IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Martin County, Florida; Thomas L. Hewitt; And V. Michael Ferdinandi, *Plaintiffs*, v. U.S. Department 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, *Defendants*.	)	Civil Action No. 15-632 (CRC)

AAF HOLDINGS LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Like the plaintiffs in *Indian River County v. Rogoff*, Case 1:15-cv-00460, the Martin County Plaintiffs in this case seek to prevent AAF Holdings LLC ("AAF") from proceeding with an infrastructure project to restore passenger service to a railway that has been in continuous use for 120 years ("AAF Project" or "Project"). The Project would significantly improve that railway by enhancing the safety of existing tracks and grade crossings, and by installing state-of-the-art technology that will allow both passenger and freight trains to be controlled and stopped remotely. Despite this, and despite having co-existed with significant freight service for decades, the Martin County Plaintiffs do not want the Project to go forward and are trying to make it more expensive to complete, in the hope that doing so will prevent it altogether. The Court should deny their request for a preliminary injunction for three primary reasons:

First, as with the Indian River County plaintiffs, the Martin County Plaintiffs lack standing to challenge the exercise of tax exemption authority by the Under Secretary for Policy of the United States Department of Transportation ("USDOT"). They lack constitutional standing because the injuries they claim would not result from any USDOT action, but instead from AAF's independent decision to restore the passenger rail service, and from other independent third-party actions. Accordingly, their alleged injuries are not "fairly traceable" to the government action challenged. Further, those injuries would not be redressed by a judgment in Plaintiffs' favor. Although federal tax-exempt financing is important to the project, AAF is committed to the Project's success and intends to continue to move forward, even if it is ultimately unable to sell tax-exempt bonds.

The Martin County Plaintiffs also lack standing to challenge the USDOT's decision to issue the allocation because their alleged injuries are not within the "zone of interests" protected by the applicable statute, Section 142 of the Internal Revenue Code, 26 U.S.C. § 142. Courts

routinely reject attempts by plaintiffs to police another party's tax exemption, and they have made clear that a plaintiff lacks standing under the "zone of interests" test when its claims are more likely to frustrate than to further statutory objectives. Here, the Plaintiffs' claims run afoul of both of those proscriptions. They are clearly attempting to police another party's tax exemption, and their interests in undermining or delaying the planned upgrades to the existing rail line to restore passenger rail operations and improve the safety of train operations are directly contradictory to Section 142's objective of promoting private investment in transportation infrastructure.

Second, even if Plaintiffs had standing, they would not succeed on the merits. With respect to their claim regarding the Project's eligibility to receive a tax exemption allocation under 26 U.S.C. §§ 142(a)(15) and 142(m)(1)(A), Plaintiffs overlook that the terms of the statute fully support the agency's interpretation, and therefore, under the familiar *Chevron* test, the inquiry into the agency's approach comes to an end. The plain language of the statute authorizes the Secretary to allocate a tax exemption to "*any* surface transportation project which receives Federal assistance under title 23." 26 U.S.C. § 142(m) (emphasis added). The AAF Project undeniably qualifies under this statutory standard because it is a surface transportation project that has received a significant amount of Title 23 funding for railway-highway crossing improvements. Plaintiffs' attempts to explain why the statute does not mean what it plainly says do not withstand scrutiny. Were the statute deemed ambiguous, however, the only question is whether the agency's interpretation is a permissible one. Unquestionably, it is. Plaintiffs' attempt to rely on snippets from the legislative history to prove otherwise is unavailing.

Plaintiffs also claim that tax-exemption allocations for the Project are limited to the particular railway-highway crossings that received funds under Title 23. However, the phrase

"any surface transportation *project* which receives Federal assistance under title 23," 26 U.S.C. § 142(m) (emphasis added), reasonably can be read to encompass the project as a whole, one portion of which receives Federal assistance under Title 23. That interpretation is supported by the plain language of the statute, and is consistent with the agency's longstanding practice and with the practical realities of how surface transportation projects are funded. In a memorandum issued at the time Section 142(m) was enacted, the Federal Highway Administration ("FHWA"), an agency within the U.S. Department of Transportation, persuasively explained why the provision must be understood to allow a tax-exemption allocation to be used for an entire project, even if only a portion of the project receives Title 23 funds.

Finally, contrary to Plaintiffs' assertion, USDOT's interpretation of Section 142(m) does not make the high-speed rail provision of Section 142, 26 U.S.C. § 142(i), superfluous. A project is not automatically eligible for a tax exemption under Section 142(m) merely because it has a railway-highway crossing. Only certain rail projects receive Title 23 funds for crossing improvements, and new crossings being constructed as part of a new rail line are not eligible for funds under the Title 23 crossing-improvement program. Additionally, tax-exemption allocations under Section 142(m) are capped at $15 billion. Once that limit is reached, no further allocations under Section 142(m) are permitted. By contrast, there are different caps that vary by state (or no cap in the case of publicly owned projects) on the amount of tax-exempt private activity bonds that a state can issue to support high-speed rail under Section 142(i).

Plaintiffs' claim under the National Environmental Policy Act ("NEPA") also fails, as federal agencies are only required to conduct environmental impact analyses of "major federal actions"—federal actions with effects that are major and that are subject to federal control and responsibility. 40 C.F.R. § 1508.18. The only federal action at issue here is USDOT's decision

to give tax-exempt status to bonds that would be authorized by the Florida Development Finance Corporation ("FDFC"). This action does not give USDOT any control or responsibility over the environmental aspects of the project; nor can USDOT prevent the environmental effects of which Plaintiffs complain. Thus, USDOT's exercise of its tax-exemption authority is not a "major federal action" for which NEPA is triggered.

Third, Plaintiffs cannot satisfy any of the remaining requirements for a preliminary injunction. They are unable to show irreparable harm for the same reason they lack standing: AAF will continue to move forward with the project even if tax-exempt bonds are not issued. Thus, an injunction will not prevent any of Plaintiffs' alleged harms from taking place. Moreover, the speculative harms complained of would not amount to the kind of irreparable harm that could justify an injunction in any event. For one thing, they are not imminent: completion of improvements to the rail line is subject to further permitting, and passenger rail service through Martin County is not scheduled to begin until mid to late 2017. Nor are they of sufficient certainty or severity to warrant an injunction because the only harms identified by Plaintiffs are those arising from the improvement and operation of an existing railroad right-of-way that has been in continuous operation for more than one hundred years.

AAF, by contrast, *will* suffer a concrete and irreparable injury if an injunction is entered – it will be forced to finance its project through more expensive means, and will never be able to recover its increased financing costs. The balance of harms thus tips strongly against an injunction. A preliminary injunction would also thwart the public interest, which Congress and the Obama Administration have determined would be advanced by allowing surface transportation projects like the AAF Project to benefit from tax-exempt financing.

The requested preliminary injunction should be denied.

FACTUAL BACKGROUND

I. The AAF Project.

AAF is part of a family of private corporate entities that were formed for the principal purpose of developing and operating convenient express intercity passenger rail service connecting Miami, Fort Lauderdale, West Palm Beach, and Orlando—the four largest urban population centers in Southern and Central Florida. *See* Declaration of P. Michael Reininger, ¶ 2 ("Reininger Decl.").[1] The service will run along an existing railroad right-of-way that has been in continuous use since the late 1800s, when Martin County was essentially unpopulated. *Id.* ¶¶ 4-5, 13-16. The right-of-way was utilized for both passenger and freight service from 1895 through 1968, but in recent decades has been used exclusively for freight service. *Id.* ¶ 7-10. AAF is now bringing passenger service back, and improving the existing railway. It is investing hundreds of millions of dollars to enhance the safety of existing tracks and grade crossings, and is installing Positive Train Control systems that will allow trains to be controlled and stopped remotely in the event of operator error or disability. *Id.* ¶¶ 13-14, 29-34.

AAF's parent company publicly announced the AAF Project in March 2012. *Id.* ¶ 40. AAF itself was formed the following year, while All Aboard Florida – Operations LLC ("AAF Operations") had been in existence since 2007. *Id.* ¶ 40. AAF commenced construction of the Phase I segment, from Miami to West Palm Beach, early last year using its own cash equity, while simultaneously exploring other means of financing for the Project as a whole. *Id.* ¶ 41. Its goal is to secure the most time- and cost-efficient means of financing available, so as to maximize the profitability of the rail line and reduce the amount passengers will ultimately have to pay to use it. *Id.*

[1] A full discussion of the All Aboard Florida Project, including its history and its benefits, was provided in AAF's May 11 Opposition to Indian River's Motion for Preliminary Injunction *Indian River County v. Rogoff,* Case 1:15-cv-00460 (ECF No. 22). Those facts are incorporated herein by reference.

