ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1302

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

STATE OF MARYLAND,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL,
Acting Administrator of the Federal Aviation Administration,

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL AVIATION ADMINISTRATION

PETITIONER'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and Amici. The Petitioner is the State of Maryland ("Maryland"). The Respondents are the Federal Aviation Administration ("FAA") and Daniel Elwell, Acting Administrator of the FAA.

Rulings under Review. The FAA's final order is in the form of a September 10, 2018, letter from James A. Lofton to John E. Putnam regarding the State of Maryland's administrative petition regarding Baltimore/Washington International Thurgood Marshall Airport ("BWI Marshall"). The order appears in the Administrative Record ("AR") at L2.

Related Cases. This case has not previously been before this Court or any other court. Another case addressing airspace at BWI Marshall, *Howard County v. FAA*, No. 18-2360, is pending before the U.S. Court of Appeals for the Fourth Circuit. The petitioners in *Howard County* seek review of FAA's response to an administrative petition they submitted to the agency that raises some, but not all, of the same arguments included in Maryland's administrative petition. The petitioners in *Howard County* also seek review of a number of FAA decisions that Maryland does not challenge here. To counsel's knowledge, there are no other cases

pending before FAA, this Court, or any other court which involve substantially the same issues as this case.

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GLOSSARY

APA	Administrative Procedure Act
AR	Administrative Record
BWI Marshall	Baltimore/Washington International Thurgood Marshall Airport
2017 Defense Act	National Defense Authorization Act for Fiscal Year 2017
EA	Environmental Assessment
EIS	Environmental Impact Statement
FAA	Federal Aviation Administration
FONSI/ROD	Finding of No Significant Impact/Record of Decision
NEPA	National Environmental Policy Act
NextGen	Next Generation Air Transportation System

STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Under Circuit Rule 28(a)(5), relevant statutes, regulations, and agency orders are submitted in an addendum attached to this brief.

INTRODUCTION

The Federal Aviation Administration ("FAA") made a series of amendments to flight paths around Baltimore/Washington International Thurgood Marshall Airport ("BWI Marshall") as part of its efforts to modernize the U.S. airspace. The immediate effect of these flight path changes was to concentrate flights over communities in Maryland that previously had only minimal exposure to aircraft overflights. The increased flight concentration led to increased noise and a drastic rise in complaints.

Maryland was not the only area affected by FAA's implementation of its airspace modernization program, known as Next Generation Air Transportation System, or NextGen. Revised flight paths have led to noise impacts, community outrage, and litigation across the country. In response, in 2016, Congress included in the National Defense Authorization Act for Fiscal Year 2017 ("2017 Defense Act") a specific requirement for FAA to review the environmental impact of many of its prior decisions to change flight paths.

In June 2018, after years of suffering from the effects of NextGen, Maryland submitted an Administrative Petition to FAA requesting that

it comply with the congressional mandate contained in the 2017 Defense Act. Maryland also asked FAA to supplement the environmental analysis it had done for some of the flight procedure changes, and to amend or repeal its prior flight procedures in order to minimize the impacts of those procedures on noise-sensitive areas.

Remarkably, FAA did not grant or deny Maryland's petition but, instead, in September 2018, sent a terse, one-page letter ("September Letter") in which it "decline[d] to respond" to the Administrative Petition. AR L2, September Letter (Sept. 10, 2018).

Maryland promptly filed this suit challenging FAA's failure to adequately respond to its Administrative Petition and seeking an order from this Court requiring FAA to adequately respond to the Administrative Petition and/or to halt its unreasonable delay in complying with the 2017 Defense Act's requirements for environmental review.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Maryland's petition for review of the September Letter under 49 U.S.C. § 46110(a). The September Letter is a final order within the meaning of § 46110(a). Maryland filed this

petition for review on November 8, 2018, within the 60-day period for seeking review under § 46110(a).

This Court has jurisdiction over Maryland's claim of unreasonable FAA delay pursuant to § 46110(a) and 5 U.S.C. § 706(1), which authorizes this Court to "compel agency action unlawfully withheld or unreasonably delayed."

STATEMENT OF THE ISSUES

1. An agency presented with a request for rulemaking has a duty to respond to that request with an explanation of the agency's rationale for its decision to initiate or decline to initiate the requested action. Flight procedures are issued as rules under the APA. Did FAA violate this basic tenet of administrative law when it declined to respond to Maryland's Administrative Petition seeking changes to flight procedures?

2. The 2017 Defense Act Section 341(b) requires the FAA Administrator to review his or her decisions to grant categorical exclusions from environmental review for flight procedures that materially changed prior flight procedures. Has FAA unreasonably

delayed performing its nondiscretionary duty to review categorical exclusions granted for changes to flight procedures at BWI Marshall?

STATEMENT OF THE CASE

A. FAA's Management of Airspace and NextGen Implementation.

Congress has authorized FAA to manage the airspace, air traffic control, and aircraft operations throughout the United States, while for the most part leaving state and local entities to operate and control airport facilities and infrastructure. 49 U.S.C. § 40103. As part of FAA's management of the airspace, it develops routes and procedures that pilots and controllers use to ensure safety and efficiency and reduce noise impacts. *See generally* AR D2, FAA Order 7400.2L, Procedures for Handling Airspace Matters.

Over the past decade, FAA has been implementing NextGen, its program to use emerging technologies and aircraft navigation capabilities to modernize the nation's air transportation system. AR E6, NextGen Fact Sheet 1 (Oct. 13, 2014). NextGen shifts navigation from a ground-based system to a satellite-based system using technologies such as GPS. AR B12a, D.C. Metroplex Draft EA 1-12 (June 2013). NextGen

procedures are often referred to as "RNAV" or "RNP" procedures. *Id.* at 1-2.

B. Flight Procedure Changes and NEPA.

FAA's flight procedure changes are subject to environmental review under the National Environmental Policy Act ("NEPA"), which requires FAA to "assess and disclose the environmental impacts of 'major' actions prior to taking those actions." *City of Phoenix v. Huerta*, 869 F.3d 963, 971 (D.C. Cir. 2017) (quoting 42 U.S.C. § 4332(2)(C)); *see also* AR D2, FAA Order 7400.2L, Procedures for Handling Airspace Matters, Chp. 32 (Environmental Matters). The environmental impacts of a proposed action are usually evaluated in environmental assessments ("EAs") or environmental impact statements ("EISs"). *See* 40 C.F.R. §§ 1501.3–.4.

Under certain circumstances, NEPA regulations allow agencies to exempt categories of activities from more detailed environmental review using a mechanism called a "categorical exclusion." "Categorical exclusions" are appropriate for "categor[ies] of actions which do not individually or cumulatively have a significant effect on the human environment." *Id.* § 1508.4. Therefore, neither an EA nor an EIS is required for actions in these categories. *Id.* But an agency is not

permitted to use a categorical exclusion if there exist "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id.*

FAA's policy and procedures for compliance with NEPA and its implementing regulations, set forth in FAA Order 1050.1E,[1] authorize categorical exclusions for certain FAA actions "involving establishment, modification, or application of airspace and air traffic procedures." AR D20, FAA Order 1050.1E, ¶ 311. For example, FAA permits a categorical exclusion for flight procedures that "do not cause traffic to be routinely routed over noise sensitive areas" and "do not significantly increase noise over noise sensitive areas." *Id.* ¶ 311i. A "noise sensitive area" is "an area where noise interferes with normal activities associated with its use." *Id.* ¶ 4.2c. Residential, educational, and recreational areas are generally noise sensitive areas. *Id.*

[1] The environmental analysis for the D.C. Metroplex was conducted pursuant to Order 1050.1E. *See, e.g.*, AR B12a, D.C. Metroplex Draft EA 1-1 (June 2013); AR B3, D.C. Metroplex FONSI ROD 1 (Dec. 2013). In July 2015, FAA issued Order 1050.1F, which superseded and canceled Order 1050.1E. AR D9, FAA Order 1050.1F, ¶ 1-5. Maryland will reference Order 1050.1E in relation to FAA actions taken prior to July 2015 and to Order 1050.1F in relation to actions taken (or requested) beginning in July 2015.

In accordance with NEPA regulations, FAA may not use a categorical exclusion for a flight procedure change if extraordinary circumstances exist. *See id.* ¶¶ 304, 311. With respect to proposed NextGen procedures, Congress has made clear that a categorical exclusion is appropriate "unless the Administrator determines that extraordinary circumstances exist with respect to the procedure." FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 213(c)(1), 126 Stat. 11, 49 (2012).

Extraordinary circumstances exist when a proposed action will have "[a]n impact on noise levels of noise-sensitive areas," AR D20, FAA Order 1050.1E, ¶ 304f, or will have "[e]ffects on the quality of the human environment that are likely to be highly controversial on environmental grounds," *id.* ¶ 304i, and these impacts or effects may be significant, *id.* ¶ 304. "The effects of an action are considered highly controversial when reasonable disagreement exists over the project's risks of causing environmental harm." *Id.* ¶ 304i. When extraordinary circumstances exist, a categorical exclusion may not be used and an EA or EIS must be prepared. *See id.* ¶¶ 303c, 304.

C. FAA Amends Flight Procedures at BWI Marshall.

In 2012, FAA began to develop new approach procedures for two runways at BWI Marshall – Runway 33L and Runway 10. *See* AR A171, Categorical Exclusions Letter 1 of 9 (Oct. 11, 2012). FAA asked Maryland, the proprietor of BWI Marshall, to complete a checklist to help FAA determine whether those procedure changes would be eligible for categorical exclusions. *Id.* Responding to FAA's request, Maryland stated it did not believe the changes would result in significant change in noise exposure as defined by FAA Order 1050.1E, but it nevertheless expressed "concern[] that the procedures [would] lead to significant concentration of arrival flight tracks over residential or other noise-sensitive areas" outside the bounds of the geographic area required to be considered under Order 1050.1E. *Id.* at 6 of 9. Maryland further warned that this concentration of flight tracks "might result in citizen response and public controversy on environmental grounds." *Id.*

Nonetheless, FAA moved forward with the proposed changes and published amended procedures for Runway 33L and Runway 10 in

January 2013.[2] There is no evidence that *any* environmental review was completed for those procedures. Separately, FAA evaluated changes to other flight procedures at BWI Marshall, as well as at other airports in the Washington D.C. metropolitan area, as part of a broader NextGen airspace redesign for the entire region known as the DC Metroplex. AR B12a, D.C. Metroplex Draft EA 1-17 to -18 (June 2013). FAA released a draft EA analyzing the impact of these changes in June 2013. *See generally id.* The agency issued a Finding of No Significant Impact/Record of Decision ("FONSI/ROD") in December 2013, documenting its conclusion that the implementation of the DC Metroplex flight procedure changes would not have significant environmental impacts. AR B3, D.C. Metroplex FONSI ROD 2 (Dec. 2013). FAA implemented the procedures considered in the draft EA and the FONSI/ROD in late 2014 and early 2015. AR L4, Md. Admin. Pet. 4 (June 26, 2018).

[2] *E.g.*, AR A41, RNAV (RNP) Z RWY 33L Amendment 2 (Jan. 10, 2013); AR A51, RNAV (GPS) Y RWY 33L Amendment 3 (Jan. 10, 2013); AR A36, RNAV (RNP) Z RWY 10 Amendment 2 (Jan. 10, 2013); AR A46, RNAV (GPS) Y RWY 10 Amendment 3 (Jan. 10, 2013).

D. The Amended Flight Procedures Result in Significant Noise Impacts.

As Maryland had warned, the changed procedures resulted in the concentration of flight tracks over certain residential neighborhoods near BWI Marshall, leading to increased noise in those communities and a dramatic rise in complaints. In 2015, with FAA's flight procedure changes in place at BWI Marshall, the airport received *550 percent* more noise complaints than it did in 2013, before the NextGen procedures went into effect. *See* AR F79, Complaint History Presentation 2 of 5 (June 20, 2017). There were 250 percent more complainants in 2015 than in 2013, demonstrating that numerous households were affected. *See id.* The number of complaints and complainants continued to rise in each subsequent year. *Id.*

Alarmed by these impacts, Maryland asked FAA to revise the NextGen procedures and to include Maryland in the review and approval of any further changes in NextGen procedures at BWI Marshall. AR H8, MAA Letter re: NextGen Procedures 2 (Oct. 22, 2015). FAA did adjust procedures in February 2016, including one procedure which raised departure profiles in an effort to reduce noise impacts. AR L4, Md.

Admin. Pet. 4 (June 26, 2018) (describing TERPZ6[3] procedure). FAA used a categorical exclusion for that change, exempting it from environmental analysis. AR A172, TERPZ6 Categorical Exclusion Declaration (Oct. 7, 2015).

Far from solving the noise problems, the change only resulted in *new* noise impacts. The revised departure procedure routed flights north of the previous flight corridor, over communities that had previously experienced only scattered overhead flights. AR L4, Md. Admin. Pet. 6–7 (June 26, 2018). The departure procedure also concentrated flights in the south portion of the corridor, whereas previously flights had been dispersed throughout the corridor.[4] *Id.*

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[3] "TERPZ6" is the name of an FAA flight procedure, and not an acronym. FAA names its flight procedures using all capital letters.

[4] During this time period, Maryland began planning for a group of capital improvement projects at BWI Marshall. These projects included the improvement and relocation of taxiways, expansion of deicing pads, and construction of a new airline maintenance facility, all done to meet FAA design standards, enhance airfield safety and efficiency, and accommodate existing and anticipated demand at BWI Marshall. AR J6a, Proposed Improvements 2016–2020 Draft EA and Draft Section 4(f) Determination 1-5 to -6 (Jan. 5, 2018). In its draft EA for the projects, Maryland determined that the proposed action, as compared with no action, would only minimally affect noise-sensitive areas, and that no

E. Congress Requires FAA to Conduct Additional Analysis.

Meanwhile, a similar story was unfolding across the country. In Phoenix, for example, FAA's NextGen flight path changes led the airport to receive more noise complaints in the two weeks following the changes than it had received in all of the previous year. *City of Phoenix*, 869 F.3d at 966. Arizona's congressional delegation, along with other members of Congress concerned about the noise impacts of FAA's NextGen efforts, introduced legislation to require FAA to address the problem. *E.g.*, NextGen Flight Path Review and Notification Act of 2016, H.R. 5744, 114th Cong. (2016).

Ultimately, Congress enacted a provision in the 2017 Defense Act – section 341(b) – requiring FAA to review any decision made between February 14, 2012, and December 22, 2016, to grant a categorical exclusion for a flight procedure "that was a material change from procedures previously in effect at the airport to determine if the implementation of the procedure had a significant effect on the human environment in the community in which the airport is located." 2017

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mitigation measures would be required. *Id.* at 5-32 to -33. The projects would not alter flight procedures.

