No. 15-1285

NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CITIZENS ASSOCIATION OF GEORGETOWN; BURLEITH CITIZENS ASSOCIATION;
FOXHALL CITIZENS ASSOCIATION; HILLANDALE CITIZENS ASSOCIATION;
COLONY HILL NEIGHBORHOOD ASSOCIATION;
PALISADES CITIZENS ASSOCIATION; FOGGY BOTTOM ASSOCIATION;
GEORGETOWN UNIVERSITY,

PETITIONERS,

V.

FEDERAL AVIATION ADMINISTRATION;
MICHAEL HUERTA, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION

RESPONDENTS.

FINAL PETITIONERS' REPLY BRIEF

DENTONS US LLP
MATTHEW G. ADAMS (CA BAR # 229021)
matthew.adams@dentons.com
One MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
TEL: (415) 267-4000
FAX: (415) 267-4198

KENNETH PFAEHLER (D.C. BAR # 461718)
kenneth.pfaehler@dentons.com
1900 K STREET, NW
WASHINGTON, D.C. 20006
TEL: (202) 408-6468

RICHARD DEC. HINDS (D.C. BAR # 174425)
DON W. CROCKETT (D.C. BAR # 953489)
CITIZENS ASSOCIATION OF GEORGETOWN
2000 PENNSYLVANIA AVE, NW
WASHINGTON, DC 20006
TEL: (202) 316-6999
FAX: (202) 776-1942

Attorneys for Petitioners CITIZENS ASSOCIATION OF GEORGETOWN, ET AL.

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GLOSSARY

AR:	Administrative Record
DCA:	Washington National Airport
CATEX:	Categorical Exclusion
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
FAA:	Federal Aviation Administration
MWAA:	Metropolitan Washington Airports Authority
NEPA:	National Environmental Policy Act
NHPA:	National Historic Preservation Act
RNAV:	Area Navigation

SUMMARY OF ARGUMENT

In five distinct steps stretching over four years, the FAA shifted several hundred daily flights from the settled, 70-year-old National 328 flight path to nine New Routes containing a procedure called LAZIR, which crosses directly over Georgetown and neighboring historic districts: (1) in 2011, without public notice, agency consultation, or substantive environmental review, the agency approved the original version of LAZIR; (2) in 2013, the agency incorporated LAZIR into the New Routes as an "existing procedure" involving no further review or evaluation; (3) in 2013-2014, the agency withheld information about LAZIR from Petitioners and their representatives, falsely suggesting that flight paths had remained constant since 2008; (4) in 2015, again acting without public notice, the agency amended LAZIR and collaborated with the Secret Service on a test of the revised procedure; and (5) later that same year, the agency formally published orders implementing the New Routes, making LAZIR the default northern departure route from National.

Nowhere in this process was the LAZIR component of the New Routes subject to the rigorous, public environmental review mandated by the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and Section 4(f) of the Department of Transportation Act ("Section

4(f)”). And never were Petitioners provided a meaningful opportunity to participate in the truncated decision-making process that did occur.

As shown below, the FAA’s efforts to explain away these failures do not withstand scrutiny. Accordingly, Petitioners request that the FAA orders implementing the New Routes be vacated until such time as the agency properly complies with NEPA, the NHPA, and Section 4(f). *See City of Dania Beach v. FAA,* 485 F.3d 1181, 1186-67 (D.C. Cir. 2007).

ARGUMENT

I. PETITIONERS’ CLAIMS ARE TIMELY

Petitions for review of FAA decision-making must be filed within 60 days of a final agency order unless there are reasonable grounds for a later filing date. 49 U.S.C. §46110(a) (Addendum p. 11). This Petition is timely under either standard: the Petition was filed within 60 days of the FAA’s publication of the New Routes (part I.A, *infra*); and, in any event, Petitioners’ filing date is supported by reasonable grounds (part I.B, *infra*).

A. Petitioners Timely Filed This Action Within 60 Days of the FAA’s Publication of the New Routes

Petitioners’ Opening Brief explained that (i) the 60-day period for filing a petition for review of FAA decision-making does not begin to run until the issuance of an agency order; (ii) an order must be final before it can be reviewed;

(iii) the concept of finality is pragmatic, flexible, and dependent on case-specific circumstances; (iv) a final order need not be the product of a formal process or take any particular form; and (v) an order is reviewable if it "authorizes" action and "provides marching orders about how air traffic will be managed." (*See* Opening Brf. at 22-23 (collecting cases).) The FAA does not dispute any of these points. (*See* Answering Brf. at 37-38.)