In March 2013, AAF Operations applied to FRA for a $1.6 billion loan under the FRA's Railroad Rehabilitation and Improvement Financing ("RRIF") Program. *Id.* ¶ 42. That loan application remains pending. *Id.* ¶ 42. Because RRIF loans are subject to NEPA review, the FRA is preparing an Environmental Impact Statement ("EIS"). *Id.* ¶ 43. The U.S. Coast Guard and U.S. Army Corps of Engineers are also acting as cooperating agencies in that process. *Id.* Because AAF Operations was uncertain how long the environmental review process would take, and thus when it could be deemed eligible for the loan, it also obtained $405 million in private debt financing to cover the potential time gap. *Id.* ¶ 45. Those funds remain in escrow. *Id.*

II. The USDOT Allocation Decision.

On August 15, 2014, AAF applied to USDOT for an allocation of federal tax-exempt status for up to $1.75 billion in private activity bonds to be issued by a Florida development agency, the Florida Development Finance Corporation ("FDFC"). *Id.* ¶ 46 & Ex. F. Private activity bonds are tax-exempt bonds issued by a state or local entity, the proceeds of which are used for a defined qualified purpose by a private entity. The types of projects for which private activity bonds may be issued are listed in the Internal Revenue Code at 26 U.S.C. § 142.

In 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which amended 26 U.S.C. § 142 to add "qualified highway or surface freight transfer facilities" to the list of projects eligible for private activity bond issuance. SAFETEA-LU, Pub. L. No. 109-59, § 11143, 119 Stat. 1144, 1963-64 (2005). Congress defined "qualified highway or surface freight transfer facilities" to include "any surface transportation project which receives Federal assistance under title 23." *Id.*; 26 U.S.C. § 142(m).

In general, states have an annual private activity bond issuance limitation ("state volume limitations") set forth in 26 U.S.C. § 146 and each state decides each year how to allocate its

limited quantity of private activity bonds among the various types of projects listed in Section 142 without involvement from USDOT. However, under SAFETEA-LU Section 11143, "qualified highway or freight transfer facilities" are not subject to the state volume limitations. Instead, Congress set a separate limit of $15 billion in total (this amount does not recur annually) specifically for these facilities and directed the Secretary of Transportation to allocate the $15 billion "in such manner as the Secretary determines appropriate." 26 U.S.C. § 142(m)(2)(C).

Pursuant to SAFETEA-LU Section 11143, AAF applied to USDOT for an allocation of $1.75 billion in private activity bonds for construction of the intercity passenger rail line providing service between Miami and Orlando. *See* Reininger Decl. ¶ 46 & Ex. F. In that application, AAF explained that the Project had received approximately $9.3 million in Title 23 funds since December 2011 to improve railway-highway crossings in preparation for growth in rail traffic, including the introduction of passenger service. *Id.* Ex. F at 10.

In a December 22, 2014 letter, USDOT advised AAF that it had reviewed AAF's application along with "[the] applicable statutory and regulatory requirements," and was "provisionally allocating up to $1.75 billion of private activity bond authority to the Florida Development Finance Corporation." *Id.* ¶ 49 & Ex. H at 1. USDOT's letter included several conditions, including that the bonds "must be issued by July 1, 2015" or the provisional allocation of federal tax exemption will "automatically expire[]." *Id.* ¶ 50 & Ex. H at 1.

USDOT's Section 142(m) allocation to a rail project such as AAF was consistent with previous allocations to other passenger rail projects. In 2010, USDOT approved an allocation of approximately $398 million in private activity bonds for a passenger rail project from Denver International Airport to Denver's Union Station under the same provision under which AAF

received its allocations.[2] Likewise, in 2014, USDOT approved an allocation under the same provision of approximately $1.3 billion in private activity bonds for a passenger rail project in Maryland known as the "Purple Line."[3]

Consistent with USDOT's long-established practice in these and other allocation decisions, the agency did not conduct a NEPA review prior to granting the provisional allocation. Its position has always been—and remains—that an allocation of federal tax exemption for private activity bonds is not a "major federal action" and is therefore not subject to NEPA. However, as an additional condition of the allocation, USDOT did require AAF to continue to facilitate the completion of the environmental review process that FRA is conducting in connection with AAF's application for a RRIF loan, and on which other federal agencies, such as the U.S. Coast Guard and U.S. Army Corps of Engineers, will rely in making permitting decisions. *See* Reininger Decl. ¶ 50 & Ex. H. at 1-2. It also required, among other things, that AAF agree not to use the proceeds of the bonds until 45 days after FRA issues its Final EIS, and to implement any mitigation measures that emerge from the EIS process. *Id.*

AAF has agreed to comply with those conditions and is proceeding with its application to the FDFC for issuance of private activity bonds. *Id.* ¶ 51 & Ex. I. If the bonds are issued, the sale proceeds will then be lent to AAF Operations for use in funding Project costs in the counties identified in the application as areas where the bond proceeds would be spent. *Id.* ¶ 52. Indian

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[2] *RTD Sells $398 Million in Bonds for FasTracks*, The Denver Post, Aug. 7, 2010, http://www.denverpost.com/ci_15700272; FHWA, Private Activity Bonds, http://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_debt_financing/private_activity_bonds/ (last visited May 15, 2015).

[3] Maryland Transit Administration, *Purple Line*, at 3 (2014), http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/PurpleLinePresentation93014.pdf; FHWA, Private Activity Bonds, http://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_debt_financing/private_activity_bonds/ (last visited May 15, 2015).

River and Martin Counties are not among the counties identified; the work in those counties will be funded through other means. *Id.* ¶ 53 & Ex. I at 11.

On April 20, 2015, the FDFC conducted a public hearing to solicit comments on AAF's application. *Id.* ¶ 54. The FDFC will next hold a meeting to approve or deny the issuance of the bonds for the Project. *Id.* ¶ 54.[4] If the FDFC approves issuance, the bonds can be issued immediately thereafter. However, AAF has committed not to close on the sale of bonds until after the close of business on June 8, 2015, and use of the bond proceeds will remain subject to the conditions discussed above. *Id.* ¶¶ 55-56.

STANDARD OF REVIEW

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20; *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011).

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits.

A. Plaintiffs Do Not Have Constitutional Standing.

To establish standing, Plaintiffs must establish that they have suffered (or will imminently suffer) injury-in-fact. They must show that the conduct of which they complain is the cause of that injury. And they must show that it is likely—not just speculative—that a favorable decision will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). When a suit challenges government action to which the plaintiff is not directly

[4] This meeting was originally scheduled for May 28, 2015, but has recently been postponed.

subject, it is "substantially more difficult" to establish standing. *Id*. at 561-62 (plaintiff must "adduce facts showing that those choices [by independent third parties] have been or will be made in such manner as to produce causation and permit redressability of injury."). Where a plaintiff alleges a violation of a procedural requirement – such as a NEPA violation – the analysis is essentially the same. *St. John's United Church of Chris v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008) (with respect to connection between agency's substantive decision and injuries alleged, plaintiffs "must satisfy the normal standard for redressability").

The arguments set forth in AAF's May 11 Opposition regarding the constitutional standing of the Indian River Plaintiffs apply with equal force here. Rather than restate those arguments in full, we incorporate the arguments by reference and provide a short summary.

1. USDOT's Tax Exemption Decision Is Not the Cause of Plaintiffs' Claimed Injuries.

Plaintiffs claim that a variety of injuries will result from the construction of improvements to the existing rail corridor and the operation of AAF's passenger trains. But Plaintiffs cannot show that these injuries are "fairly . . . trace[able]" to "the challenged action of the defendant" – USDOT's decision to authorize a tax exemption – rather than to the action of a third party. *Lujan*, 504 U.S. at 560-61 (citation omitted; alteration in original). There are several crucial causal steps separating USDOT's decision from the harms that Plaintiffs allege, each of which depends upon the independent decision of a third party.

First, USDOT's approval is not needed for the construction and operation of the AAF Project. Rather, AAF made the independent decision to undertake the Project long before USDOT issued its tax exemption letter. Indeed, by the time AAF applied for the tax exempt allocation, it had already committed itself to building the improvements and operating the railroad. *See* Reininger Decl. ¶¶ 40-41, 64.

Second, although Plaintiffs refer to USDOT's decision as an "approval" of the bonds, *see* Memo. at 1, 2, 11, 17, 19, USDOT has not approved and cannot approve *issuance* of the bonds. Instead, the issuance of the bonds depends upon the decision of agency third party—the FDFC. Reininger Decl. ¶ 54. The FDFC's decision on the bonds remains outstanding, and is contingent on the FDFC taking action. *Id*. at ¶¶ 52, 54.

Third, AAF must obtain all required federal, state, and local permits (including from the U.S. Coast Guard and U.S. Army Corps of Engineers) needed for construction. The U.S. Coast Guard and U.S. Army Corps of Engineers are coordinating with FRA to complete an EIS in connection with the permit applications, and they will independently decide whether to require mitigation measures. The agencies may decide to require certain measures that will remedy harms that Plaintiffs have alleged.

Thus, several independent decisions stand between the challenged USDOT action and the harms that Plaintiffs allege. As a result, those harms are not "fairly traceable" to the challenged USDOT action.

