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October 20, 2020

Via Email

Mr. Andrew Brooks
Environmental Program Manager - Airports Division
Federal Aviation Administration
Eastern Regional Office, AEA-610
1 Aviation Plaza
Jamaica, New York 11434

**Re: Draft Environmental Impact Statement for the LaGuardia
Airport Access Improvement Project**

Dear Mr. Brooks:

On behalf of our client, Riverkeeper, Inc. (Riverkeeper),¹ as well as Guardians of Flushing Bay,² the Pace Environmental Litigation Clinic, Inc., respectfully submits the following comments on the Draft Environmental Impact Statement Draft (the “DEIS”) for the Port Authority of New York and New Jersey (“Port Authority or the “Applicant”) LaGuardia Airport (LGA) Access Improvement Project (the “AirTrain” or the “Proposed Project”), released August 20, 2020.

Riverkeeper is concerned about several aspects of this DEIS related to fairness, statutory obligations, public health and the environment. Riverkeeper is concerned that the deficiencies in the DEIS will render it impossible to determine whether the AirTrain will be completed in the best interests of the New York region it is intended to serve. The DEIS is deficient in several respects. The Federal Aviation Administration (“FAA”):

¹ Riverkeeper is a member-supported, not-for-profit organization, dedicated to protecting the Hudson River and its tributaries, and to safeguarding the drinking water supply for New York City. Since 1966, Riverkeeper has used litigation, science, advocacy, and public education to end pollution, restore ecological health, and revitalize waterfront use and access. For more information, please visit www.riverkeeper.org.

² Guardians of Flushing Bay is a coalition of residents, human-powered boaters and park users advocating for a healthy and equitably accessible Flushing Bay and Creek. Through waterfront programming, hands on stewardship, community visioning and bottom up advocacy, Guardians of Flushing Bay strives to realize Flushing Waterways as a place where our most marginalized watershed residents can learn, work and thrive.

- 1) narrowed the Purpose and Need Statement in exceedance of the applicant's purpose and in contradiction of its statutory requirements;
- 2) imposed unlawfully stringent criteria to preclude any possible alternatives other than to construct the AirTrain project on the Applicant's preferred alignment;
- 3) omitted analysis of several factors relevant to analysis of alternatives;
- 4) discarded without review alternatives that could partially meet the purpose of the project as was originally proposed;
- 5) seems to have ignored significant potential impacts, especially the cumulative impact on 7-train ridership;
- 6) shirked its responsibility to plan mitigation, relying instead on the Applicant's woefully insufficient promise of an \$8.5 million payment for the promenade; and
- 7) entirely ignored issues and alternatives required by Section 4(f) of the Department of Transportation Act of 1966 regarding alienation of parkland; and
- 8) may have allowed the Applicant to unduly influence the NEPA process.

We request that FAA remedy these shortcomings and publish a new draft environmental impact statement and draft Section 4(f) review for public comment.

I. AirTrain Project Description

The Port Authority of New York and New Jersey ("Port Authority") proposes to construct an elevated AirTrain to carry passengers between The New York City Transit Authority Mets-Willets Point Subway Station and the LaGuardia Airport. The proposal also includes appurtenant buildings, including passenger and walkway systems, parking garages, ground transportation facilities, a multilevel operations, maintenance, and storage facility that includes 1,000 Airport parking spaces ("parking facilities"), traction power substations located at the on-airport East Station, the Mets-Willets Point Station, a 27kV main substation, and utilities infrastructure.³ The proposed system would include two on-airport stations and a terminus station at Willets Point connecting to the Long Island Railroad ("LIRR") Port Washington Branch and the New York City Transit 7 Subway Line. The rail system would span approximately 2.3 miles in length, traversing the Flushing Bay Promenade at World's Fair Marina and continuing through the East Elmhurst community of Queens. The proposed rail line, beginning at the airport north of the Grand Central parkway, the proposed project would tower over a 2,100-foot stretch of promenade until the 31st Drive pedestrian bridge, until it passes over the westbound lanes of the Grand Central Parkway and follow the highway median until crossing over to the CitiField Parking lots in Flushing Meadows Corona Park.

³ Notice of Intent to Prepare an Environmental Impact Statement (EIS) and Initiate Section 106 Consultation for the Proposed LaGuardia Access Improvement Project at LaGuardia Airport (LGA), New York City, Queens County, New York, 84 Fed. Reg. 19,151, 19,151–53 (May 3, 2019) [hereinafter FAA Notice of Intent to Prepare AirTrain EIS], *available at* <https://www.federalregister.gov/documents/2019/05/03/2019-08863/notice-of-intent-to-prepare-an-environmental-impact-statement-eis-and-initiate-section-106>. This notice was in error, as the applicant is now pursuing a 1,000-spot employee parking garage instead of a 500-spot parking garage.

The Proposed Project involves large-scale infrastructure construction, expected to cost more than \$2 billion.⁴ The resources expected to be expended on this project are extensive. Before investing such resources on a miles-long infrastructure project that could remain in a densely populated East Elmhurst neighborhood for decades, the FAA as the supervising federal agency of the at the DEIS must consider all other available and possible options and designs, as well as the potential significant environmental impacts and all possible mitigation for those impacts.

II. FAA unlawfully narrowed the purpose and need statement in exceedance of the applicant’s purpose and in contradiction of its statutory requirements, precluding study of reasonable and feasible transportation alternatives.

National Environmental Policy Act of 1969 (“NEPA”) requires that all agencies of the Federal Government shall include a detailed environmental analysis by the responsible official, or “lead agency” for major federal actions significantly affecting the quality of the human environment.⁵ This analysis is known as the environmental impact statement (“EIS”).⁶ The primary purpose of an EIS is to “provide full and fair discussion of significant environmental impacts and [to] inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”⁷ The EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives.”⁸ Thus, the alternatives analysis is regarded as “the heart of the environmental impact statement.”⁹ “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”¹⁰

As a part of the alternatives analysis, FAA must define a purpose and need for the proposed action.¹¹ The confirmation of the purpose and need of a project by the lead agency involves the lead agency’s discretionary determination of the needs and goals of the project and the parties involved. Importantly here, the purpose and need statement must address the problems instead of potential solutions, because “one obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”¹² For instance, a purpose and need statement to permit a new highway has effectively rendered the alternatives analysis meaningless since it precludes consideration of non-highway solutions.¹³

⁴ Michael Gannon, AirTrain Cost Now Tops \$2 Billion, Queens Chronicle (July 3, 2019), *available at* https://www.qchron.com/editions/queenswide/lga-airtrain-cost-now-tops-2-billion/article_a99f749c-e632-57df-ac98-907d3cf531af.html.

⁵ *See, e.g.*, 42 U.S.C. § 4332.

⁶ 42 U.S.C. § 4332.

⁷ 40 C.F.R. § 1502.1.

⁸ 40 C.F.R. § 1502.14(a).

⁹ 40 C.F.R. §§ 1502.14, 1502.16.

¹⁰ *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

¹¹ 40 C.F.R. § 1502.13.

¹² *Simmons v. U.S. Army Corps. of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997).

¹³ *Citizens Against Burlington, Inc. v. Bushey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

An agency is not permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.¹⁴ This being said, an agency does not act unreasonably by rejecting a no-action alternative on the ground it would not meet the purpose and need of the proposed project.¹⁵

The court will review the actions taken by the FAA under NEPA through the lens of “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁶ Under this standard of review the “court will review the administrative record to ensure ‘that the agency examined the relevant data and articulated a satisfactory explanation for its action. Moreover, the agency’s decision must reveal a rational connection between the facts found and the choice made.’”¹⁷ A court will evaluate whether the FAA’s s purpose and need statement properly states the agency’s purpose and need “in a manner broad enough to allow consideration of a reasonable range of alternatives.”¹⁸ A purpose and need statement drawn so narrowly so as to foreordain approval only of a specific result will not stand.¹⁹

- a. FAA inexplicably limited its statement of purpose to “time-certain” airport access, rather than “convenient, predictable, and reliable access,” resulting in an arbitrarily curtailed alternatives analysis.

In proposing the AirTrain, Project Sponsor Port Authority has stated its purpose to provide convenient, predictable, and reliable access to LaGuardia:

The primary purpose of the LGA Airport Access Improvement Project is to provide convenient, predictable, and reliable access to the Airport for its customers and employees that complements existing mass transit services and does not contribute to roadway congestion.²⁰

This statement on its own would have been unreasonably narrow. However, FAA did not let this statement of purpose stand; instead it significantly narrowed the purpose even further by stating the purpose of the Proposed Project is to “[p]rovide a *time-certain* transportation option for air passenger and employee access to LGA.”²¹ Critically, the FAA goes on to further narrow the purpose by stating that that in order to designate a proposed alternative as “time-certain,” “the alternative *must* provide access to LGA on a specific schedule and using a dedicated right-of-

¹⁴ *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983).

¹⁵ *Friends of Southeast’s Future v. Morrison*, 153 F. 3d 1059, 1067 (9th Cir. 1998).

¹⁶ *Brodsky v. United States NRC*, 704 F.3d 113, 119 (2d Cir. 2013).

¹⁷ *Id.*

¹⁸ *Nat’l Parks v. Bureau of Land Mgmt*, 586 F.3d 735, 747 (9th Cir. 2009).

¹⁹ *Id.* at 748.

²⁰ Port Authority of N.Y. & N.J., LGA Airport Access Improvement Project Purpose and Objectives and Analysis of Alternatives Report § 1.2 (2018), <https://anewlga.com/wp-content/uploads/2018/10/LGA-AirTrain-Alternatives-Report.pdf> [hereinafter Port Authority Alternatives Analysis].