The circumstances presented in this case demonstrate that the 2015 orders implementing the New Routes were final and reviewable. Before the 2015 orders, LAZIR was an optional, rarely-flown flight path for northbound departures from National and was subject to ongoing evaluation and adjustment by the FAA to address conflicts with FAA Protected Area 56. After the 2015 orders, LAZIR was incorporated into the New Routes and became the default northbound departure route from National. In short, the 2015 orders represented both the culmination of the agency's decision-making process and the event which gave rise to "real world" consequences directly affecting the Petitioners. As such, they were final and reviewable within the meaning of 49 U.S.C. § 46110(a). *City of Dania Beach,* 485 F.3d at 1188 (document providing "marching orders about how air traffic will be managed" was final and reviewable).[1]

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[1] Indeed, the FAA admits that the 2015 publication of the orders marked the "implementation" of the New Routes. (Answering Brf. at 38.)

The FAA's arguments to the contrary are premised on the notion that the agency's 2013 Environmental Assessment and Finding of No Significant Impact/Record of Decision (together, the "2013 Environmental Documents") constitute the only final, reviewable orders addressing the New Routes. (Answering Brief, 35-38.) That premise is unsound. First of all, the agency's position is inconsistent with its own guidance materials addressing "Performance-Based Navigation" procedures such as the New Routes. That guidance, known as Order 7100.41, clearly specifies that environmental documents must be prepared well before new routes are finalized and implemented. (JA 1743, 1754, §§ 2-4, 2-6].)[2] The Order divides the decision-making process into five phases. (JA 1740-1754, §§ 2-3 to 2-7.) Environmental review and documentation occur during Phase 2. (JA 1743, § 2-4.) Implementation and use of new routes is not allowed

[2] The FAA argues that Order 7100.41 does not apply to the New Routes because it post-dates the 2013 Environmental Documents. (Answering Brief, p. 39.) While it is true that the Order bears an "effective date" of April 3, 2014, it does not follow that the New Routes are subject to different rules. For one thing, other FAA Orders likewise provide that a new route becomes effective and available for use upon publication rather than upon environmental review. (*See, e.g.,* JA 246, 248 [Order 7400.2G].) For another, Order 7100.41 was intended to memorialize a standardized approach to the development and implementation of all Performance-Based Navigation procedures and, to that end, it repealed prior orders and directives addressing the topic. (*See* JA 231, §1.1].) That repeal left Order 7100.41 as the only order that could have been applicable to the ongoing process of adjusting and implementing the New Routes. Finally, the FAA orders preceding Order 7100.41 (*i.e.,* the orders repealed on April 3, 2014) similarly involved a phased implementation process requiring environmental impacts to be reviewed well before final implementation. (*See, e.g.,* JA 1443-1447 [FAA Order 7100.9E, §§6(a)-(b), 7(b)(6)].)

until all of the steps in Phases 2, 3 and 4 of the process are complete. *Id.* Agency action is not final if it is contingent on the completion of additional administrative steps. *See, e.g., Village of Bensenville v. Federal Aviation Administration*, 457 F.3d 52, 69 (D.C. Cir. 2006) (order not final if it "does not complete the agency's decisionmaking process" and further approvals necessary).

Second, the FAA did, in fact, undertake further analysis and review of the New Routes after the 2013 Environmental Documents were published. (*See* Resp. Motion to Dismiss at 7 ("routes were subject to additional safety and technical reviews").) If the New Routes remained subject to review — and presumably revision — after publication of the 2013 Environmental Documents, those Documents cannot have represented the consummation of the agency's decision-making process. *Village of Bensenville*, 457 F.3d at 69; *see also DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.,* 76 F.3d 1212, 1214 (D.C. Cir. 1996) (order not final if contingent on future administrative action).

Finally, even if the 2013 Environmental Documents represented a final, reviewable order, it does not necessary follow that they were the *only* final, reviewable order relating to the New Routes. As Petitioners' Opening Brief explained, this Court has previously held that "a firm interpretation of an existing regulation" is a final, reviewable order. *See Aviators for Safe & Fairer Regulation v. FAA*, 221 F.3d 222, 225 (D.C. Cir. 2000). Thus, even if the FAA's 2013

Environmental Documents were reviewable, it does not follow that the agency's 2015 orders are not also reviewable. *Id.* The FAA has not offered any argument in opposition to that point. (*See* Answering Brf. at 37-41.)

