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

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| MARTIN COUNTY, FLORIDA; THOMAS L. HEWITT; and V. MICHAEL FERDINANDI<br><br>*Plaintiffs*,<br><br>v.<br><br>U.S. DEPT. OF TRANSPORTATION; ANTHONY R. FOXX, in his official capacity as Secretary of Transportation; PETER M. ROGOFF, in his official capacity as Under Secretary of Transportation for Policy<br><br>*Defendants*. | ) | Civil Action No. 15-632 |

**PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs Martin County, Florida; Thomas L. Hewitt; and V. Michael Ferdinandi (collectively, the "Plaintiffs") respectfully submit this Motion for Preliminary Injunction ("the Motion") against the United States Department of Transportation, Anthony R. Foxx in his official capacity as Secretary of Transportation, and Peter M. Rogoff in his official capacity as the Under Secretary of Transportation for Policy (collectively, the "DOT" or "Defendants"). Plaintiffs move for the issuance of a preliminary injunction staying, until the Court resolves the merits of Plaintiffs' claims, the DOT's approval of the issuance of $1,750,000,000 in tax-exempt private activity bonds ("PABs") to support Defendant-Intervener AAF Holdings LLC's proposed intercity passenger rail project. The grounds for the Motion are set forth in the accompanying Memorandum of Points and Authorities, the Declarations and Exhibits submitted in support of

this Motion, and in Plaintiffs' Complaint (Dkt. No. 1), which is incorporated by reference in this Motion.

May 4, 2015

Respectfully submitted,

s/ Amandeep S. Sidhu

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2015, I caused copies of the foregoing materials to be served by electronic means on all counsel of record through the Court's CM/ECF system.

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| MARTIN COUNTY, FLORIDA; THOMAS L. HEWITT; and V. MICHAEL FERDINANDI<br><br>*Plaintiffs,*<br><br>v.<br><br>U.S. DEPT. OF TRANSPORTATION; ANTHONY R. FOXX, in his official capacity as Secretary of Transportation; PETER M. ROGOFF, in his official capacity as Under Secretary of Transportation for Policy<br><br>*Defendants*. | ) | Civil Action No. 15-632 |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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Pursuant to Rule 65 of the Federal Rules of Civil Procedure and the Local Civil Rules, Plaintiffs Martin County, Florida (the "County"), Thomas L. Hewitt; and V. Michael Ferdinandi (collectively, the "Plaintiffs") respectfully move this Court for a preliminary injunction staying, until the Court resolved the merits of Plaintiffs' claims, the allocation of private activity bonds by Defendants United States Department of Transportation, Anthony R. Foxx (in his official capacity as Secretary of Transportation), and Peter M. Rogoff (in his official capacity as the Under Secretary of Transportation for Policy of DOT) (collectively, "Defendants" or "DOT") to Defendant-Intervenor AAF Holdings LLC d/b/a All Aboard Florida ("AAF"). A proposed order is attached.

## I.
## INTRODUCTION

Defendants have directed that $1,750,000,000 in tax-exempt private activity bonds ("PABs") be issued by no later than July 1, 2015, so as to provide financing for AAF's proposed passenger rail line between Miami and Orlando, Florida (the "Project"). This Court should preliminarily vacate Defendants' actions, thereby preventing the issuance of the bonds, at least until such time that the Court has had the opportunity to evaluate the merits of Plaintiffs' assertion that Defendants' actions are unlawful. Absent such preliminary injunctive relief, the Project will go forward and inflict irreparable harms on the Plaintiffs, including harms caused by the Project itself and procedural harms associated with Defendants' violations of the National Environmental Policy Act of 1969 ("NEPA") and its implementing regulations.

* * * * *

This is an action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, to set aside as arbitrary, capricious, an abuse of discretion, in excess of statutory authority and

otherwise contrary to law Defendants' decision to allocate PABs for the Project. That decision is embodied in a December 22, 2014 Provisional Bond Allocation Approval Letter (PAB "Approval Letter") definitively approving the PABs and affirmatively requiring that the PABs be issued by no later than July 1, 2015. *See* Ex. 1, Approval Letter from Under Secretary Peter Rogoff to AAF (Dec. 22, 2014). Defendants' approval of the PABs is unlawful, unjustified, and improper for two reasons: (1) the statute on which DOT purports to rely as authorizing PABs for the Project does not provide for that authorization; and (2) DOT made the decision to approve the PABs in derogation of NEPA and its implementing regulations.

At this juncture, Plaintiffs seek a preliminary injunction preventing implementation of the Approval Letter until the Court has had a full opportunity to evaluate the merits of Plaintiffs' claims. Plaintiffs have a strong likelihood of success on their claims and will be irreparably harmed if the allocation decision and bond issuance is not stayed. AAF has described the bonds as the "linchpin" of its ability to complete the Project and it is not clear that DOT has the authority to revoke the bonds once they have been issued, even if the Court decides the bonds were issued unlawfully. Issuance of the bonds will all but ensure that the Project—which will undisputedly harm Plaintiffs by increasing noise, traffic, pollution and safety hazards in their communities—will go forward. It will also permanently deprive Plaintiffs of the opportunity (guaranteed by NEPA) to persuade Defendants that the Project should be rejected in favor of various alternatives, including a "no action" alternative. In contrast, a preliminary injunction will force Defendants to reevaluate the issuance of bonds consistent with the Court's findings and comply with the law.

It is no answer to these concerns that the Federal Railroad Administration ("FRA") is preparing an environmental impact statement ("EIS"), as it is required to do by NEPA, in connection with its review of a separate loan application that an affiliate of AAF has filed with the FRA. By approving the PABs for the Project and directing that they be issued by a date certain, DOT has all but mooted the FRA's ongoing environmental review, and has, at a minimum, squashed any meaningful consideration of Project alternatives. DOT's own internal NEPA procedures also prohibit DOT from relying on the FRA's forthcoming EIS in this situation. And if the Project gets funded now by the PABs, Plaintiffs will have no meaningful opportunity to later challenge the adequacy of the EIS. Once the PABs are issued, AAF will have the "linchpin" for its Project and Plaintiffs' right to challenge the forthcoming EIS as insufficient will be largely if not entirely moot. In these circumstances, preliminary injunctive relief is appropriate and necessary.

