JUDGMENT 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.

ROCKLAND COUNTY, NEW YORK, CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND FRIENDS OF ROCKEFELLER STATE PARK PRESERVES' REQUEST FOR REHEARING OR REHEARING *EN BANC*

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INTRODUCTION

Pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure (FRAP), Petitioners Rockland County New York, State of Connecticut Department of Environmental Protection and Friends of the Rockefeller State Park Preserve seek rehearing or rehearing *en banc* of the panel's June 10, 2009, decision dismissing the consolidated petitions for review in the above captioned appeal. Rehearing or rehearing *en banc* is justified under FRAP Rules 40 and 35 for four reasons. **First**, the decision overlooks the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) regarding FAA's responsibilities under Section 4(f) of the DOT Act of 1966, 49 USC Sec. 303(c). **Second**, the panel misapprehended the law of waiver in this Circuit and the overlooked important facts in the record in holding that Petitioners had "forfeited" their claim that FAA had failed to adequately consult with state and local park officials regarding "at least 236 properties that petitioners say may be affected . . . because "no one raised it during the administrative proceeding." Mem. Op. at 5. **Third**, the panel's decision misapprehended public participation requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et. seq. and overlooked the decisions of this Circuit regarding the rule of prejudicial error in holding that the FAA was not obligated to allow for public comment on important noise impact analysis only first released with the September 5, 2007 Record of

Decision (ROD). **Fourth**, the proceeding involves issues of exceptional importance to the public affected by the redesign project because panel excused the FAA's failure to comply with important procedural protections under Section 4(f) and NEPA depriving the 30 million people living in the 31,180 square miles of the five affected states from fully participating in a decision that affects the noise they experience and the parks they enjoy.

ARGUMENT

I. The Decision Overlooked the Supreme Court's Decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970).

The decision quotes the language of Section 4(f) "prohibit[ing] the Secretary of Transportation from adopting a project...requiring the use of ...a public park..." unless "there is no prudent and feasible alternative..." 49 USC 303(c).[1] Yet, the panel never mentions the only Supreme Court decision to interpret Section 4(f), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970) ("*Overton Park*") nor does the Panel address the FAA's 4(f) implementing regulations setting forth strict procedures for meeting the Secretary's burden under that statute. The *Overton Park* Court held that "Section 4(f) of the Department of Transportation Act and section 138 of the Federal Aid Highway Act are clear and specific

[1] The panel notes that this prohibition extends to constructive use, including "noise that is inconsistent with a parcel of land's continuing to serve it's recreational, refuge or historical purpose." *City of Grapevine v. DOT*, 17 F.3d. 1502, 1507 (DC Cir. 1994). Mem. Op. at 5.

directives . . . the very existence of the statutes indicates that protection of parkland was to be given paramount importance". *Overton Park*, 401 U.S. at 412-413 (footnotes omitted).[2] While the *Overton Park* Court recognized that the Secretary's actions are entitled to a "presumption of regularity" under the Administrative Procedure Act (APA), 5 U.S.C. § 706, the Court recognized that the Secretary's discretion is not unlimited and 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 Court especially held that although court's inquiry "into the facts is **to be searching and careful**, the ultimate standard of review is narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* at 416-17 (emphasis supplied). This "**searching and careful review** " includes "**whether the Secretary's actions followed the necessary procedural requirements.**" *Id* at 417 (emphasis supplied).

The FAA's regulations implement *Overton Park's* strong direction by creating a presumption of "significance" that can only be overcome by following very strict procedures. The FAA "assumes . . . that any part of a publicly owned

[2] 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." *Overton Park*. at 413 n28.

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.IE § 6.2 (a) and (e), JA 41.[3] Here, the record is clear that the FAA did not follow its mandatory procedures of consulting with "all appropriate federal, state and local officials" prior to reaching its conclusion that the airspace redesign would not result in a "constructive use" of any section 4(f) resources any where in the five state area.

By ignoring *Overton Park* and the FAA's own regulations as applied to this record, the Panel failed to engage in the "searching and careful review" required by law. Without any analysis of the law and the facts, the panel 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

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[3] For a project to result in constructive use, a substantial impairment must occur. FAA Order 1050.1E defines "substantial 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, JA 41.

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 a supplemental analysis would be required for properties located in a quiet setting where "the setting is generally recognized feature of attribute of the site's significance."[4] The ruling also sanctions a process whereby the FAA gathers important information covering certain noise sensitive sites and then "hides" that information from the public comment even where the study contains crucial information on the possible need for a supplemental noise analysis.

