

Case No. 07-1385

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

COUNTY OF DELAWARE, PA, a political subdivision
of the Commonwealth of Pennsylvania, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents

PETITION FOR REVIEW OF AN ACTION
OF THE FEDERAL AVIATION ADMINISTRATION

BRIEF OF THE FEDERAL RESPONDENTS

Oral Argument Scheduled for October 7, 2008

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

The certificate required by D.C. Cir. Rules 28 and 32.1 can be found in Petitioners' Opening Brief. Federal Respondents are not aware of any additional parties, rulings, or related cases that are not identified in Petitioners' certificate.

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*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

CAA	Clean Air Act
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FONSI	Finding of No Significant Impact
FSEA	Final Supplemental Environmental Assessment
LAS	McCarran International Airport, Las Vegas, NV
NAAQS	National Ambient Air Quality Standards
ROD	Record of Decision
SIP	State Implementation Plan

ORAL ARGUMENT SCHEDULED FOR OCTOBER 7, 2008

STATEMENT OF JURISDICTION

On July 30, 2007, Federal Respondent Federal Aviation Administration (“FAA”) published a notice in the Federal Register entitled *Federal Presumed to Conform Actions Under General Conformity*. 72 Fed. Reg. 41,565-02. (“Presumed to Conform List”). On September 14, 2007, Petitioners filed a petition for review with this Court identifying that Federal Register notice as the challenged agency decision. Petitioners invoke this Court’s jurisdiction to review that publication under the Federal Aviation Act (“Aviation Act”), 49 U.S.C. § 46110(a), which permits for the filing of petitions in the federal courts of appeals for review of certain actions of the Secretary of Transportation, the Under Secretary of Transportation, or the Administrator of the FAA. Petitioners’ Opening Brief (“Br.”) at 1.

Federal Respondents dispute Petitioners’ statement of jurisdiction. As explained in this brief, the Aviation Act does not grant this Court jurisdiction to review the agency publication identified in the petition for review. For this reason, Federal Respondents filed a Motion to Dismiss for Lack of Jurisdiction with this Court on November 21, 2007. This Court referred that motion to the merits panel and has requested the parties to make any such arguments anew in the briefs.

Therefore, a full description of the jurisdictional defects underlying the petition for review is contained herein.

PERTINENT STATUTES AND REGULATIONS

The text of applicable statutes and regulations is set forth in Addendum A, attached to Petitioners' Opening Brief.

ISSUES PRESENTED

1. Whether Petitioners lack standing when their alleged injuries are the result of independent agency decisions that are not the subject of this petition for review, and therefore:
 - a. Petitioners' injuries are not caused by the challenged agency decision; and
 - b. Petitioners' injuries cannot be redressed by remanding the challenged agency decision.
2. Whether Petitioners' challenge to the FAA's Presumed to Conform List is ripe, when the List has not been applied to any action taken by the agency.
3. Whether this Court lacks jurisdiction under the judicial review provision of the Aviation Act.
4. Whether Petitioners' challenge to the validity of the EPA's General Conformity regulations is time barred under the Clean Air Act, 42 U.S.C.

§ 7607(b), which provides a sixty-day statute of limitations to challenge those regulations.

5. Whether the FAA's Presumed to Conform List complies with the requirements of EPA's regulations establishing the guidelines an agency must follow in order to publish such a list.

STATEMENT OF FACTS

I. Statutory Background

A. The Clean Air Act

The Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), establishes a joint state and federal program to control the Nation's air pollution by setting national primary and secondary ambient air quality standards. *See* 42 U.S.C. § 7409.

Under the CAA, the EPA first establishes national ambient air quality standards ("NAAQS") for certain pollutants. *Id.* Each state is then required to submit to the EPA a list of all geographic areas that are designated as "nonattainment," which is defined as "any area that does not meet * * * the national primary or secondary ambient air quality standards." 42 U.S.C. § 7407(d)(1)(A)(i).

