SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 24, 2019

United States Court of Appeals for the District of Columbia Circuit

No. 19-5012

INDIAN RIVER COUNTY, FLORIDA; INDIAN RIVER COUNTY EMERGENCY SERVICES DISTRICT,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; DEREK KAN, in his official capacity as Under Secretary of Transportation for Policy; FEDERAL RAILROAD ADMINISTRATION; PAUL NISSENBAUM, in his official capacity as Associate Administrator of the Federal Railroad Administration,

Defendants-Appellees,

AAF HOLDINGS LLC,

Intervenor for Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia in Case 1:18-cv-00333-CRC (Honorable Christopher Reid Cooper, U.S. District Judge)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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GLOSSARY OF ABBREVIATIONS

AAF	AAF Holdings LLC and its affiliates
APA	Administrative Procedure Act
DOT	U.S. Department of Transportation
EIS	Environmental Impact Statement
FECR	Florida East Coast Railway
FEIS	Final Environmental Impact Statement
FRA	Federal Railroad Administration
JA	Joint Appendix
NEPA	National Environmental Policy Act
PAB	Private Activity Bond
ROD	Record of Decision

Summary of Argument

Plaintiffs may bring suit under the Administrative Procedure Act because their interests are within the zone of interests of 26 U.S.C. §§ 141-147 (the subpart titled "private activity bonds"), whose provisions bear an integral relationship to each other. Plaintiffs' interests also fall within the zone of interests of the specific provision of the statute (§ 142(m)) DOT is alleged to have violated.

DOT's determination that the AAF project is eligible to be financed by private activity bonds ("PABs") violated 26 U.S.C. § 142(m). To be eligible, a surface transportation project must have actually received title 23 funding. It is undisputed that, on the facts of this matter, the only type of surface transportation project authorized to receive title 23 funding and that received title 23 funding were the "projects for the elimination of hazards of railway-highway crossings," 23 U.S.C. § 130, funded under section 130 of title 23. The AAF project is not a project for the elimination of such hazards and therefore, contrary to DOT's determination, is not a "surface transportation project which receives Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A).

DOT violated NEPA by failing to disclose and take a hard look at mainline pedestrian safety risks and failing to collect the data necessary for a hard look at train noise or provide a rational explanation for its deficient noise assessment.

Argument

I. Plaintiffs' interests are within the zone of interests of the statute DOT is alleged to have violated.

The APA "'make[s] agency action presumptively reviewable.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("*Patchak*") (citation omitted). A plaintiff may bring suit if its interests are "'arguably within the zone of interests to be protected or regulated by the statute'" allegedly violated. *Id.* The word "arguably" is "conspicuously included … to indicate that the benefit of any doubt goes to the plaintiff." *Id.* Suit is foreclosed only when a plaintiff's "'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.*

In determining whether a plaintiff falls "within the 'zone of interests' … , [courts] do not look at the specific provision said to have been violated in complete isolation, but rather in combination with other provisions to which it bears an 'integral relationship.'" *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (internal citations and quotations omitted); *see also Clarke v. Securities Industry Association*, 479 U.S. 388, 401 (1987).

A. The District Court correctly held that the provisions governing PABs bear an integral relationship to each other.

The interrelated provisions governing PABs (26 U.S.C. §§ 141-147) should be considered together in defining the "zone of interests." Since one of these provisions requires a county, other local government or the State to approve a new PABs issuance, a county's concerns are within the "zone of interests."

Section 141(e) provides that a "qualified bond"[1] includes an "exempt facility bond." Section 142(a)(15) provides that an "exempt facility bond" may finance "qualified highway or surface freight transfer facilities." Section 142(m) defines the term "qualified highway or surface freight transfer facilities."

Section 141(e)(3) provides that a "qualified bond" also must meet "the applicable requirements of each subsection of section 147."[2] Section 147(f) includes the "public approval" requirement, under which a PAB "shall not be a qualified bond unless … [it] has been approved by … each governmental unit having jurisdiction over the area in which any facility [to be financed by the PABs] … is located [with one exception]." 26 U.S.C. § 147(f)(1), (f)(2)(A).

Sections 141, 142 and 147 bear an integral relationship with each other, in that together they establish the requirements for PABs to qualify as tax-

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1 A "qualified bond" is tax exempt. 26 U.S.C. § 103(b)(1).