II. The Panel's Decision Misapprehends the Law of "Waiver" in this Circuit.

The panel overlooked important facts in the record and misapprehended the law of waiver in relying solely on *City of Olmstead Falls v. FAA*, 292 F.3d 261 (D.C. Cir. 2002) to dismiss Petitioners' claims. In *Olmsted Falls*, this Court, citing 49 U.S.C. 46110(d), held that any Section 4(f) issues not raised before FAA are waived on appeal. *See Olmsted* at 274. Unlike *Olmstead*, the Petitioners did raise the issue of the FAA's need to study the project's impacts on potentially affected

[4] *See* Order 1050.1E, App. A § 6.2i, JA 42 *see also* JA 47- 48 ("DNL analysis may optionally be supplemented on a case by case basis to characterize specific noise effect."); *Grand Canyon Trust v. FAA,* 290 F.3d 339 (D.C. Cir. 2002) where the FAA conducted a detailed supplemental noise analysis addressing the natural quiet of Zion National Park from a proposed construction of a local replacement airport.

state and local parks during the administrative process. Specifically, the Chair of the Suffolk County Legislature commented on August 30, 2007 that "there will be deleterious effects of airplane noise over County Parks. Increased noise will certainly have a negative effect on the enjoyment or our open spaces. . . ." (AR 9762:58, JA 1819). The County also requested that the FAA delay its final decision until it conducted a full evaluation of noise sensitive park resources. Yet the FAA ignored the County's plea. Other commenters also raised these issues and as the FAA has acknowledged.[5]

Not only did the panel overlook important facts, it misapprehended the law of waiver in this Circuit --- that one objection, *by any party*, puts FAA on notice and preserves that issue on appeal. *See* 49 U.S.C. § 46110(d); *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam).[6] It was

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[5] Rockland County's discussion of 4(f) issues included a request for full evaluation of noise resources, AR 9762:58 JA 1815. FAA stated that "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 . . . ." Resp.Br. at 87.

[6] In *N.E. Maryland. Waste Disposal Authority,* this court rejected a claim that petitioners should be barred from raising a specific procedural issue regarding EPA's failure to set forth a rationale for distinguishing between different types of units in setting standards for solid waste incinerators under the Clean Air Act because petitioners did not specifically object to EPA's failure to articulate a rationale. The court held that the issue of sub categorization between units had generally been raised and that was sufficient to preserve the issue for appeal. *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

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.[7] Clearly, the record demonstrates that the issue of section 4(f) compliance for state and local parks was presented by commenters.

Further, the panel overlooked the alternative basis under Section 46110(d) ("reasonable grounds for not making the objection") for Petitioners not raising the specific 236 park 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 statue 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. Therefore, Petitioners could not have challenged such a position during the administrative process. Rather, the 236 park omission issue only came to light after suits were filed, cases consolidated and the petitioners

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F.2d 1106, 1109 (D.C. Cir. 1992) ("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).

[7] *See also Friends of Richards-Gebaur Airport v. FAA*, 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 had preserved the argument on appeal, even if the argument was not thorough at the administrative level).

reviewed the massive FAA's record to determine the aggregate number of parks within the jurisdictions of the eleven petitioners that were never studied. [8]

III. The Panel's Decision Misapprehends NEPA's Public Outreach Mandate and this Circuit's Law on the Rule of Prejudicial Error.

The panel excuses FAA's failure to allow public comment on a *post hoc* noise analysis of important parks that was appended to the ROD, in violation of NEPA and the law of this Circuit on the rule of prejudicial error. The panel never examined the importance of the study to the public's understanding of project's impacts on park resources and merely held that "as indicated by the FAA's extensive public outreach effort and its thorough process of environmental review, the agency complied with the regulation" (referring to the CEQ regulations at 40 C.F.R. § 1506.6(a)). Mem. Op. at 6.

The panel's rationale is inconsistent with NEPA's strong mandate "to consider every significant aspect of the environmental impact of a proposed action . . . and to ensure that the agency will inform the public that it has indeed considered environmental concerns in its decision – making process" *Balt Gas &*

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[8] This case is distinguishable from the Court's recent decision in *Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868, 873 (D.C. Cir. 2009) where this Court held that the "reasonable grounds" exception in *Arkansas Power* under the Federal Power Act (limited to where the FPC subsequently acknowledged that its action under challenge had been unlawful) did not apply because the FPC "made no such admission." In contrast, the FAA never indicated during the administrative process that it would not contact state or local officials in its 4(f) review as the agency's own regulations required.

Elec Co. v. NRDC, 462 U.S. 87, 97 (1983). Further, the panel's attempt to distinguish *Am. Bird Conservancy Inc. v. FCC*, 516 F. 3d 1027, 1035 (D.C. Cir. 2008) by holding that the FAA did not "evade" implementation of its own regulations requiring additional notice and public comment, Mem. Op. at 6, fails to recognize that the FAA's own regulations state that the "FAA's Community Involvement Policy Statement (dated April 17, 1995), affirms FAA's commitment to make complete, open and effective public participation an essential part to its actions, programs and decision." Section 208a of Order 1050.1E. Here, in light of this affirmative duty, the Panel wrongly held that the FAA's overall public outreach effort met NEPA because the FAA hid this critical study from public view.