1. The Clean Air Act Requires Conformity to State Implementation Plans.

Each State must adopt and submit to EPA for approval a state implementation plan ("SIP") that provides for the implementation, maintenance, and enforcement of the NAAQS in a designated air quality region. 42 U.S.C.

§ 7410(a)(1). A SIP must specify emissions limitations and other measures that are necessary to attain and maintain the NAAQS for the relevant pollutants. 42 U.S.C. §§ 7410(a)(2)(A)-(M). Federal agency actions must be consistent with these plans. “No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP] after it has been approved or promulgated under section 7410 of this title.” 42 U.S.C. § 7506(c)(1).

Under the statute, “conformity” to a SIP generally means that the anticipated emissions from a proposed activity will not frustrate an implementation plan’s purpose of attaining (and maintaining) the NAAQS. 42 U.S.C. §§ 7506(c)(1)(A)-(B). The EPA promulgated regulations to assist federal agencies in determining the conformity of their actions with SIPs. *See* 40 C.F.R. § 93.150 *et seq.* (referred to herein as EPA’s “General Conformity Regulations”). Generally, a conformity determination is required only for proposed federal actions within a maintenance or nonattainment area. If a proposed federal action is located in a maintenance or nonattainment area, a conformity determination must be prepared for each pollutant (or its specified precursors) where the total emissions caused by a proposed federal action in an area designated as “nonattainment” or “maintenance” for that pollutant would equal or exceed specified emissions levels, or where the total emissions are deemed to be regionally significant. 40 C.F.R. § 93.153(b); 40

C.F.R. § 93.153(i). Agencies perform an “applicability analysis” to determine whether such thresholds will be exceeded. If the applicability analysis shows emissions would be below *de minimis* levels, no further analysis is necessary. However, if the applicability analysis shows that emissions would exceed *de minimis* levels, a conformity determination must then be completed.

2. Exempt Actions and Presumption of Conformity

Neither an applicability analysis nor a full conformity determination is required for every federal action. The General Conformity Regulations include broad categories of exempt actions in 40 C.F.R. § 93.153(c)(2) that result in no emissions increases or increases in emissions that are clearly *de minimis*. Exempt actions do not require an applicability analysis under § 93.153(b). In promulgating the General Conformity Regulations, EPA also explained that

There are too many Federal actions that are *de minimis* to completely list in either the rule or this preamble. In addition to the list in the rule, the EPA believes that the following actions are illustrative of *de minimis* actions:

* * *

(2) Air traffic control activities and adopting approach, departure and enroute procedures for air operations.

Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214, 63,229 (Nov. 30, 1993).

In addition to the list of specific activities in the General Conformity Regulations that EPA identified as being exempt from the general conformity

requirements, *see* 40 C.F.R. §§ 93.153(c)(2)(i)-(xxi), EPA also promulgated regulations allowing federal agencies to establish categories of actions that are presumed to conform to a SIP for the criteria pollutants and their precursors that are identified in 40 C.F.R. §§ 93.153(b)(1) and (b)(2). *See* 40 C.F.R. §§ 93.153(f)-(h) (referred to herein as EPA’s “Presumed to Conform Rule”). The Presumed to Conform Rule was “intended to assure that these rules are not overly burdensome and Federal agencies would not spend undue time assessing actions that have little or no impact on air quality.” 58 Fed. Reg. at 63,228. This allows federal agencies, such as FAA, to better focus limited resources on actions that would have an adverse effect on air quality. EPA determined that “certain actions should be exempt from the rule and other actions should be presumed to conform, with the presumption being rebuttable.” 58 Fed. Reg. at 63,230. The presumption of conformity for a given action can be overcome on a case-by-case basis, in which case an applicability analysis or a conformity determination would be required. 40 C.F.R. § 93.153(j).