B. Petitioners' Filing Date is Supported By Reasonable Grounds

Petitioners' Opening Brief explained that even if the FAA had finalized its decision-making process before publishing the New Routes, this Petition would nonetheless be timely. (Opening Brf. at 25-26*; see also id*. at 15-17, 30-33.) A petition for review may be filed more than 60 days after FAA action so long as there are "reasonable grounds" for the filing date. (*Id*. (citing 49 U.S.C. §46110(a)).) Petitioners identified five such grounds, which, taken together, amply support their filing date: (i) Petitioners were not provided with notice of or a reasonable opportunity to comment on the 2013 Environmental Documents; (ii) information about LAZIR was withheld from Petitioners and their elected District of Columbia representative; (iii) although Petitioners and their representatives specifically inquired about northern departures from National in 2013, the FAA did not inform them of the 2013 Environmental Documents or the New Routes; (iv) although Petitioners discussed National departure routes with the FAA on at least 10 occasions between 2014 and 2015, at no time did the agency disclose the existence of the 2013 Environmental Documents or identify them as the last word on departure routes; and (v) upon learning of the 2013 Environmental Documents,

LAZIR, and the New Routes, Petitioners promptly sought judical review. (Opening Brf. at 25-26.)

The FAA does not dispute the factual allegations supporting Petitioners' demonstration of "reasonable grounds." (Answering Brf. at 41-46.) Nor has it fully addressed Petitioners' legal position — namely, the overall reasonableness of Petitioners' filing date in light of all five grounds identified in the Opening Brief. (*Id.*) Instead, the agency has sought to distract from the full scope of Petitioners' showing by pressing a series of narrow arguments designed to leave the impression that none of the five grounds is individually sufficient to support Petitioners' filing date. (*Id.*) The effort is not convincing.

The FAA's first set of arguments generally allege that "lack of actual notice to Petitioners is irrelevant" to determining whether reasonable grounds exist. (Answering Brf. at 42.) That contention is not supported by the authority on which it relies. Contrary to the FAA's representation, *Avia Dynamics v. FAA*, 641 F.3d 515 (D.C. Cir. 2011) does not stand for the proposition that notice is irrelevant to the reasonable grounds inquiry. Rather, *Avia Dynamics* held that absence of actual notice, without more, was not enough to demonstrate "reasonable grounds" under the facts of that case. *See Avia Dynamics*, 641 F.3d at 521 (reasonable grounds argument was "unavailing because we have heretofore found reasonable grounds only in cases in which the petitioner attributes the delay [in filing] to more than

simply ignorance of the order"). In this case, unlike *Avia Dynamics*, Petitioners have demonstrated more than a mere failure of actual notice — quite a bit more, in fact. *Avia Dynamics* does not control here.[3]

The FAA's second set of arguments seeks to explain away documentary evidence demonstrating that the agency collaborated with the MWAA to withhold information about LAZIR and the New Routes from Petitioners and their elected District of Columbia Councilmember. (*See* Answering Brf. at 42-43.) Specifically, FAA asserts that "the Councilmember did not contact the FAA, and Petitioners cannot hold the FAA at fault if the Councilmember was dissatisfied with [MWAA's] response." (*Id*. at 43.) This is a deeply disingenuous assertion. While it is true that Councilmember Evans originally contacted MWAA rather than the FAA, the evidence shows that the FAA collaborated with MWAA in formulating a response to the inquiry and, furthermore, that the information and data on which that response was based came directly from the FAA. (JA 1482-1483.) Moreover, the issue before the Court is not (as the FAA misleadingly suggests) that the agencies' response left Councilmember Evans "dissatisfied." (Answering Brf. at p.43.) The problem with the response is that it affirmatively

[3] *Avia Dynamics* is also distinguishable on the facts. There, the petitioners had been in contact with the FAA throughout the administrative process and were generally on notice of the agency's proceedings; here, the FAA excluded Petitioners from the administrative proceedings. *Compare Avia Dynamics*, 641 F.3d at 517-19 *with* Part III.C, *infra*.

misled the Councilmember and his constituents, including Petitioners, into thinking their concerns were unrelated to any flight path changes, regulatory processes, or deadlines for judicial review. And that misrepresentation, in turn, supports a finding that Petitioners had reasonable grounds for their filing date.