Finally, it is worth noting that despite the enormity of the Project's implications for Plaintiffs and others in Florida, DOT's Approval Letter deliberately provides no explanation for the statutory or regulatory basis for allocating PAB funding to the Project. Only after multiple inquiries from Members of Congress—and over four months after issuing the Approval Letter—did DOT belatedly produce its "justification": namely, that the Project is eligible for $1.75 billion in PAB financing under 26 U.S.C. § 142(m) as a "qualified highway or surface freight transfer facility." The "bootstrap" for this justification is that DOT had previously provided $9.3 million to eliminate railway-highway crossing hazards along a portion of the Project corridor. This regulatory explanation has no support in the lengthy and extensive legislative history (discussed *infra* at Section VI.A.2). PAB allocations were never intended to be used to fund

projects of this nature (and certainly not $1.75 billion, almost all of which is correlated to eliminating hazards of highway crossings). Therefore, DOT's claimed statutory justification appears to be an attempt to fit an elephant into a mousehole. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). This blatant violation of specific congressional lawmaking leaves this Court no basis to approve DOT's fortuitous logic and claims.

If the Court finds the Defendants' PAB allocation was unauthorized and unlawful (Count II in Plaintiffs' Compl.), the Court does not have to reach the Plaintiffs' NEPA claim (Count I in Plaintiffs' Compl.). While the NEPA claim is well-founded, a Court decision in favor of the Plaintiffs on the Title 23 claim would be sufficient to stop the unlawful activity and moot the NEPA claims in this lawsuit (and those of Indian River County).

## II.
## STATUTORY FRAMEWORK

### A. The Administrative Procedure Act ("APA")

The APA provides that federal courts "shall . . . 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 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." 5 U.S.C. § 706(2).

**B. The National Environmental Policy Act of 1969 ("NEPA")**

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions before undertaking those actions. More specifically, for all "major Federal actions significantly affecting the quality of the human environment," the responsible agency official must prepare a "detailed statement," known as an environmental impact statement ("EIS") on, among other items, the "environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action." 42 U.S.C. § 4332(c). That requirement ensures that federal agencies carefully consider the health, safety, and environmental impacts of their proposed actions and that relevant information about those actions is made available to the public. The Approval Letter and the Project are major federal actions significantly affecting the quality of the human environment. *See* Compl. (Dkt. No. 1) ¶¶ 15-22.

**C. 26 U.S.C. § 142 and Title 23 of the Internal Revenue Code ("I.R.C.")**

The conduit through which AAF sought to obtain PAB authority for the Project is the "exempt bond facility" provisions under Section 142 of the I.R.C. 26 U.S.C. § 142. Under that section, "the term 'exempt facility bond' means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide—(1) airports, (2) docks and wharves, (3) mass commuting facilities, (4) facilities for the furnishing of water, (5) sewage facilities, (6) solid waste disposal facilities, (7) qualified residential rental projects, (8) facilities for the local furnishing of electric energy or gas, (9) local district heating or cooling facilities, (10) qualified hazardous waste facilities, (11) *high-speed intercity rail facilities,* (12) environmental enhancements of hydroelectric generating facilities, (13) qualified public

educational facilities, (14) qualified green building and sustainable design projects, or (15) *qualified highway or surface freight transfer facilities*." 26 U.S.C. § 142(a) (emphasis added).

As it relates to intercity passenger rail projects, exempt bond facilities may only be used for (1) "high-speed intercity rail facilities." 26 U.S.C. § 142(a)(11). "[H]igh-speed intercity rail facilities" are defined as "any facility (not including rolling stock) for the fixed guideway rail transportation of passengers and their baggage between metropolitan statistical areas (within the meaning of section 143(k)(2)(B)) using vehicles that are reasonably expected to be *capable of attaining a maximum speed in excess of 150 miles per hour* between scheduled stops, but only if such facility will be made available to members of the general public as passengers." 26 U.S.C. § 142(i)(1) (emphasis added). Importantly, the Project does not qualify a high-speed intercity rail facility, under that definition – because its trains will not be capable of traveling in excess of 150 miles per hour. Based on publicly available information, AAF has selected Siemens to manufacture train sets to be used on proposed Miami-to-Orlando rail line[1] that will operate "at maximum speeds up to 125 mph."[2] Thus, neither DOT nor AAF has claimed the Project qualifies for PAB support as a "high-speed intercity passenger rail facility."

As it pertains to railroad-related projects, Title 23 (entitled "highways") is clear that it only permits funding for the "elimination of hazards of railway-highway grade crossings." 23 U.S.C. § 101(a)(4)(E). Specifically, Title 23 permits funding for the limited purpose of "elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the

[1] Paul Brinkmann, *Siemens to build All Aboard Florida trains*, Orlando Sentinel (Sept. 11, 2014), http://www.orlandosentinel.com/business/brinkmann-on-business/os-siemens-selected-to-build-all-aboard-florida-trains-20140911-post.html.
[2] *All Aboard Florida Selects Siemens as Train Manufacturer*, Siemens (Sept. 11, 2014), http://news.usa.siemens.biz/press-release/rail-systems/all-aboard-florida-selects-siemens-train-manufacturer.

relocation of highways to eliminate grade crossings . . . ." 23 U.S.C. § 130(a). Neither DOT nor AAF can argue the $1.75 billion PAB allocation is for that purpose. The DOT's claim that a single dollar for this purpose permits all of the subsequent funding is ludicrous—virtually every railroad, whether it be high-speed, freight, or intercity passenger rail line in America now or in the future will intersect with roads and highways. The import of DOT's position is that it has authority under Title 23 to provide tax-exempt funding for every passenger railroad, including those that are not high-speed rail.