²¹ Fed. Aviation Admin., Public Info Sessions Display Boards, 1, 4 (Jan. 14, 15, 2020), https://static1.squarespace.com/static/5c36586cee175949fd76ec7c/t/5e1ea294c7a87d3abb55b18b/1579066101682/LGA-DEIS_Jan_2020_Public_Info_Sessions_DisplayBoards_Website.pdf (emphasis added).

way (that is, it would *operate 24 hours per day and 7 days per week*, would be *exclusively used by the transportation mode*, and would be *separate from and would not be affected by or affect on-road transportation or traffic*).”²² This definition of “time-certain” excludes *any* on-road transportation, limiting the range of reasonable alternatives to be considered. FAA also eliminates the use of ferry service and alternative airports, because doing so could result in using roadways. Even though non-rail alternatives were named in the DEIS, they were preempted from actual consideration by this statement of purpose.

FAA relies on the potential uncertainty in road traffic patterns as justification for the “time-certain” necessity, but, in an effort to find superiority of rail options, omits analysis of relevant factors such as frequent delays in rail service in the New York region, due to, *inter alia*, human error, engine failure, sick passengers, and track obstructions. Even under optimal conditions, platform waiting times can significantly decrease time certainty and increase overall duration of travel, depending on frequency and timing of trains. For instance, the LIRR currently operates only once every half hour on the Port Washington Branch, and the 7-train from Manhattan is overcrowded with frequent stops. Therefore, FAA provides no reasonable basis upon which to compare the alternatives.²³ The statement of purpose merely identifies a transportation solution (*i.e.*, the AirTrain), then defines the purpose and need so as to exclude any other alternative. It is, therefore, unreasonable.

As a result, FAA adopted an unreasonably constricted purpose and need statement, even more constricted than requested by the applicant. The rigged statement of purpose yields limited alternatives that may be selected. The NEPA process, the heart of which has been defined as “identification and evaluation of alternative ways of meeting the purpose and need of the proposed action,”²⁴ is now a waste of time and resources as the FAA failed to present any alternative to building a fixed guideway to LGA.

b. FAA undermined its statutory purpose by incorporating parking facilities into the purpose and need statement for the DEIS.

FAA is overseeing the AirTrain environmental review because Port Authority applied to use Passenger Facility Charge funding to pay for the AirTrain and its appurtenant buildings. The FAA’s own implementing regulations prohibit Passenger Facility Charges from being levied for “restaurants, car rental and automobile parking facilities, or other concessions.”²⁵

Incorporating parking facilities into the purpose of the action directly contradicts the Passenger Facility Charge Program’s prohibition, but FAA did so anyway: “the proposed Project includes off-Airport employee parking with convenient access by way of the new transportation service to the Airport.”²⁶ FAA acknowledges that the off-site employee parking facility will have

²² *Id.* at 5 (emphasis added).

²³ See *Sierra Club, Ill. Chapter v. U.S. Dep’t of Transp.*, 962 F. Supp. 1037, 1044 (N.D. Ill. 1997).

²⁴ *A Citizen’s Guide to the NEPA*, COUNCIL ON ENV’T L QUALITY 16 (Dec. 2007), https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf.

²⁵ 14 C.F.R. § 158.15(b)(6).

²⁶ Port Authority Alternatives Analysis, *supra* note 20.

the immediate benefit of “enable[ing] efficient use of on-airport space,”²⁷ which frees up room for on-site concession passenger parking. Moreover, it is possible that in the future the proposed off-site parking facility will be used for passengers and/or rental car facilities.

On June 15, 2016, Port Authority Project Executive Richard Smyth sent a letter to Stephen Kulhanek, Chairman of Community Board 3, stating:

we were tasked to ensure an adequate level of parking such that the surrounding neighborhoods are not used as parking lots. . . . To manage parking, the Port Authority implemented a comprehensive plan to ensure the airport can handle anticipated demand. . . . Our analysis indicates that once the East and West Garages are completed we will have sufficient capacity to meet the overall demand.²⁸

When it estimated parking demand, it is most likely that Port Authority knew the East and West garages would only serve as concession parking facilities for paying flyers, and that additional employee parking would later have to be constructed elsewhere to accommodate such on-airport concession parking. Therefore the purpose of the employee garage is merely to maximize on-airport concession parking availability for passengers. We request copies of this comprehensive plan referenced in the letter be considered by FAA in its analysis of the project and published in an appendix in the next draft environmental impact statement.

While the FAA may consider the applicant’s purpose for the Proposed Project in drafting its DEIS, it must do so in the context of the agency’s statutory objectives. Indeed, the NEPA implementation guidance documents regarding aviation projects counsels that FAA should consider its own statutory objectives in evaluating the applicant’s proposed airport development:

The airport sponsor, not FAA, proposes development at an airport. Consequently, the sponsor is the applicant seeking FAA approval. The responsible FAA official and ARP airport planners should ensure the purpose and need is rational and supported by current, available data. . . . The purpose and need should be defined considering the statutory objectives of the proposed Federal actions as well as the sponsor’s goals and objectives.²⁹

The guidance follows a legal doctrine established by the Second and Ninth Circuit Courts whereby agencies must consider their own statutory objectives in defining purpose and need. In determining whether an EIS related to transportation of nuclear materials should have considered bargaining as an alternative, the Second Circuit reasoned that the guideline for the lead agency’s objective should be the legislative grant of power:

²⁷ Fed. Aviation Admin., Alternatives, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, Queens at 2-38 (2020).

²⁸ Letter from Richard Smyth, Project Executive, N.Y/N.J. Port Authority to Stephen Kulhanek, Chairman, Queens Community Board 3 (June 15, 2016).

²⁹ Fed. Aviation Admin., Order 5050.4B; NEPA Implementing Instructions for Airport Actions at § 706(b) (2006), https://www.faa.gov/airports/resources/publications/orders/environmental_5050_4/media/5050-4B_complete.pdf.

a pertinent guide for identifying an appropriate definition of an agency's objective will be the legislative grant of power underlying the proposed action. Statutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives.³⁰

Similarly, the Ninth Circuit found that the lead agency must consider its statutory authorization to act:

[p]erhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.³¹

Here, FAA believes its legislative grant of power for the Passenger Facility Charge Program excludes parking facilities. Therefore, the legislative grant of power should guide FAA's objective in setting the project purpose to exclude the parking garage. FAA, however, ignored and contradicted its legislative grant of power in incorporating the parking facilities as a fundamental aspect of the Proposed Project in the purpose and need for the DEIS. Therefore, its definition of purpose and need unreasonably failed to balance relevant factors.³²

The parking facilities requirement in the purpose and need statement was consequential, having the effect of excluding from review construction of additional traffic lanes on the Grand Central Parkway, free bus service and other optimization for the Q70 route, increased use of other airports, and implementing emerging transportation technologies.

III. FAA conducted a legally inadequate alternatives analysis by artificially narrowing the pool of potential alternatives, ignoring relevant available information, and prematurely eliminating options that partially meet the proposed project's goal.

By creating an extralegal set of eight exclusive criteria split into two analytical steps to whittle down forty-seven potentially viable alternatives to two, FAA arbitrarily and capriciously failed to provide any meaningful way to compare the environmental impacts, merits and demerits of the alternatives.³³ Even if the eight criteria were legitimate, which they were not, given that they served to eliminate every alternative, FAA ignored pertinent available data and dismissed

³⁰ *City of New York*, 715 F.2d at 743 (citation omitted).

³¹ *Nat'l Parks*, 586 F.3d at 747 (quoting *Citizens Against Burlington, Inc.*, 938 F.2d at 196).

³² *See id.*

³³ *See NRDC v. Calloway*, 524 F.2d 79, 92 (2d Cir. 1975) (It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as the linchpin of the entire impact statement (internal quotation and citations omitted).)

alternatives that could have partially met the goals of the Proposed Project with much less environmental harm than construction of the AirTrain. Additionally, FAA further limited consideration and comparison of alternatives by implementing a two-step preliminary screening process, each of which included four of the eight criteria.

NEPA directs federal agencies to prepare:

an environmental impact statement [that] ... shall provide a full and fair discussion of significant environmental impacts and shall inform the decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.³⁴

The lead agency shall “rigorously explore and objectively evaluate” all reasonable alternatives.³⁵ To be reasonable, “the agency must go beyond mere assertions and indicate its basis for them” and must “explicate fully its course of inquiry, its analysis and its reasoning”³⁶ to “enable a reader to evaluate the analysis and conclusions.”³⁷

The lead agency charged with drafting an EIS “will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.”³⁸ An EIS must “consider such alternatives to the proposed action as may partially or completely meet the proposal's goal and it must evaluate their comparative merits.”³⁹ Where a project only partially satisfies the goals with less environmental impact, such an alternative “may be worth the tradeoff with a preferred alternative that had greater environmental impact.”⁴⁰

As discussed in greater detail below, FAA set two screening steps containing a total of eight limiting criteria that served to eliminate 45 of the 47 potential alternatives without analysis of their relative merits, costs, or environmental impacts. It concluded, without providing relevant supporting data, analysis, or reasoning, that all 45 alternatives were inferior. The total number of alternatives excluded by this preliminary screen is irrelevant; in the end FAA failed to establish any meaningful way to compare alternatives. Moreover, FAA ignored available evidence to compare alternatives and arbitrarily dismissed those that could have met or partially met the project's purpose and need at less environmental cost.

Not only were the eight criteria arbitrarily limiting of appropriate consideration of nearly fifty alternatives, but the two-step format used in the DEIS, each providing an exclusory function in alternatives consideration, prevented all alternatives from even being considered on the same

³⁴ 40 C.F.R. § 1502.1.

