoid addressing Petitioners' exceptionally important issue.[2] The Court then concluded that "[a]bsent a firm commitment to such monitoring, neither NEPA nor the agency's regulations require it." Slip op. at 7. The Court ignored the fact that FAA did make the commitment and then flatly contradicted its own rule by withdrawing it. The Court's citation to *Robertson v. Methow Valley Citizens Council*, 490 U.S. 32, 359 (1989) does not support its conclusion. In this case, unlike *Robertson*, FAA unqualifiedly committed to a specific noise mitigation plan in the FEIS. FEIS App. Q at 33; AR 9304:3133, JA 1673; Pet. Br. 62-63.

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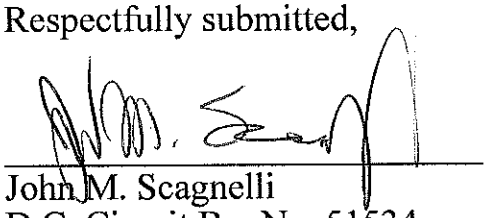
[2] In fact, elsewhere in the FEIS, FAA, in its response to a comment expressing concern regarding whether the modeled noise results would be achieved in practice, again cited FAA Order 1050.1E, Paragraph 512b and reiterated the requirement that, with respect to each mitigation measure selected, "(a) monitoring and enforcement program shall be adopted . . . ." FEIS App. Q at 31; AR 9304:3131, JA 1671.

CONCLUSION

Petitioners City of Elizabeth, Mayor J. Christian Bollwage of the City of Elizabeth, New Jersey Coalition Against Aircraft Noise, County of Union, Union County Freeholders Traffic Advisory Board, Bergen County (NJ) Board of Chosen Freeholders and Boroughs of Emerson, Hillsdale, Montvale, Old Tappan, Oradell, Park Ridge, River Vale, Westwood and Woodcliff Lake, and Township of Washington respectfully request that the Court grant their Petition for Rehearing *En Banc* or Rehearing of the Panel's June 10, 2009 Decision.

Respectfully submitted,



Dated: July 24, 2009

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CERTIFICATE OF COMPLIANCE

FED. R. APP. P. 28(a)(11); 32(a)(7)(C); CIR. R. 32(a)(7)(C)
CASE NO. 07-1363

I certify, pursuant to *Fed. R. App. P.* 28(a)(11) and 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), that the foregoing brief is proportionately spaced, has a typeface of 14 points, and is less than 15 pages.

Respectfully submitted,

Dated: July 24, 2009

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ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1363 **September Term, 2008**

FILED ON: JUNE 10, 2009

COUNTY OF ROCKLAND, NEW YORK, ET AL.,
PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION,
RESPONDENT

Consolidated with 07-1437, 07-1493, 07-1494, 07-1495, 07-1496, 07-1497, 07-1498, 07-1499, 08-1105, 08-1106, 08-1107

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

Before: SENTELLE, *Chief Judge*, GINSBURG, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

These petitions for review were considered on the record from the Federal Aviation Administration and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the petitions for review be dismissed insofar as the petitioners forfeited some of their challenges and otherwise denied for the reasons given in the attached memorandum opinion.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

MEMORANDUM OPINION

In a corrected Record of Decision (ROD) issued September 28, 2007 the Federal Aviation Administration adopted a multi-phase plan to modernize the New York/New Jersey/Philadelphia Metropolitan Area airspace. The redesign shifts flight paths, reallocates management of particular sectors of airspace amongst air traffic control facilities, and adopts new flight procedures. The changes will, the FAA determined, reduce delay and increase operational efficiency, without imposing significant noise effects upon, or increasing air pollution in, the states below the NY/NJ/PHL airspace. The petitioners object to the FAA's analysis of environmental impacts as procedurally invalid and substantively unreasonable, in violation of the National Environmental Policy Act (NEPA), the Department of Transportation Act (DOT Act), and the Clean Air Act (CAA). We dismiss the petitions for review insofar as the petitioners forfeited some of their challenges and deny the rest of the petitions because the FAA's environmental impact analysis was procedurally sound and substantively reasonable.