2 Section 142 also cross-references provisions of section 147. *See* 26 U.S.C. §§ 142(b)(1)(B)(ii), 142(l)(9)(C), 142(m)(2).

exempt. DOT argues that section 142 and section 147 are "*different* statute[s]." DOT Br. at 16 (original emphasis). But these provisions were both enacted by section 1301 of the Tax Reform Act of 1986. *See* Pub. L. 99-514, 100 Stat. 2085, 2603 (Oct. 22, 1986). Thus, they were enacted at the same time and by the same provision of law. Prior to the 1986 law, the provisions now codified at section 142(a) (listing facilities eligible for PABs) and section 147(f) (the public approval requirement) were included together in section 103 of the Code. *See* 26 U.S.C. § 103 (1982).

In 2005, Congress enacted section 142(a)(15) and 142(m),[3] making bonds for "qualified highway or surface freight transfer facilities" subject to the public approval requirement under section 147(f). When section 141(e), 142 and 147(f) are considered together, and in light of their former codification in the same statutory provision and re-enactment by the same provision of the 1986 statute, it is clear that they bear an integral relationship to each other such that the concerns of a local "governmental unit" such as Indian River County are within the statute's "zone of interests."

B. Section 142(m), even considered alone, encompasses a broad range of interests, including those of local governments.

Section 142(m) provides DOT with discretion in allocating PABs to qualified facilities. 26 U.S.C. § 142(m)(2)(C). Nothing in the statute precludes

[3] Pub. L. 109-59 § 11143, 119 Stat. 1144 (Aug. 10, 2005).

DOT from taking local or environmental concerns into account in evaluating PABs applications under section 142(m), and DOT's own guidance establishes that it considers these concerns. DOT instructs applicants to provide information on "all necessary permits and environmental approvals." DOT, Applications for Authority for Tax-Exempt Financing of Highway Projects and Rail-Truck Transfer Facilities, 71 Fed. Reg. 642, 643 (Jan. 5, 2006). AAF's application provided such information. JA4532-34. DOT also instructs applicants to "[p]rovide a copy of a resolution adopted in accordance with state or local law authorizing the issuance of a specific issue of obligations [as required by section 147(f)]." 71 Fed. Reg. at 643. AAF did so. JA4522; JA4545.

The statute at issue in *Patchak* authorized the government to acquire property "'for the purpose of providing land for Indians.'" *Patchak*, 567 U.S. at 211 (quoting 25 U.S.C. § 465). The plaintiff (Mr. Patchak) raised concerns with respect to the land's planned use and environmental impacts. The Supreme Court held that his concerns were within the statute's "zone of interests," reasoning that because the "Secretary will typically acquire land with its eventual use in mind," the "neighbors to the use (like Patchak) are reasonable – indeed, predictable – challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit." *Id.* at 227-28. *Patchak* establishes that concerns relating to the considerations an agency "will

typically … [have] in mind," *id.*, in making a decision under a statutory provision fall within its "zone of interests."

As reflected in its established practice in reviewing PABs applications, DOT typically has "in mind" a broad range of interests – including environmental matters and whether section 147(f) approval has been secured – in deciding whether to approve the use of PABs to finance a qualified facility under section 142(m). Under *Patchak*, this is sufficient to conclude that such interests are at least arguably within that provision's "zone of interests."

The zone of interests analysis "focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998). Local governments are precisely those "who in practice can be expected to police" the interests protected by section 142(m). Such predictable challengers may bring suit under the APA.

II. The AAF project is not a "surface transportation project which receives Federal assistance under title 23."

DOT violated section 142(m)(1)(A) in determining that the AAF project is a "qualified highway or surface freight transfer facility." To be a qualified facility, the AAF project must be a "surface transportation project which receives Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A). The phrase "surface transportation" is used more than 300 times in title 23, which authorizes

DOT to provide Federal assistance for many types of surface transportation projects, including (among others) highways, bridges, bus terminals, certain transit projects and projects for the elimination of hazards of railway-highway crossings. 23 U.S.C. §§ 103, 130, 133, 149 (2006).[4] Any of these surface transportation projects may be financed with PABs if such project were to receive Federal assistance under title 23. It is undisputed, however, that the only type of surface transportation project to have received Federal assistance here is the kind that may be funded under section 130 of title 23, which authorizes Federal funding of "projects for the elimination of hazards of railway-highway crossings." *Id.* § 130. It also is undisputed that the AAF passenger railroad project is not such a project. Accordingly, the AAF passenger railroad project cannot fall within the category of a "surface transportation project which receives Federal assistance under title 23," 26 U.S.C. § 142(m)(1)(A), and is not eligible to be financed with PABs.[5] DOT's counterargument is unpersuasive for five reasons:

First, DOT would have the Court read the phrase "any surface transportation project" and "receives Federal assistance under title 23" as two

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[4] The 2006 Code is cited because section 142(m)(1)(A) references the version of title 23 in effect as of August 10, 2005.

