IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTIN COUNTY, FLORIDA, *et al.*, Plaintiffs, vs. U.S. DEPARTMENT OF TRANSPORTATION, *et al.*, Defendants.	Case No. 1:18-cv-00333-CRC

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND STATEMENT OF POINTS AND AUTHORITIES

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PRELIMINARY STATEMENT

The Federal Defendants' approval of the use of $1,150,000,000 of private activity bonds ("PABs") to finance Phase II of the All Aboard Florida project should be vacated and annulled. As this Court held in prior litigation, and for the additional reasons set forth below, Plaintiffs have Article III standing to bring their claims. *See* Point I, *infra*. The approval violated the National Environmental Policy Act ("NEPA") because the Federal Defendants: (a) failed to take a hard look at the relevant environmental issues, (b) failed to include in the environmental impact statement ("EIS") a "statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment," 40 C.F.R. § 1502.22(b)(2), and (c) failed to identify and evaluate reasonable alternatives and mitigation measures. *See* Point II, *infra*. The Federal Defendants' approval exceeded their authority under the Internal Revenue Code ("I.R.C.") because (a) the only passenger railway projects entitled to issue PABs under Section 142 of the I.R.C. are "high-speed intercity rail facilities" that reach 150 mph, and (b) the Plaintiff counties have not approved the use of PABs for Phase II, as required by Sections 142 and 147(f) of the I.R.C. *See* Point III, *infra.*

FACTUAL STATEMENT

All Aboard Florida LLC and its affiliates ("AAF") are proposing to construct and operate a passenger train service between Miami and Orlando (the "Project"). Phase I – now in operation – provides service from Miami to West Palm Beach. In Phase II, AAF proposes to construct a second track along a 128.5 mile stretch of the single-track freight train corridor owned by Florida East Coast Railway ("FECR")[1] between West Palm Beach and Cocoa, and to

[1] Grupo México purchased FECR in 2017, but AAF has an agreement with FECR to allow use of the rail corridor for the passenger trains. AR0074258.

build a new 40-mile rail corridor from Cocoa to Orlando. AR0074271; AR0074222-23. It is the north-south segment of Phase II that runs through the heart of the civic, commercial and residential areas of the Plaintiff counties. *See* Final EIS ("FEIS"), App. 4.1.1, Figures A10-A12 (Martin County) & Figures A17-A21 (Indian River County); Compl. Ex. 4.

AAF's plan is to run 32 passenger trains daily along the north-south Phase II corridor at speeds up to 110 mph. *See* FEIS, pp. S-3, S-7, 3-59, Table 5.2.2-1. These trains would hurtle non-stop through Indian River County for a distance of 21 miles at an average speed of 106.6 mph, crossing 32 roadways at-grade, and non-stop through Martin County for a distance of 26 miles at an average speed of 79.5 mph over 27 at-grade crossings, and up to 110 mph in some locations. *See* FEIS, p. 4-14 & App. 3.3.5-C, p. 4-5. In contrast, today the average speed of the freight trains in the two counties is 28.5 mph. *See* FEIS, p. 5-13 & App. 3.3.5-C, p. 2-2.

The existing rail corridor is largely unfenced, with many formal and informal pedestrian crossings, leading a Federal Railroad Administration ("FRA") engineer to conclude, after his on-site inspection, that "[t]respassing is an epidemic along this corridor." AR0018140.

The FECR freight trains carry ammonia, sulfuric acid, ammonium nitrate, sulfur dioxide, liquid propane gas, explosives, and other hazardous materials. FEIS Table 5.2.4-1. The Project would cause the freight trains to increase their average speeds to 54.2 mph and 44.4 mph in Indian River and Martin Counties, respectively. FEIS, p. 5-13. Their top speed would ramp up to 70 mph, but even at that speed, they would be much slower than the AAF passenger trains. *Id.*, App. 3.3.3-A4, sheet 11.

The Project will use the existing St. Lucie River and Loxahatchee River moveable rail bridges. *Id.*, pp. 4-133, 6-7. When these bridges are in the down position so that trains can pass over them, they rest seven and four feet above the water, respectively, blocking maritime

navigation. *Id.*, App. 4.1.3-B1, p. 5-2, 4-1. The 32 daily passenger trains would cause many more bridge closures, further disrupting maritime navigation. *Id.*, pp. 5-23, 5-25.

Although one would never know it from reading the FEIS, more than 100 people have been killed, and almost 200 have been injured along the FECR corridor over the past ten years – even though the line has until recently carried only slow-moving freight trains. *See* Compl. ¶ 38.[2] The safety record of Phase I is alarming. On February 11, 2017, an AAF passenger train derailed, causing substantial property damage. Decl. of Chief Daniel J. Wouters ¶ 37; Compl. ¶ 37.[3] AAF trains have already struck and killed or injured 13 pedestrians or bicyclists in the few months they have been running. Wouters Decl. ¶¶ 10-22.

FRA began the NEPA review of the Project because AAF requested $1,600,000,000 in federal loans under the Railroad Rehabilitation and Improvement Financing ("RRIF") program. In September 2014, FRA released the draft EIS (the "DEIS"),[4] kicking off a public comment period in which more than 15,000 comments were submitted. FRA thereafter issued the FEIS in August 2015. Plaintiffs actively participated in the environmental review, submitting detailed comments to FRA. *See, e.g.*, AR0036462-513 (Indian River County, Dec. 1, 2014); AR0038198

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[2] The Federal Defendants' Answer did not admit or deny this allegation, or most of the Complaint's other factual allegations, stating that the referenced FRA report "speaks for itself" and on that basis the allegations are denied "to the extent they are inconsistent with the cited documents." All factual allegations of the Complaint as to which such equivocal denials are pleaded should be deemed admitted, as the Federal Defendants' gamesmanship is inconsistent with Fed. R. Civ. P. 8(b).

[3] Plaintiffs request that the Court take judicial notice of the data presented in the declaration of Martin County Fire Rescue Department Division Chief Wouters. *See Seifert v. Winter*, 555 F. Supp. 2d 3, 11 n.5 (D.D.C. 2008); *NAACP v. Trump*, 298 F. Supp. 3d 209, 248 n.32 (D.D.C. 2018).

[4] A separate NEPA review was performed for Phase I, resulting in FRA's Finding of No Significant Impact ("FONSI") for Phase I in 2013. *See* FEIS, p. 1-3.

(Martin County, Nov. 28, 2014); AR0034085-144 (CARE FL Dec. 2, 2014); AR0044463-78 (Martin County, July 28, 2015); AR0058468-509 (Indian River County, Sept. 23, 2015); AR0057520-537 (CARE FL Sept. 23, 2015); AR0057580-58368 (Martin County, Sept. 23, 2015); AR0064661-85 (Martin County, Indian River County, CARE FL July 26, 2017).

In December 2017, FRA issued the Record of Decision ("ROD") – the final action taken under NEPA – challenged in this proceeding. The reason for the extended time lag between the issuance of the FEIS and ROD is not apparent from the record, since the ROD does little more than parrot excerpts from the FEIS. Attached to the ROD as Appendix C is a table that purports to respond to the comments submitted on the FEIS.

In the face of public comments highlighting the deficiencies of the DEIS, AAF put aside its request for a RRIF loan and applied to DOT for an allocation of $1,750,000,000 in PABs, under the apparent misapprehension that such a maneuver would sidestep the need for DOT to comply with NEPA. On December 22, 2014, DOT approved AAF's application prior to completion of the environmental review for the Project.

Plaintiffs Indian River County and Martin County commenced separate actions to vacate the 2014 PAB approval as having been issued in violation of NEPA, with Martin County asserting an additional claim that the approval exceeded DOT's authority under Section 142 of the I.R.C. *See Indian River Cnty. v. Rogoff*, Case No. 1:15-cv-00460 (D.D.C.); *Martin County v. U.S. Dep't of Transp.*, Case No. 1:15-cv-00632 (D.D.C.). The defendants opposed the plaintiffs' motions for a preliminary injunction on the ground that, *inter alia*, plaintiffs had not established standing because they had not shown that the relief sought would significantly increase the likelihood that Project construction would be halted. The basis for that assertion was that AAF would go forward with the Project, with or without the PABs.

The Court denied the preliminary injunction motions (*Indian River County v. Rogoff*, 110 F. Supp. 3d 59 (D.D.C. 2015)), but later granted plaintiffs' request for jurisdictional discovery. After completion of discovery, defendants moved to dismiss for lack of standing and failure to state a claim. After extensive briefing and oral argument, the Court denied their motions, *see Indian River Cnty. v. Rogoff*, 201 F. Supp. 3d 1 (D.D.C. 2016), holding that the plaintiffs had Article III standing because vacatur of "DOT's decision to authorize $1.75 billion in PABs would significantly increase the likelihood that AAF would not complete Phase II of the project." *Id.* at 4.

With respect to the NEPA claims, this Court ruled that DOT's approval of the PABs was a "major Federal action" subject to NEPA. *Id.* at 20. It did so "[i]n light of the considerable benefit conferred on AAF by access to PAB financing, the major cost to the federal government of specifically supporting the project in this way, and DOT's ability to exercise control over the entire project's manner of construction." *Id*. Thus, DOT had "the requisite degree of control called for by NEPA … so as to implicate major federal action." *Id.* at 19. The Court also ruled that Martin County had not established "prudential standing" to claim that DOT exceeded its authority under Section 142 of the I.R.C., holding that the County's pleaded concerns were not within the zone of interest protected or regulated by Section 142. *Id.* at 21.

Subsequently, plaintiffs moved for summary judgment, but instead of defending that motion, AAF requested that DOT withdraw the $1,750,000,000 PAB allocation then before this Court, on the condition that DOT approve a new allocation of $600,000,000 for Phase I. Its request stated that "'[AAF] will separately discuss a new request for an allocation of up to $1.15 billion in PABs authority for Phase II.'" *Indian River Cnty. v. Rogoff*, 254 F. Supp. 3d 15, 19 (D.D.C. 2017) (citation omitted).

On November 16, 2016, DOT approved the new $600,000,000 PAB allocation and withdrew the $1,750,000,000 allocation. Two weeks later, the defendants moved to dismiss on the ground that their new PAB approval strategy mooted the lawsuits. This Court granted that motion over plaintiffs' opposition, ruling that "now that DOT has rescinded the [PABs] allocation [for Phase II], … the requested relief would no longer be meaningful." *Id.* at 21.

On December 5, 2017, AAF renewed its application for a $1,150,000,000 PAB allocation for Phase II, which DOT granted 15 days later. Plaintiffs brought this lawsuit to challenge the new PAB approval on the ground that the Federal Defendants failed to comply with NEPA and exceeded their authority under the Internal Revenue Code.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") mandates that agency action shall be set aside when the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). When reviewing agency action, the question of whether the agency acted in an arbitrary and capricious manner is a legal one that the district court can resolve on the agency record. *University Medical Center of S. Nevada v. Shalala*, 173 F.3d 438, 440 n. 3 (D.C. Cir. 1999).

It is an "essential function of the reviewing court . . . to guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority." *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 40 (D.D.C. 2011). On this record,

DOT admits that its "interpretation" of Section 142 did not go through rulemaking. DOT Answer ¶ 262. Accordingly, any deference to the agency's interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

ARGUMENT

I. Plaintiffs have established their Article III standing to challenge the Federal Defendants' compliance with law in approving the PABs for the Project.