I. NEPA

NEPA directs a federal agency to "include in every ... report on proposals for ... major Federal actions significantly affecting the quality of the human environment, a detailed statement ... on ... the environmental impact of the proposed action," 42 U.S.C. § 4332(2)(C)(i), known as an environmental impact statement (EIS). We review the FAA's compliance with NEPA for the most part under the arbitrary and capricious standard of the Administrative Procedure Act, asking whether the agency provided "the necessary process" and took a "'hard look' at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350

(1989); *see Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006). We address only a few of the petitioners' many objections to the EIS. None of the petitioners' objections amounts to a significant procedural deficiency and none indicates that the FAA failed to take a "hard look" at the environmental impacts of its action. *See Cmtys. Against Runway Expansion v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004).

The petitioners first attack the FAA's forecast of future traffic. The agency's forecast is entitled to "even more deference" than this court gives "under the highly deferential arbitrary and capricious standard." *St. John's United Church of Christ v. FAA*, 550 F.3d 1168, 1172 (D.C. Cir. 2008). The petitioners argue the FAA failed to consider reasonably foreseeable indirect effects of the redesign, as required by 42 U.S.C. § 4332(2)(C)(ii) and 40 C.F.R. § 1508.8(b), because the agency refused to adjust its forecast for the growth-inducing effect of reductions in flight delay. In the FAA's experience, however, airspace redesign, which increases throughput but not airport capacity, does not induce significant enough additional demand to warrant modeling. We have deferred to similar reasoning before, and we do so again here. *See City of Olmstead Falls v. FAA*, 292 F.3d 261, 272 (D.C. Cir. 2002). The petitioners insist the FAA's reliance upon its experience ran counter to the evidence before it, but they point to statements of the agency that show nothing more than the possibility of another reasonable view; that is not enough to discharge their burden to show the FAA was arbitrary, *see City of Los Angeles v. FAA*, 138 F.3d 806, 808 (9th Cir. 1998).

Next, the petitioners change course, contending that once the FAA recognized it had overestimated future traffic, particularly at Newark International Airport, it should have adjusted the baseline for its environmental analysis. The FAA, however, took the requisite hard look by

"creating its models with the best information available when it began its analysis and then checking the assumptions of those models as new information became available." *Village of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C. Cir. 2006). Although the agency found a 14% gap between its forecast of 2006 traffic on the average annual day at Newark and actual traffic there on the average day in 2005, it also found the overall forecast was well within the 10% margin of acceptable error the agency employs when deciding whether a forecast is useful for decision making. The FAA concluded the forecast, although not perfect, still "capture[d] the general flow and magnitude of the traffic in a way that can show differences among the proposed alternatives."

The petitioners' chief complaint is that the FAA's explanation is unreasonable because whether the redesign will reduce delay turns upon the forecast at Newark. As the FAA explains, however, although Newark will experience the greatest reduction in "block time" — which the petitioners erroneously treat as a reduction in delay — all the major airports in the region will experience reductions in delay. The petitioners' focus upon one data point for Newark is therefore based upon their having misunderstood the record before the agency. Given the substantial deference we owe the agency, *see St. John's*, 550 F.3d at 1172, we cannot say its reassessment of the forecast was arbitrary and capricious.

In their final challenge to the FAA's traffic forecast, the petitioners argue the FAA should have forecast the impact of future traffic in 2012 and in 2017 because the agency "usually" forecasts such impacts for the "year of anticipated project implementation and [for] 5 to 10 years after implementation." FAA Order 1050.1E, Environmental Impacts: Policies and Procedures app.A § 14.4g(2) (Mar. 20, 2006). The FAA, however, need only select an

"appropriate" timeframe for a forecast, *id.*, and the petitioners have not given us a reason to think the FAA, when it began the analysis in 2001, selected an inappropriate timeframe; nor have they shown that, once the FAA pushed back the date of implementation, it was arbitrary not to restart the analysis. The probability that air traffic will increase after 2011 does not show the FAA's decision to adopt the redesign with environmental mitigation measures was based upon an insufficient appreciation of the impact of the project.