³⁵ 40 C.F.R. § 1502.14(a).

³⁶ *Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973) (citation omitted).

³⁷ *NRDC v. Calloway*, 524 F.2d at 93 (citing *Silva v. Lynn*, 482 F.2d at 1287).

³⁸ *City of New York*, 715 F.2d at 743 (citations omitted).

³⁹ *Id.* at 742 (citation omitted).

⁴⁰ *No. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990).

bases by the same criteria. The two screening steps limited which alternatives would be given full rigorous consideration under the DEIS:

Screening Step 1: Would the Alternative Meet the Purpose and Need of the Proposed Action?

Screening Step 1 consists of the “purpose and need” criteria numbered 1 through 4 below. If an alternative did not meet all of the first four criteria, the alternative was removed from consideration before Step 2, consequently ending its analysis in the DEIS analysis. The exclusory function of this step ensured that not all alternatives were assessed by the same criteria. This directly contradicts the mandate that agencies shall “devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their *comparative* merits.”⁴¹ Thirty-two alternatives, including the no-action alternative, passed muster in Step 1 to be screened in Step 2, and 15 were excluded.

Screening Step 2: Would the Alternative Be Reasonable to Construct and Operate?

Screening Step 2 consists of the “reasonable to construct” criteria numbered 5 through 8 below. Only thirty-two alternatives, including the No-Action alternative, were examined under these four subsequent criteria.

The eight criteria amount to bare assertions of insufficiency for all but the Proposed Project, conveniently sandbagging every alternative except for the AirTrain on Port Authority’s preferred route:

1. Time-Certain Transportation [from Only Grand Central Station]. As discussed above, the “time-certain” criterion narrows the purpose further than even requested by the applicant. FAA cites the “time-certain” objective to eliminate all on-road transit and the ferry option without providing a good-faith comparison between road, water, and rail travel.

FAA never considered likely travel delays in its assessment of the Proposed Project; it merely assumed Long Island Rail Road service from Grand Central Station every 15 minutes, even though such service does not exist now.⁴² As discussed above, in its analysis FAA claims on-road and ferry options are insufficient due to travel time uncertainty, despite their potential to reduce traffic delays. Meanwhile, FAA ignores common transit delays on rail that would affect subway, rail or train commutes between Manhattan and the AirTrain station at Willets Point, as well as on the AirTrain between Willets Point and LaGuardia. Even under perfect conditions, platform wait times can add significant delays to trips.⁴³

⁴¹ 40 C.F.R. § 1502(14)(a) (emphasis added).

⁴² Fed. Aviation Admin., Purpose and Need, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, Queens at 1-37 (2020).

⁴³ New York City Independent Budget Office, Fiscal Brief: “We Are Being Held Momentarily:” How Much Time and Money Are New York City Subway Riders Losing to Delays?” (2017).

Moreover, FAA ignores the reality that ferry travel is more certain than any other type of travel. New York City Department of Transportation found that the “Staten Island Ferry is the most reliable form of mass transit in New York City, with a consistent annual on-time performance record of over 92 percent during the last several years.”⁴⁴ Some experts have found that even the no action alternative, leaving existing transit options in place, would be faster than the proposed AirTrain: “compared to existing transit services, most riders using the AirTrain would spend *more time* traveling to LaGuardia than they do now.”⁴⁵

FAA also ignores the fact that few if any commutes to or from LaGuardia actually originate or conclude at Grand Central Station. Instead, people travel to the airport from their homes, hotels, or places of business, with most coming from other areas in Manhattan and around the city. While 18% of airport passengers are coming from/going to Midtown Manhattan within walking distance to Penn Station or Grand Central Terminal, 30.6% go to or from other areas in Manhattan, and 28.6% go to or from the other four boroughs. Another 10.9% come from or go to Long Island, New Jersey or Pennsylvania.⁴⁶ No comparative analysis was performed on the benefits of the Proposed Project to those collective 70.1% of passengers, as compared to other options.⁴⁷

Proportionally even fewer of the 13,000 LaGuardia airport workers commute from Midtown Manhattan. Almost all workers—90.6%—commute from areas other than Manhattan while only roughly 0.4% come from Midtown Manhattan and 6% coming from the borough in total. Instead, the bulk of airport employees are from Queens (47.2%), with an additional 14% coming from Long Island; 13% from Brooklyn; and 11.6% from the Bronx.⁴⁸

The FAA’s failure to consider the impacts and benefits of the alternatives on the large majority of airport passengers and employees is inexplicable. It reveals that the project is more about the *perception* of accessibility to New York’s business district rather than enhancing capacity of the airport. FAA must incorporate into its analysis the average and peak travel times for travelers from areas other than Midtown Manhattan, along with their expected ridership of each alternative.

When asked during the September 22, 2020 DEIS online workshop whether a time-certain criterion was previously used to exclude non-rail options for any project, FAA

⁴⁴ Letter from Alexandria Ocasio-Cortez, U.S. Congressperson to Philip Newman, Asst. Adm’r for Gov’t and Industry Affairs, at 2 (Jan. 10, 2020) (citing New York City Dep’t of Transportation, Staten Island Ferry Facts, <https://www1.nyc.gov/html/dot/html/ferrybus/staten-island-ferry.shtml>) (last accessed July 6, 2020).

⁴⁵ Yonah Freemark, *For LaGuardia, an AirTrain That Will Save Almost No One Any Time*, TRANSPORT POLITIC (Jan. 21, 2015), <https://www.thetransportpolitic.com/2015/01/21/for-laguardia-an-airtrain-that-will-save-almost-no-one-any-time/>.

⁴⁶ Alon Levy, *Port Authority’s LaGuardia Rail Link Study*, PEDESTRIAN OBSERVATIONS BLOG (Oct. 13, 2018), <https://pedestrianobservations.com/2018/10/13/port-authoritys-laguardia-rail-link-study/>.

⁴⁷ Fed. Aviation Admin., Alternatives, *supra* note 27.

⁴⁸ *Id.*

representatives stated: “I’m not familiar with screening criteria that have been used for rail projects. So, I cannot answer this question.” FAA then recommended submitting the question on the record. Has FAA previously used a time-certain travel criterion to exclude on-road alternatives to rail projects?

FAA excluded 15 alternatives from review due to the alternatives’ inability to meet this arbitrary “time-certain” transportation from Grand Central Station criterion. The analysis must be broadened to objectively evaluate each alternative’s overall ability to preserve or enhance capacity at LaGuardia.⁴⁹

2. Supplemental Access. Utilizing the criterion that any access provided by the alternative must provide a “new mode of access to LGA or an increase in existing access,”⁵⁰ FAA eliminates legitimate alternatives that could improve the capacity of LaGuardia and/or surrounding airports and decrease on-road traffic with less environmental harm than the AirTrain. For instance, FAA overlooks the benefit of speeding up the M60 bus route from Manhattan by reducing the number of stops on the route. Fewer stops would increase the efficiency of the route for Manhattan passengers. In rejecting the alternative, FAA ignores the potential benefits and cites the reduction of stops as a limitation on existing access. FAA must fairly consider the benefits of the alternative in conjunction with its downsides. It must also consider whether those stops could be well served by a separate bus route.

Similarly, FAA casts aside the alternative of providing free bus service on the Q70 bus route, saying that the bus route already exists, so it would not provide “supplemental” access. However, if it were free and optimized with clear wayfinding provided at LaGuardia Airport and online; amenities such as low floors and baggage racks; dedicated bus lanes; and no fare, ridership on the Q70 could be increased.⁵¹ FAA does not analyze the potential impact of these changes, besides to say its benefit would be “limited”⁵² in some apparently unquantifiable manner. FAA’s failure to review existing information to estimate the increase in Q70 ridership after implementing these possible changes is arbitrary and capricious.

Five alternatives in total fail to meet this “supplemental access” criterion.

3. Reduce Vehicle Trips Without Increasing Roadway Congestion. This alternative is unfairly assessed by penalizing on-road alternatives for potential to increase congestion instead of evaluating the complex relationship between mass transit and congestion. Additional and/or optimized public transit options have the potential to decrease overall congestion by taking passenger cars off the road, even while adding busses and/or bus lanes. This benefit was never considered in FAA’s analysis.

⁴⁹ See 14 C.F.R. § 158.15(a)(1).

⁵⁰ Fed. Aviation Admin., Alternatives, *supra* note 27, at 2-37.

⁵¹ Vincent Pellecchia, *AirTrain to LaGuardia, How About Better Bus Service?* Tri-State Transportation Corporation (Jan. 19, 2017), available at <http://blog.tstc.org/2017/01/19/instead-spending-1-5-billion-airtrain-laguardia-better-bus-service/>

⁵² Fed. Aviation Admin., Alternatives, *supra* note 27, at 2-42.

It is likely, for instance, that travel times for those using the Woodside and Jackson Heights transportation hubs would significantly decrease with dedicated bus lanes, making the option much more attractive to those who would otherwise take passenger cars. No evidence was given for FAA's conclusory statement that this and other alternatives would not reduce passenger vehicle trips. Further, analysis of this criteria inexplicably alludes to increased congestion caused by loss of on-street parking spots.⁵³ Fewer parking spots does not necessarily increase congestion. If it did, Port Authority could construct replacement parking, as it is doing for the Proposed Alternative.

FAA's invocation of the detriments of on-road transit options without analyzing their benefits is arbitrary and capricious and an abuse of discretion. Eight alternatives unfairly fail to meet this criterion.