[5] Plaintiffs made the same argument to the District Court. JA95-96; Dkt. 29, pp. 52-54; Dkt. 37, pp. 37, 42. AAF's contrary contention is baseless. Also baseless is its suggestion that the Court disregard the amicus brief submitted by a local community organization as beyond the scope of this appeal.

entirely separate phrases imposing separate, unconnected requirements. DOT emphasizes that (i) the AAF project is "any surface transportation project" and (ii) the AAF project (supposedly) received "Federal assistance under title 23." But the words of section 142(m)(1)(A) – which are not separated by subsections or punctuation – comprise one phrase. The words "which receives" – following "any surface transportation project" – are words of limitation modifying the phrase "surface transportation project." The word "any" appearing prior to the words "surface transportation project which receives Federal assistance under title 23" does not negate the words of limitation within that same phrase. While "any" can broaden an object it modifies, it cannot "transform[]" the "clear meaning" of the phrase as a whole. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012); *see also National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 629 (2018) ("the word 'any' cannot expand the phrase" that follows it).

Second, the sentence must be read as a whole because to do otherwise would frustrate Congressional intent. The phrase "any surface transportation project" cannot be read in isolation because even if "the language of the provision, considered in isolation, may be open to competing interpretations," there may be "only one interpretation [that] is permissible" when "considering the provision in conjunction with the purpose and context." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011); *see also Dolan v. U.S.P.S.*, 546 U.S. 481, 486

(2006) ("The definition of words in isolation … is not necessarily controlling in statutory construction… Interpretation of a … phrase depends upon reading the whole statutory text, considering the purpose and context of the statute….").

Section 142(m) places specified limits on the sort of projects eligible for PABs financing. In drafting section 142(m)(1)(A), Congress *could have* given discretion to DOT to approve PABs for *any* surface transportation project. It did not do so. The language of the provision was crafted to allow into the program only a surface transportation project which receives title 23 assistance. DOT's interpretation of the statute would allow a passenger railroad project – which is not the surface transportation project that received assistance (or even the type of project eligible for assistance) under the cited provision of title 23 – to be financed with PABs due to the happenstance that it purportedly will benefit from a Federally-funded safety project at a railway-highway crossing. As plaintiffs explained in their initial brief, DOT's interpretation would allow an 850-mile passenger railroad to be financed with PABs simply because it utilizes an existing corridor where one railway-highway crossing had received funding under section 130 of title 23. This result is not only absurd; it contravenes the language of section 142(m)(1)(A) because the 850-mile passenger railroad is not the project that received title 23 funding. The only type of project eligible for and that

actually received funding under section 130 of title 23 was the safety project at the railway-highway crossing.

Congress could have amended section 142(a)(11) to remove the limitation allowing PABs financing only for passenger railroad projects capable of traveling over 150 mph. *See* 26 U.S.C. § 142(a)(11), 142(i)(1). It did not do so. There is no logical reason why Congress would have made the availability of PABs financing for a passenger railroad project turn on whether the project benefits from a Federally-funded safety project at a railway-highway crossing. The essential nature of the passenger railroad project would be the same regardless of whether it benefits from such a Federally-funded safety project. This Court should reject a statutory interpretation that would ascribe an illogical purpose to Congress in requiring that a PABs-financed surface transportation project receive Federal assistance under title 23. *See Babbitt v. Sweet Home Chapter of Communities For A Great Oregon*, 515 U.S. 687, 701 (1995) (rejecting interpretation that would ascribe to Congress an "absurd purpose" in requiring the permit); *Abbott Laboratories v. Young*, 920 F.2d 984, 989 (D.C. Cir. 1990) (rejecting interpretation that is "possible linguistically but fails to serve any conceivable statutory purpose"). When the definitional phrase is considered as a whole and in light of its statutory context and purpose, it is clear that to be financed with PABs, the surface transportation project must be the type of project that is

eligible for title 23 funding and actually received Federal assistance under such authority.