B. FAA’s Presumed to Conform List

Following the process described in EPA’s regulations, the FAA published a proposed list under which 15 different categories of actions, specifically defined, are presumed to conform to any applicable SIPs and therefore do not require an applicability analysis. 72 Fed. Reg. 6,641 (Feb. 12, 2007). The FAA issued a draft

notice in the Federal Register; notified all of the appropriate organizations and encouraged them to comment, including EPA Regions, State and local air quality agencies, and metropolitan planning organizations; provided a 45-day comment period; responded to significant comments; and made appropriate revisions. *Id.* at 41,566. The FAA finalized the Presumed to Conform List on July 30, 2007. *Id.* at 41,565. For activities on the list, the FAA need not perform an applicability analysis or a general conformity evaluation, unless the action is regionally significant or does in fact interfere with the applicable SIP or the relevant NAAQS. 72 Fed. Reg. at 41,579.

The Presumed to Conform List contains several different categories of activities. Many are minor physical improvements or upgrades to airport facilities, such as pavement markings, *id.* at 41,569, pavement work on areas other than runways that do not increase airport capacity, *id.* at 41,570-71, and improvements to aircraft gate areas, *id.* at 41,571. The category that Petitioners focus on in this case is Category 14, entitled “Air Traffic Control Activities and Adopting Approach, Departure and Enroute Procedures for Air Operations.” *Id.* at 41,578. This category presumes that changes in air traffic control activities at airports conform if those changes “are designed to enhance operational efficiency (*i.e.*, to reduce delay), increase fuel efficiency, or reduce community noise impacts by means of engine thrust reductions.” *Id.* The category also presumes,

unsurprisingly, that “actions that have no effect on air emissions or result in air quality improvements” are presumed to conform to applicable SIPs. *Id.*; *see, e.g.*, 40 C.F.R. § 93.153(c)(2).

II. Factual Background

Petitioners focus in their brief on two recent FAA actions: a change in a departure route at McCarran International Airport in Las Vegas, Nevada (“LAS”), and a revision of the airspace in the Northeast region of the United States, known as the New York/New Jersey/Philadelphia Airspace Redesign (“Airspace Redesign”). These descriptions require reference to the Records of Decision for both decisions, which are not in the administrative record for the Presumed to Conform List, but which Petitioners nevertheless rely on throughout their brief.¹ To provide this Court the necessary factual background, both of those decisions are briefly described here.

A. The Modified Departure Procedure at LAS

1. The Air Quality Analysis Demonstrated That The New Procedure Would Improve Air Quality.

On March 20, 2007, the FAA modified its departure procedures for aircraft at LAS, by reinstating a procedure that had been in effect for twenty years prior to its suspension in 2001. The reinstated procedure allows some aircraft departing

¹ Petitioners have requested that this Court take “judicial notice” of the content of these agency decision documents.

from one LAS runway (25R) to make a right turn. The purpose of the procedure is to reduce the required waiting time between departures, thereby reducing runway delays, improving the efficiency of the operation of the airport, and in turn decreasing air emissions from aircraft waiting in the queue for departure.

Prior to implementing this procedure, FAA prepared a Draft Supplemental Environmental Assessment and Final Supplemental Environmental Assessment (“LAS FSEA”), pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f. The FSEA and the Finding of No Significant Impact/Record of Decision (“LAS FONSI/ROD”) for the modified procedure were both issued in November of 2006.