4. Off-Site Parking Facilities to Enable Efficient Use of on-Airport Space. Even if this criterion weren't precluded by its statutory objectives, as discussed above, FAA should not use it to exclude optimizing existing transit options or adding lanes to the Grand Central Parkway. Convenient off-site employee parking facilities could still be provided nearby the airport no matter what alternative is ultimately selected. Moreover, the proposed location of additional parking at the Mets-Willets Point station is likely to draw additional traffic through the Grand Central Parkway corridor, undermining the stated purpose not to affect on-road transportation or traffic.

Six alternatives were unfairly excluded for their failure to meet this criterion.

5. No Material Impact on Major Infrastructure, Transportation Facilities or Utilities. FAA leaves the potential impacts on infrastructure, transportation facilities or utilities completely unanalyzed, besides using any such impacts as a trigger to eliminate each alternative. The level or significance of infrastructure impacts are not discussed. This is a consequential omission, as 29 of 32 alternatives remaining in the second round of preliminary screening were eliminated because of this factor. Meanwhile, the cost screening criterion would allow for most of these alternatives to proceed to full review despite the expense of mitigating these impacts. The relatively low costs suggests the impacts were correspondingly minor and mitigatable.

In a City as dense as New York, calling alternatives "unreasonable" because they affect existing infrastructure is arbitrary and capricious. By declining to identify the relative significance of the impact to infrastructure, potential mitigation cannot be considered. As a result, FAA provided no way for the reader to compare the potential infrastructure impacts with those that would occur if the Proposed Project were constructed at World's Fair Promenade.

⁵³ *E.g. id.* at 2-44 ("this alternative could result in additional congestion on off Airport streets on which this bus travels because parking on both sides of Junction Boulevard and 94th Street would have to be converted to a dedicated bus lane").

For instance, several alternative AirTrain alignments that could require “realignment of the BQE interchange with the GCP” were eliminated even though such construction would be feasible and not too expensive. The significance of the highway realignment was never identified, but it was cited as a basis to eliminate six alternatives (Alternatives 9K, 9L, 9M, 9O, 9R, and 9S).

There are several feasible “west” guideway alternative alignments (e.g., Alternatives 9K, 9L, and 9M) that avoid the Flushing Bay area altogether. These alignments would connect at the Roosevelt Avenue/Jackson Heights Subway Station or the Woodside LIRR/61st St., Woodside Subway Station. While there might be certain unanalyzed trade-offs that would make some alignments more desirable than others, the magnitude of the impacts and associated costs have not been provided. It is not apparent that the degree of those impacts were balanced against their respective benefits.

Similarly, Alternatives 9A (the Port Authority’s preferred AirTrain alignment over the Flushing Bay Promenade), 9B, and 9E have similar alignments to a point and then diverge, with Alternative 9A following a more westerly track along Flushing Bay Promenade and 9B and 9E following a more easterly alignment along the Grand Central Parkway. There 9B and 9E were eliminated because they would require a lane shift on the Grand Central Parkway. Yet no analysis was done on the impacts of such a lane shift to traffic.

The United States Army Corps of Engineers found FAA’s analysis lacking as well. The Army Corps specifically noted FAA’s failure to adequately evaluate the potential disruption caused by shifting lanes on the Grand Central Parkway, the only reason cited for eliminating Alternative 9B and one of two reasons cited for eliminating Alternative 9E. The Army corps requested more information about the impacts of these “traffic disruptions”:

For the multiple alternatives affecting Grand Central Parkway (GCP), provide a more robust description of ramifications of GCP traffic disruptions that are cited as reasons for elimination of these alternatives.⁵⁴

No such analysis was provided. Army Corps’ reasoning could be extended to the 13 alternatives excluded for their impact on local roads or highways (Alternatives 8C 9B, 9C, 9E, 9F, 9G, 9H, 9J, 9K, 9L, 9O, 9R, 9S,).

This lack of analysis of these trade-offs is apparent in those alternatives that have potential to impact sewage and stormwater infrastructure. FAA cited such potential

⁵⁴ U.S. Army Corps of Engineers, Alternatives to Be Carried Forward Concurrence/Comment Form, Fed. Aviation Admin., Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, Queens App’x A.3 at 243 (2020). Army Corps also calls for more robust reasoning for elimination of the airport traffic diversion alternatives 2A and 2B.

impacts as a reason to exclude 22 alternatives from review (Alternatives 8A, 8B, 8C, 8D, 8E, 8F, 9F, 9G, 9H, 9K, 9L 9M, 9N, 9O, 9P, 9Q, 9R, 9S 9T, 10A 10B, and 10C). This decision to exclude these alternatives is premature. Just because such infrastructure may be affected does not preclude construction, as it occurs often in New York City. In a letter to FAA, the New York City Department of Environmental Protection (“DEP”) acknowledges the potential impacts to sewer infrastructure, but offered to coordinate should a major sewer need to be relocated. The DEP states:

If the requested vertical clearance . . . is not acceptable to DEP, then DEP will provide either the specific height of vertical clearance required to be maintained or will recommend to relocate the existing DEP infrastructure outside the footprint of elevated subway structure if the DEP's required vertical clearance cannot be maintained. . . . If any DEP infrastructure is required to be replaced/relocated due to the impact of the proposed elevated subway construction, then it should be done as per DEP latest standard specifications and requirements and also at no cost to NYC DEP.⁵⁵

FAA unreasonably chose not to probe such feasible possibilities.

If any impacts to infrastructure, transportation facilities or utilities were truly a nonstarter for construction, FAA should have excluded the Proposed Project as well. If the AirTrain were constructed as proposed, Port Authority would demolish and reconstruct an entire marina in a different area:

- a 16,000 square foot boat lift, which transfers watercraft in and out of the water, in conjunction with finger piers;
- a marina office, occupying approximately 2,000 square feet;
- 25,000 square feet of paved parking lot that accommodates boat storage and parking;
- finger piers extending approximately 100 feet into Flushing Bay, as well as a floating timber dock that extends an additional 90 feet into the bay (5,000 square feet in total); and
- a related 1,100 square-foot operations shed, and 3,500 square feet of pavement used for miscellaneous storage.⁵⁶

⁵⁵ Fed. Aviation Admin., Alternatives Supporting Materials, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, Queens App’x E.2 at 2 (2020).

⁵⁶ Fed. Aviation Admin., Presentation: LaGuardia Airport Access Improvement Project Environmental Impact Statement Public Workshop at 33, https://static1.squarespace.com/static/5c36586cee175949fd76ec7c/t/5dc055572750c155f6295c05/1572885867439/LGA-EIS_Scoping+Report+Attachment+1_Scoping+Materials_web.pdf; Fed. Aviation Admin., Purpose and Need, *supra* note 42, at 1-38 t.1-9.

In its Memorandum of Agreement with New York City, Port Authority previously acknowledged the potential need to move underground utility infrastructure during the marina reconstruction:

The Marina Facilities A/E will perform the following analyses to determine construction feasibility for the two potential alternate sites: 1. Drainage and sewer investigation, including determination of any interference with current DEP plans for interceptor and CSO storage tunnel work.

...

Once a potential alternate site is selected by the Parties, the Marina Facilities A/E shall perform the following analyses and design to produce a signed and sealed bid package for the Marina Facilities:

9. Utility Survey - determine feasibility of electric, gas, water, and sanitary or septic service supply needed for office and boatyard operations - identification and location of storm, sanitary, combined and interceptor sewers; water mains, gas mains and steam mains; electric and telephone conduits; utility chambers and vaults; utility poles and overhead electric facilities; other surface or subsurface facilities and appurtenances.⁵⁷

FAA's failure to evaluate the significance of the impacts on existing infrastructure, transportation or utilities resulting from its selected alternative, while using the same reasoning to exclude other alternatives, is arbitrary and capricious. Due to the lack of analysis, 29 of the 32 alternatives remaining in the second step of the preliminary screening stage were excluded for their failure to meet this criterion.

During the September 22, 2020 DEIS online workshop, Jason Rabinowitz asked:

The AirTrain EIS mandated that any alternative plan must not have a "material effect" to any other infrastructure, [facilities] or utilities. Is this standard applied to any other [transportation] related project in New York City, such as the Second Avenue Subway or

⁵⁷ Fed. Aviation Admin., Draft DOT Section 4(f) and 6(f) Evaluation, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, Queens, App'x I at 205 (2020), Memorandum of Agreement Concerning the Coordination Between the Parties on Certain Matters Regarding an Airport Mass Transit Project at LaGuardia Airport by and Between the Port Authority of New York and New Jersey and the City of New York at Ex. J, pp. 1, 3 (2019) [hereinafter Port Authority & NYC Memorandum of Agreement].

East Side Access? If not, why was this requirement used here?”

FAA representatives could not respond to that question. They could not even “hazard a guess.” For the record, was this standard used to exclude alternatives for the Second Avenue Subway or East Side Access projects? Is FAA aware of any other projects for which such a standard was used?

6. No Temporary Impact on Peak Hour Subway, Rail and/or Transit Service During Construction. It is unreasonable to insist that a major, multi-billion-dollar transportation project must have zero impact on peak-hour transit in a city as dense as New York. Similar to the infrastructure impact criteria above, FAA provides no guidance on the level or significance of the service disruption that would trigger elimination of the alternatives. For instance, those alternatives that could potentially impact a bus depot (i.e., Alternatives 9I, 9H, 9G, and 9F) were summarily eliminated, with no evidence in the record that FAA or MTA discussed whether the impacts could be mitigated. Despite the disruptions, it seems that the cost estimates for alternatives having such impacts are still reasonable. With no guidance on how transit service would be disrupted, how that disruption could be mitigated, and how expensive such mitigation would be, it is impossible to compare each alternative’s respective temporary impact on transit. With a lack of analysis, 21 alternatives were rejected for their failure to meet this criterion.
7. Reasonable to Construct Given Cost Considerations. Cost considerations *are* a reasonable factor in determining alternatives, albeit a minor one. Relevant costs should be considered, such as mitigation of impacts or replacement for infrastructure, transportation facilities or utilities, as well as mitigation of transit disruption during construction.