In its third set of arguments, the FAA attempts to address a series of meetings — at least 10 overall — involving the agency and Petitioners between 2013 and 2015. (Answering Brf. at 43-44.) The FAA does not deny that these meetings took place. (*Id.*) It does not deny that during the meetings Petitioners directly asked for information about northern departures from National. (*Id.*) It does not deny that the agency's responses to those inquiries failed to disclose existing plans to make LAZIR the mandatory default departure for all such departures. (*Id.*) Instead, the FAA pretends that the scope of Petitioners' inquiries was somehow limited to then-existing conditions and had no relevance whatsoever to the New Routes. (*See, e.g.,* Answering Brf. at 43 ("As Petitioners were concerned with noise that they were already experiencing, it is hardly surprising that the conversations centered around the status quo rather than upcoming procedures not yet in use in any substantial way").) The argument fails as a matter of common sense: Why would Petitioners have been interested in noise problems existing at the time of the meetings but have no interest in New Routes which would dramatically intensify those same problems? The argument also fails as a

matter of logic: Under the FAA's theory of the case, the New Routes had already been finalized at the time of the meetings and should therefore have been part of the "existing conditions" being discussed. (*See* Answering Brf. at 27-30 (claiming that FAA finalized its decision on the New Routes in 2013).) The FAA's failure to mention its plans to make LAZIR the default departure for northbound departures from National had nothing to do with Petitioners' disinterest or a singular focus on "existing conditions."

Finally, the FAA suggests that a finding of "reasonable grounds" would unfairly subject the agency to "a continuous threat of future litigation over decisions reached years ago." (Answering Brf. at 44-45.) In the agency's view, this threat must be avoided by limiting the "reasonable grounds" exception to situations where the FAA has taken "affirmative steps" to inject doubt into the regulatory process. (*Id.* at 44.) There are two fundamental problems with the FAA's position. First, nothing about this case subjects the FAA to a "continuous threat" of litigation. Petitioners' showing of reasonable grounds is based on unique facts revealing highly-improper agency behavior in a very specific context. There is no reason to believe — and Petitioners do not allege — that the FAA regularly engages in similar behavior in other contexts. Second, the FAA is wrong to suggest that it took no "affirmative steps" to inject doubt in the decision-making process here at issue. For one thing, it affirmatively misled Petitioners' District of

Columbia Councilmember. For another, it withheld from Petitioners information about its plans to make LAZIR the default northern departure route from National. This Court has previously applied the "reasonable grounds" exception where the FAA has misled or withheld information from a petitioner. *See, e.g., Safe Extensions v. FAA*, 509 F.3d 593, 603-04 (D.C. Cir. 2007) (agency's statements "could have confused petitioners and others"); *Paralyzed Veterans of America v. Civil Aeronautics Board*, 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), *rev'd on other grounds, Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986) (agency statements gave petitioners reason to believe the decision-making process was not complete); *see also Greater Orlando Aviation Authority v. FAA*, 939 F.2d 954, 960 (11th Cir. 1991) *abrogated on other grounds, Corbett v. TSA*, 767 F.3d 1171(11th Cir. 2014) (agency communication with petitioner "introduced confusion").[4] Petitioners respectfully submit that the same result should obtain here.

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[4] *National Federation for the Blind v. Department of Transportation*, 827 F.3d 51 (D.C. Cir. 2016), cited on page 44 of the FAA's Answering Brief, is not to the contrary. In that case, the petitioners' filing delay was caused by their own mistake of law, a circumstance which this Court explicitly distinguished from situations where (as here) delay is attributable to representations made by a federal agency. *Id*. at 58.

II. PETITIONERS' CLAIMS WERE NOT WAIVED

In a further effort to avoid the merits, the FAA argues that Petitioners have waived their claims because their concerns were not presented in "the proceedings below." (Answering Brf. pp. 46-49.) The argument fails for each of three independent reasons.

First, as the FAA properly concedes, the controlling statute provides that a party's failure to participate in administrative proceedings may be excused upon a showing of reasonable grounds. *See* 49 U.S.C. §46110(d) (Addendum, p. 11). Reasonable grounds supporting Petitioners' position in this matter are more fully discussed in Part I.B, *supra*. But it bears repeating that Petitioners, acting through their elected District of Columbia Councilmember, specifically inquired about potential changes to the northbound departures from National in 2013. (JA 1482-1483; *see also* Opening Brf. at 13-14.) Neither MWAA nor the FAA informed the Councilmember that the FAA was in the process of considering the New Routes <u>at that very time</u>. (*Id.*)

