No. ____

IN THE

Supreme Court of the United States

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

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, IN HER OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; UNDER SECRETARY OF TRANSPORTATION FOR POLICY; FEDERAL RAILROAD ADMINISTRATION; PAUL NISSENBAUM, IN HIS OFFICIAL CAPACITY AS ASSOCIATE ADMINISTRATOR OF THE FEDERAL RAILROAD ADMINISTRATION; AAF HOLDINGS LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Internal Revenue Code authorizes the issuance of tax-exempt bonds to finance "qualified highway or surface freight transfer facilities." 26 U.S.C. §142(a)(15). That term is defined, in relevant part, to mean "any surface transportation project which receives Federal assistance under title 23." *Id.* §142(m)(1)(A). The Department of Transportation has taken the position that a facility is a project "which *receives* Federal assistance under title 23" so long as it "*benefits from*" federal Title 23 expenditures, even if the facility does not receive, has never received, and is not even eligible to receive such assistance. In this case, the court of appeals deferred to the Department of Transportation's view under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The court did not, however, find that the statute was ambiguous or discuss the meaning of the statutory term "receives" before doing so. The question presented is:

Whether the court of appeals properly deferred to the agency's informal views under *Skidmore*, without finding the statute ambiguous or applying (much less exhausting) traditional interpretive tools.

PARTIES TO THE PROCEEDINGS BELOW

Indian River County, Florida, and Indian River County Emergency Services District were plaintiffs in the district court and appellants in the court of appeals.

The United States Department of Transportation; Elaine L. Chao, in her official capacity as Secretary of Transportation; Derek Kan, in his official capacity as Under Secretary of Transportation for Policy; the Federal Railroad Administration; and Paul Nissenbaum, in his official capacity as Associate Administrator of the Federal Railroad Administration, were defendants in the district court and appellees in the court of appeals. Derek Kan resigned as Under Secretary of Transportation for Policy in June 2019, and a successor has not been appointed. Joel Szabat, the Assistant Secretary for Aviation & International Affairs, currently performs the functions and duties of the Under Secretary.

AAF Holdings LLC intervened on behalf of the defendants in the district court and was an appellee in the court of appeals.

Martin County, Florida, and Citizens Against Rail Expansion in Florida were plaintiffs in the district court. They dismissed their claims during the district court proceedings and did not participate in the court of appeals proceedings below.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition within the meaning of Rule 14.1(b)(iii) are:

- *Indian River County, et al.* v. *Dep't of Transp., et al.*, No. 19-5012 (D.C. Cir.), judgment entered on December 20, 2019; and
- *Martin County, et al.* v. *Dep't of Transp., et al.*, No. 1:18-cv-00333 (D.D.C.), judgment entered on December 24, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Indian River County, Florida, and Indian River County Emergency Services District (collectively, "Indian River County" or the "County") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-32a) is reported at 945 F.3d 515. The district court's opinion (App., *infra*, 35a-115a) is reported at 348 F. Supp. 3d 17.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 20, 2019. On March 10, 2020, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including May 18, 2020. No. 19A995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title 23 and Title 26 of the U.S. Code are set forth in the appendix. App., *infra*, 116a-127a.

PRELIMINARY STATEMENT

This case reflects an extreme example—bordering on abdication of the judicial role—of deference to an agency's informal interpretation of statutory text. It arises in a case with profound implications for the federal fisc, redirecting scarce federal resources to fund private commercial ventures that do not qualify for federal assistance. The statute here authorizes the issuance of tax-exempt bonds for a "project which *receives* Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A) (emphasis added). Notwithstanding that clear statutory provision, the court of appeals held that a project can be said to "receive[ ] Federal assistance" even where it has *never received*—and *is not qualified to receive*—a dime of federal money.

In reaching that atextual result, the court of appeals uncritically accepted the Department of Transportation's informal position that a "'project * * * receives Federal assistance under title 23'" as long as it "*benefits* from

assistance under Title 23" provided to others, App., *infra*, 26a (emphasis added)—even where, as here, the project does not receive assistance under Title 23 and is not even eligible for it. The court of appeals thus held that a proposed passenger railway was eligible for a *$2.1 billion* bond allocation to finance more than 160 miles of new track because a freight railway with an *adjacent* track was awarded $9 million in highway funds to improve railway-highway crossings.

To reach that result, the court invoked *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), to defer to the agency's informal interpretation. But the court did not itself undertake an effort to engage in statutory construction, let alone determine, after doing so, that the statute was ambiguous. Worse, the court of appeals ended up deferring to an agency "construction" that did nothing to reconcile itself with the statute's clear text. That surrender of the judiciary's constitutional role "to say what the law is" is an extreme example, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—and a perfect vehicle for addressing the disarray in the federal courts over when, and what is required before, the judiciary may defer to an agency's interpretation of the law under *Skidmore*.

Skidmore instructs courts to give "respect" to an agency position if the statute is ambiguous and the agency's position is well-founded, consistent, and persuasive. 323 U.S. at 140. But federal courts are in wide disagreement as to whether, under *Skidmore*, they need to employ the customary tools of statutory construction to interpret the statute for themselves before deciding whether to defer to the agency's interpretation, or whether they may simply declare an agency's interpretation reasonable without resort to and irrespective of the statute's language. This Court cannot long afford to

allow this disagreement to persist. The failure to obey *Skidmore*'s prescriptions threatens judicial surrender of the constitutional responsibility "to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177.

STATEMENT

This case arises from the allocation of more than $2 billion dollars in tax-exempt private activity bonds to finance a passenger railway in Florida.

I. Statutory And Regulatory Background

A. Private Activity Bonds

States and local governments issue private activity bonds, or "PABs," to finance non-governmental activities that putatively benefit the public, such as construction of private airports, docks, and schools. See 26 U.S.C. §§ 141(a)-(d), 142(a). Ordinarily, interest on bonds is subject to federal income tax. See *id.* § 103(b)(1). But interest on qualified bonds is tax-exempt, which allows issuers to offer lower interest rates. App., *infra*, 5a. The savings can be significant. See Steven Maguire and Joseph S. Hughes, Cong. Research Serv., *Private Activity Bonds: An Introduction* 3 (2018).

Because of the financial incentives, Congress has long been concerned about abuse. See Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986*, 99th Cong. 1151 (1986). During the 1986 overhaul of the Internal Revenue Code, Congress tightened restrictions on tax-exempt private activity bonds. See *id.* at 1152-1156. Congress sought in part to ensure that "tax-exempt bonds for nongovernmental persons should be used, to the extent possible, only for an activity for which financing specifically has been approved." *Id.* at 1154.

B. "Qualified Highway or Surface Freight Transfer Facilities" Under 26 U.S.C. § 142

The Internal Revenue Code authorizes issuance of tax-exempt private activity bonds to finance 15 types of "exempt" facilities. 26 U.S.C. § 142(a). Those facilities include airports, docks, "high-speed intercity rail facilities" (*i.e.*, passenger railways where trains can travel in excess of 150 miles per hour), and—most relevant here—"qualified highway or surface freight transfer facilities." 26 U.S.C. § 142(a), (i); see *id.* § 141(e)(1)(A). At least 95% of the net proceeds of any bond issued under § 142 must be "used to provide" those facilities. *Id.* § 142(a).

The statute establishes eligibility requirements for each type of facility, including "qualified highway or surface freight transfer facilities." 26 U.S.C. § 142(m).[1] Under § 142(m), "any surface transportation project which receives Federal assistance under title 23, United States Code (as in effect on [August 10, 2005])" is a qualified facility. *Id.* § 142(m)(1)(A).

In turn, Title 23—titled "Highways"—authorizes the federal government to provide financial assistance to various projects, such as highways, bridges, and bus terminals. See 23 U.S.C. §§ 103, 130, 133, 149 (2006).[2] A "project," for purposes of Title 23, encompasses "any

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[1] Enacted as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFTEA-LU"), Pub. L. 109-59, 119 Stat. 1144 (2005), § 142(m)(2)(A) authorizes the issuance of up to $15 billion of tax-exempt private activity bonds for such facilities. The Secretary of Transportation must allocate that amount among eligible facilities. 26 U.S.C. § 142(m)(2)(C).

[2] Although the petition cites the version of Title 23 in effect on August 10, 2005, no intervening amendments materially alter the relevant language.

* * * undertaking eligible for assistance under th[at] title." *Id.* § 101(a)(21) (2006).

One source of eligible projects is the Railway-Highway Crossings Program. See 23 U.S.C. § 130 (2006). That program authorizes the Secretary of Transportation to use funds from the Highway Safety Improvement Program—a federal-state program to improve safety "on public roads," *id.* § 148(b) (2006)—to pay up to the "entire cost of construction of projects for the elimination of hazards of railway-highway crossings," *id.* § 130(a), (e)(1) (2006).

C. The Department of Transportation's Implementation of § 142(m)

The Department of Transportation ("DOT") has not issued formal regulations construing 26 U.S.C. § 142(m), but its officials have offered informal views.

For example, the Acting Chief Counsel of the Federal Highway Administration, Edward V.A. Kussy, authored a letter concerning § 142(m). App., *infra*, 128a-132a. The letter acknowledged that § 142(m) defines a "qualified highway or surface freight transfer facilit[y]" as "any surface transportation project [which] receives Federal assistance under title 23, United States Code." *Id.* at 129a. The letter also acknowledged that Title 23 defines the term "project." *Id.* at 130a-131a. But the letter took the position that an "*entire* transportation facility" is eligible for financing through § 142(m) "even though *only a portion of that facility* receives Federal assistance under title 23." *Id.* at 130a (emphasis added).

The Kussy letter expressed concern about the consequences of limiting PAB financing to only the portions of a highway "actually subject to a funding agreement under 23 U.S.C. § 106." App., *infra*, 131a. Doing so, the

letter stated, "would induce State grantees to 'sprinkle' title 23 funds to every separate project or contract of an entire facility to make full use of PAB proceeds." *Ibid.* The letter therefore stated that "any qualified facility that includes a project funded with Federal-aid highway funds made available under title 23" may be funded with tax-exempt PABs, even if other elements of the facility are not eligible for Title 23 funds. *Id.* at 132a. As a DOT official later told Congress, even "a dollar" of Title 23 spending on any portion of a facility renders the whole facility eligible for tax-exempt PABs. C.A. App. 299.

II. Proceedings Below

A. The Planned Passenger Rail Line

In 2011, AAF Holdings, Inc. ("AAF") announced plans to build a privately owned passenger railroad in Florida, originally named All Aboard Florida and since renamed Brightline, to connect Miami and Orlando. C.A. App. 4363. In Phase I, AAF added passenger service between Miami and West Palm Beach. *Ibid.* Now, in Phase II, AAF is building a line between West Palm Beach and Orlando. *Ibid.*

Over 128 miles of track AAF is building for Phase II will use an existing railroad right-of-way owned by the Florida East Coast Railway ("FECR"). C.A. App. 4362-4363. That right-of-way already contains track that FECR uses for freight trains. C.A. App. 4362. AAF is adding a second track for passenger trains alongside the existing freight track. C.A. App. 4363.

B. The Bond Allocations

In August 2014, AAF applied to DOT for an allocation of tax-exempt private activity bonds under 26 U.S.C. § 142(a)(15) to finance Brightline. App., *infra*, 12a. That provision authorizes bonds for a "surface transportation

project *which receives* Federal assistance under title 23." 26 U.S.C. §142(m)(1)(A) (emphasis added).

AAF, however, had not received federal funds under Title 23 to build Brightline. See App., *infra*, 59a-60a; C.A. App. 308. AAF thus invoked prior improvements to highway-railway crossings made by FECR along FECR's right-of-way, which were supported by about $21 million in Title 23 funds. C.A. App. 4496-4510. Those funds had been "awarded to the FE[C]R, not A[A]F," and the improvements were "built to accommodate the heavy weight requirements of rail freight not passenger." C.A. App. 308. But DOT nonetheless provisionally approved AAF's application for $1.75 billion in tax-exempt PABs based on FECR's prior improvements to crossings. C.A. App. 4511-4513. That provisional allocation was later replaced with a final allocation of $600 million in tax-exempt bonds for Phase I. C.A. App. 4517-4520.

To finance Phase II, AAF sought another $1.15 billion in tax-exempt bonds. C.A. App. 4521-4539. AAF represented that its rail line had "received financial assistance under Title 23 of the U.S. Code" because "approximately $9 million" of Title 23 funds "ha[d] been invested *in the entire corridor*" since the "planning process for All Aboard Florida started in December 2011." C.A. App. 4536 (emphasis added). DOT approved that application as well. App. *infra*, 12a. It later increased the Phase II allocation to $2.1 billion, bringing DOT's total bond allocation to AAF to $2.7 billion. *Ibid.*

C. District Court Proceedings

1. Petitioner Indian River County is a local government on Florida's Treasure Coast. The new Brightline track would traverse the County, bisecting roads and paths that residents regularly cross. App., *infra*, 38a; C.A. App. 1736. Indian River County challenged the

Phase II bond allocation under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. C.A. App. 14. The allocation was arbitrary, capricious, and contrary to law, the County argued, because AAF's passenger railroad had not received federal assistance under Title 23. C.A. App. 15. The construction of AAF's passenger railroad, the County alleged, is not even "eligible for funding under Title 23." C.A. App. 96.[3]

Defending the bond allocation, DOT argued that it "has never required a project sponsor to show that it has received" Title 23 assistance; DOT instead deems projects eligible merely if they are "*directly benefitted* by expenditures of Title 23 funds." D. Ct. Dkt. 36-1 at 23-24 (emphasis added) (citing a declaration from an agency official). According to DOT, it had allocated $1.34 billion in bonds to an intermodal logistics park in Illinois "based on" Illinois's plans "to spend Title 23 funds to improve a bridge *near* the facility and to widen and reconstruct a *nearby* interstate freeway." App., *infra*, 135a-136a (emphasis added). DOT also urged it had allocated $1.3 billion in PABs to a Maryland light-rail facility "based on" Maryland's "plans to spend $1 million in Title 23 funds to upgrade" a "shared use trail *adjacent* to the planned rail line." *Id.* at 135a (emphasis added).

2. The district court granted summary judgment to the defendants. App., *infra*, 37a. The court rejected DOT's challenge to the County's standing, finding that the County's interests fall within the zone protected by 26 U.S.C. § 142(m). *Id.* at 47a-52a. But the court upheld

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[3] The County's challenges under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and to DOT authorizations under 26 U.S.C. § 147, see C.A. App. 14, 16, are no longer at issue.

the challenged bond allocation, deferring to DOT's position under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). App., *infra*, 45a, 52a. "The court," it reasoned, "must defer to any reasonable agency interpretation, which need not be the one 'deemed most reasonable by the courts.'" *Id.* at 45a (internal citations omitted).

The district court accepted DOT's view that §142(m) "allow[s] for PAB allocation to projects based on *direct benefits* from" prior "Title 23 spending" on a separate project by a different entity. App., *infra*, 59a (emphasis added). The court thought bond allocations could not rest on "incidental and unintentional benefit[s]." *Id.* at 60a. But it held that a facility "receives Federal assistance under title 23" if "funds [a]re disbursed to benefit the project." *Ibid.* Applying that construction, the court observed that "approximately $9 million" had been disbursed to improve highway crossings on a right of way that AAF's rail line would use. *Ibid.* The court admitted that the $9 million had been disbursed to "FECR rather than AAF." *Id.* at 59a-60a. And it recognized that the upgrades were to accommodate "planned increases in FECR freight traffic." *Id.* at 60a. While no evidence showed that Florida had disbursed Title 23 funds to FECR to benefit AAF's passenger line, the court was "skeptical" that Florida had "disbursed" the "Title 23 funding without the knowledge—if not purpose—of" doing so. *Ibid.* The court thus held that AAF's line had "received" Title 23 assistance despite it never having received (or been eligible for) a single federal dollar. *Ibid.*

The court also rejected the argument that "Phase II of the AAF railway" is not a "project" within the meaning of §142(m). App., *infra*, 61a. Relying on the Kussy letter, the court held that the "expenditure of Title 23 funds for

discrete highway-rail crossings * * * sufficed to render the whole [rail] corridor eligible for PAB allocation." *Ibid.* The Kussy letter's analysis, the court stated, "reflects a reasonable assessment of congressional intent and the statutory text." *Ibid.* The court did not identify any statutory provisions that, in its view, supported the letter's assessment.

D. Court of Appeals Proceedings

The D.C. Circuit affirmed. App., *infra*, 4a.[4] Like the district court, the D.C. Circuit acknowledged that, to qualify for PABs, the project must be one that "receives Federal assistance." *Id.* at 24a. Like the district court, however, it deferred to DOT's view that a facility need not "receive[ ]" a single federal dollar—or even qualify for federal money—to be a "project which receives Federal assistance." Instead, it accepted DOT's position that a "'project * * * receives Federal assistance under title 23'" if it merely, "in whole or part[,]" "*benefits* from assistance under Title 23." *Id.* at 26a (emphasis added).

The D.C. Circuit did not decide whether DOT's informally expressed view of §142(m) warrants deference under *Chevron*. Instead, the court invoked *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). App., *infra*, 25a. "When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework," the court stated, "deference to the agency's position is due under *Skidmore*." *Ibid.* (citing *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399-402 (2008)).

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[4] The court of appeals agreed that the County had standing. App., *infra*, 17a-23a.

The court found that DOT's position was "consistent" and "eminently reasonable." App., *infra*, 25a-26a. The court found "persuasive" the Kussy letter's statement that a "narrow reading of the word 'project' would 'distort the longstanding way in which facilities are actually funded'" and have other adverse impacts. *Id.* at 26a. The court stated that it had "no reason to question" DOT's view because the "statute does not require an applicant for PABs to be the direct recipient of Federal assistance under Title 23; rather, the 'project' at issue must receive assistance under Title 23." *Id.* at 26a-27a. The court, however, did not point to any passage from the Kussy letter addressing the meaning of "receive." Nor did it cite any other legal authority to support the view that a "project which receives" Title 23 funding means a "project which benefits from" Title 23 assistance "received" by a different project.

Having deferred to DOT's view, the court of appeals upheld the (now) $2.1 billion bond allocation for Phase II of AAF's passenger railroad based on the "benefits" it enjoyed from $9 million previously disbursed to another company, FECR, to improve crossings along the right-of-way used by FECR's freight trains. App., *infra*, 24a, 27a-28a. Observing that about $2.2 million of the funds were used to upgrade crossings that AAF's Phase II rail line will traverse, the court stated that "the benefits afforded to" AAF's rail line "are obvious." *Id.* at 24a, 28a.

REASONS FOR GRANTING THE PETITION

The Framers understood that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Constitution commits "to the judiciary the duty of interpreting and applying" the written laws. *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). This

case represents an unconscionable abdication of that duty under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

The statute at issue here sets aside tax-exempt bonds to finance surface-transportation facilities that are "project[s] *which receive[]* Federal assistance under title 23." 26 U.S.C. §142(m)(1)(A) (emphasis added). The statute is unambiguous: To be eligible, the facility must *receive* federal funds under Title 23. The court of appeals reached the opposite result by deferring to the agency's counter-textual view that a facility need not "receive[]" a dollar of federal assistance—or even qualify for federal money—to be a "project which receives Federal assistance." It accepted DOT's position that a "'project * * * receives Federal assistance under title 23'" if it merely "*benefits* from assistance under Title 23," including from Title 23 assistance afforded other applicants and projects. App., *infra*, 26a (emphasis added).

The court of appeals thus gave judicial imprimatur to a *$2.1 billion* bond allocation to finance the construction of more than 160 miles of a new passenger railroad based on putative benefits "received" when *$9 million* was awarded to a different railroad to eliminate hazards from highway-railway crossings on a shared right-of-way. App., *infra*, 28a. Under the court's view, and the agency's, a facility can be said to "receive" federal assistance by "benefit[ing] from" federal spending nearby. In this very case, DOT touted its allocation of $1.3 *billion* in tax-exempt PABs to another rail facility "based on * * * plans to spend $1 *million* in Title 23 funds to upgrade" a "trail *adjacent* to the planned rail line." *Id.* at 135a (emphasis added).

Worse, the court of appeals did not even suggest the statute was ambiguous before it embraced the agency's effort to rewrite it. The court did not ask what the

statute means using the traditional tools of statutory construction. It did not inquire what it means to "receive[ ] Federal assistance," as a matter of ordinary parlance or within Title 23 specifically. The court did not discuss the legislative context or purpose of the statute—a statute designed to restrict PABs to a defined set of eligible facilities for "which financing specifically has been approved." Staff of the Joint Committee on Taxation, *supra*, at 1154. Rather, the court summarized a letter from an agency official that offered a few policy rationales for another point altogether, without addressing the relevant statutory terms and structural considerations. See App., *infra*, 25a-26a. The court then declared that the agency's informal views were sufficiently "long-standing" and "reasonable" to warrant "deference" under *Skidmore*. *Ibid.*

This Court has, in recent years, increasingly emphasized that deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Auer* v. *Robbins*, 519 U.S. 452 (1997), do not displace the judiciary's responsibility to interpret and apply the text that Congress has enacted into law. *Skidmore* deference is not a license to abdicate those judicial responsibilities, let alone an exemption from the requirement that courts apply the traditional tools of statutory interpretation before deferring to agency views.

Skidmore simply allows courts to give "respect" to an agency's construction of an ambiguous statute if the agency's position is well-founded, consistent, and persuasive. *Skidmore*, 323 U.S. at 140. Before deferring to an agency's interpretation, a court at least must examine the statute and conclude that it is ambiguous. Yet the courts of appeals are in disarray on whether, under *Skidmore*, they must interpret the statute themselves before defer-

ring to agencies' interpretations. The disarray in the federal courts promises to grow. The decision below is an extreme example of the view that no judicial interpretation is called for or required.

As such, this case highlights the enormity of the constitutional problem that has developed in the lower courts. Contrary to Congress's intent, clearly expressed in statutory text, billions of dollars of federally subsidized bonds are being allocated to a manifestly ineligible private commercial enterprise based on the notion that *Skidmore* authorizes uncritical deference to an agency's informal interpretation without any judicial inquiry into whether the statute is clear on its face or unambiguous. Review of this important case from the D.C. Circuit is warranted.

I. The Court Of Appeals Deferred Under *Skidmore* To An Informal Agency Interpretation That Contradicts The Statute's Plain Meaning

In our system of government, "the duty of making laws" lies with Congress and "the duty of interpreting and applying them" lies with the courts. *Mellon*, 262 U.S. at 488. Statutory interpretation "always" must "begin[] with the text," *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016), and "end[] there as well" if "the statutory language provides a clear answer," *Hughes Aircraft Co.* v. *Jackson*, 525 U.S. 432, 438 (1999). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

The court below abdicated the judicial duty to apply unambiguous statutory text. Section 142 authorizes DOT to allocate tax-exempt private activity bonds *only* to facilities that are "projects *which receive* Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A) (emphasis

added). Invoking *Skidmore*, however, the decision below deferred to a DOT construction of "projects which receive Federal assistance" so expansive that it encompasses facilities that do not receive, have never received, and are not eligible for, Title 23 assistance. Rather than require a project to "receive Federal assistance," the court accepted the agency's view that § 142(m) extends to any facility that happens to "*benefit[] from*" a project funded under Title 23. App., *infra*, 26a. The court thus upheld a $2.1 billion allocation of tax-exempt bonds to finance the construction of AAF's new passenger rail line—which receives no Title 23 funds—based on the claim that the line derives "benefits from" $9 million in Title 23 funds received by another entity to spend on railway-highway crossing improvements. *Id.* at 26a-28a.

A. The Court of Appeals' Decision Defies the Statute's Text

1. It is axiomatic that "'[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). Here, the statutory language could not be clearer. Under § 142, tax-exempt private activity bonds may be issued "to provide" a "qualified highway or surface freight transfer facilit[y]." 26 U.S.C. § 142(a)(15). Such facilities include a "surface transportation project which *receives* Federal assistance under title 23." *Id.* § 142(m)(1)(A) (emphasis added). Thus, unless the "surface transportation project * * * receives Federal assistance" under Title 23, it is not eligible for a bond allocation. *Ibid.* Indeed, 95% of the bond allocation must be dedicated "to provide" the "project which receives Federal assistance under title 23." *Id.* § 142(a), (m)(1)(A).

Section 142's clear text should have made resolution of this case straightforward. It was undisputed that *no* Title 23 monies were provided to AAF to build the 168.5-mile, $2.1 billion stretch of passenger rail line, or otherwise. The only identified projects that received Title 23 funds were improvements, costing about $9 million, that another company, FECR, made to railway-highway crossings along its right-of-way. See C.A. App. 309, 4536; AAF C.A. Br. 34 n.7 ("FECR * * * was the direct recipient of the Title 23 funds."). The facility AAF seeks to provide here, a new passenger railroad, thus was not a "project which receives Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A). Nor were the bonds allocated to AAF dedicated "to provid[ing]" the highway-railway crossings that had received assistance. *Id.* § 142(a), (m)(1)(A). AAF obtained tax-exempt bonds to finance a facility that does not receive and has never received a single federal dollar.[5]

In fact, AAF's miles of new rail line were not even *eligible* to receive Federal assistance under Title 23. Title 23 defines "project" as an "undertaking eligible for assistance under this title." 23 U.S.C. § 101(a)(21) (2006). It then defines eligible undertakings in detail. See, *e.g.*, *id.* §§ 103, 104, 130, 133, 149 (2006). Section 130, for example, authorizes the government to cover the cost of "projects for the elimination of hazards of railway-

[5] Title 23 contains mechanisms to avoid confusion about what is receiving assistance. For every project, "the State transportation department" must execute a "project agreement." 23 U.S.C. § 106(a)(2) (2006). Crossing upgrades cannot be confused with a new rail line. Title 23 recognizes that those are different: While § 130 provides assistance to crossings only, other provisions provide assistance to "intercity * * * rail facilities" that meet different requirements. 23 U.S.C. § 601(a)(8)(C) (2006); see *id.* § 602 (2006).

highway crossings." *Id.* §130(a) (2006). It provides illustrative examples of what is encompassed within those projects (*e.g.*, "the reconstruction of existing railroad grade crossing structures"). *Ibid.* But the bonds here were not issued to finance projects eligible under §130; all of those projects were completed by 2014—three years before the bonds here were allocated, see App., *infra*, 27a, 40a. The bonds here were issued to finance the construction of 168.5 miles of new rail line in Phase II, a project not eligible for funding under Title 23. See C.A. App. 4524-4525, 4564-4565.

Other statutory provisions confirm that AAF's passenger railroad is *not* eligible for federal funding. Section 142 makes "*high-speed* intercity rail facilities" eligible. 26 U.S.C. §142(a)(11) (emphasis added). But that category is limited to passenger rail lines supporting speeds that exceed 150 miles per hour. *Id.* §142(i)(1). AAF's lower-speed passenger line does not qualify. Had Congress wished to finance such lower-speed lines through tax-exempt bonds, "Congress could easily have said so." *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010). But it did not. To the contrary, Congress deliberately excluded facilities like AAF's lower-speed line.

2. The court of appeals reached the opposite result only by "defer[ring]" to DOT's view that a facility "receives" Title 23 funding if it merely "benefits from assistance under Title 23." App., *infra*, 26a. As a matter of ordinary English, the term "receives" does not mean "benefits." To "receive" something means to "take in one's hand, or into one's possession," or "to take delivery of (a thing) from another." *The Compact Oxford English Dictionary* 1524 (2d ed. 1996); see *Webster's New Int'l Dictionary* 2076 (2d ed. 1954) ("To take, as something that is offered, * * * paid, or the like"; "To come into

possession of, get, acquire, or the like"). By contrast, to "benefit" is capacious. It means "[t]o receive benefit," "to get advantage," or "to profit" from something. *Oxford English*, *supra*, at 126; see *Webster's*, *supra*, at 253 ("To gain advantage; to receive benefit; to profit"). The concepts are different. If a city spends money on a beautification project, local merchants and their shops might "benefit" from that. But no ordinary English speaker would say they or their shops "received" city funds. Nor would Congress. The court of appeals did not even attempt to explain why the word "receives" can be rewritten as "benefits from."