In response to comments on the DSEA suggesting that further investigation of the conformity of the new procedure with CAA requirements was needed, the FAA conducted an applicability analysis to confirm that the proposed action would not result in an emissions increase above the thresholds specified in the general conformity rule. 40 C.F.R. § 93.153(b). [LAS FSEA, Exh. E to Fed. Resp. Mot. to Dismiss at 4-23 to 4-24, C-29 to C-45]. The FAA noted that Las Vegas Valley has been designated as non-attainment for nitrogen oxides and volatile organic compounds, which contribute to the formation of ozone and are therefore referred to in the LAS FSEA as “precursor pollutants.” *Id.* at 4-20. In addition, a portion of Clark County, including the City of Las Vegas, has been designated as non-

attainment for two criteria pollutants, carbon monoxide and particulate matter (“PM10”). These pollutants are emitted from aircraft engines and other sources at airports. *Id.* The FAA calculated the net emissions effect of the proposed action by comparing the projected emissions of both criteria and precursor pollutants with and without the proposed action in 2005 and 2010 to determine the net emissions that would be caused by the proposed change to the departure procedure. *Id.* at 4-22 to 4-24, C-40 to C-45. This comparison showed not only that emissions of all the criteria and precursor pollutants would not exceed the thresholds specified in 40 C.F.R. § 93.153(b), but that in fact emissions will decrease approximately 153 tons per year in 2005 and 214.7 tons per year in 2010. *Id.* at 4-24, Table 4.10.

Because the approved activity would not result in increased emissions of the relevant pollutants, the FAA’s approval of the Procedure did not require a full conformity determination. 40 C.F.R. § 93.153(b); LAS FSEA at 4-23 to 4-24. The FAA concluded in the FONSI/ROD that “[s]ince the Proposed Action would cause a decrease in aircraft emissions of all the criteria and precursor pollutants, there would be no air quality impacts, no mitigation measures would be required, and no further analysis or reporting would be required under NEPA or CAA regulations.” [LAS FONSI/ROD, Exh. F. to Fed. Resp. Mot. to Dismiss, at 7].

2. Petitioners Challenged The LAS Decision in the Ninth Circuit.

Two Petitioners in this case (the City of Las Vegas, Nevada, and the Nevada Environmental Coalition, Inc.), as well as others, filed a petition in the Ninth Circuit seeking review of the FAA’s final action approving the reinstated LAS departure procedure, alleging that the FAA violated both the CAA and the NEPA. *City of Las Vegas v. United States Dept. of Transp.*, No. 07-70121 (9th Cir.). On March 12, 2007, the Petitioners in that case filed an “Emergency Motion for Stay Pending Review of Agency Order,” alleging that the FAA had failed to analyze the procedure’s air quality impacts to determine whether it would comply with the general conformity rule. The Ninth Circuit denied the motion for an emergency stay. The case proceeded to merits briefing, in which Petitioners argued, *inter alia*, that the LAS FONSI/ROD was not based on a sufficient conformity analysis. The case is now fully briefed and awaits oral argument and a final decision by the Ninth Circuit.

B. New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign

1. The FAA Determined That The Airspace Redesign Decision Will Improve Air Quality.

On September 28, 2007, the FAA issued a final agency order entitled “Corrected New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign” (hereafter “Airspace Redesign ROD”). In the Airspace Redesign ROD, the FAA approved the redesign of federally-controlled airspace in the New York,

New Jersey, and Philadelphia Metropolitan Areas to reduce congestion and delays at some of the nation's busiest airports, including John F. Kennedy, LaGuardia, Newark, and Philadelphia. The Airspace Redesign ROD was based on over nine years of environmental study, presented first in a Draft Environmental Impact Statement (June 2005) and then a Final Environmental Impact Statement ("Airspace FEIS") (July 2007).

The Airspace FEIS noted that the FAA had published a draft Presumed to Conform List and that the list included "Air Traffic Control Activities and Adopting Approach, Departure and Enroute Procedures for Air Operations." [Airspace FEIS, Exh. G to Fed. Resp. Mot. to Dismiss at 5-132]. However, the final notice for the Presumed to Conform list had not yet been issued, and the FAA provided additional evidence that the selected project would not result in emissions that would exceed the applicable *de minimis* emission levels for nonattainment and maintenance areas. A fuel consumption analysis was conducted for the preferred alternative with and without mitigation, as well as for the future no-action alternative. "The analysis * * * indicated that the Preferred Alternative with mitigation would reduce aircraft fuel consumption in the Study Area in 2011 by about 194 metric tons per average day." [Airspace Redesign Corrected ROD, Exh. H to Fed. Resp. Mot. to Dismiss, at 43]. "As reduced fuel consumption is directly related to reducing air pollutant emissions," the selected project "would clearly