To establish Article III standing, a "plaintiff must demonstrate (1) an 'injury in fact' that is 'concrete and particularized' and 'actual or imminent' and that is also (2) fairly traceable to the defendant's conduct and (3) likely to be redressed by a favorable judgment." *Indian River Cnty. v. Rogoff*, 201 F. Supp. 3d at 7 (internal quotation marks and citation omitted). In the prior lawsuit, the Court found that the plaintiffs had established Article III standing to challenge the $1,750,000,000 PAB approval for the Project, holding that:

> Plaintiffs' burden is not to demonstrate with certainty that invalidating the PAB authorization would grind the project to a halt. They must show, rather, that denying AAF access to PABs would significantly increase the likelihood that AAF would not proceed with Phase II of the project. Plaintiffs have met their burden, because they have sufficiently called into question AAF's commitment to completing the project absent PABs and shown the difficulty AAF would face in obtaining any other form of financing.

Id. at 14.

The Court's ruling applies with equal force here: the bifurcated approval strategy cooked up by AAF and DOT – whereby DOT withdrew its approval of the $1,750,000,000 in PABs for the Project and then re-approved the PABs with $600,000,000 allocated for Phase I and $1,150,000,000 for Phase II – changes nothing, because AAF was permitted to issue the exact

same amount of PABs and in two or more tranches under the approval before the Court in 2016. *Id.* at 13 n.9.

Nor has the Project's "profitability" improved. In the first quarter of 2018, AAF reported ticket and other revenue of $768,000, with an average ticket price of $8.87. These revenues were swamped by almost $29 million in operating expenses, resulting in an operating loss of over $28 million.[5] The operating loss does not take into account non-operating expenses, such as interest on the $600,000,000 in PABs used to finance Phase I. Nothing has emerged to call into question AAF's representation to FRA that "'traditional debt financing in the capital markets is not feasible.'" *Indian River Cnty. v. Rogoff*, 110 F. Supp. 3d at 69 (citation omitted).

Plaintiffs have established their Article III standing. Their prudential standing to claim that the PAB approval violates Section 142 of the I.R.C. is briefed below in Point III.A.

II. The Federal Defendants violated NEPA in approving the issuance of $1,150,000,000 of PABs to finance Phase II of the Project.

Since this Court held that the approval of PABs for the Project was a "major Federal action" subject to NEPA, *Indian River Cnty. v. Rogoff*, 201 F. Supp. 3d at 20, the focal point of the briefing below is whether the FEIS and ROD complied with the requirements of that statute. Under NEPA, an agency must "'consider every significant aspect of the environmental impact of a proposed action.'" *Pub. Emps. for Env. Responsibility v. Hopper*, 827 F.3d 1077, 1081 (D.C. Cir. 2016) (citation omitted). An agency must "take a 'hard look' at [the] environmental consequences" of its actions, and "provide for broad dissemination of relevant environmental information." *Id.* at 1082 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,

[5] AAF's financial statement for the first quarter of 2018 is available here: https://emma.msrb.org/ES1174475-ES918037-ES1319125.pdf. AAF has not posted its financial statement for the second quarter.

350 (1989)). This "hard look" requirement applies to the "'authorization or permitting of private actions'" like the Project. *Id.* (citation omitted).

The "principal way the government informs the public of its decisionmaking process is by publishing environmental impact statements." *Id.* (citing 42 U.S.C. § 4332(2)(C)). Among other things, the EIS "must describe a proposed 'action's anticipated direct and indirect environmental effects.'" *Id.* (citation omitted). In addition to taking the required "hard look" at the relevant issues of environmental concern, the agency is required to consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The NEPA regulations require agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives"; to include "reasonable alternatives not within the jurisdiction of the lead agency"; and to include "appropriate mitigation measures not already included in the proposed action." 40 C.F.R. § 1502.14.

As explained below, the FEIS and ROD failed to take a hard look at important issues of environmental concern, failed to rigorously explore alternatives, and failed to present appropriate mitigation measures for the agency to consider.

A. The Federal Defendants violated NEPA by failing to take a hard look at the effects of the Project on public safety.

A fundamental goal of NEPA is to "assure … safe … surroundings" for "all Americans" and to "attain the widest range of beneficial uses of the environment without degradation [or] risk to health or safety." 42 U.S.C. § 4331. The NEPA regulations require that an EIS examine the "degree to which a proposed action affects … safety." 40 C.F.R. § 1508.27(b)(2). FRA's own NEPA procedures require FRA to address public safety in an EIS. *See* 64 Fed. Reg. 28,545, 28,555 (May 26, 1999).

This analysis must be more than a perfunctory exercise in base-touching, because agencies must take a "hard look" at the environmental consequences of their actions. The "hard

look" is not to be taken behind closed doors, because NEPA calls for "broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350; *see also* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). The reason for this is that federal decisions on environmental impacts are to be made in light of informed public comment. *See Robertson,* 490 U.S. at 349.

An EIS must examine the potential for a proposed action to have *catastrophic* impacts on public safety, because under the NEPA regulations "reasonably foreseeable" significant adverse impacts on the human environment include "impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. § 1502.22(b)(4).

Where information about safety is incomplete or unavailable, the agency may not assert that the proposed project is safe; rather, it must disclose that information regarding safety "is lacking," 40 C.F.R. § 1502.22, and include in the EIS "a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment." *Id.* § 1502.22(b)(2); *see, e.g.*, *Beverly Hills Unified Sch. Dist. v. FTA*, No. CV 12-9861, 2016 WL 4650428, at **94-95 (C.D. Cal. Feb. 1, 2016) (FTA violated NEPA when the EIS it prepared for a new subway line failed to disclose the uncertainty of information as to safety); *cf. Nat'l Aud. Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (the "'hard look' … encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail").

These bedrock NEPA principles are of critical importance to Plaintiffs, which include local governments faced with the prospect of the Project sending 32 passenger trains barreling non-stop through their densely populated urban centers, crossing scores of at-grade crossings along a narrow, largely unfenced corridor shared by freight trains. As Indian River County explained to FRA in its comments on the FEIS, it is municipal and county governments that are on the front lines in protecting public safety, because it is *their* personnel who must respond in the first instance to pedestrian fatalities, vehicle/train collisions, derailments and other accidents that occur in the course of railroad operations. AR0058475; *see also* Wouters Decl. ¶¶ 34-46. However, their ability to protect the public against rail-related risks through the exercise of local police power is limited by principles of preemption, since under federal law the power to regulate railroad safety is wielded primarily by FRA. Under such circumstances, it is essential that an EIS include the information local governments need to provide meaningful comments on public safety in the NEPA process, and that FRA consider carefully the concerns of affected local governments in its review of the alternatives and mitigation measures that could be implemented to avoid or minimize the safety risks a project would cause.

The FEIS did not take a hard look at public safety. Public comments on the DEIS pointed out that for passenger rail projects in New York, California, and North Carolina, FRA conducted detailed risk analyses and hazard and safety evaluations not performed for the AAF Project. AR0038707. Rather than responding to that comment by performing a safety analysis here, FRA shuffled the comment off to AAF, which prepared the following response:

> Consistent with FRA safety requirements which are not of the NEPA process, AAF will develop a Hazard Analysis and System Safety Program Plan prior to the start of operations. These documents will identify potential system risks based on an evaluation of potential risk severity and frequency…. The Hazard Analysis that the AAF is developing in advance of the start of train service per the Code of Federal Regulations will identify collision hazards and will make an assessment

> of the potential frequency and severity of these incidents. This is not a NEPA requirement.

AR0038707-08; *see also* AR0038675, AR0038683. The FRA then copied and pasted this language into the FEIS. *See* FEIS, p. 1-23.[6]

The FEIS omits the most basic information on critical rail safety issues. The document includes tables purporting to show that accidents occurring along the north-south FECR corridor have been "minimal," FEIS, p. 4-117, but the data presented cover only the years 2007-2012, and give no hint of the disturbing fact that nearly 200 people were killed on the FECR tracks in the ten years prior to issuance of the FEIS, at a time when freight trains operating on that corridor were running at *moderate* speeds. *See* Wouters Decl. ¶¶ 25-29.

That the FEIS would whitewash the historical record is troubling, but of far more concern are the document's deficiencies with respect to the *prospective* risks the Project poses to public safety. Rather than identifying such risks and discussing the alternatives and measures that might mitigate them in an open public forum, it concludes that "[t]he Project would have an overall beneficial effect on public health, safety and security in the rail corridor." FEIS, p. S-20. This conclusion is based solely on a summary recitation of various safety-related design elements (such as signal improvements and grade-crossing upgrades) and vaguely-described future actions, rather than a hazard analysis. *Id.* As noted above, the FEIS specifically disavows any requirement to provide such an analysis under NEPA. *See* FEIS at 1-23 (block quotation above) & p. 5-161 ("Some commenters requested that [the FEIS include] … a safety analysis…. Consistent with FRA safety requirements which are not part of the NEPA process, AAF will develop a Hazard Analysis and System Safety Program Plan prior to the start of operations.").

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[6] FRA made one edit to AAF's response to the public safety comments on the DEIS, changing "the Code of Federal Regulations" to "federal regulations." FEIS, p. 1-23.

The FEIS failed to identify the safety risks posed by the Project, apart from the detailed review by one of its engineers that focused on safety risks from at-grade road crossings. *See* FEIS App. 3.3.5-B (reviewing grade crossings). The consequence of this failure is that affected local governments and the public have been kept in the dark about critically important public safety issues, and have been deprived of a voice in how to address them.

Plaintiffs have advised FRA in detailed comments submitted during the NEPA process that numerous informal pathways cross the mostly unfenced FECR tracks, where trespassing is "epidemic." AR0058354. At the same time, FRA's own guidelines warn that "[h]igh-speed passenger trains are difficult to detect visually and can be virtually silent until their arrival at any given location."[7] The deadly mix of these circumstances poses grave and unique risks to pedestrians and cyclists. Rather than examining the problem of pedestrian safety in an open forum, the FEIS kicks the can down the road by stating that sometime *after* project approval "AAF will conduct ROW Field Surveys to observe, document, and provide recommendations to minimize trespassing by employing fencing, warning signage, public outreach/information, and other appropriate measures as required." FEIS, p. 5-162. This language is a direct copy and paste from the AAF-drafted response to the public comments on the DEIS. *See* AR0038583.

In its comments on the FEIS, one municipality in Indian River County asked FRA for information concerning the timing and location of the fencing. FRA's response to that fundamentally important question was "AAF has notified FRA that a hazard analysis, including an analysis of fencing, will be performed under the requirements and timeframes of the FRA system safety plan regulatory structure pursuant to 49 CFR 270." ROD, App. C, p. 1. The FEIS

[7] FRA, Highway-Rail Grade Crossing Guidelines for High Speed Passenger Rail, p. 13 (Nov. 2009) (available at https://www.fra.dot.gov/eLib/Details/L03536).

channels AAF with similar language elsewhere. *See, e.g.*, FEIS, p. 1-23 (indicating that AAF will "provide recommendations" as to fencing the FECR corridor); FEIS, p. 3-44 ("the corridor will be fenced in locations 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"); *see also* ROD App. C, p. 31 ("Fencing on the N-S Corridor would be upgraded based on existing public access locations and the potential for conflicts with the increased train frequency. Specific designs for fencing will be developed as the project advances.").

Such artful language about future "recommendations" being included in a post-approval study by AAF does not pass muster in addressing a critical safety issue under NEPA. The Federal Defendants put AAF in the driver's seat with respect to where fencing would be installed and how it would be designed; and they provide no assurance that such fencing would be in place by the time the AAF trains begin to run. As discussed below, under applicable federal regulations FRA need not even review, much less approve the hazard analysis AAF prepares; and the fencing "recommendations" AAF elects to include in that analysis need not be implemented until three years after AAF sends its trains speeding down the corridor. The FEIS did not make any of these disclosures.