## III.
## FACTUAL BACKGROUND

### A. AAF's Project and Injuries to Plaintiffs

The Project would establish a for-profit intercity passenger rail service sharing tracks with the existing freight rail service between Orlando and Miami, Florida. Compl. (Dkt. No. 1), at ¶ 7. In Phase I of the Project, AAF has proposed to purchase five train sets, add a second track along an existing 66.5-mile corridor of the Florida East Coast Railroad ("FECR"), and add 16 round-trip (32 one-way) trips on the West Palm Beach to Miami corridor section of the FECR corridor. *Id.* Phase II of the Project involves, in substantial part, construction of additional new tracks extending the new passenger rail service from West Palm Beach north to Orlando and construction of a new rail station at Orlando International Airport. *Id.* at ¶ 37. The core of Plaintiffs' injuries will result from the ability of the railroad to run additional freight trains in the corridor based on the new facilities, as well as the addition of 16 daily round-trip (32 one-way) passenger rail trips, which will be effectuated by the acquisition of equipment and construction through Martin, Palm Beach, and Indian River counties that will occur in both Phases I and II of the Project. *See* Ex. 2, Declaration of Martin County Administrator, Taryn Kryzda, at ¶¶ 8-13

("Kryzda Decl."). To be clear, the Project will significantly increase the number and speed of trains passing through nearly 350 at-grade road crossings along the FECR corridor, 29 of which are located in Martin County and 26 of which are located in Palm Beach County. *Id.* at ¶ 9. Those at-grade road crossings create what the FRA has euphemistically called "opportunities for conflict" but what would be more accurately described as "opportunities for catastrophic and fatal collisions between trains and cars and trains and people." Compl. at ¶ 38.

**B. Funding for AAF's Project**

On March 15, 2013, AAF submitted a Railroad Rehabilitation and Improvement Financial ("RRIF") Program loan application to the FRA. Ex. 8, AAF RRIF Loan Application to DOT (Mar. 15, 2013).Through its application, AAF requested a loan of $1,350,000,000 to fund the Project. *Id.* AAF subsequently increased the amount requested in this loan to $1,600,000,000. *Id.* The FRA recognized that approving a loan for the Project would constitute "major Federal action[] significantly affecting the quality of the human environment" within the meaning of NEPA § 102(c), 42 U.S.C. § 4332(c). Compl. at ¶ 40. Accordingly, it began the NEPA-required process of evaluating the environmental, economic, social, health and welfare impacts of the Project, including the preparation of a draft environmental impact statement ("DEIS"), which was to be followed (after a period of public review and comments) by a final environmental impact statement ("FEIS") and a final decision on AAF's loan application. *Id.* The FRA indicated that it would combine its NEPA analysis with the analyses required by the National Historic Preservation Act and the Department of Transportation Act of the Project's

impacts on historic and recreational resources. *Id.* The FRA released a DEIS for the Project on September 19, 2014.[3]

The DEIS—although seriously flawed in many material respects, including, among others, the failure to adequately consider reasonable alternatives to the Project and the failure to adequately assess the Project's impacts on marine navigation and public safety—confirmed that the Project would have multiple adverse impacts on Martin County and Palm Beach County and their residents, including, among others, adverse impacts to public health and safety; transportation; navigation; social and economic conditions; air quality and vehicle emissions; wildlife habitat; floodplain and wetlands; and threatened and endangered species. *See* Compl.. at ¶ 41. The Project will also adversely impact social, economic, and community wellbeing. *See* Ex. 2, Kryzda Decl. at ¶¶ 8-13; Ex. 3, Declaration of Martin County Fire Rescue Department Division Chief of Operations, Daniel J. Wouters, at ¶¶ 5-7 ("Wouters Decl."), 16-17; Ex. 4, Declaration of Martin County Community Development Director, Kevin Freeman, at ¶¶ 5-8 ("Freeman Decl."); Ex. 5, Declaration of Martin County Deputy Engineer, Terry Rauth, at ¶¶ 6-8 ("Rauth Decl."); Ex. 6, Declaration of Plaintiff Thomas L. Hewitt, at ¶¶ 4-5 ("Hewitt Decl."); Ex. 7, Declaration of Plaintiff V. Michael Ferdinandi, at ¶¶ 5-9 ("Ferdinandi Decl."); Ex. 10, Martin County Comments on the Draft Environmental Impact Statement for the All Aboard Florida Passenger Rail Project (Nov. 18, 2014). As of the filing of this Motion, the FRA has not released a FEIS and has not completed the reviews required by NEPA, the NHPA and the DOT Act. Nor has any other federal agency, office or operating administration done so.

[3] *See* Fed. R.R. Admin., *Draft Environmental Impact Statement and Section 4(f) Evaluation of All Aboard Florida Intercity Passenger Rail Project* (Sept. 19, 2014), www.fra.dot.gov/Elib/Details/L15976. The DEIS is 522 pages—accordingly, Plaintiffs attach hereto as Exhibit 9 only the sections of the DEIS cited in support of this Motion.

**C. DOT's Decision to Allocate $1.75 billion in PABs to AAF**

On August 15, 2014, AAF secretly submitted an application to DOT's Office of Infrastructure Finance and Innovation, an office within DOT's Office of the Secretary, which is itself separate and distinct from the FRA, requesting an allocation of $1.75 billion in PAB volume. Ex. 11, AAF PAB Application to DOT (Aug. 15, 2014). In its application, AAF stated that "[t]he private activity bond financing described in the enclosed application is the *linchpin for completing our project*." *Id.* (emphasis added). AAF further stated that it would "use the proceeds of these private activity bonds to finance construction of our intercity passenger rail service linking Miami and Orlando, with intermediate stops in Fort Lauderdale and West Palm Beach." *Id.* AAF stated that

> [a]lthough construction is well underway, completing the entirety of our Miami-to-Orlando service requires significant additional financing. We are applying for a $1.75 billion private activity bond allocation to pursue this financing in the most expedient manner possible and with the highest degree of execution certainty.