Defense Act, Pub. L. No. 114-328, § 341(b), 130 Stat. 2000, 2081 (2016) (codified at 49 U.S.C. § 40101 note) ("2017 Defense Act § 341(b)"). If FAA, in consultation with the airport operator, determines that the procedure *did* have a significant effect, it shall "consult with the operator of the airport to identify measures to mitigate the effect of the procedure on the human environment." *Id.* FAA has not undertaken such a review of the non-Metroplex changes to flight procedures at BWI Marshall.

F. Maryland Files its Administrative Petition.

When it became clear that FAA would not take action to address the negative impacts of the flight procedure changes on Maryland residents, Maryland filed the Administrative Petition. The Administrative Petition made three requests.

First, Maryland asked FAA to comply with the duty set forth in the 2017 Defense Act Section 341(b). AR L4, Md. Admin. Pet. 13–14 (June 26, 2018). At BWI Marshall, FAA relied on categorical exclusions for at least the changes to the Runway 33L and Runway 10 approach procedures put into effect in 2013, and for the revised procedure implemented in 2016. *Id.* at 13 (describing TERPZ6 procedure); *see also supra* pp. 8–9, 11. By directing and concentrating flight paths over noise

sensitive communities that previously experienced only low densities of flights overhead, these procedures represented a material change from procedures previously in effect. Pursuant to the 2017 Defense Act Section 341(b), FAA was required to reanalyze its decisions to use categorical exclusions. AR L4, Md. Admin. Pet. 6–14 (June 26, 2018). The Administrative Petition requested that FAA undertake the review of its decisions as required by Congress – or, if FAA had done so already, that it share the results of its review with the public. *Id.* at 13–14.

Second, the Administrative Petition asked FAA to supplement its prior environmental analyses in light of significant new information about environmental impacts. *Id.* at 5–13. Under NEPA regulations, agencies must prepare supplemental environmental analyses if "[t]here are significant new circumstances or information relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(ii); *see also* AR D9, FAA Order 1050.1F, ¶ 9-3 ("The responsible FAA official must prepare a supplemental EA . . . [if] there are significant new circumstances or information relevant to environmental concerns . . . ."). Significant information is "information that paints a dramatically different picture

of impacts compared to the description of impacts in the EA." AR D9, FAA Order 1050.1F, ¶ 9-3.

In the Administrative Petition, Maryland presented evidence of significant new information about the impacts of the new NextGen flight procedures on Maryland residents. Maryland highlighted the opacity of the draft EA that hindered public assessment of the impacts of FAA's proposed changes, AR L4, Md. Admin. Pet. 6–8, 11–13 (June 26, 2018), and identified the increase in noise complaints and noise impacts that resulted from the changes, *id.* at 4, 8–11. The Administrative Petition requested that FAA supplement its environmental analysis and do so in a way that would further public participation. *Id.* at 14.

Third, the Administrative Petition requested that FAA "continue, accelerate, and expand efforts to adjust NextGen routes at BWI Marshall to improve compatibility with neighborhoods." *Id.* at 2. Maryland asked that these efforts "include measures to reroute procedures to minimize impacts over residential . . . and other sensitive uses," "maximize altitudes on arrival and departure routes where possible," and "return dispersion of flights to more equitably share noise burdens." *Id.* at 14. Those changes necessarily require FAA to reconsider its prior

rulemakings in order to modify existing procedures or create new procedures.

G. FAA Refuses to Respond to Maryland's Administrative Petition.

On September 10, 2018, FAA sent a one-page letter in response to Maryland's Administrative Petition. FAA stated that Maryland had "no formal right" to "'petition' the Acting Administrator" and "decline[d] to respond" to the Administrative Petition. AR L2, September Letter (Sept. 10, 2018). FAA asserted that it had no legal duty to supplement the environmental reviews associated with the flight path changes. *Id.* FAA did not offer any authority or basis for its refusal to respond. FAA did offer to discuss the issues raised in the Administrative Petition – but only on the condition that Maryland withdraw the Administrative Petition. *Id.*

Less than 60 days later, on November 8, 2018, Maryland filed this Petition for Review.

SUMMARY OF ARGUMENT

In the Administrative Petition, Maryland requested that FAA review its prior decisions to adopt flight procedures at BWI Marshall and that it adopt new, or changed, procedures to address noise concerns.

Through the Administrative Petition, Maryland properly exercised its right to petition for the amendment of a rule, as authorized by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e). FAA "decline[d] to respond." AR L2, September Letter (Sept. 10, 2018).

The APA requires more of FAA. 5 U.S.C. § 555(e) requires an agency to provide notice of the denial of a petition, "accompanied by a brief statement of the grounds for denial." FAA failed to respond to the facts and evidence presented in the Administrative Petition, and accordingly, the September Letter is arbitrary, capricious, and not in accordance with law. *See id.* § 706(2). This Court should remand to FAA to require it to provide an adequate response to the Administrative Petition.

Maryland further requests that this Court compel FAA to review its grant of categorical exclusions for new NextGen procedures at BWI Marshall as required by the 2017 Defense Act Section 341(b), a nondiscretionary duty that FAA has unreasonably delayed executing. Congress left no question that FAA is required to act under Section 341(b). Two and a half years have gone by with no indication that FAA plans to do so. It is clear that FAA never studied or disclosed

the impacts of its flight path changes or performed the kind of analysis Congress has now mandated. Meanwhile, communities under those new flight paths suffer from the noise of concentrated flight routes, and Maryland suffers from impacts to its own property and its inability to mitigate the noise impacts of its airport. This Court should order FAA to stop delaying and carry out its congressionally mandated duty.

STANDING

To establish standing, a petitioner "must show that it has suffered a 'concrete and particularized' injury that is actual or imminent, caused by or fairly traceable to the act being challenged in the litigation, and redressable by the court." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (citation omitted). When a petitioner alleges a "procedural injury," the petitioner must show that "the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *Id.* (citation omitted).

Here, FAA's delay and refusal to review its categorical exclusion decisions and to prepare supplemental environmental analysis – expressed through its response to Maryland's petition and the complete absence of *any* evidence in the record that FAA is taking these actions –

has caused and continues to cause noise impacts that affect Maryland's particularized interests.

FAA's failure to act necessarily means the amended flight procedures remain in effect, which adversely affects Maryland due to the noise impacts on state-owned property under and near the flight paths. "Like any private landowner, a State suffers concrete injury if its property is despoiled." *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 591 (D.C. Cir. 1994). Maryland owns eight properties under or near the amended flight paths. Ex. 1, Dickinson Decl., ¶¶ 4–5; *see also id.* Attach. 1. These properties include parks and recreation areas, educational facilities, and residential facilities that are sensitive to aircraft noise. Ex. 1, Dickinson Decl., ¶ 6. The increased overflights from FAA's amended flight procedures have harmed Maryland's interest in managing these properties for noise-sensitive uses. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) ("In this Circuit we have found standing for a city suing an arm of the federal government when a harm *to the city itself* has been alleged."); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) ("A political body may . . . sue to protect its own proprietary interests that might be congruent with

those of its citizens, including responsibilities, powers, and assets." (internal quotation marks and citation omitted)).

Additionally, FAA's failure to act interferes with Maryland's proprietary interest in managing the noise impacts of its Airport. *See City of Las Vegas v. FAA*, 570 F.3d 1109, 1114 (9th Cir. 2009) (finding city had standing because "proposed departure path directs flights over densely populated parts of the city, which threatens the city's interests in the environment and in land management"); *c.f. Griggs v. Allegheny Cty.*, 369 U.S. 84, 87, 89 (1962) (holding that airport "promoter, owner, and lessor" was liable for the "taking" of an air easement over petitioner's property due to the severe noise of aircraft flights over the property).

Further, under Maryland law, the Maryland Aviation Administration, as the operator of BWI Marshall, has an obligation to assess the noise environment near the airport, delineate any noise zone, identify any impacted land use area, and develop a noise abatement plan to reduce the size of or eliminate the impacted land use area by altering the coverage of the noise zone through the application of the best available technology, at a reasonable cost and without impairing safety of flight. Md. Code Ann., Transp. §§ 5-805 to -806, 5-819 to -820.

Accordingly, Maryland has a direct interest in assuring that noise impacts from new flight procedures are identified and disclosed so that it can take appropriate action.

As established in the Administrative Petition, FAA's flight procedure changes have "greatly concentrated flight procedures over new areas near BWI [Marshall]," resulting in enormous increases in noise complaints. AR L4, Md. Admin. Pet. 6–8 (June 26, 2018). Maryland's injury is caused by FAA's failure to adequately consider and disclose the effects of the changed procedures on the human environment. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996) ("To prove causation, a plaintiff seeking the preparation of an [environmental analysis] must demonstrate that the particularized injury that the plaintiff is suffering . . . is fairly traceable to the agency action that implicated the need for an [environmental analysis].").

Maryland's injury would be redressed by a favorable ruling that requires FAA to properly respond to Maryland's petition or to review categorical exclusions as required by the 2017 Defense Act Section 341(b). Requiring FAA to follow necessary procedures, including reviewing its categorical exclusion decisions and supplementing its environmental

analysis, would redress Maryland's procedural injury. *See Dania Beach*, 485 F.3d at 1186 (holding that procedural injuries due to failure to engage in NEPA review were redressable because action could be remanded to agency to complete required procedures). Moreover, if FAA considered changes to flight procedures or conducted the required review of its categorical exclusion decisions or supplemented its environmental analysis, it might alter the flight path procedures that are the source of Maryland's injury. Thus, Maryland has standing. *See, e.g., Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (explaining that plaintiff had standing because, after performing proper analysis, agency might be persuaded to alter plan it had proposed).

ARGUMENT

I. FAA's Failure to Respond to the Administrative Petition Is Arbitrary and Capricious.

FAA issued the September Letter in response to Maryland's Administrative Petition. The Administrative Petition is a petition for rulemaking under APA § 553(e) because the Administrative Petition requested that FAA review its existing flight procedures and adopt new or changed procedures based on updated environmental analysis. This review and analysis would ultimately lead to the issuance, amendment,

or repeal of flight procedure changes, which are "rules" under the APA. Because FAA "decline[d] to respond" to the Administrative Petition, AR L2, September Letter (Sept. 10, 2018), and failed to provide a reasoned explanation in response to the Administrative Petition as required by the APA, this Court should remand to FAA for it to properly respond to Maryland's petition.

A. Standard of Review.

Under 49 U.S.C. § 46110, any person with a substantial interest in an order issued by FAA may seek review of that order by filing a petition in this Court. This Court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," and may order FAA "to conduct further proceedings." *Id.* § 46110(c).

This Court reviews FAA orders under the standards set forth in the APA "to determine whether they were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)). This Court's review of an agency's denial of a petition is "extremely limited" and "highly deferential." *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 527 (2007). This Court asks "whether the

agency employed reasoned decisionmaking in rejecting the petition," and, more specifically, whether the agency "adequately explained the facts and policy concerns it relied on and [whether] those facts have some basis in the record." *Flyers Rights Educ. Fund, Inc. v. FAA*, 865 F.3d 738, 743 (D.C. Cir. 2017) (alterations in original) (citations omitted).

B. The September Letter Is a Final Order Reviewable Under 49 U.S.C. § 46110.

The September Letter is an "order" reviewable under § 46110. Although § 46110 does not define "order," the APA defines an order as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making." 5 U.S.C. § 551(6); *see, e.g.*, *Safe Extensions*, 509 F.3d at 598 (looking to APA to supply definition of "order" under § 46110).

The term "order" in § 46110 "should be read 'expansively,'" *Dania Beach*, 485 F.3d at 1187, and this Court's jurisdiction under § 46110 extends to review of agency rulemakings. *Nat'l Fed'n of the Blind v. Dep't of Transp.*, 827 F.3d 51, 55 (D.C. Cir. 2016) ("[S]ection 46110(a) includes agency rules within the term 'order,' as there is no evidence that the Congress intended to vest the district court with jurisdiction of challenges to DOT rules."). Under § 46110, an order "need not be a *formal*

order, the product of a *formal decision-making process*, or be issued personally by the Administrator." *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998) (emphasis added). "Thus, letters . . . can be final orders depending upon the surrounding circumstances and other indicia of finality." *Id.* at 577; *see also id.* at 577–78 (collecting cases).

Regardless of its form, to be a final order, the decision "'must mark the consummation of the agency's decisionmaking process,' and it 'must determine rights or obligations or give rise to legal consequences.'" *Safe Extensions*, 509 F.3d at 598 (quoting *Dania Beach*, 485 F.3d at 1187). The "core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

The September Letter is a final order because it clearly marks the consummation of FAA's decisionmaking process and determines the parties' rights and obligations. First, the Letter expressly states that FAA declines to respond to the Administrative Petition and expresses FAA's belief that Maryland had no right to petition the agency at all. AR L2, September Letter (Sept. 10, 2018). That clearly ends the agency's

decisionmaking process. Although FAA suggests that it may be willing to discuss certain issues regarding noise concerns, FAA's suggestion was conditioned on Maryland withdrawing the Administrative Petition. *Id.* Thus, with respect to the Administrative Petition itself, "[t]here is no indication in the letter or in the record that any additional process on the FAA's part was to follow." *Tulsa Airports Improvement Tr. v. FAA*, 839 F.3d 945, 949 (10th Cir. 2016). The September Letter marks the consummation of FAA's decisionmaking process.

Second, the September Letter affects the rights of the parties. As explained above, *supra* pp. 18–21, Maryland has been harmed by FAA's failure to review categorical exclusions used in amending BWI Marshall flight procedures and to supplement the environmental analysis for those changes. This is an ongoing harm. Seeking redress for this harm, Maryland filed the Administrative Petition and asked FAA to take action. The September Letter established that FAA does not believe it has any obligation to act on Maryland's request or to conduct the reviews sought in the Administrative Petition. The September Letter further established that Maryland could not obtain relief for the harms it suffers through the administrative process. The September Letter fixed the

rights and obligations of the parties. *See Tulsa Airports Improvement Tr.*, 839 F.3d at 949–50 ("[T]he letter determined rights and obligations by concluding that TAIT had no right to reimbursement for the requested funds and that the FAA had no obligation to pay them.").

FAA tries to avoid judicial review of its decision by asserting that the September Letter "does not constitute final agency action." AR L2, September Letter (Sept. 10, 2018). While an agency's self-serving classification of its decisions is a factor in determining an order's finality, it does not decide it. *See Aerosource*, 142 F.3d at 579. Allowing FAA to declare the finality, and thus reviewability, of its actions would allow the agency to immunize itself against judicial review. *Cf. Safe Extensions*, 509 F.3d at 600 ("If an agency action qualified as an order only when accompanied by a sufficient record to permit judicial review, agencies could escape judicial review by simply refusing to create a record to support their decisions.").

Here, FAA offered no reason why the September Letter is not a final order and did not suggest that it was engaged in any further decisionmaking on the issues raised by Maryland. As made clear above, the September Letter is a final order because it consummates FAA's

decisionmaking and determines the rights of the parties. FAA's self-serving declaration that the September Letter is not a final decision cannot change its effect or legal meaning.