Moreover, there is nothing in the NEPA documents to indicate that AAF must maintain any such fencing in a safe and secure condition after it is installed. Furthermore, the NEPA documents give no indication that public comments will be solicited or considered in selecting the location of fencing or whether such fencing would be consistent with community character. Thus, members of the public have been deprived of the opportunity to voice their concerns regarding the effects that the erection of barriers through their communities may have on the

socio-economic wellbeing of their neighborhoods, or to recommend additional measures to reduce that disruption – such as the construction of pedestrian overpasses – where continued connectivity is required to maintain community character.[8]

In the same fashion, the FEIS downplays the risk that pedestrians (and motorists) may be blind-sided by one fast-moving train passing behind another, slower train near grade crossings along the shared rail corridor. *See* FEIS at 5-161 ("According to the operating plan, some trains are scheduled to pass or 'meet' at or in the immediate vicinity of grade crossings. As part of the diagnostic review, 'Next Train Coming' notification signs or Operation Lifesaver Education forums *will be considered* to notify the public of a change in grade crossing operations." (emphasis added)). It is cold comfort that someone at some future point will "consider" some ill-described measures to address a significant Project impact – and such vague assurances fall far short of the hard look that NEPA demands.

The FEIS and ROD suggest that the Project would improve the safety of at-grade road crossings. *See, e.g.* FEIS at 5-157 ("The Project would result in enhancing public safety with improvements to grade crossing signal equipment for vehicular and pedestrian traffic."). Making crystal clear that such improvements are not being mandated by FRA as a mitigation requirement under NEPA, the document reports that AAF has "voluntarily agreed" (FEIS, p. S-20; ROD, pp. 26-27) to install various elements recommended in an FRA diagnostic study at specified grade crossings, along with pedestrian gates where "defined" sidewalks exist at track crossings. *See*

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[8] The FEIS brushes aside the effects of walling off "environmental justice communities" from "jobs/services/school access" by stating that "all such unauthorized pedestrian crossings are both illegal trespass and unsafe under current conditions." FEIS, p. 1-22. While that may be so, it does not negate the impact that fences would have on the connectivity of affected communities. Nor does it address the readily apparent safety risk that people will continue to seek access to jobs, services and schools by breaching any fencing and putting themselves into harm's way of the new trains.

FEIS, pp. 7-8, 3-45. But FRA – at AAF's request (*see* AR0039804) – added an important catch to these "voluntary" commitments: AAF's "agreement" to make the grade-crossing improvements would be effective only "in conjunction with county and municipal execution of amendments to existing crossing license agreements." FEIS, pp. 3-45, 7-8. This language too was copied and pasted verbatim from AAF's email to FRA. AR0039804.

Thus, AAF's "commitment" to install the roadway-crossing upgrades is expressly conditioned on the Plaintiff counties agreeing to assume a perpetual obligation to bear the cost of maintaining the improvements after they are installed. *See* FEIS, pp. 1-19, 1-20; *see also* FEIS, p. 3-46 ("Pedestrian gates would only be installed at locations where there is an agreement with municipalities to maintain the gates."); ROD, App. C, p. 26 ("AAF will install pedestrian crossing gates at locations where there is an agreement for maintenance."). But consistent with Florida law (AR0064668), several affected local governments, including the Plaintiff counties, have not bowed to AAF's demands. The FRA has not imposed an *unconditional* requirement on AAF to install and maintain the necessary improvements, yet no "hard look" was taken at the public safety consequences of operating the Project without the FRA-recommended safety improvements in the event that AAF does not make such improvements in localities that decline to amend their licensing agreements to require them to pay for ongoing maintenance. Moreover, the FEIS did not make the disclosures required by 40 C.F.R. § 1502.22(b) in light of the uncertainty on this issue. Nor did it evaluate whether as an alternative mitigation measure, AAF should be required to install *and maintain* at its expense the required safety improvements for the Project. These failures violated the specific NEPA requirements – discussed above – to take a "hard look" at public safety issues, to make the disclosures with respect to incomplete information required by 40 C.F.R. § 1502.22(b), and to identify potential mitigation measures.

The FEIS contains no analysis of whether the Project will adversely affect public safety by increasing the likelihood of train-on-train collisions. The potential for such risks is clear because AAF's 32 faster passenger trains will crisscross the tracks daily to pass freight trains on the shared track, which *themselves* will be operating much faster than they do today, but at speeds considerably slower than passenger trains operating along the same corridor. Such risks are compounded by the fact that many of the freight trains operating on the shared corridor carry hazardous materials. *See* FEIS, Table 5.2.4-1; Compl. ¶ 164.

On July 28, 2015, Martin County submitted a "Railcar Chemical Release Vulnerability Study" to FRA, which included a risk assessment of the potential release of chemicals transported on FECR rail cars. AR0044026. That study demonstrated how catastrophic damage could result from an accident involving freight trains carrying hazardous materials. AR0044463-78. As one example, it demonstrated that a release associated with an accident involving a railcar carrying anhydrous ammonia in Stuart would leave 490 people in the "red zone," which includes the population at risk of life-threatening adverse health effects or death; 897 people in the "orange zone," which includes the population at risk of irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape the environment; and 694 people in the "yellow zone," which includes the population at risk of notable discomfort, irritation or sensory effects, but effects are not disabling and are reversible. AR0044466-67. In a chlorine gas accident in Port Salerno, 5,317 people would be in the "red zone," 5,602 in the "orange zone," and 1,740 in the "yellow zone." AR0044473.

The FEIS makes only passing reference to the risks of train-on-train accidents, and in the same breath negates the significance of such risks with assurances about the benefits of "positive train control" ("PTC") and other possible mitigation measures. *See* FEIS, p. 5-159 ("While

greater frequency of trains may increase the opportunity for conflict between trains and vehicles or people, safety improvements at crossings, an upgraded PTC system, enhanced security and improved communication between emergency responders would be a beneficial effect."). Likewise, in responding to a comment raising concerns about the potentially catastrophic impacts of a collision involving hazardous substances, the ROD references PTC and states that "AAF [sic] will continue to transport hazardous materials consistent with applicable statutes, rules and regulations and therefore does not expect any effect to the health and safety of adjacent communities." ROD App. C, p. 10.

FRA's rosy picture is undercut by AAF's own acknowledgment that co-locating passenger and freight trains on the same tracks may result in "casualty and property risks as a result of shared use of the corridor with freight railroad operations" due to the "inherent risk of catastrophe, mechanical failure, [and] collision…." AAF Preliminary Offering Memorandum (June 4, 2014), pp. 24-25.[9] AAF has already begun operating Phase I without PTC on the freight trains, and FRA has itself expressed serious concern that FECR will not install PTC on the freight trains by the time AAF commences operation of Phase II.[10] Notably absent from the FEIS and ROD is discussion of any mitigation requirement precluding operation of the Project prior to the installation of such technology on the corridor.

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[9] *Indian River Cnty. v. Rogoff*, 1:15-cv-00460-CRC, Dkt. # 15-22, p. 25. AAF included this same language on page 70 of its Offering Memorandum for the Phase I PABs. *See* https://emma.msrb.org/ER1107449-ER866075-ER1266758.pdf.

[10] Lisa Broadt, *Brightline, railway at risk of missing safety deadline, Federal Railroad Administration says*, TCPalm (May 4, 2018), https://www.tcpalm.com/story/news/local/shaping-our-future/all-aboard-florida/2018/05/04/brightline-risk-not-meeting-ptc-deadline/574727002/.

It is well established that NEPA imposes procedural – not substantive – obligations on federal agencies. *See Robertson*, 490 U.S. at 350. Thus, putting aside FRA's limited authority with respect to the approval of PABs for passenger railroad projects (*see* Point III, *infra*), the FRA could – without violating NEPA – approve the issuance of PABs for a project inimical to public safety. But the FRA could do so only after preparation of an EIS that takes a hard look at the relevant safety issues, makes the disclosures required by 40 C.F.R. § 1502.22(b) where only incomplete information is available, and rigorously examines alternatives and mitigation measures to avoid or mitigate the relevant safety issues. The EIS falls well short of these NEPA standards.

One final note is required to address the notion advanced by AAF – and transcribed by FRA into the FEIS – that FRA can abandon its NEPA obligation to examine the public safety impacts of the Project in a public forum because AAF must prepare a hazard analysis under the System Safety Plan ("SSP") requirements appearing at 49 C.F.R. Part 270 (the "Part 270 Regulations"). A federal agency may be excused from NEPA compliance only where its "organic legislation mandates procedures for considering the environment that are 'functional equivalents' of the environmental impact statement process." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 n.51 (D.C. Cir 1981); *see also Fund for Animals v. Hall*, 448 F. Supp. 2d 127, 134 (D.D.C. 2006) ("[a]n agency may be exempt from conducting a NEPA environmental review if a statute provides, 'procedurally and substantively,' for the 'functional equivalent' of compliance with NEPA") (citation omitted). But the SSP required by the Part 270 Regulations is not the functional equivalent of a hard look at safety under NEPA.

An SSP is a safety manual to be followed by railroad personnel in their daily operations, *see* 49 C.F.R § 270.101(a), while an EIS is a pre-approval disclosure document informing

decisionmakers and the public of a proposed project's potential environmental impacts and safety risks, as well as the alternatives and mitigation measures that would avoid or minimize them. A draft SSP need not even be submitted to FRA until 90 days prior to the commencement of operations, long after federal project approvals have been issued. *Id.* § 270.201(a)(1). The Part 270 Regulations do not require that the "risk-based hazard analysis" that informs the preparation of the SSP (and that is repeatedly touted in the FEIS as the solution for virtually all potential safety risks) be made available for public review. In fact, that analysis might not even be submitted to FRA under the Part 270 Regulations, because it is only upon the specific request of FRA or a participating State that the risk-based hazard analysis need be provided for governmental review. *Id.* § 270.201(a)(2).

Thus, under the Part 270 Regulations it is unlikely that detailed information on the safety risks posed by the Project – or how such risks could be mitigated, if at all – will *ever* be available for examination by, or comment from, the general public. For this reason alone the Part 270 Regulations are not the functional equivalent of a proper NEPA review. *See Fund for Animals v. Hall*, 448 F. Supp. 2d at 135-36 (holding that the review processes under the Migratory Bird Hunting Framework and Endangered Species Act are not the functional equivalent of NEPA because their procedures do not "provide for public comment in the same way that NEPA does").

Moreover, the Part 270 Regulations do not require an SSP to be implemented until 36 months after the plan is approved (49 C.F.R. § 270.103(f)(2)) – a fact also not disclosed in the FEIS. One only has to consider the issue of fencing – and the dismal safety record of Phase I of the Project – to understand the grave implications that will flow from leaving matters critical to public safety unaddressed for such an extended time period. The FRA ducks the issue under NEPA by stating that AAF's fencing analysis "will be performed under the requirements and

timeframes of the FRA system safety plan regulatory structure pursuant to 49 CFR 270." ROD, App. C, p. 1. As a consequence, the fencing analysis will not be completed until just prior to the commencement of operations, and any fencing ultimately required need not be installed until *three years* after Phase II is up and running.[11]

Thus, local authorities and the public have been denied their right under NEPA to inform federal decision making on a topic of critical environmental and community concern. With no substantive underpinning in the NEPA record, FRA concluded in the ROD that the Project "would have an overall beneficial effect on public health, safety, and security in the rail corridor." ROD, p. 26. But FRA made similar claims in the FONSI issued for Phase I. *See* FEIS, p. 5-157 ("According to the 2013 FONSI, Phase I of the Project will not result in significant adverse impacts on public health and safety. The same conclusion applies to Phase II."). That conclusion has turned out to be wrong, with repeated fatal consequences over the short period of time Phase I has been in operation. It is equally baseless with respect to Phase II.