*Id.*. AAF further stated that "[p]roceeds from a $1.75 billion private activity bond issuance would be deployed *across the length of our passenger rail system*, including the Miami-to-West Palm Beach segment. *Id.* We believe this use of proceeds is a *crucial factor in ensuring our project is financed and completed*." *Id.* AAF also indicated that "we are pursuing a $1.75 billion financing for the *entire Miami-to-Orlando corridor*." *Id.* at 2 (emphasis added). More recently, AAF told this Court that without PABs, it will not have an "effective means to finance its plans to provide passenger service connecting major urban areas in Florida." AAF's Unopposed Motion to Intervene (Dkt. No. 7), at 10.

AAF's PAB application indicated that "[t]he Project has already received financial assistance under Title 23 of the U.S. Code. The planning process for [AAF] started in December

2011. Since then, approximately $9.3 million in [U.S. taxpayer] funds from Section 130 of U.S. Code Title 23 has been invested in the corridor to improve railway-highway grade crossings and to prepare the corridor for growth in rail traffic, including the introduction of passenger service." Ex. 11, at 10.

On December 22, 2014, DOT informed AAF that it had "reviewed [AAF's] application . . . and applicable statutory and regulatory requirements . . . [and] provisionally allocate[ed] up to $1.75 billion of private activity bond authority to the Florida Development Finance Corporation . . . ." *See* Ex. 1. Although styled as a "provisional" approval of tax-exempt bonds for the Project, the Under Secretary's December 2014 Approval Letter is anything but provisional. The Approval Letter is a classic final agency action subject to judicial review under the APA. First, the Approval Letter marks the consummation of DOT's decision-making process with respect to approval of the bond allocation. The Approval Letter does not merely allocate the bonds, it dictates that the bonds "must be issued by July 1, 2015" and further provides that if the bonds have not been issued by that date the allocation automatically expires. *Id.* Nowhere does the Approval Letter suggest, let alone state, that DOT is continuing to review some aspect of AAF's application or has reserved the right to make some other decision about the application in the future. *Id.* The Approval Letter itself is that final decision. *Id.* For example, although the Approval Letter mentions that FRA is expected to issue a final EIS at some unidentified point in the future, nowhere does it suggest that completion of the EIS is part of DOT's process for deciding whether or not to allocate the bond authority. *Id.* The Approval Letter suggests only that completion of the EIS is a pre-condition to *spending* the bond proceeds. *Id.* By definition this allows the bonds to be issued and subscribed to by

investors. Indeed, counsel for AAF informed the Court during its status conference on April 28, 2015, that these sales will begin on or shortly after June 8, 2015. *See Indian River County, et al. v. Rogoff, et al.*, Case 1:15-cv-00460-CRC (Dkt. No. 19). The decision to allocate the bonds and direct that they be issued has been made. Second, the Approval Letter determines legal rights and obligations and is a document from which legal consequences flow. Ex. 1. The Approval Letter authorizes the bonds to be issued and indicates that they "must" be issued by a set date. *Id.*

But while the Approval Letter is the "linchpin" enabling AAF to move forward with the Project, DOT neither provided justification or explanation of the statutory or regulatory authority utilized to approve AAF's application for $1.75 billion in PABs nor explained the basis for disregarding the required EIS review under NEPA. Nowhere in the Approval Letter does it state why the Project is eligible for PAB funding. To the contrary, defendants did not even attempt to offer such an explanation until months later, in April 2015. *See infra* Argument Section VI.A.2.

## IV.
## STANDING

Where multiple plaintiffs bring an action, one plaintiff can rely on the standing of another. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990). Here, all three Plaintiffs readily satisfy the three requirements for establishing standing: injury, traceability, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

First, it is beyond dispute that the Project will harm Plaintiffs in multiple ways; indeed, many of those harms (such as increased traffic congestion in Martin County and the economic and air quality problems that flow from that congestion) are documented in the DEIS for the Project released by DOT's Federal Railroad Administration in September 2014. *See* Ex. 9, DEIS

Excerpts; Ex. 2, Kryzda Decl. ¶¶ 8-13. Martin County is a duly organized political subdivision in the State of Florida and is home to over 151,000 residents. Ex. 2, Kryzda Decl. at ¶ 1. By requiring substantial construction to accommodate increased rail traffic, the Project would disrupt normal business activities in the County and impact personal activities of its residents. *Id.* at ¶ 10; Ex. 3, Wouters Decl. at ¶¶ 5-7, 12-17; Ex. 4, Freeman Decl. at ¶¶ 5-8; Ex. 5, Rauth Decl. at ¶¶ 6-9. At full operations, the Project will result in an additional 32 passenger trains, pulled by diesel locomotives, passing through the County daily at speeds of over 100 miles per hour. Compl. at ¶ 6. This disruption will result in traffic tie-ups near railroad crossings, safety concerns, noise, harm to County parks, and damage to neighborhoods and environmental resources in the County. *See* Ex. 2, Kryzda Decl. at ¶¶ 7-10; Ex. 3, Wouters Decl. at ¶¶ 5-7, 12-17; Ex. 4, Freeman Decl. at ¶¶ 5-8; Ex. 5, Rauth Decl. at ¶¶ 6-9. The Project will increase safety hazards on the railroad track and on the waterways, traffic congestion, air pollution, and also have significant detrimental impacts on the Martin County economy. *See* Ex. 2, Kryzda Decl. at ¶¶ 7-10; Ex. 3, Wouters Decl. at ¶¶ 5-7, 12-17; Ex. 4, Freeman Decl. at ¶¶ 5-8; Ex. 5, Rauth Decl. at ¶¶ 6-9..

