U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

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July 2, 2020

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Dear Mr. Frosh:

On June 26, 2018, the State of Maryland wrote to the Federal Aviation Administration ("FAA") to request several actions related to air-traffic procedures used in the airspace around Baltimore/Washington International Thurgood Marshall Airport ("BWI"), which is owned and operated by the State. We initially responded on September 10, 2018, to explain that Maryland's letter (the "Administrative Petition") did not seem to comport with any specific process used by the FAA to respond to such requests. We therefore declined, at that time, to respond substantively to the State's requests. We have now fully considered the Administrative Petition, and in this letter we respond to both the issues it raised and the actions it requested. This letter therefore replaces and supersedes the FAA's September 10, 2018 letter to the State, and is the FAA's complete and final response to the Administrative Petition.

The FAA understands that Maryland residents have concerns about aircraft noise, and the FAA takes those concerns seriously. This letter is not intended to address those concerns broadly or to establish any sort of new FAA policy or position. Nor is this letter intended as a direct response to arguments made by the State in its brief to the United States Court of Appeals for the D.C. Circuit regarding this Administrative Petition. Rather, this letter is intended only to respond to the specific issues raised in Maryland's June 26, 2018 Administrative Petition. The FAA believes that the best venue for exploring the broader concerns of Maryland residents about aircraft noise and other environmental issues related to aviation is through a public forum like the D.C. Metroplex BWI Community Roundtable.

Maryland's Administrative Petition made three specific requests of the FAA. First, Maryland requested supplementation of the FAA's 2013 Environmental Assessment for the Washington, D.C., Optimization of Airspace and Procedures in the Metroplex (the "D.C. Metroplex"). Second, Maryland asked the FAA to review arrival procedures for BWI's Runway 10 and Runway 33L, citing a provision of the National Defense Authorization Act of 2017. Finally, Maryland requested that the FAA "[c]ontinue, accelerate, and expand efforts to adjust RNAV routes at BWI to improve compatibility with neighborhoods, including arrival routes to Runways 33L and 10."[1]

[1] Admin. Pet. p. 2.

We are pleased to report significant progress on the third request. Since Maryland first submitted its Administrative Petition, the BWI Roundtable has endorsed notional designs for new air-traffic procedures that are intended to address many of the noise complaints discussed in the Administrative Petition. The FAA is actively reviewing those designs and intends to form a Performance-Based Navigation Working Group that will conduct further design work so the procedures can be subjected to safety and environmental reviews as a formal proposal for implementation. We believe that this continuing work addresses the State's third request.

However, we are denying Maryland's first and second requests. There is no legal basis for Maryland's multiple requests that the FAA revisit its long-finalized decisions discussed in the Administrative Petition. Nor is there any legal basis for asking the agency to supplement a NEPA document after the proposed action described in that document has been fully implemented and no further action is being considered. The FAA fully implemented and completed the D.C. Metroplex nearly three years before Maryland proposed supplementation of the environmental review for that project. In 2013, the FAA circulated the draft environmental assessment to Maryland's public officials for comment, and none of them raised this issue (or any others). The window for requesting additional details in the description of the proposed action in the environmental assessment has closed—the proposed action was fully implemented and completed several years ago. Moreover, an increased number of after-the-fact public comments regarding aircraft noise, which was cited in the Administrative Petition, is not, in these circumstances, a legal basis for supplementing that long-finished environmental document or revisiting the decision based on it. Additionally, the specific provision of the National Defense Authorization Act of 2017 that the State relies on in its second request is inapplicable to the air-traffic procedures discussed in the Administrative Petition, so we will also not be using that process to reconsider those procedures. The FAA has no legal obligation to revisit or reconsider those final actions, and the time to seek judicial review of those final decisions expired long ago.[2]

The air-traffic procedures discussed in the Administrative Petition were approved between four and five years before Maryland sent its petition to the FAA. That significant length of time is highly relevant to a request for the agency to revisit previously approved procedures. In January 2013, the FAA approved next-generation arrival procedures for BWI Runways 10 and 33L.[3] These procedures were subject to a categorical exclusion from further analysis under the National Environmental Policy Act ("NEPA"), as we will explain further in this letter. Also during 2012 and 2013, the FAA developed the "D.C. Metroplex," a large package of air-traffic procedures for BWI, Washington Dulles International Airport, Ronald Reagan Washington National Airport, and other airports in the region. The FAA issued a Record of Decision approving the D.C. Metroplex in December 2013. After close and careful consideration of the Administrative Petition, the FAA has found no legal obligation that would require reconsideration of either the D.C. Metroplex or other air-traffic procedures discussed in the petition.