The FEIS also failed to take a hard look at the adverse impacts of the Project on emergency vehicle response times. FRA's environmental consultant – Vanasse Hangen Brustlin, Inc. ("VHB") – emphasized the importance of including a proper analysis in the FEIS of the

[11] DOT's December 17, 2017 PAB approval letter states that "AAF agrees" that it will implement the mitigation commitments set forth in the "Phase II Environmental Documents" and "that service will not commence on a portion of the Project until AAF certifies the completion or ongoing implementation, as applicable, of the mitigation commitments…." AR0074325. Since the Project's impacts to public safety have not been identified as significant, FRA has not imposed mitigation measures to address such risks in the FEIS or the ROD. The one exception to this relates to "Traffic and Grade Crossings" for which AAF is required to "[i]mplement and fund *initial* grade crossing safety enhancements" identified in the FEIS. ROD, p. 35 (emphasis added). But since AAF's "commitment" to prepare the SSP is keyed to FRA's regulatory requirements, its implementation of the public safety components of the SSP within the 3 year regulatory time frame would apparently suffice for purposes of the certification.

effects that the Project would have on emergency vehicle response times. According to VHB, "[e]mergency vehicle response times are an important public safety concern. The analysis needs to include any effects on response times resulting from the proposed action." AR0001317; AR0000897 (discussing VHB's role). Although AAF responded to this recommendation with the assurance that "the analysis will include a discussion of emergency response times," AR0001307, the "discussion" that actually was included in the document cannot be characterized as an "analysis" of this critical issue at all. EMS personnel routinely must cross the FECR tracks when delivering patients who are in need of urgent medical care to hospitals on the other side of the tracks. FEIS, p. 1-24 (acknowledging comments submitted by Plaintiff counties). During the period of construction access through the grade-crossings that are critical to the speedy delivery of patients would be restricted or precluded altogether. However, nowhere in the document are such critical locations identified, nor is there any indication as to the potential duration of the closures and restrictions that would impede or prevent travel across them during an emergency, or the effect that detours would have on emergency response times. Any doubt as to the profoundly serious nature of this issue is dispelled by a statement in the record by Dr. Michael Collins, the Medical Director for the Jupiter Medical Center's emergency department. As Dr. Collins pointed out, "[s]ometimes eight seconds, fifteen seconds, thirty seconds is all we have to save a life in the emergency department…. Seconds do count in the world of critical care." AR0058353. Instead of identifying delays to emergency response times during construction as a potential impact and imposing a mitigation measure requiring that AAF work with emergency response personnel to develop a plan for minimizing them, FRA has closed its eyes to such impacts altogether. It has done so for one reason only – apparently AAF has advised it "that [u]pgrades to road crossings will be coordinated with and/or communicated to local emergency

responders **during both construction and operations**, as activations at the road crossings are expected to be more frequent with the increased frequency of train traffic." ROD, App. C, p. 27 (emphasis in original). Such double-speak hardly qualifies as a "hard look" at a significant impact under NEPA.

The FRA's cavalier disregard of NEPA requirements with respect to public safety was arbitrary and capricious and warrants redress by this Court.

B. The FEIS failed to take a hard look at the environmental impacts of the changes the Project will cause to freight operations.

The Project improvements to the rail corridor will cause a marked increase in the speed of *freight* traffic on the line between Miami and Cocoa. For example, as a result of the Project, average freight train speeds in Indian River County will increase from 28.5 mph to 54.2 mph. *See* FEIS, pp. 5-9, 5-13. The Project's newly reconstructed track will be designed for 70 mph freight operations over long stretches of the FECR corridor – resulting in freight trains traveling up to 45 mph faster than they do today. *See* FEIS App. 3.3.3-A4, pp. 7, 11, 15, 18, 20, 21, 24, 25, and 27. For example, freight trains running through the City of Vero Beach, a densely developed area of Indian River County, currently have a maximum speed limit of 45 mph, but with the track improvements effectuated by the Project, the limit for freight train speeds through Vero Beach would increase to 70 mph. *See* FEIS, App. 3.3.3-A4, sheet 11. Moreover, in some cases, the second track would lie within the FECR right of way at a location closer to sensitive uses, such as residences, schools, and churches.

Where the increased speed of the freight trains would arguably help offset the impact of AAF's passenger trains (as in the case of calculating the duration of draw-bridge closures adversely affecting navigation), the FEIS relies upon the increase in freight train speeds to

minimize the Project's projected impacts. *See, e.g.*, FEIS, App. 4.1.3-B1, p. 1-3. Yet the document goes silent when it comes to the *negative* impacts of an increase in freight speeds.

Thus, there is no discussion in the FEIS of how the increased speed of freight trains will affect adjacent communities by increasing safety risks and adding to the noise and vibration those trains generate.[12] There is no discussion about whether the annoyance caused by freight-related noise and vibrations will be aggravated by the need to shift freight trains to nighttime hours in order to clear the way for the 32 new daytime passenger trains along the FECR corridor. There is also no discussion of the vibration impacts to the structural stability of the 92-year-old St. Lucie Bridge from the increased use and train speeds.[13]

Instead of taking a hard look at these Project-related environmental impacts, FRA denied that there was any need to consider them. Responding to Indian River County's concern that Project-related track improvements would increase freight train speeds and that the EIS failed to take a hard look at the resulting environmental impacts, FRA asserted that "changes to the existing freight operations along the FECR Corridor are outside of the scope of this FEIS." ROD, App. C, p. 3. This statement merely concedes the point: that the FEIS failed to take a hard look at this Project-related impact. It does nothing to justify such a glaring omission.

NEPA requires federal agencies to take a "hard look" at *all* potentially significant project impacts, and those caused here by changes in freight operations – which are a *direct* result of the

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[12] Higher train speeds cause higher noise and vibration levels. *See* FTA, Transit Noise and Vibration Impact Assessment, pp. 2-6, 7-11 (2006) (www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Noise_and_Vibration_Manual.pdf).

[13] Train induced vibrations can cause deterioration of structure. *See* Complaint ¶ 229 (citing Brandon J. Van Dyk, *et al.*, Evaluation of Dynamic and Impact Wheel Load Factors and their Application for Design, Transportation Research Board 93rd Annual Meeting, p. 1 (Nov. 15, 2013)).

improvements the Project will make to the FECR corridor – are not exempt from this requirement. *Accord* 40 C.F.R. § 1508.8 (defining "direct effects" as effects that are "caused by the action and occur at the same time and place"). Thus, FRA's own NEPA procedures require that an EIS consider the "direct, indirect, and cumulative" impacts of the proposed action and any alternatives, and that such analysis should extend to the transportation impacts "of both passengers and freight." FRA, Procedures for Considering Environmental Impacts, 64 Fed. Reg. 28,545, 28,550 (May 26, 1999). Since the changes to freight operations are caused directly by the Project improvements, the fact that the freight trains are operated by FECR rather than AAF has no bearing on FRA's duty to examine thoroughly the impacts of such changes under NEPA.[14] And that would be so even if those changes were not a direct consequence of the Project because an EIS must account for not only direct effects, but also the *indirect* effects an action would cause, so long as they are reasonably foreseeable. 40 C.F.R. §§ 1502.16, 1508.8.

Moreover, an EIS must account for "cumulative impacts," which are defined to include "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7. FRA violated NEPA by disregarding the cumulative impacts that AAF's passenger trains – combined with faster freight trains – will have on safety, noise and vibration in the affected communities.

Indian River County and Martin County objected to the omission from the FEIS of any analysis of the changes the Project would cause to freight operations. *See, e.g.*, AR0058472, AR0058356-58. FRA purported to respond to those comments by stating "[t]he FEIS (pg. 5-54)

[14] The freight trains are operated by FECR but are dispatched by a joint venture of FECR and AAF. AR0074260. The scope of the required NEPA analysis, however, would be the same even if AAF were not a party to that joint venture.

addresses this issue as follows: 'freight operations are expected to continue with a planned annual growth of 3 percent. This continued growth will likely result in marginal increases in noise levels through possible increases in train speed, frequency, and length.'" ROD, App. C, p. 24. Even if that throwaway line could be considered to be a "hard look" at a potential impact, it has no relevance to the issue raised by the Plaintiff counties because it does not address the impacts of the Project at all. Rather, the quoted language refers to freight conditions if the Project were *not* to go forward and supports the conclusion that "there would be no noise impact *associated with the No-Action Alternative*." FEIS, p. 5-54 (emphasis added).

With its outright refusal to take a hard look at whether the changes the Project causes to freight operations would result in significant impacts to public safety, noise, and vibration, FRA abrogated its obligation to consider the direct, indirect, and cumulative effects of the Project, and it thereby violated one of NEPA's central mandates. Since the FEIS itself projected that the Project-related improvements to the FECR corridor would cause dramatic increases in freight train speeds, FRA's obligation to take a hard look at the resulting environmental impacts and identify any appropriate mitigation cannot be dismissed as asking FRA to "foresee the unforeseeable." *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1084 (D.C. Cir. 1974).

C. The FEIS failed to take a hard look at the adverse environmental impacts of Project-related vessel queueing at railroad bridges over navigable waters.

The Project will retain the existing St. Lucie River and Loxahatchee River rail bridges, despite the fact that both bridges are antiquated and already significantly impede navigation. *See* FEIS, pp. 4-133, 6-7. When the bridges are in use (in the down position, so that trains can pass over them) they rest only seven and four feet above the water, respectively, blocking maritime

navigation. The opening-closing process for these bridges takes approximately 20 minutes, effectively shutting down navigation for at least that amount of time, for each closure.

According to the FEIS, the St. Lucie River bridge is currently in use (impeding maritime navigation) for a total of 6.6 hours per day; with the addition of the AAF passenger trains, the waterway is estimated to be impassable for 9.8, hours per day. FEIS, p. 5-23. The Loxahatchee River bridge is currently in use (impeding maritime navigation) for a total of 5.8 hours per day; with the passenger trains, the waterway is estimated to be impassable for 8.6 hours per day. *Id.* The FEIS also discloses that these rivers have extensive commercial tug-barge and recreational traffic, *see* FEIS, p. 5-21, and that the frequent, prolonged bridge closures will cause extensive vessel "queues" in which boats waiting to pass beneath the bridge must wait for the bridge to re-open. For example, the FEIS predicts the Project will result in a maximum vessel waiting time – for a single bridge closure at the Loxahatchee River – of 169.7 minutes (*i.e.*, almost 3 hours), and a maximum vessel waiting time – for a single bridge closure at the St. Lucie River – of 167.6 minutes (*i.e.*, almost 3 hours). FEIS, App. 4.1.3-B2, Tables 3-4 & 3-7.

But these disclosures should have been the beginning rather than the end of the analysis. What the FEIS does *not* assess are the environmental impacts resulting from these extensive vessel "queues." Thus, the FEIS failed to assess whether the logjam of vessels waiting for a railroad bridge to open will cause adverse impacts to public safety, due to the jostling of vessels in hazardous currents, making queueing in these areas difficult and dangerous. In addition to being at greater risk of collision, grounding and being set upon the bridge by strong currents, vessels idling and trying to position themselves for when the bridges open unnecessarily waste fuel and spew increased air emissions due to the additional fuel burn and typically low engine speed. The typically strong current makes conditions tough for boaters to stay in neutral without

moving with the current and wind and tough to stay within the channel. AR0064670. Consequently, motors cannot be turned off and must remain in gear to maintain control of the watercraft, resulting in the emission of nitrogen oxides, particulate matter, and other air pollutants not assessed in the FEIS. *Id.* The FEIS failed to take the required hard look at adverse impacts to air quality from the queueing vessels. The FEIS also failed to examine the impact of vessel queues on manatees, fish and aquatic wildlife. AR0064671.