Second, contrary to the FAA's assertion (Answering Brf. at 48), there is no bright-line rule requiring parties to participate in the NEPA process before challenging agency action. The Supreme Court has recognized that "the agency bears the primary responsibility to ensure that it complies with NEPA," and therefore a NEPA document's flaws may sometimes be "so obvious that there is no

need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004); *see also, New York v. Nuclear Regulatory Comm'n,* 681 F.3d 471, 482 (D.C. Cir. 2012) (adopting "so obvious" standard in the course of upholding agency action). The "so obvious" rule has been interpreted to mean that no exhaustion of remedies is required where an agency has "independent knowledge" of a plaintiff's concerns. *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006); *Barnes v. Dep't of Transp*., 655 F.3d 1124, 1132 (9th Cir. 2011). This is just such an occasion. The inquiry by Petitioners' Councilmember regarding the noise impacts of northbound departures from National — and FAA's involvement in the response to that inquiry — demonstrates "independent knowledge" of Petitioners' interests. More generally, it should have been obvious to the agency that Petitioners would be concerned about basic issues such as ensuring that the LAZIR component of the New Routes (which, after all, passes over their homes) was fully addressed. Indeed, this Court has long held that an agency may not "simply [ ] sit back, like an umpire, and resolve adversary contentions…[r]ather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process..." *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1119 (D.C. Cir. 1971).

Third, the FAA's waiver claims ring hollow in light of the agency's efforts to avoid notifying District of Columbia stakeholders about the New Routes. That issue is addressed in detail in Part III.B, *infra*. For purposes of addressing the FAA's waiver argument, however, it is especially noteworthy that the agency transmitted its draft Environmental Assessment of the New Routes — the very document on which it now alleges Petitioners were required to comment — to roughly 600 public officials and libraries in Virginia, Maryland, West Virginia, and Pennsylvania, but failed to provide a copy to any District of Columbia elected official or library. (*See* JA 892-907.)

III. THE FAA'S IMPLEMENTATION OF THE NEW ROUTES WAS ARBITRARY AND CAPRICIOUS

A. The LAZIR Component Of The New Routes Has Never Been Subject To Required Environmental Review

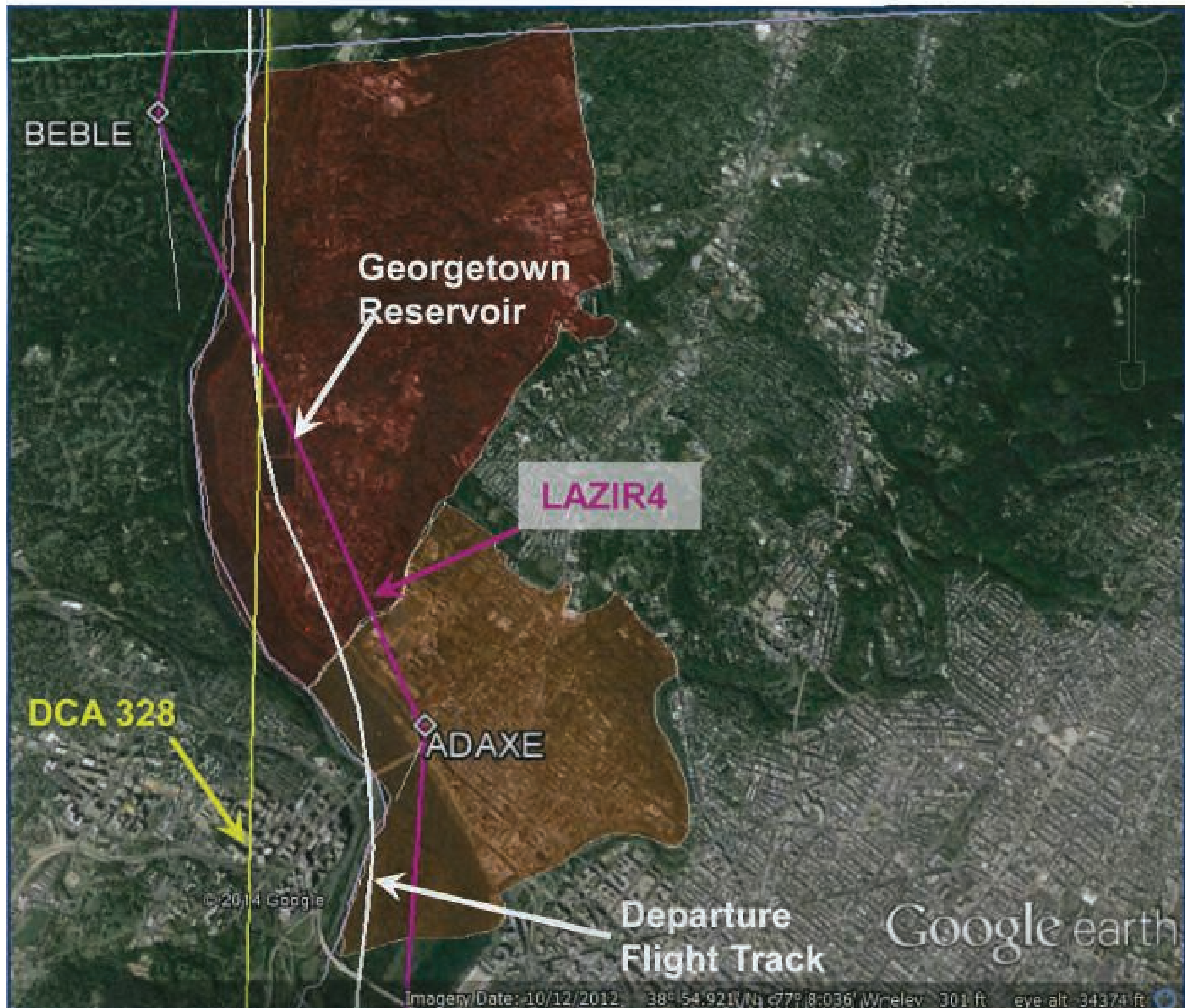
Petitioners' Opening Brief described how the New Routes transformed LAZIR from a rarely-used optional flight path into the mandatory default departure procedure for all northbound aircraft from National. (Opening Brf. at 12-16.) Petitioners further demonstrated that the FAA was required to fully evaluate, disclose, and address the environmental consequences of that change under NEPA, the NHPA, and Section 4(f). (*Id*. at 6-10, 26-33.) The agency failed to comply with those requirements, and its attempts to explain that failure are not persuasive.