The petitioners next complain the FAA should have produced a supplemental draft EIS (DEIS) because, they assert, the agency substantially changed the project at the eleventh hour when, after having issued the DEIS, it designed a noise mitigation measure routing flights over part of the Rockefeller State Park Preserve in New York. *See* 40 C.F.R. § 1502.9(c) (requiring supplemental DEIS whenever agency "makes substantial changes in the proposed action that are relevant to environmental concerns"). As the FAA explains, however, it essentially readopted the pre-redesign flight path over the park, the noise impact of which had already been the subject of public comment when the agency assessed the no-action alternative. We defer to that reasonable explanation why no supplemental analysis was necessary. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374–77 (1989).

One more NEPA challenge deserves mention: The petitioners argue the FAA failed to honor a commitment it made in the final EIS (FEIS) to institute a compliance monitoring program as part of its noise mitigation plan. In responding to a comment upon the Noise Mitigation Report, the FAA briefly stated the agency would adopt a compliance monitoring plan in the ROD. The FAA, however, never developed a detailed monitoring program as part of the FEIS, or specified one in its ROD, and the agency's stray comment was not a binding

commitment to adopt such a program. Absent a firm commitment to such monitoring, neither NEPA nor the agency's regulations require it. *See* 40 C.F.R. § 1505.3 ("Mitigation ... and other conditions established in the [EIS] or during its review and committed as part of the decision shall be implemented"); Order 1050.1E § 512b ("Any mitigation measure that was made a condition of the approval of the FEIS must be included in the ROD"); *cf. Robertson*, 490 U.S. at 352 (NEPA does not impose "substantive requirement that a complete mitigation plan be actually formulated and adopted" before agency can act).

II. DOT Act

Section 4(f) of the DOT Act prohibits the Secretary of Transportation from adopting a "project ... requiring the use ... of a public park ... or land of an historic site" unless "there is no prudent and feasible alternative to using that land" and the Secretary has done "all possible planning to minimize harm to the park ... or historic site." 49 U.S.C. § 303(c). The prohibition of the Act extends to constructive use, including "noise that is inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose." *City of Grapevine v. DOT*, 17 F.3d 1502, 1507 (D.C. Cir. 1994). The FAA applied the guidelines contained in 14 C.F.R. pt.150 and, as required by Order 1050.1E app.A § 6.2i, considered "[a]dditional factors" beyond the guidelines when assessing "the significance of noise impacts on noise sensitive areas." Based upon that analysis, the FAA concluded the redesign would not result in the constructive use of any § 4(f) property.

The petitioners argue the FAA's process of screening for potentially affected § 4(f) properties was procedurally defective and substantively inadequate because the agency did not consult all state and local park officials and did not give individualized attention to at least 236

properties the petitioners say may be affected. We dismiss this challenge as forfeit because no one raised it during the administrative proceeding. *See Olmstead Falls*, 292 F.3d at 274.

With respect to properties that were the subjects of public comments, the petitioners argue the FAA violated § 4(f) and Order 1050.1E (1) by failing to conduct individualized analyses of certain properties they say are noise-sensitive and (2) by improperly analyzing noise impacts at another property. Because, however, the petitioners have failed to impugn the agency's screening methodology or to offer "a serious argument" that the FAA failed adequately to consider any property that may suffer a constructive use, we defer to the agency, *see Town of Cave Creek v. FAA*, 325 F.3d 320, 333 (D.C. Cir. 2003).

The petitioners also argue the FAA violated § 4(f) and 40 C.F.R. § 1506.6 by delaying additional noise impact analyses for several parks, which analyses were then summarized in, and appended to, the ROD without an opportunity for further public comment. Section 4(f) does not require such an additional process, however, and 40 C.F.R. § 1506.6(a) merely directs the agency generally to "[m]ake diligent efforts to involve the public in preparing and implementing [its] NEPA procedures." As indicated by the FAA's extensive public outreach effort and its thorough process of environmental review, the agency complied with the regulation. The petitioners cite *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008), but that case is inapposite because in appending additional analyses to the ROD the FAA did not "evade" implementation of any FAA regulation requiring additional notice or public comment.