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[2] *Maryland v. FAA*, 952 F.3d 288 (D.C. Cir. 2020).

[3] The FAA again provided the relevant documents underlying those air-traffic procedures to Maryland as part of the FAA's administrative record in D.C. Circuit case number 18-1302. Occasionally we will cite to those documents by using the "AR" citation format typically used in federal courts of appeals.

Not only does the FAA have no legal obligation to revisit those final decisions, there are also practical reasons not to do so. Between 2013 (when most of these procedures were approved) and 2018 (when Maryland submitted its Administrative Petition), the FAA continued improving the airspace around BWI by making additional changes like amending the TERPZ SIX departure procedure. These iterative improvements build upon one another, and each air-traffic procedure is closely interrelated (or directly connected) to those around it. Individual air-traffic procedures therefore cannot be changed without impacting other procedures that are linked to, adjacent to, or otherwise affected by the changed procedure. Reconsidering procedures approved in 2013 is not just a matter of re-analyzing what was proposed years ago. Some of those procedures have since been amended, and changes to others will have a ripple effect throughout the airspace because of the close relationship between the many air-traffic procedures in use in that area. We decline to undertake this time-consuming and expensive task without a need directly tied to the FAA's statutory mandate to improve the safety and operational efficiency of the national airspace.

Also, during the intervening years the FAA has conducted additional environmental review of the area in conjunction with a recently built cargo facility at BWI. That more recent environmental review, prepared in close coordination with Maryland, further confirmed the FAA's earlier conclusions with respect to noise and other environmental impacts of aircraft operations, and contradicts the concerns raised in the Administrative Petition. We conclude that the FAA is required to take no further action related to the prior decisions addressed in the Administrative Petition.

Finally, the FAA sees no practical benefit to either the agency or the public in undertaking the additional environmental review requested in the Administrative Petition. The FAA has limited resources and personnel, and must prioritize its activities accordingly. To the extent that the Administrative Petition requests discretionary actions by the FAA that are not legally required, the FAA declines to undertake them. It is not a wise use of agency resources to revisit prior final decisions at BWI. Those resources are better put to use in considering proposals for implementing future air-traffic procedures that might address the State's concerns.

I. The FAA is not required to reconsider the D.C. Metroplex or other procedures at BWI.

A. MAA reviewed and approved the changes to Runway 10 and 33L arrivals in 2012.

In 2012, when the FAA was considering changes to arrival procedures for BWI's Runways 10 and 33L, the FAA reached out to and involved the Maryland Aviation Administration ("MAA"). The MAA operates BWI and is the State of Maryland's primary representative in aviation matters. Congress has mandated that the FAA design air-traffic procedures to make the national airspace system safer and more efficient.[4] But the FAA provided the MAA, as Maryland's representative, an opportunity to raise *any* objections to the

[4] *See, e.g.*, 49 U.S.C. § 40101(d)(4). *See also* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 213, 126 Stat. 11, 46-50 (2012) (requiring the FAA to expeditiously transition the national airspace system to next-generation navigation procedures).

development of these air-traffic procedures. When asked in 2012 about the proposed changes to approach procedures at BWI's Runways 10 and 33L, the MAA unambiguously said that it "does not object to the establishment of either RNAV approach as proposed."[5] The MAA was asked specifically to consider whether the proposals could potentially be described as "significantly affecting the quality of the human environment," which is the legal standard under the National Environmental Policy Act for federal actions that require the preparation of an environmental impact statement.[6] The FAA had already concluded that the proposal was categorically excluded from further NEPA review, but wanted to ensure that Maryland had an opportunity to provide any additional information that might be relevant to that decision. The MAA considered a list of specific factors and then concluded that "we do not believe the proposed procedures would result in significant change in noise exposure" and therefore required no further NEPA review.[7]