1. The impacts of the LAZIR component of the New Routes were not subject to environmental review in 2011

The FAA originally designed LAZIR in 2011 as an optional departure route. (*See* JA 584-45.) Petitioners' Opening Brief showed that during the route design process, FAA personnel proceeded from the assumption that LAZIR was a "direct overlay" of existing routes and then concluded that LAZIR qualified for a Categorical Exclusion from further environmental review. (Opening Brf. at 27-28.) The FAA offers a pair of contradictory responses, neither of which withstands scrutiny.

The FAA's primary contention is that agency personnel were right to assume LAZIR was a direct overlay of existing routes. (Answering Brf. at 51.) It bases that argument on noise abatement procedures which allowed air traffic controllers the option to instruct aircraft departing from National to follow the Potomac River before joining a 328-degree radial "abeam" (or due west of) the Georgetown Reservoir. (*Id.*) In the FAA's view, LAZIR is "essentially" the same as the route that could have been instructed by the air traffic controllers. (*Id.*) But there is a critical difference between the two departure paths: the noise abatement procedures call for northbound aircraft to remain over the Potomac River and to the west of Georgetown Reservoir before joining the 328-degree radial; in contrast, LAZIR directs those same aircraft to depart from the Potomac River in the vicinity of Foggy Bottom, fly over the District of Columbia, and cross the Reservoir from the

southeast. (*See, e.g.,* JA 1608.) The routes and their impacts are simply not the same, as the FAA's own graphics show. (*Id.*)



In a secondary argument, the FAA asserts that its 2011 environmental review properly invoked a Categorical Exclusion for the establishment of new flight paths outside of noise-sensitive areas. (Answering Brf. at 51-52.) This directly contradicts the FAA's primary contention. And nothing in the Administrative Record explains how the FAA could possibly have determined that LAZIR was <u>*outside*</u> of a noise-sensitive area. (*Id*.; *see also* JA 584-84, 554-574.) Indeed, Congress has recognized that Georgetown and its surrounds contain a significant concentration of historic districts, landmarks, and public parks and declared that those resources are to be protected from the noise and visual impacts of modern commercial areas of the Virginia and the District of Columbia. *See* Pub. L. No. 81-808, 64 Stat. 903 (1950) (Addendum pp. 17-18.)

Petitioners' Opening Brief also noted that the 2011 version of LAZIR was merely an elective departure route; the default departure procedure remained National 328. (*See* Opening Brf. at 28.) In contrast, the New Routes render LAZIR the mandatory default northbound departure path from National. *Id*. Therefore, even if the FAA had properly conducted a full environmental review of the 2011 version of LAZIR, that review would not have been sufficient to address the impact of incorporating LAZIR into the New Routes. *Id*. The FAA has not responded to this point and does not appear to dispute it. (*Compare* Opening Brf. at 28 *with* Answering Brf. at 50-52.)

2. The impacts of the LAZIR component of the New Routes were not subject to environmental review in 2013

The FAA has suggested that the impacts of the LAZIR component of the New Routes were comprehensively evaluated in the 2013 Environmental Documents. (Answering Brf. at 20-26, 52-54.) Petitioners' Opening Brief demonstrated the opposite: The 2013 Environmental Documents treated LAZIR as an "existing procedure" — a part of the environmental baseline against which the impacts of New Routes would be measured, not an impact in and of itself — and therefore failed to properly evaluate the impacts of transforming LAZIR from a rarely-flown optional procedure into the default route for northbound departures from National. (Opening Brf. at 28-29.)