The importance of this new study in the public's understanding of the project's impacts to sensitive parks is clear. That *post hoc* study considered twelve historic resources and concluded that a more sensitive supplemental analysis was not required. If the public had been allowed to comment, it could have challenged such findings and 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 Rockland County that will have more than a 3.0 DNL increase — the threshold for a more careful evaluation under the Part 150

guidelines.[9] 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 activates and picnicking are not permitted.[10]

The FAA's failure to allow for comment on this critical study meets the standard of prejudicial error in this Circuit. As this Court recently held, "it would appear to be fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (citing *Gerber v.*

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[9] Centennial Watershed State Forest, located in Fairfield, count 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'rs Br. at 97. The Rockland County Parks "are examples of county parks known for their passive recreational activities which as hiking, experiencing the local ecology and viewing wildlife." Decl. of Alan Beers at Add. D to Pet'rs Br.

[10] 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" Consolidated Laws of N.Y., Parks Rec. and Hist. Preser. Law Ann., tit. C. art. 20, sec. 20.02 subsec. 6 (McKinney 1984). *See* Decl. of Alix Schnee, Add. to Pet'rs Br. at 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").

Norton, 294 F.3d 173, 182.)[11] Here, the record demonstrates that the FAA relied on this additional noise analysis in the ROD in concluding that there would not be an constructive use of any federal, state or local park resources any where in the five state project area.[12] In denying the public the opportunity to comment, the FAA violated its duty to obtain public input on information vital to making a decision on project impacts to important park resources.

IV. The Proceeding Involves a Question of Exceptional Importance.

The underlying proceeding involves an issue of exceptional importance. The FAA developed the Airspace Redesign "to address congestion and delays and some of our nation's busiest airports" Corrected Record of Decision (ROD) at 1, AR 9762:7, JA 1753. The project entailed profound changes in air traffic control procedures and flight paths affecting 30 million people living throughout the 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), the Clean Air Act and NEPA.

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[11] *See also Portland Cement Ass'n v. EPA,* 486 F. 2d 375, 393 (1973) ("it is not consonant with the purpose of a rule making proceeding to promulgate rules on the basis of inadequate data or on data that [to a] critical degree is known only to the agency.")

[12] The corrected record of decision states " 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 increases in noise or other proximity impacts sufficient to impair the value of those resources." Corrected ROD AR 9762 at 52, JA 1812. (emphasis supplied).

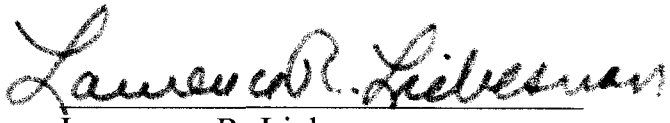
The FAA was under a duty not to take any "shortcuts" that would deprive the public of their right to participate in order to fully inform the FAA in making such a far reaching decision. Yet, the Panel has approved a process that prevents local officials (and the public they represent) from participating fully in the FAA's vital decision making process.

CONCLUSION

Petitioners Rockland County New York, Connecticut Department of Environmental and Friends of Rockefeller State Park Preserve respectfully request that the Court grant their request for Rehearing or Rehearing *En Banc* of this court's June 10, 2009 decision.

Respectfully submitted,

Date: July 21, 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,

Date: July 21, 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

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* 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).

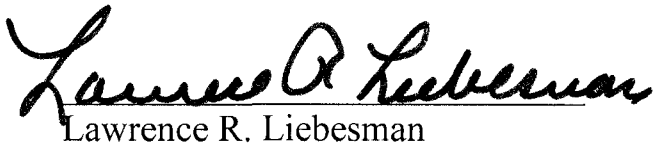
pending motions for judicial notice and for supplementation of the administrative record are dismissed as moot.

So ordered.

CORPORATE DISCLOSURE STATEMENT
[frap 28(a)(1); 26.1; cir.r. 28(a)(1)(a)]

Petitioner Friends of the Rockefeller State Park Preserve is a not-for-profit corporation, not publicly held, and has no parent. It is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

Respectfully submitted,



Date: July 21, 2009

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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 ("NJCAAN"); 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,

Date: July 21, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this 21 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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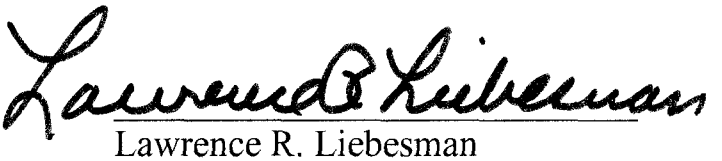

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