Six years later, Maryland's Petition claims that this same letter gave the FAA "specific direction" to ignore the MAA's explicit and unambiguous conclusions and prepare an Environmental Assessment.[8] But that is not what the MAA said in 2012. The MAA advised that it anticipated some public concern about the concentration of flight tracks over some residential areas, "which might result in citizen response and public controversy on environmental grounds."[9] The MAA's 2012 letter conceded that "supplying the FAA with this information does not automatically indicate that an EA or EIS is needed."[10] Instead, the MAA believed it was something the FAA needed to consider, and the FAA did so. Any *post hoc* interpretation of this statement suggesting that the FAA was *required* to give those arrival procedures additional NEPA review is incorrect. In any event, Maryland failed to raise its objection that an environmental assessment was required within the 60 day period established by 49 U.S.C. § 46110(a).

B. Maryland raised no objections to the level of detail in the D.C. Metroplex Environmental Assessment in 2013.

In December 2013, the FAA published its final Finding of No Significant Impact and Record of Decision for the D.C. Metroplex.[11] The improvements to the national airspace approved in that document were fully implemented by the summer of 2015. In its 2018 Administrative Petition, the State alleges that the Environmental Assessment and its accompanying documents lacked sufficient information for the public to understand the proposed changes. Specifically, the State alleges that "the EA did not contain any analysis of noise impacts to those areas that could be meaningfully accessed by the public."[12] The State is far too late (as a legal matter) to raise this objection, and therefore the FAA has no legal obligation to reconsider its prior final decision. Once that decision was finalized and fully implemented, and the statutory filing period for seeking judicial review had passed, allegations about insufficient detail in the

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[5] Letter from Wayne B. Schuster, Director of BWI's Office of Planning and Environmental Services, to Gerald Lynch, Manager of the FAA's Eastern Service Area Flight Procedures Office (Oct. 11, 2012), AR 171 at 1.
[6] *See* 42 U.S.C. § 4332(c).
[7] AR 171 at 4.
[8] Admin. Pet. p. 3.
[9] AR 171 at 4.
[10] *Id.*
[11] This entire document is publicly available at http://www.metroplexenvironmental.com/dc_metroplex/dc_docs.html.
[12] Admin. Pet. p. 11.

document are no basis under the National Environmental Policy Act or other statutes for asking the agency to reopen its decision, and we will not do so now.[13] Nevertheless, we want to briefly address the factual misstatements in Maryland's Administrative Petition, to avoid any confusion on these issues on the part of the State or its citizens.

It is true, as Maryland's Petition notes, that many of the maps and depictions of airspace changes in the 2013 Environmental Assessment were drawn on a large scale. The affected areas included portions of three states, plus the District of Columbia, and the study area included 14 airports in the region. Producing maps on a block-by-block or neighborhood scale was never an option for a project of this scale, especially when the project had no impacts "significantly affecting the human environment" as a legal matter.[14] The National Environmental Policy Act required the production of a "concise public document" describing the expected environmental impacts.[15] But the FAA provided much more information than that.

For example, consider Exhibit 4-2. To produce this document, the FAA forecast the anticipated change in aircraft noise at over 126,000 specific locations (named "centroids") within the study area. To those centroids, the FAA added an additional 10,000 specific locations that were of particular concern because they were potentially protected by either Section 4(f) of the Department of Transportation Act (dealing primarily with parks and historical and cultural resources), or the National Historic Preservation Act.[16] Every single one of these more than 136,000 specific centroids was placed on a map showing both existing conditions *and* the expected change in noise resulting from the D.C. Metroplex. On the digital PDF file that FAA provided, any resident of Maryland could zoom in on a location on the map that they were interested in and receive a location-specific answer to the question: "how much will aircraft noise change at this location?" The noise analysis indicated that no areas around BWI would experience a reportable or significant noise increase, so there was no reason to choose certain smaller portions of the very large study area to show in a more detailed map.

In addition to this map (which was, and is, available online), the EA provided an Appendix listing over 10,000 locations of special interest (parks, historic properties, etc.) along with their particular address and exact anticipated changes in aircraft noise levels.[17] The table is arranged geographically, so that anyone could look for locations close to their home, school, or place of business.