Third, DOT argues that it is sufficient that "*part* of the Project" has received Federal assistance under title 23. DOT Br. at 24. But the issue here is not whether "part of the Project" rather than the "whole Project" received Federal assistance: that issue would be joined if the cited provision of title 23 allowed for funding of passenger railroad projects, and DOT had provided Federal assistance for only one segment of the AAF project. The issue here is whether a passenger railroad project – which is not the type of surface transportation project that may receive Federal assistance under the cited provision of title 23 – may find a back door into the PABs program because different projects that *were* eligible for title 23 assistance received it.

Fourth, DOT misinterprets the phrase "receives Federal assistance" as meaning "receives *a benefit from* Federal assistance." DOT Br. at 23-24. The obvious meaning of the phrase "Federal assistance" is "Federal government funding." The phrase "Federal assistance" is used 17 times in the law that enacted section 142(m) (Pub. L. 109-59, cited *supra* n.3). In each instance, it is clear from the context that the term refers to Federal government funding.[6] There is no

[6] *See, e.g.*, Pub. L. 109-59 § 1114 (authorizing $100,000,000 annually to allow DOT to provide "Federal assistance" for highway bridge repairs); § 1602 (authorizing a "recipient of Federal assistance" to deposit a portion

statutory basis for the notion that the AAF project should qualify merely because it is alleged to have derived a benefit from other surface transportation projects that received title 23 funding. The "benefit" that one Federally-funded surface transportation project may afford to another does not conflate the two projects into the one that received the Federal funding. To be eligible for PABs financing, the surface transportation project must *itself* have received Federal funding under title 23. It is not sufficient that the project to be financed with PABs enjoy a "direct benefit" (DOT Br. at 29) from another surface transportation project that received such funding.

In addition to being inconsistent with the statutory language, the "direct benefit" argument DOT advances is inconsistent with its guidance, which directs an applicant seeking PABs financing to describe the "*Title 23 … funding received by the project*." 71 Fed. Reg. at 643. The guidance says nothing about a project providing evidence that it has received a "direct benefit" from another surface transportation project that received title 23 funding.

Finally, DOT errs in dismissing the plain language interpretation of section 142(m)(1)(A) as "extreme." DOT Br. at 24. Plaintiffs' interpretation does

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of the funds into a State infrastructure bank); § 3011 (defining a certain type of project as a "new fixed guideway capital project for which the Federal assistance provided or to be provided under this section is $75,000,000 or more").

not impede the use of PABs to finance any of the surface transportation projects that are authorized to receive and actually receive Federal assistance under title 23.

At page 23 of its brief, AAF compares its passenger rail project to transit projects in Denver and Maryland partially financed with DOT-approved PABs, seeking to establish that DOT's interpretation is the product of "'careful consideration … over a long period of time.'" *Id.* at 27 (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)). But the Denver and Maryland projects actually received Federal assistance under title 23. *See* https://www.transportation.gov/tifia/financed-projects/eagle-project ($280 million in Federal assistance to Denver project under 23 U.S.C. § 601); https://www.transportation.gov/tifia/financed-projects/purple-line-project ($874.6 million in Federal assistance to Maryland project under 23 U.S.C. § 601). DOT's approval of PABs for the AAF project strayed from DOT's past practice of allocating PABs only to projects that qualified for and received Federal assistance under title 23.

AAF states that the bonds at issue here have been sold. AAF Br. at 14. AAF neglects to inform the Court that the bonds were sold subject to their

"extraordinary mandatory redemption" in the event they are deemed subject to taxation.[7]

III. DOT violated NEPA.

A. DOT did not take a hard look at mainline pedestrian safety.

Defendants acknowledge that NEPA requires an EIS to take a "hard look" at the potential impacts of a proposed action on public safety, P. Br. at 26, and do not dispute that the "hard look" must "'consider *every significant aspect*'" of public safety. *Id.* at 24 (quoting *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1081 (D.C. Cir. 2016)). Likewise, defendants do not dispute that here mainline pedestrian safety is a "significant aspect" of public safety because, as the District Court correctly observed, "the problem of informal crossings, legal or not, is 'reasonably foreseeable' and therefore must be considered." JA4612. Such risks are grave because: (i) the project would send 32 trains daily hurtling through Indian River County at 106.6 mph, covering the length of a football field every 2 seconds (P. Br. at 28); (ii) the rail corridor is narrow, largely unfenced, at-grade, surrounded by densely developed adjacent neighborhoods, and riddled with informal grade crossings utilized by residents who regularly cross the tracks to access jobs, shopping, schools and services (*id.* at 27); and (iii) DOT's own guidance document warns

[7] Limited Offering Memorandum, p. 24 (April 2, 2019), available at https://emma.msrb.org/Security/Details/34061YAD2.

that "'[h]igh-speed passenger trains are difficult to detect visually" and "[t]respassing on railroad property is the single largest cause of deaths associated with railroad operations.'" *Id*. at 27 (quoting JA2965-66).