The fact that AAF has referred to the tax exemption as the "linchpin" for completing the Project does not warrant a different conclusion. A fair reading of the application makes clear that AAF was referring to tax-exempt bonds not as a prerequisite for going forward, but merely as the "linchpin" to completing the Project "in the most expedient manner possible and with the highest degree of execution certainty." Reininger Decl. Ex. F, at 1. Indeed, as AAF's application explained, and as the Reininger Declaration details further, AAF had *already* closed on $405 million of debt financing and had funded construction using its own equity in the Project. Reininger Decl. ¶¶ 41, 45, 64. These concrete steps demonstrate that AAF was already committed to completing the Project when it applied to USDOT. *Id*.

This Court's decision in *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79 (D.D.C. 2008), is directly on point. There, the plaintiffs alleged injury as a result of the issuance of tax credits for coal projects. To establish standing, the plaintiffs highlighted the defendant agencies' announcement that the credits "will accelerate the widespread use of [advanced coal] technologies." *Id*. at 88 (alteration in original). They also relied on Duke Energy's statements that the tax credits were "very important" to one of the projects at issue. *Id*. The court held that the plaintiffs had not established standing, for they had failed to address "a crucial link" in the chain of causation—n namely, "Duke Energy's independent decision to go forward with the . . . project." *Id*. at 89. The court explained that whether the tax credits were "important" to the company was "analytically distinct" from whether the federal government's allocation of tax credits was causally linked to the plaintiffs' injuries. *Id*. As to the latter question, the court concluded that the plaintiffs could not "adequately bridge the uncertain ground found in any causal path that rests on the independent acts of third parties," particularly because "Duke Energy was preparing to build the plant even before it was awarded the tax credit." *Id*. (citation omitted). The same logic applies here.[5]

2. Plaintiffs' Injuries Are Not Redressable by an Order of This Court.

Plaintiffs cannot establish standing for the additional reason that their alleged injuries would not be redressed by a decision in their favor. To demonstrate redressability, a plaintiff

[5] Courts also have repeatedly rejected suits challenging a government decision to provide a third party with a tax exemption where the purpose of the suit is to alter that party's conduct. That is because a tax exemption never compels a third party's action; it merely influences their incentives. The third party remains free to decide whether or not to take the action that is the source of the plaintiff's alleged injuries; and thus it is the third party, not the government's tax that causes the alleged injuries. In *Fulani v. Brady*, for example, the D.C. Circuit rejected a challenge to an IRS decision granting a tax exemption to a third party on the ground that the third party "remains an intervening causal agent" free to decide how it might respond if the tax exemption were lost (935 F.2d 1324, 1329 (D.C. Cir. 1991). *See Fulani,* 935 F.2d at 1329 (explaining that "the IRS's decision to provide the [third party] with tax-exempt status . . . is merely one in a chain of independent causal factors necessary to achieve this injury"). The reasoning of *Fulani* applies equally here.

must show that "the relief sought, assuming the court chooses to grant it, will likely alleviate" the injury alleged. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Circ. 1996) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). Here, Plaintiffs challenge USDOT's allocation of tax-exempt status to certain bonds that AAF intends to use to finance portions of its Project. The injuries that Plaintiffs allege, however, do not result directly from USDOT's allocation. Rather, they stem from AAF's construction and operation of the planned passenger railway. *See* Memo. at 12-13 (enumerating claimed injuries). And when a plaintiff challenges agency action but claims harm from a third party's actions, such as AAF, the plaintiff must provide some basis for concluding that the third party's actions "will be altered or affected by the agency activity [that] they seek to overturn." *St. John's*, 520 F.3d at 463.

Plaintiffs cannot make this showing, for AAF is committed to the success of the Project and will move forward with its plan to construct and operate the passenger railway, even in the absence of tax-exempt bonds. *See* Reininger Decl. ¶¶ 58-65. Were Plaintiffs to prevail, the only result would be that AAF would need to rely on taxable bonds or other alternatives to finance the Project. *Id.* ¶ 60. As set forth more fully in AAF's Opposition to Indian River County's motion for preliminary injunction, AAF and its parent company, Florida East Coast Industries LLC ("FECI"), are fully committed to the Project, and plan to proceed even if the tax exemption were revoked. *Id.* ¶ 64. Thus, a revocation of the allocation would make the Project more expensive to complete and may delay its progress, but it would not end the Project. *Id.* ¶ 58. Indeed, AAF and FECI have already spent over $240 million of cash equity on the development and construction of the Project, and have either committed or expect to commit another $560 million more in cash equity, and $600 million in land and easements, for the same purpose. *Id.* ¶ 64. They have also already secured a $405 million private debt facility to cover any potential time

gap, all of which remains in escrow. *Id.* ¶¶ 41, 64. Because AAF would still build and operate the railway as planned even if the Court were to enter an injunction on the allocation, none of Plaintiffs' alleged injuries would be redressed.[6]

Indeed, courts in this Circuit have concluded, on similar facts, that plaintiffs challenging government action could not show redressability when the alleged harms were caused by a third party whose conduct did not depend upon the challenged action. In *St. John's*, for example, the plaintiffs challenged the FAA's decision to reimburse the City of Chicago for expenses related to the expansion of O'Hare Airport, claiming standing based on injuries resulting from the expansion. The D.C. Circuit dismissed for lack of standing, because the city "is prepared to obtain funding from other sources if federal money is unavailable." *St. John's*, 520 F.3d at 463. Vacating the FAA's grant, the court explained, "would not redress the petitioners' injuries because Chicago is committed to completing the project anyway." *Id.*; *see also Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 151 (D.D.C. 2011) (finding a lack of redressability where an affidavit from the applicant indicated that "the project would, in fact, go forward now even without federal backing."); *Chesapeake Climate Action Network v. Export-Import Bank of the U.S.*, No. CV 13-1820 (RC), 2015 WL 267099, at *10 (D.D.C. Jan. 21, 2015) (no standing to challenge approval of a loan guarantee to a third party where plaintiff failed to "provide some basis for finding that the 'nonagency activity' that affects them—namely Xcoal's exporting of

[6] Plaintiffs misleadingly assert that AAF stated in its motion to intervene 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.'" Memo. at 10 (citing AAF Mot. to Intervene at 10). What AAF *actually* said in its motion to intervene is as follows:

> The Complaint specifically seeks to prevent the issuance of any PABs financing. Were Plaintiffs to succeed, such a ruling not only *could*, but most certainly *would*, negatively impact AAF's ability to utilize PABs, and thereby to benefit from a lower-cost and effective means to finance its plans to provide passenger service connecting major urban areas in Florida.

AAF Mot. to Intervene at 10. AAF characterized the tax exempt bonds as an "effective means" to finance the Project, but not the *only* such means, as they are not.

coal—'will be altered or affected by the agency activity they seek to overturn.'") (quoting *St. John's*, 520 F.3d at 463).

These cases are directly on point. Just as the third parties responsible for the alleged harms in those cases demonstrated that they could move forward regardless of the litigation's outcome, AAF has demonstrated that it will move forward with the Project even if this Court were to deprive USDOT's decision of effect. Thus, as in those cases, Plaintiffs' alleged injuries are not redressable.

B. Plaintiffs Do Not Have Standing to Challenge the Merits of USDOT's Allocation Decision Under the "Zone Of Interests" Test.

Plaintiffs do not have standing to challenge the merits of USDOT's allocation decision for the additional reason that their alleged injuries are not within the "zone of interests" protected by the applicable statute, 26 U.S.C. § 142. The zone-of-interests test precludes claims where a plaintiff's grievance falls outside the zone of interests protected by the statutory provision at issue in the lawsuit. *Allen v. Wright*, 468 U.S. 737, 751 (1984).[7] This requirement serves as "a limitation on the cause of action for judicial review conferred by the [APA]," *Lexmark*, 134 S. Ct. at 1387, foreclosing suit when "a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation omitted).

Thus, a litigant's standing to challenge agency action under a particular statute is determined by whether the alleged injury is to an interest protected by that statute. *See Air*

[7] Although traditionally analyzed under the label of "prudential standing," the Supreme Court recently adopted Judge Silberman's observation that the zone of interest test is more appropriately considered a tool of statutory interpretation, which asks whether "this particular class of persons ha[s] a right to sue under this substantive statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (quoting *Association of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675-676 (2013) (concurring opinion)).

Courier Conference of Am., Petitioner v. Am. Postal Workers Union, 498 U.S. 517 (1991) (unions had no standing under Postal Act because "Congress was concerned not with protecting postal employment, but with the receipt of necessary revenues for the Postal Service."); *ALDF v. Espy*, 29 F.3d 720 (D.C. Cir. 1994) (plaintiff's alleged informational injuries do not fall within the zone of interests of the Animal Welfare Act). Specifically, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (emphasis in original). A challenger whose claims would be "more likely to frustrate than to further statutory objectives" lacks standing to pursue those claims. *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

Applying the zone-of-interests test, courts routinely reject the notion that a plaintiff has standing to police an alleged unauthorized tax exemption that benefits a third party. It is "well-established . . . that, ordinarily, one may not litigate the tax liability of another." *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989) (citing *Allen*, 468 U.S. at 748-49); *see also United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981) (finding it "crystal clear" that "only the taxpayer may question the assessment" even where the assessment would have affected the plaintiff's own liability). In *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), the Court rejected an oil producer's attempt to challenge IRS rulings that allowed tax credits to certain foreign oil companies because the producer was not "an intended beneficiary of the statutory provision on the basis of the interests [that] Congress arguably intended to regulate or protect in the legislation." *Id.* at 145. This was so even though the producer had demonstrated concrete injury as a competitor because "[e]very decision by a

government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties." *Id*. at 144.