The Project will also inflict similar injuries on Plaintiffs Thomas L. Hewitt and V. Michael Ferdinandi, each of whom have standing to bring suit against DOT. Both Hewitt and Ferdinandi are residents of Palm Beach County, one of seven coastal Florida counties through which the Project will be constructed and operated. Ex. 6, Hewitt Decl. at ¶ 2; Ex. 7, Ferdinandi Decl. at ¶ 2. As residents of Palm Beach County, in communities located close to the Project, Plaintiffs Hewitt and Ferdinandi are adversely impacted by the Project and directly injured by the DOT's Approval Letter. Ex. 6, Hewitt Decl. at ¶¶ 4, 5; Ex. 7, Ferdinandi Decl. at ¶¶ 5-9.

Second, each of those harms is fairly traceable to Defendants' decision to approve the PABs for the Project, and each harm will redressed if that decision is vacated. AAF itself has insisted that the PABs are the "linchpin" of its ability to complete the Project. Ex. 11, AAF PAB Application to DOT. More recently, it admitted that without the PABs it will not have an "effective means to finance its plans to provide passenger service connecting major urban areas in Florida." AAF's Unopposed Motion to Intervene (Dkt. No. 7), at 10.

In these circumstances, no question exists that Plaintiffs have established the injury, traceability, and redressability prongs of the standing analysis. *See, e.g., Connecticut v. United States Dep't of Commerce*, 204 F.3d 413, 414 & n.2 (2d Cir. 2000) (standing existed based on allegation of economic harm to the State); *NYPIRG v. Whitman*, 321 F.3d 316 (2d Cir. 2003) (standing existed based on increased uncertainty about pollution exposure); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (natural resource harms, such as "impaired air quality," constituted harm to city); *Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996) (county had standing based on threatened injury to its property); *Butte Cnty., Cal. v. Hogen*, 609 F. Supp. 2d 20, 27 (D.D.C. 2009) (county had standing as it alleged "concrete, particularized, and imminent" harms to the county). In addition, the failure to comply with NEPA inflicts a procedural injury on Plaintiffs that is, standing alone, sufficient to confer standing—Defendants have deprived Plaintiffs of the opportunity to comment on and influence the outcome of DOT's consideration of AAF's PAB application. *See W. Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 808 n.4 (9th Cir. 1980)

## V.
## LEGAL STANDARD

To obtain a preliminary injunction, a party must demonstrate the following four elements: (1) a likelihood of success on the merits; (2) it will suffer irreparable injury if preliminary injunctive relief is denied; (3) the threatened injury to the movant outweighs whatever damage the preliminary injunction may cause to the non-movant; and (4) the entry of a preliminary injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 15 F. Supp. 3d 32, 38 (D.D.C. 2014).

## VI.
## ARGUMENT

The Court should grant Plaintiffs a preliminary injunction to enjoin DOT from allocating PABs to AAF because, in the absence of Court intervention, the Project will proceed beyond the point of no return. As outlined below, Plaintiffs readily meet each of the elements required to support this Court issuing a preliminary injunction.

### A. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claims

The APA mandates that the DOT's agency action to issue the Approval Letter shall be set aside when the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). When determining whether an agency action exceeds the power granted by Congress in a statute, courts apply the two-step analysis described in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Pursuant to the first step of the *Chevron* test, if "Congress has directly spoken to the precise question at issue[,]" a court "must give effect to the unambiguously expressed intent of

Congress." *Id.* at 842-43. Thus, if a challenged action conflicts with the clearly expressed intent of the statute, it is deemed invalid and the Court's *Chevron* analysis is at its end. *See, e.g., Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009) ("'A regulation which . . . operates to create a rule out of harmony with the statute is a mere nullity.'") (alteration in original) (quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936)); *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1371 (D.C. Cir. 1990) (Wald, C.J.) (where Congress "explicitly" delegated authority to the agency, the agency exceeded its statutory authority under a different section of the statute that did not explicitly delegate such authority, noting that "had Congress wished [the agency] to play a similarly active role in mass transportation safety, it would have expressed that desire in the same manner when amending § 22 in the 1982 Act."). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see also Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (explaining that the reviewing court's task at step two of the *Chevron* analysis is to determine "whether the [agency] interpretation . . . exceeds the bounds of the permissible").

As it pertains to Plaintiffs' Count I claims related to NEPA, the Court should apply a *Chevron* step-one analysis as Congress has clearly outlined the review requirements that were disregarded prior to issuance of the Approval Letter. With regard to Plaintiffs' Count II claims related to Title 23, however, the Court must look to Chevron step-two to determine whether DOT's action was based on a "permissible construction of the statute," in this case Section 142(m) or the I.R.C. and Title 23. *Chevron*, 467 U.S. at 843.

*1. DOT's Approval Letter, Standing Alone, Constitutes Arbitrary and Capricious Agency Action*

As a threshold matter, DOT's failure to provide any explanation of the statutory and/or regulatory underpinnings for its decision to authorize a $1.75 billion PAB allocation for the Project was, in and of itself, arbitrary and capricious. The deficiency of DOT's decision is further compounded by its failure to comply with the mandatory EIS review procedures under NEPA.