Accordingly, DOT was required to examine such impacts, and to do so with the candor and thoroughness that NEPA demands. *Id.* at 24 (citing caselaw and regulations). DOT did not do so.

1. The EIS failed to disclose the safety risk.

An EIS is required to disclose the direct and indirect effects of a project and the significance of these effects. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); 40 C.F.R. § 1502.16(a) and (b). Yet defendants do not deny that: (i) the draft EIS did not so much as mention the risks posed to mainline pedestrians; (ii) neither the FEIS nor ROD acknowledged the potential danger to pedestrians from the increase in train *speeds* along the corridor; and (iii) DOT characterized the public comments on the draft EIS sounding the alarm about such issues as voicing only the "perception" of a safety problem. P. Br. at 38-39.

Now that Phase I of the project has begun operation and pedestrian fatalities are mounting (P. Br. at 28), defendants are attempting to re-write the record to imply that the EIS itself disclosed these safety risks. It did not. With no analysis of the dangers that AAF's bullet trains would cause to pedestrians outside of formal crossings, the EIS concludes that "[t]he Project … would not adversely

impact the public's health or safety." JA2395. Since the document makes no mention of public safety in its identification of the project's significant environmental effects, the Record of Decision imposes no mitigation measures to safeguard mainline pedestrians. P. Br. at 28-29 (citing JA1677, JA2395, JA4393-97).[8]

DOT claims that plaintiffs' "allegation" that the EIS made a "no impact" finding with respect to public safety is a "distortion" of the record. DOT Br. at 33-34. According to defendants, the EIS (as quoted in the preceding paragraph) did not mean what it said, but made a different determination that the project would not cause "*net* adverse public safety impacts." *Id.* (original emphasis). But defendants cannot in this litigation revise the EIS, and they are wrong in suggesting that an agency may neglect to assess thoroughly a significant aspect of the problem on the basis that "overall" the action will have no "net" adverse impact on public safety. Moreover, the supposed reduction in automobile fatalities that is mentioned in the EIS – on the theory that some drivers will take the new passenger trains instead of driving – is not a basis to avoid disclosing another significant aspect of the problem: the particular risks to members of

[8] AAF asserts that "FRA imposed extensive mitigation measures designed to improve pedestrian safety, including for trespassers," AAF Br. at 37, but FRA did not impose mitigation addressing mainline pedestrian safety. JA4393-97.

environmental justice communities and others who regularly walk across the corridor outside of formal grade crossings. P. Br. at 27.

AAF asserts that the FEIS "acknowledges that the Project poses certain public safety risks, including to trespassers," AAF Br. at 36, quoting a sentence stating that "[w]hile greater frequency of trains may increase the frequency of opportunities for conflict between trains and vehicles or people, safety improvements at crossings, an updated Positive Train Control system, enhanced security, and improved communications among emergency responders would minimize potential conflicts and their consequences." JA1658; *see also* DOT Br. at 36. This purported "acknowledgment" is limited to potential "opportunities" for "conflicts" arising from the *scheduling* of 32 new trains a day – with no hint of the dangers those trains will pose to mainline pedestrians as they rocket down a densely developed corridor at more than 106 mph. Moreover, even the disclosure that more frequent trains "may" present more "opportunities" for "conflicts" is sugar-coated with distractions having no bearing on mainline pedestrian risks. This statement does not disclose a significant adverse impact – either in those words or in any other words. Such equivocation is hardly the candid acknowledgment of the risks that NEPA requires, *see* P. Br. at 24, and does not comply with NEPA's disclosure requirements. *See Sierra Club v. FERC*, 867 F.3d at 1374.

2. The EIS failed to examine mainline pedestrian safety.

Instead of taking the required hard look at the risks that AAF's speeding trains would pose to mainline pedestrians, the EIS denies any obligation to study the issue on the grounds that: (i) these pedestrians are trespassers, and (ii) AAF will develop the "Hazard Analysis and System Safety Program Plan" required by the Part 270 Regulations. *See* P. Br. at 32-33. Now, realizing that such excuses are not a legally valid basis for its failure to take a hard look under NEPA, DOT has adopted the pretense that the EIS did, in fact, take the required hard look. But the EIS does not contain even one paragraph that identifies and discusses the threat the new bullet trains pose to mainline pedestrians, much less assess the magnitude of the risk and evaluate the feasibility of potential measures to reduce it.

