

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC.; GUARDIANS OF
FLUSHING BAY, INC.; and DITMARS
BOULEVARD BLOCK ASSN., INC.;

Petitioners,

v.

THE U.S. FEDERAL AVIATION
ADMINISTRATION; STEPHEN
DICKSON, in his official capacity as FAA
ADMINISTRATOR; and PORT
AUTHORITY of NY & NJ;

Respondents.

No. _____

Petition for Review

Riverkeeper, Inc., Guardians of Flushing Bay, Inc., and Ditmars Boulevard Block Association, Inc., hereby petitions the Court for review of the decision and order of the Federal Aviation Administration for the environmental review of the LaGuardia Airport (LGA) Access Improvement Project entered on July 20, 2021

Pursuant to Section 4370m-6(a) of the National Environmental Policy Act (NEPA), 49 U.S.C. § 46110(a), the Administrative Procedure Act 5 U.S.C. §§ 701-706, the Department of Transportation Act of 1966 (DOTA), 28 U.S.C. §138(a), 49 U.S.C. § 303(c), Passenger Facility Charge Program Regulations, 49 U.S.C. § 40117, 14 C.F.R. § 158.15(b)(6), and Rule 15(a) of the Federal Rules of Appellate

Procedure, Riverkeeper Inc, Guardians of Flushing Bay, Inc., and Ditmars Boulevard Block Association, Inc. (collectively, Petitioners) hereby petition this Court to review the July 20, 2021 order of the Federal Aviation Administration (FAA) approving the NEPA Environmental Impact Statement (EIS) and Department of Transportation Act of 1966 Section 4(f) Evaluation of the proposed LaGuardia Airport (LGA) Access Improvement Project (proposed project). This Court has jurisdiction directly to review the FAA Order pursuant to 49 U.S.C. § 46110(a), Section 4370m-6 of NEPA, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Petitioners respectfully submit this petition in accordance with Federal Rule of Appellate Procedure 15(a).

FAA issued a Notice of Intent to complete an EIS on the proposed project on May 3, 2019. Guardians of Flushing Bay commented on the Draft Scope of the EIS on June 14, 2019. Riverkeeper and Ditmars Boulevard Block Association commented separately on the Draft Scope of the EIS on June 17, 2019. FAA issued a Notice of Availability of a Draft EIS for the AirTrain on October 7, 2019. By and through the Pace Environmental Litigation Clinic, Riverkeeper and Guardians of Flushing Bay submitted comments on the Draft EIS on October 20, 2020. Guardians of Flushing Bay submitted supplemental comments on the Draft EIS on October 20, 2020. Ditmars Boulevard Block Association also submitted comments on the Draft EIS on October 20, 2020. FAA issued a Notice of

Availability for the Final EIS on the AirTrain on March 19, 2021, less than 23 months following the Notice of Intent. On April 6, 2021, Riverkeeper submitted a letter to the United States Department of Transportation, copying FAA and others, which letter reiterated outstanding concerns about the Project and FAA's analysis that were left unaddressed in the Final EIS. FAA published the Record of Decision to approve the proposed project to proceed to construction on July 20, 2021 along with a letter response to Riverkeeper dated July 19, 2021.

Under Executive Order 13807, FAA was charged with completing the EIS for the AirTrain within two years for the \$2.05 billion major infrastructure project in a densely populated, environmental justice community, a timeframe much faster than the average of more than four years for similar major transportation infrastructure project reviews. New York State Governor Andrew Cuomo and project applicant/Respondent Port Authority of New York and New Jersey (Port Authority) pushed the FAA to move even faster. In order to meet this accelerated timeline FAA pursued a strategy of narrowing the Purpose and Need Statement for the proposed project and creating eight arbitrary screening criteria to preempt consideration of 45 transit alternatives. Such alternatives include, but are not limited to, extending subway service restarting ferry service to the airport—each of which would have been direct one-seat rides from midtown Manhattan—or

optimizing bus transit. The “AirTrain” was the only proposed action that survived this preliminary screening process.

The proposed AirTrain rail system would span approximately 2.3 miles in length, traversing above a roughly 2,100-foot stretch of Malcolm X Promenade at World’s Fair Marina and continuing through East Elmhurst, Queens, an environmental justice community. Although FAA has incorporated a \$23 million parkland improvement fund and a \$7.5 parkland maintenance fund in the Record of Decision, it has left planning for expenditures of those funds solely within the discretion of Port Authority in consultation with the New York City Parks Department. Moreover, due to the lack of advanced planning, the funding for parkland improvements falls woefully short of other similar parkland projects on Brooklyn and Queens waterfronts.

The flaws in FAA’s methodology and conclusions render the EIS and Section 4(f) Evaluation deficient under the National Environmental Policy Act and the Department of Transportation Act of 1966. Specifically, FAA: 1) inappropriately constrained its Purpose and Need Statement, so as to preclude meaningful consideration of non-rail transit alternatives; 2) applied arbitrary, cherry-picked exclusory screening criteria in an uneven manner to exclude all but Port Authority’s preferred alternative; 3) failed to properly identify and consider the cumulative impacts of the proposed action when added to other past, present,

and future proposed projects; 4) approved the use of parkland property along Malcolm X Promenade despite the existence of feasible and prudent alternatives; 5) FAA failed to complete all possible planning to mitigate the impacts to Malcolm X Promenade from construction and operation of the AirTrain; 6) inappropriately granted Port Authority authorization to use Passenger Facility Charges to moving employee parking offsite to make room for concessions; and 7) failed to consider the impact of these concessions. These deficiencies in the Record of Decision denied the public important information about the feasibility, cost, environmental impacts, and regional transit and jobs benefits of the alternatives. The public simply has no way to determine whether the AirTrain is in the best interests of the region with the least impact on local communities and the environment.

Petitioners seek relief from the FAA's unlawful approval of the proposed project in accordance with the Federal Rules of Appellate Procedure Rule 15(a) and 49 U.S.C section 46110. The proposed project development will directly harm the environment and community members who use and enjoy Malcolm X Promenade and Flushing Bay. Petitioners' interests therefore will be adversely and irreparably impacted by the FAA's failure to comply with NEPA, DOTA and Passenger Facility Charge Program regulations unless the relief requested is granted.

Therefore, Petitioners respectfully request this Court to set aside the FAA's July 20, 2021 Order as arbitrary and capricious, an abuse of discretion, and contrary to law. Additionally, Petitioners respectfully request this Court to set aside the FAA's March 19, 2021 Final EIS and Section 4(f) Evaluation upon which the Record of Decision was based, as arbitrary and capricious, an abuse of discretion, and contrary to law. Finally, Petitioners request this Court to require the FAA to prepare an EIS and Section 4(f) Evaluation for the Project in accordance with the law.

Date: September 20, 2021



Todd D. Ommen
Pace Environmental Litigation Clinic, Inc.
Attorneys for Petitioners
Elisabeth Haub School of Law
78 North Broadway
White Plains, New York 10603
tommen@law.pace.edu
(914) 422-4343