FAA seems to omit operational costs from its analysis, such as the increase in Long Island Railroad Service necessary to make the Proposed Project successful.⁵⁸ These operational costs are necessary to show the true cost differences among the alternatives.

Only three alternatives fail to meet this criterion due to their exorbitant cost.

8. Access to Selected Origin/Destination Locations. While consideration of accessibility is reasonable, Port Authority must analyze the relative merits of providing access to some of the selected origin/destination locations, rather than all.⁵⁹ For example, Alternative 10A – “Rail alternative along the Brooklyn-Queens Expressway from Sunnyside Yards” was eliminated because “this alternative would not provide

⁵⁸ Current service on the Port Washington Line of the Long Island Railroad offers only one train every 30 minutes during peak hours. Subway and bus service would be faster in most instances than waiting for a train. Long Island Railroad, Port Washington Branch Timetable (Mar. 9, 2020), <http://web.mta.info/lirr/Timetable/Branch/PortWashingtonBranch.pdf>.

⁵⁹ See *City of New York*, 715 F.2d at 742.

reasonable access to *all* identified access points.”⁶⁰ As discussed above with respect to the “Time-Certain” from Grand Central Station criterion, FAA must assess each reasonable alternative’s relative ability to improve airport access for passengers and employees from all areas in New York, not just Midtown Manhattan. This analysis includes the number of passengers and employees affected, as well as the relative benefit of each alternative to those groups. Four alternatives were eliminated due to their failure to provide access to *all* selected origin/destination locations, despite the ability of those alternatives to improve access to *some* locations in New York.

Collectively, these eight criteria are set up to artificially eliminate any competition to the AirTrain’s eventual acceptance in the DEIS. The statements regarding the insufficiency of other alternatives are conclusory, providing an unfair and unbalanced review with no explanation or appropriate factual data. None of the other alternatives’ environmental impacts are considered in comparison to the Proposed Project. Such conclusory statements fail to measure up to the explicit requirement in NEPA to “study, develop and describe” alternatives.⁶¹

This study left only two alternatives to compare for environmental impact: FAA’s project as it intended, and the No-Action Alternative. CEQ regulations mandate that, “Based on the information and analysis presented on the Affected Environment and the Environmental Consequences, [the alternatives analysis] should present the environmental impacts of the proposal and the alternatives in comparative form...”⁶² FAA’s methodology ensured the environmental impact of the Proposed Project could only be compared to the impacts of no agency action. Given that NEPA is, at its core, an environmental statute meant to “encourage productive and enjoyable harmony between man and his environment”⁶³ with procedures requiring “broad dissemination of relevant environmental information,”⁶⁴ the FAA’s DEIS seems to frustrate the very purpose of the statute.

The resulting analysis provides cover for constructing the AirTrain; it does not allow the decision-maker to adjudge the optimal transit system for LaGuardia and the New York region. As FAA failed to establish a meaningful way to compare alternatives, the agency’s consideration of only one action alternative, along with the statutorily-mandated No Action alternative, is arbitrary and capricious.

IV. The DEIS seems to ignore significant potential impacts, especially the cumulative impact on 7-train ridership.

The assessment of the Proposed Project’s environmental impacts, in particular its cumulative impacts, is so vague as to preclude meaningful scientific assessment by public commenters. The assessment of environmental impacts is the “scientific and analytic basis for the comparison ... of alternatives.”⁶⁵ Every Environmental Impact Statement must “provide full

⁶⁰ Fed. Aviation Admin., Alternatives, *supra* note 27 at 2-73 (2020).

⁶¹ 42 U.S.C. § 4332(E).

⁶² *Id.*

⁶³ 42 U.S.C. § 4321.

⁶⁴ *North Carolina Wildlife Federation v. North Carolina Dep’t of Transp.*, 677 F.3d 596, 601 (4th Cir. 2012).

⁶⁵ 40 C.F.R. § 1502.16.

and fair discussion of significant environmental impacts” arising from the reasonable alternatives.⁶⁶ As discussed above, the alternative analysis plays a crucial role in an agency’s EIS because it “provides a clear basis for choice among options by the decisionmaker and the public.”⁶⁷ FAA must measure the direct and cumulative environmental effects of proposed actions. The Fourth Circuit has cautioned that “conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.”⁶⁸

The DEIS asserts that there will be no or minimal impact on 7-train capacity. However, MTA notified FAA on September 18, 2019 that “the majority of [the excess capacity on the 7-train] is subscribed by the build-out of the Willets Point neighborhood.”⁶⁹ Therefore, FAA must account for the expected Willets Point build out in its cumulative impacts analysis. There is also a proposal to rezone the Special Flushing Waterfront District undergoing New York City’s Uniform Land Use Review Procedure (“ULURP”), which would result in even less capacity on the 7 line.⁷⁰ The impact to the 7 train, compounded by these forthcoming developments, is a key concern for community members and seems to have been ignored. How have the impacts of all these forthcoming development projects been accounted for in the DEIS analysis?

Moreover, the DEIS notes the existence of the Willets Point Redevelopment and Special Flushing Waterfront District⁷¹ but does not seem to evaluate whether and how the proposed Project comports with those redevelopment plans during construction and operation. For instance, the DEIS contemplates temporary parking in Willets Point during construction,⁷² but does not address whether such parking will comport with the Willets Point Redevelopment Plan. In fact, the DEIS states that a mayoral zoning override will be necessary.⁷³ FAA has a letter from Port Authority stating that it will “coordinate with the State of New York and the City of New York and their respective agencies to ensure the proposed project is reasonably consistent with

⁶⁶ *Defenders of Wildlife v. North Carolina Dep’t of Transp.*, 762 F.3d 374, 394 (4th Cir. 2014); 40 C.F.R. § 1502.1.

⁶⁷ 40 C.F.R. § 1502.14.

⁶⁸ *North Carolina Wildlife Federation v. North Carolina Dep’t of Transp.*, 677 F.3d 596, 602 (4th Cir. 2012).

⁶⁹ Fed. Aviation Admin., Alternatives Supporting Materials, *supra note* 55, at App’x E, Email from Judith Schwartz, Metropolitan Transit Authority, to Jacob Balter et al., (Sept. 18, 2019 at 1:12 PM). (“While there is currently some capacity in the peak direction for additional customers, it should be noted that the majority of this capacity is subscribed by the build-out of the Willets Point neighborhood. The rezoning of the neighborhood took place under the Bloomberg administration and has been stalled and reconfigured several times. So, the actual development has not happened yet.”); *see also* 26 N.Y. City Env’tl. Dev. Corp., Willets Point Development (Jan 15, 2019), <https://www.nycdc.com/project/willets-point-development> (last accessed June 16, 2019).

⁷⁰ Flushing Willets Point Corona LDC, Flushing Waterfront Revitalization, <https://www.queensalive.org/flushing-waterfront-boa> (last accessed June 16, 2019); Mike Odenthal, Flushing is Flushed with Residential Development, Several Significant Projects Underway in Queens Neighborhood, Cooperator (Feb. 13, 2019), *available at* <https://cooperator.com/article/flushing-flush-with-residential-development/full>.

⁷¹ Fed. Aviation Admin., Affected Environment and Environmental Consequences, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, Queens 3-159 to 3-160 (2020).

⁷² Port Authority and New York City Memorandum of Agreement, *supra note* 57, at 37.

⁷³ *Id.* at 38.

existing plans for development in the area.⁷⁴ The letter then goes on to discuss the Memorandum of Law and Assembly Bill A1158, neither of which seems to allow for subversion of land use laws in Willets Point. To our knowledge, the required Uniform Land Use Review Procedure application for a zoning variance has not been submitted for the garage. Even if a Mayoral override is subsequently granted, the garage seems to conflict with existing development plans for the area and its impacts on those plans must be specified in the DEIS. Please evaluate and specify how a parking garage will comply with Willets Point zoning laws and plans. What social, economic and environmental impacts will the Proposed Project have on Willets Point and Flushing neighborhoods, during construction and operation? Will it change existing plans for the area?

The promenade and marina are used for walking, jogging, biking, picnicking, resting and relaxing, and boating (human- and motor-powered), among other things. These uses depend on the aesthetic enjoyment of the surroundings, especially on the bay and promenade. The serenity provided by the view of a large open waterway is a significant attribute of the park, especially in the East Elmhurst neighborhood of Queens which is otherwise starved for open space and parkland.⁷⁵ The benefits of the bay and promenade include presence of wildlife, natural light, and limited visual disruptions. The FAA must acknowledge these impacts and evaluate them in its analysis. The FAA seems to rely on the proximity of the Grand Central Parkway to determine that the visual, noise, vibration, decreased access, air quality impacts will be negligible, but the DEIS does not quantify the impacts on parkland attributable to the Proposed Project. How, if at all, does FAA expect AirTrain construction and operation will impact parkland recreation and enjoyment?

V. The DEIS proposed mitigation is inadequately considered and woefully insufficient.

The DEIS does not evaluate mitigation for the impacts upon parkland use. To build and operate the AirTrain, New York State Department of Transportation would need to permanently condemn 35.5 acres of parkland for the guideway support columns, the operations, maintenance and storage facility, and parking garage, and stormwater outfall as well as permanent aerial easements for the elevated portions of the guideway and the Willets Point station. Another 7.5 acres would be required for operations and maintenance.⁷⁶ Besides the taking of property, the impacts of this loss of parkland, and the ongoing, constant harm caused by the presence and 24/7 operation of the AirTrain—including visual, noise, vibration, decreased access, and air quality—have not been fully identified in this DEIS.