DOT now acknowledges that "trespassing on the rail corridor is a prevalent and extremely dangerous problem." DOT Br. at 31. With this concession, one would think DOT would proceed to demonstrate how the EIS had disclosed these risks, taken the hard look that NEPA requires, and evaluated the feasibility and efficacy of potential mitigation measures to minimize them. Instead, defendants wander here and there across the record to find snippets that touch generally on the topic of trespassing and fences, and put forward those

scraps as if they amount to the thorough examination required for a deadly serious problem under NEPA.

Defendants point to a table entry to the effect that "[f]encing is installed in specific areas throughout the FECR corridor," JA2041, and a random sentence mentioning the boundary fences in natural areas, JA2012, to argue that "the FEIS … examined FECR's current practices regarding fencing." AAF Br. at 37. They also: refer to a few vague assertions that unspecified "design elements" and "infrastructure improvements" would purportedly limit trespassing, as if they were DOT "findings" to that effect, *see* AAF Br. at 37-39 (citing JA2397, JA1736); cite a passage calling for "pedestrian crossings wherever sidewalks exist" but neglect to mention that such improvements would be limited to *formal* grade crossings, *see* AAF Br. at 38 (citing JA2254); and elaborate on the "sealed corridor" improvements to be installed only at formal crossings. DOT Br. at 33.[9]

In contrast to its own ROD, which does not mention any mitigation of mainline pedestrian safety risks, DOT now seeks to spin a tale about developing a "two pronged-approach" to "[m]itigate th[e] risk," which purportedly consists of the installation of fencing and the addition of sidewalks at formal crossings. DOT

[9] Notwithstanding the word "corridor," the term "sealed corridor" refers to the installation of four quadrant gates and other safeguards at formal grade crossings, not along a railway's mainline corridor. JA3176, JA2960-61.

Br. at 33.[10] With respect to fencing, DOT highlights a sentence anticipating that the "corridor will be fenced where an FRA hazard analysis review determines that fencing is required for safety; this will be in populated areas where restricting access to the rail corridor is necessary for safety." *Id.* (citing JA1900). But what that sentence – and similar ones calling for future "field surveys," JA2400 – are referring to is the *hazard analysis required under the Part 270 regulations*. *See* JA4414 (clarifying the nature of the "FRA hazard analysis" as follows: "AAF has notified FRA that a hazard analysis, including an analysis of fencing, will be performed under the requirements and timeframes [of] … 49 CFR 270"). Reference to a future study not subject to public review is not a lawful substitute for disclosing and assessing the public safety risks in the EIS. P. Br. at 32-36; *see also* AAF Br. at 42 n.9 (confirming that AAF will not make its hazard analysis under Part 270 available for public review).

In addition to violating NEPA's public review requirements, the future Part 270 study does not provide a rational basis for finding no safety risk to mainline pedestrians because: (i) AAF, an entity with "a completely different philosophical view towards safety" than FRA (JA2606) and which has testified *in*

[10] Support for DOT's purported "second prong" of mitigation is drawn from a response-to-comment stating that trespassing will be reduced by "adding sidewalks" at "formal grade crossings," with no explanation as to how sidewalks at *formal* grade crossings would minimize pedestrian traffic elsewhere along the corridor. DOT Br. at 33 (citing JA1762).

opposition to fencing (P. Br. at 31), will prepare the study[11]; (ii) AAF is under no obligation to install any fencing until three years *after* Phase II operations begin, a fact not mentioned in the EIS (*id*. at 34); and (iii) there is no mention in the EIS or elsewhere in the record of the critical issue of *maintaining* the fencing after it is installed (*id.* at 33-34).

Defendants contend that DOT did not defer the analysis required by NEPA because the Part 270 study is an *additional* analysis. AAF Br. at 40; DOT Br. at 34. But DOT has conceded that even a "preliminary hazard analysis" had not been conducted for the project at the time the ROD was issued, JA4441, and the EIS is devoid of anything resembling the "full and fair discussion" of the issue that NEPA requires. 40 C.F.R. § 1502.1. Thus, without the "Hazard Analysis" that DOT anticipates under Part 270, there would be no analysis of the problem at all. The record establishes that upon receiving comments from Indian River County and others that the draft EIS was materially deficient in not taking a hard look at the critical issue of public safety, DOT turned the issue over to AAF to perform the first and only analysis of the hazards posed to mainline pedestrians and to come up with whatever steps AAF may "recommend" behind the closed doors of the Part 270 program. P. Br. at 39-40.