*2. DOT Exceeded Its Statutory Authority When It Authorized the Allocation of $1.75 Billion in PAB Funding to AAF*

Although AAF has unequivocally indicated that the PAB authorization in DOT's Approval Letter is the "linchpin" to finance the Project, DOT provided no justification or explanation of the statutory or regulatory authority utilized to approve AAF's application for $1.75 billion in PABs. Instead, it took inquiries from at least two Members of Congress to prompt DOT to provide the rationale for its Approval Letter. On March 20, 2015, Congressman Bill Posey (FL-8th District) sent a letter to the Inspector General of DOT noting that "[t]his controversial project is of great concern to my constituents, for reasons related to safety, the environment, quality of life, and taxpayer burden." Ex. 12, Letter from Rep. Posey to DOT (Mar. 20, 2015). Rep. Posey requested that DOT respond to several specific questions regarding the statutory authority for DOT's approval of AAF's PAB application. *Id.* at 2. In particular, Rep. Posey sought clarification about his concern that the approval of PABs for AAF's Project "is inconsistent with the high-speed rail provision in IRC Section 142(a)(11), as every single rail project in the county has railway-highway crossings and would therefore qualify under Section 142(a)(15) and 142(m)." *Id.* He further questioned whether DOT's decision "makes this PAB

law itself a nullity, as it disregards the fifteen explicit categories of qualified projects in the statute and essentially places no limits on what constitutes a qualified project." *Id.* Finally, Rep. Posey requested that DOT "point [him] to Congressional language that implies [that] Title 23 provides funding for an entire rail project—not just funding for the work on railway-highway crossing themselves—so long as the project has such crossings" and requested that DOT identify all similar rail projects that have received Federal assistance as "qualified highway or surface rail freight transfer facilities" under IRC Sections 142(a)(15) and 142(m). *Id.*

On April 3, 2015, over four months after DOT's Approval Letter was issued to AAF, Congressman Patrick Murphy (FL-18th District) received a letter response from Defendant Anthony Foxx, Secretary of Transportation. *See* Ex. 13, Letter from Defendant Foxx to Rep. Murphy (Apr. 3, 2015). The Secretary indicated that "AAF's application is eligible [for PABs] under 26 U.S.C. § 142(m), which states that a 'qualified highway and surface freight transfer facility' may include 'any surface transportation project which receives Federal assistance under Title 23, United States Code.'" *Id.* The Secretary went on to note that "[s]ince the passenger rail plans were first announced in 2012, the Florida Department of Transportation has spent approximately $9.3 million of funding that was provided under the State's Federal apportionment under section 104 of title 23 to eliminate railway-highway crossing hazards along the project corridor." *Id.* The Secretary unequivocally stated that the $9.3 million in Title 23 assistance "makes [AAF's Project] eligible under the statutory definition" authorization to issue $1.75 billion in PABs. *Id.* Finally, the Secretary acknowledged that he was "very much aware of the sensitivities surrounding this project" and that DOT had secured "AAF's written agreement to complete the ongoing Federal Railroad Administration's environmental review

process and to fulfill all of their obligations with the Final Environmental Impact Statement." *Id.* However, the Secretary did not rescind or otherwise alter DOT prior approval for AAF to market and sell up to $1.75 billion in PABs by July 1, 2015.

The legislative history does not support Secretary Foxx's *post hoc* explanation of the Department's authority. On its face, Title 23 does not permit DOT to allocate PABs for this type of rail project; rather, it permits funding for "elimination of hazards of railway-highway grade crossings." 23 U.S.C. § 101(a)(4)(E). According to DOT's Federal Highway Administration's website, "Section 11143 of Title XI of SAFETEA-LU amended Section 142 of the Internal Revenue Code to add highway and freight transfer facilities to the types of privately developed and operated projects for which private activity bonds (PABs) may be issued." 26 U.S.C. §§ 142(a)(15) and 142(m) define "qualified highway or surface freight transfer facilities" as "any surface transportation project which receives Federal assistance under title 23," or "any facility for the transfer of freight from truck to rail or rail to truck." 26 U.S.C. § 142(a)(11), provides that PABs can be issued for "high-speed intercity rail facilities" so long as the trains "are reasonably expected to be capable of attaining a maximum speed in excess of 150 miles per hour between scheduled stops." *Id.* § 142(i)(1).

In 1988, 26 U.S.C. § 142(a)(11) and the related 26 U.S.C. § 142(i) were signed into law (Pub. L. 100-747) and were amended in the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) to substitute "be capable of attaining a maximum speed in excess of" for "operate at speeds in excess of." In 2005, Congress added 26 U.S.C. § 142(a)(15) and the related 26 U.S.C. § 142(m) to the fourteen categories explicitly listed in 26 U.S.C. § 142 to establish two new types of projects qualified to receive a private activity bond allocation: (1) "Highway

Projects" and (2) "surface freight transfer facilities." *See* Pub. L. 109-59. These provisions were enacted in the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"). *Id.* According to Defendant DOT, "Section 11143 of Title XI of SAFETEA-LU amended Section 142 of the Internal Revenue Code to add highway and freight transfer facilities to the types of privately developed and operated projects for which private activity bonds (PABs) may be issued."[4] Qualified highway or surface freight transfer facilities are defined, in relevant part, as "any surface transportation project which receives Federal assistance under title 23, United States Code" or "any facility for the transfer of freight from truck to rail or rail to truck (including any temporary storage facilities directly related to such transfers) which receives Federal assistance under either title 23 or title 49, United States Code (as so in effect)." 26 U.S.C. § 142(m)(1)(A) and (C).

The conference committee on the SAFETEA-LU bill accepted the Senate Amendment's definition of a "qualified highway facility" as "any surface transportation or international bridge or tunnel project (for which an international entity authorized under Federal or State law is responsible) which receives Federal assistance under title 23 of the United States Code (*relating to Highways*)." H.R. Rep. No. 109-203, at 1144 (2005) (Conf. Rep.) (emphasis added). It also accepted the Senate Amendment's definition of a "qualified surface freight transfer facility" as "a facility for the transfer of freight from truck to rail or rail to truck which receives Federal assistance under title 23 or title 49 of the United States Code (relating to Transportation)." *Id.* at 1145. The Senate Finance Committee interpreted the provision in a similar manner, stating in a

[4] U.S. Dept. of Transportation, Federal Highway Admin., Tools & Programs, Fed. Debt Financing Tools, Privacy Activity Bonds (PABs), http://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_debt_financing/private_activity_bonds/.