⁷⁴ Fed. Aviation Admin., Land Use Assurance Letter, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport (2020); Letter from Huntley A. Lawrence, Dir. Aviation, Port Authority of N.Y. and N.J., to Evelyn Martinez, Manager, N.Y. Airports Dist. Offi., Fed. Aviation Admin. (Aug 12, 2020).

⁷⁵ Community Board 3, consisting of parts of East Elmhurst, Jackson Heights and North Corona, ranks in the bottom quarter of citywide community boards for walking access to parkland. N.Y. City Planning Dep't, Community District Profiles, Queens Community District 3, <https://communityprofiles.planning.nyc.gov/queens/3> (last accessed June 17, 2019).

⁷⁶ Fed. Aviation Admin., Project Description, Draft Environmental Impact Statement; LaGuardia Airport (LGA) Access Improvement Project, LaGuardia Airport, at 43 (2020).

Instead of proposing specific mitigation for these impacts, the FAA merely states, “the Port Authority is committed to providing additional specific mitigation to the Promenade area,” citing to a voluntary Memorandum of Agreement (“MOA”) to which FAA is not even a party and, to our knowledge, had no input in. Not only is the MOA not part of the Section 4(f) analysis and unenforceable by FAA, the Applicant fails to give a firm commitment to meaningful mitigation in the MOA.

In the MOA, in addition to relocating the marina that will be directly displaced by the project, Port Authority proposes to pay \$500,000 for *de minimis* bulkhead repair and \$8 million for “enhancing and improving the paths, including refurbishment of railing and walkway to a uniform and improved condition, (ii) *de minimis* repairs, as necessary, to the bulkhead/seawall alongside the paths to make them safe for public use, (iii) irrigation [] and (iv) improved landscaping along the entirety of the Promenade/Marine area. There no consideration of mitigating the impacts of the train for park users, and no plan for continued maintenance and operations of proposed parkland improvements, beyond that one-time payment. This type of “let them figure it out later” analysis is insufficient. Instead, FAA should identify the potential harms to park use, determine whether they are mitigatable, and estimate the costs to do so. If a payment is determined to be the only possible mitigation, FAA should determine whether the figure paid is sufficient relative to the harm caused.

At the very least, we urge FAA to set forth mitigation for design details, ensuring zero emissions from the AirTrain, noise reduction mechanisms, lighting congruent with parkland use. In addition, all land disturbed during construction and operation should be refurbished and returned to use, where possible. Mitigation for these direct impacts should be separate and apart from any proposed funding to “enhance and improve” the park.

As it stands, what funding the Port Authority has proposed is a pittance, and it is insulting. \$8.5 million will do very little to improve the promenade. Other parks recently relandscaped in New York City cost much more per acre. For instance, Hunter’s Point South, another park in Queens was recently redeveloped in two phases. The New York City Economic Development Corporation spent \$66 million for phase one to 5.5-acres of park and accompanying 3,400 feet of roadway. Phase two, which was completed in 2018, cost \$99 million for another 5.5 acres and 3,500 linear feet of new roadways. On average, redevelopment of the park cost roughly \$15 million per acre.⁷⁷ The 84-acre Brooklyn Bridge Park had a budget of \$347 million, an operations and maintenance budget of \$16 million.⁷⁸ That equates to a construction cost of \$4.13 million per acre and maintenance budget of \$190,476 per acre. Domino Park in Williamsburg, Brooklyn, cost \$50 million to redevelop the 11-acre park, or \$4.5 million per acre.⁷⁹

⁷⁷ Jonathan Hilburg, *Hunter’s Point South Park completes a Queens coastline years in the making*, THE ARCHITECT’S NEWSPAPER (Nov. 7, 2019) <https://www.archpaper.com/2019/11/hunters-point-south-park-queens-coastline/>

⁷⁸ BROOKLYN BRIDGE PARK, BROOKLYN BRIDGE PARK FINANCIAL PLAN (2009) <http://brooklynbridgepark.s3.amazonaws.com/s/520/Financial%20Plan%20Presentation.pdf>.

⁷⁹ Michelle Cohen, *First look at Williamsburg’s Domino Park ahead of Sunday opening*, 6SQFT (June 6, 2018) <https://www.6sqft.com/domino-park-opens-sunday-offering-public-access-to-south-williamsburgs-waterfront-for-the-first-time/#:~:text=Two%20Trees'%20investment%20in%20the,into%20three%20distinct%20programmatic%20areas.>

Some of the amenities identified in the MOA and in other previous plans could each cost into the millions:

- Nature Trail Boardwalk Over Marsh \$1.69 to \$2.70 Million
- Grand Central Parkway Underpass Improvements \$1.87 to \$3.00 Million
- Candela Restoration and Repurposing \$0.73 to \$1.07 Million
- Parking Lot Bioswales \$0.51 to \$0.74 Million
- Undulating, Resilient, Fishable Shoreline \$3.78 to \$8.29 Million
- Enhanced Landscaping \$0.73 to \$1.22 Million
- Green Space Grading and Terracing \$0.99 to \$1.66 Million
- Safe, Well-Designed Lighting \$1.99 to \$3.33 Million
- Historic and Educational Signage \$0.07 to \$0.11 Million
- Refurbished, Permeable Pathway \$8.31 to \$12.75 Million
- Refurbished Railing \$2.22 to \$3.70 Million
- Wayfinding \$0.20 to \$ 0.33 Million
- Public Activity Area \$1.69 to \$2.81 Million
- Adult Exercise Equipment \$0.41 to \$0.69 Million
- Bulkhead Repair \$12.94 to \$28.46 Million
- Horse Bib Connections for Irrigation \$0.13 to \$0.22 Million
- Repaving and Organizing of Parking Lots \$2.55 to \$3.74 Million
- Aesthetic Treatments to Pedestrian Bridges \$1.25 to 2.75 Million
- Pedestrian Bridge Design Improvements \$0.37 to \$0.63 Million
- Sound Berm Along Grand Central Parkway \$12.94 to \$28.46 Million
- Restored NYC Ferry Stop at Pier 1 \$3.45 to \$5.75 Million
- One Bathroom \$3.60 to \$4.70 Million

In total, just these improvements could cost between \$62.42 and \$117.11 million.

Given these figures, the proposed \$8.5 million for parkland improvement is an indefensibly low sum. NYC Parks states that World’s Fair Promenade is 13.16 acres, and depending on how you measure it, it could encompass up to 17 acres.⁸⁰ At 13.16 acres, Port Authority is offering roughly \$646,900 per acre. In preparing to implement these funds, Port Authority has issued a request for proposals for professionals to provide:

engineering and architectural expertise to assist the Port Authority in developing a concrete plan that improves the Promenade, including (1) alleviating disruptions to park resources, enhancing the full length of the Promenade and providing amenities to the local

⁸⁰ *Flushing Meadows Corona Park*, NYC PARKS (Last visited Oct. 6, 2020) <https://www.nycgovparks.org/parks/flushing-meadows-corona-park/highlights/10388#:~:text=574%2C264%20square%20feet%20%2D%2013.16%20acres,them%2C%20all%20set%20by%20hand.>

community, and (2) improving the Ditmars Boulevard entrances to the two pedestrian bridges located at 27th Avenue and 31st Drive.⁸¹

The costs for those experts alone could cost into the hundreds of thousands to millions of dollars.

At going rates for construction and design, redeveloping the promenade would easily cost \$5 million per acre. With the impact of COVID-19, costs for labor and materials have increased significantly.⁸² Furthermore, although the train will remain there permanently, the proposed \$8.5 million will not go far to improve the park, and, without funding for an operation and maintenance plan, no ongoing benefit to park goers will remain, despite the train's continuous presence. At a conservative rate of \$5 million per acre, and assuming only the 13.16 acres would be improved, a more appropriate cost to improve the park would be \$65.8 million, and an accompanying operation and maintenance budget would be \$2.5 million. These costs *do not* include the cost to move the marina and equipment, as those costs are not included in the parkland redevelopment estimate and that relocation would be the result of a direct displacement caused by the AirTrain. Given these comparative costs, \$8.5 million touted by Port Authority is an unconscionable nonstarter that would provide no meaningful mitigation for park users.

While attending the virtual hearings on the DEIS, we heard loud and clear the community members' need for a community center and health services, especially for the elderly population, which has borne the brunt of the COVID-19 pandemic. We have also heard the concerns about impacts on homes, on community health from air and noise pollution. For a project as disruptive as the AirTrain, these areas of mitigation should be assessed and incorporated into the FAA's DEIS. Mitigation for the park use and mitigation for the community impact can both be achieved.

In addition to parkland and community improvements, for any wetlands permanently disturbed, Port Authority should be made work with NYC Parks and/or the New York City Department of Environmental Protection to provide an equal or greater wetland resource in the immediate area, Queens or the Bronx in the Upper East River or tributaries. Establishing wetlands in areas further away would have less benefit to local species impacted by the project. Flushing Creek and Flushing Bay have been devastated by development, industry and sewage discharges. The existing wetlands are one positive aspect of the waters that provide habitat and water quality benefits. The close proximity of the mitigation for the harm is important for the ongoing remediation of the area.

Under the New York State Environmental Quality Review Act, mitigation of these significant impacts will be mandatory for any actions taken by New York State Department of Transportation, such as condemnation of parkland for use by Port Authority to operate an AirTrain, will require mitigation plans to be finalized before action is taken.⁸³ Prior to acting, a

⁸¹ Port Authority of N.Y. & N.J., Request for Proposals for the Performance of Expert Professional Architecture, and Engineering Design Services for the Flushing Bay Promenade on Behalf of the LaGuardia Airport AirTrain Program During 2021 Through 2026 (RFP # 61763), Aug. 27, 2020.