Because the September Letter marks the consummation of FAA's decisionmaking process with respect to the Administrative Petition and determines the rights and obligations of Maryland and FAA, it is a final order reviewable by this Court under § 46110.

C. Maryland Properly Petitioned FAA for Action.

FAA's September Letter rests on the assertion that Maryland has no right to petition the FAA. However, the APA requires agencies to provide interested parties with the right to petition for the issuance, amendment, or repeal of a rule. Flight procedures are "rules" for purposes of the APA. The Administrative Petition asked FAA to make changes to flight procedures and to perform the environmental review and analysis necessary to inform those changes. Because Maryland sought the issuance, amendment, or repeal of a rule, the Administrative Petition is properly classified as a petition for rulemaking under the APA.

1. APA § 553(e) Provides the Right to Petition for a Rulemaking.

Under the APA, interested parties must be afforded "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e); *see also* 14 C.F.R. § 11.61 (FAA regulation permitting interested parties to petition for adoption, amendment, or repeal of a regulation). The APA defines "rule" expansively as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). As this Court has noted, "this definition is broad enough 'to include nearly every statement an agency may make.'" *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983) (quoting *Batterton v. Marshall*, 589 F.2d 694, 700 (D.C. Cir. 1980)).

Courts have consistently identified "general applicability" and "future effect" as critical characteristics of a "rule" under the APA. *See Safari Club Int'l v. Zinke*, 878 F.3d 316, 332–33 (D.C. Cir. 2017) (identifying these two principles as "stand[ing] out" in "[j]udicial constructions of a 'rule' under the APA" and collecting cases). In contrast

with adjudication, the other mode of agency action contemplated by the APA, "[r]ulemaking is prospective in scope and nonaccusatory in form, directed to the implementation of general policy concerns into legal standards." *Fed. Trade Comm'n v. Brigadier Indus. Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979).

While certain forms of agency rulemaking – "interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice" – are exempted from APA § 553's notice-and-comment requirements, *see* 5 U.S.C. § 553(b)–(c), there are no such exceptions to the right to petition for the issuance, amendment, or repeal of a rule, *see id.* § 553(e). *See* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 38 (1946) (explaining that predecessor section to § 553(e) applied "not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules"); *see also* Staff of S. Comm. on the Judiciary, 79th Cong., on Administrative Procedure 21 (Comm. Print 1945) (rejecting agency argument that right of petition would "force" a "tremendous" number of hearings by explaining the "alternative implied is that no one should have a right of petition, leaving action or inaction to the [agency's]

initiative," and noting that "[e]ven Congress, under the Bill of Rights, is required to accord the right of petition to any citizen").

2. Flight Procedures Are "Rules" Under the APA.

Congress delegated to FAA the authority to "prescribe air traffic regulations on the flight of aircraft" to navigate aircraft, protect individuals and property on the ground, use the navigable airspace efficiently, and prevent collisions. 49 U.S.C. § 40103(b)(2). Flight procedures provide direction to pilots and air traffic controllers, are agency statements of general applicability and future effect, and are "rules" for purposes of the APA. *See* 5 U.S.C. § 551(4). Accordingly, FAA creates flight procedures and incorporates them by reference into the Code of Federal Regulations. 14 C.F.R. § 97.20(b); *see also* 84 Fed. Reg. 18,971, 18,971 (May 3, 2019) ("This rule amends [14 C.F.R. Part 97] by establishing, amending, suspending, or remov[ing] [flight procedures].").

According to FAA, incorporation by reference is appropriate because "the large number" of flight procedures, "their complex nature, and the need for a special format make publication in the Federal Register expensive and impractical." 84 Fed. Reg. at 18,971. FAA likewise finds that for flight procedure changes, "notice and public

procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest." *Id.* at 18,971–72.

Although FAA may exempt the creation of flight procedures from APA § 553's notice-and-comment requirements pursuant to § 553(b) and (c), FAA cannot prohibit interested parties from requesting the issuance, amendment, or repeal of those procedures *after* adoption. Section 553(e) requires that each agency "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). That provision does not provide for any exceptions or limits on that right, nor does it authorize an agency to limit the right of petition. *Compare id.* (requiring each agency to provide "the right to petition for the issuance, amendment, or repeal of a rule"), *with id.* § 553(b) (excepting "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice requirements), *and id.* § 553(c) (requiring opportunity for public participation in rulemaking only when notice is required under 5 U.S.C. § 553(b), thereby extending exceptions to comment requirements).

3. The Administrative Petition Requests the Issuance, Amendment, or Repeal of FAA Rules.

The Administrative Petition asked FAA to make changes to flight procedures at BWI Marshall and to conduct the environmental analysis necessary to support those changes under NEPA and the 2017 Defense Act in order to "address the effects associated with the community response caused by the flight procedure shift and concentration." *See* AR L4, Md. Admin. Pet. 5–6, 13 (June 26, 2018). Because flight procedures are rules under the APA, *see supra* pp. 31–32, the Administrative Petition is a petition for rulemaking filed pursuant to 5 U.S.C. § 553(e).

Maryland acknowledges that the Administrative Petition does not explicitly track FAA's procedures for requesting a rulemaking from the agency, *see* 14 C.F.R. § 11.71, nor is it expressly labeled as a petition for rulemaking. But federal agencies – and this Court – routinely construe requests for agency action as petitions for rulemaking where appropriate and necessary to provide the requested relief, regardless of whether the requests were expressly labeled as such. *See, e.g.*, *Sierra Club v. Envtl. Prot. Agency*, 755 F.3d 968, 977 (D.C. Cir. 2014) (holding that administrative petition was "request for new rulemaking" because "[r]egardless of how they captioned their administrative petition,"

petitioners sought relief for which only remedy was new rulemaking); *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1009 (6th Cir. 1995) ("Because the Department of Transportation did not have in place a procedure for dealing with Rehabilitation Act claims, it treated the petitioners' complaint as a petition for rulemaking . . . ."); *Pub. Serv. Comm'n of Md. v. Fed. Commc'ns Comm'n*, 900 F.2d 1510, 1514 (D.C. Cir. 1990) (construing petition for declaratory ruling that Commission order had been undermined by Supreme Court opinion as petition for new rulemaking asking Commission to reexamine order in light of Supreme Court opinion); *Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, 794 F. Supp. 2d 39, 43 (D.D.C. 2011) (applying APA petition-for-rulemaking framework to administrative petitions requesting that agency issue certifications of visibility impairment).

Under that authority, FAA was obligated to treat the Administrative Petition as a petition for rulemaking pursuant to APA § 553 because the Administrative Petition requested an addition or amendment to or deletion from the Code of Federal Regulations, even though it was not explicitly labeled a § 553 petition.

D. FAA Failed to Adequately Respond to the Administrative Petition.

The APA requires agencies to give "[p]rompt notice" of the denial of a petition for rulemaking, accompanied by "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). This requirement, along with the right to petition discussed in Part I.C.1, *supra*, "suggest[s] that Congress expected that agencies denying rulemaking petitions must explain their actions." *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987); *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (rejecting agency view that "simply filing a petition seeking agency action does not, by itself, require [the agency] to respond to it," and noting that the agency was "obligated *under the APA* to respond" to the petition). Furthermore, the agency's explanation must be "reasoned" in order to comply with the APA. *See, e.g.*, *Massachusetts*, 549 U.S. at 534 ("EPA has offered no reasoned explanation for its refusal to decide [the matter presented to it]. Its action was therefore 'arbitrary, capricious, . . . or otherwise not in accordance with law.'" (alteration in original) (citation omitted)); *Flyers Rights Educ. Fund*, 864 F.3d at 744 (explaining that when an agency responds to a petition that exposes a

concern, the agency must reasonably address that concern in its response).

Under APA § 555(e), FAA had a duty to respond to the Administrative Petition and to explain the basis for its response, even if the ultimate decision was to deny the Administrative Petition. FAA failed on both counts. The September Letter states that FAA "declines to respond to Maryland's administrative petition." AR L2, September Letter (Sept. 10, 2018). But an agency has no "decline to respond" option under the APA. *See In re Am. Rivers*, 372 F.3d at 419 ("FERC is obligated *under the APA* to respond to the 1997 petition."); *see also* 5 U.S.C. § 555(b) (requiring each agency to "conclude a matter presented to it" "within a reasonable time"); *id.* § 555(e) (requiring "[p]rompt notice" of agency's denial of a petition, "accompanied by a brief statement of the grounds for denial").

The arbitrary and capricious nature of FAA's non-response is underscored by its stated willingness to discuss aspects of Maryland's concerns if Maryland withdrew the Administrative Petition. AR L2, September Letter (Sept. 10, 2018). If FAA is willing to discuss noise concerns in the absence of the Administrative Petition, there is no

rational reason why it cannot address those issues pursuant to the Administrative Petition. FAA cannot play games with the administrative process, or the lives of the thousands of residents affected by noise daily.

Similarly, FAA asserted that it had no duty to supplement the environmental reviews associated with the changed flight procedures at BWI Marshall. AR L2, September Letter (Sept. 10, 2018). However, that assertion does not explain why it would not consider amending its flight procedure rules and fails to provide the reasoned explanation required by the APA. *See Massachusetts,* 549 U.S. at 534.

Moreover, the kind of environmental analysis Maryland requested would be needed to evaluate changes to flight procedures and to fulfill FAA's obligations under the 2017 Defense Act. Although "an agency need not supplement an [EA] every time new information comes to light after the [EA] is finalized," a supplemental EA must be prepared if there remains major federal action to occur and the new information shows "the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373–74 (1989) (alteration

and internal quotation marks omitted); *see* 40 C.F.R. § 1502.9(c)(1) (NEPA implementing regulations); AR D9, FAA Order 1050.1F, ¶ 9-3 ("The responsible FAA official must prepare a supplemental EA . . . [if] there are significant new circumstances or information relevant to environmental concerns . . . .").

The 2017 Defense Act Section 341(b) created a requirement for FAA to reopen its environmental review of the flight procedure changes at issue here, and the Administrative Petition established the presence of significant new information that merits NEPA supplementation. Thus, FAA had a duty to reopen its NEPA analysis and perform additional environmental analysis, including consideration of the information Maryland presented in its Administrative Petition. FAA did not provide an adequate explanation for its refusal to supplement its environmental analysis in light of the 2017 Defense Act's statutory mandate and the evidence of significant impacts on the human environment, in violation of the APA.

FAA's refusal to respond to the Administrative Petition, and failure to provide a reasoned explanation for its decision, are inadequate under the APA. Therefore, the September Letter is arbitrary and capricious,

and this Court should remand to FAA for it to provide a proper response to the Administrative Petition.

II. FAA Has Unreasonably Delayed Reviewing Categorical Exclusions as Required by Law.

When it enacted the 2017 Defense Act, Congress established a discrete, mandatory duty for FAA to review its decisions to grant certain categorical exclusions for flight procedure changes to determine whether they resulted in significant effects on the human environment. Two and a half years later, FAA has yet to conduct this review, and shows no intention of doing so. FAA has unreasonably delayed discharging its obligation under the 2017 Defense Act Section 341(b), and this Court should compel the agency to act pursuant to APA § 706(1).

A. Standard of Review.

This Court has jurisdiction under 49 U.S.C. § 46110(a) and 5 U.S.C. § 706(1) to compel FAA to take action it has unreasonably delayed. Because § 46110(a) commits review of an FAA order exclusively to the courts of appeals, this Court also has jurisdiction to hear claims concerning FAA's failure to issue an order. *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 535 (1st Cir. 1997) ("It is well established that the exclusive jurisdiction given to the courts of appeals to review

FAA actions also extends to lawsuits alleging FAA delay in issuing final orders."); *see also Telecomms. Research & Action Ctr. v. Fed. Commc'ns Comm'n* ("*TRAC*"), 750 F.2d 70, 75 (D.C. Cir. 1984) ("[T]he statutory commitment of review of FCC action to the Court of Appeals, read in conjunction with the All Writs Act, affords this court jurisdiction over claims of unreasonable Commission delay." (citations omitted)). The APA provides a cause of action to request that this Court "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).[5]

[5] *TRAC* and subsequent decisions following that case have noted that courts have authority to review claims of unreasonable delay because the All Writs Act "empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction." *E.g.*, *TRAC*, 750 F.2d at 76. But "the exact interplay" between mandamus relief and APA § 706(1), both of which may compel agency action unreasonably delayed, "has not been thoroughly examined by the courts." *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). The U.S. Supreme Court has explained that the APA "carried forward the traditional practice" of compelling agency action through the use of "writs of mandamus under the All Writs Act." *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 63 (2004); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 228, 230 n.4 (1986) (construing suit for mandamus as "in essence," suit under APA § 706(1)); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (noting that APA § 706(1) standard "reflects the common law writ of mandamus"); *cf. Indep. Mining Co.*, 105 F.3d at 507 n.6 ("[W]e question the applicability of the traditional mandamus remedy . . . where there is an adequate remedy under the APA."). Accordingly, Maryland makes its case for an order compelling FAA to act pursuant to APA § 706(1) but notes that, should

A failure to act claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*." *SUWA*, 542 U.S. at 64. This Court assesses claims of unreasonable delay using the "hexagonal contours of a standard" established in *TRAC*. *TRAC*, 750 F.2d at 80. These "*TRAC* factors" are discussed in detail in Part II.C, *infra*. Ultimately, this Court must determine whether agency delay is "so egregious" as to warrant judicial intervention. *TRAC*, 750 F.2d at 79.

B. The 2017 Defense Act Section 341(b) Establishes a Mandatory Duty.

The 2017 Defense Act Section 341(b) establishes a "discrete action" that FAA is "required to take." *SUWA*, 542 U.S. at 64 (emphasis omitted). In the 2017 Defense Act Section 341(b), Congress stated that FAA "*shall* review" certain categorical exclusion decisions for flight procedure changes, and that if FAA determines the implementation of

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this Court determine that the All Writs Act rather than the APA governs here, this Court's analysis of FAA's delay will be the same, and Maryland requests that this Court grant mandamus relief. *See SUWA*, 542 U.S. at 63–64 (explaining connection between mandamus and APA § 706(1) relief); *cf. Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189–190 (D.C. Cir. 2016) (explaining that mandamus requirements and unreasonable delay analysis under *TRAC* may merge depending on circumstances of case).

those procedures had a significant effect on the human environment, FAA "*shall* . . . consult with the operator of the airport to identify measures to mitigate the effect of the procedure on the human environment." 2017 Defense Act § 341(b) (emphasis added).