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[13] *See, e.g., Citizens' Ass'n of Georgetown v. FAA*, 896 F.2d 425, 434 (D.C. Cir. 2018) (concluding that the 60 days in which to seek review of the D.C. Metroplex began in December 2013); *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981) (holding that the finality ensured by a statute of limitations "would be frustrated if untimely procedural challenges could be revived by simply filing a petition for rulemaking requesting rescission [of a past agency action] and then seeking direct review of the petition's denial"); *Clayton County v. FAA*, 887 F.3d 1262, 1267-68 (11th Cir. 2018) (holding that "advisory guidance" on the FAA's "already-existing obligations" was not independently reviewable).

[14] 42. U.S.C. § 4332(c).

[15] 40 C.F.R. § 1508.9(a).

[16] These statutes include 49 U.S.C. § 303(c) (commonly called "Section 4(f)") and 54 U.S.C. § 3016108 (National Historic Preservation Act). For a description of the placement of these additional centroids, see Draft Environmental Assessment at 4-11.

[17] Appendix F to the Environmental Assessment.

The Administrative Petition also alleges that the average annual day-night sound level, or "DNL" standard, is not a "good predictor" of the noise impacts associated with new performance-based navigation procedures.[18] Notably, Maryland itself continues to rely on DNL when measuring aircraft noise, and does not put forth any alternative metric in its Administrative Petition. In the time since that petition was filed, Congress has directed the FAA to evaluate alternative noise metrics, and the FAA has now completed that review.[19] The report reaffirms that the DNL standard remains the most reliable and uniformly applicable noise metric available to the FAA to identify noise impacts when considering the environmental consequences of a proposed action.

Maryland was provided ample opportunity to comment on the Draft Environmental Assessment. In addition to publishing the Draft Environmental Assessment and all its accompanying material online, the FAA sent copies directly to Maryland's Congressional representatives, members of the Maryland House of Delegates and Maryland State Senate, various Maryland state agencies, county councils, Governor's office, and public libraries.[20] But the State didn't express concern about the granularity of detail on these maps then. We even invited Maryland (and other interested parties) to ask for public workshops about the Metroplex.[21] But no one—not a Congressional representative, nor the Governor's office, nor any county council representative—requested such a meeting. Because these objections were not raised in a timely fashion, they provide no basis to request that the FAA reconsider its finalized environmental assessment.

C. No reconsideration or supplementation of the D.C. Metroplex decision is required by the National Environmental Policy Act or other authority.

Maryland's Petition conflates several distinct decisions made over multiple years and in different contexts. In particular, the Runway 33L and Runway 10 arrivals, as well as the TERPZ FIVE and TERPZ SIX departure procedures, were not part of the D.C. Metroplex decision. Those procedures were approved in separate decisions and categorically excluded from NEPA review. Yet the Administrative Petition complains that the D.C. Metroplex Environmental Assessment didn't provide sufficient details about Runway 33L arrivals or TERPZ SIX departures. Later, the Petition specifically requests that the FAA supplement the Environmental Assessment to address these procedures. Objections to the separate approval of these procedures (particularly TERPZ FIVE and TERPZ SIX, which happened after the Metroplex) have no relevance to the question of whether the FAA must revisit its prior environmental assessment of a different federal action.

Putting aside these specific objections, the State's broader request that the FAA supplement its 2013 Environmental Assessment still has no basis. The FAA may need to supplement an environmental assessment while it is considering a proposed action if new circumstances arise (or if the agency receives new information) relevant to environmental

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[18] Pet. p. 6.
[19] Federal Aviation Administration, *Report to Congress: FAA Reauthorization Act of 2018 (Pub. L. 115-254), Section 188 and Section 173* (Apr. 14, 2020).
[20] EA Appendix B pp. B-5 to B-20.
[21] EA Appendix A p. A-14.

concerns and bearing on the proposed action or its impacts.[22] But the requirement to supplement only applies to *proposed* federal actions.[23] The D.C. Metroplex was fully implemented more than three years before Maryland submitted its Administrative Petition. Procedures approved in that decision in 2013 continue to be refined and modified, subject to their own independent approvals and environmental review. To give but one example, TERPZ FOUR was considered in the D.C. Metroplex Environmental Assessment.[24] But that procedure has been amended three times since then, and currently exists as TERPZ SEVEN. Further environmental review of TERPZ FOUR, which is no longer flown, would provide no information of value to either the public or to the FAA as a decision-maker.