That general rule applies with full force to this case. Plaintiffs have pled a range of alleged injuries to their interests from the AAF Project, including traffic at railroad crossings, safety, air pollution, noise, impacts to parks, and damage to neighborhoods and the Martin County economy. Memo. at 13. However, none of these injuries are within the zone of interests of the statute under which the tax exemption allocation was undertaken. Section 142 of the Internal Revenue Code was amended in 2005 by Section 11143 of Title XI of SAFETEA-LU to add "any surface transportation project which receives Federal assistance under title 23" to the projects eligible for tax-exempt private activity bonds. Pub. L. No. 109-59, § 11143, 119 Stat. 1144, 1963-64 (2005) (amending 26 U.S.C. § 142). Section 11143 is a very narrow statutory provision with a clear purpose: providing tax exempt status to private bonds to encourage private investment in our nation's transportation infrastructure. *See* Reininger Decl. Ex. G (FHWA Overview of PAB Program). Plaintiffs do not even attempt to explain why their interests fall within those that the statute was intended to protect.

In fact, Plaintiffs' interests in delaying or undermining the corridor improvements and initiation of passenger rail service are directly contradictory to the statute's objective to promote private investment in transportation infrastructure. Plaintiffs' claims are aimed at precluding the use of tax-exempt bonds to fund the improvements planned to the existing rail line. Thus, Plaintiffs' claims are "more likely to frustrate than to further" the statutory objective of encouraging private investment in our nation's transportation infrastructure, and accordingly they lack standing to pursue those claims. *Hazardous Waste Treatment Council*, 885 F.2d at 922; *see also Nat'l Fed. of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989)

("Appellants alleged particular interest in the instant case is protection of the federal jobs of their members," which is inconsistent with the objectives of the Budget and Accounting Act of 1921.); *Taubman Realty Grp. Ltd. P'ship v. Mineta*, 320 F.3d 475 (4th Cir. 2003) (the Federal Aid Highway Act was enacted to improve the interstate highway system, and an operator of shopping mall potentially impacted by FHWA decision lacked standing because operator was not within the zone of interests protected by that Act); *Hous. Auth. of Elliott Cnty. v. Bergland*, 749 F. 2d 1184 (6th Cir. 1984) (housing corporation lacked standing to challenge USDA funding decision because corporation was not an intended beneficiary of the act and was not within the zone of interests protected).

C. Plaintiffs' Claims Regarding Eligibility for a Tax Exemption Fail on the Merits.

As Plaintiffs acknowledge, when reviewing an agency interpretation of a statute it administers, courts apply the familiar two-step analysis established in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under *Chevron*, if the statute clearly allows a tax-exempt allocation to a rail project such as the AAF Project, this Court's analysis is at an end. Even if the statute is ambiguous with respect to the eligibility question, this Court must defer to USDOT's interpretation if it is based on a permissible construction of the statute. *See Nat'l Treasury Empls. Union v. Fed. Labor Rels. Auth.*, 754 F.3d 1031, 1041 (D.C. Cir. 2014); *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 811 (D.C. Cir. 2011).

With respect to their eligibility claim, Plaintiffs do not even attempt to prevail at step one of *Chevron*. Instead, they *concede* that the statute does not unambiguously support their position, and that the agency's decision can be upheld as long as it is based on a permissible construction of the statute. *See* Memo. at 16 ("With regard to Plaintiffs' Count II claim related to Title 23, . . . the Court must look to *Chevron* step-two to determine whether DOT's action was

based on a 'permissible construction of the statute . . . .'"). While USDOT's interpretation here easily passes muster under that step-two standard, in fact the statute is clear on its face and no step-two analysis is required.[8]

1. The Statutory Text is Unambiguous

The phrase "qualified highway or surface freight transfer facilities" in Section 142(a)(15) delineates the uses that are eligible for the tax exemption allocated by USDOT. That phrase, however, is itself defined by statute: Section 142(m) states that "qualified highway or surface freight transfer facilities" includes, among other things, "any surface transportation project which receives Federal assistance under title 23." 26 U.S.C § 142(m). "Surface transportation project" is not defined further, but its plain meaning unquestionably includes a passenger rail project. Thus, the statutory text provides that a passenger rail project is eligible to receive a tax-exempt allocation under Sections 142(a)(15) and 142(m) as long as that project receives federal assistance under Title 23.

The AAF Project (like the two other rail projects that received allocations under the same statute, *see supra* at p. 8) readily qualifies under this standard. First, it is a passenger rail project, and thus is a "surface transportation project." Second, the AAF Project has received a significant

[8] Plaintiffs also devote one sentence to arguing that USDOT failed to explain the underpinnings of its tax exemption decision and that the allocation is therefore arbitrary and capricious. Memo. at 17. Plaintiffs cite no authority for the proposition that USDOT was obligated to provide an explanation beyond that provided in USDOT's December 22, 2014 letter, which makes clear that USDOT was acting on the basis of AAF's Application for a private activity bond allocation and the "applicable statutory and regulatory requirements." *See also* AAF Application at 10 (detailing Title 23 funds that the AAF Project has received and will continue to receive). That is particularly true given that USDOT's decision was consistent with FHWA's 2005 opinion letter (discussed below) and with USDOT's past practice with respect to the use of tax-exempt private activity bonds for rail projects.

amount of Title 23 funding for grade crossing improvements. Reininger Decl. ¶ 32. That should be the end of the inquiry under *Chevron* step-one.[9]

2. Whether the Entire AAF Project Could Have Been Funded Under Title 23 Is Irrelevant.

Plaintiffs do no better if this Court were to undertake a *Chevron* step-two determination of whether DOT's interpretation of the tax exemption statute is permissible on the assumption that the statutory terms are ambiguous. They do not seriously engage with the broad language of Section 142(m). Instead, they argue that under Sections 142(a)(15) and 142(m), eligibility must be limited to the discrete segments of a project to which Title 23 funding is actually applied. Memo. at 7, 22. This argument has no basis in the statutory language. Once again, the language defines the relevant tax exemption allocation to include "any surface transportation project" that receives Title 23 funding. It does not restrict eligibility to the discrete project components (here, the grade crossing improvements) that are eligible for Title 23 funding. In fact, the statute gives USDOT nearly complete discretion to decide how tax exemptions are allocated: it expressly permits the Secretary to allocate the relevant tax exemptions "*in such manner as the Secretary determines appropriate*." 26 U.S.C. § 142(m)(2)(C) (emphasis added).

Thus, there is no basis for reading into the statute a requirement that tax exemptions may be allocated only for the portions of a project that receive Title 23 funding. Such a requirement would contravene the statutory purpose, which is to encourage private investment in certain types of infrastructure. Private investors will find use of tax-exempt private activity bonds far less attractive if they can be used only for discrete segments of a surface transportation project.[10]

[9] The prior allocations of tax-exempt private activity bonds for the Colorado and Maryland rail projects underscore that USDOT's decision here was not an outlier, but reflects a consistent application of Section 142(m) to projects such as AAF.

[10] Relatedly, Plaintiffs suggest that the AAF Project is ineligible for tax-exempt authority under Section 142(m) because Title 23 supposedly permits funding only for the elimination of hazards of railway-

Indeed, FHWA itself explained in an opinion letter provided to the Internal Revenue Service shortly after the enactment of SAFETEA-LU in 2005 why Plaintiffs' position is wrong. FHWA's letter explained that the term "project" in 26 U.S.C. § 142(m) means the overall transportation project that contains some segment receiving Title 23 funds, rather than only that funded segment by itself: "[W]e believe the most reasonable reading of [the provision] permits the proceeds of private activity bonds (PAB) authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed even though only a portion of that facility receives Federal assistance under title 23." Letter from Edward Kussy, Acting Chief Counsel, FHWA to Donald Korb, Chief Counsel, IRS at 2 (Oct. 7, 2005) (Exhibit 1). As FHWA explained, it is common for only a portion of a transportation facility to receive Title 23 funds, in part because such funds subject recipients to various federal requirements. *Id*. A narrow reading of the word "project," FHWA continued, "would distort the longstanding way in which facilities are actually funded, create needless red tape, and artificially result in the extension of Federal requirements that have nothing to do with the bonding of transportation facilities." *Id*. In addition, FHWA observed that other statutory provisions and the legislative history indicate that Congress did not intend to interfere with how states choose to fund transportation projects, which is exactly what a narrow reading of the word "project" would do. *Id*. Finally, FHWA stressed that tax-exempt private activity bonds are likely to be secured by a revenue stream from the project as a whole, rather than a discrete segment thereof—and that it therefore makes sense to allow such bonds to fund the project as a whole. *Id*. Thus, the very contention that Plaintiffs

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highway grade crossings, and not for other aspects of rail projects. Memo. at 6-7 ("As it pertains to railroad-related projects, Title 23 . . . is clear that it only permits funding for the 'elimination of hazards of railway-highway grade crossings'"). This argument is flawed for the reasons given above, but its factual premise is also incorrect. Funding for railway-highway crossings is *not* the only rail-related funding that Title 23 envisions. Rather, funding under the Transportation Infrastructure Finance and Innovation Act ("TIFIA"), codified at Chapter 6 of Title 23, is available for "intercity passenger bus or rail facilities." 23 U.S.C. § 601(a)(12)(C).

now press was considered and rejected by FHWA. That interpretation is entitled to substantial deference. *Nat'l Treasury Empls. Union*, 754 F.3d at 1041 (court will defer to a reasonable interpretation by the agency).