This language establishes that the review and subsequent consultation described in the 2017 Defense Act Section 341(b) is mandatory. "Ordinarily, legislation using 'shall' indicates a mandatory duty." *Anglers Conservation Network*, 809 F.3d at 671; *see also Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (noting that "the language of the relevant section," which used "shall," "manifestly obligate[d]" the agency to take action). "The plain meaning of the statutory text thus demonstrates a clear legislative intent that [the 2017 Defense Act Section 341(b)]'s procedures are mandatory, not permissive." *Wash. Metro. Area Transit Auth. v. Local 2, Office & Prof'l Emps. Int'l Union*, 965 F. Supp. 2d 13, 27 (D.D.C. 2013). The joint explanatory statement in the conference report for the 2017 Defense Act confirms that Section 341(b) would "*require* the [FAA] to review flight path changes at civilian airports to determine if recent adjustments have had an impact on local communities." H.R. Rep. No. 114-840, at 1001 (2016) (emphasis added).

Furthermore, the action required by the 2017 Defense Act Section 341(b) is a "specific, unequivocal command" of the type that may be compelled by this Court pursuant to APA § 706(1). *SUWA*, 542 U.S. at 63 (citation omitted). The 2017 Defense Act requires FAA to review a defined universe of categorical exclusion decisions for the very specific purpose of determining whether procedures implemented under those decisions have had a significant effect on the human environment. 2017 Defense Act § 341(b). This clear-cut duty makes the present case distinguishable from those in which parties have unsuccessfully alleged "[g]eneral deficiencies in compliance." *See, e.g.*, *SUWA*, 542 U.S. at 65–67 (noncompliance with general mandate to manage land in a manner so as not to impair its suitability for wilderness preservation "lack[ed] the specificity requisite for agency action"); *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009) (allegations that agency neglected obligations "to manage the forest so as to provide for multiple uses and a sustained yield of resources" did not warrant judicial intervention). Instead, through the 2017 Defense Act Section 341(b), Congress has established a legally required, discrete action that this Court may compel under APA § 706(1).

C. FAA Has Unreasonably Delayed Performing this Duty.

FAA has unreasonably delayed performing the nondiscretionary duty established by Congress in the 2017 Defense Act Section 341(b). This Court uses the *TRAC* factors to assess the reasonableness of agency delay. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). These factors "are not 'ironclad,' but rather are intended to provide 'useful guidance'" in this effort. *Id.* (quoting *TRAC*, 750 F.2d at 80). The *TRAC* factors support a finding of unreasonable agency delay here.

Rule of Reason and Statutory Scheme. The first *TRAC* factor states that "the time agencies take to make decisions must be governed by a rule of reason," and the second notes that the statutory scheme and any "indication of the speed with which [Congress] expects the agency to proceed" may supply that rule of reason. *TRAC*, 750 F.2d at 80. While there is no per se rule as to when an agency delay becomes unreasonable, "a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers*, 372 F.3d at 419.

Here, the 2017 Defense Act requires FAA to review categorical exclusion decisions that were made "on or after February 14, 2012, and before the date of the enactment of this paragraph," which was December

23, 2016. 2017 Defense Act § 341(b). By limiting FAA's review to decisions made in this specific time period, Congress charged FAA with a relatively discrete task that could and should have been done quickly. This is not a situation where Congress has charged the agency with implementing a broad programmatic change that will take substantial planning to execute. The limited obligation created in the 2017 Defense Act Section 341(b) supports the conclusion that FAA must review its categorical exclusion decisions, as directed, in short order.

Yet FAA continues to delay discharging this mandatory duty. It has been two and a half years since the 2017 Defense Act Section 341(b) went into effect. As described above, FAA has implemented a number of NextGen flight procedures using a categorical exclusion (or with no apparent environmental review at all). Nonetheless, FAA gives no indication that it has taken – or plans to take – any action to comply with the requirements of this provision. Nearly a year ago, in June 2018, Maryland submitted its Administrative Petition, noting that it was "aware of no review conducted by the FAA" to comply with the 2017 Defense Act Section 341(b) and "ha[d] not been consulted" by the agency. AR L4, Md. Admin. Pet. 13 (June 26, 2018). Maryland asked FAA to

conduct the required reviews. *Id.* FAA "decline[d] to respond" to the Administrative Petition, never once mentioning the 2017 Defense Act Section 341(b). AR L2, September Letter (Sept. 10, 2018).

This is not a case where this Court may be "satisfied that [the agency] is now proceeding toward completion of its [action] within a reasonable time," and, therefore, decline to compel FAA to act. *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985). FAA has not made any indication that it intends to comply with the 2017 Defense Act Section 341(b) absent a court order compelling it to do so.

Economic Versus Health Impacts. The third *TRAC* factor considers the subject matter of the agency action and notes that delays that are reasonable in the context of economic regulation may be "less tolerable when human health and welfare are at stake." *TRAC*, 750 F.2d at 80. Here, noise impacts on Marylanders from FAA's new NextGen procedures have led to enormously increased impacts. AR L4, Md. Admin. Pet. 8–11 (June 26, 2018). Because FAA used categorical exclusions for a number of these changes, or conducted no environmental

review at all, it did not even consider their possible environmental impact. *See supra* pp. 8–9, 11.

Congress acknowledged the potential for harm from FAA's NextGen flight procedure changes and enacted the 2017 Defense Act Section 341(b) in response. Congress ordered additional environmental review for the specific purpose of determining whether flight procedure changes had "a significant effect on the human environment." *See* 2017 Defense Act § 341(b); *cf. In re Cmty. Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (evaluating third *TRAC* factor and noting fact that agency "itself has acknowledged" threat to human health and welfare). FAA's delay in conducting the reviews required by the 2017 Defense Act Section 341(b) is resulting in significant effects on the human environment, and this delay is not tolerable.

Competing Agency Priorities. The fourth *TRAC* factor directs the court to consider any competing agency priorities. *TRAC*, 750 F.2d at 80. Here, FAA has completely failed to provide any indication of its progress in complying with the 2017 Defense Act Section 341(b). Consequently, it is not possible to evaluate the urgency of any competing priorities. However, "[e]ven assuming that [FAA] has numerous competing

priorities under the fourth factor . . . the clear balance of the *TRAC* factors favors the issuance of the writ." *In re Cmty. Voice*, 878 F.3d at 787.

Nature and Extent of Interests. The fifth factor considers "the nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80. As set forth in Maryland's statement of standing, *supra* pp. 18–21, Maryland has a significant interest in managing the noise impacts from FAA's NextGen flight procedures and protecting nearby communities from increased and concentrated noise. Maryland's own properties, managed for noise-sensitive uses, are also affected. *See supra* p. 19. Maryland's interests will continue to be impaired so long as FAA delays reviewing the categorical exclusions granted for the new NextGen flight procedures at BWI Marshall.

Finding of Impropriety Not Required. The sixth and final *TRAC* factor simply notes that the reviewing court need not find any impropriety on the part of the agency to conclude there has been unreasonable delay. *TRAC*, 750 F.2d at 80.

In summary, FAA's years-long delay in conducting the analysis and consultation required by the 2017 Defense Act Section 341(b) exceeds any

"rule of reason." Congress required FAA to review categorical exclusions granted during a defined, approximately five-year time period, a limited task that indicates an intent for FAA to satisfy its obligation without delay. Meanwhile, Maryland's property and its residents are affected and Maryland is unable to manage the noise impacts from its airport. FAA has identified no competing agency obligations of a higher priority, nor has it indicated any progress towards complying with the 2017 Defense Act Section 341(b) or intentions to do so. For these reasons, the *TRAC* factors weigh in favor of finding that FAA has unreasonably delayed carrying out the nondiscretionary duty established in the 2017 Defense Act Section 341(b). This Court should compel FAA to complete these actions as required by law.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above, Maryland respectfully requests that this Court find that FAA failed to respond adequately to the Administrative Petition pursuant to 5 U.S.C. §§ 553 and 555 in violation of the APA, 5 U.S.C. § 706(2), and remand to FAA to provide a reasoned explanation in response to the Administrative Petition. *See, e.g.*, *Flyers Rights Educ. Fund*, 864 F.3d at 747 (remanding to FAA to "adequately

address the petition" and "the concerns it raises," and noting that if the petition "is again denied, [FAA] must provide appropriate record support for its decision"); *Am. Horse Prot. Ass'n*, 812 F.2d at 7 (stating that remanding to the agency "is particularly appropriate when the agency has failed to provide an adequate explanation of its denial").

Additionally, Maryland respectfully requests that this Court declare that FAA's failure to review its grant of certain categorical exclusions as required by the 2017 Defense Act is unreasonable and a violation of the APA, and order that FAA initiate the required categorical exclusion review promptly and make the results of that review publicly available. *See* 5 U.S.C. § 706(1). Maryland further requests that this Court retain jurisdiction of this matter for purposes of enforcing its order.

Respectfully submitted,

May 24, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,818 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ *W. Eric Pilsk*
W. ERIC PILSK

ADDENDUM OF LEGAL AUTHORITIES

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§ 551. Definitions

For the purpose of this subchapter [*5 USCS §§ 551* et seq.]--

(1)"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A)the Congress;

(B)the courts of the United States;

(C)the governments of the territories or possessions of the United States;

(D)the government of the District of Columbia;

or except as to the requirements of section 552 of this *title [5 USCS § 552*]--

(E)agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F)courts martial and military commissions;

(G)military authority exercised in the field in time of war or in occupied territory; or

(H)functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49 [*49 USCS §§ 47151* et seq.]; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2)"person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3)"party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4)"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5)"rule making" means agency process for formulating, amending, or repealing a rule;

(6)"order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7)"adjudication" means agency process for the formulation of an order;

(8)"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9)"licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10)"sanction" includes the whole or a part of an agency--

(A)prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B)withholding of relief;

(C)imposition of penalty or fine;

(D)destruction, taking, seizure, or withholding of property;

(E)assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F)requirement, revocation, or suspension of a license; or

(G)taking other compulsory or restrictive action;

(11)"relief" includes the whole or a part of an agency--

(A)grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B)recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C)taking of other action on the application or petition of, and beneficial to, a person;

(12)"agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13)"agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14)"ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter [*5 USCS §§ 551* etc.].

History

(Sept. 6, 1966,*P.L. 89-554*, § 1, *80 Stat. 381*; Sept. 13, 1976, *P.L. 94-409*, § 4(b), *90 Stat. 1247*; July 5, 1994, *P.L. 103-272*, § 5(a), *108 Stat. 1373*; Jan. 4, 2011, *P.L. 111-350*, § 5(a)(2), *124 Stat. 3841*.)

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
(1)	5 USC Sec. 1001(a)	June 11, 1946, ch 324, Sec. 2(a), *60 Stat. 237*. Aug. 8, 1946, ch 870, Sec. 302, *60 Stat. 918*. Aug. 10, 1946, ch 951, Sec. 601, *60 Stat. 993*. Mar. 31, 1947, ch 30, Sec. 6(a), *61 Stat. 37*. June 30, 1947, ch 163, Sec. 210, *61 Stat. 201*. Mar. 30, 1948, ch 161, Sec. 301, *62 Stat. 99*.
(2)-(13)	*5 USC Sec. 1001*	June 11, 1946, ch 324, Sec. 2

5 USCS § 553

Current through PL 116-17, approved 5/10/19

United States Code Service - Titles 1 through 54 > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES > PART I. THE AGENCIES GENERALLY > CHAPTER 5. ADMINISTRATIVE PROCEDURE > SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1)a military or foreign affairs function of the United States; or

(2)a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1)a statement of the time, place, and nature of public rule making proceedings;

(2)reference to the legal authority under which the rule is proposed; and

(3)either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A)to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B)when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this *title [5 USCS §§ 556* and *557*] apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1)a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2)interpretative rules and statements of policy; or

(3)as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

History

5 USCS § 555

Current through PL 116-17, approved 5/10/19

United States Code Service - Titles 1 through 54 > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES > PART I. THE AGENCIES GENERALLY > CHAPTER 5. ADMINISTRATIVE PROCEDURE > SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter [*5 USCS §§ 551* et seq.].

(b)A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

History

(Sept. 6, 1966,*P.L. 89-554*, § 1, *80 Stat. 385*.)

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large

5 USCS § 706

Current through PL 116-17, approved 5/10/19

United States Code Service - Titles 1 through 54 > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES > PART I. THE AGENCIES GENERALLY > CHAPTER 7. JUDICIAL REVIEW

Notice

Part 1 of 3. You are viewing a very large document that has been divided into parts.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1)compel agency action unlawfully withheld or unreasonably delayed; and

(2)hold unlawful and set aside agency action, findings, and conclusions found to be--

(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D)without observance of procedure required by law;

(E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this *title [5 USCS §§ 556* and *557*] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History

(Sept. 6, 1966,*P.L. 89-554*, § 1, *80 Stat. 393*.)

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	*5 USC Sec. 1009(e)*	June 11, 1946, ch 324, Sec. 10(e), *60 Stat. 243*.

qualified third parties to enable those third parties to design procedures that will meet the broad range of requirements of the Administration; and

"(viii) lifecycle management strategy for RNP procedures to be developed by qualified third parties, if applicable.

"(D) Additional procedures for non-OEP airports. A process for the identification, certification, and publication of additional required navigation performance procedures that may provide operational benefits at non-OEP airports in the future.

"(2) Implementation schedule for non-OEP airports. The Administrator shall certify, publish, and implement--

"(A) not later than 18 months after the date of enactment of this Act, 25 percent of the required procedures for non-OEP airports;

"(B) not later than 36 months after the date of enactment of this Act, 50 percent of the required procedures for non-OEP airports; and

"(C) before June 30, 2016, 100 percent of the required procedures for non-OEP airports.

"(c) Coordinated and expedited review.

(1) In general. Navigation performance and area navigation procedures developed, certified, published, or implemented under this section shall be presumed to be covered by a categorical exclusion (as defined in *section 1508.4 of title 40, Code of Federal R*egulations) under chapter 3 of FAA Order 1050.1E unless the Administrator determines that extraordinary circumstances exist with respect to the procedure.

"(2) NextGen procedures. Any navigation performance or other performance based navigation procedure developed, certified, published, or implemented that, in the determination of the Administrator, would result in measurable reductions in fuel consumption, carbon dioxide emissions, and noise, on a per flight basis, as compared to aircraft operations that follow existing instrument flight rules procedures in the same airspace, shall be presumed to have no significant affect on the quality of the human environment and the Administrator shall issue and file a categorical exclusion for the new procedure.

"(3) Notifications and consultations. Not later than 90 days before applying a categorical exclusion under this subsection to a new procedure at an OEP airport, the Administrator shall--

"(A) notify and consult with the operator of the airport at which the procedure would be implemented; and

"(B) consider consultations or other engagement with the community in the which the airport is located to inform the public of the procedure.

"(4) Review of certain categorical exclusions.

(A) In general. The Administrator shall review any decision of the Administrator made on or after February 14, 2012, and before the date of the enactment of this paragraph to grant a categorical exclusion under this subsection with respect to a procedure to be implemented at an OEP airport that was a material change from procedures previously in effect at the airport to determine if the implementation of the procedure had a significant effect on the human environment in the community in which the airport is located.