The U.S. Coast Guard, in a letter dated February 4, 2014, also raised concerns about manatee casualties from vessel queueing. AR0015554. The FRA responded to this letter by stating that the manatees would not be harmed because "construction activities will not take place in the water" (AR0016845), but construction activities have nothing to do with vessel queuing. Nowhere in the administrative record is there any indication that any agency took a hard look at this issue, at any time, much less presented any analysis in the FEIS.

The EIS also failed to examine reasonable alternatives to the use of the existing bridges. In response to public comment on this manifest deficiency in the DEIS, the FEIS examined one alternative for each river: building a new "high level" fixed bridge (*i.e.*, not a draw bridge) with a height matching the nearest adjacent fixed bridge crossing the river. This strawman alternative was shot down in a one page table that did not provide any substantiation for its conclusions. FEIS, p. 3-55. We now know that the one page table was drafted by AAF without input from FRA or any other agency. *See* AR0038910 (table); AR0038897 (AAF cover email). There is no indication in the record that AAF's conclusions were ever examined by anyone at FRA. Rather, the agency accepted AAF's findings at face value and inserted them without review or material edits into the FEIS, in violation of its obligations under NEPA. *See Sierra Club v. Alexander*, 484 F. Supp. 455, 469 (N.D.N.Y.), *aff'd*, 633 F.2d 206 (2d Cir. 1980) (agency's obligation to

consider alternatives under NEPA could not be satisfied by absolute reliance on the applicant's findings without additional independent analysis); *Seattle Aud. Soc'y v. Moseley,* 798 F. Supp. 1473, 1482 (W.D. Wash. 1992) ("The agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information."), *aff'd sub nom.* 998 F.2d 699 (9th Cir. 1993).

But even accepting for argument's sake that FRA had a rational basis to dismiss the feasibility of building a new fixed bridge at a height matching the nearest adjacent fixed bridge crossing the river, the FEIS – as detailed by Martin County in its FEIS comments – is deficient in not examining other reasonable alternatives, such as a faster and more modern draw bridge with a higher vertical clearance than the current antiquated draw bridges (allowing more vessels to pass beneath the new draw bridge even when it is closed) or a draw bridge with a wider horizontal opening (allowing two-way vessel traffic when the bridge is opened, reducing the clearance time of vessel queues). AR0058351, AR0058364; *cf.* AR0038570 (Coast Guard assessment that given the narrow width of the moveable portion of the current bridges, two boats cannot safely and prudently pass beneath a bridge in the "open" position). The failure to examine reasonable alternatives violated NEPA.

D. The Federal Defendants failed to take a hard look at available alternatives that would avoid environmental and safety harms.

The Federal Defendants failed to consider all available alternative alignments of the AAF Project. Compl. ¶ 243. For example, the Federal Defendants failed altogether to consider an alternative alignment of the CSX Transportation branch (the "K Branch") that runs north-south in the western part of Martin County that is sparsely populated, despite Plaintiffs raising this issue in their request for a Supplemental Environmental Impact Statement on July 26, 2017. *Id.* ¶ 244; AR0064683. The K Branch alternative would avoid heavily populated areas, but also

would avoid using the aging railroad bridges over the Loxahatchee and St. Lucie River and the associated adverse impacts from use of these low-clearance bridges. Compl. ¶ 244. The Federal Defendants do not even attempt to mask the reason for failing to consider any route other than the one proposed by AAF; the ROD plainly states that "'alternatives were evaluated *primarily in the light of whether they could be constructed and operated in accordance with AAF's financial model*.'" *Id.* ¶ 245 (quoting ROD, emphasis added). In other words, the Federal Defendants arbitrarily and capriciously gave greater weight to AAF's *preferences* rather than actually considering all available alternatives, as required by NEPA. AAF's counsel admitted as much during a June 30, 2016 hearing before this Court, stating that AAF "had no interest in running on someone else's track" – the very factor that was so heavily weighted by the Federal Defendants. *Id.* ¶¶ 246-47 (citing Hearing Transcript, *Indian River Cnty. v. Rogoff*, 1:15-cv-00460-CRC, Dkt. # 82, at 23-24). The ROD reinforces AAF's pre-determined outcome, illustrating that the Federal Defendants adopted AAF's preferred corridor without adequately considering alternatives, including the "K" Branch. *Id.* ¶¶ 248-254. The failure to examine reasonable alternatives violated NEPA.

E. The FEIS failed to take a hard look at the noise impacts of the Project.

The analysis presented in the FEIS failed to adhere to the most basic protocols for an adequate examination of rail-related noise impacts. Those protocols are laid out in an FRA manual entitled "High Speed Ground Transportation Noise and Vibration Impact Assessment" dated September 2012 (the "FRA Manual")[15] and a Federal Transit Administration document entitled "Transit Noise and Vibration Impact Assessment" dated May 2006 (the "FTA

[15] FRA, High-Speed Ground Transportation Noise and Vibration Impact Assessment (Sep. 2012), https://www.fra.dot.gov/Elib/Document/2680.

Manual").[16] Under these guidance documents, noise analyses are supposed to follow three basic steps. First, a preliminary screening assessment is to be performed to determine whether there is a need for further analysis in light of the nature of the project and the overall character of the affected area. If the project does not screen out, a "general assessment" is to be conducted using estimates of conditions based upon broad assumptions regarding nearby noise sources, the general characteristics of the area, noise-generating characteristics of project equipment and facilities, and computer modeling. "[F]or smaller projects" a general assessment may be "sufficient to define impacts and determine whether mitigation is necessary." FTA Manual, p. 1-4. But it is a different story for significant projects like the one proposed by AAF because under the FRA Manual a "'Detailed Noise Analysis is appropriate for assessing noise impacts for high speed train projects'" at a point where "'preliminary engineering has been initiated, and the preparation of … Environmental Impact Statement … has begun.'" AR0036482 (Indian River Comments on DEIS, quoting FRA Manual, p. 5-1); *see also* FTA Manual, p. 1-2 ("it is likely that for major infrastructure projects requiring an EIS, *the most detailed treatment of noise and/or vibration impacts will also be required*" (emphasis added)).

Contrary to its own guidance – and even the recommendations of its own environmental consultant[17] – FRA published an EIS that presents nothing more than the results of a "general assessment" prepared on behalf of AAF by Amec Environment & Infrastructure in July 2013

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16 FTA, Transit Noise and Vibration Impact Assessment (May 2006), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Noise_and_Vibration_Manual.pdf.

17 VHB found wanting the noise analysis prepared by AAF's consultant and incorporated into the FEIS, advising that "[n]oise should be assessed following the Detailed Noise Assessment methodology outlined in the FTA/FRA guidance manuals rather than the General Assessment methodology." AR0001325.

(the "Amec Report"). The Amec Report (AR0061081-61238) provides only the roughest of estimates of the effects the Project will have on noise in the surrounding areas. Thus, the location of sensitive receptors along the rail corridor were not identified; existing noise conditions in the affected area were not measured; and locations where train operations would generate particularly high noise levels (such as where trains would accelerate or decelerate) were not analyzed. AR0058471. Moreover, modeling was based on generic assumptions, like average train speeds across entire counties, and census tract-level population data. *Id.*

The result of this 10,000 foot analysis is of no utility in determining the impacts the Project would have at critical locations or the mitigation needed to address such impacts. For example, the FEIS indicates that high speed train operations would result in daytime noise levels of 63.5 dBA L_{eq} at 50 feet from the rail corridor across *all of Indian River Cnty.*, except at the 32 grade crossings, where noise levels of 63.9 dBA L_{eq} are predicted at 50 feet *in every case*. FEIS Table 5.2.2-9. The FEIS purports to depict the impacts derived from its general noise assessment in FEIS App. 5.2.2-A2, which consists of high-altitude aerial photographs marked up with calculated noise and vibration contours. But these large scale, low-resolution photographs do not identify landmarks, towns or street names, so they shed no light on the actual locations where potentially significant impacts would occur. Thus, the FEIS ignores the FRA's own guidance that "[i]t is important to illustrate noise … on base maps at a scale sufficient to provide location reference for the reader." AR0058471.

As if all this were not enough to obscure the Project's true noise impacts, the FEIS is at odds with itself in disclosing the results of the inadequate General Noise Assessment. It declares that "no receptors along the N-S corridor would experience noise levels that exceed impact criteria," FEIS at 5-56, and reports in Table 5.2.2-13 that there would be "0" impacts along the

corridor. But the aerial photographs buried in FEIS App. 2.2-A2 tell a different story: that "moderate" impacts were revealed by the General Assessment *all the way down the line*.[18] According to the FRA Manual, "[a]lthough impacts in [the moderate] range are not of the same magnitude as Severe Impacts, there can be situations that make a compelling argument for mitigation." FRA Manual, p. 3-10. But the information necessary for such an assessment was not provided in the FEIS because a Detailed Noise Assessment was not performed.

By failing to take the "hard look" called for by FRA's own guidance, the FEIS lacks the information FRA needed to determine whether the Project would cause noise impacts requiring mitigation at particular locations with unique railroad operating conditions or particularly sensitive nearby uses. The FEIS also lacks the information needed to determine the adequacy of AAF's commitment to install "way-side horns" only at those grade crossings where Amec predicted "severe" noise impacts in its General Assessment, *see* FEIS App. 3.3.5-D; AR0026390, because other grade-crossings may also merit such mitigation in light of their particular characteristics not accounted for in the General Assessment.

FRA seeks to excuse its departure from its own guidelines by asserting that the general assessment methodology is "conservative" in predicting impacts, ROD App. C, p. 23, but conservative assumptions were not used in the analysis. The FRA Manual states that "by using conservative estimates (e.g., maximum design speeds and operations at design capacities), it [the General Assessment methodology] will allow estimates of worst-case noise impacts." FRA Manual, p. 4-5. However, in *yet another* departure from guidance in the FRA Manual, the Amec Report *did not* use conservative assumptions. Its General Assessment used "average speeds" on

[18] FEIS Table 5.2.2-9 also shows that "Impact Criteria (moderate)" for daytime impacts at non-residential receptors (parks, nature preserves, concert halls and schools) would be exceeded along the entire mainline in 4 of the 5 counties along the FECR corridor.

a county-by-county basis (FEIS, p. 5-47; *see also* AR0061125), instead of "maximum design speeds," and there is not the slightest indication that train operations were assumed to be running at "design capacities."[19] Thus, the generic results appearing in the FEIS indicating "moderate impacts" across five counties cannot be characterized as "conservative."

FRA has responded to comments pointing out these failings with a smokescreen, asserting repeatedly that "noise and vibration have been assessed according to guidelines specified" in FRA and FTA guidance. *See, e.g.*, FEIS at S-12, 4-30-4-31; ROD at 18; ROD App. C, pp. 22, 23. But repeating an inaccuracy does not make it so. In truth, that squarely applicable guidance was thrown out the window when FRA approved an FEIS with a half-baked general assessment of the noise impacts that the Project would cause.

The ROD insists that the FEIS noise analysis was "based upon the information that was available at the time of the [Amec] study." ROD App. C, p. 23. Even if some data were lacking at the time of a 2013 report from AAF's consultant, that would have no bearing on *FRA*'s obligation to take a hard look at the noise impacts of the Project in the 2015 FEIS or 2017 ROD. Furthermore, any assertion that the necessary design information was unavailable at the time of the FEIS is debunked by the document itself, which estimated that the Project would be *completed* by 2016 (FEIS, pp. 3-29, 3-62, 3-64) and screened out alternatives that would delay construction until that year (FEIS, p. 3-24). Indeed, the FEIS contains detailed information as to the type of equipment to be used (FEIS, pp. 3-60, 5-38), train schedules (FEIS, pp. 3-59, 3-60),

[19] For example, the FEIS noise analysis assumed that passenger trains in Martin County will travel at a uniform speed of 79.5 mph, *see* FEIS, p. 5-47, but passenger trains in many stretches of that county may travel at 110 mph. *See* FEIS, App. 3.3.3-A4 N-S Track Chart, Sheets 15, 16, 17, 18.

speed profiles (FEIS, p. 3-60 and App. 3.3.3-A4), locations of access roads (*id.*), and landform topography (*id.*) – all of the elements required for a Detailed Noise Analysis.