memorandum on July 28, 2005—the day before the Senate voted on the conference version of the bill—that: "The proposal authorizes $15 billion of tax-exempt bond authority to finance *highway projects and rail-truck transfer facilities*. Cost: $738 million over 10 years."[5]

The DOT's FHWA has previously restricted the definition of a "highway project" to exclude rail projects. In 2006, FHWA, the agency directed by Section 6005 of SAFETEA-LU to implement a "Surface Transportation Project Delivery Pilot Program," submitted a report to Congress on its Section 6005 Activities. FHWA defined a "highway project" as "any undertaking to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a highway, bridge, or tunnel, or any portion thereof, including environmental mitigation activities, which is eligible for assistance under title 23 of the United States Code." The FHWA's definition specifically excludes certain types of projects:

> Firstly, this definition *excludes planned multi-modal projects*. Since these projects involve the transportation interests of agencies other than the FHWA, as well as features that are not unique to highways, the FHWA proposes to define "highway project" to *exclude those projects that are intended at project conception to be multi-modal*.

Fed. Hwy. Admin., Report to Congress on SAFETEA-LU Section 6005 Activities, FR Doc. E6-4911 (Apr. 4, 2006), http://www.environment.fhwa.dot.gov/strmlng/6005_05-06.htm (emphasis added). Internal Revenue Service Notice 2006-45 provides additional support that the provision is limited to only qualified *highway* or *surface freight transfer facilities*: "This notice provides guidance relating to exempt facility bonds for qualified highway or surface freight transfer

[5] U.S. Senate Finance Comm. Mem. on the Conference Title of Transportation Reauthorization Bill, 4 (July 28, 2005), http://www.finance.senate.gov/download/?id=5264AC0E-E831-4275-9597-EA1154F9D2A4 (emphasis added).

facilities under sections 142(a)(15) and 142(m) of the Internal Revenue Code (the Code)." I.R.S. Notice 2006-45, 2006-1 C.B. 891.

Based on this legislative history, 26 U.S.C. § 142(a)(15) and 142(m) were enacted in 2005 to add qualified highway projects and surface freight transfer facilities to the list of categories already eligible to receive PAB allocation—not passenger rail projects, which are covered under the parameters of 26 U.S.C. § 142(a)(11) and 142(i).

Accordingly, DOT has arbitrarily concluded that because the Project will have a number of railway-highway crossings—subject to $9.3 million in improvements under Title 23—it is subsequently eligible to receive a $1.75 billion PAB allocation as a "qualified highway or surface freight transfer facility." Ex. 13, Letter from Defendant Foxx to Rep. Murphy (Apr. 3, 2015). Based on AAF's own submission to DOT and public statements, AAF intends to use the $1.75 billion to fund the entire Project, not just the safety improvements that are authorized by Title 23. DOT's arbitrary conclusion intentionally renders meaningless the limitation of the high-speed rail provision in 26 U.S.C. § 142(a)(11)—since, on information and belief, virtually every single passenger rail project in the country will have railway-highway crossings and would therefore qualify for *full funding* under 26 U.S.C. §§ 142(a)(15) and 142(m). This interpretation makes the law itself a nullity as it disregards the fifteen explicit categories of qualified projects in the statute and essentially places no limits on what constitutes a qualified project. DOT could allocate funds for any project, irrespective of these limits enacted by Congress. This interpretation is clearly in conflict with the law and renders DOT's agency decision-making illegal—and, therefore, arbitrary, capricious, an abuse of discretion, in excess of statutory authority under the APA.

*3. DOT Failed To Comply With NEPA Prior to Issuance of the Approval Letter*

As to Count I, Plaintiffs have represented to the Court that they will be bound by the decision on Indian River County's Motion for Summary Judgment, A Temporary Restraining Order and/or a Preliminary Injunction (Case 1:15-cv-00460-CRC, Dkt. No.15). As set forth in detail in the motion papers submitted by Indian River County, Defendants were required to prepare a FEIS before approving PAB authority for the Project and their failure to do so is a violation of NEPA and its implementing regulations. It is no answer for the defendants to claim that they are somehow excused from their obligations under NEPA because they have conditioned the *spending* of the PAB proceeds until completion of the FRA's FEIS. That is true for three separate and independent reasons. First, NEPA requires that an EIS be issued *before* agencies take actions such as the Approval Letter, not after those actions have been taken. *See* 42 U.S.C. § 4332(c) (requiring an environmental impact statement for all "major federal actions significantly affecting the quality of the human environment); *see also* Compl. at ¶¶ 15-22 (detailing NEPA's requirements) & ¶¶ 85-96 (alleging that the Approval Letter is a major federal action significantly affecting the quality of the human environment). Second, as noted above, the Approval Letter precludes any meaningful discussion of reasonable alternatives in the EIS—in direct contravention of NEPA and its implementing regulations—because it directs that the bonds must be issued *for the Project* by July 1, 2015, regardless of when the EIS has been completed. Third, DOT's own internal NEPA procedures require that that when the Secretary's Office originates a major federal action—such as the Approval Letter issued by the Secretary's

Office—the Secretary's Office, not DOT's operating administrations such as the FRA, is responsible for approval of the EIS. *See* DOT Order 5610.1C § 21.[6]

**B. Plaintiffs Will Suffer Substantial Irreparable Injury Absent a Preliminary Injunction**

As the "linchpin" of AAF's Project, the significance of the PAB funding cannot be overstated. AAF has made representations to the Court that—assuming it receives approval from the Florida Development Finance Corporation ("FDFC") on May 28, 2015—it would sell bonds on or after June 8, 2015. *See Indian River County, et al. v. Rogoff, et al.*, Case 1:15-cv-00460-CRC (Dkt. No. 19).