"(B) Content of review. If, in conducting a review under subparagraph (A) with respect to a procedure implemented at an OEP airport, the Administrator, in consultation with the operator of the airport, determines that implementing the procedure had a significant effect on the human environment in the community in which the airport is located, the Administrator shall--

"(i) consult with the operator of the airport to identify measures to mitigate the effect of the procedure on the human environment; and

"(ii) in conducting such consultations, consider the use of alternative flight paths that do not substantially degrade the efficiencies achieved by the implementation of the procedure being reviewed.

"(C) Human environment defined. In this paragraph, the term 'human environment' has the meaning given such term in section 1508.14 of title 40, Code of Federal Regulations (as in effect on the day before the date of the enactment of this paragraph).

"(d) Deployment plan for nationwide data communications system. Not later than 1 year after the date of enactment of this Act, the Administrator shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a plan for implementation of a nationwide data communications system. The plan shall include--

"(1) clearly defined budget, schedule, project organization, and leadership requirements;

"(2) specific implementation and transition steps; and

"(3) baseline and performance metrics for measuring the Administration's progress in implementing the plan.

"(e) Improved performance standards.

(1) Assessment of work being performed under NextGen implementation plan. The Administrator shall clearly outline in the NextGen Implementation Plan document of the Administration the work being performed under the plan to determine--

"(A) whether utilization of ADS-B, RNP, and other technologies as part of NextGen implementation will display the position of aircraft more accurately and frequently to enable a more efficient use of existing airspace and result in reduced consumption of aviation fuel and aircraft engine emissions; and

"(B) the feasibility of reducing aircraft separation standards in a safe manner as a result of the implementation of such technologies.

"(2) Aircraft separation standards. If the Administrator determines that the standards referred to in paragraph (1)(B) can be reduced safely, the Administrator shall include in the NextGen Implementation Plan a timetable for implementation of such reduced standards.

"(f) Third-party usage. The Administration shall establish a program under which the Administrator is authorized to use qualified third parties in the development, testing, and maintenance of flight procedures.

"Sec. 214. Performance metrics.

"(a) In general. Not later than 180 days after the date of enactment of this Act, the Administrator of the Federal Aviation Administration shall establish and begin tracking national airspace system performance metrics, including, at a minimum, metrics with respect to--

"(1) actual arrival and departure rates per hour measured against the currently published aircraft arrival rate and aircraft departure rate for the 35 operational evolution partnership airports;

"(2) average gate-to-gate times;

"(3) fuel burned between key city pairs;

"(4) operations using the advanced navigation procedures, including performance based navigation procedures;

"(5) the average distance flown between key city pairs;

"(6) the time between pushing back from the gate and taking off;

"(7) continuous climb or descent;

49 USCS § 46110

Current through PL 116-17, approved 5/10/19

United States Code Service - Titles 1 through 54 > TITLE 49. TRANSPORTATION > SUBTITLE VII. AVIATION PROGRAMS > PART A. AIR COMMERCE AND SAFETY > SUBPART IV. ENFORCEMENT AND PENALTIES > CHAPTER 461. INVESTIGATIONS AND PROCEEDINGS

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title [49 USCS § 41307 or 41509(f)], a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part [49 USCS §§ 40101 et seq.], part B [49 USCS §§ 47101 et seq.], or subsection (l) or (s) of section 114 [49 USCS § 114] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate. The Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court. When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

History

Md. TRANSPORTATION Code Ann. § 5-805

Current through chapters effective May 15, 2019, including Chapters 1, 2, 7, 8, 13, 15, 18, 19, 30, 31, 173, 174, 292, 293, 400, 456, 473, 491, and 522 of the 2019 Regular Session of the General Assembly.

MD - Annotated Code of Maryland > TRANSPORTATION > TITLE 5. AVIATION > SUBTITLE 8. NOISE ZONE REGULATIONS > PART II. STATEWIDE REGULATIONS

§ 5-805. Assessment of noise environment; noise abatement plan for impacted land use area

(a) Airport operators to assess noise environment. --

(1) Each airport operator, including each person intending to operate a proposed airport, shall assess the noise environment created by the operation and projected future use of the airport.

(2) The assessment method shall follow the procedures that the Executive Director establishes for calculating or measuring cumulative noise exposure.

(3) The assessment shall delineate any noise zone and identify any impacted land use area.

(b) Plan to be developed. --

(1) If an impacted land use area exists within a noise zone, the airport operator shall develop a noise abatement plan to reduce the size of or eliminate the impacted land use area by altering the coverage of the noise zone through the application of the best available technology, at a reasonable cost and without impairing safety of flight.

(2) The plan may include:

(i)A development of runway and flight path use to reduce adverse noise impact;

(ii) Establishment of noise abatement glide slopes;

(iii) Establishment of noise abatement flight and ground procedures;

(iv) Restrictions on operations of noisy aircraft;

(v) Restrictions on noisy maintenance operations;

(vi) Relocation of runways; and

(vii) Acquisition of property to reduce the size of or eliminate an impacted land use area.

(c) Assessments and plans to be submitted to Executive Director. --

(1) Unless required earlier as part of an environmental impact study or by the Executive Director, an assessment of the noise environment for each airport and any noise abatement plan required by this section shall be submitted to the Executive Director for approval by July 1 of each fifth year after July, 1976.

(2) Before the Executive Director approves any assessment or plan, the Executive Director shall furnish it to the chief executive officer and the zoning board of any affected political subdivision and give them an opportunity to comment.

History

Md. TRANSPORTATION Code Ann. § 5-806

Current through chapters effective May 15, 2019, including Chapters 1, 2, 7, 8, 13, 15, 18, 19, 30, 31, 173, 174, 292, 293, 400, 456, 473, 491, and 522 of the 2019 Regular Session of the General Assembly.

MD - Annotated Code of Maryland > TRANSPORTATION > TITLE 5. AVIATION > SUBTITLE 8. NOISE ZONE REGULATIONS > PART II. STATEWIDE REGULATIONS

§ 5-806. Implementation and monitoring of approved plans; certification of noise zones

(a) Implementation of plan. --

(1) As to each noise abatement plan the Executive Director approves, the airport operator shall:

(i) Begin to carry out the plan within 6 months of its approval; and

(ii) Except as provided in paragraph (2) of this subsection, fully carry out the plan within 18 months of its approval.

(2) The Executive Director may grant a delay of up to 2 years to carry out the plan fully if the Executive Director finds that, despite the good faith efforts of the operator, the operator cannot comply with the schedule required by this subsection.

(b) Certification of noise zone. --After notice and a public hearing, the Executive Director shall certify and publish, as a noise zone for purposes of Parts III and IV of this subtitle, any noise zone that results from an approved assessment or an approved plan.

(c) Adjustment to plan or zone. --On application by the airport operator or an affected political subdivision, the Executive Director shall consider any adjustment to an approved plan or noise zone that is needed to reflect potential operational changes, changes in adjoining land uses, or other factors. Adjustments may be made only by recertification of the noise zone by the Executive Director, after notice and a public hearing.

(d) Political subdivisions to have opportunity to comment. --Before any hearing under this section, the Executive Director shall give the chief executive officer and zoning board of any affected political subdivision an opportunity to comment. After certification of a noise zone, the Administration shall notify them of the certified noise zone.

(e) Monitoring of plans. --The Executive Director may adopt rules and regulations for monitoring compliance with approved plans.

History

An. Code 1957, art. 1A, § 7-705; 1977, ch. 13, § 2; *1994, ch. 457*; *2016, chs. 153*, *154*.

Annotations

Notes

EFFECT OF AMENDMENTS. --

Md. TRANSPORTATION Code Ann. § 5-819

Current through chapters effective May 15, 2019, including Chapters 1, 2, 7, 8, 13, 15, 18, 19, 30, 31, 173, 174, 292, 293, 400, 456, 473, 491, and 522 of the 2019 Regular Session of the General Assembly.

MD - Annotated Code of Maryland > TRANSPORTATION > TITLE 5. AVIATION > SUBTITLE 8. NOISE ZONE REGULATIONS > PART IV. STATE-OWNED AIRPORTS

§ 5-819. Executive Director's duty as airport operator

For all airports owned by this State, the Executive Director shall discharge all of the obligations required of an airport operator by §§ 5-805 and 5-806 of this subtitle, including the delineation of noise zones and the establishment of any required noise abatement plans.

History

An. Code 1957, art. 1A, § 7-703; 1977, ch. 13, § 2; *1994, ch. 457*.

End of Document

Md. TRANSPORTATION Code Ann. § 5-820

Current through chapters effective May 15, 2019, including Chapters 1, 2, 7, 8, 13, 15, 18, 19, 30, 31, 173, 174, 292, 293, 400, 456, 473, 491, and 522 of the 2019 Regular Session of the General Assembly.

MD - Annotated Code of Maryland > TRANSPORTATION > TITLE 5. AVIATION > SUBTITLE 8. NOISE ZONE REGULATIONS > PART IV. STATE-OWNED AIRPORTS

§ 5-820. Adoption and enforcement of regulations

(a) In general. --After the Executive Director certifies and publishes a noise zone for a State-owned airport, he shall adopt, administer, and enforce regulations for the airport in the same manner that a political subdivision enforces its regulations under Part III of this subtitle.

(b) New airports. --As to new airports, the Executive Director shall establish noise zones, any required noise abatement plan, and noise zone regulations as follows:

(1) For any newly constructed State-owned airport, before the initial operation of the airport; and

(2) For any newly acquired State-owned airport, within 1 year of the acquisition of the airport.

History

An. Code 1957, art. 1A, § 7-703; 1977, ch. 13, § 2; *1994, ch. 457*.

End of Document

14 CFR 11.61

This document is current through the May 20, 2019 issue of the Federal Register. Title 3 is current through May 2, 2019.

Code of Federal Regulations > TITLE 14 -- AERONAUTICS AND SPACE > CHAPTER I -- FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION > SUBCHAPTER B -- PROCEDURAL RULES > PART 11 -- GENERAL RULEMAKING PROCEDURES > SUBPART A -- RULEMAKING PROCEDURES > PETITIONS FOR RULEMAKING AND FOR EXEMPTION

§ 11.61 May I ask FAA to adopt, amend, or repeal a regulation, or grant relief from the requirements of a current regulation?

(a) Using a petition for rulemaking, you may ask FAA to add a new regulation to title 14 of the Code of Federal Regulations (14 CFR) or ask FAA to amend or repeal a current regulation in 14 CFR.

(b) Using a petition for exemption, you may ask FAA to grant you relief from current regulations in 14 CFR.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40109, 40113, 44110, 44502, 44701-44702, 44711, 46102, and 51 U.S.C. 50901-50923.

History

[Doc. No. 1242, *27 FR 9586,* Sept. 28, 1962, as amended by Amdt. 11-3, 29 FR 9662, July 17, 1964; Amdt. 11-4, *29 FR 15074,* Nov. 7, 1964; Amdt. 11-5; *31 FR 11091,* Aug. 20, 1966; Amdt. 11-15, *43 FR 52205,* Nov. 9, 1978; Amdt. 11-30, *51 FR 2348,* Jan. 16, 1986; Amdt. 11-32, 54 FR 39290, Sept. 25, 1989; Amdt. 11-35, 56 FR 65638, Dec. 17, 1991; Amdt. 11-42, 62 FR 46864, 46865, Sept. 4, 1997; Doc. No. FAA 1999-6622, Amdt. 11-46, 65 FR 50850, 50866, Aug. 21, 2000]

End of Document

14 CFR 11.71

This document is current through the May 20, 2019 issue of the Federal Register. Title 3 is current through May 2, 2019.

Code of Federal Regulations > TITLE 14 -- AERONAUTICS AND SPACE > CHAPTER I -- FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION > SUBCHAPTER B -- PROCEDURAL RULES > PART 11 -- GENERAL RULEMAKING PROCEDURES > SUBPART A -- RULEMAKING PROCEDURES > PETITIONS FOR RULEMAKING AND FOR EXEMPTION

§ 11.71 What information must I include in my petition for rulemaking?

(a) You must include the following information in your petition for rulemaking:

(1) Your name and mailing address and, if you wish, other contact information such as a fax number, telephone number, or e-mail address.

(2) An explanation of your proposed action and its purpose.

(3) The language you propose for a new or amended rule, or the language you would remove from a current rule.

(4) An explanation of why your proposed action would be in the public interest.

(5) Information and arguments that support your proposed action, including relevant technical and scientific data available to you.

(6) Any specific facts or circumstances that support or demonstrate the need for the action you propose.

(b) In the process of considering your petition, we may ask that you provide information or data available to you about the following:

(1) The costs and benefits of your proposed action to society in general, and identifiable groups within society in particular.

(2) The regulatory burden of your proposed action on small businesses, small organizations, small governmental jurisdictions, and Indian tribes.

(3) The recordkeeping and reporting burdens of your proposed action and whom the burdens would affect.

(4) The effect of your proposed action on the quality of the natural and social environments.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40109, 40113, 44110, 44502, 44701-44702, 44711, 46102, and *51 U.S.C. 50901*-50923.

History

14 CFR 97.20

This document is current through the May 20, 2019 issue of the Federal Register. Title 3 is current through May 2, 2019.

Code of Federal Regulations > TITLE 14 -- AERONAUTICS AND SPACE > CHAPTER I -- FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION > SUBCHAPTER F -- AIR TRAFFIC AND GENERAL OPERATING RULES > PART 97 -- STANDARD INSTRUMENT PROCEDURES > SUBPART C -- TERPS PROCEDURES

§ 97.20 General.

(a) This subpart prescribes standard instrument approach procedures and takeoff minimums and obstacle departure procedures (ODPs) based on the criteria contained in FAA Order 8260.3, U.S. Standard for Terminal Instrument Procedures (TERPs), and other related Orders in the 8260 series that also address instrument procedure design criteria.

(b) Standard instrument approach procedures and associated supporting data adopted by the FAA are documented on FAA Forms 8260-3, 8260-4, 8260-5. Takeoff minimums and obstacle departure procedures (ODPs) are documented on FAA Form 8260-15A. These forms are incorporated by reference. The Director of the Federal Register approved this incorporation by reference pursuant to *5 U.S.C. 552*(a) and 1 CFR part 51. The standard instrument approach procedures and takeoff minimums and obstacle departure procedures (ODPs) are available for examination at the FAA's Rules Docket (AGC-200) and at the National Flight Data Center, 800 Independence Avenue, SW., Washington, DC 20590, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to *http://www.archives.gov/federal-register/code-of-federal-regulations/ibr-locations.html*.

(c) Standard instrument approach procedures and takeoff minimums and obstacle departure procedures (ODPs) are depicted on aeronautical charts published by the FAA. These charts are available from the FAA at *https://www.faa.gov/air]traffic/flight]info/aeronav/digital]pro* ducts/.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, and 44721-44722.