The ROD seeks to cure the deficiencies in the noise analysis by stating that the "Detailed Noise and Vibration Assessment [required by the FRA/FTA guidance will be performed] throughout the corridor … to identify locations where any additional mitigation would be necessary." ROD, p. 19. This approach of approving first and studying impacts later frustrates one of NEPA's most basic goals. It is well established that "a post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS." *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1104 (9th Cir. 2016); *see also Robertson*, 490 U.S. at 349; FRA Manual, p. 3-10 ("Decisions regarding mitigation should be made only after considering input from the affected public, relevant government agencies and community organizations."). Without any rational explanation in the record, the FEIS departed from FRA/FTA guidance requiring a detailed noise assessment, and failed to take a hard look at one of the most critical areas of environmental concern posed by the Project.[20]

F. The proper judicial remedy for violation of NEPA is vacatur of the PAB approval and remand for preparation of a supplemental EA or EIS.

The remedy for Plaintiffs' NEPA claims is governed by the APA, which provides that the Court shall "hold unlawful and *set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added). Vacatur is considered the "standard remedy" and "presumptive

[20] Indian River County repeatedly requested FRA to provide it with a copy of the Amec Report, but the agency did not do so until after the opportunity for public comment had passed. AR0056464, AR0057020, AR0057494, AR0059160. FRA thereby violated 40 C.F.R. § 1502.18 ("material which substantiates any analysis fundamental to the impact statement" is to "be … readily available on request").

remedy" for a NEPA or similar violation. *Public Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016). In determining whether to depart from the "standard remedy," the Court considers "'the seriousness of the … deficiencies [of the agency action] ... and the disruptive consequences of an interim change that may itself be changed.'" *Id.* (quoting *Allied–Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The case at bar does not merit departure from the standard remedy.

First, the errors here were serious. The fundamental mandate of NEPA is that a federal agency consider potential environmental impacts, as well as alternatives and mitigation measures, before it takes action with respect to a proposal – a directive that a federal agency "look before it leaps." *See Robertson v. Methow Valley Citizens*, 490 U.S. at 349 (NEPA requires the environmental impacts of all reasonable options be evaluated and quantified before resources have been committed or "the die otherwise cast."); *see also* 40 C.F.R § 1502.2(g) (the EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"). Allowing the PAB approval to remain in place would thus undermine the basic purpose of NEPA since the successful marketing of $1,150,000,000 of PABs could render meaningless any future consideration of environmental impacts and alternatives.

Second, vacatur of the PAB approval would not cause "disruptive consequences." Since AAF has not sold any Phase II PABs, this is not a case where "the egg has been scrambled and there is no apparent way to restore the status quo ante." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). Moreover, AAF and potential investors in the Project are on notice that there is a legal infirmity to the PAB approval and there can be no

justifiable reliance on that approval under the circumstances. Accordingly, the approval should be nullified even if the bonds are sold to such on-notice investors.

III. DOT exceeded its authority under 26 U.S.C. § 142 when it approved the PAB allocation to the Project.

DOT allocated $1,150,000,000 in PABs to the Project under Section 142(a)(15) and 142(m) of the I.R.C. AR0074220. However, under the plain language of Section 142(a), the only intercity railway projects that are entitled to PAB funding are "high-speed intercity rail facilities" capable of reaching 150 mph. The top speed of the Project is 110 mph from West Palm Beach to Cocoa and 125 mph from Cocoa to Orlando. *See* FEIS, pp. 3-44, 3-59. Instead of adhering to the statute, DOT conjured up a theory to transform the Project from a *passenger rail* facility into a "qualified *highway* facility or surface freight transfer facility" under Section 142(m), and it approved the allocation on that basis. But it is patently clear that the Project is neither a "qualified highway project" nor a "surface freight transfer facility." Accordingly, the Project is not eligible to receive a PAB allocation.

A. Plaintiffs have prudential standing to bring their claim.

In the earlier litigation, this Court held that Martin County[21] was not within the "zone of interests" of 26 U.S.C. § 142 because that provision does not "protect . . . those who would claim that public safety or other related interests would be impaired by a bond allocation to an ineligible project." *Indian River Cnty. v. Rogoff*, 201 F. Supp. 3d at 21. The Court observed that the zone of interest test "'denies a right of review if the 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.* at 20 (quoting *Clarke v. Sec. Indus.*

[21] Indian River County did not plead a claim under Section 142 in its action challenging the 2014 PAB approval. The two actions were litigated in tandem but were not consolidated.

Ass'n, 479 U.S. 388, 399 (1987)). At the same time, this Court noted that "'[t]he test is not meant to be especially demanding'" and "'there need be no indication of congressional purpose to benefit the would-be plaintiff.'" *Id.* (quoting *Clarke*, 479 U.S. at 399-400). Thus, "the question of reviewability 'turns on congressional intent' as to 'whether a particular plaintiff should be heard to complain of a particular agency decision.'" *Id.* (quoting *Clarke*, 479 U.S. at 399-400); *accord Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1389 (2014) ("[W]e have … conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff, and have said that the test forecloses suit only when a plaintiff's interests are so marginally related to … the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." (internal quotation marks and citations omitted)).

In holding that the claim asserted in the previous litigation failed to fall within the zone of interests, this Court confined its focus to the interests protected by I.R.C. Section 142 and declined to consider the broader interests protected by the I.R.C. as a whole or the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005) ("SAFETEA-LU"). *See Indian River Cnty. v. Rogoff*, 201 F. Supp. 3d at 20 ("In conducting the zone-of-interest test here, the relevant unit of analysis … is the section of the Internal Revenue Code that allows for tax-exempt bonds to be issued when their proceeds are used to fund certain types of projects").

The Court need not go beyond the I.R.C. provisions enacted for the specific purpose of governing PABs to find Plaintiffs' claims in this case to be within the zone of interests. The Complaint alleges that the use of PAB financing for the Project is unlawful because the local governmental approvals mandated by Section 147(f) of the I.R.C. have not been granted. That

provision – entitled "Public approval required for private activity bonds" – requires PABs to be "approved by … each governmental unit having jurisdiction over the area in which any facility [financed by PABs] … is located (except that if more than 1 governmental unit within a State has jurisdiction over the entire area within such State in which such facility is located, only 1 such unit need approve such issue)." 26 U.S.C. § 147(f). Point III.E *infra* discusses why the one exception to the explicit mandate to secure approvals from "each governmental unit having jurisdiction" over a PAB-financed project is inapplicable here. This Court need not consider that discussion for purposes of the zone of interests test. The decisive point for the zone of interests test is that Congress has imposed a requirement *aimed specifically at PABs* requiring project approval from "each governmental unit" with jurisdiction over the facilities those bonds would finance. It is clear from this mandate that Congress recognized that such federally assisted projects would have local effects, and that affected governmental units – including the Plaintiff counties – should have an integral role in their approval. It can be readily inferred from such a powerful provision – which amounts to giving local governmental units veto power over PAB-financed projects – that Congress intended to enable those entities to protect the public health and safety of their citizens, the character of their communities, the economic impact on their citizens as well as county budgets, and the quality of their environment from the potential impacts of such projects.

Plaintiffs respectfully request that this Court expand the scope of its prudential standing analysis to encompass not just Section 142(m), but also the directly related "Public approval require[ments] for private activity bonds" set forth in Section 147(f) of the I.R.C. If the Court were to do so, it would be clear that the interests asserted by the Plaintiff counties fall well within the zone of interests that Congress intended to protect through the set of interrelated

I.R.C. provisions that comprise the PABs program. *Accord Nat'l Petrochem. & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) ("In determining whether a petitioner falls within the zone of interests to be protected by a statute, we 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." (internal citations and quotation marks omitted)).

Moreover, the factual landscape has changed in the two years since the Court's ruling on prudential standing. The PAB allocation approval granted by DOT on December 20, 2017, now impacts Martin and Indian River Counties by imposing on them the responsibility for funding the multi-million dollar maintenance costs of AAF's grade-crossing equipment within the counties. It does so by requiring, as a condition of approval, that AAF's "construction, development, and operation of Phase II" be conducted "in accordance with … the [ROD and FEIS]." AR0074325. The ROD and FEIS, in turn, require the Plaintiff counties to pay for the maintenance of AAF's grade-crossing equipment within their respective jurisdictions in perpetuity. *See* ROD, App. C, p. 25; FEIS, pp. 3-45, 7-158; *see supra* at p. 16 (noting that AAF drafted this FEIS language). Thus, the PAB approval now before the Court purports to allocate to the Plaintiff counties the perpetual obligation to pay for the maintenance of the Project-related safety improvements at the grade crossings. Compl. ¶ 53.

Accordingly, the Plaintiff counties' interests now go beyond the public safety, environmental protection, and historic preservation interests that the Court held to be outside the "zone of interests" appurtenant to Section 142 of the I.R.C. Plaintiffs are now unlawfully required to financially support a private rail project. Requiring the Plaintiff counties to expend public funds in support of the AAF Project is in conflict with the purpose of Section 142, which – as this Court noted – is to create a federal tax benefit to construct projects with significant

public benefits. *Indian River Cty.*, 201 F. Supp. 3d at 21. Plaintiffs' interests in not expending their own local funds on the Project are within the zone of interests Congress considered when enacting Section 142.

The financial harm faced by the Plaintiff counties in this case is similar to that suffered by the City of Miami in *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). In that case, the Supreme Court held that Miami's loss of property tax revenue and necessary increases in municipal spending – which resulted from two large banks' discriminatory lending practices – fell within the zone of interests that the Fair Housing Act ("FHA") sought to protect. *Id.* at 1303 ("Here, we conclude that the City's claims of financial injury in their amended complaints – specifically, lost tax revenue and extra municipal expenses – satisfy the ... 'prudential standing' … requirement [because they] . . . are, at the least, '*arguably* within the zone of interests' that the FHA protects." (emphasis in original, internal quotation marks and citation omitted)). Just as Miami's financial burden brought it within the zone of interests of the FHA, the millions of dollars in maintenance costs that the Plaintiff counties will be forced to expend – due to DOT's unreasonable application of Section 142 – places them squarely within the zone of interests Section 142 is intended to cover. Although *Bank of Am. Corp. v. City of Miami* was not an APA case, the Supreme Court has held that the "zone of interest" test in the APA context is *less* demanding than in other contexts so as not to undermine the APA's "'generous review provisions.'" *Lexmark Int'l, Inc.*, 134 S. Ct. at 1389 (citation omitted).

The zone of interests analysis called for here is similar to that undertaken in *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014), which held that American workers are within the zone of interest of the Immigration and Nationality Act because they were harmed by the Department of Labor's ("DOL's") lax visa requirements for foreign sheepherders, goat herders, and cattle

herders. *Mendoza*, 754 F.3d at 1017–18. The D.C. Circuit reached this conclusion by finding that DOL's actions made it harder for American workers to find decent paying jobs. *Id*. Here, as in *Mendoza*, the Federal Defendants' improper interpretation of Section 142(m) – which was intended to create a tax break for beneficial public projects – has instead forced the Plaintiff counties to shoulder the burden of supporting the Project by expending taxpayer dollars, thereby financially burdening the very public the provision was intended to benefit. By burdening Plaintiffs with maintenance of AAF's grade-crossing equipment within their respective jurisdictions, DOT's PABs approval has implicated an interest of the Plaintiffs that is within the zone of interests of Section 142.