III. Clean Air Act

The CAA requires a federal agency to determine whether a proposed federal project will conform to an applicable state implementation plan (SIP) adopted to achieve the Environmental

Protection Agency's national ambient air quality standards (NAAQS). 42 U.S.C. § 7506(c). Pursuant to § 7506(c)(4)(A), the EPA has promulgated a General Conformity Rule that relieves a federal agency of the obligation to conduct a full-scale conformity determination if the project is not "regionally significant," 40 C.F.R. § 93.153(i)–(j), and if the project either will result in at most *de minimis* emissions of criteria pollutants, *id.* § 93.153(b)–(c), or comes within one of the categories in the agency's list of actions that are presumed to conform to any SIP, *id.* § 93.153(f)–(h). Because we hold the FAA reasonably concluded the redesign is exempt from a conformity determination under the *de minimis* exemption, we need not and do not reach the petitioners' challenge to the agency's having relied, in the alternative, upon its presumed-to-conform list, *see* Federal Presumed to Conform Actions Under General Conformity, 72 Fed. Reg. 41,565, 41,578 (2007).

In applying the *de minimis* exemption the FAA did not directly calculate the level of emissions resulting from the project, but rather relied upon a fuel burn analysis that showed the redesign will "reduce fuel consumption by just over 194 metric tons per day" in the study area. Because reducing fuel consumption reduces aircraft emissions, the FAA concluded the redesign will reduce emissions in the study area. As the agency sensibly reasoned, a project that *decreases* emissions cannot cause a more than *de minimis* (if it could cause any) *increase* in emissions or be otherwise regionally significant; therefore, it did not conduct a conformity determination.

The petitioners' main contention is that, notwithstanding the result of the fuel burn analysis, the FAA had to calculate "the total of direct and indirect emissions" resulting from the project, 40 C.F.R. § 93.153(c)(1), and compare that total to thresholds identified by the EPA, *id.*

§ 93.153(b); *see also* Order 1050.1E app.A § 2.1c. According to the petitioners, the fuel burn analysis cannot show the redesign will reduce emissions because it does not account for the possibilities that the redesign will increase (a) emissions from airport ground equipment and (b) emissions of some pollutants due to changes in aircraft speed. Therefore, the petitioners argue, only by preparing an inventory of emissions could the FAA determine that emissions will not be significantly increased by the redesign.

Assuming the agency erred when it failed to inventory emissions, the petitioners still have failed to identify any way in which the error was or might have been harmful. *See* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error" when court reviews agency action). As the FAA explains, by reducing idling and taxiing, and thus reducing the time aircraft run their engines at or near ground level, the redesign will reduce the emissions most likely to have an effect upon local air quality. The agency did not need to quantify the reduction in order to conclude the redesign was exempt from a conformity determination. We therefore deny the petitions for review with respect to the petitioners' core challenge to the fuel burn analysis. *See Olmstead Falls*, 292 F.3d at 271 (even if FAA erred, "the burden is on petitioners to demonstrate that [the FAA's] ultimate conclusions are unreasonable").*

* * *

We have considered and found no merit in the petitioners' other arguments. Based upon the foregoing opinion, the petitions for review are dismissed in part and denied in part. The

* The petitioners also argue the fuel burn analysis failed to show the redesign will reduce emissions in all relevant nonattainment and maintenance areas, *see* 40 C.F.R. § 93.153(b), but that argument is not properly before us because the petitioners failed to raise it until their reply brief, *see Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

pending motions for judicial notice and for supplementation of the administrative record are dismissed as moot.

So ordered.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES, INTERVENORS AND AMICI

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

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

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

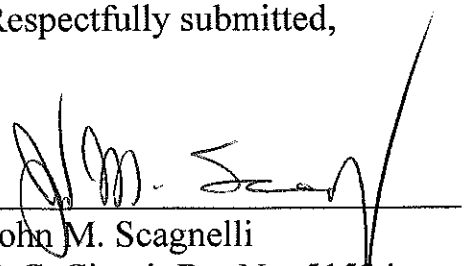
B. RULING UNDER REVIEW

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

C. RELATED CASES

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

Respectfully submitted,



Dated: July 24, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of July, 2009, a copy of the foregoing request was served by electronic mail and first-class mail, postage pre-paid, upon the following counsel of record for Respondents:

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