Nor did the court explain how AAF's construction of a new railroad line is a "project" that "receives" funding "under title 23." The term "project" has a specific meaning within Title 23, referring to "undertaking[s] *eligible* for assistance under th[at] title." 23 U.S.C. § 101(a)(21) (2006) (emphasis added). Those undertakings include the construction of railway-highway crossings; they do not include building rail lines like AAF's. See pp. 17-18, *supra*. Section 142(m), moreover, requires that the facility receive funding "under"—*i.e.*, "'by reason of the authority of'"—Title 23. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 630 (2018). An undertaking that is not eligible for Title 23 money cannot possibly be said to receive assistance "under" Title 23.

The court also did not pause to grapple with § 142's "place in the overall statutory scheme." *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). DOT's interpretation of § 142 is irreconcilable with the entire statutory framework. Section 142 delineates specific facilities eligible for tax-exempt bonds. See 26 U.S.C. § 142(a). Similarly, Title 23 distinguishes among "projects for the elimination of hazards of railway-highway crossings," 23

U.S.C. § 130(a) (2006), "project[s] for intercity * * * rail facilities" meeting particular requirements, *id.* §§ 601(a)(8)(C), 602 (2006), and other undertakings. But DOT's view, adopted below, renders those careful restrictions illusory: It authorizes PAB allocations for activities that are *not* projects eligible for Title 23 assistance so long as they "benefit[ ] from" assistance provided to eligible projects.

DOT's position in the courts below underscores the extraordinary breadth of its view embraced by the court of appeals. Defending the bond allocation here, DOT touted that it had allocated $1.3 billion in PABs to a rail line in Maryland "based on * * * plans to spend $1 million in Title 23 funds to upgrade" a "trail *adjacent* to the planned rail line." App., *infra*, 135a (emphasis added). DOT stated that it had allocated $1.34 billion in bonds to an intermodal logistics park "based on" state plans "to spend Title 23 funds to improve a bridge *near* the facility" and "a *nearby* interstate freeway." *Id.* at 135a-136a (emphasis added).[6] But § 142(m) does not authorize the issuance of tax-exempt bonds for facilities that happen to be "nearby" or "adjacent" to projects receiving Title 23 assistance. It requires, in language that could not be clearer, that the facilities actually "receive[ ]" Title 23 assistance.

By rewriting the statutory language, DOT and the court of appeals denuded it of all intended meaning. The resulting construction of § 142(m) is so broad that billions of dollars in tax-exempt bonds can be allocated to

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[6] The bond allocation there was under 26 U.S.C. § 142(m)(1)(C), which likewise requires the facility to "receive[ ] Federal assistance under either title 23 or title 49."

facilities that do *not* receive and are not even eligible to receive Title 23 funding. In this case, for example, it permitted DOT to allocate $1.15 *billion*—later increased to $2.1 *billion*—in bonds to build a 168.5-mile stretch of passenger rail line based on $9 *million* disbursed to a different company, a freight-train operator, to improve a few dozen railway-highway crossings along the same right-of-way.

B. The Court of Appeals Converted *Skidmore* Deference into Judicial Abdication

The court of appeals justified its atextual holding by invoking *Skidmore*. App., *infra*, 25a-26a. The court, however, did not construe the relevant text, let alone find it ambiguous, before resorting to deference. Nor did the court make any effort to resolve any putative ambiguity through the traditional "devices of judicial construction." *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004). Instead, the court pronounced DOT's view of § 142(m) to be "long-standing," "consistent," and "eminently reasonable." App., *infra*, 25a-26a.

But *Skidmore* does not permit courts to so completely jettison customary principles of interpretation or abdicate their duty to say what the law is. In reading *Skidmore* to sanction abandonment of statutory text—or even an effort to construe that text—the court of appeals fundamentally erred. This Court's decision in *Skidmore* recognizes that "respect" may be accorded an agency's views of a statute if those views have the "power to persuade." 323 U.S. at 140. But that power is not a power to persuade in the abstract, but rather under the language of the statute. Nowhere does *Skidmore* abrogate the constitutional imperative that courts construe statutory text, a process that begins and ends with statutory text if that "statutory language provides a clear

answer." *Hughes*, 525 U.S. at 438. "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics*, 540 U.S. at 600 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987)). Nothing less is tolerable under *Skidmore*'s less deferential standard. See *ibid.*

Skidmore, moreover, permits a court to "follow an agency's rule only to the extent it is persuasive." *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006). Courts thus ask whether the agency has considered "specific provisions" of the statute, "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140. But certain considerations matter more than others. An agency's failure to consider "specific provisions of [a] statutory scheme" should be disqualifying even if that failure to consider the text is "longstanding." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 360-361 (2013). A consistent and longstanding error is still an error. See *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374 (1998).

In this case, the court did not even ask or consider whether DOT had anchored its position in the statute's text and structure. Instead, the court recited the Kussy letter's statement that the agency's construction would avoid undesirable outcomes, crediting (without explanation) the letter's assertion "that a narrow reading of the word 'project' would 'distort the longstanding way in which facilities are actually funded'" and "'create needless red tape.'" App., *infra*, 25a-26a. Such "policy arguments," however, cannot overcome a statute's clear text.

Sebelius v. *Cloer*, 569 U.S. 369, 381 (2013). And while the court echoed the letter's statement that the agency's reading accorded with Congress's intent, App., *infra*, 26a, the court nowhere explained why it so believed, much less why the statute's text did not "'accurately express[ ] the legislative purpose,'" *Gross*, 557 U.S. at 175.[7]

Moreover, the Kussy letter *does not even* address what it means to "*receive[ ]* Federal assistance under title 23," 26 U.S.C. § 142(m)(1)(A) (emphasis added), as the court's description makes clear, see App., *infra*, 26a. The letter nowhere suggests that a project that "benefits" from "nearby" federally funded improvements can be said to "receive" Federal assistance. The letter merely explains why DOT believes tax-exempt bonds can be issued to support an *entire* facility if *part* of that *facility* constitutes a "project funded with Federal-aid highway funds." *Id.* at 128a-132a. The Kussy letter cannot support the contention that, because FECR was awarded funds to improve crossings along FECR's right-of-way, Brightline—which never received a federal dollar under Title 23—can be deemed to have "received Federal assistance." The Kussy letter's failure to address key parts of § 142's "text and design" deprives it of any "power to persuade" on the actual issue—the meaning of "receives Federal assistance." *Gonzales*, 546 U.S. at 269-270.

The court's textual analysis consisted of its conclusory observation that it had "no reason to question" the agency's position "because the statute does not require

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[7] The Kussy letter cites 23 U.S.C. § 145, App., *infra*, 130a, but that provision has no bearing on the phrase a "project which receives Federal assistance under title 23." It says the States can "determine which projects shall be federally financed" under Title 23. 23 U.S.C. § 145(a) (2006).

an applicant for PABs" (like AAF) "to be the direct recipient of Federal assistance." App., *infra*, 26a-27a. That misses the point. The issue is not whether Title 23 funds were "directly" or "indirectly" spent on AAF's rail line. The issue is whether AAF's enterprise to build a new rail line "receives" funds under Title 23. It does not—and never has.

The court of appeals did emphasize that DOT's position was "long-standing" and "consistent." App., *infra*, 25a-26a. That alone does not make a position "persuasive." See p. 22, *supra*. Moreover, DOT's view that "receives" means "benefits from" does not trace to the Kussy letter, which says no such thing. It traces to a declaration DOT filed *in 2015* in related *litigation* over the bond allocation for Phase I of AAF's rail line. See D. Ct. Dkt. 36-1 at 24 (citing D. Ct. Dkt. 19-2 in *Martin County* v. *Dep't of Transp.*, No. 1:15-cv-00632-CRC (D.D.C.) (filed May 15, 2015)). That DOT's view traces not to the statutory text, or even the Kussy letter, but instead to a recent DOT litigation position, should have rendered it utterly unpersuasive. See *E.I. Du Pont De Nemours & Co.* v. *Smiley*, 138 S. Ct. 2563 (2018) (Gorsuch, J., statement respecting the denial of certiorari).

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Regrettably, the decision below is just one example—albeit an extreme one—of a now-familiar pattern: Courts regularly invoke *Skidmore* to avoid judicial interpretation of a statute entirely. The result is deference to agency interpretations that are not even arguably persuasive. Although the court of appeals acknowledged that an agency's views under *Skidmore* are only "entitled to a level of deference commensurate with their power to persuade," App., *infra*, 25a, its opinion relied on an impoverished concept of persuasion. The court did not

interrogate at all the "validity" of DOT's reasoning or ask whether DOT employed the sort of considerations a court would in exercising independent judgment. *Skidmore*, 323 U.S. at 140. The court did not question the "thoroughness" of a letter that was silent on the critical statutory phrase. *Ibid.* Nor did the court even begin to exhaust the full suite of traditional interpretive tools to determine the statute's meaning. The court did little more than recite the operative language from *Skidmore* and declare that the agency's informal policy rationale for its atextual interpretation was "eminently reasonable." App., *infra*, 25a-26a. That cannot be what *Skidmore* contemplates. If it is, the judiciary will have little role to play in the interpretation and application of congressional statutes.

II. As This Case Illustrates, The Lower Federal Courts Are In Disarray Over *Skidmore*

The uncritical deference the court of appeals extended to DOT's informal position below is tantamount to abdication of the court's role. Unfortunately, the decision is not an outlier. It is one (particularly egregious) example of disarray in the lower federal courts regarding *Skidmore* deference—disarray fueled in part by this Court's inconsistent guidance. As this Court has recognized, *Skidmore* "has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other." *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001) (citations omitted). This Court's clarification and correction is necessary.

A. This Court's Guidance Regarding *Skidmore* Has Been Inconsistent

Some of this Court's decisions emphasize that judges must "decide cases based on their independent judgment and 'follow [an] agency's [view] only to the extent it is

persuasive.'" *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring) (quoting *Gonzales*, 546 U.S. at 269) (second brackets in original); see, *e.g.*, *Nassar*, 570 U.S. at 361-362; *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 16 (2004). Put another way, *Skidmore* requires a court to "proceed to determine the meaning of the [statute] the old-fashioned way: * * * 'decid[ing] for [itself] the best reading.'" *Miller* v. *Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012); see *Warner-Lambert Co.* v. *United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005); *Landmark Legal Found.* v. *IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001).

Nassar illustrates that approach. There, the Court considered the "plain language," "structure," and "design" of Title VII to decide whether the statute required but-for causation. 570 U.S. at 352-353. Only then did it consider agency views. See *id.* at 361-362. Although the agency had a "longstanding" view that found support in lower-court decisions, the Court rejected it as unpersuasive. *Id.* at 360-361. One of the agency's rationales, the Court explained, "fail[ed] to address the specific provisions of this statutory scheme," and another had "circular" reasoning. *Id.* at 361-362. The longevity of the agency's view was secondary to what the statute said.

At other times, this Court has provided very different guidance. In *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389 (2008), this Court "defer[red]" under *Skidmore* to the agency's reading of the statutory term "charge." *Id.* at 395, 402. The statute "d[id] not define charge," and the agency's regulations lacked sufficient content. *Id.* at 395. As the dissent noted, however, the Court did not resolve the uncertainty by employing the usual presumption that undefined terms carry their ordinary meaning. See *id.* at 408-409 (Thomas, J., dissenting)

(citing *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994)). Nor did it ask whether the agency had conducted a similar analysis or found the statute's best reading. Instead, the Court "defer[red]" to an informal agency position (despite admitted inconsistencies in application) because it had "been binding on [agency] staff for at least five years" and was "consistent with the design and purpose" of the statute. *Id.* at 399, 402 (majority opinion).

Holowecki's emphasis on longevity and consistency with general goals can be read—as it was in this case—to suggest that agency views deserve deference without resort to "regular interpretive method[s]" to resolve statutory ambiguities. *Gen. Dynamics*, 540 U.S. at 600. In "defer[ring]," moreover, this Court suggested that, under *Skidmore*, courts are absolved from seeking the best reading of a statute. When a statute contains a gap, the Court stated, an "agency may choose among reasonable alternatives." *Holowecki*, 552 U.S. at 403. While there might be "reasonable" alternatives to the agency's position, the statute's implementation was, in the Court's view, "a matter for the agency to decide." *Id.* at 403, 407. That decision could be read to depart from the view that *Skidmore* requires courts to employ their independent judgment, permitting deference to an agency's considered view only after traditional interpretive tools fail to supply answers.

Holowecki does not stand alone. In *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461 (2004), the Court accepted the Environmental Protection Agency's view that it had authority to review state permitting decisions, again without examining the ordinary meaning of the statutory terms—"requirement" and "determine." *Id.* at 488-495; compare *id.* at 503-517 (Kennedy, J., dissenting). The Court, moreover, describ-

ed *Skidmore* in terms that contemplate a diminished judicial role. *Skidmore*, the Court stated, permits deference to agency constructions that are "permissible" and "rational." *Id.* at 493 (majority opinion). As in *Holowecki*, the decision nowhere suggested that courts should search for the best reading of a statute. Rather, as the dissent observed, the majority opinion "hid behind *Chevron*'s vocabulary" of reasonableness while invoking *Skidmore*'s "less deferential" standard. *Id.* at 517-518 (Kennedy, J., dissenting).

B. This Court's Inconsistent Decisions Have Contributed to Disarray in Lower Federal Courts

Lacking clear guidance from this Court, lower courts have taken the example of *Holowecki*—and *Skidmore* deference—to their unintended extremes. Here, for example, the court of appeals seized on *Holowecki*'s reasoning that "deference to [an] agency's position is due" when it is "binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework." App., *infra*, 25a (citing *Holowecki*, 552 U.S. at 399-402). The court below then applied that formulation to avoid independent, judicial consideration of statutory text and structure. The court of appeals instead focused almost exclusively on DOT's policy rationales, without attempting to determine for itself whether DOT's informal views captured the statute's unambiguous meaning. See pp. 22-23, *supra*.

Other federal courts have likewise understood *Skidmore* to allow courts to emphasize consistency, longevity, or policy to the virtual exclusion of statutory text. See, *e.g.*, *Seaview Trading, LLC* v. *Comm'r*, 858 F.3d 1281, 1287 (9th Cir. 2017) (deferring to agency's "consistent position"); *Unified Turbines, Inc.* v. *U.S. Dep't of Labor*, 581 F. App'x 16, 18-19 (2d Cir. 2014); *Cervantes* v. *Hol-*

der, 597 F.3d 229, 234-235 & n.7 (4th Cir. 2010) (deferring to agency that "consistently adhered to that reading"); *Ammex, Inc.* v. *United States*, 367 F.3d 530, 535 (6th Cir. 2004). Some decisions even declare that "obviously some level of deference" is due an agency's longstanding view. *Ammex*, 367 F.3d at 535.

Consistent with that understanding, some courts proceed directly from the fact that the statute leaves a term or phrase undefined to deferring to an agency construction, without themselves examining the language to determine the statute's meaning. See, *e.g.*, *Estrada-Rodriguez* v. *Lynch*, 825 F.3d 397, 404-406 (8th Cir. 2016); *Ammex*, 367 F.3d at 535. For example, in *United States* v. *Miller*, 833 F.3d 274 (3d Cir. 2016), the Third Circuit noted that the relevant statutory phrase, "in the business [of advising others]," was not defined and that the court had not "previously interpreted the phrase." *Id.* at 281. But rather than construe that phrase, the court treated a definition from an SEC interpretive release—a release that "represent[ed] only the views of the SEC staff"—as controlling. *Ibid.* Without analyzing the statutory language, the court declared that "'[n]o clearer alternatives'" were within its "'authority or expertise to adopt.'" *Ibid.* (quoting *Holowecki*, 552 U.S. at 402).[8]

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[8] Scholars have remarked on lower courts' inconsistent approaches to *Skidmore*. "It is apparent," a leading article states, that courts "lack a coherent conception of how *Skidmore*'s sliding scale should function." Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1291 (2007); see *id.* at 1271 (courts split over whether *Skidmore* requires exercise of "independent judgment"); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1464-1465 (2005). A common misconception, another observes, is that *Skidmore* simply requires "'weak deference'" and

These decisions illustrate how far courts have departed from the judicial role that *Skidmore* contemplates. The courts have "become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent* v. *Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir.) (Kethledge, J., dissenting) (discussing *Chevron*), cert. dismissed sub nom. *Valent* v. *Saul*, 140 S. Ct. 450 (2019). The judicial role begins with the court's interpretation of the statute, and urges deference to the agency's interpretation only to the extent that interpretation has power to persuade. This Court's intervention is needed to clarify *Skidmore*'s injunction that courts must employ the tools of statutory construction *first* to determine the statute's meaning, *thereafter* deferring only insofar as an agency's interpretation is persuasive.

III. The Question Presented Is Important And Recurring

Whether *Skidmore* requires courts to independently interpret the statute—employing the usual tools of statutory interpretation—before invoking deference is an important and recurring question. *Skidmore* holds a prominent place in the law. Courts of appeals have invoked *Skidmore* more than 1,300 times in the 19 years since this Court's *Mead* decision revitalized *Skidmore*. District courts have cited *Skidmore* more than 1,700 additional

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Chevron "'strong deference.'" Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 Colum. L. Rev. 1867, 1879 & n.59 (2015). That "misconceives the distinction as one of degree when it is in fact a difference in kind." *Ibid.*

times. The subject matter of the decisions applying *Skidmore* is as varied as federal agencies themselves.[9]

The frequency with which courts confront questions about *Skidmore*'s meaning and scope is destined to accelerate. Last term, this Court "reinforc[ed]" significant "limits" on *Auer* deference. *Kisor*, 139 S. Ct. at 2415; see *id.* at 2415-2418. The Court made clear, for example, that courts "must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." 139 S. Ct. at 2423-2424. But the Court did not foreclose courts from applying *Skidmore* in lieu of *Auer* deference, see *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (taking that approach)—now an increasingly likely scenario.

How courts apply *Skidmore* has predictably case-dispositive effects. When courts exercise independent judgments to determine the meaning of statutes, agen-

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[9] See, *e.g.*, *Air Transp. Ass'n of Am., Inc.* v. *FAA*, 921 F.3d 275, 279 (D.C. Cir. 2019) (FAA construction of airport-development grant assurance statute); *Hayes* v. *Harvey*, 903 F.3d 32, 46 (3d Cir. 2018) (HUD construction of §8 housing statute); *Sec'y of Labor* v. *Am. Future Sys., Inc.*, 873 F.3d 420, 426 (3d Cir. 2017) (DOL construction of FLSA); *Baylor Cty. Hosp. Dist.* v. *Price*, 850 F.3d 257, 264 (5th Cir. 2017) (HHS construction of Medicare Rural Hospital Flexibility Program Act); *Delaware* v. *Surface Transp. Bd.*, 859 F.3d 16, 20 (D.C. Cir. 2017) (Board construction of Interstate Commerce Commission Termination Act of 1995); *Varsity Brands, Inc.* v. *Star Athletica, LLC*, 799 F.3d 468, 478 (6th Cir. 2015), aff'd on other grounds, 137 S. Ct. 1002 (2017) (Copyright Office construction of Copyright Act); *Mansour* v. *Holder*, 739 F.3d 412, 417 (8th Cir. 2014) (BIA construction of Immigration and Nationality Act); *McMaster* v. *United States*, 731 F.3d 881, 892 (9th Cir. 2013) (DOI construction of federal California Wilderness Act); *Lopez* v. *Terrell*, 654 F.3d 176, 185 (2d Cir. 2011) (BOP construction of good-time-credit statute).

cies prevail about 38.5% of the time. See Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017). The more deference courts extend to agencies, the more agencies win, with the win rate increasing to 77.4% under *Chevron*. *Ibid.* Whether *Skidmore* requires courts to search for the best reading of a statute or apply a more deferential standard under which "reasonable" (or even atextual) views can prevail thus makes an enormous difference—as this case bears out.

The issue is also critical to the separation of powers. The Constitution gives courts the authority—and responsibility—to interpret the law. See *Marbury*, 5 U.S. (1 Cranch) at 177. Doctrines that allow for consideration of agencies' views must be kept in check to preserve the constitutional structure. This Court has "reinforc[ed]" traditional constraints on deference, even for laws entrusted to agencies for administration. *Kisor*, 139 S. Ct. at 2415. *Chevron* is explicit that courts must exhaust the "traditional tools of statutory construction." 467 U.S. at 843 n.9. "[D]eference is not due" to an agency's construction, this Court has held, unless the application of those tools leaves "an unresolved ambiguity." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018); see *Cardoza-Fonseca*, 480 U.S. at 446-447. Similarly, in the context of *Auer* deference, courts must conclude a regulation is "genuinely ambiguous" and "exhaust all the 'traditional tools' of construction" before deferring to agencies' positions. *Kisor*, 139 S. Ct. at 2415.

Those limits, however, serve to constrain little if courts do not similarly scrutinize informal agency interpretations. Agencies will be discouraged from undertaking laborious notice-and-comment processes to promulgate formal rules if courts defer to informal

agency positions without scrutinizing them. Cf. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 Cornell L. Rev. 397, 408, 420-433 (2007). And they will prefer to "promulgate vague and open-ended regulations that they can later interpret as they see fit," using informal positions to do so. *Christopher*, 567 U.S. at 158.

This case illustrates the stark consequences that result when *Skidmore* is invoked to disregard statutory text. Statutes reflect deliberate and deliberated legislative judgments about how to allocate scarce resources and balance competing public interests. Here, Congress enacted a law that provides $15 billion in tax-exempt—essentially taxpayer-subsidized—bonds for a carefully defined list of projects. See 26 U.S.C. § 142(m). AAF's passenger rail line is not among them. Whatever DOT's reasons for wanting to finance that rail line, it evaded the statute to allocate $2.7 billion in bonds to an undertaking that Congress made ineligible—depriving eligible and worthy facilities of more than $2 billion dollars in tax-exempt bonds that Congress intended to make available to them.[10]

CONCLUSION

Because AAF's railroad did not receive and has never received federal assistance under Title 23, it is ineligible for tax-exempt private activity bonds under 26 U.S.C. § 142(m)(1)(A). The court of appeals' contrary decision rests on a conception of *Skidmore* deference that all but

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[10] The disarray is particularly intolerable given that many civil statutes for which agencies may seek *Skidmore* deference also carry criminal consequences. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Gonzales*, 546 U.S. at 261-262.

eliminates the judicial role in construing the law. It represents an egregious example of the disarray in the lower federal courts over *Skidmore*. Neither it, nor the disarray it reflects, can be allowed to stand. The petition should be granted, so that the Court can clarify what courts must do before deferring to an agency's informal interpretation under *Skidmore*—and prevent displacement of the judiciary's constitutional duty to construe statutes and to say what the law is.

Respectfully submitted.

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MAY 2020

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5012

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

Appellants,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00333)

OPINION

Argued September 24, 2019
Decided December 20, 2019

Philip E. Karmel argued the cause and filed the briefs for appellants.

Steven L. Brannock and *Tracy S. Carlin* were on the brief for *amicus curiae* Indian River Neighborhood Association in support of appellants.

Joan M. Pepin, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With her on the brief were *Jeffrey Bossert Clark*, Assistant Attorney General, *Eric Grant*, Deputy Assistant Attorney General, *Kevin W. McArdle*, Attorney, *Steven G. Bradbury*, General Counsel, U.S. Department of Transportation, *Paul M. Geier*, Assistant General Counsel for Litigation and Enforcement, and *Charles E. Enloe*, Trial Attorney.

Eugene E. Stearns argued the cause for intervenor-appellee. With him on the brief were *David H. Coburn*, *Cynthia L. Taub*, and *Matthew Buttrick*.

Before: GARLAND, *Chief Judge*, SRINIVASAN, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In 2011, Intervenor AAF Holdings LLC ("AAF") announced plans to construct and operate express passenger railway service connecting Orlando and Miami, Florida. Phase I of the All Aboard Florida Intercity Passenger Rail Project (also "AAF Project" or "Project"), connecting Miami to West Palm Beach, has been completed. Phase II, which will extend service to Orlando, is presently under construction. In 2014, AAF applied for an allocation of tax-exempt qualified Private Activity Bond ("PAB") authority to partially finance Phase II of the Project. In December 2017, the Department of Transportation ("DOT") allocated $1.15 billion in tax-exempt PABs to be

issued by the Florida Development Finance Corporation to finance Phase II of the Project. AAF, the sponsor of the Project, received the proceeds of the bond sales to fund the Project and is responsible for repaying them.

In February 2018, Indian River County, the Indian River County Emergency Services District (together "County" or "Appellant"), and other parties filed a complaint in the District Court claiming that DOT exceeded its authority under 26 U.S.C. § 142(m)(1)(A) when it allocated $1.15 billion in PABs to fund Phase II of the AAF Project. The complaint further alleged that the allocation violated 26 U.S.C. § 147(f), which requires certain state or local governmental approvals before tax-exempt PABs may be issued. Finally, the complaint challenged the adequacy of the Environmental Impact Statement ("EIS") prepared by the Federal Railway Administration ("FRA") pursuant to the requirements of the National Environmental Policy Act ("NEPA"). See 42 U.S.C. § 4332. With respect to all of its claims, Indian River County raised causes of action under the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2)(A) (an agency action may be set aside if found "to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *id.* § 706(2)(C) (an agency action may be set aside if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). On December 24, 2018, the District Court rejected Appellant's claims and granted summary judgment to the federal defendants. *Indian River Cty.* v. *Dep't of Transp.*, 348 F. Supp. 3d 17 (D.D.C. 2018).

The District Court ruled that because the complaint arguably fell within the zone-of-interests protected or regulated by § 142, Indian River County was among the class of parties authorized by Congress to pursue a cause

of action under the APA. However, the District Court found no merit in Indian River County's claims. The court ruled that the disputed Project constituted a "surface transportation project" under § 142(m)(1)(A), as required for DOT's allocation of PABs qualifying for tax-exempt status. The District Court also ruled that the use of the disputed PABs did not violate 26 U.S.C. § 147(f). And, finally, the District Court ruled that the FRA's preparation of the EIS as required by NEPA was neither arbitrary, nor capricious, nor an abuse of discretion, nor otherwise in violation of the law. On appeal, Indian River County challenges only the District Court's rulings with respect to § 142 and NEPA. DOT and Intervenor AAF, in turn, contend that Appellant's claims should be dismissed because its interests are not within the zone-of-interests protected by 26 U.S.C. § 142(m). In the alternative, they seek affirmance of the District Court's judgments on the merits.

For the reasons explained below, we affirm the judgments of the District Court. We agree that Indian River County's interests are within the zone-of-interests protected by 26 U.S.C. § 142 and, therefore, the complaint raises claims that are cognizable under the APA. However, we hold that DOT permissibly and reasonably determined that the Project qualifies for tax-exempt PAB financing under 26 U.S.C. § 142(m). We also hold that the EIS for the Project adheres to the commands of NEPA.

I. BACKGROUND

A. Statutory Background

1. Private Activity Bonds

Under 26 U.S.C. § 103(a) of the Internal Revenue Code ("Code"), interest on state or local bonds is generally not subject to federal taxation. 26 U.S.C.

§ 103(a). However, a PAB issued by state or local governments to finance private activities is not tax-exempt unless it is a "qualified bond." *Id.* § 103(b)(1). As the District Court explained:

> Congress has authorized interest earned on certain types of PABs to be exempted from federal taxation. See 26 U.S.C. §§ 103, 141. Because this exemption allows the bondholder to keep all the interest, bond issuers can sell the bond at a lower interest rate. . . .
>
> Section 141 outlines certain types of PABs that can constitute "qualified bond[s]," including "exempt facility bond[s]." *Id.* § 141(e)(1)(A). Under § 142(a), a bond is an "exempt facility bond" if at least 95% of proceeds from its issue are used to finance one of fifteen enumerated categories of projects. *Id.* § 142(a). One such category is "qualified highway or surface freight transfer facilities." *Id.* § 142(a)(15). Section 142(m) defines "qualified highway or surface freight transfer facilities," *id.* § 142(m)(1), and authorizes the Secretary of Transportation, "in such manner as [she] determines appropriate," *id.* § 142(m)(2)(C), to allocate up to $15 billion of PAB authority to eligible projects, *id.* § 142(m)(2)(A). Put simply, Congress has enacted a mechanism through which the Secretary can allocate tax exemptions to bonds used to finance construction of, or improvements to, certain types of facilities. These exemptions lower the cost of selling the bonds, better enabling state and local governments to finance the projects.
>
> The Secretary's allocation is necessary . . . for a bond to be tax-exempt because it finances a "quali-

> fied highway or surface freight transfer facilit[y]." *Id.* § 142(m)(2)(A).