⁸² Holland & Knight LLP, *A Look at COVID-19 Impacts on the Construction Industry*, Lexology (May 26, 2020) <https://www.lexology.com/library/detail.aspx?g=ed526aab-e9ac-4f38-8282-a41e524b45a2>.

⁸³ See 6 N.Y.C.R.R. §§ 617.15; 617.11

New York State entity must ensure the project “avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.” Such measures include measures to minimize impact upon parkland use.

VI. The DEIS analysis does not comply with parkland alienation requirements under Section 4(f) of the Department of Transportation Act of 1966.

Use of parkland for the AirTrain must comply with Section 4(f) of the Department of Transportation Act of 1966. That section provides that the use of any Section 4(f) property cannot be approved for transportation use unless it is determined that there is no feasible and prudent alternative to using the land, and that the action includes all possible planning to minimize harm to the affected property.⁸⁴ If the use of parkland for the Proposed Action is unavoidable, preparation of a Section 4(f) statement is required.

The Section 4(f) evaluation must sufficiently include: (1) the purpose and need for the project; and (2) the adequate discussion of alternatives to support the determination regarding the availability of feasible and prudent alternatives to the use of the Section 4(f) property.⁸⁵ If the Section 4(f) evaluation identifies feasible and prudent alternatives that avoid parkland alienation, the FAA *may not* select an alternative that uses a Section 4(f) property. If there is no feasible and prudent alternative that avoids all Section 4(f) property, the FAA may approve only the alternative that meets the purpose and need and causes the “least overall harm” to Section 4(f) property.⁸⁶ The requirements of Section 4(f) are stringent.⁸⁷ Pursuant to 23 CFR § 774.3(c), FAA shall consider the following seven factors when conducting Section 4(f) evaluations:

1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
2. The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
3. The relative significance of each Section 4(f) property;
4. The views of the official(s) with jurisdiction over each Section 4(f) property;
5. The degree to which each alternative meets the purpose and need for the project;
6. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
7. Substantial differences in costs among the alternatives.

⁸⁴ 49 U.S.C. § 303(c); 23 C.F.R. § 774.3.

⁸⁵ *Section 4(f) Tutorial: Draft Evaluations*, U.S. D.O.T. Federal Highway Administration (Last visited Oct. 7, 2020) https://www.environment.fhwa.dot.gov/env_topics/4f_tutorial/evaluations_draft.aspx.

⁸⁶ 23 C.F.R. § 774.3(c)(1).

⁸⁷ *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1447 (9th Cir. 1984).

In considering the significance of the impacts of the proposed project, the FAA should note the current uses of the parkland. Even where an EIS is otherwise reasonable, failure to discuss and address Section 4(f) properties can invalidate the EIS.⁸⁸

When a 4(f) determination has been made, the determinations are subject to the standard of judicial review of “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁸⁹ A reviewing court will draw upon *Overton Park*’s definition of a “feasible and prudent alternative.”⁹⁰ Section 4(f) resources “may be used [] only if there are truly unusual factors present in the case, if feasible alternative routes involve uniquely difficult problems, or if the cost or community disruption resulting from alternative routes reach extraordinary magnitudes.”⁹¹

Additionally, “if the record fails to show a sufficient basis for the Secretary’s decision, the 4(f) determination must be overturned.”⁹² The Ninth Circuit Court in *Stop H-3 Ass’n v Dole* found the Secretary of Transportation’s rejection of an alternative highway configuration that would wholly avoid the construction through a park and public golf course to be imprudent and the 4(f) determination failed to satisfy the stringent *Overton Park* standards.⁹³ The court found that the adverse impacts of one particular discarded alternative route, including:

dislocation of one church, four businesses and 31 [adjacent] residences; increase[d] noise, air quality and visual impacts to residences in the general vicinity; require[d] additional costs [] (\$42 million additional); and require[d] construction to lesser design geometric [or, in other words, lesser safety] standards,

did not amount to unique problems or truly unusual factors, or cause costs or community disruption to reach extraordinary magnitudes as would be required to route a project through parkland.⁹⁴ Indeed, the court found that “if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the [4(f)] statutes The very existence of the statutes indicates that protection of parkland was to be given paramount importance.” Therefore, the Court found the Secretary “could not have reasonably believed that no feasible and prudent alternative exists to the use of [parkland]” and the approval of the construction of the highway was an abuse of discretion.⁹⁵ The Court ultimately remanded

⁸⁸ *Citizens Against Burlington, Inc. v. Bushey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

⁸⁹ Administrative Procedure Act, 5 U.S.C. § 706(2)(A); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

⁹⁰ *Overton Park*, 401 U.S. at 413, 416.

⁹¹ *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1113 (1999) (quoting *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413, 416) (internal citations omitted).

⁹² *Stop H-3 Ass’n*, 740 F.2d at 1450.

⁹³ *Id.* at 1451–52.

⁹⁴ *Id.* at 1451.

⁹⁵ *Id.* at 1455.

the 4(f) determination to the Secretary for a more comprehensive 4(f) determination to more sufficiently consider alternatives that would avoid the construction through protected parkland.⁹⁶

Similarly, in *Davis v. Mineta*, the Tenth Circuit imposed a preliminary injunction prohibiting the Secretary of the Department of Transportation from constructing a highway through parkland, finding that the Section 4(f) analysis, which narrowed the pool of alternatives to the favored highway alignment and a no action alternative was insufficient.⁹⁷ The court held that the purpose of the project, an “additional crossing over the Jordan River at 11400 South,” was so narrow as to inappropriately exclude consideration of alternative river crossings in other areas.⁹⁸ The exclusions undermined the NEPA’s and Section 4(f)’s mandates to minimize noise and other environmental impacts.⁹⁹ The Secretary’s rejection of other alignments due to their impacts on certain structures was also improper, as the analysis set forth “no discussion [] of the comparative historic value of these other structures nor [] any quantitative comparison of the impact of various orientations.”¹⁰⁰ Finally, no effort was made to evaluate potential alternatives in combination rather than separately, such as transportation system management and mass transit. The court found that the treatment of these alternatives in a “conclusory and perfunctory manner” did not support the Secretary’s decision to eliminate them from consideration.¹⁰¹

In the case of the AirTrain, the proposed route is directly through or adjacent to the promenade and marina. Flushing Meadows Corona Park and the World’s Fair Promenade were found to be Section 4(f) parkland properties that would be “used,” or in other words, significantly and negatively impacted. As described above, the promenade and marina are frequented by local community members and other denizens of the city and region for walking, jogging, biking, picnicking, resting and relaxing, and boating (human- and motor-powered), among other things. These uses depend on the aesthetic enjoyment of the surroundings, especially on the bay and promenade. The serenity is a significant attribute of the park, especially in the East Elmhurst neighborhood of Queens, which is otherwise starved for open space and parkland. The benefits of the bay and promenade include presence of wildlife, natural light, and limited visual disruptions.

The Proposed Project’s impacts on this park use are never fully identified in the DEIS, let alone quantitatively or qualitatively evaluated. In fact, the DEIS incorrectly claims that the AirTrain will run “adjacent” to the park, rather than through it, even though its support structures will be located in the park, and it will displace park infrastructure.¹⁰² Construction and operation of the AirTrain, whether on or “adjacent to” the promenade, will substantially impair enjoyment of the park by limiting and/or decreasing accessibility of the parkland, increasing local noise, causing local vibrations, diminishing the value of habitat, scaring away wildlife, diminishing aesthetic enjoyment due to the train towering above the park, shading vegetation, and changing character

⁹⁶ *Id.*

⁹⁷ *Davis v. Mineta*, 302 F.3d 1104, 1127 (10th Cir. 2002)

⁹⁸ *Id.* at 1119.

⁹⁹ *Id.* at 1121.

¹⁰⁰ *Id.* at 1121.

¹⁰¹ *Id.*

¹⁰² Fed. Aviation Admin., Draft DOT Section 4(f) and 6(f) Evaluation, *supra* note 42 at 30 (“A substantial segment of the APM guideway would be constructed adjacent to the Flushing Bay Promenade along the GCP.”).

of the park with marina amenities moving further away from the East Elmhurst neighborhood. These impacts are given a mere passing statement of impact, rather than an analysis. The New York City Department of Parks and Recreation, owner of the World's Fair Promenade agrees that

the introduction of a guideway built along the Flushing Bay Promenade would result in a significant 4(f) constructive as well as physical use. The guideway structure would significantly detract from the use and enjoyment of the Promenade by park users because of its aesthetic effects.¹⁰³

However, FAA's analysis does not reflect these concerns, identifying the park use and how it would be harmed, perhaps because the DEIS was released just 11 days after the city Parks Department provided its opinion.

“The few green havens that are public parks are not to be lost,” especially in a densely populated environmental justice area with as little open space as East Elmhurst, “unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.”¹⁰⁴ Such “truly unusual factors” or “extraordinary magnitudes” of community disruption have not been shown by FAA.

Indeed, the impacts and benefits of the relative alternatives were never evaluated nor compared to the Proposed Project. In *Stop H-3*, the Secretary quantified and compared the relative negative impacts to highway safety, private property, noise, air and visual aesthetics, etc., and the Ninth Circuit held even impacts on dozens of private properties and lesser safety standards for alternate highway alternatives were not unique nor extraordinary. Here, by contrast, FAA has not even begun to meaningfully consider the qualitative impacts of any alternative. Instead, FAA elected to summarily exclude analysis of every single alternative except the no action alternative and Proposed Project. FAA has provided no reasoned Section 4(f) alternatives analysis on the DEIS record.