For similar reasons, the FAA is also not required to revisit its compliance with other special-purpose statutes. There is no new federal undertaking for purposes of the National Historic Preservation Act that would require reconsideration of the D.C. Metroplex years after it was implemented.[25] Nor is any further analysis required by Section 4(f) of the Department of Transportation Act at this time.[26] Among other reasons, the Administrative Petition fails to identify any newly discovered historic properties, unanticipated effects on historic properties, or new information about Section 4(f) resource impacts.[27]

Raising objections to the specifics of certain graphics in the Draft Environmental Assessment five years after the FAA sought public comment is simply too late. Had Maryland raised this issue when it was asked for comment, the FAA could have provided additional information to the public if that would have served the primary goal of NEPA, which is to ensure that the agency making a decision is fully informed about environmental impacts.[28] But the procedures approved in the Metroplex decision were fully implemented by mid-2015, and revising the Environmental Assessment now would serve no purpose under NEPA as there is no longer any major federal action under consideration for those procedures.

Notably, the Petition contains no discussion of Maryland's own request for FAA's approval of a new cargo facility at BWI that Maryland expected would add thousands of additional aircraft operations per year. The large majority of those aircraft would use the same air-traffic procedure that the Administrative Petition objects to. And in that process, Maryland repeatedly contradicted claims made in the Administrative Petition. In June 2018, Maryland insisted in its Administrative Petition that supplementation of the D.C. Metroplex Environmental Assessment was not only advisable but legally required because "the actual effects of the FAA's actions were greater than assumed."[29] But three months later, Maryland appeared to change its

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[22] FAA Order 1050.1F ¶ 9-3 (citing 40 C.F.R. § 1502.9).
[23] *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1990).
[24] *See* D.C. Metroplex EA pp. 2-15, 3-35.
[25] *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163-65 (9th Cir. 2018).
[26] 49 U.S.C. § 303.
[27] 36 C.F.R. § 800.13.
[28] The United States Supreme Court has explained that NEPA's public-disclosure requirements are not intended simply for public education, but to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).
[29] Pet. at 11 n.5.

mind. After conducting an environmental analysis of a proposed *increase* in operations at BWI, Maryland concluded that "no category of environmental change is anywhere close to reaching thresholds of significance" under NEPA.[30] Maryland's Administrative Petition alleges that an increase in noise complaints in recent years required supplementation of the Environmental Assessment. But four months later, Maryland's Technical Report for the cargo facility project concluded that "no significant new circumstances" had arisen at BWI since 1998.[31] Maryland concluded (and the FAA agreed) that even after the changes brought by the Metroplex and an increase in operations from the new cargo facility, assumptions about overall aircraft noise at BWI made back in 1998 remained valid. Further technical review by the Maryland Aviation Administration concluded that the noise contours around BWI were very similar to those in 1998.[32] Similarly, the State's Administrative Petition asserted that Section 106 consultation needed to be re-initiated to assess the impact of the use of the D.C. Metroplex procedures on historic resources. Yet the State Historic Preservation Officer was consulted on whether an increase of cargo operations on those very same procedures would have an adverse effect, and the Officer concluded there would be no adverse effect.[33] The FAA concurred with these conclusions, supported by a detailed technical report approved by the FAA, and they are still correct today.

Maryland also objects in its Administrative Petition to the FAA's categorical exclusion of some other procedures at BWI that were approved independently of the D.C. Metroplex.[34] But that objection is also contradicted by Maryland's more recent statements about noise from operations at BWI. The Administrative Petition focuses on the increase in noise complaints that Maryland attributes to changes in arrival procedures at Runways 10 and 33L (approved in 2013) and to the TERPZ departures changed in 2015.[35] But in September 2018, Maryland assured the FAA that even with an increase in air traffic from the anticipated new cargo operations at BWI, "community concerns about noise, including recent FAA flight procedure changes," were no reason to engage in any additional environmental review.[36] Maryland was correct the second time—an increase in noise complaints is not the specific *type* of "public controversy" that can, by itself, require the preparation of an environmental assessment for an otherwise categorically excluded agency action.