History

[35 FR 5609, April 7, 1970; *68 FR 16943, 16948,* Apr. 8, 2003; *70 FR 23002, 23004,* May 3, 2005; Doc. No. FAA-2002-14002, Amdt. 97-1336, *72 FR 31662, 31680,* June 7, 2007; *83 FR 9162, 9172,* Mar. 5, 2018]

40 CFR 1502.9

This document is current through the May 20, 2019 issue of the Federal Register. Title 3 is current through May 2, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

40 CFR 1508.4

This document is current through the May 20, 2019 issue of the Federal Register. Title 3 is current through May 2, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

Rules and Regulations

Federal Register
Vol. 84, No. 86
Friday, May 3, 2019

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31249; Amdt. No. 3849]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective May 3, 2019. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of May 3, 2019.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29, Room 104, Oklahoma City, OK 73125. Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under

5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on April 19, 2019.

Rick Domingo,

Executive Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 20 June 2019

Prattville, AL, Prattville—Grouby Field, Takeoff Minimums and Obstacle DP, Amdt 2
Tucson, AZ, Tucson Intl, RNAV (GPS) Z RWY 11L, Amdt 1C
Tucson, AZ, Tucson Intl, RNAV (GPS) Z RWY 29R, Amdt 2D
Lincoln, CA, Lincoln Rgnl/Karl Harder Field, RNAV (GPS) RWY 15, Orig-A
Mountain View, CA, Moffett Federal Afld, ILS OR LOC RWY 32R, Amdt 1
San Diego, CA, Brown Field Muni, VOR OR GPS–A, Amdt 4, CANCELLED
San Diego, CA, Brown Field Muni, VOR OR TACAN–A, Orig
Stockton, CA, Stockton Metropolitan, RNAV (GPS) RWY 29R, Amdt 2
Truckee, CA, Truckee-Tahoe, RNAV (GPS)-A, Orig
Lake Wales, FL, Lake Wales Muni, RNAV (GPS) RWY 6, Orig-C
New Smyrna Beach, FL, Massey Ranch Airpark, RNAV (GPS) RWY 18, Orig, CANCELLED
New Smyrna Beach, FL, Massey Ranch Airpark, RNAV (GPS) RWY 36, Orig, CANCELLED
New Smyrna Beach, FL, Massey Ranch Airpark, RNAV (GPS)-A, Orig
New Smyrna Beach, FL, Massey Ranch Airpark, RNAV (GPS)-B, Orig
New Smyrna Beach, FL, New Smyrna Beach Muni, Takeoff Minimums and Obstacle DP, Amdt 3
Fort Stewart (Hinesville), GA, Wright AAF (Fort Stewart)/Midcoast Rgnl, RNAV (GPS) RWY 6L, Amdt 1
Fort Stewart (Hinesville), GA, Wright AAF (Fort Stewart)/Midcoast Rgnl, Takeoff Minimums and Obstacle DP, Amdt 1
Macon, GA, Middle Georgia Rgnl, RNAV (GPS) RWY 23, Amdt 2F
Millen, GA, Millen, RNAV (GPS) RWY 17, Amdt 3
Millen, GA, Millen, RNAV (GPS) RWY 35, Amdt 2
Hilo, HI, Hilo Intl, RNAV (GPS) RWY 26, Amdt 1
Burlington, IA, Southeast Iowa Rgnl, ILS OR LOC RWY 36, Amdt 10C
Burlington, IA, Southeast Iowa Rgnl, RNAV (GPS) RWY 12, Amdt 1B
Burlington, IA, Southeast Iowa Rgnl, RNAV (GPS) RWY 36, Amdt 1A
Burlington, IA, Southeast Iowa Rgnl, VOR RWY 12, Amdt 6D
Burlington, IA, Southeast Iowa Rgnl, VOR RWY 30, Amdt 13D
Mattoon/Charleston, IL, Coles County Memorial, ILS OR LOC RWY 29, Amdt 7
Mattoon/Charleston, IL, Coles County Memorial, VOR RWY 6, Amdt 13B, CANCELLED
Mattoon/Charleston, IL, Coles County Memorial, VOR RWY 24, Amdt 11B, CANCELLED
Marion, IN, Marion Muni, ILS OR LOC RWY 4, Amdt 8
Marion, IN, Marion Muni, RNAV (GPS) RWY 4, Amdt 1
Marion, IN, Marion Muni, RNAV (GPS) RWY 22, Amdt 1
Marion, IN, Marion Muni, RNAV (GPS) RWY 33, Orig-D
Marion, IN, Marion Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Montague, MA, Turners Falls, RNAV (GPS)-B, Orig-A
Montague, MA, Turners Falls, Takeoff Minimums and Obstacle DP, Amdt 2
Montague, MA, Turners Falls, VOR–A, Amdt 4A
Detroit, MI, Detroit Metropolitan Wayne County, RNAV (GPS) Z RWY 4L, Orig-A
Detroit, MI, Detroit Metropolitan Wayne County, RNAV (GPS) Z RWY 22R, Orig-A
Duluth, MN, Duluth Intl, RADAR–1, Orig
Grand Rapids, MN, Grand Rapids/Itasca Co-Gordon Newstrom Fld, Takeoff Minimums and Obstacle DP, Amdt 4A
Hammonton, NJ, Hammonton Muni, RNAV (GPS) RWY 3, Amdt 1D
Hammonton, NJ, Hammonton Muni, VOR–B, Amdt 2D
Fallon, NV, Fallon Muni, Takeoff Minimums and Obstacle DP, Amdt 1A
Norwich, NY, Lt Warren Eaton, RNAV (GPS) RWY 19, Amdt 1A
Piseco, NY, Piseco, RNAV (GPS) RWY 4, Orig-B
Oklahoma City, OK, Will Rogers World, ILS OR LOC RWY 17R, ILS RWY 17R SA CAT II, Amdt 13
Oklahoma City, OK, Will Rogers World, RNAV (GPS) Y RWY 17R, Amdt 5
Oklahoma City, OK, Will Rogers World, RNAV (RNP) Z RWY 17R, Amdt 2
Pierre, SD, Pierre Rgnl, RNAV (GPS) RWY 31, Orig-B
Bristol/Johnson/Kingsport, TN, Tri-Cities, ILS OR LOC RWY 5, Amdt 3D
Bristol/Johnson/Kingsport, TN, Tri-Cities, ILS OR LOC RWY 23, ILS RWY 23 SA CAT I, ILS RWY 23 CAT II, Amdt 24H
Bristol/Johnson/Kingsport, TN, Tri-Cities, RNAV (GPS) RWY 5, Amdt 1D
Bristol/Johnson/Kingsport, TN, Tri-Cities, RNAV (GPS) RWY 27, Amdt 1B
Brownsville, TX, Brownsville/South Padre Island Intl, ILS OR LOC RWY 13, Orig-B
Houston, TX, Houston-Southwest, LOC RWY 9, Amdt 4
Houston, TX, William P Hobby, LOC RWY 22, Amdt 2
Yakima, WA, Yakima Air Terminal/McAllister Field, COPTER NDB RWY 27, Amdt 2A, CANCELLED
Yakima, WA, Yakima Air Terminal/McAllister Field, ILS OR LOC RWY 27, Amdt 1
Yakima, WA, Yakima Air Terminal/McAllister Field, ILS Z RWY 27, Amdt 27B, CANCELLED
Watertown, WI, Watertown Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Buckhannon, WV, Upshur County Rgnl, RNAV (GPS) RWY 11, Amdt 2C
Buckhannon, WV, Upshur County Rgnl, RNAV (GPS) RWY 29, Amdt 2C
Buckhannon, WV, Upshur County Rgnl, VOR–A, Amdt 1B
Lewisburg, WV, Greenbrier Valley, RNAV (GPS) RWY 22, Amdt 1A
Parkersburg, WV, Mid-Ohio Valley Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3
Pineville, WV, Kee Field, Takeoff Minimums and Obstacle DP, Amdt 2

[FR Doc. 2019–08861 Filed 5–2–19; 8:45 am]

BILLING CODE 4910–13–P

Report on HH–60G sustainment and Combat Rescue Helicopter program (sec. 333)

The Senate bill contained a provision (sec. 322) that would require the Secretary of Defense to report to the congressional defense committees a plan to modernize, train, and maintain the HH–60 fleet.

The House amendment contained no similar provision.

The House recedes.

Subtitle E—Other Matters

Air navigation matters (sec. 341)

The Senate bill contained a provision (sec. 333) that would amend Section 358 of the National Defense Authorization Act for fiscal year 2011 (Public Law 111–383) to ensure that due diligence and proper assessment is given so energy projects do not interfere with operational training of the military services.

The House amendment contained a similar provision (sec. 343) that would amend section 44718 of title 49, United States Code, to authorize the Secretary of Transportation to include the interests of national security, as determined by the Secretary of Defense, in the Secretary's aeronautical studies and reports required under this statute.

The Senate recedes with an amendment that would include the due diligence and proper assessment to ensure energy projects do not interfere with operational training, and would amend title 49, United States Code, to require the Secretary of Transportation to review flight path changes at civilian airports to determine if recent adjustments have had an impact on local communities.

Contract working dogs (sec. 342)

The Senate bill contained a provision (sec. 337) that would amend Section 2583(h) of title 10, United States Code, and require each future contract with a provider of tactical explosive detection dogs to include a provision requiring the contractor to transfer the dog to the 341st Training Squadron after the animal's service life.

The House amendment contained no similar provision.

The House recedes with a technical amendment that would include the terminology a working dog that is "trained and kenneled by an entity that provides such a dog pursuant to such a contract."

Plan, funding documents, and management review relating to explosive ordnance disposal (sec. 343)

The House amendment contained a provision (sec. 342) that would establish a joint Explosive Ordnance Disposal (EOD) program, with the Navy as executive agent for the Department of Defense, to coordinate and integrate research, development, and procurement for EOD defense programs. This section would also require the Secretary of Defense to conduct a review of the management structure of the program and to brief the results of the review to the Committees on Armed Services of the Senate and the House of Representatives by May 1, 2018.

The Senate bill contained no similar provision.

(2) Objection is made to the application of the provision to minimum wage determinations in connection with public contracts, but subsection (a) contains adequate exemption for good cause which is operative in any proper case.

(3) It is suggested that the provision should not apply to interpretative rules or statements of policy. If the exemption clause is not deemed ample to care for these types of rules, it may be well to add "or interpretative rules and statements of policy" at the end of the parenthetical expression in the subsection.

(*d*) *Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.*

EXPLANATION

Subsection (d) requires agencies to receive and consider requests of private parties for the making, modification, or rescission of rules. The Attorney General's Committee proposed that such a provision be included in legislation (*Final Report*, pp. 195, 230).

SUGGESTIONS

One agency objects to the statutory statement of a right of petition on the ground that it would "force" a "tremendous" number of hearings. The alternative implied is that no one should have a right of petition, leaving action or inaction to the initiative of the agency concerned. Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen. If a petitioner states and supports a valid ground for hearing or relief, manifestly he should be entitled to hearing or relief. Not every petition need result in a hearing, just as not every complaint in court need result in trial.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court, (2) the selection or tenure of an officer or employee of the United States, (3) proceedings in which decisions rest solely on inspections, tests, or elections, (4) the conduct of military, naval, or foreign affairs functions, (5) cases in which an agency is acting as an agent for a court, and (6) the certification of employee representatives—

EXPLANATION

This section defines generally the procedure for the administrative adjudication of particular cases. The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing, and the first of the further exceptions eliminates matters subject to a

become automatically inoperative. If the situation is such as to compel the agency, in addition, to dispense with the thirty-day provision, the rule should also contain the finding required by the last clause of section 4 (c).

Section 4 (c) is not intended to repeal provisions of other statutes which require a period of longer than thirty days between the issuance and effective date of certain rules. For example, the Cotton Standards Act authorizes the Secretary of Agriculture to set cotton classification standards which may not become effective in less than one year (7 U. S. C. 56). The thirty-day period prescribed by section 4(c) of the Administrative Procedure Act does not supersede the one-year period thus required by the Cotton Standards Act.

SECTION 4(d)—PETITIONS

Section 4(d) provides that "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule." Section 4(d) applies not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules. It is applicable both to existing rules and to proposed or tentative rules.

The right to petition under section 4(d) must be accorded to any "interested person". It will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.

Every agency with rule making powers subject to section 4 should establish, and publish under section 3(a)(2), procedural rules governing the receipt, consideration and disposition of petitions filed pursuant to section 4(d). These procedural rules may call, for example, for a statement of the rule making action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements.

If the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rule making proceedings under section 4(a) and (b) are required. However, the mere filing of a petition does not require the agency to grant it or to hold a hearing or to engage in any other public rule making proceedings. For example, under section 701(e) of the

Federal Food, Drug and Cosmetic Act (21 U.S.C. 371(e)), the Federal Security Administrator must provide a hearing on a proposed rule only where an application, stating reasonable grounds, is made by an interested industry or a substantial portion of the industry. Section 4(d) was not intended to modify that statute so as to require the Federal Security Administrator to hold a hearing on the petition of a single individual.

The agency need act on the petition only in accordance with its procedures as published in compliance with section 3(a)(2). The denial of a petition is governed by section 6(d). Sen. Rep. p. 15; H.R. Rep. p. 26 (Sen. Doc. pp. 201, 260). Accordingly, prompt notice of such denial should be given to the petitioner, together with a simple statement of the procedural or other grounds therefor.

Neither the denial of a petition under section 4(d), nor an agency's refusal to hold public rule making proceedings thereon, is subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230).

This subsection (as in the case of the preceding portions of section 4) does not apply to rules relating to the functions and matters enumerated in the first sentence of section 4. The reports of the Senate and House Committees on the Judiciary state that "The introductory clause exempts from *all of the requirements* of section 4 any rule making so far as there are involved (1) military, naval, or foreign affairs functions or (2) matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." (Underscoring supplied). Sen. Rep. p. 13; H.R. Rep. p. 23 (Sen. Doc. pp. 199, 257). The petition procedure of section 4(d) is not applicable, for example, to the rules which an agency has issued or is empowered to issue with respect to loans or pensions.

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I electronically filed the foregoing brief, together with its addendum and exhibits, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *W. Eric Pilsk*
W. ERIC PILSK

Exhibit 1

Declaration of Randall Dickinson (May 24, 2019)

ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1302

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

STATE OF MARYLAND,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL,
Acting Administrator of the Federal Aviation Administration,

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL AVIATION ADMINISTRATION

DECLARATION OF RANDALL DICKINSON IN SUPPORT OF PETITIONER STATE OF MARYLAND

I, Randall Dickinson, being competent to make this statement, do swear and affirm the following:

1. I am an Administrator I in the Maryland Department of Transportation Maryland Aviation Administration's (MDOT MAA) Office of Planning. This Declaration is based upon my personal

knowledge and upon information from business records which are maintained in the ordinary course of business and from entries made therein at or near the time of the events so recorded. I am authorized to testify to the matters herein.

2. I have been employed by MDOT MAA since 1992 and have served previously in the MDOT MAA Office of Real Estate and the MDOT MAA Office of Noise, Real Estate and Land Use Compatibility.