reduce rather than increase emissions.” *Id.* Thus, the FAA’s conclusion that the Airspace Redesign project did not require a full conformity determination, like its similar determination concerning the modified departure procedure at LAS, has a basis independent of the Presumed to Conform List: it is based on the fact that the project will reduce air emissions by reducing fuel consumption.

2. Petitioners Challenged The Airspace Redesign Decision in This Court.

Just as Petitioners have already challenged the LAS decision, Petitioners have also filed with this Court a petition for review of the Airspace Redesign ROD. Twelve different groups of Petitioners challenged that decision, and this Court consolidated them into a single proceeding. *County of Rockland, NY v. FAA*, D.C. Cir. No. 07-1363 (lead case). Of those twelve Petitioners, the Petitioners in the instant case (including Delaware County, PA, and Friends of the Heinz Wildlife Refuge) are the only ones that indicated in their Statement of Issues to this Court that they intend to challenge the Airspace Redesign decision on the basis of the FAA’s conformity analysis. Petitioners in this case filed a motion for judicial stay of the Airspace Redesign decision in December 2007, partly on the grounds that it was inconsistent with the CAA’s requirements. This Court denied the motion, and also denied Petitioners’ motion for *en banc* reconsideration of that denial. *County of Delaware, PA v. United States Dept. of Transp.*, D.C. Cir. No. 07-1493. The

consolidated challenges to the Airspace Redesign are currently being briefed, and Petitioners' joint opening brief is due to be filed on August 1, 2008.

SUMMARY OF ARGUMENT

Each Petitioner in this proceeding currently has a suit pending against the FAA in either this Court or the Ninth Circuit challenging the decision that they believe has injured them – either the FAA's reinstatement of a runway departure procedure at LAS, or the FAA's redesign of the northeast United States' airspace. In each of those cases, Petitioners have alleged that those decisions are invalid, because, in part, of FAA's failure to comply with the CAA's general conformity rule. In this suit, Petitioners simultaneously attempt a collateral attack on those same two decisions.

This petition for review should be dismissed. Petitioners lack standing to challenge the FAA's Presumed to Conform List. Petitioners' alleged injuries do not result from the Presumed to Conform List; any alleged injuries would result from either the LAS ROD or the Airspace Redesign ROD. Since these RODs are not challenged in this petition, those alleged injuries fail to establish standing to challenge the List directly.

Petitioners fundamentally misunderstand the relationship of the Presumed to Conform List to the FAA decisions that they wish to see reversed. Neither the LAS ROD nor the Airspace Redesign ROD relied exclusively on the Presumed to

Conform List in order to determine whether those respective decisions would adversely impact conformity with any applicable SIPs. In fact, the List was not published in its final form until after both of those decisions were issued.

Independent analyses showed that both decisions would *decrease* air emissions.

Because the LAS and Airspace redesign decisions do not depend on the Presumed to Conform List, they would not be altered if this Court were to grant Petitioners relief in this case. Thus, Petitioners' alleged injuries would not be redressed by eliminating Category 14 from the List (or even by invalidating the entirety of the List).

Second, Petitioners' challenge to the Presumed to Conform List is not ripe, as the presumptions established by the List have not been applied to any action taken by the FAA. The List itself does not approve or fund any project, and until the List is applied in a concrete fashion, Petitioners have no basis to challenge it.

Third, Petitioners proceed exclusively under the judicial review provision of the Aviation Act. The Presumed to Conform List is not a final, reviewable "order" within the meaning of that act. Therefore, this Court cannot use that provision to assume original jurisdiction over a challenge to the List.