Indian River Cty., 348 F. Supp. 3d at 28 (alterations in original)

As noted, an "exempt facility bond" includes a bond whose proceeds from its issue are used to finance "qualified highway or surface freight transfer facilities." 26 U.S.C. § 142(a)(15). Section 142(m)(1)(A) defines "qualified highway or surface freight transfer facilities" as "any surface transportation project which receives Federal assistance under title 23, United States Code." Title 23, in turn, authorizes federal funding for, *inter alia*, "the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a).

2. National Environmental Policy Act

As we recently explained in *Mayo* v. *Reynolds*, 875 F.3d 11 (D.C. Cir. 2017), Congress enacted NEPA in part "to promote efforts which will prevent or eliminate damage to the environment and biosphere and . . . enrich the understanding of the ecological systems and natural resources important to the Nation." *Id.* at 15 (internal quotation marks omitted) (quoting 42 U.S.C. § 4321). To achieve these ends,

> NEPA requires all federal agencies to include a detailed environmental impact statement ("EIS") "in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). This process ensures that an agency will consider every significant aspect of the environmental impact of a proposed action and inform the public of its analysis. In other words, agencies must take a hard look at [the] environmental consequences of their

> actions, and provide for broad dissemination of relevant environmental information.
>
> . . . .
>
> Where NEPA analysis is required, its role is primarily information-forcing. As the Supreme Court has explained, "[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency, as NEPA was not intended to resolve fundamental policy disputes.
>
> It is now well-established that NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. It is equally clear that NEPA does *not* impose a duty on agencies to include in every EIS a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action.

875 F.3d at 15-16 (alterations in original) (citations and quotation marks omitted).

In sum, because NEPA's requirements are "essentially procedural," the statute does "not mandate particular substantive environmental results." *Theodore Roosevelt Conservation P'ship* v. *Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011) (internal quotation marks and citations

omitted). Instead, NEPA "focus[es] Government and public attention on the environmental effects of proposed agency action." *Id.* (alteration in original) (internal quotation marks omitted). Those requirements "simply . . . ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *WildEarth Guardians* v. *Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (internal quotation marks and citation omitted).

B. Factual Background

The dispute in this case emanates from financial and environmental concerns relating to the construction and operation of an express passenger railway service connecting Miami, Fort Lauderdale, West Palm Beach, and Orlando, Florida. The rail service, known as the All Aboard Florida Intercity Passenger Rail Project, has been spearheaded by AAF. The new rail service will run along an existing rail corridor designed in the late 1800s by the Florida East Coat Railway ("FECR"). The FECR corridor accommodated both passenger and freight rail service until 1968, when passenger rail service was terminated. The AAF Project is designed to restore portions of the existing rail corridor between Miami and Cocoa and construct a new segment between Cocoa and Orlando. The ultimate goal is to establish speedy rail passenger service along a significant segment of the east coast of Florida.

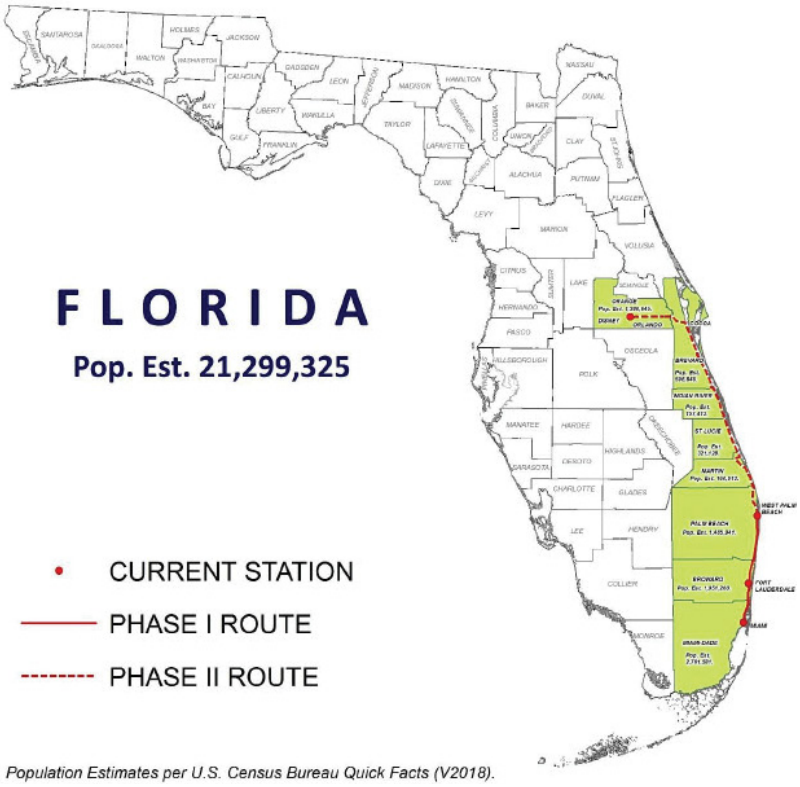
AAF announced its plans for the Project in 2011. According to AAF, the high-speed passenger service will include 32 daily departures that will cover the 235-mile trip in about three hours. Phase I of the Project, connecting Miami to West Palm Beach, with a stop in Fort Lauderdale, was completed in January 2018. Phase II, connecting West Palm Beach to Orlando, is still under

construction. When Phase II is completed, passenger trains will run north from West Palm Beach to Cocoa, turn west, and run inland along State Road 528 to Orlando International Airport.

The record indicates that, in both Phases of the Project, AAF is improving the existing rail corridor by:

> (i) replacing portions of the existing mainline tracks and reinstalling a second set of tracks where the historic second track was previously removed; (ii) adding a third track in certain locations within the corridor to allow for more efficient service; (iii) replacing or repairing existing bridges across waterways; (iv) installing Positive Train Control systems which will provide integrated command and control of passenger and freight train operations; and (v) upgrading railway-roadway crossing safety features per federal regulations and requirements, as well as specific requests from counties and municipalities along the Project route. JA1831-44. . . . In addition, AAF has been helping counties and municipalities convert existing crossings into "Quiet Zones," which eliminates the requirement for warning horns to be sounded as trains approach. JA2291.

Intervenor's Br. at 3.



Id. at 5.

In 2013, an AAF subsidiary applied to FRA for a $1.6 billion loan pursuant to the Railroad Rehabilitation and Improvement Financing program to help finance the Project. Because projects benefiting from such loans are subject to NEPA, FRA conducted an environmental review of the entire AAF Project. The agency prepared an Environmental Assessment and Section 4(f) Evaluation for Phase I, which resulted in a Finding of No Significant Impact. FRA also commenced preparing an EIS for Phase II, with the assistance of the U.S. Coast Guard and U.S. Army Corps of Engineers. In 2015, AAF withdrew its loan application, so FRA did not issue a

Record of Decision on its EIS. In 2017, however, after AAF resubmitted its loan application, FRA completed the NEPA review process.

The NEPA review lasted over two years and included an extensive period for public comment, including numerous public meetings in counties along the Project corridor. Over 15,400 written comments were received from interested parties, including Indian River County. FRA responded to comments in its Final EIS, which was published on August 5, 2015. The Final EIS is over 600 pages in length, includes an additional 70 appendices, and concludes that the existing FECR corridor was the only feasible alternative for the north-south segment of the Project. FRA also concluded that "[t]he Project would have an overall beneficial effect on public health, safety, and security in the rail corridor," J.A. 1658, as well as "beneficial cumulative impacts" on "transportation, air quality, and economic resources," *id.* at 1662. Finally, the EIS set forth significant mitigation measures relating to public safety, vehicular traffic, navigation, noise and vibration, water resources, biological resources, essential fish habitat, wetlands and other ecological systems, threatened and endangered species, and historic properties. *Id.* at 2503-21. After receiving additional public comments, FRA issued a Record of Decision on December 15, 2017. This included the agency's analyses regarding alternatives, environmental impacts, and mitigation, *id.* at 4357-4412, and a separate addendum in which it evaluated and responded to the comments on the Final EIS, *id.* at 4414-48.

In the end, the loan that had been sought by AAF was never made. As explained below, AAF obtained financing through the sale of tax-exempt PABs and withdrew its loan application in February 2019.

The allocation of the PABs in support of the Project occurred as follows:

> In 2014, AAF applied [to DOT] for an allocation of tax-exempt PABs to partially finance the project. To demonstrate that the Project is indeed a "surface transportation project which receives Federal assistance under title 23," 26 U.S.C. § 142(m)(1)(A), AAF submitted documentation showing that more than $9 million in Title 23-funded improvements had been made to 72 separate grade crossings (railway-highway intersections) since 2012 along the N-S corridor and the Miami to West Palm Beach corridor. DOT determined that the Project was eligible for PAB funding and provisionally allocated $1.75 billion in tax-exempt PABs to the project. In September 2016, however, AAF submitted a new request for a $600 million allocation for Phase I only, and it asked that the previous allocation be withdrawn. DOT granted both requests in November 2016. The $600 million in PABs for Phase I were subsequently issued by the Florida Development Finance Corporation and sold to private investors.
>
> A year later, AAF submitted a new application for an allocation of PABs to finance Phase II. DOT allocated $1.15 billion for Phase II in December 2017. The Florida Development Finance Corporation's authority to issue those bonds was set to expire at the end of 2018, but it was extended to June 30, 2019. While this appeal has been pending, DOT granted AAF's request to modify the Phase II allocation to allow for the issuance of an additional $950 million in PABs. All $2.1 billion in bonds have

been issued. See https://www.transportation.gov/buildamerica/programs-services/pab.

DOT Br. at 6-7 (citations omitted).

C. Procedural History

In 2015, Indian River County filed a lawsuit challenging DOT's December 2014 allocation of $1.75 billion in PABs. Martin County filed a similar action, in which it additionally claimed that the Project was not eligible to receive an allocation of PABs under 26 U.S.C. § 142(m). The District Court denied a motion to dismiss both Counties' environmental claims, but granted dismissal of Martin County's claim that DOT exceeded its authority under § 142. See *Indian River Cty.* v. *Rogoff*, 201 F. Supp. 3d 1, 20-21 (D.D.C. 2016). After AAF requested that the initial PAB allocation be withdrawn, the two cases pending in the District Court were dismissed as moot. See *Indian River Cty.* v. *Rogoff*, 254 F. Supp. 3d 15, 17-18, 22 (D.D.C. 2017).

The litigation in the present case was initiated in February 2018. Three claims were raised: First, the complaint alleged that DOT exceeded its authority under 26 U.S.C. § 142(m) when it allocated $1.15 billion in PABs to fund Phase II of the AAF Project. Second, the complaint asserted that the allocation violated 26 U.S.C. § 147(f), which requires certain state or local governmental approvals before tax-exempt PABs may be issued. Finally, the complaint challenged the adequacy of DOT's NEPA review of the Project prior to allocating the disputed PABs. AAF intervened to defend against the complaint. Martin County and Citizens Against Rail Expansion in Florida were originally named as co-plaintiffs, along with Indian River County. However, before this appeal was filed, they reached a settlement

with AAF and stipulated to the dismissal of their claims with prejudice.

In December 2018, the District Court granted summary judgment to the federal defendants and AAF. See *Indian River Cty.* v. *Dep't of Transp.*, 348 F. Supp. 3d 17 (D.D.C. 2018). As noted above, the District Court ruled that because the complaint arguably fell within the zone-of-interests protected or regulated by § 142, Indian River County was among the class of parties authorized by Congress to pursue a cause of action under the APA. The court also ruled that the disputed allocation of PABs did not violate § 142 or § 147(f). As to Appellant's claim under § 142, the District Court upheld DOT's determination that the Project is a "surface transportation project" that has received federal assistance under Title 23 of the U.S. Code, as required by 26 U.S.C. § 142(m)(1)(A). With respect to the § 147(f) claim, the District Court ruled that DOT lawfully allocated the disputed PABs after obtaining the State of Florida's approval, thus concluding that DOT was not obligated to seek the approval of each local governmental authority in areas through which Phase II will run.

Finally, the District Court found that FRA's environmental review of the Project satisfied NEPA's requirements. The District Court rejected Appellant's claims relating to pedestrian safety, noting the EIS's thorough study of every grade crossing along the entire corridor; the extensive safety improvements that AAF is mandated to make; and the record demonstrating that the EIS considered the safety of trespassers who cut across the tracks between formal crossings and addressed the safety problems posed by these situations. The District Court also rejected Appellant's claim that a complete mitigation plan, detailing the location and

design of fencing along the railway, was required in the EIS. Finally, the District Court held that the EIS adequately examined noise impacts.

Indian River County now appeals the District Court's grant of summary judgment with respect to its claims under § 142 and NEPA, but it no longer presses its claim under § 147(f). DOT and AAF contend that the case should be dismissed because Indian River County's asserted interests fall outside the zone-of-interests protected by § 142. In the alternative, DOT and AAF seek affirmance of the District Court's judgments on the merits.

II. Analysis

A. Standard of Review

"This court reviews the District Court's ruling on summary judgment *de novo*." *Feld* v. *Fireman's Fund Ins. Co.*, 909 F.3d 1186, 1193 (D.C. Cir. 2018). In reviewing a summary judgment motion, courts are required to "'examine the facts in the record and all reasonable inferences derived therefrom in a light most favorable to' the non-moving party." *Id.* (quoting *Robinson* v. *Pezzat*, 818 F.3d 1, 8 (D.C. Cir. 2016)). We must then determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The District Court's conclusion that Appellant has a cause of action under the APA for its § 142(m) claim is also reviewable *de novo*, because it is a question of law. *Zuza* v. *Office of High Representative*, 857 F.3d 935, 938 (D.C. Cir. 2017).

When, as in this case, the appeal is from a final judgment issued by the District Court, we do not defer to the District Court's review of the agency action. *Novicki*

v. *Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991). Rather, "[w]e review the administrative action directly, according no particular deference to the judgment of the District Court." *Mingo Logan Coal Co.* v. *EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (internal quotation marks and citation omitted). The reason is that, under well-established law, "when an agency acts pursuant to congressionally-delegated authority and the action has the force of law, 'the agency itself is typically owed deference with respect to its fact-finding, see *NLRB* v. *Brown*, 380 U.S. 278, 292 (1965), its application of law to facts, see *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), and its interpretation of the governing statute or regulation, see *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).'" EDWARDS & ELLIOTT, FEDERAL STANDARDS OF REVIEW 145 (3d ed. 2018) (quoting *Novicki*, 946 F.2d at 941).

Because neither NEPA nor 26 U.S.C. § 142 supplies a private right of action, judicial review under both statutes is governed by the APA. The APA requires that we "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In evaluating contested agency action, the court must "not . . . substitute its [own] judgment for that of the agency." *Id.*

In reviewing NEPA challenges, we must be "mindful that our role is not to 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor. Rather, it is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *WildEarth Guardians*, 738 F.3d at 308 (citation and internal quotation marks omitted); see also *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) (making it clear that the courts must give deference to agency judgments as to how best to prepare an EIS).

B. Appellant's Interests Fall Within the "Zone of Interests" Protected by § 142

In *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), the Supreme Court explained the "lenient approach" that the courts must follow in determining whether a party has stated a cause of action under the APA:

> First, we presume that a statutory cause of action extends only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked." The modern "zone of interests" formulation originated in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act (APA). We have since made clear, however, that it applies to all statutorily created causes of action; that it is a "requirement of general application"; and that Congress is presumed to "legislate against the background of" the zone-of-interests limitation, "which applies unless it is

> expressly negated." *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997). . . .
>
> We have said, in the APA context, that the test is not "'especially demanding,'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 225 (2012). In that context we have often "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 or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that'" Congress authorized that plaintiff to sue. *Id.* That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review.

Id. at 129-30 (citations and brackets omitted).

DOT and Intervenor AAF argue that this case should be dismissed because Appellant's interests are not within the zone-of-interests of 26 U.S.C. §142. In pressing this position, DOT argues that the District Court erred in concluding that "the interests at stake in §142 . . . are illuminated by §147(f), which requires State or local government approval for certain PABs to qualify for tax exemption." *Indian River Cty.*, 348 F. Supp. 3d at 29. In DOT's view, "the arguable existence of a cause of action under *Section 147(f)* does not give Plaintiffs a cause of action to sue for an alleged violation of *Section 142*." DOT Br. at 16. DOT's position is shortsighted, and it reflects a distorted view of the District Court's decision.

What the District Court said was this:

> In applying the zone-of-interests test, courts do not look at the specific provision said to have been violated in complete isolation. At the same time, courts must police the extent to which they look beyond the provision invoked to ensure that casting a wider net does not deprive the zone-of-interests test of virtually all meaning. Accordingly, a court must limit its analysis to the provision invoked for suit, as clarified by any provisions to which it bears an integral relationship. In this case, then, the Court must first determine whether § 147(f) bears an integral relationship with § 142, the provision upon which Indian River County sues.
>
> The Court concludes that the two provisions do bear an integral relationship. They form adjacent requirements for PABs used to finance certain categories of facilities to qualify for tax-exempt status: § 142 enumerates the types of facilities, and § 147(f) ensures public approval and democratic accountability for their construction. Absent § 147(f) approval, PABs used to finance a § 142 facility cannot be tax-exempt; and PABs approved pursuant to § 147(f) are not tax-exempt unless they are used to finance a § 142 facility.
>
> Most importantly, each requirement evinces a common purpose: ensuring that when the public fisc forgoes revenue through tax-exempt bonds, those bonds are used to benefit the public.

Indian River Cty., 348 F. Supp. 3d at 29-30 (footnote, citations, quotation marks, and brackets omitted). This is a perfectly reasonable construction of the zone-of-interests test. The simple point made by the District Court is that "[b]y demonstrating that § 142 and § 147(f)

bear an integral relationship, the County has illuminated § 142 in a way that suggests Congress's intent was indeed to allow State and local governments to ensure public benefit would accrue from projects financed by tax-exempt bonds." *Id.* at 31. The District Court did not say, as DOT suggests, that the arguable existence of a cause of action under § 147(f) gives Appellant a cause of action to sue for an alleged violation of § 142.

In any event, we need not tarry further over the District Court's decision because we hold that Appellant is within the zone-of-interests of 26 U.S.C. § 142(m) for reasons analogous to those discussed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 224-28. Just as the Court noted in that case, we note here that there is no dispute over the fact that Appellant's environmental and safety concerns are matters of the sort that DOT surely will have "in mind" when exercising its authority to allocate PABs pursuant to § 142. *Id.* at 227. This alone is enough to show that Appellant's asserted interests at least arguably fall within the zone-of-interests protected by § 142.

DOT has discretion under the statute to allocate PABs to qualified facilities. 26 U.S.C. § 142(m)(2)(C). And nothing in the statute precludes DOT from considering local government concerns and environmental issues when evaluating PAB allocations under § 142(m). Indeed, DOT instructs PAB applicants to "[i]ndicate the current status of milestones on [the estimated timeline provided], including all necessary permits and *environmental approvals*." Notice of Solicitation and Request for Comments, Applications for Authority for Tax-Exempt Financing of Highway Projects and Rail-Truck Transfer Facilities, 71 Fed. Reg. 642, 643 (Jan. 5, 2006) (emphasis added). DOT also instructs applicants to "[p]rovide a

copy of a resolution adopted in accordance with state or local law authorizing the issuance of a specific issue of obligations [as required by section 147(f)]." *Id.* AAF's application provided all of this required information. J.A. 4522, 4532-34, 4545.

DOT's position regarding the zone-of-interests inquiry is obviously wanting because it fails to take account of the fact that Appellant's cause of action arises under the APA, not under the Code. As noted above, the zone-of-interests test is not "especially demanding" with respect to matters arising under the APA, and "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225 (citation omitted). Furthermore, the Supreme Court has "consistently held that for a plaintiff's interests to be arguably within the zone of interests to be protected by a statute, there does not have to be an indication of congressional purpose to benefit the would-be plaintiff." *Nat'l Credit Union Admin.* v. *First Nat. Bank & Tr. Co.*, 522 U.S. 479, 492 (1998) (internal quotation marks and citation omitted). And a plaintiff certainly need not be expressly listed as a beneficiary of a statutory provision in order to be within its protected zone-of-interests. Finally, the Supreme Court has emphasized that the zone-of-interests test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225 (citation omitted). That certainly is not this case.

In assessing whether a plaintiff's interests fall within the zone-of-interests protected by a statute, we must consider the "context and purpose" of the relevant

statutory provisions and regulations at issue. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 226. "'[W]e do not look at the specific provision said to have been violated in complete isolation[,]' but rather in combination with other provisions to which it bears an 'integral relationship.'" *Nat'l Petrochemical & Refiners Ass'n* v. *EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (second alteration in original) (citation omitted). In applying these principles, it is quite clear that Appellant—a local government entity whose citizens will be directly affected by the AAF Project—has compelling interests that fall within the zone-of-interests protected by the statute. The statutory context and purpose make this clear.

26 U.S.C. § 141(e)(1)(A) outlines certain types of PABs that can constitute "qualified bond[s]," including "exempt facility bond[s]." An "exempt facility bond" includes a bond whose proceeds from its issue are used to finance "qualified highway or surface freight transfer facilities." 26 U.S.C. § 142(a)(15). Section 142(m)(1)(A) then defines "qualified highway or surface freight transfer facilities" as "any surface transportation project which receives Federal assistance under title 23, United States Code." Title 23, in turn, authorizes federal funding for, *inter alia*, "the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). It cannot be doubted that Indian River County is seriously concerned about the effects of any surface transportation project that cuts through the County. Nor can it be doubted that Indian River County has a strong interest in limiting or removing any hazards posed by railway-highway crossings in the County. Therefore, on the record in this case, it is not difficult to conclude that DOT's allocation of PABs pursuant to § 142(m) implicates important interests

of Indian River County. The County is a "reasonable—indeed, predictable—challenger[] of the Secretary's decisions" regarding PAB allocations in a case of this sort. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 227.

Given this context, we reject the suggestion made by DOT and Intervenor AAF that Indian River County's interests are only "marginally related to" DOT allocations of tax-exempt qualified Private Activity Bonds pursuant to 26 U.S.C. § 142(m)(1)(A). We therefore affirm the judgment of the District Court that Indian River County's interests are within the zone-of-interests of 26 U.S.C. § 142.

C. DOT Lawfully and Reasonably Allocated Private Activity Bonds to the AAF Project

The principal issue on the merits is whether DOT permissibly allocated PABs to the AAF Project. Appellant's argument on this point is straightforward:

> The AAF passenger rail project is eligible to be financed with private activity bonds only if it "receives Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A). The AAF project has not received such funding. DOT approved the use of PABs for the project on the theory that it will indirectly benefit from highway safety projects on railway-highway crossings that received federal funding under 23 U.S.C. § 130. These highway safety projects were made on the pre-existing freight corridor to be utilized by the AAF project. But a supposed benefit to the AAF project, even if proven, would not satisfy the statutory language that the AAF project itself receive federal assistance under title 23. Not only has the project not received such funding, it would not have been

> *eligible* for such funding because the only type of project eligible to receive funding under 23 U.S.C. § 130 is a project to improve the safety of railway-highway crossings. The AAF project is not a project to improve the safety of railway-highway crossings.

Appellant's Br. at 10. We find no merit in Appellant's argument.

Section 142(m)(1)(A) authorizes allocations of PABs for "any surface transportation project which receives Federal assistance under title 23, United States Code." DOT has followed a consistent interpretation of the statute that a project "receives assistance" for purposes of § 142(m) even if only a constituent portion was directly financed with Title 23 funds. Applying that interpretation here, railroad grade crossings are part of a railroad "project" on any ordinary understanding, and the record adequately supports the District Court's conclusion that crossing improvements were made in contemplation of the All Aboard Florida initiative. See *Indian River Cty.*, 348 F. Supp. 3d at 34-35.

After the Project was announced, AAF received $9 million in Title 23 funds that were used to upgrade railway-highway crossings on the Project corridor. About $2.2 million of those funds were used to upgrade 39 crossings in Phase II of the Project. The Title 23 funds used to improve the safety of the grade crossings clearly benefit the AAF Project and are important to "eliminat[ing] hazards of railway-highway crossings" as required by the statute. 23 U.S.C. § 130. Therefore, DOT permissibly and reasonably determined that the Project qualified for tax-exempt PABs under 26 U.S.C. § 142(m).

In opposition, AAF argues that DOT's interpretation of the statute rests on an "informal document" written in 2005 by the then-Acting Chief Counsel of the Federal Highway Administration and, therefore, it "does not warrant deference under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984) ("*Chevron*"), and at most is entitled to respect only to the extent it has the 'power to persuade.' *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)." Appellant's Br. at 17; see also EDWARDS & ELLIOTT, FEDERAL STANDARDS OF REVIEW 211-16, 248-51 (3d ed. 2018) (discussing *Chevron* and *Skidmore*). DOT, in response, contends that "*Chevron* deference is appropriate in light of 'the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.'" DOT Br. at 25 n.4 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002)). We need not decide whether *Chevron* deference is due because it is clear on the record before us that DOT's position easily survives review under *Skidmore*.

When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework, deference to the agency's position is due under *Skidmore*. See, *e.g.*, *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399-402 (2008). This is because an agency's views that are within its area of expertise are entitled to a level of deference commensurate with their power to persuade. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001).

DOT's position has not only been consistent; it is also eminently reasonable. After the enactment of § 142(m),

DOT sent a letter, dated October 7, 2005, to the Internal Revenue Service, explaining that "the most reasonable reading of [the statute] permits the proceeds of [PABs] authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed even though only a portion of that facility receives Federal assistance under title 23." J.A. 4494. The letter further explained that Title 23 grantees typically build some segments of the facility with Title 23 funds and other segments with state or local funds, even if the entire facility is eligible for Title 23 funding. *Id.* at 4493. The letter goes on to say that a narrow reading of the word "project" would "distort the longstanding way in which facilities are actually funded, create needless red tape, and artificially result in the extension of Federal requirements that have nothing to do with the bonding of transportation facilities." *Id.* at 4495. "This would result in doing exactly what the Congress indicated it did not intend to do. In summary, our view is that PAB proceeds may be used on any qualified facility that includes a project funded with Federal-aid highway funds made available under title 23." *Id.* DOT's long-standing position is based on persuasive considerations that are consistent with the statute. It is therefore due deference.

Appellant contends that DOT's position in this case should be rejected because the disputed PABs were approved for a surface transportation project that has not received federal assistance under Title 23. We find no merit in this claim. DOT has reasonably interpreted "project which receives Federal assistance under title 23" to mean a project which—in whole or part—benefits from assistance under Title 23. We have no reason to question this position because the statute does not require an applicant for PABs to be the direct recipient

of Federal assistance under Title 23; rather, the "project" at issue must receive assistance under Title 23.

Appellant also insists that it is not enough that the AAF Project received some assistance under Title 23; rather, according to Appellant, in order to qualify for PABs under § 142(m)(1)(A), the entire proposed Project must be funded by Title 23. See Appellant's Br. at 20. However, there is nothing in the statute to support this interpretation. In this case, DOT reasonably construed § 142 to authorize an allocation of PABs to a project that has indisputably gained significant benefits from Title 23-funded improvements to grade crossings throughout the rail line.