3. I am generally familiar with the locations of the flight paths that FAA implemented from approximately 2013 to 2016 as part of its NextGen program and that are the subject of this matter. I am also familiar with property owned by the State of Maryland that lies under or near those flight paths.

4. Using geographic information system ("GIS") mapping technology and with the assistance of an MDOT MAA contractor, I was able to overlay a map showing state-owned property with the NextGen flight paths implemented by FAA. Attachment 1 depicts the results of that analysis. The blue lines show representative flight paths from 2012, before the NextGen procedures were implemented. The

red lines show representative flight tracks from 2017, *after* the NextGen procedures were implemented. The property highlighted in yellow identifies state-owned land under or near the flight paths and within 20 miles of BWI Marshall.

5. Those eight (8) selected properties are depicted in greater detail in Attachments 1A – 1H and are identified as:

Site A. Towson University, University System of Maryland

Site B. North Point State Park, Maryland Department of Natural Resources

Site C. Sandy Point State Park, Maryland Department of Natural Resources

Site D. 1) Maryland Veterans Cemetery, Maryland Department of Veterans Affairs

2) Severn Run Natural Environmental Area, Maryland Department of General Services

Site E. Maryland School for the Deaf, Maryland Board of Public Works

Site F. Maryland Agricultural Experiment Station, University System of Maryland

Site G. Patapsco Valley State Park, Maryland Department of Natural Resources

Site H. Soldiers Delight Natural Environmental Area, Maryland Department of Natural Resources

6. I am aware that Maryland manages these properties as recreational, educational, and residential sites. I understand that Maryland is concerned about the impacts of noise, including noise from concentrated aircraft overflights like those resulting from FAA's NextGen flight procedure changes, on these properties.

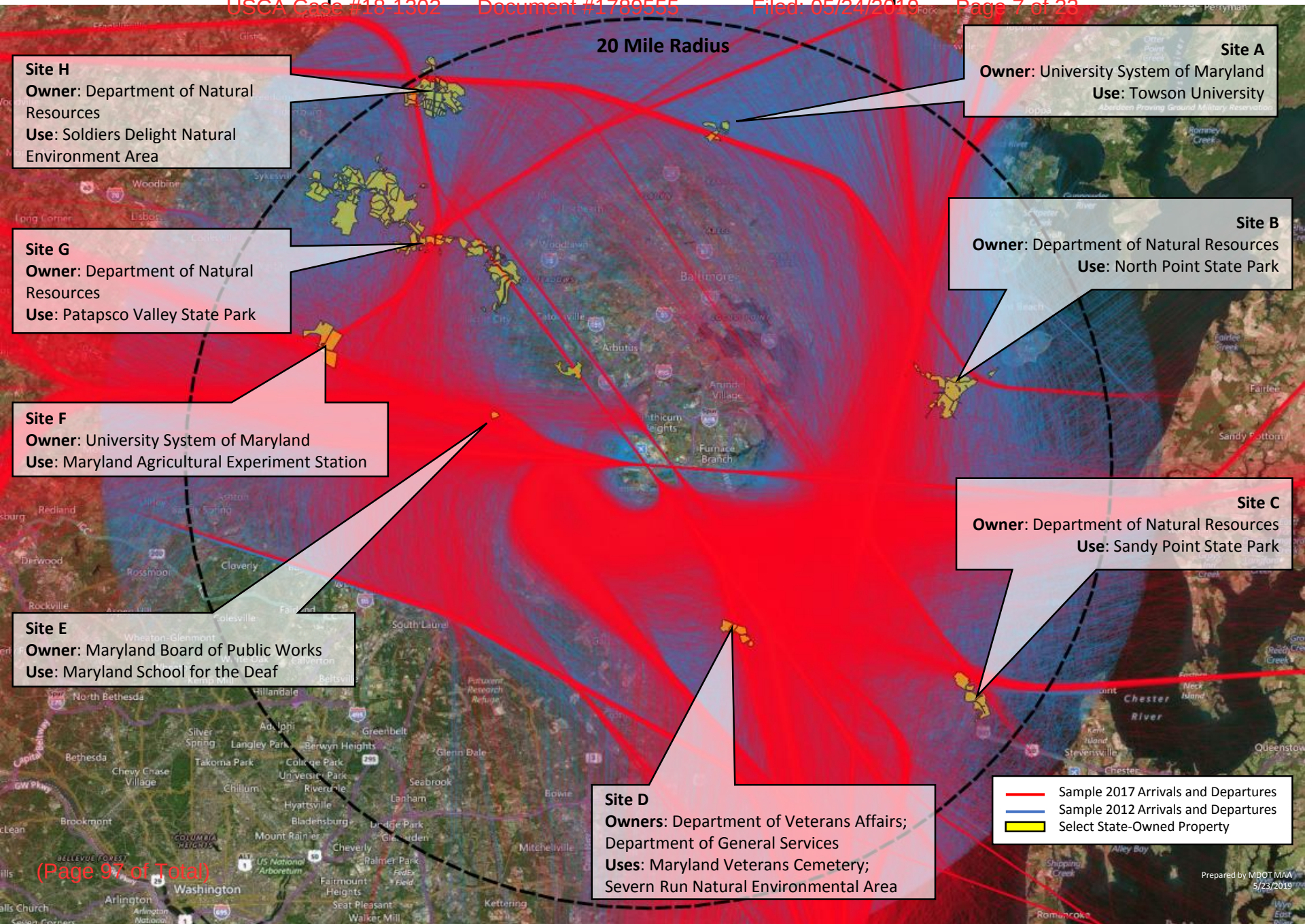
I declare under penalty of perjury that the foregoing is true and correct.

Randall Dickinson

Executed this 24th day of May, 2019, at Linthicum, Maryland.