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[11] AAF faults plaintiffs for describing AAF's testimony without submitting a copy of it to FRA, but AAF does not deny that it testified in opposition to fencing the corridor.

The District Court erred in characterizing this lawsuit as an attempt to require that the EIS describe a "complete mitigation plan." P. Br. at 40. Plaintiffs are not nit-picking about an incompletely described mitigation program: the ROD does not contain *any* disclosure or analysis of the severity of mainline pedestrian risks and does not require any mitigation of such risks. *Id.* at 29. DOT's failures here distinguish this case from those cited by the District Court and defendants. *Id.* at 41-44.

Contrary to DOT's contention (DOT Br. at 36), it would hardly be "flyspecking" for this Court to require the hard look that NEPA requires at the dead-serious risks that the AAF bullet trains pose to mainline pedestrians and to evaluate in a public forum the efficacy of potential measures to minimize those risks.

B. DOT failed to take a hard look at the project's noise impacts.

"An EIS is deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS does not … demonstrate 'reasoned decisionmaking.'" *Sierra Club v. FERC*, 867 F.3d at 1368 (citations omitted)). DOT's assessment of the project's noise impacts – particularly along the mainline corridor – is not the product of reasoned decisionmaking and violated NEPA.

AAF's consultant (Amec) prepared a "general noise assessment" for the EIS. The FRA noise assessment manual (applicable here, JA3389 n.2) states

that even for a "general noise assessment" it is "essential" to base the assessment on actual noise data, rather than modeled data. P. Br. at 47; JA499. In its comments on the draft EIS and FEIS, Indian River County pointed out that the Amec noise study was materially deficient in failing to collect noise data (JA1425, JA3390, JA3412-13) and plaintiffs made the same argument to the District Court in moving for summary judgment (Dkt. 29, p. 32) and opposing the defendants' motion for summary judgment (Dkt. 37, p. 23).[12]

With years to formulate a response, defendants have yet to provide a rational explanation for why "[c]ontrary to [FRA] guidance, Amec … did not measure existing noise along the N-S Corridor." Dist. Ct. Op. at 62 (JA4632). The District Court excused this deviation because noise levels had previously been measured for a different project, and "[c]alculated noise levels were compared to analogous measured noise levels … with good agreement." *Id.* at 63 (JA4633). But such "good agreement " was confined to the data derived for formal grade crossings; Amec reported that the measured noise levels along the *mainline* – averaged over a 24-hour period – were a full 7 decibels higher than its modeling had predicted. P. Br. at 49. And contrary to an assumption that is fundamental to the EIS finding of minimal mainline impacts, Amec *itself* attributed this discrepancy in 24-hour average noise levels to the fact that trains do, in fact, blow

[12] Defendants' claim of forfeiture, which they did not make to the District Court, is baseless.

their horns along the mainline corridor with sufficient frequency to account for the much higher noise in the measured 24-hour noise levels. JA4202. The District Court overlooked these uncontested facts entirely, and the defendants steer clear of them in their briefs. The failure to collect necessary baseline data violates the "hard look" requirement and renders an EIS deficient. *See Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d at 1081-84 (EIS held deficient because geotechnical data were not collected).[13]

Defendants also ignored FRA guidance in failing to prepare a detailed noise assessment. The guidance states that a detailed analysis "is appropriate for assessing noise impacts for high-speed train projects" when "*preliminary engineering* has been initiated, and the preparation of … an Environmental Impact Statement … has *begun*." JA513 (emphasis added). FRA's own consultant found the analysis prepared by Amec to be deficient because "the [d]etailed methodology

[13] AAF argues – contrary to Amec's interpretation – that train horns sound outside of grade crossings only in emergencies. AAF Br. at 55. But the regulation AAF cites states that "[n]othing in this part restricts the use of the locomotive horn for purposes other than highway-rail crossing safety." 49 C.F.R. § 222.23(c). It also provides that horns may be blown "where required for other purposes under railroad operating rules." *Id.* Under FECR's operating rules, "[t]he whistle may be used anytime as a warning regardless of any whistle prohibitions." General Code of Operating Rules (April 1, 2015) at p. 5-8 (http://fwwr.net/assets/gcor-effective-2015-04-01.pdf). AAF also argues that the Court should defer to FRA's expertise in railroad operations (AAF Br. at 55), but FRA never made a record finding rejecting Amec's explanation for the poor correlation between its noise modeling results and the previously collected ambient noise data discussed in its report.

should be used." JA412. The agency ignored these admonitions in issuing an EIS that included only a general assessment, which was of no use in identifying mainline locations where significant impacts requiring mitigation would occur. JA3389-91.