Plaintiffs also fall within the zone of interests of 26 U.S.C. § 142 because that statute, when read together with the provisions of Title 23 referenced therein, is intended to protect bicycle safety. In 2005, Congress enacted Section 11143 of Title XI of SAFETEA-LU to (among other things) amend the list of projects in Section 142 for which PAB funding could be used to include the construction of qualified highway facilities, but Congress mandated that such facilities have received Title 23 assistance to be "qualified." 26 U.S.C. § 142(m). Title 23 permits the use of funds for the "construction of projects for the elimination of hazards of railway-highway crossings" and requires that prior to the allocation of funds, certain factors be taken into consideration, including "bicycle safety." 23 U.S.C. §§ 130(a), 130(j). Accordingly, Plaintiffs also fall within Section 142's zone of interest because they have an interest in ensuring bicycle safety within Martin and Indian River Counties. *See generally Nat'l Petrochem. & Refiners Ass'n v. EPA*, 287 F.3d at 1147 (*per curiam*). Bicyclists have already been struck and killed by AAF trains. Compl. ¶ 36; Wouters Decl. ¶ 14. Plaintiffs' interest in bicycle safety is within the zone of interests that Congress intended Title 23, and by extension, Section 142(m) to

cover. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1317 (D.C. Cir. 2015) (concerns over "heightened safety risks" held to put plaintiff within zone of interests of the Natural Gas Act).

Finally, Plaintiffs' broader interest in safe transportation is within Section 142's zone of interests. Section 142(m) was enacted as part of SAFETEA-LU. Therefore, as part of its zone of interest analysis, the Court should consider the broader safety concerns that led Congress to implement the SAFETEA-LU, and as a part of that statute, Section 142(m). *See Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 249 F. Supp. 3d 524, 550 (D.D.C. 2017) (stating that when analyzing congressional intent, courts should look to "both the language of the specific statutory provision in question and the broader history of the statute as a whole."), *aff'd in relevant part*, 892 F.3d 332 (D.C. Cir. 2018). Plaintiffs have pled numerous facts establishing their interest in transportation safety, thereby placing them within the zone of safety interests Congress contemplated when it enacted Section 142(m). *See* Compl. ¶¶ 18-21, 35-40.

The Plaintiff counties have demonstrated their interests in protecting the welfare of their citizens, the character of their communities and their environmental resources, as well as their financial and transportation safety interests. Because these are all interests Congress contemplated when it enacted the provisions of the Internal Revenue Code governing PABs, the Court should hold that Plaintiffs have established prudential standing.

B. The unambiguous language of Section 142 clearly indicates that the Project is neither a qualified highway nor a surface freight transfer facility.

Section 142(a) of the I.R.C. allows the issuance of PABs to finance a project only if it falls into one of 15 specified categories.[22] One of these categories is a "high-speed intercity rail facility," but Congress defined high-speed intercity rail facilities as "any facility … for the fixed guideway rail transportation of passengers . . . using vehicles that are reasonably expected to be capable of attaining a maximum speed in excess of 150 miles per hour…." 26 U.S.C. § 142(i)(1). Because it is undisputed that the AAF Project is not a "high-speed intercity rail facility" as defined in Section 142, the Federal Defendants approved the PABs for the Project on the theory that it is a "qualified highway or surface freight transfer facility" under 26 U.S.C. § 142(a)(15) and (m). However, the Project is a passenger railroad. It is neither a highway nor a freight transfer facility. Accordingly, it was plain error for the Federal Defendants to conclude that the Project is a "qualified highway or surface freight transfer facility."

In 2005, Congress enacted Section 142(a)(15) and 142(m) (hereafter "Section 142(m)") to add new types of projects – highway projects and surface freight transfer facilities – to the pre-existing list of 14 categories of projects eligible to receive a PAB allocation. *See* SAFETEA-LU, Pub. L. 109-59 § 11143. In enacting SAFETEA-LU, Congress defined "qualified highway or surface freight transfer facilities" as follows:

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[22] The 15 categories are: "(1) airports, (2) docks and wharves, (3) mass commuting facilities, (4) facilities for the furnishing of water, (5) sewage facilities, (6) solid waste disposal facilities, (7) qualified residential rental projects, (8) facilities for the local furnishing of electric energy or gas, (9) local district heating or cooling facilities, (10) qualified hazardous waste facilities, (11) *high-speed intercity rail facilities*, (12) environmental enhancements of hydroelectric generating facilities, (13) qualified public educational facilities, (14) qualified green building and sustainable design projects, or (15) *qualified highway or surface freight transfer facilities*." 26 U.S.C. § 142(a) (emphasis added).

> **(m) Qualified highway or surface freight transfer facilities**
>
> (1) [T]he term "qualified highway or surface freight transfer facilities" means:
>
> (A) any surface transportation project which receives Federal assistance under title 23, United States Code (as in effect on the date of the enactment of this subsection),
>
> (B) any project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible and which receives Federal assistance under title 23, United States Code (as so in effect), or
>
> (C) any facility for the transfer of freight from truck to rail or rail to truck (including any temporary storage facilities directly related to such transfers) which receives Federal assistance under either title 23 or title 49, United States Code (as so in effect).

26 U.S.C. § 142(m)(1).

Since the AAF Project is not an international bridge or tunnel, it cannot fall within Section 142(m)(1)(B), and since it is not a freight transfer facility, it cannot fall within Section 142(m)(1)(C). Thus, the Federal Defendants rely on the words "any surface transportation project" in Section 142(m)(1)(A) to turn what is, in reality, a passenger rail project into a "qualified highway or surface freight transfer facility." In reaching this bizarre conclusion, the Federal Defendants ignore the directive to construe words "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

When read in statutory context, it is clear that Congress intended Section 142(m)(1)(A) to include only *highway* surface transportation projects. For starters, Congress included that provision in a statutory section entitled "Qualified *highway* or surface freight transfer facilities" (emphasis added), and imposed in that provision the requirement that a project receive Title 23 *highway* funds to be eligible to receive a PAB allocation under Section 142(m)(1)(A). *See* 26 U.S.C. § 142(m)(1)(A) ("any surface transportation project which receives Federal assistance

under title 23, United States Code"). In contrast, Congress required that "surface freight transfer facilities" (Section 142(m)(1)(C)) receive federal assistance under *either* Title 23 (highways) or Title 49 (which includes rail programs) to be eligible to receive a PAB allocation under in Section 142(m)(1)(C). *See* 26 U.S.C. § 142(m)(1)(C).

Congress added qualified highways and surface freight transfer facilities to a list of eligible categories that already included mass commuting facilities and high-speed intercity passenger rail facilities. The DOT's interpretation of "any surface transportation project" in Section 142(m)(1)(A) ascribes "a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Act[] of Congress." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (describing how courts "rely on the principle of *noscitur a sociis* – a word is known by the company it keeps – to avoid ascribing" an overly broad reading of one word in a statute). Its overbroad reading of "surface transportation project" violates the canon that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)).

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted). This canon would be violated by DOT's sweeping interpretation of the term "surface transportation project" in Section 142(m)(1)(A) without reference to the word "highway" in the heading of Section 142(m).

Additionally, under the *expressio unius est exclusion alterius* canon, when the "items expressed are members of an 'associated group or series,' [that] justif[ies] the inference that

items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (stating that under the "interpretive canon, *expressio unius est exclusio alterius*, 'expressing one item of [an] associated group or series excludes another left unmentioned.'" (citation omitted)). Congress enacted Section 142(m)(1)(A) to provide the DOT Secretary authority to allocate PABs to *only* highway projects that receive Title 23 assistance. Congress enacted Section 142(m)(1)(B) to provide the DOT Secretary authority to allocate PABs to specific types of other types transportation projects – international bridges and tunnels – that receive Title 23 assistance. Congress enacted Section 142(m)(1)(C) to provide the DOT Secretary authority to allocate PABs to other specific types of transportation projects – surface freight *rail* transfer facilities – that receive federal assistance under Title 23 or Title 49. By authorizing the DOT Secretary to allocate PABs to only certain enumerated types of transportation projects in Section 142(m), Congress denied the DOT Secretary authority to allocate PABs to projects not specifically enumerated.

When "Congress has directly spoken to the precise question at issue," both the agency and this Court must give effect to Congress's stated intent. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). The DOT's interpretation is unlawful because the statute is clear on its face: there is no provision in Section 142(m) that provides the DOT Secretary the authority to allocate PABs to this passenger rail project.

C. Even if the Court holds the language of Section 142(m)(1)(a) to be ambiguous, it should hold DOT's interpretation to be unreasonable.

"In the interpretation of statutes, the function of the courts is . . . to construe the language so as to give effect to the intent of Congress. . . ." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). As described above, Congress enacted SAFETEA-LU and created a new category of projects eligible for PAB allocations by amending Section 142 to add Section 142(m): "qualified highway or surface freight transfer facilities." Prior to the enactment of this provision, there were fourteen explicit categories of projects that qualified for PAB allocations. Among these provisions were "mass commuting facilities" in Section 142(a)(3) and "high-speed intercity rail facilities" in Section 142(a)(11) and (i). Reading Section 142 as a whole – as well as the legislative history surrounding the provision – it is clear that Congress did not intend for Section 142(m) to include non-high speed intercity passenger rail projects to be eligible for PABs.[23]

1. The legislative history offers no support for DOT's position that Congress intended Section 142(m) to encompass passenger rail projects.

The evidence before the Court, including the allegations set forth in the Complaint, detail years of negotiations of the highway and surface freight transfer PAB proposal illustrating that Congress clearly *never intended* to include intercity passenger rail in the final version of Section 142(m). *See* Compl. ¶ 282 (citing Congressional statements).

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[23] This is supported by the declaration of Congressman Rahall, former Ranking Member of the U.S. House Committee on Transportation and Infrastructure, who stated that the Section 142(m) amendment to SAFETEA-LU sought to "add highway and surface freight transfer facilities to the list of projects eligible to receive private activity bond allocations[,] and [a]t no point during the debate over the SAFETEA-LU legislation did Congress discuss intercity passenger rail projects qualifying under the new § 142(m)…." *Martin Cnty. v. U.S. Dep't of Transp.*, 1:15-cv-00632-CRC, Dkt. # 20-2.

There is additional clear evidence that Congress and the Federal Defendants did not intend for intercity passenger rail to be eligible for tax-exempt financing under Section 142. A May 25, 2005 industry analysis of the legislation stated as follows: "An earlier draft of the proposal prepared by USDOT had also included intercity passenger rail and bus vehicles and facilities [in addition to highway and surface freight transfer facilities]. . . . These provisions were not included in the final Administration bill, presumably because the assumed 'cost' to the Treasury was unacceptable." Compl. ¶ 282(f) (quoting Karen J. Hedlund, Nossaman Guthner Knox & Elliot LLP and providing citation). The Hon. Emil Frankel, former DOT Assistant Secretary for Transportation Policy, said in 2003 while Congress was debating the reauthorization of SAFETEA, "[w]e're very hopeful that Congress will enact private activity bonds, which are private bonds, private borrowers in which tax exempt status is available for some transportation projects, but not all. And we would allow authorized private activity bonds to be utilized *in connection with the highway and intermodal freight projects*." Compl. ¶ 282(g) (quoting Statement of Hon. Emil Frankel, DOT Assistant Secretary for Transportation Policy).

2. TIFIA's statutory language indicates that Congress did not intend to include passenger rail projects as eligible recipients of PAB allocations under Section 142(m).