D. No "extraordinary circumstances" required the preparation of an environmental assessment for other procedures identified in the Administrative Petition.

Maryland also appears to want the FAA to reconsider or revisit its January 2013 final approvals for changes to arrival procedures used for Runways 10 and 33L at BWI, as well as amendments to the TERPZ departure procedure approved in 2015. The FAA denies that request,

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[30] Letter from Maryland DOT Secretary Pete Rahn to Winsome Lenfert, Acting Associate Administrator for Airports (Sept. 14, 2018).
[31] October 2018 Technical Report prepared by MAA in support of the Proposed Midfield Cargo Facility Improvements, p. 39.
[32] *Id.*
[33] *Id.*, pp. 26-28 & Appendix D.
[34] Admin. Pet. pp. 6-9.
[35] *Id.* at 9.
[36] *Id.*

because it has no legal obligation to reconsider those approvals. Those decisions were finalized years ago, and the time for any legal challenge has long since passed. As discussed above, the relevant provisions of FAA Order 1050.1F requiring supplementation of an environmental review under NEPA apply only to a *proposed* action. Nor is any further analysis of these air-traffic procedures required under Section 106 of the NHPA or Section 4(f) of the Department of Transportation Act. We deny Maryland's request to reconsider those decisions on this basis.

But as we did with Maryland's inaccurate characterization of the D.C. Metroplex Environmental Assessment, we wish to briefly address the issues Maryland raises so that the public record is clear as to these prior FAA decisions. As Maryland is aware, NEPA does not require a detailed environmental analysis of all actions undertaken by a federal agency. NEPA expressly prioritizes analysis of those federal actions "significantly affecting the human environment." 42 U.S.C. § 4332(c). What constitutes "significance" is further detailed in federal regulations and FAA orders that were published following public notice-and-comment. *See* 40 C.F.R. § 1508.27 (defining "significant" generally); 14 C.F.R. Part 150 App. A & B (defining "significant" specifically in relation to aircraft noise); FAA Order 1050.1F. Some categories of actions are "excluded" from further NEPA review because they have been determined, in advance, to have no potential for "significant" environmental impacts as defined by law. The January 2013 approvals for revisions to arrivals for BWI's Runway 10 and 33L, and the 2015 amendments to the TERPZ departures (which were approved as TERPZ SIX in 2015, and which were recently updated to TERPZ SEVEN) fell into one or more of the FAA's published categorical exclusions from NEPA. These categorical exclusions were published subject to notice-and-comment procedures in consultation with the Council on Environmental Quality. As the Administrative Petition correctly notes, sometimes "extraordinary circumstances" arise that require an environmental assessment even for an action that would normally be categorically excluded. But no extraordinary circumstances existed when the FAA was considering these procedures that would have required the preparation of an environmental assessment.

The FAA Order governing the environmental review of these procedures explained that a categorical exclusion may not be appropriate when an FAA action is "highly controversial."[37] The Administrative Petition points out an appreciable increase in noise complaints in 2017.[38] But the FAA's obligation is to consider whether extraordinary circumstances might exist at the time of decision. These complaints, which arose long after the decision was made, cannot retroactively invalidate the agency's application of categorical exclusions at the time the decisions were made.

Even if they could, these complaints do not demonstrate the specific type of "controversy" that might trigger the requirement to prepare an environmental assessment. The controversy must specifically involve "a substantial dispute involving reasonable disagreement over the degree, extent, or nature of a proposed action's environmental impacts."[39] But the

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[37] FAA Order 1050.1E, pp. 3-3 to 3-4, ¶ 304i. This version of the FAA's *Environmental Impacts: Policies and Procedures* Order was in effect throughout the time that the challenged air-traffic procedures were being reviewed for potential environmental impacts before they were approved.

[38] Admin. Pet. pp. 8-9.