3. USDOT's Allocation of a Tax Exemption Under Section 142(m) Does Not Render the High-Speed Rail Provisions Superfluous.

Plaintiffs next argue that Congress could not have intended to allow rail projects to receive tax exemptions under Sections 142(a)(15) and 142(m) because doing so supposedly would render superfluous Sections 142(a)(11) and 142(i), which allow tax exemptions for high-speed rail projects (i.e., projects capable of attaining speeds in excess of 150 miles per hour and meeting certain other criteria).[11] Specifically, Plaintiffs contend—on no more than their "information and belief"— that "virtually every single passenger rail project in the country will have railway-highway crossings" and would therefore be eligible for a tax exempt allocation under Sections 142(a)(15) and 142(m). If so, Plaintiffs argue, there would be no need for a separate provision for high-speed rail projects. Memo. at 22. This argument fails.

First, the statute makes clear that the test for qualification under Section 142(m) is whether the surface transportation project "receives" Title 23 funds, not whether there are crossings eligible to receive such funding. States receive a limited amount of Title 23 funding for railway-highway crossings, and it is up to them to decide which crossings receive this limited funding. *See* 23 U.S.C.§ 130. There is no guarantee that a state will choose to allocate Title 23 funds to crossings on a given rail line and thus make a passenger rail project on that line potentially eligible for a tax exempt allocation under Section 142(m). Further, altogether new passenger rail projects are not eligible to receive Title 23 funds for railway-highway crossings.

[11] Trains used in the AAF Project will not be capable of exceeding 150 miles per hour, so the Project does not qualify for private activity bonds under the high-speed rail provision of Section 142.

See 23 U.S.C. § 130 (referring to the use of funds for the elimination of grade crossing hazards); FHWA, "Section 130 Program Overview and Update" (stating that Section 130 funding is not available for "[n]ew grade crossing on a new railway or roadway.") (excerpt attached at Exhibit 2); FHWA regulation at 23 C.F.R. § 646.210. Thus, Plaintiffs' "belief" that virtually every rail project in the country would be eligible under USDOT's construction is unsustainable.[12] Entities seeking a tax exemption allocation for high-speed rail lines that do not or cannot receive Title 23 funds must rely on Sections 142(a)(11) and 142(i). Thus, that provision is not superfluous.

Second, tax-exempt private activity bonds for "surface transportation projects" under Section 142(m) are subject to very different limitations than tax-exempt private activity bonds for "high-speed rail facilities" under Section 142(i). Under Section 142(m)(2), USDOT may allocate a total of up to $15 billion in tax-exempt private activity bonds among surface transportation projects "as the Secretary determines appropriate." 26 U.S.C. § 142(m)(2). However, this $15 billion cap does not apply to high-speed rail allocations, which are subject to an entirely different set of parameters and limits.[13] In addition, USDOT plays absolutely no allocation role with respect to tax exemptions for high-speed rail facilities under Section 142(i).[14]

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[12] For example, the state of Connecticut recently reported that since 1976, only 143 of the 366 active rail crossings in the state have received funding under 23 U.S.C. § 130. Connecticut Railway-Highway Crossing Program, 2014 Annual Report at 1-2, *available at* http://www.ct.gov/dot/lib/dot/documents/dtrafficdesign/safety/rhgcp_report_ct_2014.pdf. Likewise, Indiana has reported that "Since INDOT can only fund 20-25 Section 130 crossing improvement projects a year and there are more than 6,000 public rail-highway crossings statewide, local agencies should not wait for INDOT's funding involvement." *See* Indiana Department of Transportation, Rail-Highway Crossing Program (Section 130), http://www.in.gov/indot/2608.htm.

[13] There is either no limitation on the amount of tax-exempt bond allocations for high-speed rail facilities under Section 142(i) (for government owned rail projects) or annual state-specific limitations (for privately owned rail facilities). If some of the facilities are privately owned, the limitation on allocations for high-speed rail projects is based on state volume limitations under 26 U.S.C § 146. Under that provision, states have a certain amount of annual tax-exempt private activity bonds that they can allocate—as opposed to the $15 billion aggregate limit under Section 142(m).

[14] *See, e.g.* Florida State Board of Administration, Division of Bond Finance, Summary of the Florida Private Activity Bond Allocation Act, *available at*

Rather, whether tax-exempt private activity bonds are issued under that section is a decision left to the discretion of state governments (subject, of course, to compliance with the statutory criteria for eligibility). In sum, USDOT's construction by no means renders Sections 142(a)(11) and 142(i) superfluous.[15]

4. The Legislative History Does Not Support Plaintiffs' Position.

Finally, Plaintiffs argue that the legislative history of SAFETEA-LU supports their position. Of course, the Court need not even look to the legislative history where the statute is clear on its face. *See, e.g.*, *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 238 (D.C. Cir. 2011). But even assuming that legislative history is relevant here, the legislative history that Plaintiffs cite does not support their untenable position that "any surface transportation project" actually means "any highway project."

First, Plaintiffs cite a statement in the House-Senate Conference Report on SAFETEA-LU that "qualified highway or surface freight transfer facilities" includes "any surface transportation . . . project . . . which receives Federal assistance under title 23 of the United States Code (relating to Highways)." Memo. at 20; H.R. Rep. No. 109-203, at 1144 (2005). Plaintiffs emphasize the phrase "relating to Highways." But that phrase (which was not included

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https://www.sbafla.com/fsb/portals/bondfinance/Administered_Programs/PABsummaryact.pdf (describing how Florida allocates PABs and indicating that tax exemption allocations under Section 142(m) are subject to a separate cap administered by the USDOT).

[15] More fundamentally, the fact that a given type of project might be eligible for tax-exempt bond authority under two different provisions of Section 142 does not mean that one of the allocation provisions is meaningless. Many types of transportation projects are eligible for federal assistance under multiple statutory provisions. For example, the same international bridge and tunnel projects that are eligible for private activity bonds can also receive loans made pursuant to TIFIA. *See* 23 U.S.C. § 601(a)(12) (defining "project" to include "a project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible"); 26 U.S.C. § 142(m)(1)(B) (defining "qualified highway or surface freight transfer facilities" to include "any project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible and which receives Federal assistance under title 23.").

in the statute) merely reiterates that Title 23 relates to highways. It does not establish that Congress did not mean what it said when it defined "qualified highway or surface freight transfer facilities" to include "*any* surface transportation project" that receives Title 23 funding. 26 U.S.C. § 142(m)(1).

Second, Plaintiffs cite an informal July 28, 2005 Memorandum prepared by Senate Finance Committee[16] staff stating that the bill that became SAFETEA-LU authorizes $15 billion in tax-exempt bond authority "to finance highway projects and rail-truck transfer facilities." Memo. at 20-21. But that 5-page Memorandum purports to provide only an "overview" of the provisions of the bill that became SAFETEA-LU, and by no means provides every legislative detail found in the 830 pages of SAFETEA-LU legislative text. 2005 Memorandum at 1. The 2005 Memorandum's summary reference to "highway projects" is fairly read as a paraphrase of the statutory phrase "qualified highway . . . facilities." It certainly cannot be read to overcome Congress's clear statement that "any surface transportation project" that receives Title 23 funding is eligible for tax-exempt authority.

Third, finding nothing more to support their claims in the legislative record, Plaintiffs cite to an FHWA report proposing a particular definition of "highway project." Memo. at 21. This argument is unavailing because FHWA's proposed definition was with respect to terms found in 23 U.S.C. § 327, a statute that has nothing to do with USDOT's decision to allocate tax exempt status to private activity bonds. And in any event, the definition of "highway project" is irrelevant here: The relevant statute is Section 142(m) and there Congress provided a broad definition of qualified projects that includes rail projects.

[16] U.S. Senate Fin. Comm. Mem. on the Conference Title of Transportation Reauthorization Bill (July 28, 2005), *available at* http://www.finance.senate.gov/download/?id=5264AC0E-E831-4275-9597-EA1154F9D2A4 ("2005 Memorandum").