The FAA acknowledges that LAZIR was treated as an "existing procedure" in the 2013 Environmental Documents, but asserts that its noise analysis nonetheless addressed the full impact of integrating LAZIR into the New Routes. (Answering Brf. at 53.) Specifically, the agency claims that the 2013 Environmental Documents compared a "no action" alternative which assumed zero LAZIR departures to a "New Routes" alternative which assumed that 88% of departing aircraft would use a departure path involving LAZIR. (*Id.* at 53-54.) This claim does not appear to be supported by the Administrative Record. The only portions of the record cited by the agency are documents C.1 and C.15. The former is a 500-page technical report that says nothing about a "zero LAZIR" or

"88% LAZIR" scenario.[5] The latter is a large data file which cannot be opened without proprietary noise modeling software and appears to be devoid of meaningful description or analysis. (*See* JA 1438-1441.) Neither document describes, substantiates, or otherwise memorializes any reasonably recognizable version of the evaluation described in the FAA's Answering Brief. *Id*.

Indeed, the clearest evidence in the Administrative Record points in the opposite direction. The FAA's Environmental Assessment explicitly states that the "no action" scenario includes LAZIR departures — in other words, that LAZIR was part of the environmental baseline. (JA 657-58.) If LAZIR was already included in the "no action" baseline, the effects of implementing the LAZIR component of the New Routes (*i.e.,* the comparison of the proposed action to that baseline) were not fully addressed. This was arbitrary and capricious. *See, e.g., Great Basin Res. Watch v. Bureau of Land Mgmt*., 844 F.3d 1095, 1101 (9th Cir. 2016) (emphasis added) ("Without establishing the baseline conditions *which exist ... before [a project] begins*, there is simply no way to determine what effect the [project] will have on the environment"). Had the FAA undertaken the proper analysis, it would have realized that the New Routes have significant adverse

[5] The FAA refers to pages "pdf 87 and pdf 101" of Administrative Record C.1. (Answering Brf. at 22-23.) Petitioners are unable to identify any pages so numbered.

effects on the landmarks, historic districts, parks, and residents of the District of Columbia.

An agency's decision-making may only be upheld, if at all, on the basis of the reasoning and evidence in its administrative record. As this Court held in *Safe Extensions*:

> If the FAA's documents fail to demonstrate the reasonableness of its decision, it means that the agency either had chosen not to write down the reasons for its decision or is unable to do so. Neither possibility is acceptable under the Administrative Procedure Act.

Safe Extensions, 509 F3d at 604. Here, the Administrative Record simply does not support the FAA's claim to have addressed the full impact of making LAZIR the mandatory default route for northbound departures from National. That decision must be set aside. *Id.; see also NRDC v. Hodel*, 865 F.2d 288, 300 (D.C. Cir. 1988) (agency determinations must be based on substantial evidence in the record); *Calloway v. Harvey*, 590 F. Supp. 2d 29, 36 (D.D.C. 2008) ("the function of the court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did").

3. Petitioners properly articulated all claims

In yet another attempt to avoid the merits, the FAA argues that Petitioners' Opening Brief failed to articulate any claims or arguments under the NHPA or Section 4(f) and provided only "bare citation" to the two statutes. (Answering Brf.

at 58-61.) Not so. Both claims were explicitly addressed in Petitioners' statement of the issues presented for review. (Opening Brf. at 3-4.) Both statutes were explicitly addressed in Petitioners' statement of the case. (*Id*. at 6-10.) All relevant statutory and regulatory provisions were properly provided in Petitioners' Addendum. And, most importantly, Plaintiffs' arguments explained that the FAA's analytical failures were not limited to NEPA, but also contaminated the agency's NHPA and Section 4(f) evaluations. (*See, e.g.,* Opening Brf. at 29 ("And those noise calculations, in turn, served as the foundation of the agency's analysis of potential impacts on the environment (NEPA), adverse effects on historic resources (NHPA), and use of public parks and historic properties (Section 4(f).").) All claims were properly presented.