[39] FAA Order 1050.1F, p. 5-2 ¶ b(10). This version of the FAA's *Environmental Impacts: Policies and Procedures* Order went into effect on July 16, 2015, and governs the FAA's current consideration of environmental impacts and compliance with NEPA.

complaints identified in the Administrative Petition represent the subjective experience of a small number of Maryland residents impacted by aircraft noise. Roughly 3.2 million people reside in the five counties nearest to BWI, and it appears that 1,103 individuals submitted a noise complaint in 2017. We do not dismiss the importance of those complaints, but for the narrow legal question of whether they indicate the need to prepare an environmental assessment, the answer is "no." "Mere opposition is not sufficient for a proposed action or its impacts to be highly controversial on environmental grounds."[40] A "controversy" that might require the preparation of an environmental assessment could involve a reasonable dispute over the FAA's methodology in measuring noise impacts, or a reasonable dispute as to the inputs and assumptions used in forecasting anticipated impacts. Objections to the experience of single noise events are not that type of controversy, and these complaints do not indicate that the aircraft noise resulting from either the Metroplex procedures or others identified by the Administrative Petition were substantially different than anticipated.

Furthermore, even if these complaints *did* indicate the presence of a reasonable dispute over noise measurement methodologies or some other scientific controversy, that fact alone would not preclude the use of an already published categorical exclusion. For an environmental assessment to be required, two conditions must be met: there must be impacts "on the quality of the human environment that are likely to be highly controversial on environmental grounds," *and* the FAA action in question "has the potential for a significant impact." FAA Order 1050.1F ¶ 5-2(b). Whether a change in aircraft noise is "significant" is a question that is often misunderstood by members of the public. The question is not a value judgment about any particular individual's experience of aircraft noise, or whether the change in noise is noticeable or important. Rather, the term comes from Congress, and provides the specific legal standard for the types of federal actions that require further documentation and review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C). With respect to changes in aircraft noise, the FAA has detailed standards that it applies in every circumstance defining whether a change is "significant" based on the quantitative size of the increase. These standards are explained in FAA's orders and are also published in the Code of Federal Regulations. 14 C.F.R. Part 150 & Appendix A. The air-traffic procedures at BWI that are discussed in Maryland's Administrative Petition have been flown for more than five years, and the FAA has seen no evidence indicating the potential for a significant increase in aircraft noise as defined by its orders and regulations. Thus, for this second reason, no "extraordinary circumstances" exist that would require the preparation of an environmental assessment for those legacy air-traffic procedures. In 2018, Maryland's own conclusions were that public concern about noise from aircraft operations at BWI was no reason to engage in additional NEPA review, and that the current state of aircraft noise did not approach the legal definitions of "significance" for NEPA purposes. Maryland believed this was the case even though an increase in aircraft operations was expected. No further review of these specific procedures can be required at this time under either NEPA, Section 4(f) of the Department of Transportation Act, or Section 106 of the National Historic Preservation Act.

[40] FAA order 1050.1F, p. 5-2 ¶ b(10).

II. Reconsideration of other air-traffic procedures discussed in the petition is not required by the National Defense Authorization Act of 2017.

Maryland separately requests that the FAA undertake a retroactive review of the amended arrival procedures for BWI's Runway 10 and 33L that the FAA approved in January 2013, as well as changes to the TERPZ departures to the west approved in 2016, using a specific provision of the National Defense Authorization Act (NDAA) of 2017.[41] But that provision does not apply to those decisions, and the FAA therefore denies Maryland's request.

A brief history of the statutory provision may help explain what it is designed to address. In 2012, Congress enacted legislation to expedite the transition of the National Airspace System to next-generation air-traffic procedures. [42] This statute excluded *all* NextGen air-traffic procedures "developed, certified, published, or implemented under this section" from further NEPA review "unless the Administrator determines that extraordinary circumstances exist with respect to the procedure."[43] The FAA informally refers to this provision as the "legislative CatEx." Separately, the statute directed the FAA Administrator to categorically exclude from NEPA any new NextGen procedure that "would result in measurable reductions in fuel consumption, carbon dioxide emissions, and noise."[44] In effect, this statute created two new categorical exclusion for performance-based navigation procedures in addition to those already promulgated by the FAA.