D. Plaintiffs' NEPA Claims Fail on the Merits.

Given that Plaintiffs have adopted the NEPA arguments set forth in the Indian River Motion for Preliminary Injunction (Memo. at 23), AAF will not repeat its full response to those arguments here. Instead, AAF adopts by reference the arguments set forth at pages 24-31 of AAF's May 11 Opposition, Case 1:15-cv-00460 (ECF No. 22), and briefly summarizes those points below.

As set forth in AAF's May 11 Opposition, USDOT has nowhere near the level or kind of control necessary to make its tax exemption authorization a "major Federal action" triggering NEPA. AAF does not need USDOT's approval to move forward with the Project, and USDOT lacks authority to prevent or control the environmental harms alleged by Plaintiffs. USDOT has no control over the design, construction, or operation of the AAF Project. Its tax-exemption authorization is just that and nothing more—an authorization that AAF remains free to use (by seeking the issuance of bonds by the FDFC) or to disregard as it moves forward with the Project. Thus, USDOT lacks the requisite "power to control the nonfederal activity." *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513-14 (4th Cir. 1992). Indeed, the statute authorizing the tax exemptions, 26 U.S.C. §§ 141-42 (2012), gives USDOT no authority to regulate the projects to be funded.

In addition, this case involves no federal funding—the USDOT authorization merely determines that the interest on bonds used to fund the Project will be exempt from federal income tax. The bonds themselves are to be issued by FDFC, not by the federal government. And the capital is provided by the private investors who will purchase the bonds, not by the federal government. Thus, USDOT's authorization of a tax exemption is quite different than a federal loan, which gives the federal government a direct financial stake in a project. *See Sugarloaf*, 959 F.2d at 514 (finding no major federal action where agency "does not control the

financing, construction or operation of the project. Although the Facility receives an economic benefit, no direct federal funding or other substantial federal assistance is provided, and no licensing action is involved.").

Moreover, the value of the tax exemption is a small percentage of the total Project expense. If the FDFC decides to issue the tax-exempt bonds, AAF would be able to secure $1.75 billion in proceeds from the private investors who purchase the bonds. But the "cost" to the federal government of the tax exemption—the projected amount of forgone tax revenue—is only between $271-294 million, and is expected to be entirely offset—and then some—by $650 million in new tax revenue from the Project. *See* Marcus Decl. ¶ 3; Reininger Decl. Ex. D at 34-35.[17] Thus, the value of the federal allocation, if one ignores the anticipated new tax revenue, is only between 9.3% to 10.1% of the total expected cost of the Project, not including land and easements, and only 15.4% to 16.8% of the total bond proceeds. *See* Reininger Decl. ¶ 20. This is not sufficient to trigger NEPA, as "the courts have required a *significant* level of federal funding in order to meet NEPA's 'major Federal action' requirement." *Sancho v. U.S. Dep't of Energy*, 578 F. Supp. 2d 1258, 1266-67 (D. Haw. 2008) (emphasis added) (no "major Federal action" where federal government contributed $531 million toward construction of $5.84 billion super-collider); *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 329 (9th Cir. 1975) (no major federal action where federal funding was 9.5% of entire project); *Riverfront Garden Dist. Ass'n, Inc. v. City of New Orleans*, No. CIV. A. 00-544, 2000 WL 35801851, *2, *7 (E.D. La. Dec. 11, 2000) (NEPA inapplicable where FHWA paid 17% of the project cost, project had been planned well before the agency became involved, and the agency exercised insufficient

[17] The Project is also expected to have other positive economic effects, both direct and indirect, resulting in a total economic impact to the State of Florida of roughly $6.4 billion over 8 years. Reininger Decl. ¶ 25.

discretion and control over the design, location or choice of alternatives). Here, of course, there is no federal funding at all.

Plaintiffs also assert that USDOT's allocation decision "precludes any meaningful discussion of alternatives" in the environmental impact statement that FRA is preparing in connection with AAF's application for a federal loan. Memo. at 23. However, USDOT's allocation decision in no way limits the choice of reasonable alternatives for FRA. The allocation decision did not (and could not) prescribe or foreclose any particular route, or any other alternative that FRA may consider, including outright denial of AAF's loan application. FRA remains entirely free to reject that application, or to grant it subject to conditions. Indeed, the allocation decision *reaffirms* AAF's preexisting obligation to comply with any requirements imposed by FRA or other agencies, including requirements concerning environmental mitigation. Thus, Plaintiffs' argument that they "will have no meaningful opportunity to later challenge the adequacy of the EIS" because the issuance of the tax-exempt private activity bonds will render the EIS moot is entirely off-base. Memo. at 3. The FRA EIS will not be "mooted" by any investments in the Project, including the tax-exempt private activity bonds.

USDOT has properly concluded throughout the history of its private-activity-bond program that the absence of a significant degree of agency involvement with, or control over, projects funded by private activity bonds compels a determination that USDOT's role with regard to those projects does not constitute a "major Federal action" for purposes of NEPA. Given the relatively small value of tax exemption at issue in this case relative to the total cost of the Project, and given that USDOT does not have a significant degree of involvement with, or control over, the Project, USDOT properly determined that its allocation decision was not a

major Federal action under NEPA.[18] *See DOT v. Public Citizen*, 541 U.S. 725, 767 (2004) (rejecting the argument that "an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect").

II. Plaintiffs Have Failed to Identify Any Irreparable Harm That a Preliminary Injunction Would Prevent.

A party seeking to demonstrate irreparable harm must meet a demanding standard. *First*, "the party seeking injunctive relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'" *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (second alteration in original; citations omitted); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Circ. 2006) (same); *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 39 (D.D.C. 2013) (same). *Second*, "the movant must show that the alleged harm will *directly* result from the action which the movant seeks to enjoin." *Wis. Gas*, 758 F.2d at 674 (emphasis added); *Sierra Club*, 990 F. Supp. 2d at 39 (same). *Third*, the injury must be "both certain and great," and "actual and not theoretical." *Wis. Gas*, 758 F.2d at 674. To justify the extraordinary remedy of an injunction, the injury must be more serious than a mere annoyance. *See Committee of 100 on the Federal City v. Foxx*, __ F. Supp. 3d __, No. 14 CV 1903 (CRC), 2015 WL 1567902, at *7 (D.D.C. Apr. 7, 2015) (Cooper, J.).

A. The Harms Identified By Plaintiffs Cannot Justify a Preliminary Injunction.

Plaintiffs' argument on irreparable harm falls far short of the necessary showing. Plaintiffs assert that "DOT has all but mooted the FRA's ongoing environmental review," Memo. at 3, and that without an injunction, they will be "permanently deprive[d] … of the

[18] Plaintiffs also allege that "DOT's own internal NEPA procedures require that when the Secretary's Office originates a major federal action . . . the Secretary's Office . . . is responsible for approval of the EIS." Memo. at 23-24. However, since the Secretary's Office has not originated a major federal action in this case for the reasons outlined above, this point is irrelevant.

opportunity (guaranteed by NEPA) to persuade Defendants that the Project should be rejected in favor of various alternatives, including a 'no action' alternative." Memo. at 2; *see also id*. at 25 (claiming that Plaintiffs will be "deprived of the opportunity to influence the outcome of the ongoing FRA environmental review" and that they will "face an argument that an[y] future challenge to the FRA's final EIS is moot").

As an initial matter, "allegations of harm based on . . . alleged procedural violations alone are insufficient to demonstrate irreparable injury." *Appalachian Voices*, 725 F. Supp. 2d at 106. For that reason alone, Plaintiffs have failed to meet their burden. Moreover, as explained above, Plaintiffs fundamentally misunderstand the nature of USDOT's decision, which was solely whether to approve the tax exempt status of bonds to be issued by some other, non-federal entity. USDOT was not deciding, and has no authority to decide, whether the AAF Project should go forward, or to consider alternatives to the Project. Nor does USDOT's decision in any way short-circuit the environmental review that FRA is undertaking in connection with AAF's application for a RRIF loan and in connection with permits that AAF requires from other federal agencies, including the Coast Guard and the U.S. Army Corps of Engineers. FRA remains entirely free to reject the loan application or to grant it subject to conditions; and the other agencies likewise remain free to decide whether to grant the permits and what, if any, conditions to impose. Indeed, USDOT's allocation decision *reaffirmed* AAF's preexisting obligation to comply with any requirements imposed by FRA or other agencies, including mitigation measures that result from their environmental review.

Plaintiffs' main argument for irreparable harm, ironically, has nothing to do with any harm they themselves will face. Instead, they argue that "hundreds or thousands of bond-holders" could face harm if Plaintiffs ultimately prevail and the Court then must "unwind an

unlawful scheme." Memo. at 24. In the first place, Plaintiffs cannot justify a preliminary injunction based upon hypothetical harm that might befall third parties; instead, they must identify an irreparable injury of their *own*. *See Winter*, 555 U.S. at 22 (an "applicant must demonstrate that in the absence of a preliminary injunction, '*the applicant* is likely to suffer irreparable harm before a decision on the merits can be rendered'" (quoting 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.1995) (emphasis added))). Moreover, this litigation is not secret; any prospective bond-holder truly concerned about the Court's ability to devise a remedy in the event that Plaintiffs prevail can simply choose not to buy the bonds. *See Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012) (no irreparable harm when parties could avoid harm).