Finally, Appellant argues that DOT's approval of PABs for the AAF project is arbitrary and capricious because the federally funded highway safety improvement projects were not *intended* to benefit the AAF project. Assuming without deciding that such intent is required, the District Court correctly concluded that sufficient evidence of intent was present here.

The District Court found that:

> [T]he record indicates that a disproportionate amount of the Title 23 funding was disbursed only after the AAF project began. Over the ten-year period from 2005 through 2014, the railway received approximately $21 million dollars in Title 23 funding, approximately 43% of which came in the three years following the commencement of AAF's planning. Given that the AAF project received substantial attention in Florida, the Court is skeptical that the State's Department of Transportation disbursed (and increased) this Title 23 funding without the knowledge—if not purpose—of benefitting the project. In short, the

> record indicates that this is not an instance in which the AAF project was such an ancillary or unintended beneficiary of the funds as to prevent the Secretary from concluding that it had "receive[d] Federal assistance under title 23[.]" 26 U.S.C. § 142(m)(1)(A).

Indian River Cty., 348 F. Supp. 3d at 35 (second and third alteration in original) (citation omitted). These findings and the District Court's conclusion are supported by the record.

A large portion of the disputed Title 23 funds were disbursed *after* the Project was announced and they provided federal assistance to the Project by improving grade crossings all along the corridor. The financial assistance provided has been substantial, and the benefits afforded to the Project are obvious. We therefore affirm the judgment of the District Court.

D. The Environmental Impact Statement for the AAF Project Complied with the Requirements of NEPA

Finally, Appellant contends that the EIS prepared for the Project does not comply with the requirements of NEPA. Appellant argues that the EIS did not take a "hard look" at the effects of the Project on public safety; that it did not adequately disclose and mitigate safety risks to trespassers cutting across the tracks at locations other than at legal grade crossings; and that it did not sufficiently analyze the noise impacts caused by both the higher speeds of the freight trains on the improved tracks and the train horns at grade crossings. The record belies these claims.

The Supreme Court has emphasized that "inherent in NEPA and its implementing regulations is a 'rule of

reason.'" *Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004) (citation omitted). This standard "ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id.* "NEPA does *not* impose a duty on agencies to include in every EIS a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action." *Mayo*, 875 F.3d at 16 (internal quotation marks and citation omitted). And once an agency has taken a "hard look" at "every significant aspect of the environmental impact" of a proposed major federal action, it is not required to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program. *Baltimore Gas & Elec. Co.* v. *Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (quoting *Vermont Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). In sum, the Supreme Court has made it clear that we must give deference to agency judgments as to how best to prepare an EIS. See *Robertson*, 490 U.S. 332.

As the District Court's decision shows, the environmental review process conducted by FRA was thorough and it complied fully with the commands of NEPA. The District Court aptly noted that "[a]gency action is rarely perfect. But NEPA does not demand perfection. Instead, it requires that an agency take a 'hard look' at the reasonably foreseeable impacts of a proposed major federal action. The extensive Final EIS, appendices, common responses, and Record of Decision together demonstrate that FRA met that requirement here." *Indian River Cty.*, 348 F. Supp. 3d at 61-62. We agree.

As noted above, FRA prepared an EIS, covering more than 600 pages, examining the environmental impacts of the Project. J.A. 1635-2574. This process also included multiple public meetings and opportunities for public comment. *Id.* at 2559-74. In September 2014, FRA released a draft EIS and received more than 15,400 comments from a wide range of stakeholders. The public commentary was then considered by FRA when it prepared the Final EIS. *Id.* at 2569. In early August 2015, the Final EIS was released. *Id.* at 1667.

The EIS examines the Project's impacts on land use, transportation, navigation, air quality, noise and vibration, farmland soils, hazardous material disposal, coastal zone management, climate change, water resources, wild and scenic rivers, wetlands, floodplains, wildlife habitat, threatened and endangered species, social and economic effects (including impacts on low-income communities), public health and safety, parks, and historic properties, as well as the Project's cumulative impacts when combined with other past, present, or reasonably foreseeable future actions. See *id.* at 1635-2574. The EIS also sets forth a host of mitigation measures to ameliorate those negative impacts. *Id.*

The EIS additionally includes a thorough discussion of pedestrian safety, at both formal and informal crossings. And it examines and discusses mitigation of risks to pedestrians, including those using informal crossings. With respect to formal crossings, the EIS relies on a survey of every grade crossing on the rail corridor. This survey was conducted by FRA's Office of Safety, Highway Rail Crossing and Trespasser Program Division, and it includes an accompanying analysis summarized in engineering reports which are included in the EIS as Appendix 3.3.5-B. *Id.* at 2604-19.

The EIS further acknowledges that informal crossings do occur and that this form of trespassing was "an epidemic along this corridor." *Id.* at 2607 (Appendix 3.3.5-B); see also *id.* at 1762. The EIS recognizes that these informal crossings are illegal and unsafe, *id.* at 1762, and that the arrival of AAF's passenger rail service could increase the frequency of accidents involving trains and pedestrians, *id.* at 2397, 2400.

To mitigate these risks, the EIS describes a two-pronged approach: (1) AAF must discourage the use of informal crossings by installing fencing, and (2) AAF must encourage the use of formal crossings by adding sidewalks. *Id.* at 1763-64. This mitigation approach also includes a public information campaign, which will be conducted in coordination with the rail-safety organization, Operation Lifesaver. *Id.*

Moreover, the EIS notes that the rail corridor is already fenced in at certain locations, *id.* at 2199, and that AAF will conduct field surveys along the right-of-way to determine where additional fencing and other preventative measures are needed to prevent trespassing, *id.* at 2400. The EIS provides that the "corridor will be fenced where an FRA hazard analysis review determines that fencing is required for safety; this will be in populated areas where restricting access to the rail corridor is necessary for safety." *Id.* at 1900. "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." *Id.* at 2400.

In addition, the EIS takes a "hard look" at noise impacts from the Project. It finds that, if left unmitigated, these noises (principally from the warning horns that the trains, both freight and passenger, are required to sound at public highway-rail grade crossings) could

cause adverse impacts. To mitigate these impacts, AAF committed to installing pole-mounted horns at 117 intersections in the Phase II corridor, *id.* at 2291, including 23 in Indian River County, *id.* at 2671. To further reduce horn noise, AAF is cooperating with local governments that wish to establish "quiet zones" that allow both passenger and freight trains to pass through grade crossings without sounding horns. *Id.* at 2291.

It is unnecessary for us to detail other parts of the EIS or the environmental review process. The District Court's opinion, which offers an impressively thorough and thoughtful examination of the record, and which we endorse, is more than sufficient. *Indian River Cty.*, 348 F. Supp. 3d at 42-62. The bottom line is that the Final EIS for the AAF Project clearly complies with the requirements of NEPA.

CONCLUSION

For the reasons set forth above, we affirm the judgments of the District Court.

So ordered.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5012

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

Appellants,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00333)

September Term, 2019

Filed On: December 20, 2019

Before: GARLAND, *Chief Judge*, SRINIVASAN, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments of the District Court appealed from in this cause are hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

Date: December 20, 2019

Opinion for the court filed by Senior Circuit Judge Edwards.

APPENDIX C
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NO. 18-CV-00333 (CRC)

INDIAN RIVER COUNTY, FLORIDA[1] et al,
Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION et al,
Defendants.

MEMORANDUM OPINION

December 24, 2018

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[1] This case was captioned *Martin County et al* v. *Department of Transportation et al* in all previous filings. The Court has adjusted the case name to reflect Martin County's voluntary dismissal. See Joint Stipulation of Dismissal, ECF No. 48.

AAF Holdings, Inc. ("AAF") plans to construct and operate an express passenger railway connecting Orlando and Miami, Florida. The initial segment of the line between Miami and West Palm Beach is currently operational. The extension of the line to Orlando is still in the planning stages. To help AAF finance the extension, the U.S. Department of Transportation has allocated $1.15 billion in federally tax-exempt bonds to be issued by a Florida economic development agency.

The planned extension of the railway will run through Indian River County on Florida's Treasure Coast. The County and its Emergency Services District (together, "Indian River County" or "Plaintiff") have long objected to the project. In this, its second lawsuit challenging the

project, Indian River County seeks summary judgment on two grounds. First, it contends that the Department of Transportation exceeded its authority in allocating the bonds because the project is not eligible to receive tax-exempt funding under two separate provisions of the Internal Revenue Code. Second, the County maintains that the Federal Railway Administration ("FRA") violated the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA") by conducting a flawed and incomplete review of the public health and safety consequences of the project. Defendants the Department of Transportation, its component FRA, and several of its officers (together, "federal Defendants," "the Department," or "FRA") filed a cross motion for summary judgment, as did AAF, which has intervened as a defendant. Because the Department's allocation met the tax code's requirements and the FRA's review complied with NEPA, the Court will deny Indian River County's motion for summary judgment and grant the federal Defendants' and AAF's.

I. Background

A. Factual Background

1. The proposed project

AAF is in the process of constructing a private passenger train service that will ultimately provide service between Miami and Orlando. Phase I of the project currently operates from Miami to West Palm Beach. AR 65115-16. Phase II will run from West Palm Beach north along Florida's east coast to Cocoa and then west and inland to Orlando. *Id.* AAF plans to lay a second track along a 128.5 mile stretch of single-track train corridor owned by the Florida East Coast Railway ("FECR") from West Palm Beach north to Cocoa. AR 65115. This track is currently used only by freight trains, some of

which carry hazardous materials, but historically was used by both freight and passenger trains. AR 73914. This corridor is referred to in the record and by the parties as either the FECR Corridor or the N-S Corridor. AR 65115. The N-S Corridor bisects Indian River County. AR 73572. AAF also proposes constructing a new 40-mile track that would connect Cocoa and Orlando. This stretch of track is referred to as the E-W Corridor. AR 65115.

AAF plans to operate thirty-two passenger trains per day in addition to the FECR freight trains that now run along the N-S Corridor. AR 65116. These trains would run through Indian River County for twenty-one miles. AR 73753. There are thirty "grade crossings" in the County. *Id.* A grade crossing is an intersection where the railway crosses a road or path at the same level or grade, rather than an intersection where trains cross over or under the road using an overpass or tunnel. In addition to these grade crossings, the trains will traverse bridges that are either fixed or moveable (*i.e.*, draw bridges). Two of these moveable bridges are at issue in this case: the St. Lucie River Bridge and the Loxahatchee River Bridge. AR 73915. When these bridges are in the "down" position, trains can cross over but boats on the river cannot cross under.

2. The Secretary's bond allocation

AAF is partially financing the railway project through private activity bonds ("PABs") issued by the Florida Development Finance Corporation ("FDFC"), an agency of the State of Florida. Congress has authorized the United States Department of Transportation to allocate tax-exempt authority to PABs used to finance specific types of transportation projects. See 26 U.S.C. § 142(m)(2)(C). AAF initially applied for a PAB allocation

in August 2014. In December 2014, the Department of Transportation approved that application and provisionally allocated $1.75 billion in tax-exempt PABs for the project. See *Indian River Cty.* v. *Rogoff* ("*Indian River Cty. I*"), 110 F. Supp. 3d 59, 65 (D.D.C. 2015). AAF planned to use these PABs to finance both phases of the railway.

In November 2016, the Department, at AAF's request, withdrew the provisional allocation and replaced it with a $600 million allocation of PAB authority to finance only Phase I of the project. *See Indian River Cty.* v. *Rogoff* ("*Indian River Cty. III*"), 254 F. Supp. 3d 15, 17-18 (D.D.C. 2017). Then, in December 2017, AAF applied for a new allocation of $1.15 billion in PAB authority to finance Phase II of the project. See AR 74220-62. As part of its application, AAF represented that the project had received $9 million in Title 23 federal funds, disbursed by Florida's Department of Transportation for highway-rail crossings along the rail corridor. AR 74235. AAF included in its application a resolution by FDFC approving the issue of bonds to finance the project. AR 74240-53. That resolution concluded that the bond issue had received requisite public approval for tax-exempt status because a designee of the State's Governor had approved their issue after a properly noticed public hearing. AR 74242-44. AAF's application highlighted that the bonds had already received this public approval. AR 74221. Further, AAF included in its application a bond counsel validity opinion, by the law firm Greenberg Traurig, which concluded that "interest on the Bonds . . . is excludable from gross income for purposes of federal income taxation under existing laws as enacted and construed[.]" AR 74256.

The Department approved the application and provisionally allocated $1.15 billion in PAB authority on December 20, 2017. AR 74324-26. Its provisional allocation letter conditioned final allocation on several requirements, including compliance with all applicable federal laws, as well as "a final bond counsel tax and validity opinion . . . issued at the time of the closing of the bond issue in substantially the form provided with the application." AR 74324. While FDFC will issue the bonds, AAF is responsible for marketing and selling them to investors. The parties have represented that the bonds will be marketed in the next several weeks.

3. The environmental review process

AAF originally sought federal loan funding for the project through the Railroad Rehabilitation and Improvement Financing ("RRIF") program. RRIF loans are subject to NEPA review. 49 C.F.R. § 260.35. FRA reviewed the potential environmental impacts of the project under NEPA. AR 73636. With respect to Phase I, FRA issued a Finding of No Significant Impact in 2013. AR 73570. FRA then began preparing an Environmental Impact Statement ("EIS") for Phase II. AR 73571. It held five public scoping meetings in May 2013 and received 248 comments in response to those meetings and more than 160 comments in the subsequent seventeen months. AR 74155-56. As required, FRA coordinated with federal, state, local, and tribal governments, including Indian River County. AR 74157-59.

FRA completed a draft EIS in September 2014. AR 74164. The draft attracted some 15,400 public comments. *Id.* During the comment period, FRA also held eight public meetings, *id.*, which were attended by over 2,500 people, AR 74165. FRA issued a Final Environmental Impact Statement ("FEIS") in August 2015. See AR

73568. FRA subsequently received additional comments on the FEIS, including from Plaintiff. AR 65154. When AAF withdrew its RRIF loan application in 2015, FRA decided to not issue a Record of Decision ("ROD"). AR 65118. After AAF re-filed an RRIF application in 2017, FRA resumed the NEPA process and published the ROD in December 2017. AR 65109-65. Appendix C to the ROD provides responses to the comments on the FEIS. See AR 65154; AR 65266-300.

The FEIS selects AAF's preferred route as the best alternative for the project and determines that no further environmental review is necessary. AR 73578. The FEIS itself is 646 pages long and separately includes numerous appendices including maps and analyses of noise impacts, navigation patterns, and more. The FEIS and ROD outline the purpose of and need for the project, the alternatives considered, the affected environment, the potential environmental consequences of the project and reasonable alternatives, and the historic properties affected by the project. The FEIS also includes a chapter on measures that would avoid, minimize, or mitigate impacts that would result from the project. AAF has committed to implementing a series of mitigation measures during both the construction and operation phases of the project.

As part of the NEPA process, AAF retained the environmental consulting firm Vanasse Hangen Brustlin ("VHB") as a third-party advisor to FRA. This arrangement was memorialized in an agreement between FRA, VHB, and AAF. See AR 1045-62. Under that agreement, VHB's "scope of work, approach, and activities shall be under the sole supervision, direction, and control of the FRA." AR 1046. AAF also hired its own consultant, Amec Foster Wheeler ("Amec"). In general, Amec

conducted initial technical work, which it then submitted to VHB and FRA for review and comment. AR 897-98; see also AR 1062. The record includes a series of technical memoranda produced by Amec on issues like noise and vibration. See, *e.g.*, AR 61081-238 (Amec's "Technical Memorandum No. 5 Noise and Vibration for AAF Passenger Rail Project"). The record also reflects significant back-and-forth regarding those memoranda between VHB and FRA on the one hand and Amec and AAF on the other. See, *e.g.*, AR 1083-87, 1305-43, 1561-62, 7302-06, 7349-51 (charts setting forth VHB/FRA comments on Amec technical memoranda and Amec/AAF responses).

B. Procedural Background

As noted above, this is the second time Indian River County has sued in this Court to prevent or delay the Secretary of Transportation's allocation of tax-exempt bond issuance authority to finance the AAF project. In 2015, both Indian River County and nearby Martin County, through which the proposed railway would also run, sought (among other relief) a preliminary injunction vacating the Secretary's authorization of the tax exemption, which allocated PAB authority for both phases of the project. See *Indian River Cty. I*, 110 F. Supp. 3d at 66. Both counties alleged violations of NEPA, the National Historic Preservation Act ("NHPA"), and the Department of Transportation Act ("DTA"), each of which sets forth certain procedural requirements for major federal actions. Martin County also alleged a violation of § 142 of the Internal Revenue Code. There, as here, AAF intervened as a defendant. Initially, the Court concluded that the counties had failed to show that their asserted injuries—public-safety hazards and harms to environmental and historic sites from the construction and oper-

ation of the railway—were traceable to the Secretary's action or redressable by the Court. Specifically, while the counties had shown that the cost of financing the project would increase without the Secretary's allocation of tax-exemptions, they were unable to show "that these costs would *significantly* increase the likelihood that AAF would abandon the project[.]" *Id.* at 71. In short, the plaintiffs had failed to show that if the Court were to grant them precisely what they asked for, the project would cease and their harms would be remedied. The Court also held that the counties' alleged procedural injury—stemming from the purported failure to conduct an appropriate environmental review—was insufficient to confer standing absent some tethering to a substantive injury sufficient for standing. *Id.* at 73. The Court thus denied the counties' motions because they had not established standing to sue. See *id.*

Following *Indian River County I*, the Court granted the counties permission to conduct jurisdictional discovery to demonstrate that, but for the PAB allocation, AAF would not complete the railway. Subsequently, the Department of Transportation moved to dismiss the counties' suits. The Court concluded that through jurisdictional discovery, the counties had shown "that invalidating [the Department's] decision to authorize . . . PABs would significantly increase the likelihood that AAF would not complete . . . the project." *Indian River Cty.* v. *Rogoff* ("*Indian River Cty. II*"), 201 F. Supp. 3d 1, 4 (D.D.C. 2016). Further, the Court found that the plaintiffs had alleged sufficient facts to demonstrate that the AAF project qualified as "major federal action" triggering certain requirements under NEPA, NHPA, and DTA. *Id.* at 20. Consequently, it denied the motion to dismiss those claims. It did, however, dismiss Martin

County's claim that the PAB allocation violated § 142 of the Internal Revenue Code, concluding that the County's asserted injuries fell outside the zone of interests that Congress sought to protect in § 142. *Id.* at 21.

Following the Court's decision in *Indian River County II* that the counties had stated valid claims, AAF withdrew its application for a PAB allocation. It replaced that application, which had sought to use the bonds to finance both phases of the project, with an application for a smaller allocation to be used only for Phase I. Because Phase I dealt only with a portion of the proposed railway that did not run through the plaintiff counties, the Court dismissed the cases at moot. *Indian River Cty. III*, 254 F. Supp. 3d at 22.

Since then, AAF applied for an allocation to help finance Phase II, which the Department of Transportation provisionally approved. Indian River County, initially joined by Martin County and a group of concerned citizens, has again sued. They contend that the PAB allocation violated two provisions of the Internal Revenue Code and that FRA did not comply with its requirements under NEPA. AAF again intervened as a defendant. The parties all moved for summary judgment. The Court held a hearing on these motions on November 27, 2018. Shortly before this hearing, Martin County and the citizens group reached a settlement with the federal Defendants and AAF and, therefore, are no longer plaintiffs in the case.

II. Analysis

A. The Bond Allocation

To facilitate Phase II of the AAF railway, the Secretary of Transportation provisionally allocated tax-exempt authority to $1.15 billion in PABs to be issued to finance the project. The Secretary of Transportation's allocation

is subject to review under the APA. 5 U.S.C. §§ 702, 706. *Chevron, U.S.A.* v. *NRDC*, 467 U.S. 837 (1984), establishes a two-part inquiry to determine whether an agency has arrived at a permissible interpretation of the law it is charged with administering. First, if a law directly addresses the precise question at issue, Congress's directive controls. *Id.* at 842-43. Second, if the statute is silent or ambiguous regarding the matter at hand, "the question for the court is whether the agency's interpretation is based on a permissible construction of the statute in light of its language, structure, and purpose." *Nat'l Treasury Emps. Union* v. *Fed. Labor Relations Auth.*, 754 F.3d 1031, 1042 (D.C. Cir. 2014) (quoting *AFL-CIO* v. *Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)). The court must defer to any reasonable agency interpretation, *Loving* v. *IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014), which need not be the one "deemed most reasonable by the courts[,]" *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

Indian River County contends that the Secretary's allocation violated two provisions of the Internal Revenue Code. A brief overview of the statutory scheme contextualizes these challenges and the Department and AAF's responses. Congress has authorized interest earned on certain types of PABs to be exempted from federal taxation. See 26 U.S.C. §§ 103, 141. Because this exemption allows the bondholder to keep all the interest, bond issuers can sell the bond at a lower interest rate. A PAB must be a "qualified bond" in order for it to be tax-exempt. *Id.* § 103. Section 141 outlines certain types of PABs that can constitute "qualified bond[s]," including "exempt facility bond[s]." *Id.* § 141(e)(1)(A). Under § 142(a), a bond is an "exempt facility bond" if at least 95% of proceeds from its issue are used to finance one of

fifteen enumerated categories of projects. *Id.* §142(a). One such category is "qualified highway or surface freight transfer facilities." *Id.* §142(a)(15). Section 142(m) defines "qualified highway or surface freight transfer facilities," *id.* §142(m)(1), and authorizes the Secretary of Transportation, "in such manner as [she] determines appropriate," *id.* §142(m)(2)(C), to allocate up to $15 billion of PAB authority to eligible projects, *id.* §142(m)(2)(A). Put simply, Congress has enacted a mechanism through which the Secretary can allocate tax exemptions to bonds used to finance construction of, or improvements to, certain types of facilities. These exemptions lower the cost of selling the bonds, better enabling state and local governments to finance the projects.

The Secretary's allocation is necessary, but not sufficient, for a bond to be tax-exempt because it finances a "qualified highway or surface freight transfer facilit[y]." *Id.* §142(m)(2)(A). The Internal Revenue Code also establishes other requirements for PABs to be considered "qualified" and thus tax-exempt. See *id.* §141(e)(3). These include a requirement that bonds used to finance a facility must be approved by both "the governmental unit . . . which issued such bond," *id.* §147(f)(2)(A)(i), and "each governmental unit having jurisdiction over the area" in which any bond-financed facility is located, *id.* §147(f)(2)(A)(ii).

In this case, Indian River County alleges first that the Secretary violated the statute because the AAF passenger railway is ineligible for a PAB allocation under §142(m). The County also contends that, in any event, because it has not approved the bond issue as §147(f) requires, the PABs cannot be tax exempt. The Court turns to each of these statutory provisions.

1. Section 142(m)

Indian River County alleges that the Secretary's allocation of PAB authority to the AAF railway violated 26 U.S.C. § 142(m). It contends that because the project is not an eligible "qualified highway or surface freight transfer facilit[y]," the Secretary exceeded her statutory powers in allocating PAB authority to the project. In the last round of litigation, Martin County raised a similar argument, which the Court rejected as going beyond the "zone of interests" protected by § 142. See *Indian River Cty. II*, 201 F. Supp. 3d at 20-21. Both the federal Defendants and Intervenor-Defendant ask the Court to reach the same result this time around. Alternatively, they argue that the allocation complied with § 142. For the following reasons, the Court concludes that Indian River County has shown that its asserted interests arguably fall within the zone of interests Congress sought to protect in § 142, but that its claim fails on the merits.

a. Zone of Interests

Before the Court reaches the substance of Indian River County's § 142 claim, it "must . . . inquire whether the plaintiff[ ] fall[s] within the class of persons whom Congress has authorized to sue under the Administrative Procedure Act." *Mendoza* v. *Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014). To do so, it must determine whether Indian River County's "grievance . . . arguably fall[s] within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit," in this case § 142. *Id.* (quoting *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997)). This inquiry "is not meant to be especially demanding" and "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke* v. *Sec. Industry Ass'n*, 479 U.S. 388, 399 (1987)).

When Martin County advanced its § 142 claim in the last round of litigation, the Court concluded that it had not cleared this hurdle. In that instance, like Indian River County does here, Martin County asserted interests in public safety, environmental protection, and historic preservation. *Indian River Cty. II*, 201 F. Supp. 3d at 21. It relied on SAFETEA, Pub. L. 109-59, 119 Stat. 1144 (2005)—the legislation through which Congress amended § 142 to add PAB authorization for "qualified highway or surface freight transfer facilities"—to contend that Congress sought to protect these interests when it amended § 142. See *Indian River Cty. II*, 201 F. Supp. 3d at 20-21. But as the Court explained at the time, SAFETEA is a "massive statute with many objectives" and its relevant amendments to § 142 were "but a tiny component of the overall legislation." *Id.* at 21. As such, it would have been—and remains—too dilutive of the zone of interests test to allow a plaintiff to challenge an allocation under § 142(m) based on an interest advanced *anywhere* in SAFETEA. *Id.* at 20 (citing *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977)). Instead, "the relevant unit of analysis" for conducting the inquiry is § 142 itself. *Id.* And because "Martin County present[ed] no real argument that its interests [were] more than marginally related [to] those protected or regulated by *Section 142* itself," but rather "place[d] all its eggs in the SAFETEA basket instead," *id.* at 21, the Court dismissed the claim.

In this litigation, Indian River County has advanced stronger arguments, focusing appropriately on the interests at stake in § 142 itself. Indian River County con-

tends that these interests are illuminated by § 147(f), which requires State or local government approval for certain PABs to qualify for tax exemption. "In applying the zone-of-interests test, [courts] do not look at the specific provision said to have been violated in complete isolation[.]" *Fed'n for Am. Immigration Reform, Inc. ("FAIR")* v. *Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996). At the same time, courts must police the extent to which they look beyond the provision invoked to ensure that casting a wider net does not "deprive the zone-of-interests test of virtually all meaning." *Air Courier Conference of Am.* v. *Am. Postal Workers Union*, 498 U.S. 517, 530 (1991). Accordingly, a court must limit its analysis to the provision invoked for suit, as clarified by any provisions to which it bears an "integral relationship." See, *e.g.*, *FAIR*, 93 F.3d at 904. In this case, then, the Court must first determine whether § 147(f) bears an integral relationship with § 142, the provision upon which Indian River County sues.

The Court concludes that the two provisions do bear an integral relationship. They form adjacent requirements for PABs used to finance certain categories of facilities to qualify for tax-exempt status: § 142 enumerates the types of facilities, and § 147(f) ensures public approval and democratic accountability for their construction.[2]

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[2] The fact that each provision specifically deals with "facilities" is important. Indian River County relies in part on the fact that § 142 and § 147 share a common subpart of the Internal Revenue Code, which governs PABs eligibility. Courts have often found provisions contained in a common sub*section* to be integrally related. See, *e.g.*, *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798, 804-05 (D.C. Cir. 1985); *Save Jobs USA* v. *DHS*, 210 F. Supp. 3d 1, 11-12 (D.D.C. 2016). But a common subpart is less instructive where, as here, the PABs subpart has multifarious purposes and covers several different types of bonds. But § 142 and § 147 each gov-

Absent § 147(f) approval, PABs used to finance a § 142 facility cannot be tax-exempt; and PABs approved pursuant to § 147(f) are not tax-exempt unless they are used to finance a § 142 facility. Cf. *Wash. All. of Tech. Workers* v. *DHS*, 156 F. Supp. 3d 123, 135 (D.D.C 2015) (holding that provisions share an integral relationship in part because they perform an "interlocking task").