AAF asserts that a general assessment is a preliminary screen, with "detailed assessments to follow in certain circumstances once … engineering … is more advanced." AAF Br. at 48. But AAF neglects to mention that such "circumstances" include high speed rail projects, at the point where *preliminary* engineering has begun. JA513.

DOT's excuse is that the general assessment was necessitated by the "level of design" information available when the EIS was prepared. JA4380. This explanation is disproved by the detailed design information in the FEIS (P. Br. at 51-52) and the state of the design described in AAF's 2014 PABs application. P. Br. at 53. AAF claims plaintiffs have "disingenuously" cited the 2014 PABs application as evidence of the advanced level of project design in 2014 (AAF Br. at 48), but that application described the "Design, Procurement and Construction" process for the entire project, stating that: (i) *procurement* of the construction contract for the "Track/Civil/Signal/Structure" elements of Phase II (West Palm Beach to Cocoa) would begin in the last quarter of 2014 and (ii) *construction* of those Phase II elements would begin in the first quarter of 2015. Case 1:15-cv-

00460, Dkt. 22-7, pp. 10, 13 & 14 of 27 (ECF pagination). (The FEIS was published in August 2015.) The defendants cite to nothing to substantiate their contention that insufficient information about the design of Phase II was available at the time the EIS was prepared.

Defendants have never provided a rational explanation for why it was infeasible to prepare a detailed noise assessment drawing upon the wealth of available design; nor do they elaborate on FRA's bare assertion that the noise analysis was based upon "conservative" assumptions. AAF seeks to justify the use of "average speeds as opposed to maximum speeds" in the analysis, AAF Br. at 50, thereby conceding the point that conservative assumptions were *not* used, contrary to the recommendations in the FRA Manual. P. Br. at 51. FRA's failure to follow its own guidance – and the recommendations of its environmental consultant – in assessing a fundamentally important aspect of the AAF project has no rational explanation in the record. AAF asks this Court to defer to FRA's expertise in assessing train noise (AAF Br. at 35-36), but that expertise served as the basis for FRA's 247-page guidance document, which AAF chose not to follow in preparing the Amec study.

Defendants seek to minimize FRA's uncontested failure to consider the incremental noise impact of the increase in the speed of freight trains resulting from the project. The District Court held this NEPA violation to be harmless error

because it was unconvinced that an increase in speed of less than 5 mph would lead to a significant noise impact. But the District Court did not account for EIS data indicating that *average* freight train speeds would almost *double*, from 28.5 mph to 54.2 mph. P. Br. at 50. Defendants make no attempt to explain away these data. Instead, they seek to minimize the importance of an incremental noise impact – as if that were not the whole point of a NEPA review – and discuss why freight trains would not routinely reach the maximum speeds stated in the FEIS. AAF Br. at 50.

DOT makes no attempt to explain its patently improper record rationale for ignoring the noise impacts of the project-enabled (DOT Br. at 40) increases in freight train speeds: that "changes to the existing freight operations … are outside the scope of this FEIS." JA4416. Instead, DOT now argues that the increase in noise from faster freight trains would be *de minimis* because the inadequate general assessment in the EIS predicted that AAF's *passenger* trains would not substantially increase noise levels on the mainline. DOT Br. at 41. But freight trains and passenger train have different noise-related characteristics: freight trains are much heavier, they are more than 1.5 miles long, and they operate more frequently in evening hours when residents are trying to sleep. JA4201. Having disavowed any obligation to take a hard look at the issue, DOT has no record basis to assert that the incremental noise of the faster freight trains would be

de minimis, and its effort to switch the rationale for its failure to undertake the required hard look violates basic principles of administrative law. P. Br. at 26.

CONCLUSION

Plaintiffs respectfully request that they be granted the relief described in the conclusion of their opening brief.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i); exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,489 words; and the brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

The undersigned has relied upon the word count feature of the word processing system in preparing this certificate.

Philip E. Karmel

August 1, 2019

United States Court of Appeals for the District of Columbia Circuit

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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On **August 1, 2019**, Counsel for Plaintiffs-Appellants authorized me to electronically file the foregoing **Reply Brief for Plaintiffs-Appellants** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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August 1, 2019

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