The Transportation Infrastructure Finance and Innovation Act of 1988 ("TIFIA") – which was in effect at the time Congress enacted Section 142(m) as part of SAFETEA-LU – provides further proof that DOT's interpretation of Section 142(m) is not in accordance with law. In the 1998 TIFIA legislation, Congress amended Title 23 and explicitly listed the types of projects eligible for the new transportation infrastructure financing program:

> (9) PROJECT.—The term 'project' means—
>
> (A) any surface transportation project eligible for Federal assistance under this title **or chapter 53 of title 49**;

> (B) a project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible[;]
> **(C) a project for intercity passenger bus or rail facilities and vehicles, including facilities and vehicles owned by the National Railroad Passenger Corporation and components of magnetic levitation transportation systems**; and
> (D) a project for publicly owned intermodal surface freight transfer facilities, other than seaports and airports, if the facilities are located on or adjacent to National Highway System routes or connections to the National Highway System.

Pub. L. 105-178, 112 Stat. 107, 242-43 (June 9, 1998) (emphasis added)

The statutory language of SAFETEA-LU's Section 142(m) almost mirrors the TIFIA language – except for one glaring omission: Congress omitted Section (9)(C) ("intercity . . . passenger rail") from Section 142(m) in SAFETEA-LU. Section 9(C) of TIFIA explicitly stated that intercity rail facilities would be eligible for Federal assistance. So, while Sections (9)(A), (B), and (D) of TIFIA appear in Section 142(m) of SAFETEA-LU, the intercity rail provision in Section (9)(C) is absent. Congress also chose not to include any reference to Title 49 (from Section (9)(A)) in drafting Section 142(m)(1)(A).

3. DOT's inconsistent interpretation of Section 142(m) highlights the unreasonableness of its current position.

DOT has indicated through draft legislative proposals that it does not believe that Section 142(m) includes intercity passenger rail. In a 2011 proposal, the Obama Administration made clear that it believed that Section 142(m), as it now stands, does not include intercity passenger rail, because it prepared a bill to add passenger rail projects to Section 142(m). *See* Compl. ¶ 283(c) (quoting language and providing citations). The Trump Administration has followed suit, proposing that Section 142(m) be amended to add passenger railroads.[24] This is further evidence

[24] White House, Department of Transportation, *Legislative Outline for Rebuilding Infrastructure in America* (www.transportation.gov/sites/dot.gov/files/docs/briefing-room/304441/legoutline.pdf), p. 15.

that DOT's conclusion that the Project is eligible for PABs is contrary to current law.

D. DOT's conclusion that the AAF Project is a qualified highway facility under Section 142(m)(1)(a) was unlawful because the Project has not received Title 23 assistance as required by the statute.

Even if the Court holds that a passenger rail project is eligible for a PAB allocation under Section 142(m)(1)(A), the Court should still find the AAF Project to be ineligible for a PAB allocation because it has not received Title 23 funds. Section 142(m)(1)(A) requires the "project" to have received Title 23 assistance in order to be eligible for a PAB allocation. 26 U.S.C. § 142(m)(1)(A). AAF stated in its December 5, 2017 PAB application to DOT that "$9 million from Section 130 of U.S. Code Title 23 has been invested in the entire [FECR] corridor to improve railway-highway grade crossings and prepare the corridor for growth in rail traffic. Future investments from the Section 130 program are planned for future calendar years." AR0074235. Thus, it was FECR – and not the AAF Project – that received funding under Title 23. The Florida Department of Transportation ("FDOT") expended Title 23 funds on highway-rail crossings along the freight rail corridor on which AAF proposes to run, as it had for years preceding the conception of the AAF Project; these crossing improvements would benefit the freight rail corridor regardless of whether the AAF Project ever operates. *See Martin Cnty. v. U.S. Dep't of Transp.*, 1:15-cv-00632-CRC, Dkt. # 19-2 (Baumer Decl. (2005-2014 expenditures)); AR0073548; AR0073549; *see also* Decl. of Kate Pingolt Cotner Ex. 1 (Jan. 2015 FDOT emails stating that AAF Project has not received Title 23 funding).

During Congressional testimony on April 19, 2018, Grover Burthey, DOT's Deputy Assistant Secretary for Policy, stated that DOT is:

> … not aware of any [Title 23] funds going to an All Aboard Florida account, however the application which the Department of Transportation reviewed did indicate that funds were used by the Florida Department of Transportation from

> Title 23 on the corridor on which the All Aboard Florida trains run, enabling it to be eligible for assistance under Private Activity Bond statute.[25]

In its Answer, DOT admitted that "[t]he Title 23-funded railway-highway grade crossing improvement projects listed in support of the AAF PAB application were constructed in a rail corridor that was owned by FECR" and that the corridor was owned by "a corporation that is separate and distinct from AAF, at the time of the railway-highway grade crossing projects, and continues to be owned by FECR today." Compl. ¶ 276; DOT Answer ¶ 276. AAF admitted "that the referenced Title 23 funds were expended on improvements to railway-highway grade crossings within the existing FECR corridor, to prepare that corridor for the growth in rail traffic contemplated by the Project." AAF Answer ¶ 276. AAF acknowledged that "[i]n July 2017, FECR as an entity was acquired by Grupo México Transportes." AAF Answer ¶ 277.

Thus, AAF is not the same entity that received Title 23 assistance. The FDOT spent Title 23 funds along the rail corridor owned *by FECR*. AR0074235 ("$9 million from Section 130 of U.S. Code Title 23 has been invested in the entire [FECR] corridor to improve railway-highway grade crossings and prepare the corridor for growth in rail traffic. Future investments from the Section 130 program are planned for future calendar years."). Pursuant to 23 U.S.C. 130(b), and 49 C.F.R. § 1.48, "grade crossing improvements" are limited to improvements "for the elimination of hazards and the installation of protective devices" at the crossings. 23 C.F.R. § 646.210. Accordingly, it is absurd for DOT to find that FDOT's expenditure of $9 million in Title 23 funds for grade-crossing improvements on the FECR corridor to be considered AAF's

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[25] Wouters Decl. Ex. 14, p. 2 (Segments of Unofficial Transcription, *Hearing on Examining Tax-Exempt Private Activity Bonds For All Aboard Florida's Brightline Passenger Rail System*, U.S. House Oversight and Gov't Reform Comm., Subcomm. on Gov't Operations (Apr. 19, 2018), https://oversight.house.gov/hearing/examining-tax-exempt-private-activity-bonds-for-all-aboard-floridas-brightline-passenger-rail-system/).

receipt of Title 23 assistance enabling AAF the benefit of receiving over $1 billion in PAB authority to finance the entire passenger railroad.

The Administrative Record is almost entirely devoid of any documents indicating that DOT undertook any analysis of the Project's eligibility under Section 142(m). The *only* such documents appear in an email on October 22, 2014, from AAF's lobbyist, Husein Cumber, to Paul Baumer of the DOT, in which Mr. Cumber wrote that "[t]he number in the application ties directly to the projects from 1/1/2012 to date on the attached[,]" and a 14-page attachment – provided by Mr. Cumber – to that email. AR0073548. That 14-page attachment titled "AAF - Federal Safety Funds [from] 2005-2014" is the exact same document that Mr. Baumer provided to the Court in his declaration in the prior litigation as the evidence relied upon by DOT to determine that FDOT's expenditures "along the project corridor" rendered the AAF Project a "'surface transportation project which receives Federal assistance under title 23,' and that it therefore qualified for a PAB allocation under 26 U.S.C. § 142(m)(1)(A)." *Martin Cnty. v. U.S. Dep't of Transp.*, 1:15-cv-00632-CRC, Dkt. # 19-2, at ¶¶ 10-11, Ex. B.

In reality, the FDOT previously spent Title 23 funds along the rail corridor on which the AAF Project is proposed to travel – which is owned and operated by a non-affiliated company – on separate projects to improve highway-rail crossings. The DOT's own regulations provide that these "[p]rojects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads . . . ." 23 C.F.R. § 646.210(b)(1)-(2). FDOT's separate expenditures of Title 23 funds for projects along the existing freight rail corridor, which have "no ascertainable benefit" to AAF, do not constitute the passenger rail project's receipt of Title 23 funds as required by the statute.

A "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air Reg. Grp.*, 134 S. Ct. at 2442 (citation omitted)). An agency interpretation "'inconsisten[t] with the design and structure of the statute as a whole . . . does not merit deference.'" *Id.* (citation omitted). The DOT's interpretation of what constitutes a project's receipt of Title 23 assistance is well beyond "the bounds of reasonableness." *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006). This unreasonable interpretation is compounded by DOT's position that the expenditure of $9 million in Title 23 funds for specific highway-rail crossings on the FECR corridor qualifies a new passenger railroad spanning the *entire* corridor to receive over $1 billion in PAB authority. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating that statutory interpretations that "would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

DOT's interpretation of Section 142(m) – which allows $1 of Title 23 funds spent at some point along a rail corridor to give the DOT authority to allocate over $1 billion in bonds for a new passenger railroad along the entire corridor – also violates Section 142(m)(3), which requires that at least 95% of the PABs proceeds to be expended for the "qualified highway or surface freight transfer" facility.

E. The PAB approval was unlawful because the Plaintiff counties have not approved the use of PABs for the Project.

The use of PABs for a facility must be "approved by … each governmental unit having jurisdiction over the area in which any *facility*, with respect to which financing is to be provided from the net proceeds of such issue, is located." 26 U.S.C. § 147(f)(2)(A)(ii) (emphasis

added).[26] The facility that is the subject of the Federal Defendants' actions, including their PAB approval, is Phase II of the Project. *See* PAB Approval Letter, p. 2 (requiring that "the proceeds of PABs issued under this allocation" shall be "specifically for the scope of the Project described in the Phase II Environmental Documents [*i.e.*, the FEIS and ROD]"). AR0074325.

The Phase II facility spans six Florida counties. *See* AAF Answer ¶ 8. The I.R.C. requires the approval of "*each* governmental unit having jurisdiction over the area in which any facility … is located." 26 U.S.C. § 147(f)(2)(A)(ii) (emphasis added). *See Steele v. Ind. Dev. Bd.*, 301 F.3d 401, 404 (6th Cir. 2002) ("'Under the public approval requirement of section 147(f), … a private activity bond must be approved by both the governmental unit issuing the bond and the governmental unit that has jurisdiction over the area in which the facility receiving financing through the bond proceeds is located.'" (citation omitted)). A substantial part of Phase II is located in Martin County, Indian River County, and St. Lucie County, which have not granted the approval required by the I.R.C. *See* Compl. ¶ 8; AAF Answer ¶ 8. Accordingly, the use of PABs to finance Phase II is unlawful. AAF's claim to "allocate" the $1,150,000,000 of PABs for the Phase II facility only to those portions of Phase II outside of Martin, Indian River, and St. Lucie Counties, *see* AAF Answer ¶ 8, is sophistry and, in any event, not a condition of DOT's approval of the PABs. It is also inconsistent with AAF's application for the PAB approval, which states that the bonds will provide "funds to pay … the costs of acquiring,

[26] There is one exception to the requirement of local government approval: "if more than 1 governmental unit within a State has jurisdiction over the entire area within such State in which such facility is located, only 1 such unit need approve such issue." 26 U.S.C. § 147(f)(2)(A)(ii). The exception is inapplicable because there is no governmental unit with elected representatives that has approved Phase II and which has jurisdiction over the entire project. *Id.* § 147(f)(2)(B)(i) (governmental approval requires action by the "applicable elected representative").

constructing, improving and equipping a passenger rail system on or adjacent to the Florida East Coast Railway corridor from Miami to Orlando, Florida." AR0074254.

CONCLUSION

The Court should vacate the approval of the PABs for Phase II, declare that the Project is not eligible for PAB financing, and grant the other relief sought in the Complaint.

Dated: July 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2018, I caused copies of the foregoing materials to be served by electronic means on all counsel of record through the Court's CM/ECF system.

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