Attachment 1

Select State-Owned Properties within 20 miles of BWI Marshall Airport



Attachment 1A

Site A

Owner: University System of Maryland

Use: Towson University

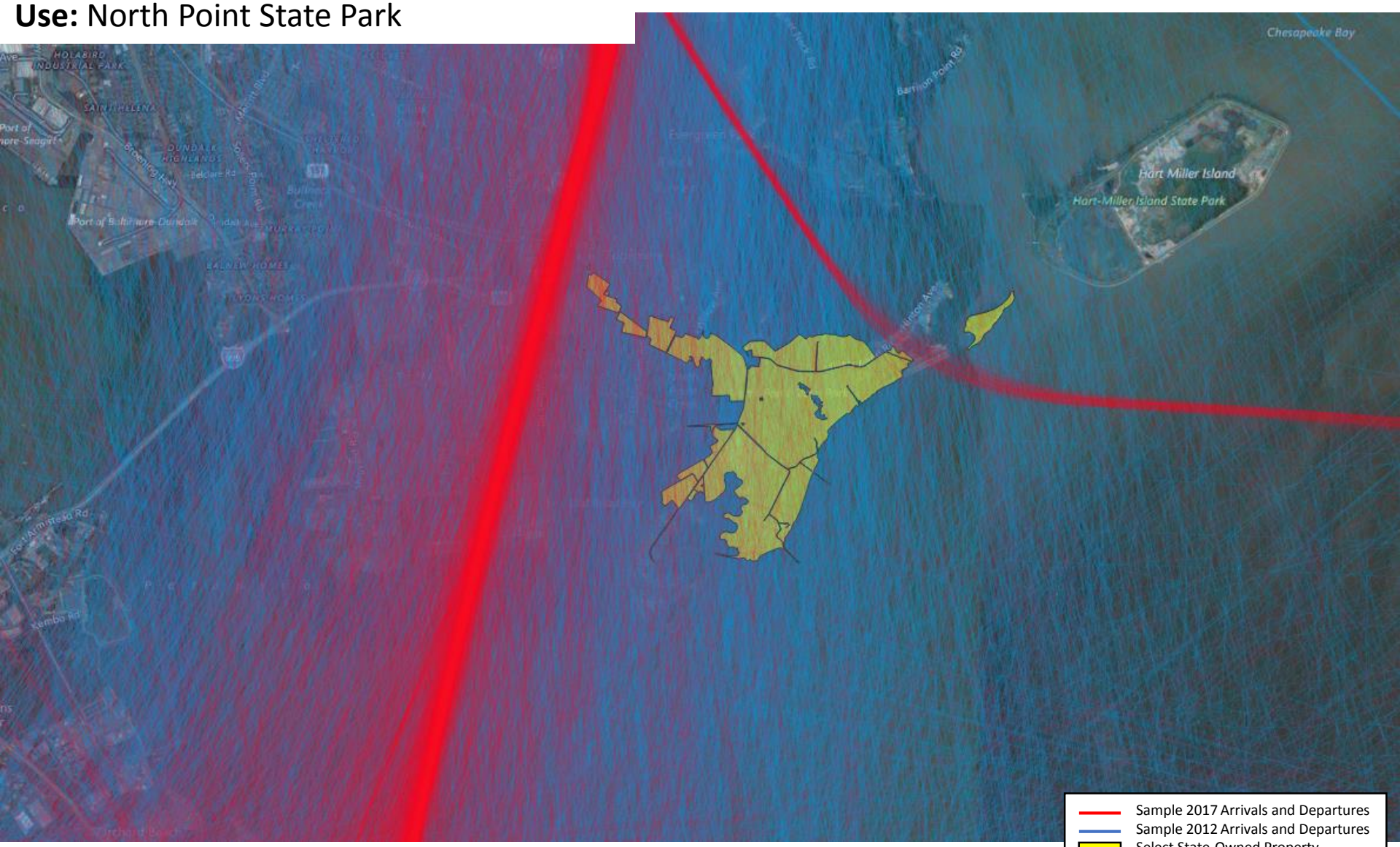
Prepared by MDOT MAA
5/23/2019

Attachment 1B

Site B

Owner: Department of Natural Resources

Use: North Point State Park



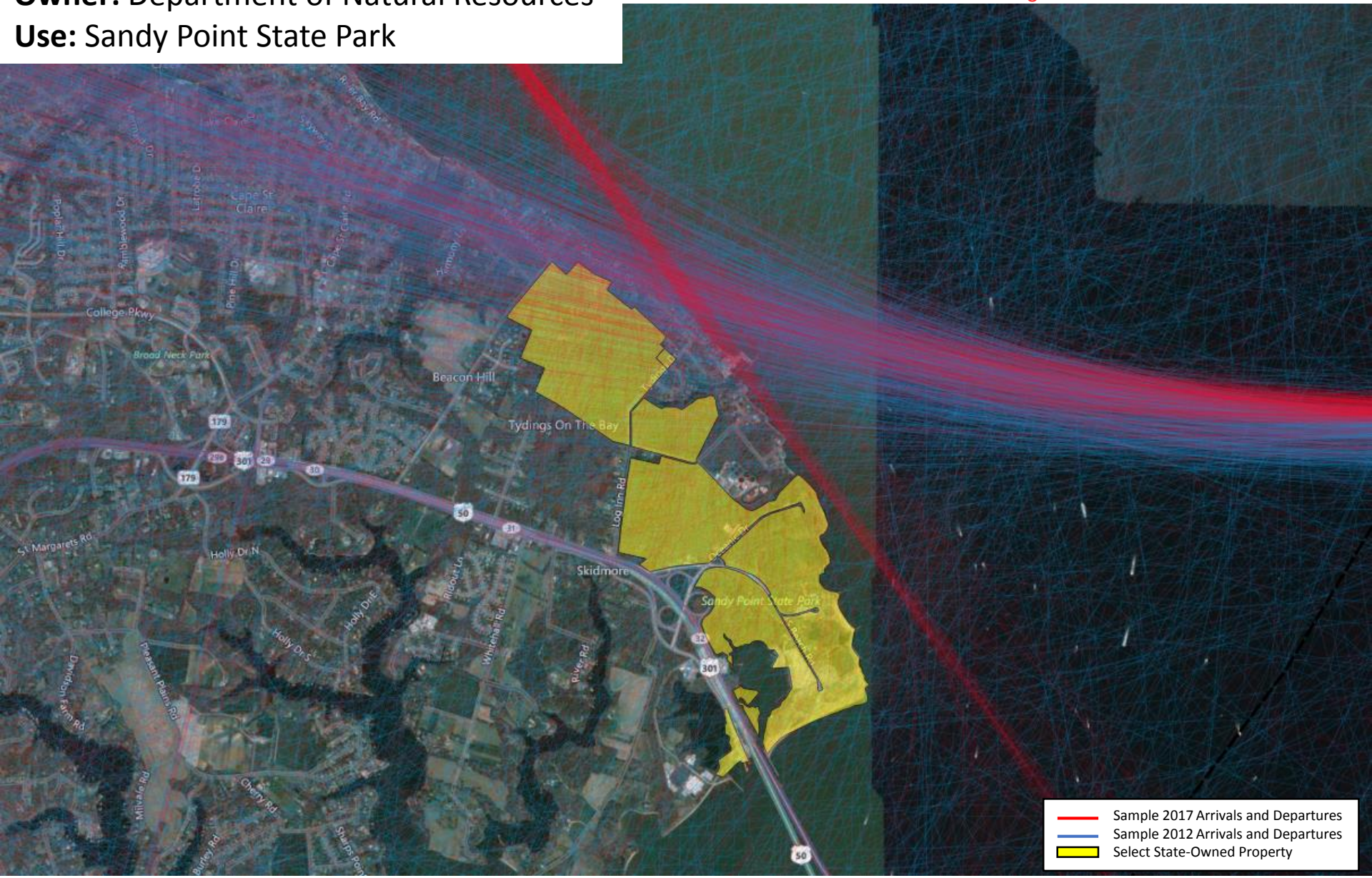
Prepared by MDOT MAA
5/23/2019

Attachment 1C

Site C

Owner: Department of Natural Resources

Use: Sandy Point State Park



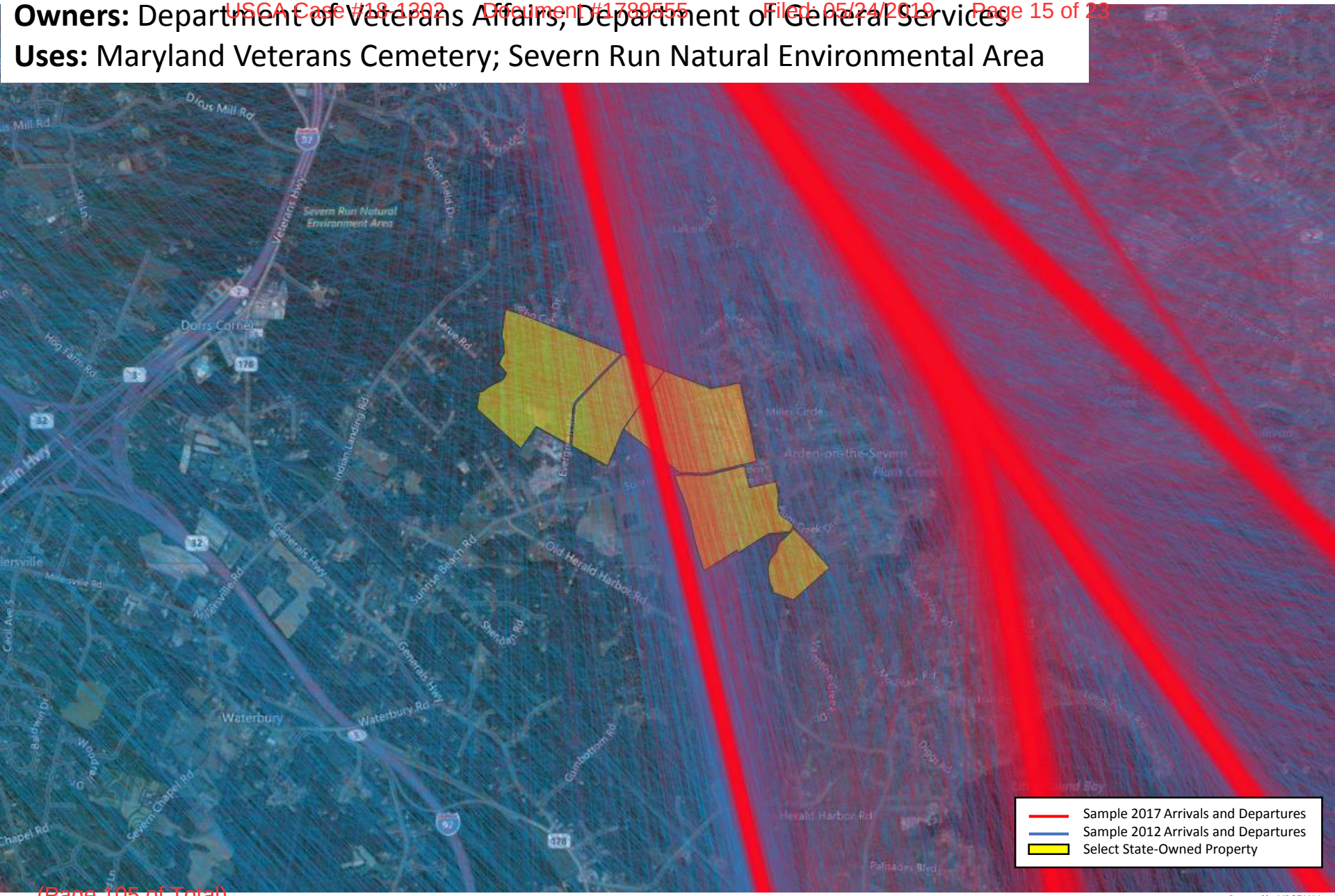
Prepared by MDOT MAA
5/23/2019

Attachment 1D

Site D

Owners: Department of Veterans Affairs; Department of General Services

Uses: Maryland Veterans Cemetery; Severn Run Natural Environmental Area



Prepared by MDOT MAA
5/23/2019

Attachment 1E

Site E

Owner: Maryland Board of Public Works

Use: Maryland School for the Deaf

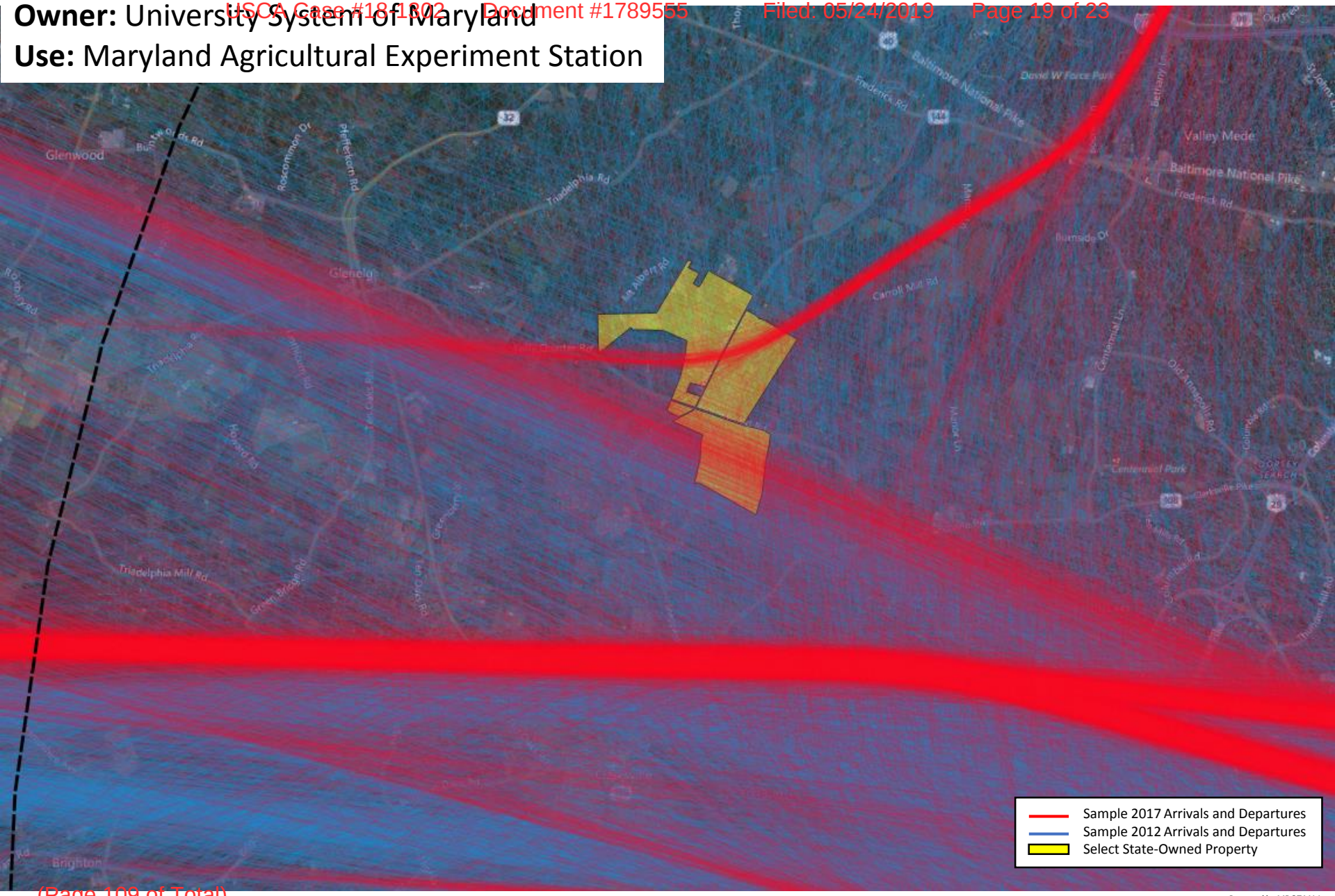
Prepared by MDOT MAA
5/23/2019

Attachment 1F

Site F

Owner: University System of Maryland

Use: Maryland Agricultural Experiment Station



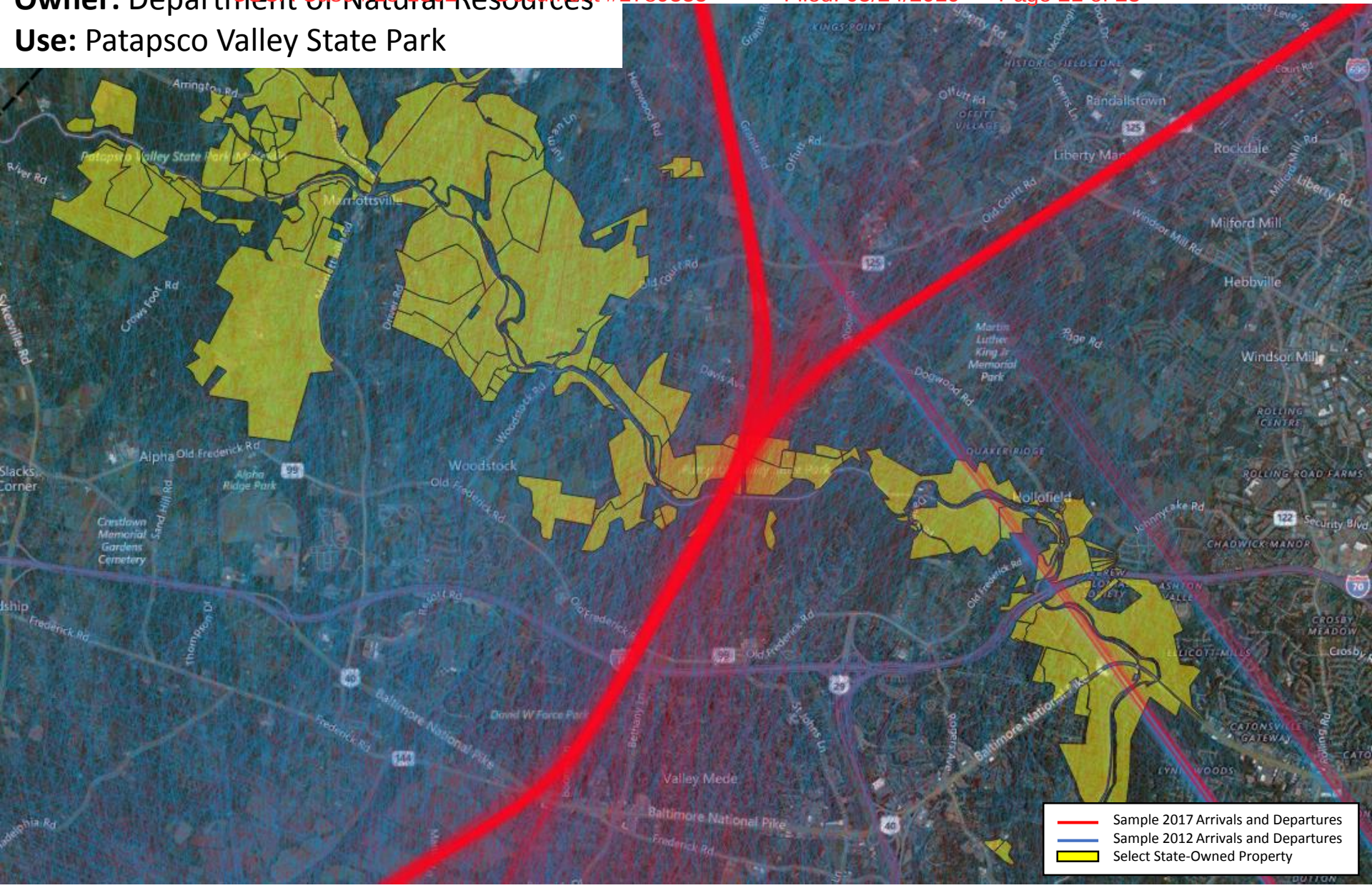
Prepared by MDOT MAA
5/23/2019

Attachment 1G

Site G

Owner: Department of Natural Resources

Use: Patapsco Valley State Park



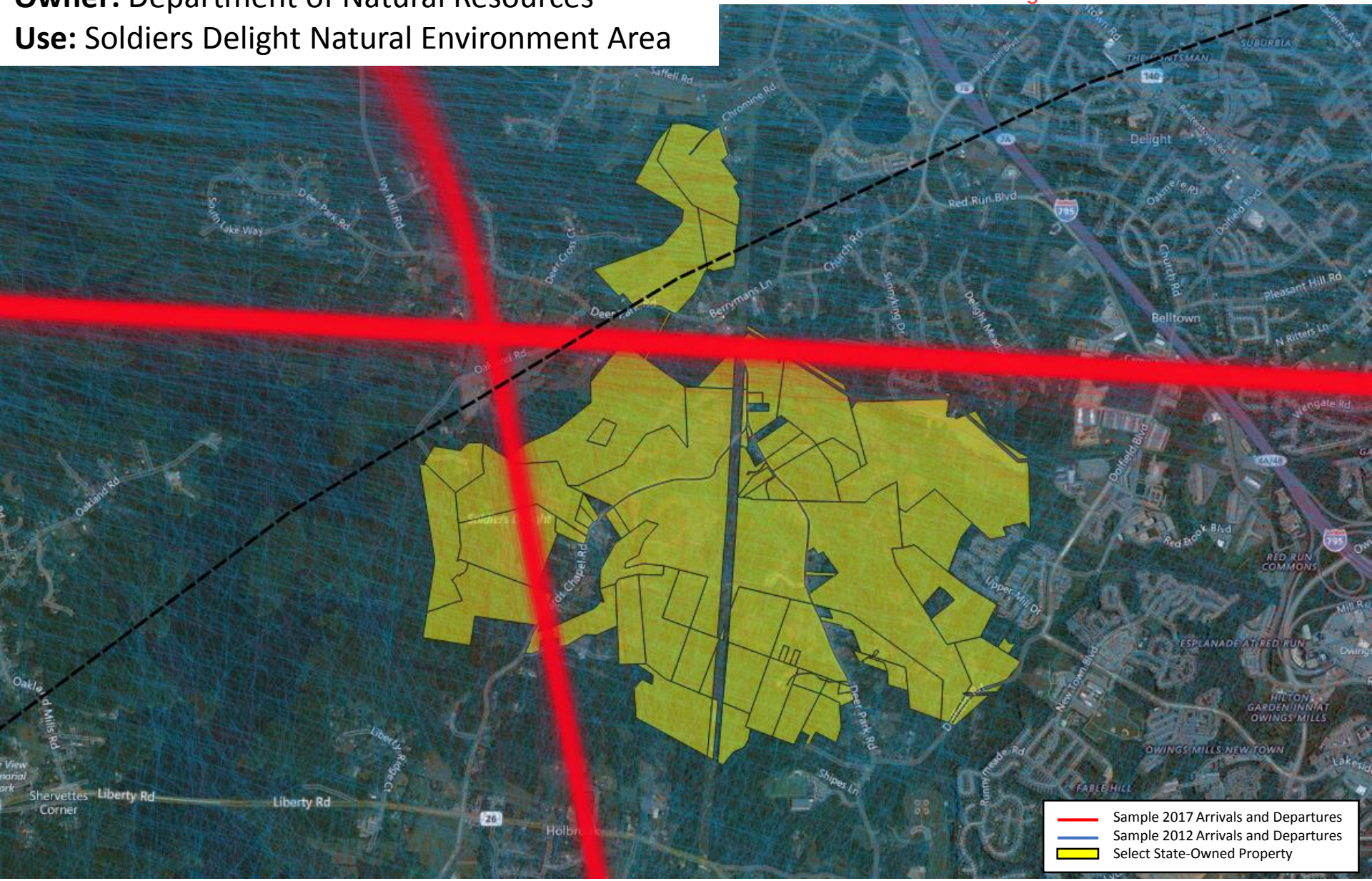
Prepared by MDOT MAA
5/23/2019

Attachment 1H

Site H

Owner: Department of Natural Resources

Use: Soldiers Delight Natural Environment Area



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5/23/2019