This case is readily distinguishable from *New York Rehabilitation Case Management, LLC v. NLRB*, 506 F.3d 1070 (D.C. Cir. 2007), on which the FAA relies. (*See* Answering Brf. at 59.) There, the petitioner merely "mentioned" an argument in a "skeletal way." *New York Rehabilitation*, 506 F.3d at 1076. Here, in contrast, Petitioners have fully presented the relevant legal framework and requirements of the NHPA and Section 4(f) and have explained why the FAA failed to comply with those statutes. (Opening Brf. at 2-10, 17-18, 26-29.) In doing so, Petitioners provided specific citations to the statutes, regulations and to the Administrative Record. (*Id*.) Nothing more was required. *See Edwards v.*

Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) ("[i]n assessing whether an issue is sufficiently argued to avoid waiver, we look at whether the opening brief contains the appellant's contentions as well as citations to authorities and the record.")[6]

B. The FAA Violated NEPA And Its Own Regulatory Orders By Withholding Information About The New Routes From Affected Stakeholders

Petitioners' Opening Brief explained that one of NEPA's fundamental purposes is to ensure that environmental information is made available to the public. (Opening Brf. at 30) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989)). Federal agencies are required to "[m]ake diligent efforts to involve the public in preparing and implementing [their] NEPA procedures." 40 C.F.R. § 1506.6 (Addendum p. 55). And all NEPA analyses must be "available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (Addendum p. 51).

The FAA's own regulatory orders also require the agency to engage the public in environmental review and decision-making. For example, FAA Order 1050.1E states "FAA's commitment to make complete, open and effective public participation an essential part of its actions, programs, and decisions" and further

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[6] Indeed, where the respondent "adress[es] the issue in its reply brief," as the FAA did here, the court "cannot say it would suffer prejudice from [the court] addressing it." *Edwards*, 356 F.3d at 1066.

mandates that "early in the process of preparing NEPA documentation, the responsible FAA official…must provide pertinent information to the affected community…and consider the affected communities' opinions." (JA 101-102, §§208a, 208b.)

The FAA attempts to dismiss these requirements "as general exhortations" and denies that Petitioners have identified any violations of law. (Answering Brf. at 56.) Not so. Petitioners' Opening Brief identified specific instances in which the agency improperly withheld "pertinent information" from "the affected community," failed to "consider the affected communities' opinions," and studiously avoided making NEPA analyses "available to public officials and citizens" in the District of Columbia. (Opening Brf. at 30-33.) Tellingly, the FAA does not dispute any of the facts underlying those claims. (Answering Brf. at 54-58.)

Instead, the agency invokes *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980), a 37 year-old Clean Water Act decision, for the proposition that "agencies may use publications such as newspapers to provide notice to the public of potential agency actions and the opportunity for public input." (Answering Brf. at 56.) The argument misses the forest for the trees. NEPA's requirement that agencies make "diligent efforts to involve the public" is not specifically tied to any particular media. 40 C.F.R. § 1506.6 (Addendum p. 55). Nor is the FAA's own

mandate to "provide pertinent information to the affected community" so limited. (JA 101-102.) Agencies cannot evade their obligations by merely providing "a hollow opportunity to participate in NEPA." *American Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) ("interested persons cannot request an EA for actions they do not know about"); *see also, Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) ("Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.")

Finally, the FAA attempts to excuse its failure to notify any elected District of Columbia officials of the New Routes by pointing out that a low-level member of the District of Columbia Office of Planning did, in fact receive notice. (Answering Brf. at 55.) But that notice was itself misleading and inaccurate. Among other things, it represented that the New Routes merely regulated "the flow of air traffic around the DC Metro Area" when in truth they re-routed departures directly over the District of Columbia. (JA 1519) (emphasis added). And, more fundamentally, a notice to a low-level staffer, misleading or otherwise, cannot excuse the agency's withholding of information from — and misrepresentations to — Petitioners and their elected Councilmember. The FAA's actions to limit public involvement, exclude District of Columbia stakeholders, and mislead Petitioners

and their elected officials were arbitrary, capricious, and unlawful, and they must be set aside.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to vacate the FAA Orders implementing the New Routes.

Dated: May 31, 2017

Respectfully submitted,

DENTONS US LLP

By: /s/ *Kenneth J. Pfaehler*
Kenneth J. Pfaehler
Matthew G. Adams
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 5,447 words. The text of the brief is in 14-point Times New Roman, which is proportionately spaced.

By: /s/ *Kenneth J. Pfaehler*
Kenneth J. Pfaehler
Matthew G. Adams
Attorneys for Petitioners

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CERTIFICATE OF SERVICE

I certify that on this 31st day of May, 2017, I electronically filed this *FINAL PETITIONERS' REPLY BRIEF* with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered to use that system and, to my knowledge, will receive copies of this document upon its filing.

By: /s/ *Kenneth J. Pfaehler*
Kenneth J. Pfaehler
Matthew G. Adams