Most importantly, each requirement evinces a common purpose: ensuring that when the public fisc forgoes revenue through tax-exempt bonds, those bonds are used to benefit the public. As the Court explained in *Indian River County II*: "Congress enacted 26 U.S.C. § 142 in general, and Sections 142(a)(1) and 142(m) in particular, to create a tax benefit to support the development and construction of certain kinds of projects with significant public benefits and a demonstrated need for financial assistance." 201 F. Supp. 3d at 21. When Congress added § 142(m) to the Internal Revenue Code in 2005, it did so against the backdrop of § 147(f), which it had first added to the Code in 1982 in a clear effort to ensure public benefit from tax-exempt bonds. As the Senate Finance Committee Report explained at the time:

> The committee believes that new restrictions are needed on [bonds] to help eliminate inappropriate uses and to help restore the benefit of tax-exempt

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erns the use of bonds to finance facilities in particular, evincing a closer relationship than § 142 shares with, for example, the rules governing mortgage bonds that are also contained in that subpart. The Court's conclusion is not that the two bear an integral relationship simply because they share a common subpart, but because they both deal with a common activity regulated by that subpart. Thus, contrary to Defendants' contentions, the Court's conclusion that the two provisions bear an integral relationship does not license *any* plaintiff whose interests are protected by *any* provision within the subpart to challenge a § 142(m) allocation.

> financing for traditional governmental purposes. However, the committee believes that, in general, state and local governments are best suited to determine the appropriate uses of [bonds]. The committee believes that providing tax exemptions for the interest on certain [bonds] may serve legitimate purposes in some instances provided that the elected representatives of the state or local governmental unit determine after public input that there will be substantial public benefit from issuance of the obligations[.]

S. Rep. No. 97-494(I), at 168 (1982).

This suggests a common purpose: § 142 reflects congressional judgment about the types of projects that benefit the public enough to warrant tax-exempt financing, and § 147(f) creates a mechanism of democratic accountability by which the public can confirm that a particular project does indeed confer public benefit. *Cf. Nat'l Petrochemical & Refiners Ass'n* v. *EPA*, 287 F.3d 1130, 1148 (D.C. Cir. 2002) (holding that provisions shared an integral relationship because one helped "accomplish[ ] one of the express goals" of the other).

The same legislative history and interlocking purpose compel the Court to reconsider its holding in *Indian River County II* that local governments fall outside § 142's zone of interests. Indian River County has properly focused its attention not on SAFETEA as a whole, but on § 142 itself and its purpose of "support[ing] the development and construction of certain kinds of projects with significant public benefits[.]" *Indian River Cty. II*, 201 F. Supp. 3d at 21. By demonstrating that § 142 and § 147(f) bear an integral relationship, the County has illuminated § 142 in a way that suggests Congress's intent was indeed to allow State and local governments to en-

sure public benefit would accrue from projects financed by tax-exempt bonds. And because it appears from the legislative history that Congress gave some deference to State and local governments' assessment of public benefit, Indian River County's asserted interests at least arguably fall within the zone of interests protected by § 142. Accordingly, the Court concludes that Indian River County has plausibly stated a claim under that provision.

b. The merits of the County's Section 142(m) claim

Moving to the merits of Indian River County's § 142 claim, the County contends that the Secretary's allocation is inconsistent with the statute because Phase II is not a "qualified highway or surface freight transfer facilit[y]," 26 U.S.C. § 142(a)(15), and thus is ineligible for an allocation of PAB authority. The Court concludes that the Secretary's allocation conformed to the statutory requirements and was a reasonable exercise of her discretion. It will therefore grant summary judgment on this issue to the Department and AAF.

Section 142 defines "qualified highway or surface freight transfer facilities" to include "any surface transportation project which receives Federal assistance under title 23, United States Code[.]" *Id.* § 142(m)(1)(A). The Secretary allocated PAB authority after concluding that the project fell within this definition. Indian River County challenges that allocation, contending that § 142(m)(1)(A) does not encompass the project and it was thus ineligible for an allocation. Specifically, the County contends that, when read in proper context, a "surface transportation project" means only a highway project, which necessarily precludes an allocation to any rail project. It also maintains that if the term "any surface transportation project" did encompass rail projects, the

AAF project has not received Title 23 federal assistance. The Court addresses each point in turn.

i. Whether the AAF project is a "surface transportation project" within the meaning of § 142(m)(1)(A)

The plain meaning of § 142(m)(1)(A) is unambiguous. It defines "qualified highway or surface freight transfer facilities" to include "any surface transportation project[.]" 26 U.S.C. § 142(m)(1)(A). Because Congress did not specify what "surface transportation" means, the ordinary meaning of the phrase controls. See, *e.g., Johnson* v. *United States*, 559 U.S. 133, 138 (2010). The dictionary definition of "surface transport" is "the movement of people or goods by road, train, or ship, rather than by plane." Cambridge Business English Dictionary (2011). This plainly includes rail projects. Defining "surface transportation" to include rail comports with its use elsewhere in federal law. For example, in SAFTEA, the legislation through which Congress enacted § 142(m), a provision in another portion of the bill defined "surface transportation system" to include "freight and intercity passenger bus and rail infrastructure and facilities." SAFETEA § 1909(b)(14), Pub. L. 109-59, 119 Stat. 1476 (2005). The Surface Transportation Board—a congressionally created agency—is particularly notable: its charge includes jurisdiction over rail issues. See generally, ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995); Surface Transportation Board Reauthorization Act of 2014, Pub. L. 114-110, 129 Stat. 2228 (2014). There is no need to belabor the point with more examples: the dictionary definition of "surface transportation," the phrase's meaning in other areas of law, and its ordinary usage all indicate that § 142(m)(1)(A) includes rail projects.

Congress's use of "any" further indicates as much: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). The Supreme Court has explained that when interpreting a statutory provision, "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). The same principle applies here: Congress's use of "any" to modify "surface transportation project" is most naturally read to mean surface transportation projects of whatever kind—including rail projects.

Indian River County nonetheless insists that the plain text of § 142(m)(1)(A) cannot be read in isolation and that its context indicates that it refers only to highway projects. Relying on the principle of *noscitur a sociis*—a word is known by the company it keeps—the County highlights several contextual clues to contend that when Congress said "any surface transportation project," it was actually referring only to highways.

First, the County notes that § 142(m)(1)(A) must be read in light of the word "highway" in the phrase that it is defining: "qualified *highway* or surface freight transfer facilities." 26 U.S.C. § 142(m)(1) (emphasis added). Because another portion of § 142(m)(1) deals with surface freight transfer facilities, see 26 U.S.C. § 142(m)(1)(C), Plaintiff contends, § 142(m)(1)(A) must deal with the "highway . . . facilities." But that argument is unavailing in the face of Congress's chosen definition. In interpreting a statute, courts defer to Congress's definition of a statutory provision, even if that definition is at odds with the ordinary meaning. See, *e.g.*, *Digital Realty Trust,*

Inc. v. *Somers*, 138 S. Ct. 767, 776-777 (2018). Thus, even accepting Plaintiff's premise, it was Congress's prerogative to define "highway . . . facilities" as encompassing more than highways. And, as discussed, that is plainly what it did when it defined the term to include "*any* surface transportation project."

Second, Indian River County notes that when Congress added "qualified highway or surface freight transfer facilities" to § 142, the statute already listed fourteen other types of facilities eligible for PABs financing. See 26 U.S.C. § 142(a). Plaintiff insists that the fact that this list already included railway facilities—in the form of "high-speed intercity rail facilities," *id.* § 142(a)(11), and "mass commuting facilities," *id.* § 142(a)(3)—Congress's inclusion of "qualified highway . . . facilities" must be understood to preclude passenger rail projects. As an initial matter, the original list did not encompass all rail projects. "[M]ass commuting facilities" do not encompass longer passenger rail services that connect distant cities to one another. Likewise, "high-speed intercity rail facilities" include only passenger trains capable of 150 mile-per-hour maximum speeds, *id.* § 142(i)(1), which excludes slower trains (including those AAF is using). In other words, the list to which Congress added "qualified highway or surface freight transfer facilities" encompassed some types of passenger rail projects, but not all. It would make perfect sense and would not be duplicative for Congress to add a provision covering other types of rail projects. Nor would it supplant those provisions. While the types of railways encompassed by "mass commuting facilities" and "high-speed intercity rail facilities" fall into the ambit of "any surface transportation project," they do not necessarily also receive Title 23 funds as § 142(m)(1)(A) requires.

Third, Indian River County points to the fact that § 142(m)(1)(A)'s limiting provision references Title 23—*i.e.*, that a surface transportation project constitutes a "qualified highway or surface freight transfer facilit[y]" only if it "receives Federal assistance under title 23, United States Code[.]" *Id.* § 142(m)(1)(A). Title 23 is a portion of the U.S. Code entitled "Highways." This detail, Plaintiff insists, further demonstrates that "any surface transportation project" must refer only to highways—especially since later in the provision, Congress included in its definition of "qualified highway or surface freight transfer facilities" certain types of facilities that receive funding under either Title 23 or Title 49, which addresses railroads. See *id.* § 142(m)(1)(C). According to Plaintiff, the exclusion of a reference to Title 49 in § 142(m)(1)(A), when it was included in § 142(m)(1)(C), means that § 142(m)(1)(A)'s reference to Title 23 indicates that it extends only to highway projects. But while Title 23 does deal generally with highways, it also contains provisions authorizing funds for non-highway transport, including passenger rail. See, *e.g.*, 23 U.S.C. § 601(a)(12). Consequently, the reference to Title 23 is not as strong a contextual clue as Plaintiff suggests and is insufficient to supplant Congress's capacious definition, notwithstanding the fact that the Title 23 is called "Highways." *Cf. United States* v. *Spencer*, 720 F.3d 363, 367 (D.C. Cir. 2013) (embracing "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text" (citation omitted)).

Indian River County also invokes the canon *expressio unius est exclusio alterius*—that "expressing one item of an associated group or series excludes another left unmentioned," *Chevron U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (citation and internal alteration omitted).

The County suggests that because other portions of § 142(m) reference non-highway surface transport, § 142(m)(1)(A) cannot be interpreted to include such transport. Section 142(m) includes both "any project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible," 26 U.S.C. § 142(m)(1)(B), and "any facility for the transfer of freight from truck to rail or rail to truck," *id.* § 142(m)(1)(C), among "qualified highway and surface freight transfer facilities," provided they receive appropriate funding. But their inclusion does not imply an exclusion of non-highway projects from "any surface transportation project[.]" The D.C. Circuit has repeatedly indicated that "[t]he *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" *Adirondack Med. Ctr.* v. *Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (quoting *Cheney R.R. Co.* v. *I.C.C.*, 902 F.2d 66, 68-69 (D.C. Cir. 1990)). In particular, "when countervailed by a broad grant of authority contained within the same statutory scheme, the canon is a poor indicator of Congress' intent." *Id.* (citing *Creekstone Farms Premium Beef, L.L.C.* v. *Dep't of Agric.*, 539 F.3d 492, 500 (D.C. Cir. 2008)). Here, Congress granted the Department wide discretion, allowing it to allocate PAB authority among facilities "in such manner as the Secretary determines appropriate." 26 U.S.C. § 142(m)(2)(C). Plaintiff's invocation of *expressio unius est exclusio alterius* is thus misplaced and does little to undermine the Secretary's interpretation, particularly in light of § 142(m)(1)(A)'s plain, capacious language.

Put simply, if Congress had intended for the addition of "qualified highway or surface freight transfer facili-

ties" to cover only highway projects, it would have made that clear. For example, it could have defined "qualified highway . . . facilities" to include only *highway* surface transportation projects, instead of "surface transportation project[s]." It did not do so. Instead, it used a definition that referred to "*any* surface transportation project," evincing broad inclusion.

As such, the Court has little trouble concluding that § 142(m) supports the Secretary's allocation of PAB authority to a passenger rail project, assuming it receives Title 23 funds.[3]

ii. Whether the project received Title 23 funding

Indian River County also contends that Phase II was ineligible for a PAB allocation because the project has not "receive[d] Federal assistance under title 23, United States Code," as required by § 142(m)(1)(A).

Here, the Secretary approved the allocation based on an application submitted by AAF. The application contains the following information concerning Title 23 funding:

> The planning process for All Aboard Florida started in December 2011. Since then, approximately $9 million from Section 130 of U.S. Code Title 23 has been invested in the entire corridor to improve railway-highway grade crossings and

[3] The plain text of the statute is enough to support the Secretary's action, but it bears noting that this is not the first instance in which the Department allocated PAB authority to a passenger railway. The Department has previously allocated such authority to Maryland's Purple Line light rail project and Denver's Eagle Commuter Rail project. See Private Activity Bonds, US Dep't of Transp. Build America Bureau, https://www.transportation.gov/buildamerica/programs-services/pab (last visited Dec. 24, 2018).

> prepare the corridor for growth in rail traffic. Future investments from the Section 130 program are planned for future calendar years. The Florida Department of Transportation administers the Section 130 program on behalf of the State of Florida.

AR 74235; see also AR 73549-62.

Indian River County objects that this Title 23 funding went to FECR, the freight railway line on whose tracks AAF's passenger trains will run. In other words, the County contends that FECR, not AAF, received the Title 23 funding and AAF merely benefitted from it. As an initial matter, § 142(m)(1)(A) requires that PABs be allocated to a "*project* which receives Federal assistance under title 23, United States Code[.]" 26 U.S.C. § 142(m)(1)(A) (emphasis added). Nothing in this provision requires that the project *proponent*—here, AAF—receive Title 23 funds. Nor does anything require the bond-financed project to be the *exclusive* beneficiary of those funds. The Department has long interpreted the statute to allow for PAB allocation to projects based on direct benefits from Title 23 spending. It highlights examples in which it has allocated PAB authority to a light rail project based on Title 23 funding to upgrade an adjoining trail, and to freight transfer facilities based on Title 23 funding to upgrade nearby highways and bridges. See Fed. Defs.' MSJ at 24 (citing Decl. of Paul Baumer ¶ 7, *Martin Cty.* v. *Dep't of Transp.*, No. 15-cv-632-CRC (D.D.C. May 15, 2015), ECF No. 19-2). Thus, the Department's long-standing interpretation of § 142(m)(1)(A) is consistent with the Secretary's allocation of PAB authority to AAF's project. And nothing in the statutory text precludes that interpretation, notwithstanding the facts that Title 23

funding went to FECR rather than AAF and that FECR, in addition to AAF, benefited from the funding.

But at the same time, as the Department has tacitly acknowledged, see Hr'g Tr. at 64:9-23, the statutory requirement that a project receive Title 23 funding cannot be construed so broadly as to allow the Department to bootstrap a project into PAB eligibility based solely on an incidental and unintentional benefit from the funds. In other words, the record must support the conclusion that the funds were disbursed to benefit the project.

The record here supports the Secretary's conclusion that the project received Title 23 funding. Florida's Department of Transportation disbursed approximately $9 million to account for increased rail traffic on the FECR railway *after* AAF commenced planning its project. AR 74235, 73549-62. To be sure, there were planned increases in FECR freight traffic as well, but the record indicates that a disproportionate amount of the Title 23 funding was disbursed only after the AAF project began. Over the ten-year period from 2005 through 2014, the railway received approximately $21 million dollars in Title 23 funding, approximately 43% of which came in the three years following the commencement of AAF's planning. AR 73549-62. Given that the AAF project received substantial attention in Florida, the Court is skeptical that the State's Department of Transportation disbursed (and increased) this Title 23 funding without the knowledge—if not purpose—of benefitting the project. In short, the record indicates that this is not an instance in which the AAF project was such an ancillary or unintended beneficiary of the funds as to prevent the Secretary from concluding that it had "receive[d] Federal assistance under title 23[.]" 26 U.S.C. §142(m)(1)(A). Between these facts and the deferential nature of its review,

the Court cannot accept Indian River County's contentions.

Indian River County also alleges that the Department inappropriately interpreted §142(m)(1)(A) to allow PAB authority to finance the entire railway corridor based on the expenditure of Title 23 funds for discrete highway-rail crossings along that corridor. The Secretary's conclusion—that the highway-rail crossings sufficed to render the whole corridor eligible for PAB allocation—is consistent with longstanding Department interpretation of what constitutes a "project" for purposes of §142(m)(1)(A). Immediately following SAFETEA's passage, the Federal Highway Administration ("FHA") wrote to the IRS to indicate its view that "the most reasonable reading . . . permits the proceeds of [PABs] authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed even though only a portion of that facility receives Federal assistance under title 23." AR 73546. FHA explained that a narrower reading of "project" would cause States, which disburse Title 23 funds, to sprinkle the funds along whole facilities in order to make them eligible for PAB allocation, rather than continuing the practice of using them at discrete portions of facilities. AR 73546-47. Concluding that Congress did not intend §142(m)(1)(A) to change disbursement practices, FHA interpreted the provision to reflect a broader definition of "project" than just the specific portion of a facility financed by Title 23 funding. FHA's analysis reflects a reasonable assessment of congressional intent and the statutory text, and the Secretary's interpretation of §142(m)(1)(A) in this case conforms to it.

The Court therefore concludes that Phase II of the AAF railway is a project that received Title 23 funding.

Because it is also a surface transportation project, the Court will grant summary judgment to the federal Defendants and Intervenor-Defendant on this claim.

2. Section 147(f)

Indian River County also challenges the use of PABs as a violation of 26 U.S.C. § 147(f), which establishes public approval requirements before bonds can be "qualified" to receive tax-exempt status. The County insists that unless and until it approves the PABs, they do not constitute qualified bonds. The Department of Transportation asks the Court to dismiss this claim as improperly presented. AAF, for its part, contends that Indian River County's claim fails on the merits because the State of Florida approved issuance of the bonds in accordance with § 147(f)'s requirements, which obviated the need for approval by all counties through which the railway runs. The Court will address each argument in turn, reaching the merits of the Plaintiff's claim and granting summary judgment to the federal Defendants and Intervenor-Defendant.

a. Failure to state a claim

The Department asks the Court to dismiss Indian River County's § 147(f) claim because the Secretary "is not required to investigate whether Section 147's requirements have been met before [she] makes a PAB allocation." Fed. Defs.' MSJ at 27. It explains the Secretary's responsibilities under the statutory scheme begin and end with § 142: she must determine only whether a project is a "qualified highway or surface freight transfer facility" and, if so, whether to allocate to that project a portion of the $15 billion in tax-exempt PABs authorized by Congress. Section 147, the Department contends, presents a wholly distinct requirement for PABs to qualify for tax-exempt status into which the Secretary need

not inquire before allocating PABs. Consequently, according to the Department, even if Indian River County's allegations regarding § 147(f) were true, they would have no bearing on the legality of the allocation but would concern only an assessment of the future tax liability of bondholders.

While it does not appear that the statutory scheme imposes any obligation on the Secretary to police § 147(f) compliance, the record indicates that the Secretary did consider such compliance in this particular instance. AAF's application for a PAB allocation highlighted its view that § 147(f)'s requirements had been met by Florida's approval. AR 74221 ("AAF has already successfully completed the necessary hearings and approvals required under" § 147(f).). As part of the application, AAF submitted two documents indicating as much. First, it provided a resolution by the FDFC, the Florida governmental entity responsible for issuing the bonds, approving their planned issue. AR 74240-53. The resolution included FDFC's finding that § 147(f) requirements were satisfied by a properly noticed public hearing held in Tallahassee and subsequent approval by a Florida official delegated powers by the State's Governor. AR 74242-44. Second, AAF submitted a proposed bond counsel tax and validity opinion by the law firm Greenberg Traurig, based on its review of the record and applicable laws. AR 74254-57. That opinion determined that "interest on the Bonds . . . is excludable from gross income for purposes of federal income taxation under existing laws as enacted and construed[.]" AR 74256. The Department invited submission of both documents. While there are no formal requirements for PAB allocation applications, the Department has indicated that "to facilitate [its] consideration of [an] application," applicants "may wish" to include,

among other information, "a copy of a resolution . . . authorizing the issuance of a specific issue of obligations," and a "Form of Bond Counsel Opinion or date by which a draft letter will be provided." 71 Fed. Reg. 642, 643 (Jan. 5, 2006). Put simply, applicants wishing to receive serious consideration for an allocation would be wise to provide documentation that would analyze and support the tax-exempt nature of the bonds, should allocation be provided.

Importantly, the Department's provisional PAB allocation in this case *conditioned* final allocation on the bond counsel's opinion. It explained that final allocation was based on several requirements, the first of which was "a final bond counsel tax and validity opinion . . . issued at the time of the closing of the bond issue in substantially the form provided with the application." AR 74324. That condition indicates that the Department sought assurances that the allocation it made would involve bonds otherwise compliant with tax-exemption requirements. It also indicates that the Department was satisfied with bond counsel's analysis, which assumes § 147(f) compliance by virtue of its conclusion that the bonds are tax exempt.

The Court's analysis here is informed by the nature of the allocation. Even accepting the Department's contention that it is not responsible for policing compliance with § 147(f), the fact remains that it is responsible for allocating highly-sought-after tax-benefits from a finite pool. In this case, the Department has used $1.15 billion of the $15 billion in that pool to support Phase II of the project. The Court is skeptical that the Department would formally allocate $1.15 billion in bond authority absent some confidence that the bonds would indeed be tax-exempt. Otherwise, the Department would be wasting nearly ten

percent of the finite resource Congress empowered it to administer. The bonds here will be issued and offered for sale imminently, and the Department has given no indication that they are legally infirm. It has not questioned the bond counsel opinion that the bonds will be properly tax-exempt. It has not suggested that the bonds fail to comply with any "applicable Federal law," a further condition of the final allocation. See AR 74325. In short, it appears that the Department has implicitly concluded that the State-level public approval satisfied § 147(f) requirements. Moreover, in this litigation, the Department has embraced AAF's view that the State-level public approval satisfied those requirements. See Fed. Defs.' Reply at 10 ("Thus, here, the State of Florida's approval is sufficient to satisfy Section 147(f).").

It bears emphasizing that the Court's holding on this issue is fact bound. The Court's conclusion is not that the statutory scheme requires the Department of Transportation to police compliance with § 147(f) or any other requirement for tax exemption. Nor can the Court conclude that the Department makes assessments of § 147(f) compliance for every allocation. Rather, it concludes only that, in this particular case, the Department has interpreted § 147(f) as satisfied—an assessment rooted in AAF's application and supporting materials, the Department's provisional allocation letter and the conditions it enumerated, the fact that the bonds will be issued imminently and the Department has not raised any § 147(f) concerns, and the Department's position in this litigation that AAF's arguments on the merits are correct.

Under these circumstances, then, the Court finds it appropriate to reach the merits of the County's § 147(f) claim.

b. Section 147(f) merits

While Indian River County has stated a valid claim under § 147(f), the claim is not meritorious, and the Court will grant summary judgment to the federal Defendants and AAF.

For PABs to be "qualified" and thus tax-exempt, § 147(f) requires public approval by:

> (i) the governmental unit—
>
> > (I) which issued such bond, or
> >
> > (II) on behalf of which such bond was issued, and
>
> (ii) 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 (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)(2)(A). Subsections (i) and (ii) are commonly known as "issuer approval" and "host approval," respectively. In this case, FDFC, a State-level agency, issued the bonds after concluding that § 147(f)'s requirements had been met. Specifically, it cited a noticed public hearing held in Tallahassee, followed by approval by a Florida State official who was "the designee of the Governor of the State of Florida, the applicable elected representative to approve the [bond] issuance." AR 74243-44; see also, 26 U.S.C. § 147(f)(2)(B) (requiring "a public hearing following reasonable public notice"); AAF's MSJ, Ex. 1 (memorandum from Florida Governor authorizing approval on his behalf).

Indian River County does not dispute that the issuer approval complied with §147(f)(i). Nor does it dispute that because the State issued the bonds, its issuer approval was tantamount to host approval by the State. See 26 C.F.R. §5f.103-2(c)(3). The County's claim, rather, is that the State's approval alone was insufficient to satisfy §147(f)(2)(A)(ii) without approval at the county level as well.

Indian River County contends that the plain text of §147(f)(2)(A)(ii) unambiguously requires the County to approve the bond issue before the bonds achieve qualified status. It maintains that because it is a "governmental unit having jurisdiction over the area in which" the railway "is located," its approval is necessary unless the parenthetical exception applies. And the exception does not apply, the County argues, because Phase II runs through five counties, so this is not an instance in which "more than 1 governmental unit . . . has jurisdiction over the entire area . . . in which [the] facility is located." 26 U.S.C. §147(f)(2)(A)(ii).

But even without the parenthetical exception, §147(f)(2)(A)(ii) is ambiguous in its requirement that "each governmental unit having jurisdiction" over the relevant area approve the bond issue. Congress did not define the term "governmental unit" beyond indicating that it excludes the federal government. See 26 U.S.C. §150(a)(2). So, the term "governmental unit" could conceivably encompass everything from the State to its counties to school boards and dogcatchers.

Hoping to sidestep ambiguity in the term "governmental unit," Plaintiff urges the Court to apply a limiting principle implicit in §147(f), noting that approval requirements are satisfied by approval "by the applicable elected representative" of a government unit, which in-

cludes "an elected legislative body of such unit" or "the chief elected executive officer." 26 U.S.C. § 147(f)(2)(E). This provision, according to Plaintiff, clarifies that "governmental unit" in this context unambiguously means an entity with an elected legislature or chief executive. See Hr'g Tr. at 47:14-16. But those provisions go to the mechanisms by which a governmental unit may approve, not to the definition of "governmental unit" itself. See 26 U.S.C. § 147(f)(2)(B). Section 147(f) also anticipates situations in which a governmental unit may not have an "applicable elected representative," *id.* § 147(f)(2)(E)(ii), which betrays the contention that Congress defined the term "governmental unit" to include only governmental entities with elected legislative bodies or chief executives. Further, even if the Court were to accept Plaintiff's contention, it would not render the statutory text unambiguous: local school boards, sheriffs, and other entities are often elected to exercise legislative or executive authority, and each would constitute a "governmental unit" absent further clarification. See 26 C.F.R. § 5f.103-2(e) (clarifying that "[i]f multiple elected legislative bodies of a governmental unit have independent legislative authority, . . . the body with the more specific authority relating to the issue is the only legislative body" whose approval suffices); *id.* § 5f.103-2(h)(7) (discussing example implicating elected school board).

Even setting aside these types of entities, Indian River County's position would mean that every single city and town through which Phase II runs would have to approve the bonds' issuance in order for them to be tax exempt, even if all of the counties encompassing those jurisdictions approved the issue. Congress passed § 147(f) to promote democratic accountability and safeguard State and local governments' input on projects as a

means of ensuring tax exemptions benefit the public. *Affordable Hous. Dev. Corp.* v. *City of Fresno*, 433 F.3d 1182, 1193 (9th Cir. 2006). But it is hard to imagine that its chosen mechanism would yield a result in which a single town could pocket veto a significant public infrastructure project notwithstanding the assent of the State and county governments.

The absurdity of Plaintiff's view is further revealed by its interpretation of §147(f)(2)(A)(ii)'s parenthetical exception "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." Plaintiff reads this to mean that State approval alone suffices *only* in such a situation. But that would mean a State could approve a facility over local government objections only if the local government had jurisdiction over the entire facility. Under Plaintiff's view, if, for example, the facility were entirely within Indian River County, Florida's approval *would* suffice, even if Indian River County opposed it, because both Florida and the County would share jurisdiction over the entire area. But, because Phase II spans four other counties within the State, Florida's approval is insufficient. It would be a bizarre outcome, to say the least, if a State could approve financing of a facility over a political subdivision's objection if the facility were located entirely within that subdivision but could not do so when the facility traverses multiple subdivisions. Why would Congress empower a county to override its State's desire to finance a facility in every instance *except* those in which it is uniquely affected? This only compounds the absurdity of Plaintiff's reading of the non-parenthetical portion of §147(f) to require assent from every single local government through which Phase II runs. The Court cannot

accept this reading. *Cf. Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (explaining that statutory interpretations that "would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

In short, there is substantial ambiguity in the requirement of approval by "each governmental unit" with jurisdiction over the facility. In the face of such ambiguity, the Court considers whether the Department's implicit interpretation—that the State's approval alone satisfied §147(f)(2)(A)(ii)—"is based on a permissible construction of the statute in light of its language, structure, and purpose." *Nat'l Treasury Emps. Union*, 754 F.3d at 1042 (quoting *AFL-CIO*, 409 F.3d at 384). There are several indications that it was a permissible construction of the statute.