But the FAA did not rely on either of these new statutory categorical exclusions when approving the air-traffic procedures identified in the Administrative Petition.[45] The TERPZ SIX departure procedure was approved in 2016 using a completely different categorical exclusion found in FAA Order 1050.1F ¶ 5-6.5(i).[46] The Runway 10 and 33L arrival procedures approved in 2013 also did not rely on the new categorical exclusions created in the 2012 FAA Modernization and Reform Act. Although the procedures were published on January 10, 2013, they were reviewed and approved well before that date. The FAA publishes new air-traffic procedures every 56 days, and these procedures entered the publication queue in November 2012. At that time, just a few months after enactment of the statute, the FAA had not yet developed guidance for the use of either of the new categorical exclusions the statute created. The FAA did not issue the first of those guidance documents, approving for the first time the use of the "legislative CatEx," until December 2012. By then, the Runway 10 and 33L arrival procedures had already been reviewed and submitted for publication. That same guidance instructed FAA personnel not to use the second new statutory categorical exclusion (for some procedures that reduced noise and air pollution) until further guidance was issued. The FAA did

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[41] Pet. pp. 13-14.
[42] FAA Modernization and Reform Act. Pub. L. No. 112-95, 126 State. 11 § 213 (2012).
[43] *Id.* § 213(c)(1).
[44] *Id.* § 213(c)(2).
[45] The FAA has only has only applied the "legislative CatEx" once—for new procedures implemented at Phoenix SkyHarbor International Airport in 2014. *See City of Phoenix v. Huerta*, 869 F.3d 963 (D.C. Cir. 2017).
[46] Maryland has a copy of this documentation (AR 172). The FAA's environmental review of this procedure is the subject of pending litigation filed by Howard County, Maryland. *Howard County v. FAA*, 4th Cir. 18-2360. The Final Answering Brief for the Federal Respondents, dated July 30, 2019, provides more detail about the FAA's environmental review of the TERPZ departure procedures at BWI.

not complete that guidance until later in 2013, after the Runway 10 and 33L arrival procedures were published.[47]

We revisit this history of the environmental review of these procedures because it is directly relevant to Maryland's request. The Administrative Petition cites the retroactive review provision of the 2017 National Defense Authorization Act, which requires review of the use of categorical exclusions "under this subsection." Pub. L. No. 114-328, 130 Stat. 2000 § 341(b) (2016). That statute amended the 2012 FAA Modernization and Reform Act to add new provisions to what had been Section 213 of the prior statute. Thus, when the 2017 statute refers to using categorical exclusions "under this subsection," it refers to the two categorical exclusions newly created by Congress in 2012. Because the FAA did not use either of those specific categorical exclusions when approving the air-traffic procedures Maryland is concerned about, the amended statute's new review provision does not require the Administrator to undertake any further environmental review. We therefore decline the State's request.

III. D.C. Circuit lawsuit

Maryland has a petition for review pending before the United States Court of Appeals for the District of Columbia Circuit, in which the State has asked the court to order the FAA to consider the requests made in the Administrative Petition.[48] This letter fulfills that request. By providing this letter, the FAA does not concede any of the arguments put forward in the State's opening brief to the D.C. Circuit, including whether: 1) the FAA's September 10, 2018 letter was judicially reviewable; 2) the State's administrative petition is properly characterized as a petition for "rulemaking" under 5 U.S.C. § 553(e); or 3) any of the air-traffic procedures at issue here are "rules" subject to the Administrative Procedure Act. Rather, we provide this response to Maryland out of special solicitude to its position as a state government that owns and operates BWI. Now that Maryland has the FAA's final response to each of the issues raised in its administrative petition, it has received the relief it requested from the court of appeals in D.C. Circuit No. 18-1302.

Sincerely,

Patrick J. Wells

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[47] *See Consolidated Guidance for Implementation of the Categorical Exclusion in Section 213(c)(1) of the FAA Modernization and Reform Act of 2012*, FAA (June 13, 2018) (describing and superseding the prior two guidance memoranda), available at https://www.faa.gov/about/office_org/headquarters_offices/apl/environ_policy_guidance/media/catex-memo.pdf.

[48] *Maryland v. Federal Aviation Administration*, D.C. Cir. No. 18-1302.