Plaintiffs also contend, in conclusory fashion, that they will "suffer the harms associated with the Project itself—increased noise, traffic congestion, safety hazards, pollution, economic harm, and so on." Memo. at 25. For several reasons, the harms that allegedly will result from the Project itself cannot justify a preliminary injunction.[19]

First, the harms allegedly resulting from the Project are all contingent upon the Project's construction and operation, Memo. at 7-8, 12-13, and therefore are not imminent: completion of improvements to the rail line is subject to further permitting, and passenger rail service through Martin County is not scheduled to begin until mid to late 2017. *See* Reininger Decl. ¶ 20. In *Appalachian Voices*, the court rejected the argument Plaintiffs advance here in almost identical circumstances. There, the plaintiffs sought to preliminarily enjoin a tax credit awarded to

[19] Indeed, many of the "facts" regarding harms set forth in Plaintiffs' declarations are merely vague, conclusory statements, such as "the resulting increase in the number of passenger and freight rail trains traveling through my community will adversely impact the safety and quality of life in my community." ECF No. 17-7 at ¶ 6. Others relate to impacts of freight trains, which as explained below, are not impacts caused by the AAF Project. *See, e.g.*, *Id.* at ¶ 7.

construct a new power plant. The court held that the plaintiffs' injuries were not sufficiently "imminent" because they would occur only "when the Cliffside plant becomes operational." 725 F. Supp. 2d at 105. Here, for the same reasons, there is no "clear and present need for extraordinary equitable relief to prevent harm." *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 50 (D.D.C. 2011) (internal quotation marks omitted).

Second, a preliminary injunction would not prevent the harms that allegedly will result from the Project. An injunction would not prevent the continuation of freight rail service on the rail line at issue and would not prevent the AAF Project from moving forward. As noted above, AAF plans to construct improvements and operate the railway regardless of whether it can benefit from tax-exempt bonds. *See* Reininger Decl. ¶¶ 10, 58-65. And "[i]t would make little sense . . . to conclude that a plaintiff has shown irreparable harm when the relief sought would not actually remedy that harm." *Sierra Club*, 825 F. Supp. 2d at 153; *Mott Thoroughbred Stables, Inc. v. Rodriguez*, __ F. Supp. 3d ___, No. CV 15-333 (RBW), 2015 WL 1570167, at *8 (D.D.C. Apr. 8, 2015) ("[A] preliminary injunction is particularly ill-suited [where] it would not necessarily redress the alleged irreparable harm."); *Appalachian Voices*, 725 F. Supp. 2d at 105 (finding no irreparable harm where "an injunction suspending the allocation of the tax credit 'w[ould] not prevent Duke [E]nergy from moving forward with [the Cliffside] project'") (second and third alterations in original).

Third, the harms that Plaintiffs allege will result from the Project are neither "certain" nor "great," and thus are not the kinds of harms that justify a preliminary injunction. *Wis. Gas*, 758 F.2d at 674. Plaintiffs' allegations regarding delay at grade crossings, noise, "waterways [congestion], traffic congestion, air pollution," construction impacts, economic harms, and harms to parks and neighborhoods are the consequence of populated areas developing around a

preexisting railroad track. Memo. at 7-9, 12-13, 25. Notwithstanding their cries that the sky is falling, the reality is that AAF's passenger service will be using a rail corridor that was established over 120 years ago, and has been continuously operated since that time. *See* Reininger Decl. ¶¶ 4-5, 7-9. That right-of-way was originally designed to support both passenger and freight service, and in fact *did* support both between 1895 and 1968. *Id.* ¶ 8. While some of the double mainline track was removed 50 years ago, the former subgrade, embankments, and track bed are in large part intact, reducing the scope of work necessary to reinstall double track and complete the other planned improvements. *Id.* ¶ 38. As recently as 2007, an average of 26 freight trains traversed the rail corridor per day. *Id.* ¶ 10. Currently, an average of 14 do, each 8,800 to 14,000 feet long, and each taking an average of ten minutes to pass through a grade crossing. *Id.* Plaintiffs fail to explain why the shared use of the same right-of-way by state-of-the-art passenger trains – each of which is no more than 900 feet long and will pass through a grade crossing in under a minute, *see id.* ¶ 18 – would cause grievous injuries that are not already being experienced.[20] *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1127, 1146-47 (D. Minn. 2010) (irreparable harm factor did not weigh in favor of an injunction where construction of oil pipeline was to be "installed primarily within or adjacent to an existing pipeline corridor").

This Court's decision in *Committee of 100* is instructive. There, the plaintiffs claimed that the expansion of a rail tunnel in their vicinity would cause local disruption, inconvenience,

[20] Plaintiffs also assert that their injuries will result from "the ability of the railroad to run additional freight trains in the corridor based on the new facilities." Memo. at 7. However, AAF's planned improvements are for the purpose of passenger service, and are not necessary for or driven by FECR's level of freight service. Communities throughout the corridor will benefit from this extensive modernization. *See* Reininger Decl. ¶¶ 33-39. Upgraded grade crossings, improved communications and enhanced signaling will further increase the system's overall efficiency, reliability and safety. *Id.* While these improvements will also benefit FECR, they are not being made for FECR, and they are not necessary for FECR to increase its freight service. FECR's freight service necessarily fluctuates based on shipper demand. As noted above, FECR ran an average of 26 freight trains per day in 2007, but today runs an average of 14. *Id.* at ¶ 10. Thus, the level of freight service is not constrained by the existing infrastructure.

"noise, dust, and vibrations," and a loss of property value, *see Committee of 100*, 2015 WL 1567902, at *6-8. Yet this Court found those allegations inadequate to demonstrate irreparable harm. *Id*. The Plaintiffs here also have not shown that their alleged harms, including any increase in air pollution, noise, or traffic, will be more than *de minimis*, particularly given the existing rail traffic and considering that the Project will displace automotive travel. *See* Reininger Decl. ¶¶ 27-28.

Finally, other harms that Plaintiffs allege are speculative. Plaintiffs have offered no evidence that "[t]he Project will increase safety hazards on the railroad track." Memo. at 13. In fact, AAF's investments in grade crossings, bridges, and track design will make the right-of-way *safer* than it currently is, reducing the risk of accident. *See* Reininger Decl. ¶¶ 29-34. In *Committee of 100*, the Court ruled that a claimed increase in the risk of train accidents, without support, was "largely speculative" and insufficient to warrant an injunction, 2015 WL 1567902, at *6-8. The same conclusion applies here.[21]

III. The Balance of Harms Tips Strongly Against a Preliminary Injunction.

"Although allowing challenged conduct to persist certainly may be harmful to a plaintiff and the public, harm can also flow from enjoining an activity, and the public may benefit most from permitting it to continue." *Sierra Club*, 990 F. Supp. 2d at 41. Accordingly, the Court "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24. Here, Plaintiffs have failed to identify any imminent harm likely to result from USDOT's authorization of tax-exempt status. Indeed, their short argument on the balance of harms relies entirely on harms that have

[21] Additionally, all of the transportation over the line, including the transportation of chemicals, is subject to an extensive federal rail safety regime administered by the FRA and, in the case of hazardous materials, the Pipeline and Hazardous Materials Safety Administration. *See* 49 C.F.R. Parts 100 through 299.

already been shown to be unlinked to the challenged allocation decision. Yet Plaintiffs entirely ignore the significant monetary damage that an injunction would inflict on AAF – to the tune of at least $277 million dollars. *See* Marcus Decl. ¶ 3. Such harm is no mere "inconvenience," as Plaintiffs would have it. Memo. at 26.

Plaintiffs assert that USDOT could "simply choose" to extend the July 1, 2015 deadline for issuing the tax-exempt bonds. Memo. at 25. However, the issue before this Court is whether Plaintiffs have met their burden to show the irreparable harm and likelihood of success required for the extraordinary relief of a preliminary injunction. The fact that USDOT might be able to extend the deadline on its allocation decision does not relieve Plaintiffs of that burden. Moreover, even if USDOT could extend its deadline, a preliminary injunction would still delay AAF from issuing its bonds, and delay imposes significant costs on AAF, which is incurring substantial carrying costs resulting from the hundreds of millions of dollars it has already invested in the Project. *See* Reininger Decl. ¶¶ 41, 45, 64.

In order to avoid the significant costs of delay, AAF intends to push forward with the Project regardless of whether it is able to issue bonds that are exempt from federal taxation. *Id.* ¶¶ 60-61. Therefore, AAF would suffer an immediate, clearly identifiable, and irreparable harm if USDOT's grant of tax exemption is deprived of effect. While financing options other than federally tax-exempt bonds are available to AAF, and AAF stands ready to pursue them, they would necessarily cost more. *Id.* Even if AAF is later able to obtain tax-exempt financing, it will never be able to recoup the additional interest it has paid in the meantime.