First, the legislative history indicates that, notwithstanding ambiguous statutory language, Congress intended State approval to suffice in situations like this. The Conference Committee reports included language "intend[ed] to clarify the application of the rule requiring a public hearing and approval by an elected official or legislative body in order to issue [PABs]." The reports explained:

> Where the facilities are located entirely within the geographic jurisdiction of the issuing governmental unit, only one public hearing and approval are required even though the facilities may be located in several different subdivisions of the issuing governmental unit.
>
> . . .
>
> For example, where a governor of a state is to approve the issuance of bonds for facilities locat-

> ed in that state (even though located in several counties), only the state is required to have a public hearing on the bond issue.

H.R. Rep. No. 97-760, at 517 (1982) (Conf. Rep.); S. Rep. No. 97-530, at 517 (1982) (Conf. Rep.).

The example is precisely on point. Here, Florida's Governor, through his representative, approved the issuance of bonds for the facilities. Per the Conference Committee reports, that approval suffices and the fact that the facilities run through several political subdivisions of the State does not undermine its sufficiency.

Second, the Department's implicit acceptance of the sufficiency of the State's approval is consistent with IRS regulations implementing § 147(f). Those regulations define "governmental unit" to mean "a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof." 26 C.F.R. § 5f.103-2(g)(1). Plugging the relevant part of that definition into § 147(f) yields a requirement of approval by "each State or political subdivision thereof having jurisdiction" over the relevant area. This phrase by itself doesn't answer the key question one way or the other, because it is not immediately clear what work the word "or" does in this context. It could signify that every unit with jurisdiction—whether a State *or* its political subdivision—must approve the issue; it could also signify that each State with jurisdiction, *or* each political subdivision with jurisdiction, must approve the issue.

Fortunately, the same IRS regulations provide examples that answer any lingering questions and confirm that it is the latter. Example 5 is particularly instructive:

> County M proposes to issue an industrial development bond to finance a project located partly

> within the geographic jurisdiction of County M and partly within the geographic jurisdiction of County N. Both counties are located in State X. The part of the project in County N is also located partly within the geographic jurisdiction of City O and partly within the geographic jurisdiction of City P. Under the provisions [implementing issuer approval], County M must give issuer approval. Additionally, under the provisions [implementing host approval], either State X, County N, or both Cities O and P, must give host approval.

Id. § 5f.103-2(h)(5).

This example removes any doubt that a higher-level government unit's approval suffices to satisfy § 147(f)(2)(A)(ii), whether or not its political subdivisions approve. That is why County N's approval obviates the need for Cities O and P to give their own approval, and why State X's approval obviates the need for County N's approval.

Given clear legislative intent and the long-standing regulations interpreting the statute, the Court concludes that it is reasonable to interpret § 147(f)(2)(A)(ii) as satisfied by State-level approval in this instance. This is also consistent with Congress's purpose, which was to build in some level of democratic accountability to ensure that tax-exempt bonds finance only those projects that actually benefit the public. That goal is achieved if every area in which a facility is located falls within the constituency of an approver.

This reading of the statute is not inconsistent with § 147(f)(2)(A)(ii)'s parenthetical exception, on which Plaintiff heavily relies as the sole exception where State approval suffices. The regulatory examples help clarify

that this exception is designed to permit approval by a lower-level government without the need for higher-level approval. In one of the examples, "State X proposes to issue an industrial development bond to finance a facility located partly within the geographic jurisdiction of State X and partly within the geographic jurisdiction of State Y," with the "portion of the facility located in State Y . . . entirely within the geographic jurisdiction of City Z." 26 C.F.R. §5f.103-2(h)(7). In this instance, "either State Y or City Z must give host approval as that part of the facility to be located outside State X will be entirely within the geographic jurisdiction of each unit." *Id.* In other words, the lower-level government need not wait for higher-level authority to *approve* such a project but does not possess veto power if the two share jurisdiction. This is consistent with the view that the statute means each State with jurisdiction, *or* its political subdivision with jurisdiction, must approve the issue.

To avoid doubt and facilitate this understanding, the IRS's regulations further provide that "if property to be financed . . . is located within two or more governmental units but not entirely within either of such units, each portion of the property which is located entirely within the smallest respective governmental units may be treated as a separate facility." *Id.* §5f.103-2(c)(3). This clarifies why, in Example 5, once County M gave issuer approval (which doubled as host approval), County N's approval sufficed absent State X's approval, even though it did not have jurisdiction over the entire area. Each portion could be treated as a discrete facility so the portion in County N was entirely within the jurisdiction of both State X and County N, allowing County N alone to give host approval. Likewise, it clarifies why Cities O and P could both give host approval without waiting for either

County N or State X. Either the State, *or* its political subdivision with jurisdiction, must approve the bond issue.

In sum, reading § 147(f)(2)(A)(ii)'s parenthetical exception to empower a local government to *approve* a facility without waiting for the State is consistent with the congressional purpose of financing facilities that benefit the public while ensuring democratic accountability. Once a local government with jurisdiction over the entire facility concludes that it is worthwhile, it would make little sense to force it to wait for the State to act. The exception is a mechanism for facilitating local government assent to a project in the face of State intransigence. Plaintiff's interpretation, on the other hand, would turn a shield into a sword and allow a local government to veto a State's approval.

Plaintiff's understanding of § 147(f) would yield absurd results and runs head first into the Conference reports in which Congress announced its intention that "where a governor of a state is to approve the issuance of bonds for facilities located in that state (even though located in several counties), only the state is required to have a public hearing on the bond issue." H.R. Rep. No. 97-760, at 517 (1982) (Conf. Rep.); S. Rep. No. 97-530, at 517 (1982) (Conf. Rep.).

The Secretary's implicit conclusion that these PABs comply with § 147(f)'s public approval requirement is consistent with longstanding IRS regulations. Those regulations, in turn, effectuate Congress's clearly expressed intent and are a reasonable interpretation of the statute. The Court will therefore grant summary judgment to the federal Defendants and Intervenor-Defendant on this issue.

B. NEPA Compliance

Indian River County also alleges that the environmental review for Phase II conducted by FRA did not comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of significant actions they propose to undertake. *Theodore Roosevelt Conservation P'ship* v. *Salazar* ("*Theodore Roosevelt Conservation P'Ship II*"), 661 F.3d 66, 75 (D.C. Cir. 2011) (quoting *Nevada* v. *Dep't of Energy*, 457 F.3d 78, 92-93 (D.C. Cir. 2006)). NEPA has two goals: it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action[,]" and "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983) (citations and quotation marks omitted). NEPA is "'essentially procedural,' designed to ensure 'fully informed and well-considered decision[s]' by federal agencies" rather than "particular results." *Del. Riverkeeper Network* v. *FERC*, 753 F.3d 1304, 1309-1310 (D.C. Cir. 2014) (first quoting *Vt. Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978); then quoting *Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 756-757 (1989)).

NEPA's core is the requirement that an agency prepare an Environmental Impact Statement ("EIS") for any proposed major federal action "significantly affecting the quality of the human environment[.]"[4] 42 U.S.C.

[4] As explained above, the Court previously held that the Secretary's first PAB allocation constituted a major federal action. See *Indian River Cty. II*, 201 F. Supp. 3d at 21. The parties do not question whether the Secretary's latest allocation also qualifies as such.

§ 4332(C). An EIS must detail the foreseeable environmental impact of the proposed action, unavoidable adverse impacts, alternatives to the proposed action, and any irreversible commitments of resources. *Id.* Understandably, preparing an EIS is a significant undertaking: the agency must not only publish its analysis for public review and comment but must also consult with other agencies that offer specific expertise. *Id.*; 40 C.F.R. §§ 1502.9, 1506.6. Finally, an EIS must be completed before the agency irretrievably commits federal resources to the project so that the NEPA review serves its purpose of ensuring that the environmental consequences are considered during the early stages of planning. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 351 (1979).

Because NEPA does not provide an independent cause of action, plaintiffs bring their NEPA claims under the general review provision of the APA. 5 U.S.C. §§ 702, 706. Under the APA, a court may only set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). This means that the agency's NEPA decision must "comply with 'principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and [the Council on Environmental Quality's] regulations.'" *Del. Riverkeeper Network*, 753 F.3d at 1313 (quoting *Found. on Econ. Trends* v. *Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985)). More specifically, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S.* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). Like in other APA challenges, a decision is not proper under NEPA "if the agency has relied on factors which Congress has not intended it to con-

sider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *State Farm*, 463 U.S. at 43). In short, the agency's NEPA review must be the "product of 'reasoned decisionmaking.'" *Id.* (quoting *State Farm*, 463 U.S. at 43).

Indian River County challenges five separate aspects of FRA's NEPA review. It contends that FRA failed to adequately analyze: (1) the public-safety consequences of more and faster trains traveling along the rail line; (2) the impact of boats having to queue at closed railroad bridges waiting for trains to pass; (3) the available route and bridge alternatives; (4) the anticipated noise generated by the trains; and (5) the projected increase in freight train speeds due to planned track enhancements. A common theme of the County's complaints is that FRA did not analyze certain issues in a manner or with a level of detail that it would have preferred, and failed to comply with NEPA's "look before leaping" directive by deferring necessary studies until after the NEPA process. With those broad critiques in mind, the Court will address the five alleged deficiencies in turn.

1. Public-safety effects of the project

Under NEPA, an agency must take a "hard look" at any impact the proposed action may have on "public health or safety." *Standing Rock Sioux Tribe* v. *U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 123 (D.D.C. 2017) (first quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); then quoting 40 C.F.R. § 1508.27(b)(2)). And, where safety information is incomplete or not available, the agency must disclose that such information "is lacking." 40 C.F.R. § 1502.22.

Indian River County contends that FRA failed to adequately consider several risks to public safety by deferring necessary safety studies until after the NEPA process was complete. Specifically, the County highlights what it perceives are inadequacies with respect to pedestrian safety, train collisions, and delays experienced by emergency responders waiting at crossings for trains to pass. Pls.' MSJ at 11. FRA and AAF counter that the agency thoroughly examined the project's public-safety impacts using the information available, considered and responded to numerous public comments regarding safety, and incorporated mandatory mitigation requirements in the FEIS. Based on its review, FRA concluded that the project would have an overall positive effect on public health and safety because the project includes planned track improvements and safety enhancements and would result in more people using trains rather than cars, leading to safer roads with fewer accidents and less pollution. AR 73589.

The Court starts with Plaintiff's underlying concern that the agency abdicated its responsibility to conduct an independent public safety evaluation by deferring any "hard look" until after the NEPA process is complete and "shuffl[ing]" responsibility to respond to public-safety concerns "off to AAF." Pls.' MSJ at 11. In support of that contention, the County relies on a response from AAF that was ultimately incorporated into the FEIS: "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 the operations." AR 38707, 73658. Plaintiff protests that NEPA is a "look before you leap" statute, requiring the agency to conduct a thorough investigation of the significant safety and environmental impacts *be-*

fore taking a major federal action. Hr'g Tr. at 13:17-14:3. In the County's view, had FRA "looked"—that is, conducted a safety analysis as part of the NEPA process—it would have disclosed and more specifically addressed the three specific safety issues identified above.

The trouble for the County is that FRA does not contend that the Hazard Analysis and System Safety Program Plan ("SSP Plan"), prepared pursuant to FRA regulations,[5] replaces NEPA. Rather, these are two separate requirements. Under NEPA, FRA must take a hard look at the safety impacts of the project, and that is what FRA did. The agency considered and disclosed a wide number of safety impacts of the project based on the information available at the time and then reasonably concluded that the increased safety risks from more and faster trains could be mitigated. These mitigation measures include grade-crossing improvements; installation of Positive Train Control ("PTC")—a system of dynamically monitoring and controlling train movements—across both passenger and freight trains; construction of fencing in locations along the line where pedestrians are more likely to cross the tracks illegally; and coordination with local officials regarding emergency vehicles. AR 74056-58. So while the County is correct that the future SSP Plans "do not obviate the need for the hard look and public airing that NEPA demands," Pls.' Reply at 8, FRA independently met its NEPA obligations in this regard.

The Court now moves to Indian River County's more specific safety concerns.

a. Pedestrian safety

Indian River County first contends that FRA and AAF overlooked serious risks to pedestrian safety at

[5] See 49 C.F.R. § 270.103.

both "formal" and "informal" crossings. Before discussing these arguments, it is helpful to define some of these train terms. Pedestrians cross train tracks at either "formal" or "informal" crossings. Formal crossings are those that pedestrians are supposed to use. We all recognize them: pathways or roads, signage, and signals indicating when a train is coming and when it is safe to cross. Informal crossings are the opposite, ones that pedestrians are not supposed to use but sometimes do. Informal crossings will be somewhere on the "mainline" of the railroad—that is, anywhere along the tracks other than at the formal, at-grade crossings—where a pedestrian can scamper across. Finally, pedestrians can cross tracks legally or illegally. A pedestrian crosses legally by waiting, at a formal crossing, for the "all clear" and complying with the signals. One crosses the tracks illegally by either jaywalking at a formal crossing or "trespassing" across the tracks at an informal crossing.

i. Formal crossings

With respect to formal crossings, Indian River County originally contended that AAF's planned grade-crossing improvements were only voluntary and that any mitigation requirements were contingent on localities agreeing to pay for ongoing maintenance. Pls.' MSJ at 16. Both FRA and AAF have clarified, however, that despite some ambiguity in the FEIS, the grade-crossing improvements are mandatory mitigation measures. See Fed. Defs.' MSJ at 31-32; AAF MSJ at 12.[6] Accordingly, AAF will

[6] For example, although the FEIS states that AAF will implement the crossing improvements "in conjunction with county and municipal execution of amendments to existing crossing license agreements," AR 73589, FRA has assured Indian River County that this does "*not* precondition the grade crossing enhancements" on any such amendments, Fed. Defs.' MSJ at 32.

be required to "implement and fund initial grade crossing safety enhancements identified in the Diagnostic Team Report." AR 74137; see also AR 74054 (FEIS concluding that the project "would result in enhancing public safety with improvements to grade crossing signal equipment for vehicular and pedestrian traffic"). And it is AAF that will pay the cost of making these initial grade-crossing safety improvements. AR 73718. Based on these representations, the County's "concern that the grade-crossing improvements will not be implemented at all has been put to rest." Pls.' Reply at 11.[7]

And these improvements are extensive. The required safety features are the result of a diagnostic safety review, a thorough study of 349 total grade crossings conducted by FRA's Office of Railroad Safety–Highway Rail Crossing and Trespasser Program Division, in which Indian River County participated. AR 73718-19. The diagnostic team made a series of crossing-related recommendations, all of which were adopted. See AR 74137. These measures include implementing sidewalk gates in particular locations, formal pedestrian crossings wherever sidewalks exist on either side of the tracks, PTC along the entire project, and four quadrant gates (which consist of automatic flashing light signals and gates) at grade crossings. AR 73718-24; see also AR 49371-85. Thus, contrary to the County's concerns, the FEIS requires AAF to implement a variety of safety measures and im-

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[7] Who will bear the cost of *maintaining* these grade crossings remains an open question subject to some combination of state law and future negotiations. The Court need not resolve this question, however, because it is beyond the scope of whether FRA reasonably concluded that the required mitigation measures were sufficient to address the safety concerns of reintroducing passenger trains to the FECR corridor.

provements at formal crossings to ensure pedestrian safety.

ii. Informal crossings

With respect to informal crossings, the County insists that even if FRA reviewed the safety risks at formal at-grade crossings, it completely overlooked the risk to *trespassing* pedestrians on the mainline. Pls.' MSJ at 13; Pls.' Reply at 3. Plaintiff says that these pedestrians risk being blind-sided by high-speed passenger trains, which can be hard to see and harder still to hear until too late. Pls.' MSJ at 13. It argues that "there is no 'existing analysis' in the FEIS, or elsewhere in the record, of the safety impacts of the Project on pedestrians on the FECR corridor outside of formal grade crossings." Pls.' Reply at 7.

The record demonstrates otherwise. The FEIS expressly considers the possibility of trespassers—including pedestrians who cross on the mainline at "informal" crossings or against signals at formal grade-crossings—and proposes mitigation measures to address the problem.[8] The suggested approach is two-fold: encouraging pedestrians to use formal crossings and erecting fencing to prevent them from using informal ones.

First, encouraging pedestrians to use formal crossings. As explained above, the FEIS and ROD require AAF to implement a series of improvements to grade

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[8] FRA argues that the Court should not address the County's concerns about pedestrian safety along the mainline because pedestrians who trespass at informal crossings "engage in an unlawful activity." Fed. Defs.' Reply at 12. However, the problem of informal crossings, legal or not, is "reasonably foreseeable" and therefore must be considered. See *Comm. of 100 on Federal City* v. *Foxx*, 87 F. Supp. 3d 191, 214 (D.D.C. 2015). In any event, the FEIS addresses it. The Court will too.

crossings, including pedestrian gates, paths to connect sidewalks on either side of the tracks, and flashing lights. The FEIS is clear that one reason to require these improvements is to encourage pedestrians to use formal crossings: "The infrastructure and safety improvements that are incorporated in the Project will reduce illegal and unsafe trespass on the rail line, and improve safety for area residents by adding sidewalks at grade crossings." AR 73657. This statement in the FEIS is consistent with the recommendations of FRA's on-site engineering field report, which expressed concerns in 2014 that AAF was not seriously committed to implementing necessary security measures. See AR 48371. That field report was shared with the diagnostic team which, as described above, produced a report that set forth the mitigation measures that AAF will be required to implement. The field report explained:

> Trespassing is an epidemic along this corridor. Rather than encourage it, it is recommended per my field notes at those particular locations—["certain locations along the corridor in which sidewalks are present on both sides of the railroad right-of-way, but do not follow through"]—to equip sidewalk approaches with a visual and gated barrier. This is to provide safe passage of pedestrians through a very active rail line and prevents them from walking into an open railway corridor; or directing them onto the street—irrespective if there is an agreement or not.

AR 49373. In light of this discussion, it cannot be said that FRA did not analyze the underlying problem of pedestrian crossings and come up with at least one response: create formal crossings where pedestrians are

most likely to cross (*i.e.*, where there are sidewalks on either side of the tracks).

FRA also adopted another response: fencing to keep pedestrians from running across the tracks at informal crossings. The FEIS explains that the FECR Corridor already has fencing in "specific areas" where trespassing has been a problem. AR 73858. Among other safety features—like warning signs, flashing signals, a public-awareness program coordinated with Florida Operation Lifesaver, and PTC—the project will either improve existing fencing or add fencing where it is lacking:

> For the E-W Corridor standard FDOT highway fencing, or its equivalent, will be added throughout the length of the corridor where the track is at-grade that will restrict and seal the railroad right-of-way from public access. . . . 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.
>
> AAF will conduct [Right of Way] 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.

AR 74059. The FEIS does not specify the "specific designs" for the fencing, explaining that fencing will be added "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." AR 73717; see also AR 74059 ("Fencing on the N-S Corridor would be upgraded based on existing public access locations and the potential for conflicts with increased train frequency. Specific designs for fencing will be developed as the project advances.").

Conceding, perhaps, that the FEIS considers trespassing, the County nonetheless contends that FRA failed to take a hard look at the problem in two ways. Neither contention is persuasive.

First, the County suggests that the FEIS understates the risks pedestrians face by relying on "stale and limited data on the history of accidents involving FECR trains." Pls.' Reply at 3. The FEIS indicates that between 2007 and 2011—when only freight trains were running on the N-S Corridor—there were ten total fatalities "not at grade crossings" between Cocoa and Miami. AR 73856 (Table 4.4.4-2). These deaths could have involved "a range of accident types, including derailments, accidents between trains, trains and humans, or between trains and objects on the tracks." *Id.* The County retorts that "the reality" of trespasser fatalities "is starkly different" than that presented in Table 4.4.4-2. Pls.' Reply at 3. Relying on data pulled from the same database used to create Table 4.4.4-2, the County argues that during that same period in that same stretch of corridor, there were actually 58 fatalities. Decl. of Philip E. Karmel, ECF No. 37-1 & Ex. 1 to Karmel Decl. But Plaintiff's data does not sufficiently call into question FRA's decision to rely on the particular data the agency chose to use. See *Sierra Club* v. *FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) ("[T]he agency's choice among reasonable analytical methodologies is entitled to deference." (citation omitted)). Plaintiff offers its data to shore up its concerns about pedestrian safety specifically on the mainline, but the data does not appear to distinguish between fatalities on the mainline and at grade-crossings. Table 4.4.4-2, by contrast, does, isolating the relevant data by presenting only mainline trespasser fatalities. Thus, Plaintiff's data is both over-inclusive and less relevant to answering the

question the County poses regarding trespasser fatalities along the mainline. Accordingly, the County's data does not directly undermine that used in the FEIS.[9]

And second, the County contends that by not identifying specific locations or designs for fencing until "sometime *after* project approval," FRA again "kicks the can down the road" on safety issues. Pls.' MSJ at 13 (citing AR 74059). According to the County, "artful language about future 'recommendations' being included in a post-approval study by AAF does not pass muster . . . under NEPA." Pls.' MSJ at 14.

NEPA, however, does not require the level of detail the County seeks. As the Supreme Court has cautioned, "there is a fundamental distinction [ ] between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson*, 490 U.S. at 352. "[I]t would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Id.* at 353. In *City of Alexandria* v. *Slater* ("*Slater*"), 198 F.3d 862 (D.C. Cir. 1999), for example, the D.C. Circuit considered whether the Federal Highway Administration's approval of plans to replace the Woodrow Wilson Bridge in Washington, D.C., complied with NEPA. The Circuit disagreed with the district court's conclusion that the agency's discussion of adverse envi-

[9] Because the Court finds Plaintiff's data less relevant to the question at hand, it need not resolve the parties' dispute over whether that data constitutes extra-record evidence that should not be considered by the Court at all.

ronmental effects and related mitigation measures was too "terse" to satisfy NEPA. *Id.* at 869-70. While the "discussion might have been more thorough," more was not required. *Id.* at 870. The agency acknowledged that constructing a new bridge would affect traffic flow on nearby streets and could delay delivery of emergency services; the agency also "offer[ed] a range of mitigation strategies," such as maintaining "some access" on roads and notifying the public of temporary road closings. *Id.* This was enough: "Perhaps [the plaintiffs] would prefer the [agency] to set forth in the final EIS a comprehensive plan detailing precisely which streets will be closed, and which alternative routes will be established, but that is not mandated by NEPA." *Id.* (citing *Robertson*, 490 U.S. at 353). Here, too, FRA acknowledged potential adverse effects the project could have on pedestrian safety, offered a range of mitigation strategies, and required AAF to implement those strategies. NEPA demands no more.

b. Train-on-train collisions

Next, the risk of train accidents. The County maintains that the "FEIS contains no analysis of whether the Project will adversely affect public safety by increasing the likelihood of train-on-train collisions." Pls.' MSJ at 17. Not so. As the County itself acknowledges, the FEIS identifies the risk of train-on-train accidents and concludes that the installation of PTC and other measures will mitigate that risk. *Id.* (quoting AR 74056). The question, then, is whether this was a sufficiently "hard look" at the problem.

It was. The FEIS discloses that the reintroduction of high-speed passenger trains to the existing freight traffic on the N-S Corridor "may increase the frequency of opportunities for conflict between trains." AR 74056. The FEIS also concludes that "safety improvements at cross-

ings, an upgraded PTC system, enhanced security, and improved communications among emergency responders would be a beneficial effect, serving to minimize potential conflicts and their consequences." *Id.* It explains that "PTC is a system *designed to prevent train-to-train collisions*, derailments caused by excessive speeds, unauthorized train movements in work zones, and the movements of trains through switches left in the wrong position." AR 73731 (emphasis added). And it points out that PTC, which is required on all new passenger lines in the United States, see 49 U.S.C. §20157(a)(1), "will be interoperable between the AAF and FECR trains," AR 73731.

In addition to PTC and improvements to the FECR tracks, the FEIS notes that AAF will implement other measures to decrease the risk of collision, including "a passenger train emergency preparation plan, safety and security certification plan, and several FECR safety procedures." AR 74056. And because there are "no anticipated changes in the frequency or quantity of hazardous materials to be transported" on the corridor, the FEIS concludes that these safety precautions will reduce the risk that a freight train involved in an accident will spill hazardous materials. AR 74060. Relatedly, the FEIS emphasizes that under the project, "[h]azardous materials would continue to be transported consistent with applicable statutes, rules and regulations." *Id.*; AR 65275.

In light of these improvements and safety measures, the government draws an apt parallel to the undersigned's decision in *Committee of 100 on Federal City* v. *Foxx*, 87 F. Supp. 3d 191 (D.D.C. 2015). Fed. Defs.' Reply at 15. In that case, the plaintiffs alleged that the relevant agency failed to evaluate the impact of rail accidents resulting from a proposed train tunnel renovation

project in Washington, D.C. *Committee of 100*, 87 F. Supp. 3d at 215. The Court acknowledged that there might be a risk of derailment but concluded that because such a "risk of an accident exists today," the plaintiffs had failed to show that "the newly-constructed tunnels will foreseeably *increase* the risk of an accident as compared to current operations." *Id.* Instead, the agency had reasonably concluded that tunnel modernization would actually decrease the risk of accidents. *Id.* So, too, here: FRA acknowledged the risk of derailment or collision but explained its conclusion that the risk would be mitigated through PTC and other measures.[10] That was sufficient under NEPA.

c. Emergency vehicles

Finally, the County contends that FRA failed to take the requisite hard look at the adverse impact the project could have on emergency vehicle response times. In simple terms, it is concerned that emergency responders—that is, EMTs, firefighters, and police—may be unduly delayed either because their routes will be detoured to avoid project-related construction or because they'll have to wait more frequently for trains to pass formal

[10] The County insists that FRA does "not take issue" with a risk assessment prepared by former-plaintiff Martin County which hypothesizes that thousands of people could be put at risk in the event of a train-on-train accident involving hazardous materials. Pls.' Reply at 9. The record, however, clearly demonstrates that Martin County raised this specific risk assessment in its comments on the FEIS and that FRA responded, citing the implementation of PTC as a means of "significantly reducing the probability of collisions between trains." AR 65275. Under the rule of reason, FRA did not need to go into more detail regarding Martin County's study given that it disclosed the risk of train-on-train collisions and concluded that the risk could be mitigated by PTC and mandatory compliance with federal regulations.

crossings. The County believes the FEIS should have (1) disclosed the specific location of road closures that could impede emergency responders during construction and (2) addressed the impact that more frequent train traffic and related grade-crossing closures will have on response times. Pls.' MSJ at 21-22.

Several parts of the record reveal that the FEIS took the requisite hard look at both issues. The FEIS clearly discloses the risk that project construction could interfere with emergency vehicle traffic. AR 74036. Critically, the FEIS also identifies how "to minimize disruption and to maintain emergency access" during construction: AAF will coordinate planned closures and detours with local emergency responders. *Id.*; AR 73659, 73914-15. While it is true that the FEIS does not specify, as the County wishes, the particular roads that will be closed and when, *Slater* is again instructive: "Perhaps [the County] would prefer [FRA] to set forth in the final EIS a comprehensive plan detailing precisely which streets will be closed, and which alternative routes will be established, but that is not mandated by NEPA." *Slater*, 198 F.3d at 870 (citing *Robertson*, 490 U.S. at 353). The FEIS also clearly discloses the risk that more frequent train traffic will require more grade-crossing closures that could affect emergency response times should a vehicle have to wait at a crossing for a train to go by. AR 73659. But after disclosing the risk, the FEIS concludes that "the delays are expected to be minimal, as the passenger trains should clear a typical crossing in less than a minute." *Id.* Thus, FRA disclosed the two potential impacts, and concluded that one would be minimal and the other mitigated. These findings satisfy NEPA's procedural requirements.

2. Effects of vessel queuing at railroad bridges over navigable waters

Plaintiff next turns to the project's impact on boats waiting or queuing to cross through the draw bridges at the St. Lucie and Loxahatchee rivers over which the N-S Corridor track runs. When a train passes over one of these bridges, the bridges obviously must be in the "down" position. And because the bridges are not particularly high, boats cannot pass underneath when trains cross over. By adding thirty-two passenger trains daily to the existing freight traffic, these bridges naturally will be in the down position much more often.