Just as was the case in *Davis*, FAA has narrowed its scope of review to the Proposed Project and the no action alternative. The FAA has declined to undertake any quantitative comparison of the impact of various orientations and ignored Riverkeeper's request that it consider alternatives three (use of other modes of transportation, including buses and ferry service); four (transportation systems management; use of busses and other measures to reduce vehicular travel to and from the airport); and five (transportation demand management) in conjunction rather than separately. As described above, the eight criteria by which FAA eliminates alternatives is so vague and non-specific as to be essentially meaningless.¹⁰⁵ Therefore, the Section 4(f) review is invalid.

The proposed mitigation also falls short of the stringent requirements set forth in Section 4(f). The FAA cannot approve the Proposed Project unless the agency first undertakes “all

¹⁰³ *Id.* at 220, Email from David Cuff, New York City Dep't of Parks and Recreation, to Stephen Culberson, Ricondo, et. al. (Aug. 10, 2020, 8:12 a.m.).

¹⁰⁴ *Coalition for Responsible Regional Dev.*, 518 F.2d at 526.

¹⁰⁵ *See Davis v. Mineta*, 302 F.3d at 1121.

possible planning to minimize harm” to the affected parkland in Flushing Meadows Corona Park, and especially the impact on World’s Fair Marina Promenade. The action will permanently use 43 acres during operation, with 7.5 of those being operations and maintenance easement areas. Instead of proposing specific mitigation, the FAA merely states that “the Port Authority is committed to providing additional specific mitigation to the Promenade area, citing to a Memorandum of Agreement, to which FAA is not a party. This plan to let Port Authority figure it out fails to meet the strict standard set by Section 4(f). Indeed, as the Second Circuit has stated, “the statutory mandate is not fulfilled by vague generalities or pious and self-serving resolutions or by assuming that someone else will take care of it.”¹⁰⁶

In setting forth a plan and considering the reasonableness of measures to minimize harm, FAA must consider “the preservation purpose of the statute and:

- (i) the views of the official(s) with jurisdiction over the Section 4(f) property;
- (ii) whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property []; and
- (iii) any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.¹⁰⁷

All factors weigh in favor of imposing greater mitigation requirements for the Proposed Project, if it is found, through a thorough alternatives analysis, to be the only feasible and prudent alternative. Indeed, “the declared purpose of Congress that parkland not be used for non-park purposes unless there is no feasible and prudent alternative.”¹⁰⁸ Congress set forth a special protection for parkland, and its use for other purposes must be mitigated. Although NYC Parks has entered into a MOA with Port Authority, it believes the mitigation already offered in the DEIs is not significant enough:

mitigation measures such as those described in the Administrative DEIS *and others included after the DEIS public comment period* shall be considered and implemented.¹⁰⁹

The impacts of the AirTrain on park use must be considered as well. Given that the Proposed Project is a \$2.05 billion rail line that will take permanently 43 acres of parkland in an environmental justice community already starved for parkland, \$8.5 million is an *unreasonably low* sum. Riverkeeper, Guardians of Flushing Bay and others have noted that that the AirTrain alignment alternatives from Willets Point west through the Grand Central Parkway corridor likely will have impacts on the community of East Elmhurst, including vibrations, noise, air

¹⁰⁶ *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 701 (2d Cir. 1972).

¹⁰⁷ 23 CFR § 774.17(c).

¹⁰⁸ *Coalition for Responsible Regional Dev. V. Brinegar*, 518 F.2d 522, 526 (4th Cir. 1975).

¹⁰⁹ Fed. Aviation Admin., Draft DOT Section 4(f) and 6(f) Evaluation, *supra* note 42, at 220, Email from David Cuff, New York City Dep’t of Parks and Recreation, to Stephen Culberson, Ricondo, et. al. (Aug. 10, 2020, 8:12 a.m.) (emphasis added).

quality and visual impacts, and the AirTrain will impact their use of and relationship to the parkland. These outside impacts should be considered in outlining a mitigation plan for the Proposed Project. FAA must withhold its approval of the 4(f) process and FEIS until after it is satisfied that all possible planning to minimize harm is completed.¹¹⁰

In addition, we understand that the Citi Field lot is technically part of Flushing Meadows Corona Park, though currently used for parking during Mets games and other events. This land, if unaffected by the proposed project, could one day revert to recreational use when no longer needed to support Citi Field operations. Therefore, if a permanent easement is granted to build the AirTrain on or adjacent to parkland, any potential impacts must be mitigated to a condition equal to or better than the no-build option. No consideration of the long-term impacts on the Citi Field lot were considered, nor was *any* mitigation proposed, despite taking 43 acres of parkland combined throughout Flushing Meadows Corona Park, including the promenade.

VII. The Applicant claims to have unduly influenced the DEIS process.

Finally, based on the actions and statements of Port Authority and New York Governor Andrew Cuomo, we are concerned that the DEIS process may have been unduly influenced. FAA's determination under Section 4(f) is to be made independently of political pressures.¹¹¹ While Riverkeeper disputes the contentions, the Port Authority has expressly represented in court in seeking to avoid disclosure of documents that it is not acting independently, but rather acting as an "agent" for FAA and "with a common legal interest" with FAA with respect to the EIS.¹¹² Specifically, Port Authority claims that: "FAA and the Port Authority worked jointly to effectuate a single standard – the NEPA requirement for paying contractors to *expedite* agency EIS workflow – in a manner which conformed to statutes and regulations and was *devised to withstand anticipated legal challenge*."¹¹³ If such an agreement or relationship does exist for the purpose of expediting the EIS process in a way devised merely to withstand a legal challenge rather than evaluate all information and alternatives in good faith, it would improperly influence FAA's consideration of the environmental issues. Such influence would invalidate the EIS process.¹¹⁴

New York State, signatory to the compact that established Port Authority, has also exerted pressure to undermine the DEIS. In 2018, New York State passed A.11158, legislation which

¹¹⁰ *Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 396, 417 (D. Conn. 2006). "[T]he Secretary must withhold his approval until he is satisfied that there has been, in the words of the statute 'all possible planning to minimize harm.'" *Id.* (quoting *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 700-01 (2d Cir. 1972).

¹¹¹ *See, e.g., D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971), *cert. denied* 405 U.S. 1030 (1972); *Citizens to Preserve Overton Park v. Volpe, on remand* 335 F. Supp. 873 (W.D. Tenn. 1972).

¹¹² Br. for Resp't-Appellant at 8, 20 (Jan. 17, 2020), *Riverkeeper, Inc. v. Port Authority of N.Y. & N.J.*, Index No. 157144/19 (N.Y. App. Div. 1st Dep't).

¹¹³ *Id.* at 13 (emphasis added).

¹¹⁴ In that court action, Riverkeeper has won a New York State Supreme Court judgment under the New York State Freedom of Information Law granting release of documents shared between Applicant and FAA. *See In re Riverkeeper Inc. v Port Auth. of N.Y. & N.J.*, 66 Misc. 3d 250 (Sup. Ct. N.Y. Cnty. 2019). We are now awaiting judgment on Applicant's appeal of that decision. We hereby incorporate by reference documents subsequently received that are responsive to the FOIL request at issue in that case, if any.

purports to authorize taking of Flushing Meadows Corona Park and World's Fair Promenade parkland for the AirTrain, and/or any route from Willets Point over the Grand Central Parkway. The legislation paves the way for FAA to approve the route preferred by Port Authority.

The Applicant represented to Riverkeeper and Guardians of Flushing Bay in June of 2018, prior to passage of A.11158, that FAA believed the parkland alienation legislation was necessary to *begin* the DEIS process. If Applicant's assertion is true, then FAA seems to have made its alternatives determination before the DEIS process has begun. Under NEPA and Section 4(f), A.11158 was not only unnecessary to begin a meaningful environmental review process but a hinderance to it.

Finally, Governor Cuomo has publicly stated that transit experts should be ignored. "Forget your transit experts," Governor Cuomo implores, "[t]here is no better time to build than right now."¹¹⁵ It is clear that Governor Cuomo has attempted to exert political influence to undermine fair consideration of expert commentators, community engagement, and viable alternatives.

If the extraneous pressure emanating from Applicant's "common legal interest" or "agency" relationship with FAA, from state legislation or from Governor Andrew Cuomo's public statements has "intruded into the calculus of considerations"¹¹⁶ on which FAA bases its decisions, it would invalidate the FAA's determinations in both the DEIS process and any subsequent approval of funding the AirTrain with passenger facility charges. We also urge FAA to share all of its communications with the Applicant, which we hope will show that our concerns about undue influence are unwarranted.

VIII. Conclusion

The DEIS does not comply with NEPA alternatives review because it utilized a purpose and need statement that was drawn in unreasonably narrow terms which precludes study or selection of any possible on-road transportation alternative, and FAA conducted a legally inadequate alternative analysis by failing to address all legally required, relevant factors and to provide any meaningful way to compare alternatives. Furthermore, FAA failed to comply with parkland alienation under Section 4(f) of the Department of Transportation Act of 1966. We request that FAA remedy these shortcomings and publish a new draft DEIS and 4(f) review for public comment.

Thank you for your attention to these matters. Riverkeeper and Guardians of Flushing Bay are available to discuss any of these issues further if it would be helpful or productive.

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¹¹⁵ Clayton Guse, 'Forget Your Transit Experts': Cuomo Defends Controversial LaGuardia AirTrain Plan, N.Y. Daily News (May 26, 2020), available at <https://www.nydailynews.com/new-york/ny-laguardia-airtrain-cuomo-subway-20200526-vhumaqz66fb4lkrvlut2vrpquq-story.html>.

¹¹⁶ *D.C. Federation of Civic Associations*, 459 F.2d at 1246.

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