Because Plaintiffs will suffer no harm from USDOT's authorization of tax-exempt bonds, and because AAF clearly will, the balance of equities tips strongly in favor of denying Plaintiffs' requested injunction. *See Committee of 100*, 2015 WL 1567902, at *20 (concluding that the

economic harms the defendant would suffer due to delays in constructing outweighed the plaintiffs' speculative harms).

IV. The Public Interest Counsels Against a Preliminary Injunction.

Plaintiffs have also failed to meet their burden as to the final preliminary injunction factor – whether the proposed injunction is in the public interest. It is well-established that, in exercising their discretion, courts of equity should "pay particular regard for the public consequences of employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

In creating a USDOT program for the allocation of tax exemption for private activity bonds, *see* 26 U.S.C. § 141, Congress has determined that the public interest favors support for private development of precisely the type of large scale transportation project that Plaintiffs attempt to thwart through this lawsuit. *Cf. Committee of 100*, 2015 WL 1567902, at *1, *20 (noting that the nation's transportation infrastructure . . . is rapidly deteriorating and remarking on the "public's substantial interest in modernizing" the challenged railway expansion). The Obama Administration has likewise determined that it is in the public interest to "invest[] in high-performance passenger rail service to meet the transportation needs of our growing population,"[22] as well as to increase the availability of tax-exempt funding for undertakings like the Project.[23]

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[22] Office of Mgmt. & Budget, Exec. Office of the President, *Statement of Administration Policy, H.R. 4745 — Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2015* (June 9, 2014), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr4745h_20140609.pdf.

[23] Thus, Section 1406 of the Administration's proposed Grow America Act would "increase by $4 billion the amount of qualified highway or surface freight transfer facility bonds . . . consistent with the Administration's policy of supporting investment in highway and freight transfer projects." USDOT Grow America Act Summary, *available at* http://www.dot.gov/sites/dot.gov/files/docs/GROW_AMERICA_Act_Summary_1.pdf.

With respect to the AAF Project specifically, the Florida public stands to benefit both economically and a reduction in the demand on overtaxed and less environmentally friendly automobile travel. *See* Reininger Decl. ¶¶ 26-28; *see also cf. Nat'l R.R. Passenger Corp. v. United Transp. Union*, Civ. A. No. 93-1750, 1993 WL 364718 (D.D.C. Aug. 24, 1993) (indicating that loss of intercity passenger rail service would "seriously and substantially" affect public interest). The Florida public also stands to benefit from the improvement of an existing rail corridor. AAF is enhancing the safety of that corridor in a number of ways, none of which would be happening but for the Project. *See* Reininger Decl. ¶¶ 29-31, 33-36.

While Plaintiffs' proposed injunction would not prevent the construction of the Project, enjoining issuance of the tax-exempt bonds may delay this important Project and would raise AAF's overall costs to build and operate the rail line—and could ultimately increase the amount passengers would have to pay to use it. The public benefits that will accrue from AAF's Project, as well as the public detriment that will result if an injunction issues, strongly favor denial of Plaintiffs' motion.

V. If the Court Grants the Requested Preliminary Injunction, It Should Require a Substantial Bond Sufficient to Cover AAF's Certain Damages.

Contrary to Plaintiffs' suggestion, if this Court grants an injunction, it should require the posting of a bond in an amount sufficient to cover at least a meaningful part of the substantial additional financing costs AAF will have to incur. A bond of $50 million would cover between 12-18% of those costs, and is the minimum that should be established. Plaintiffs' proposed "nominal bond" is not remotely appropriate here, particularly considering the context in which this litigation arises.

When the FECR right-of-way was established in the late 1800s, the area now known as Martin County was largely undeveloped and essentially unpopulated. The County itself was not

established until 1925, and it had a mere 5,111 residents in 1930.[24] The area became habitable in large part because of the railway and its population has grown as a result, though not nearly as much as in the four urban centers which it lies between. Martin County's current population, approximately 153,000, is miniscule compared to that of Orange, Palm Beach, Broward, and Miami-Dade Counties, which are collectively home to more than 7.1 million residents—or roughly 36% of Florida's entire population.[25]

While Martin County residents may not need modern passenger rail service, Orange, Palm Beach, Broward, and Miami-Dade County residents and visitors most certainly do. They suffer every day from badly congested roads, and an equally overburdened aviation system, and are in dire need of the alternative the Project provides. *See* Reininger Decl. ¶¶ 27-28.

Nonetheless, because some of Martin County's 153,000 residents are hostile to the rail line which existed long before they did, their local leaders are now seeking to prevent the millions of people who would benefit from the Project from obtaining it. They seek to make that alternative more costly, in the hope that doing so will prevent it from happening. And they have the audacity to suggest that they should only have to pay a nominal amount to obtain that "relief," regardless of the consequences to others.

In *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755 (D.C. Cir. 1980), the D.C. Circuit opined that Rule 65(c) gives district courts the authority to dispense with the normal security requirement "where the restraint will do the defendant 'no material damage.'" *Id.* at 759 (citation omitted); *see also Lofton v. District of Columbia*, 7 F.

[24] *See* http://en.wikipedia.org/wiki/Martin_County,_Florida (last visited on May 17, 2015); U.S. Decennial Census, 1930.

[25] *See* http://quickfacts.census.gov/qfd/states/12000.html (page last visited on May 17, 2015). The U.S. Census Bureau's most current population estimates reflect the following statistics: Martin County (153,392); Orange County (1,253,001); Palm Beach County (1,397,710); Broward County (1,869,235); Miami-Dade County (2,662,874); Florida statewide (19,893,297).

Supp. 3d 117, 125 n. 7 (D.D.C. 2013) (same). That is clearly not the case here. The requested injunction would do AAF significant damage, to the tune of *at least* $277 million dollars. *See* Marcus Decl. ¶ 3.

The decisions on which Plaintiffs rely as support for their "nominal bond" argument are distinguishable, as the plaintiffs there were individuals or non-profit environmental organizations with "extremely limited financial resources." *See Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) (noting that the plaintiff, an individual whose car was seized, had "extremely limited financial resources"); *Natural Res. Def. Council v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971) (describing the plaintiffs as "three nonprofit environmental organizations" unable to post a meaningful bond), *aff'd*, 458 F.2d 827 (D.C. Cir. 1972). In the latter decision, the court also emphasized that the injunction would merely cause the government a revenue loss, which it distinguished from "pecuniary damage to a private party." *Morton*, 337 F. Supp. at 169. The court noted that "[it] would be a mistake" to treat the two the same. *Id.*

Here, while Plaintiffs *say* that a large bond would "pose significant challenges" for them, they have proffered no *evidence* of that—only bare conclusory assertions. *See* Memo. at 27. And while they claim that they "do not have comparable resources to post more than a nominal security," Memo. at 27, the reality is that Martin County is one of Florida's wealthiest counties and can well afford a meaningful bond. It has already appropriated $1.4 million for this legal battle, which represents less than 0.5% of its current annual budget, and it has more than $71 million in annual excess property tax capacity on top of that budget.[26] If the County's taxpayers

[26] For appropriation and budget, *see* http://www.martin.fl.us/documents2010/BOCC_Agenda/FY2015/2015-02-17/2015-02-17%20Action%20Summary.pdf, and http://www.martin.fl.us/web_docs/adm/web/aid_Martin_County_Budget/48_FY15_Budget_in_Brief.pdf. Under Fla. Const. Art. 7 § 9(b), ad valorem taxes for county purposes are capped at 10 mills. *See* http://www.leg.state.fl.us/Statutes/Index.cfm?Mode=Constitution&Submenu=3&Tab=statutes#A7S09.

are truly intent on blocking AAF's efforts to obtain the most cost-effective financing for the Project, they should accept the risk that they will have to pay for the losses an injunction would cause, through existing or increased taxes, if the injunction were later found to have been wrongfully issued.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

In 2014, Martin County's millage rate was 5.9651 mills, and its total taxable value was $17,713,775,850. *See* http://dor.myflorida.com/dor/property/resources/pdf/cp/53martin2014.pdf.

RESPECTFULLY SUBMITTED this 15th day of May, 2015.

/s/ Cynthia Taub
David H. Coburn (DC #241901)
Cynthia Taub (DC #445906)
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
dcoburn@steptoe.com
ctaub@steptoe.com

Eugene E. Stearns (Fl. Bar #149335)
Ryan T. Thornton (Fl. Bar #99195)
Admitted Pro Hac Vice
STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33015
Telephone: (305) 789-3200
Facsimile: (305) 789-3395
estearns@stearnsweaver.com
rthornton@stearnsweaver.com

Thomas J. Perrelli (DC #438929)
Matthew E. Price (DC #996158)
Joshua M. Segal (DC #975949)
JENNER & BLOCK LLP
1099 New York Avenue, NW Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 630-6066
tperrelli@jenner.com
mprice@jenner.com
jsegal@jenner.com

Attorneys for AAF Holdings LLC