The County concedes that FRA discloses that the project would lead to increased wait times at the bridges but contends that the agency failed to take a hard look at the impact that these longer wait times would have on public safety and the environment. Pls.' MSJ at 27-28. The County describes a slew of boats waiting for the bridges to go up, idling their engines during the wait to hold their place in the queue against the current, all the while consuming more fuel, producing more pollution, and endangering marine life. While the Court agrees with Plaintiff that these kinds of potential effects are not to be downplayed, it concludes that FRA performed an adequate analysis of vessel wait times for purposes of NEPA.

The FEIS relies on the 2014 and 2015 Navigation Discipline Reports prepared by Amec. See FEIS Appendices 4.1.3-B1 & 4.1.3-B2 (AR 49486-671). Based on these reports and extensive navigation modeling analyses, the FEIS discloses that the project will increase vessel queuing time at the moveable bridges as a result of increased train traffic. AR 73934. For example, the average weekday closure time at the St. Lucie River Bridge is project-

ed to be 6.6 hours under the 2016 No-Action Alternative[11] and 9.8 hours under the Project Alternative. AR 73920 (Table 5.1.3-4). An additional three hours of bridge closures may seem like a lot but FRA cautions that the more relevant figure is the average wait time per closing rather than the total closure time per day. The average non-zero wait time[12] for boats is projected to be 6.9 minutes under the No-Action Alternative and 8.6 minutes under the Project Alternative. AR 73927. The FEIS also acknowledges that "[i]n the absence of mitigation, the potentially increased queue lengths and durations could adversely affect boater safety . . . ." AR 73934. The FEIS proceeds to explain, however, that "AAF has committed to implementing mitigation measures . . . that will reduce queuing and associated safety concerns by providing mariners with a fixed schedule of bridge closures and durations." *Id.* In other words, the agency studied the issue and estimated that the project will increase the wait time of boaters who experience any delay by 1.7 minutes on average, and proposed reducing wait times by requiring AAF to notify boaters when the bridges would be open so that they could plan accordingly.

The County essentially demands a closer analysis of the safety and environmental impacts of increased wait times for boats than that described above. However, under the applicable "'rule of reason' standard, such de-

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[11] Under the No-Action Alternative, the project does not go forward and freight operations increase by approximately five to seven percent based on current projected growth. AR 73919.

[12] "Average non-zero wait time" measures the average of only boats that must wait for some period of time. This is in contrast to "average wait time," which measures the average of boats that must wait as well as those that wait for zero minutes, thus lowering the average.

tailed second-guessing of an agency's choices is not the proper role of this Court." *WildEarth Guardians* v. *Bureau of Land Mgmt.*, 8 F. Supp. 3d 17, 33 (D.D.C. 2014) (citation omitted). After all, "it is of course always possible to explore a subject more deeply and to discuss it more thoroughly, but the line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." *Id.* (cleaned up) (quoting *WildEarth Guardians* v. *Salazar*, 880 F. Supp. 2d 77, 88 (D.D.C. 2012)); see also *N. Slope Borough* v. *Andrus*, 642 F.2d 589, 600 (D.C. Cir. 1980) ("[T]he decision of how much detail to include is one for the agency itself, guided by a 'rule of reason.'" (citation omitted)). Applying the rule of reason, the Court concludes that FRA reasonably drew the lines where it did and was not obliged to go into more detail regarding the impacts of vessel queuing.

As an initial matter, FRA advanced a reasonable basis for its conclusion that the projected increased vessel queuing would not be as dramatic as the initial navigational modeling analyses conducted by Amec suggested. The agency believed the analyses conservatively estimated wait times for three reasons. First, "[t]he model uses a conservative value of 40 seconds as the minimum gap time between all boats approaching the crossing." AR 49638; see also AR 49640. However, the FEIS found that "the *observed* time is almost half that." AR 49640 (emphasis added). Second, in response to comments on the draft EIS, Amec and FRA updated their analysis in the 2015 Navigation Discipline Report to rely on data regarding summer rather than winter boat traffic. AR 49635, 73917, 74042. There is significantly more boat traffic during the summer than winter, which means that the anticipated vessel wait times will be lower for much of the year. *Id.* And third, the model is run using two scenari-

os—one in which boats can travel through the crossings simultaneously in opposite directions and one in which they cannot. While the U.S. Coast Guard suggests that simultaneous boat crossing is not considered "safe or prudent," AR 38780, FRA found that "small and medium-sized boats have been observed traveling through the crossings simultaneously in opposite directions—only larger boats, such as commercial vessels, require one-way passage," AR 49638.

The County advances three criticisms of FRA's analysis and conclusion that wait times will not be too severe. First, it suggests that the modeling should not have considered the "passing allowed" scenario in light of the Coast Guard's warning. Pls.' Reply at 15-16. However, as Amec emphasized in its Report, "a system with no boats passing is not representative of observed conditions." AR 49645; see also AR 49638. It was reasonable for the FEIS to present the modeling results based on data consistent with observed conditions.

Second, the County asserts that FRA unreasonably and without explanation focused on the "80th percentile" volume of boat arrivals, ignoring the busiest days of boat traffic represented by the 90th percentile volume and underestimating vessel queuing and its attendant negative effects. However, the record is clear that FRA made a reasoned choice to use the 80th percentile. This value refers to "the value that exceeds 80% of the wait times of all boats, etc. For example, if the [80th percentile] wait time of all boats was 11.7 minutes, this means that 80% of the boats waited 11.7 minutes or less and 20% waited longer than 11.7 minutes." AR 49640. In other words, the 80th percentile value represents a "typical high volume day." AR 73917. FRA decided to focus on the 80th percentile rather than daily averages in response to

comments that the draft EIS had "underestimated impacts . . . by using average day values." AR 38687. Those commenters suggested using "a methodology similar to traffic analysis," such as using 80th percentile values, instead. *Id.* The 2015 updated analysis bears this out: As an example, for the St. Lucie River crossing, the average wait for all boats is 5.1 minutes, the average wait for delayed boats is 8.6 minutes, and the 80th percentile wait is 14.1 minutes. AR 49645. Thus, FRA made the reasonable choice to use the 80th percentile value rather than the average value (which would underestimate wait times) or the 90th percentile value (which would exceed a "typical high volume day") as a more realistic measure of boat traffic. The Court has no basis to second guess that decision.

And third, the County faults FRA for failing to factor in the role of "hazardous currents." Pls.' MSJ at 27-28. Commenters on the draft EIS also expressed concern that the modeling did not reflect realistic boating behavior because it "assume[s] that boats could safely hold their positions in a queue, regardless of tides, currents, vessel wake, and other factors." AR 73916. But FRA disclosed this assumption—"[t]he model does not account for the complex interaction of tides, currents, vessel wake, and boater behavior"—and explained that the model "represents the most realistic situation of boat arrivals and bridge operations possible using modeling technology." *Id.* In other words, FRA said it did the best it could with available modeling technology and conceded that it was not perfect. This was "sufficiently thorough to comply with NEPA." See *WildEarth Guardians*, 8 F. Supp. 3d at 34 (concluding that agency's "analysis complies with the 'rule of reason' in light of the information available to the agency" where it "candidly dis-

closed that no appropriate model exists to accurately predict" specific impact raised by plaintiffs and "instead relied on available modeling data"); cf. *Comm. of 100*, 87 F. Supp. 3d at 218 (explaining that an agency need not "employ the best, most cutting-edge methodologies" (quoting *Theodore Roosevelt Conservation P'Ship* v. *Salazar* ("*Theodore Roosevelt Conservation P'Ship I*"), 616 F.3d 497, 511 (D.C. Cir. 2010)). The County does not suggest a readily-available alternative modeling technique.

FRA also reasonably concluded that most of the vessel queuing—overstated as FRA believed it was—could be mitigated, likewise supporting the agency's decision not to delve deeper into the safety impacts of queuing. The modeling analysis "does not take into consideration any of the mitigation strategies" that AAF will be required to implement to reduce queue times. AR 49648. Those mitigation requirements include a publicly-available set schedule for bridge closures, notification signs with countdowns to help boaters plan trips accordingly, increased communication with local authorities during holidays and special events, and a "coordination plan" with the U.S. Coast Guard. AR 74138-39. The FEIS ultimately concludes that these mitigation measures "will reduce queuing and associated safety concerns." *Id.*; see also AR 49648 (2015 Navigation Discipline Report concluding that "[i]f these strategies are used by the boating community, the non-zero wait times"—that is, the waiting time for boats that actually experience some delay—"will decrease and any potential impact to the industry can be significantly avoided"). This makes sense: If boaters know when the bridges will be opened or closed, they can plan accordingly to avoid waits.

Under the rule of reason, then, the FEIS's discussion of vessel queuing and its related effects was adequate

under NEPA. While the County may want a more detailed analysis of each environmental and safety impact, FRA reasonably drew the line, concluding that such analysis was not necessary given that the initial projected wait times were conservative and that most wait times could be mitigated.

3. Alternatives to the route and the use of moveable bridges

"At the 'heart' of the EIS is the agency's evaluation of the potential environmental impacts of all 'reasonable alternatives' for completing the action." *Theodore Roosevelt Conservation P'ship II*, 661 F.3d at 69 (quoting *Slater*, 198 F.3d at 866); 40 C.F.R. § 1502.14. "The range of reasonable alternatives must include 'technically and economically practical or feasible' alternatives," and "is 'delimit[ed]' by the agency's reasonably defined goals for the proposed action," *Theodore Roosevelt Conservation P'Ship II*, 661 F.3d at 69 (alteration in original) (first quoting 43 C.F.R. § 46.420(b); then quoting *Slater*, 198 F.3d at 867). Both the agency's definition of its goals and its selection of alternatives are also reviewed under the "rule of reason": "as long as the agency 'look[s] hard at the factors relevant to the definition of purpose,' we generally defer to the agency's reasonable definition of objectives." *Id.* (alteration in original) (quoting *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 195-196 (D.C. Cir. 1991)). And, as long as "the agency's objectives are reasonable," a court "will uphold the agency's selection of alternatives that are reasonable in light of those objectives." *Id.* (citing *Citizens Against Burlington*, 938 F.2d at 196; *Slater*, 198 F.3d at 867).

Indian River County contends that FRA shirked its duty to meaningfully consider alternatives by unreasonably deferring to AAF in two instances. The record, how-

ever, demonstrates otherwise. FRA properly considered AAF's goals for the project within reason and independently verified information provided by the company.

a. Alternative routes

The County first complains that FRA narrowly defined the purpose of the project to mirror AAF's goals. This, in turn, led FRA to select "AAF's preferred corridor without adequately considering alternatives," including what the County suggested in a comment to the FEIS as a more appropriate route that would have avoided populated areas and aging railroad bridges. Pls.' MSJ at 29-30; AR 64683.

Because the goals of a project delineate the universe of reasonable alternatives, the Court begins with FRA's stated goals for the project. See *Union Neighbors United, Inc.* v. *Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016). FRA defined the goal of the project as follows: to "provide reliable and convenient intercity passenger rail transportation between Orlando and Miami, Florida (the Project Corridor), by extending (in Phase II) the previously reviewed Phase I AAF passenger rail service between West Palm Beach and Miami and by maximizing the use of existing transportation corridors." AR 73662; AR 65119. In other words, the goal is to provide efficient rail transportation between Orlando and Miami without having to lay too many new tracks. FRA also considered AAF's central economic goal—that the project be "sustainable as a private commercial enterprise." AR 73672, 73674; AR 65119. Contrary to the County's suggestion, considering AAF's goals was entirely appropriate: Congress "expect[ed] agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action." *Citizens Against Burlington*, 938 F.2d at 199.

FRA's decision to evaluate alternatives "primarily in light of whether they could be constructed and operated in accordance with AAF's financial model," AR 73685; AR 65120, was also appropriate: "[W]here a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'" *City of Grapevine, Tex.* v. *Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Citizens Against Burlington*, 938 F.2d at 197).

FRA considered four alternative routes, including the preferred FECR route, for connecting Orlando and West Palm Beach. AR 15741; AR 73680-84. As relevant here, FRA concluded that an alternative, inland route using tracks owned and operated by CSX Transportation was not feasible for a variety of reasons: AAF did not have the operating rights needed for the CSX-owned route; it would need to purchase or lease land to create a new rail connector between the FECR route and the CSX route to connect Phases I and II; the route would require extensive upgrades to the track, grade crossings, and new infrastructure; trip times using the CSX route would exceed the 3 hour and 15 minute target for the project; and the CSX route would result in the highest potential adverse direct and indirect impacts to wetlands and protected species compared to the other routes. AR 15757, 15760, 15765; AR 73681, 73686.

In response to the FEIS, the County proposed as another alternative the so-called "K Branch" route, which would partially run on CSX tracks. See AR 64683. FRA responded to this suggestion in Appendix C to the ROD by explaining that the K Branch route "would not meet the project purpose and need for the same reasons that

the CSX alternative was dismissed in the EIS"—that is, the "route is controlled in part by CSX, and FRA concluded that it was not reasonable to assume that AAF could secure operating rights." AR 65266. Moreover, "the lack of control over operations and the longer route length would result in trip times exceeding the approximately 3-hour run time[ ] that is part of AAF's purpose." *Id.*

This response makes clear that FRA did not, as the County argues, "refuse[ ] to consider" the K Branch route. See Pls.' Reply at 21. FRA considered the alternative, concluded it was not feasible for the same reasons as another infeasible alternative, and said as much. The case law does not require more. See *Friends of Capital Crescent Trail* v. *Fed. Transit Admin.*, 877 F.3d 1051, 1063 (D.C. Cir. 2017) ("Agencies need not reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency has considered and responded to public comment favoring other alternatives."). As in *Friends of Capital Crescent Trail*, "[r]equiring more detail on rejected alternatives would elevate form over function." *Id.* at 1064.

b. Bridge alternatives

Second, Plaintiff contends that FRA did not independently review and verify AAF's assertions, presented in the FEIS at Table 3.3-14, that it was not feasible to construct alternatives to the existing bridges at the St. Lucie and Loxahatchee Rivers that would not result in increased vessel queuing. Pls.' Reply at 18; AR 73728. To advance its point, the County emphasizes that AAF "prepared the one-page table" of bridge alternatives "and there is nothing in the record to indicate that anyone at

FRA reviewed the information before copying it *verbatim* into the FEIS." Pls.' Reply at 18.

But it is not dispositive that AAF or its consultant (rather than FRA) prepared the chart so long as FRA conducted an "independent review" of the information before including it in the FEIS. See *Comm. of 100*, 87 F. Supp. 3d at 211. There is a "presumption of regularity accorded to agencies in performing their duties." *Id.* (quoting *Sierra Club* v. *Costle*, 657 F.2d 298, 334 (D.C. Cir. 1984)). The County fails to rebut that presumption with any evidence that FRA failed to independently consider reasonable alternatives for the bridges. In fact, the record supports FRA's assertion that it independently considered the bridge alternatives.

FRA posed 123 questions to AAF regarding the draft EIS. AR 38897. One of these focused on alternatives to the two moveable bridges. FRA commented that the "FEIS should evaluate other bridge options," including higher moveable bridges and fixed bridges that could support passenger and/or freight trains. AR 38930. In response, AAF prepared a chart that walked through those possible alternatives for the St. Lucie River and Loxahatchee River Bridges. Ultimately, the chart explains that the four alternatives are not feasible for a variety of reasons. AR 38931-32. And, contrary to the County's assertion that FRA simply copied and pasted this chart into the FEIS with no independent analysis, FRA replied to AAF's responses in an email: "we've done a preliminary review of the materials that AAF has provided in response to our questions. On the whole, these seem to answer the questions. *We're having our technical experts do further review on the analyses* . . . ." AR 39151 (emphasis added). And finally, FRA emphasized throughout the FEIS that "[a]s required by NEPA,

FRA has reviewed the alternatives analysis, required AAF to evaluate alternatives other than the proposed action, and has verified the analyses." AR 73674. FRA's "statement[s] that it performed an independent review" of the materials provided by AAF "is afforded a presumption of validity, which [Plaintiff] ha[s] not rebutted." *Comm. of 100*, 87 F. Supp. 3d at 212. Rather, the record evidence contradicts the County's contention that FRA failed to independently evaluate and verify the analysis undertaken by AAF regarding bridge alternatives.

4. Noise impacts

The County next argues that FRA's analysis was inadequate under NEPA because, it contends, the agency failed to follow applicable guidance on evaluating the noise impacts of a rail project. Pls.' MSJ at 30. Plaintiff identifies what it believes are two fundamental departures from agency guidance: FRA conducted a general, rather than detailed, noise analysis and FRA calculated, rather than measured, existing noise levels, which led the agency to omit a key source of noise in its analysis.

The ROD says that "[n]oise and vibration have been assessed according to guidelines specified in FRA's *High-Speed Ground Transportation Noise and Vibration Impact Assessment* guidance manual [and] the Federal Transit Administration's (FTA) *Noise and Vibration Impact Assessment* guidance manual." AR 65131. The FRA manual "provides guidance and procedures for the assessment of potential noise and vibration impacts resulting from proposed high-speed ground transportation [] projects." AR 13032.[13] The FTA manual does the

[13] This reference to high-speed ground transportation projects is not to be confused with "high-speed intercity rail facilities" referenced in 26 U.S.C. § 142(i)(1), discussed *supra*, which applies only to passenger trains capable of 150 mile-per-hour maximum speeds. FRA's

same "for projects with conventional train speeds below 90 mph." *Id.* Both manuals outline three levels of analysis that may be used to determine the noise impact of a proposed project: an initial screening procedure, a general noise assessment, and a detailed noise analysis. AR 13068, 13071, 13094; FTA, *Transit Noise and Vibration Impact Assessment* ("FTA Manual") (May 2006), at 1-4.[14] True to their names, the general noise assessment involves applying more "simplified models to estimate train noise," AR 13071, while the detailed noise analysis uses "more refined procedures . . . to predict project noise and evaluate mitigation measures" on a "site-specific" level, AR 13094-95. The level of detail of the analysis affects when the analysis is typically done: the general noise assessment can be conducted during the "early stages in the project development," AR 13068, while the detailed noise analysis will usually be conducted after "the preliminary engineering has been initiated, and the preparation of an environmental document (usually an Environmental Impact Statement) has begun," AR 13094. Here, the agency conducted a general noise assessment while preparing the FEIS and concluded that, with the mitigation measures it required AAF to take, the project would actually result in less noise overall. AR 73953. It nonetheless required AAF to conduct a detailed noise analysis once "advanced engineering" is available for the project. AR 65133.

The County argues that this approach represents an arbitrary departure from agency guidance. The D.C. Circuit has sent mixed signals as to "[w]hether an agency

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manual "is intended for projects with train speeds of 90-250 mph," AR 13032, which includes AAF's project.

[14] Available at: https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Noise_and_Vibration_Manual.pdf.

must account for a departure" from its non-binding guidance. See *Friends of Blackwater* v. *Salazar*, 691 F.3d 428, 435 (D.C. Cir. 2012) (describing the question as "not entirely clear" and citing conflicting authority). In *Sitka Sound Seafoods, Inc.* v. *NLRB*, 206 F.3d 1175 (D.C. Cir. 2000), for example, it explained that because the guidance in question "does not bind the Board," "the relevant question is whether, quite apart from the [guidance], the Board acted unreasonably." *Id.* at 1182. In *Edison Electric Institute* v. *EPA*, 391 F.3d 1267 (D.C. Cir. 2004), by contrast, the Circuit stated that "the real question is whether [the agency] adequately accounted for any departures" from non-binding guidance because "any deviation from [such guidance] is not *per se* arbitrary and capricious." *Id.* at 1269 & n.3.

But whether an agency is required to merely act reasonably or adequately account for departures from non-binding guidance, the Court concludes that FRA's approach in this case comports with NEPA. As FRA explains, the noise-assessment manuals are "inherently flexible, and do not *require* the use of a particular level of analysis." Fed. Defs.' MSJ at 43. The County does not contest that the relevant guidance is non-binding. In addition, the agency has explained why it prepared only a general assessment for purposes of the FEIS. According to the ROD, "Noise and Vibration Impacts for the north-south corridor relied on the [applicable guidance] methodologies appropriate for the level of design of the alternatives evaluated in the FEIS." AR 65132. Critically, "[b]ecause advanced engineering is now available for the north-south route, AAF will conduct [a] Detailed Noise and Vibration Assessment throughout the corridor." *Id.* Thus, the agency explained that it relied on a general noise assessment rather than detailed one because that

was the level of analysis that was feasible at the time the FEIS was prepared. And the agency took the additional step of requiring AAF to conduct the more detailed analysis once more information became available and the more comprehensive analysis was feasible. While the agency certainly could have discussed the present infeasibility of a detailed analysis in more detail, the Court concludes that it has done enough to satisfy NEPA.

The County also argues that FRA unreasonably departed from agency guidance by calculating, rather than measuring, noise. Agency guidance explains that where, as here, "the proposed high-speed rail project corridor is to be shared with an existing rail transit corridor . . . noise measurements at representative locations along the corridor are essential to estimate noise accurately." AR 13080. This does not appear contingent on whether the agency conducts a general assessment or detailed analysis. Contrary to the guidance, Amec, the consultant that prepared the underlying technical memorandum that forms the basis of the noise information included in the FEIS, did not measure existing noise along the N-S Corridor. AR 61110. Instead, it calculated existing noise based on a variety of variables and then compared its calculations to the observed noise measurements of a 2010 Environment Assessment ("EA") for Amtrak along the same corridor. *Id.* In response to a comment from VHB and FRA regarding the need to measure existing noise, Amec and AAF explained that "[e]xisting noise measurements for existing rail line operations (i.e., freight) have been completed through recent, previous studies. . . . Calculated noise levels were compared to analogous measured noise levels as verification of accuracy, with good agreement." AR 1325. But again, whether an agency is required to act reasonably or also adequately

account for any departures from guidance, the FRA has adequately explained why it did not separately measure noise—Amec and FRA could validate their calculations based on recent noise measurements along the same corridor. The County's two counterarguments do not undermine this conclusion.

First, the County argues that by failing to measure existing noise, FRA omitted a key source of noise as a variable in its assessment of current noise levels: the use of warning horns along the mainline. Pls.' Reply at 23. To establish a baseline for its noise analysis, Amec modeled current noise by focusing only on existing freight operations, the primary source of noise along the N-S Corridor. AR 73772. As explained above, Amec calculated existing noise and then validated its calculations by comparing them to the measured noise in the 2010 Amtrak EA. AR 61110. Table 3-3 of the Amec noise analysis presents the difference between the calculated noise exposure and the observed noise exposure from the 2010 EA. *Id.* There is almost no difference between calculated and observed noise for crossings; there is, however, a sizable difference between calculated and observed noise for the mainline. *Id.*

What accounts for this difference on the mainline? Amec assumed that trains would only sound their warning horns at or near crossings, not on the mainline. *Id.* "However, based on documentation within the Amtrak EA, warning horns were observed at both the mainline and crossing monitoring locations." *Id.* Amec acknowledged that "[i]f warning horns were added to the calculated noise exposure for mainline conditions, noise levels would be the same as calculated noise exposure for crossing conditions" and thus "within 1 dBA of the observed noise levels." *Id.* Amec did not explain why it assumed

trains would sound their horns at crossings but not on the mainline.

The FEIS also does not explain why it likewise focuses exclusively on the use of warning horns at formal crossings. According to the FEIS, along the N-S Corridor, "noise impacts [from the project] would primarily be due to the increased frequency of warning horns use at *at-grade crossings*." AR 73950 (emphasis added). To mitigate this noise, the FEIS notes that "AAF has committed to installing stationary wayside horns at each of the 117 grade crossings between Cocoa and West Palm Beach where severe, unmitigated impacts would occur using locomotive-mounted horns." AR 73942. Wayside horns—which are pole-mounted horns that are quieter than train horns and sound only at the crossings—have "been shown to substantially reduce the noise footprint" at an intersection "without compromising safety at the grade crossing." *Id.* The FEIS concludes that adding these horns at grade crossings "will eliminate *all* severe noise impacts for residential and institutional receptors along the N-S Corridor." AR 73950 (emphasis added). This, says FRA, means that the Project will actually make grade crossings quieter than existing conditions (by 7 to 8 dBA) and will lead to a slight increase (by 0.2 to 0.3 dBA) along the mainline. AR 73953.

The County argues that FRA's conclusion overlooks the unmitigated noise from warning horns on the mainline. It turns out this is partially true. Both the agency and AAF confirmed at the hearing that the noise analysis did not take into account the use of warning horns along the mainline. Hr'g Tr. at 28:22-29:1; *id.* at 38:8-12. Even so, this omission is not fatal to the agency's satisfaction of its NEPA obligations. Like any agency, FRA's actions are "entitled to a presumption of regularity" and, if the

Court "can 'reasonably discern' the agency's path, it should uphold the agency's decision." *Weiss* v. *Kempthorne*, 580 F. Supp. 2d 184, 188 (D.D.C. 2008) (first quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); then quoting *Pub. Citizen, Inc.* v. *FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)).

Although the agency certainly could have been clearer, the Court is able to reasonably discern the agency's rationale for not including the use of warning horns on the mainline as a variable in its noise analysis. As explained above, the FEIS concludes that "noise impacts [from the project] would primarily be due to the increased frequency of warning horns use at at-grade crossings." AR 73950. Implicit in this conclusion is that other sources of noise, including the use of warning horns along the mainline, were not significant contributors of noise. Although the agency neglected to expressly articulate why, the record suggests that the agency concluded mainline warning horns were not a significant source of noise because they would be used only rarely and randomly. In response to one of the County's noise-related comments on the FEIS, FRA explained that "[t]rain-mounted horns may still need to be sounded at all locations along the rail corridor under emergency conditions." AR 65289. This implies that the agency concluded that the use of mainline warning horns was both rare (because they would be sounded only in emergencies) and difficult to measure (because emergencies are unpredictable). This is consistent with counsel for AAF's representation at the hearing that the use of warning horns on the mainline is "a random immeasurable event" in response to unpredictable trespassing along the line. Hr'g Tr. at 39:17.

Under the rule of reason, the Court must consider the "practical limitations on the agency's analysis," including "the information available at the time" as well as the availability of appropriate modeling. See *Wilderness Soc'y* v. *Salazar*, 603 F. Supp. 2d 52, 61 (D.D.C. 2009) (citing *Transmission Access Policy Study Grp.* v. *FERC*, 225 F.3d 667, 736 (D.C. Cir. 2000); *N. Slope Borough*, 642 F.2d at 600); *WildEarth Guardians*, 8 F. Supp. 3d at 34. Applying that principle, it makes sense for the agency to assume in its noise analysis that trains would use their warning horns on the mainline only in unpredictable "emergency conditions." Although the agency could have been more explicit in its reasoning, the Court can nevertheless discern why FRA did not consider the use of mainline warning horns.

Second, the County argues that Amec and FRA overlooked the effect that a new "turnout" (that is, an additional line of track that allows a slower moving train to pull off the mainline to let a faster moving train pass) would have on the historic Lyric Theater in Martin County. But as AAF points out, FRA expressly considered the noise impact to historic sites like the theater and concluded "there will be no noise impacts" after the required mitigation. See AAF's Reply at 12; AR 74070, 74073 (Table 5.4.5-3). FRA responded similarly after receiving comments on the FEIS regarding the theater from Martin County. See AR 65276.