Once the PABs are sold to institutional and individual investors—presumably on June 8th or shortly thereafter—this Court's hands will almost certainly be more tied with respect to the ability to unwind an unlawful scheme that would implicate the individual and collective property rights of, in theory, the hundreds or thousands of bond-holders with combined exposure of up to $1.75 billion. *See, e.g.*, *In re Residential Capital, LLC*, 560 F. App'x 100, 101 (2d Cir. 2014) (in the bankruptcy context, court refused to convert debtor's Chapter 11 reorganization to a Chapter 7 liquidation because relief from a consummated plan is inequitable if it would "unravel intricate transactions"); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986) (finding that comprehensive change in circumstances brought about by the consummation of complex third party transactions rendered appeal moot because the court was incapable of granting effective relief). There does not appear to be any standardized process for revoking the PABs once issued, which strongly suggests that the Project will go forward if the PABs are issued, even in the event

[6] DOT Order 5610.1C § 21, available at: http://www.dot.gov/sites/dot.gov/files/docs/Procedures_Considering_Environmental_Impacts_5610_1C.pdf.

DOT were to conclude that the Project is less desirable than other alternatives that might be identified during the NEPA process. Indeed, issuance of the bonds *for the Project* effectively precludes any meaningful consideration of any alternatives *to the Project* – in direct contravention of NEPA and its implementing regulations. Thus, in the absence of preliminary injunctive relief, Plaintiffs will suffer multiple harms that cannot be cured later. They will be deprived of the opportunity to influence the outcome of the ongoing FRA environmental review, at least with respect to Project alternatives, they will face an argument that an future challenge to the FRA's final EIS is moot, because the Project has already been funded by the PABs and they will suffer the harms associated with the Project itself – increased noise, traffic congestion, safety hazards, pollution, economic harm and so on.

**C. The Balance of Hardships Strongly Favors Plaintiffs**

The balance of the equities also supports the issuance of a preliminary injunction. Absent a preliminary injunction, Plaintiffs will suffer the harms discussed above – harms from the Project and from the procedural injuries inflicted by Defendants' disregard of NEPA and its implementing regulations. In contrast, the DOT Defendants will not suffer any significant harms as a result of a preliminary injunction.

If this Court grants Plaintiffs' motion, the immediate impact will be that no bonds can be issued until such a time as the Court reaches a final judgment on the merits of Plaintiffs' claims. Quite possibly, the Court will reach that final judgment before the existing July 1, 2015 deadline to issue the bonds. But if that deadline passes without a decision and the Court subsequently rules in defendants' favor, the only inconvenience AAF will need DOT to extend the date past July 1, 2015. There is no basis to believe PAB funding will not be available on August 1,

September 1, or October 1. Indeed, even that inconvenience may never come to pass, since it appears that DOT could simply choose to extend the deadline for AAF to sell the PABs. That deadline is not the product of a statutory mandate, but is instead nothing more than an "agreed upon" schedule for issuing the bonds, as DOT's January 2006 explanation of the PAB application process makes clear. *See Applications for Authority for Tax-Exempt Financing or Highway Projects and Rail-Truck Transfer Facilities*, 71 Fed. Reg. 642, 644 (Jan. 5, 2006) ("if the schedules agreed upon in the final allocation action are not met, the allocation *may* be withdrawn") (emphasis added).

To be sure, if a preliminary injunction is issued and the Court later enters judgment for Defendants, construction on the Project may not begin as quickly as it might otherwise have begun. AAF may have to reactivate their RRIF loan application or find investors who are willing to accept the risks of the Project without tax subsidies. In other words, a preliminary injunction may prevent AAF from beginning construction on its preferred timeline. But many other factors (far beyond the scope of this litigation) also bear on AAF's ability to meet its preferred timeline, such as how quickly it can obtain the various other federal permits required for the Project, such as bridge permits that the U.S. Coast Guard must issue before construction can begin in certain areas. In all events, however, AAF's desire to begin Project construction right away cannot trump the public's interest in ensuring that the DOT Defendants minimally comply with the law.

**D. A Preliminary Injunction Serves the Public Interest**

The public interest weighs heavily in favor of granting the requested preliminary injunction. Congress intended for PAB funding to be used for specific purposes outlined in

Section 142(m) of the I.R.C. and required DOT to undertake a complete NEPA review of AAF's Project. Here, DOT failed to comply with either mandate. DOT's total disregard for the legal ineligibility of the Project for a PAB allocation—combined with its failure to complete the required EIS before issuing the Approval Letter—will result in harm to Plaintiffs and thousands of other individuals in Martin County and to the Plaintiffs in Palm Beach County. It would be contrary to the public interest for AAF's Project to proceed, funded by a $1.75 billion PAB allocation, without requiring DOT to comply with the law.

**E. A Bond Is Unnecessary or, in The Alternative, Should Be Nominal**

Fed. R. Civ. P. 65 "vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond." *DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999). Indeed, the Court has "discretion to require no bond at all." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) (citing *Council on American–Islamic Rels. v. Gaubatz*, 667 F. Supp. 2d 67, 80 (D.D.C. 2009)); *see also Natural Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167, 168-69 (D.D.C. 1971) (allowing environmental group plaintiffs to post a nominal $100 bond). On this record, any bond more substantial than the nominal bond that is required would pose significant challenges for the Plaintiffs. Neither DOT nor AAF have provided any information about how a delay in the issuance of the PABs would affect Defendants. On the contrary, Plaintiffs do not have comparable resources to post more than a nominal security; to require a more substantial bond would have the effect of denying judicial review of DOT's actions under NEPA, which this Court has specifically disallowed. *See Morton*, 337 F. Supp. at 168-69.

## VII.
## CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction to enjoin DOT from allocating private activity bonds to AAF and grant such other and further relief as this Court deems just and equitable.

May 4, 2015

Respectfully submitted,

s/ Amandeep S. Sidhu

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2015, I caused copies of the foregoing materials to be served by electronic means on all counsel of record through the Court's CM/ECF system.

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