5. Changes to freight operations

Finally, the County contends that FRA expressly declined to consider the potential impacts of an increase in the speed of freight trains caused by the project's infrastructure improvements. Pls.' MSJ at 23-26. This argument lacks support in the record. In its comment about general effects on community character, Indian River

County also expressed concern about freight trains, explaining that "freight operations can be anticipated to intensify with the Project, and the speed of freight trains will increase to up to 70 mph." AR 65268. FRA responded that the number of freight trains running along the N-S Corridor was higher as recently as 2006 and that "[a]ny potential changes to the existing freight operations along the FECR Corridor are outside the scope of this FEIS." *Id.* This response should not be taken to mean that FRA "specifically declined to consider" freight trains in the FEIS. See Pls.' Reply at 12. Rather, it merely reflects that changes to existing freight operations—that is, the number of freight trains running—were not part of the federal action proposed. And even if changes to existing freight operations or speeds were not specifically planned, they were anticipated and discussed in the FEIS.

The FEIS explains that the "addition of passenger rail service" to the N-S Corridor, where freight trains currently run, "would require modifying the mostly single-track system to a mostly double track system, which would be used by both passenger and freight operations. This will improve freight efficiency by increasing average operating speeds." AR 73907; see also AR 73733 (Table 3.3-16 depicting average freight train speed in Indian River County as 38.57 mph under the "No-Action Alternative" and 43.45 mph under the project); AR 73906 (explaining that under the No-Action Alternative, "freight speeds would not increase"). The FEIS ultimately concludes that this increased efficiency means "the Project would have beneficial impacts on future freight traffic along the N-S Corridor." AR 73907.

Perhaps conceding that the FEIS at least discloses the potential for faster freight trains, the County faults

FRA for not considering four *negative* impacts of project-related changes to freight operations: (1) the public-safety effect of faster freight trains, (2) increased noise and vibrations from faster freight trains, (3) the potential shift of freight traffic from day to night to accommodate the passenger-train schedule, and (4) the threat to the structural stability of the older St. Lucie River Bridge from faster freight trains. Pls.' MSJ at 24. The Court addresses these potential effects in turn.

a. Public-safety impacts of faster freight trains

First, as explained *supra* Section II.B(1)(b), FRA determined that the project would have an overall beneficial effect on safety because AAF would be required to introduce a variety of safety features, including a Positive Train Control system interoperable between passenger and freight trains as well as improved grade crossings. The agency was not required to separately analyze the public-safety ramifications of marginally faster (by 5 mph on average) freight trains given that these safety measures would benefit both passenger and freight trains, which the agency acknowledged would be moving at increased speeds.

b. Noise and vibration impacts of faster freight trains

Second, FRA offers two responses to the County's argument that its noise and vibration analysis overlooked an increase in freight speed: first, quite simply, the analysis *did* take "into account the characteristics of future passenger and freight rail operations, including speed," Fed. Defs.' MSJ at 37; and second, in any event, faster freight trains would not have "a significant impact on overall noise conditions" because FRA concluded that *warning horns* are the predominant cause of noise along

the N-S Corridor, Fed. Defs.' Reply at 18. FRA's first argument is belied by the record but its disregard for noise from faster freight trains is harmless largely because of its second argument.

The record is clear that FRA's noise analysis does not consider the incremental noise increase from faster freight trains. Rather, the analysis takes into account freight trains only to establish the baseline level of noise based on calculated current freight operations. See AR 61108. The FEIS as well focuses on freight trains only to calculate the baseline, not as a potential source of additional noise based on an incremental increase in speed. That document discloses that the Project will "result in long-term noise and vibration adverse impacts," including "along the N-S Corridor due to the increase (greater than doubling) of vibration events as a result of adding passenger train service to the *existing* freight operations." AR 73942 (emphasis added).

The County raised its concern that the noise and vibration analysis does not account for faster freight trains in their comments on the FEIS. See AR 65289. It explained, "[t]he increases in freight train average operating speeds and maximum operating speeds as a direct result of the Project can be expected to increase noise and vibration. . . . None of these Project effects were taken into account in the general [noise] assessment." *Id.* FRA's response is similar to the one it advances here: "The FEIS 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.'" *Id.* (alterations in original) (quoting AR 73951). But critically, the FEIS cites to the *No-Action Alternative*, not

the impact of the *project* and its attendant increase in freight train speed. FRA concluded that in the absence of the project, predicted growth in freight operations would lead to some changes in those operations' noise impact. But again, FRA's response demonstrates that the parties have been talking past each other on the specific issue of incremental noise increases from faster freight trains as a result of the project since the comment period on the FEIS.

The Court must therefore determine whether this omission was prejudicial. Under the APA, the Court "shall" take into account "the rule of prejudicial error." 5 U.S.C. § 706. "[T]he inquiry into whether a NEPA plaintiff suffered prejudice is well established in the relevant precedent." *Standing Rock Sioux Tribe*, 301 F. Supp. 3d at 74 (citing, *e.g.*, *Pub. Employees for Envtl. Responsibility* v. *Hopper*, 827 F.3d 1077, 1087-1088 (D.C. Cir. 2016)); see also *Nevada*, 457 F.3d at 90.

The Court concludes that the agency's failure to take into account potential incremental increases in noise from slightly faster freight trains was harmless. The reason is two-fold. First, the FEIS anticipates that freight trains are to go only approximately 5 mph faster because of the Project. See AR 73733 (Table 3.3-16 reflecting a 4.88 mph increase in speed for freight trains traveling through Indian River County and a 5.30 mph increase in speed for freight trains traveling through Martin County). The County fails to convince the Court that this slight increase in speed would lead to a significant increase in noise. And second, the FEIS concludes that the main source of noise from the project would be the "increased frequency of warning horn use at at-grade crossings" rather than train-related noise. AR 73950. Indeed, the FEIS concluded that noise on the mainline would in-

crease only marginally (by 0.2 to 0.3 dBA) from the addition of 32 high-speed passenger trains per day, AR 73953, suggesting that noise from the trains themselves pales in comparison to that of their horns at crossings.

c. Noise impacts of nighttime freight trains

Third, in response to Indian River County's comment on the FEIS that adding passenger trains "is likely to shift freight trains to nighttime hours due to scheduling conflicts," FRA explained that "[f]uture passenger and freight train operations and the period of the day they are anticipated to occur has been analyzed based on FECR's anticipated future passenger and freight demands." AR 65289. The County fails to provide evidence that, contrary to this response, the noise analysis ignored the anticipated train schedule. Instead, Plaintiff points to Table 5.2.2-1, a table setting forth the "Proposed Passenger Rail Operations" which assumes two passenger trains per night and does not discuss freight trains. AR 73944. That this specific table does not reflect the timing of freight traffic does not prove that the agency did not do so at all. In fact, the Amec report clearly demonstrates that the noise analysis contemplated at least some nighttime freight traffic. That report explains that "[a]ccording to historical trends . . . , approximately half of the freight operations occur at night (10 pm to 7 am) and half during the day (7 am to 10 pm)." AR 61109. Table 3-1 on that same page presents the "2016 Projected Existing Conditions Rail Operations (North-South Corridor)," which contemplates 11 freight trains per night. *Id.*

d. St. Lucie River Bridge and faster freight trains

And fourth, the County faults FRA for not including "discussion of the vibration impacts to the structural sta-

bility of the St. Lucie Bridge from the increased use and train speeds." Pls.' MSJ at 24. But an agency need not discuss an impact that is "merely conceivable" and, at its worst, minimal: AAF determined that the bridge is "structurally sound," AR 73727, and in any event, freight trains were projected to go just 5 mph faster over the bridge.

* * *

Agency action is rarely perfect. But NEPA does not demand perfection. Instead, it requires that an agency take a "hard look" at the reasonably foreseeable impacts of a proposed major federal action. The extensive FEIS, appendices, comment responses, and Record of Decision together demonstrate that FRA met that requirement here. The Court will therefore grant Defendants' and Intervenor-Defendant's motions for summary judgment on Indian River's NEPA claim, and deny the County's motion for summary judgment on that claim.

III. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion for Summary Judgment, grant Intervenor-Defendant's Motion for Summary Judgment, and deny Plaintiff's Motion for Summary Judgment. A separate Order shall accompany this Memorandum Opinion.

Date: December 24, 2018

s/ Christopher R. Cooper
Christopher R. Cooper
United States District Judge

APPENDIX D

RELEVANT STATUTORY PROVISIONS

1. Title 26 of the United States Code provides in relevant part as follows:

§ 141. Private activity bond; qualified bond

(a) Private activity bond

For purposes of this title, the term "private activity bond" means any bond issued as part of an issue—

(1) which meets—

(A) the private business use test of paragraph (1) of subsection (b), and

(B) the private security or payment test of paragraph (2) of subsection (b), or

(2) which meets the private loan financing test of subsection (c).

* * * * *

(e) Qualified bond

For purposes of this part, the term "qualified bond" means any private activity bond if—

(1) In general

Such bond is—

(A) an exempt facility bond,

(B) a qualified mortgage bond,

(C) a qualified veterans' mortgage bond,

(D) a qualified small issue bond,

(E) a qualified student loan bond,

(F) a qualified redevelopment bond, or

(G) a qualified 501(c)(3) bond.

(2) Volume cap

Such bond is issued as part of an issue which meets the applicable requirements of section 146, and[1]

(3) Other requirements

Such bond meets the applicable requirements of each subsection of section 147.

* * * * *

§ 142. Exempt facility bond

(a) General rule

For purposes of this part, the term "exempt facility bond" means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide—

(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,

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[1] So in original. Probably should end with a period after "146".

(13) qualified public educational facilities,

(14) qualified green building and sustainable design projects, or

(15) qualified highway or surface freight transfer facilities.

* * * * *

(i) High-speed intercity rail facilities

(1) In general

For purposes of subsection (a)(11), the term "high-speed intercity rail facilities" means any facility (not including rolling stock) for the fixed guideway rail transportation of passengers and their baggage between metropolitan statistical areas (within the meaning of section 143(k)(2)(B)) using vehicles that are reasonably expected to be capable of attaining a maximum speed in excess of 150 miles per hour between scheduled stops, but only if such facility will be made available to members of the general public as passengers.

* * * * *

(m) Qualified highway or surface freight transfer facilities

(1) In general

For purposes of subsection (a)(15), the 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).

(2) National limitation on amount of tax-exempt financing for facilities

(A) National limitation

The aggregate amount allocated by the Secretary of Transportation under subparagraph (C) shall not exceed $15,000,000,000.

(B) Enforcement of national limitation

An issue shall not be treated as an issue described in subsection (a)(15) if the aggregate face amount of bonds issued pursuant to such issue for any qualified highway or surface freight transfer facility (when added to the aggregate face amount of bonds previously so issued for such facility) exceeds the amount allocated to such facility under subparagraph (C).

(C) Allocation by Secretary of Transportation

The Secretary of Transportation shall allocate the amount described in subparagraph (A) among qualified highway or surface freight transfer facilities in such manner as the Secretary determines appropriate.

2. Former Title 23 of the United States Code, as in effect in 2006, provided in relevant part as follows:

§ 101. Definitions and declaration of policy

(a) DEFINITIONS.—In this title, the following definitions apply:

* * * * *

(21) PROJECT.—The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title.

* * * * *

§ 106. Project approval and oversight

(a) IN GENERAL.—

(1) SUBMISSION OF PLANS, SPECIFICATIONS, AND ESTIMATES.—Except as otherwise provided in this section, each State transportation department shall submit to the Secretary for approval such plans, specifications, and estimates for each proposed project as the Secretary may require.

(2) PROJECT AGREEMENT.—The Secretary shall act on the plans, specifications, and estimates as soon as practicable after the date of their submission and shall enter into a formal project agreement with the State transportation department formalizing the conditions of the project approval.

(3) CONTRACTUAL OBLIGATION.—The execution of the project agreement shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project.

(4) GUIDANCE.—In taking action under this subsection, the Secretary shall be guided by section 109.

(b) PROJECT AGREEMENT.—

(1) PROVISION OF STATE FUNDS.—The project agreement shall make provision for State funds required to pay the State's non-Federal share of the cost of construction of the project and to pay for maintenance of the project after completion of construction.

(2) REPRESENTATIONS OF STATE.—If a part of the project is to be constructed at the expense of, or in cooperation with, political subdivisions of the State, the Secretary may rely on representations made by the State transportation department with respect to the arrangements or agreements made by the State transportation department and appropriate local officials for ensuring that the non-Federal contribution will be provided under paragraph (1).

* * * * *

§ 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid

from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of

the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) SURVEY AND SCHEDULE OF PROJECTS.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) FUNDS FOR PROTECTIVE DEVICES.—

(1) IN GENERAL.—Before making an apportionment under section 104(b)(5) for a fiscal year, the Secretary shall set aside, from amounts made available to carry out the highway safety improvement program under section 148 for such fiscal year, at least $220,000,000 for the elimination of hazards and the installation of protective devices at railway-highway crossings. At least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(2) SPECIAL RULE.—If a State demonstrates to the satisfaction of the Secretary that the State has met all its needs for installation of protective devices at railway-highway crossings, the State may use funds made available by this section for other purposes under this subsection.

(f) APPORTIONMENT.—

(1) FORMULA.—Fifty percent of the funds set aside to carry out this section pursuant to subsection (e)(1) shall be apportioned to the States in accordance with the formula set forth in section 104(b)(3)(A), and 50 percent of such funds shall be apportioned to the States in the ratio that total public railway-highway crossings in each State bears to the total of such crossings in all States.

(2) MINIMUM APPORTIONMENT.—Notwithstanding paragraph (1), each State shall receive a minimum of one-half of 1 percent of the funds apportioned under paragraph (1).

(3) FEDERAL SHARE.—The Federal share payable on account of any project financed with funds set aside to carry out this section shall be 90 percent of the cost thereof.

* * * * *

§ 145. Federal-State relationship

(a) PROTECTION OF STATE SOVEREIGNTY.—The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

(b) PURPOSE OF PROJECTS.—The projects described in section 1702 of the SAFETEA-LU, section 1602 of the Transportation Equity Act for the 21st Century, sections 1103 through 1108 of the Intermodal Surface Transportation Efficiency Act of 1991 (105 Stat. 2027 et seq.), and section 149(a) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (101 Stat. 181 et seq.)

are intended to establish eligibility for Federal-aid highway funds made available for such projects by section 1101(a)(16) of the SAFETEA-LU, section 1101(a)(13) of the Transportation Equity Act for the 21st Century, section 117 of this title, sections 1103 through 1108 of the Intermodal Surface Transportation Efficiency Act of 1991, and subsections (b), (c), and (d) of section 149 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, respectively, and are not intended to define the scope or limits of Federal action in a manner inconsistent with subsection (a).

* * * * *

§ 148. Highway safety improvement program

(a) DEFINITIONS.—In this section, the following definitions apply:

* * * * *

(3) HIGHWAY SAFETY IMPROVEMENT PROJECT.—

(A) IN GENERAL.—The term "highway safety improvement project" means a project described in the State strategic highway safety plan that—

(i) corrects or improves a hazardous road location or feature; or

(ii) addresses a highway safety problem.

(B) INCLUSIONS.—The term "highway safety improvement project" includes a project for one or more of the following:

* * * * *

(vi) Construction of any project for the elimination of hazards at a railway-highway crossing that is eligible for funding under section 130, including the separation or protection of grades at railway-highway crossings.

* * * * *

(b) PROGRAM.—

(1) IN GENERAL.—The Secretary shall carry out a highway safety improvement program.

(2) PURPOSE.—The purpose of the highway safety improvement program shall be to achieve a significant reduction in traffic fatalities and serious injuries on public roads.

(c) ELIGIBILITY.—

(1) IN GENERAL.—To obligate funds apportioned under section 104(b)(5) to carry out this section, a State shall have in effect a State highway safety improvement program under which the State—

(A) develops and implements a State strategic highway safety plan that identifies and analyzes highway safety problems and opportunities as provided in paragraph (2);

(B) produces a program of projects or strategies to reduce identified safety problems;

* * * * *

(d) ELIGIBLE PROJECTS.—

(1) IN GENERAL.—A State may obligate funds apportioned to the State under section 104(b)(5) to carry out—

(A) any highway safety improvement project on any public road or publicly owned bicycle or pedestrian pathway or trail; or

(B) as provided in subsection (e), other safety projects.

(2) USE OF OTHER FUNDING FOR SAFETY.—

(A) EFFECT OF SECTION.—Nothing in this section prohibits the use of funds made available under other provisions of this title for highway safety improvement projects.

(B) USE OF OTHER FUNDS.—States are encouraged to address the full scope of their safety needs and opportunities by using funds made available under other provisions of this title (except a provision that specifically prohibits that use).

* * * * *

§ 601. Generally applicable provisions

(a) DEFINITIONS.—In this chapter, the following definitions apply:

* * * * *

(8) PROJECT.—The term "project" means—

* * * * *

(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[.]

* * * * *

APPENDIX E
LETTER OF EDWARD V.A. KUSSY
(OCTOBER 7, 2005)

U.S. Department of
Transportation
Federal Highway
Administration

400 Seventh St., S.W.
Washington, D.C. 20590
Oct. 7, 2005
Reply to: HCC-30

Donald L. Korb, Esq.
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Room 3026
Washington, D.C. 20224-0002

By Facsimile: (202) 622-4277

Re: Section 11143 of Public Law 109-59—Tax Exempt Financing of Highway Projects and Rail-Truck Transfer Facilities

Dear Mr. Korb:

This letter represents the Federal Highway Administration's (FHWA) view of this recently enacted legislation, which amended § 142 of the Internal Revenue Code (IRC).

Section 11143 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, or "SAFTEA-LU," added a new highway category to "exempt facility bonds." Under this amendment to the IRC, "qualified highway or surface freight transfer facilities" means "any surface transportation project that receives Federal assistance under title 23, United States Code . . . 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 . . . or any facility for the transfer of freight from truck to rail or rail to truck . . . which receives Federal assistance under either title 23 or title 49, United States Code . . . ."

When highway facilities are constructed under the Federal-Aid Highway Program (FAHP), grantees typically fund some segments of the facility with Federal assistance and other segments are funded with state or local funds. This is the case even if the entire highway facility is eligible for Federal assistance. Moreover, the division between Federally assisted and grantee-only funded work may vary as to the type of work or the funding categories that a grantee may have available at any given time. Both the segments or activities actually using Federal assistance and the overall facility are referred to as "projects" in Federal highway law, regulations and practice. Section 145, title 23, United States Code, makes clear that the rights of the States to determine which projects shall be Federally financed shall not be infringed, and decisions as to how to fund particular highway projects (or portions thereof) are entirely within the discretion of our State grantees.

Thus, we believe the most reasonable reading of §11143 permits the proceeds of private activity bonds (PAB)

authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed even though only a portion of that facility receives Federal assistance under title 23.

The statute references certain eligible "facilities" as meaning "projects" that receive Federal assistance. This mixing of the words "facilities" and "projects" makes little sense unless one considers how the funding of transportation facilities is accomplished under the FAHP. Under the FAHP, States and other recipients commonly fund portions of the facility or activities associated with the construction of the facility (such as preliminary engineering, right-of-way acquisition, or construction of a segment or phase of the facility), with Federal assistance under title 23, subjecting those activities to whatever Federal requirements attach to such funds. Portions not funded with Federal assistance would not be subject to Federal requirements that apply on a contract specific basis, such as Federal competition requirements, Disadvantaged Business Enterprise goals, Davis Bacon, and Buy American, among others.

We believe that PAB proceeds are non-Federal funds, but under §11143 they must be used on a facility that receives Federal assistance on some component or segment. Thus, the Congress has limited the kinds of facilities where PAB proceeds may be used. At the same time, Congress did not intend to fundamentally change the way in which States implement project financing or the use of Federal-aid highway funding on portions of a facility and State funds or bond proceeds on other portions. See 23 U.S.C. §145. Thus, the use of PAB proceeds would not subject the non-Federal segments of any facility to Federal requirements that do not presently apply to such segments.

This is clear from a close reading of the Conference Report, H.R. Conference Rep. 109-203 at 1143-1145, which states "this provision is not intended to expand the scope of any Federal requirement beyond its application under present law . . ." *Id.* at 1145. Also, there is no reason to assume that in amending the Internal Revenue Code, Congress intended to use precisely the same definition of "project" as is found in title 23, U.S.C. The amendment found in §11143 of SAFETEA-LU uses the word "project" in the context of defining a "transportation facility." This suggests that the Congress had a broader concept in mind. The FHWA uses the word "project" in many different contexts, some quite narrow and others much more expansive in meaning. In its narrowest context a "project" under title 23 is a portion of the highway constructed by a State. See 23 U.S.C. §101(21).

The real consequence of insisting on the narrowest reading of the word "project," limiting PAB proceeds only to specific projects actually subject to a funding agreement under 23 U.S.C. §106, would distort the longstanding way in which facilities are actually funded, create needless red tape, and artificially result in the extension of Federal requirements that have nothing to do with the bonding of transportation facilities. This is because such a reading would induce State grantees to "sprinkle" title 23 funds to every separate project or contract of an entire facility to make full use of PAB proceeds. By so doing, a whole array of Federal requirements would apply in ways that are wholly inconsistent with the way in which the construction activities are generally administered, and extend many project specific requirements simply because the State grantee chose to use PAB funding rather than more established funding mechan-

isms. This would result in doing exactly what the Congress indicated it did not intend to do.

In summary, our view is that PAB proceeds may be used on any qualified facility that includes a project funded with Federal-aid highway funds made available under title 23. This reflects the way the Federal assistance grants under the FAHP are administered. Also, it reflects the way in which bond proceeds may be used. A PAB issuance for a transportation facility in many cases will be secured by a revenue stream specifically associated with that transportation facility. In other words, repayment of the PAB is likely to be supported by the facility as a whole, not just the sections on which Federal assistance funds are expended. Limiting the project activities for which PAB proceeds may be used actually runs counter to this obvious relationship.

If you have any questions or would like to discuss this issue further please contact me at (202) 366-0764.

Sincerely,

s/ Edward V.A. Kussy
Edward V.A. Kussy
Acting Chief Counsel

APPENDIX F
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 15-CV-00632-CRC

MARTIN COUNTY, FLORIDA, *et al.*,
Plaintiffs,

v.

U.S. DEPT. OF TRANSPORTATION, *et al.*,
Defendants.

DECLARATION OF PAUL BAUMER

May 15, 2015

I, PAUL BAUMER, hereby declare under penalty of perjury that the following is true and correct:

1. I am a Transportation Policy Analyst in the Office of the Assistant Secretary for Transportation Policy of the United States Department of Transportation ("DOT"). I submit this declaration in opposition to the motion for a preliminary injunction filed by the plaintiffs in the above-captioned action.

2. Pursuant to 26 U.S.C. § 142(m)(2)(C), Congress has directed the Secretary of Transportation (the "Secretary") to allocate $15 billion in private activity bonds ("PABs") among "qualified highway or surface freight transfer facilities in such manner as the Secretary deems

appropriate." The Secretary was given this responsibility by Section 11143 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005).

3. The Secretary has delegated this responsibility to the Under Secretary of Transportation for Policy (the "Under Secretary"). See 49 C.F.R. §1.25(*l*). I am currently the principal staff member assisting the Under Secretary in carrying out this responsibility.

DOT's Interpretation of the Eligibility Requirements for PAB Allocations

4. DOT is authorized to allocate PABs to "qualified highway or surface freight transfer facilities," which include, *inter alia*, "any surface transportation project which receives Federal assistance under title 23," 26 U.S.C. §142(m)(1)(A), and "any facility for the transfer of freight from truck to rail or rail to truck . . . which receives Federal assistance under either title 23 or title 49," *id.* §142(m)(1)(C).

5. DOT has consistently interpreted this statutory language as authorizing it to allocate PABs to an entire project even if only a portion of the project receives Federal assistance under Title 23 or Title 49. Thus, if some portion of a surface transportation project receives Title 23 funding, the entire project qualifies for a PAB allocation under Section 142(m)(1)(A). Similarly, if some portion of a freight transfer facility receives Title 23 or Title 49 funding, the entire facility qualifies for a PAB allocation under Section 142(m)(1)(C).

6. DOT's interpretation was set forth in a letter sent by Edward V.A. Kussy, acting chief counsel of the Federal Highway Administration ("FHWA") (a com-

ponent of DOT), to Donald L. Korb, chief counsel of the Internal Revenue Service, on October 7, 2005, less than two months after the enactment of SAFETEA-LU. A true and accurate copy of the letter is annexed hereto as Exhibit A.

7. Consistent with this interpretation, DOT has allocated PABs to entire projects, even if only certain portions of those projects receive Federal assistance under Title 23 or Title 49. For example:

a. DOT allocated $1.3 billion in PABs to the Purple Line light rail project in the Maryland suburbs north of the District of Columbia. DOT determined that the entire project qualified for a PAB allocation under 26 U.S.C. § 142(m)(1)(A), based on the Maryland Department of Transportation's plans to spend $1 million in Title 23 funds to upgrade the Capital Crescent Train, a shared use trail adjacent to the planned rail line that is being upgraded as part of the Purple Line project.

b. DOT allocated $576 million in PABs to the Seneca I-80 Railport, an intermodal freight transfer facility and logistics park in Illinois. DOT determined that the entire project qualified for a PAB allocation under 26 U.S.C. § 142(m)(1)(C), based on the Illinois Department of Transportation's plans to spend $1.248 million in Title 23 funds to replace a bridge near the facility, which would assist the project.

c. DOT allocated $1.34 billion in PABs to the CenterPoint Intermodal Center—Joliet Project, an intermodal logistics park in Illinois. DOT determined that the entire project qualified for a PAB allocation under 26 U.S.C. § 142(m)(1)(C), based on the Illinois Department of Transportation's plans to spend Title 23 funds to improve a bridge near the facility and to

widen and reconstruct a nearby interstate freeway, both of which assist the project.

d. DOT allocated $554.8 million in PABs to the RidgePort Logistics Center, a 3,000 acre master-planned distribution park in Illinois. DOT determined that the entire project qualified for a PAB allocation under 26 U.S.C. § 142(m)(1)(C), based on the Illinois Department of Transportation's plans to spend Title 23 funds to widen and reconstruct a nearby interstate freeway, which would assist the project.

e. DOT allocated $1.1 billion in PABs to the Eagle Project, a commuter rail project in Denver, Colorado. Although the application identified only two of the project's commuter rail lines (the "Gold Line" and "East Corridor") as receiving Title 23 funds, DOT determined that the entire project—which also includes a portion of a third commuter rail line (the "Northwest Rail Corridor"), a commuter rail maintenance facility, and the electrical systems at Denver Union Station—qualified for a PAB allocation under 26 U.S.C. § 142(m)(1)(A).

8. DOT also interprets the plain language of 26 U.S.C. § 142(m)(1)(A) as authorizing it to allocate PABs to *any* "surface transportation project which receives Federal assistance under title 23," including any rail project receiving such assistance. It has allocated PABs to rail projects that meet the statutory eligibility criteria, including, as discussed above, the Purple Line light rail project in Maryland and a commuter rail project in Colorado.

DOT's Allocation of PABs to the All Aboard Florida Project

9. On August 15, 2014, All Aboard Florida ("AAF") submitted an application asking DOT to allocate $1.75 billion in PAB authority to the Florida Development Finance Corporation ("FDFC"), with the proceeds to be used to fund AAF's planned passenger rail project connecting Miami and Orlando (the "AAF Project").

10. AAF's application indicated that since the planning process for the AAF Project began in December 2011, the Florida Department of Transportation ("FDOT") had spent over $9 million in Title 23 funds to improve railway-highway grade crossings along the project corridor. The application also indicated that FDOT planned similar expenditures in future years. AAF subsequently provided DOT with a spreadsheet providing details on FDOT's expenditures of Title 23 funds along the project corridor, including more than $9 million in expenditures in 2012, 2013, and 2014, as referenced in the application. A true and accurate copy of that spreadsheet is annexed hereto as Exhibit B.

11. Based on FDOT's expenditures in 2012, 2013, and 2014, and its planned future expenditures, DOT determined that the AAF Project was 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).

12. DOT determined in its discretion that it would be appropriate to make a PAB allocation to the AAF Project. On December 22, 2014, DOT issued a Provisional Bond Allocation Approval Letter allocating up to $1.75 billion in PABs for the project.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 15, 2015, in Washington, District of Columbia.

s/ Paul Baumer
Paul Baumer