Petitioners also seek review of the presumed to conform provisions in EPA's General Conformity regulations, which were promulgated in 1993 to permit federal agencies to publish lists of activities presumed to conform to applicable SIPs, just

as FAA did here. Petitioners' challenge to those regulations is time barred under 42 U.S.C. § 7607(b), which provides 60 days to challenge such regulations.

Petitioners' challenge is nearly fourteen years too late.

Finally, on the merits, Petitioners challenge only the inclusion of Category 14. The administrative record, however, fully supports the FAA's inclusion of this category. Although Petitioners argue that the FAA should have done additional studies, they point to nothing in the record or elsewhere that suggests the inclusion of Category 14 was incorrect or that the decision was arbitrary or capricious. The petition for review should be dismissed, but if it is not, the FAA's Presumed to Conform List should be upheld.

ARGUMENT

I. Petitioners Fail to Establish Article III Standing.

Petitioners fail to demonstrate the basic elements of standing, and their petition for review should therefore be dismissed. To satisfy the Article III standing requirements, a petitioner must “show a ‘substantial probability’ that it has been injured, that the defendant caused its injury, and that the court could redress that injury.” *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)). All three elements must be demonstrated to establish standing, and should any one be found lacking, the petition for review must be dismissed.

A. Petitioners Fail to Allege the Required Concrete and Particularized Injury.

Petitioners fail to allege they have “suffered a ‘concrete and particularized’ injury that is actual or imminent.” *City of Dania Beach v. Federal Aviation Admin.*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (*en banc*)).

This standard is the “irreducible constitutional minimum of standing” and the standard is no less restrictive, as Petitioners suggest, Br. at 25, for procedural injury. The Supreme Court is clear that in a procedural injury case, the court’s focus in those cases “is not the imminence or redressability of the injury to the plaintiff, but whether *a plaintiff who has suffered personal and particularized injury* has sued a defendant who has caused *that injury*.” *Fla. Audubon Soc’y*, 94 F.3d at 663 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7 (1992)) (emphasis added). Thus, it is not enough just to seek to enforce a procedural right. Petitioners must show that “the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.” *City of Dania Beach*, 485 F.3d at 1185 (quoting *Fla. Audubon Soc’y*, 94 F.3d at 664). Here, Petitioners fall short of making such a showing.

B. Petitioners' Alleged Injuries Are Not Caused by the Presumed to Conform List.

To support their claim for standing, Petitioners submitted affidavits alleging procedural harms resulting directly from either the LAS ROD or the Airspace Redesign ROD.² These allegations cannot support standing to sue the FAA for an entirely different decision – the publication of the Presumed to Conform List. Petitioners argue that the decisions are inextricably intertwined because the two RODs that allegedly injure them were based on the Presumed to Conform List, and would have been decided differently without the List or might have contained information that would alleviate their procedural harm.³ This is incorrect. Neither the LAS ROD nor the Airspace Redesign ROD relied exclusively on the Presumed to Conform List, and therefore cannot be the cause of any injury attributable to the List. Petitioners fail to carry their burden to demonstrate causation.

² The four affidavits attached to Petitioners' Opening Brief are identical to those attached to the Statement of Basis for Petitioners' Standing, filed with this Court on October 26, 2007.

³ Petitioners have filed multiple motions for judicial notice in this case, in an attempt to rely upon excerpts of documents from the administrative records from the decisions that they are actually trying to challenge, the LAS ROD and the Airspace Redesign ROD. By asserting that these decisions relied on the Presumed to Conform List, Petitioners ask this Court to exceed the scope of the proper administrative record. Petitioners do so even though they did not move to supplement the administrative record with those documents. Review of the Presumed to Conform List is limited to the administrative record filed by the agency, within the confines of Fed. R. App. P. 16(a) and 28 U.S.C. 2112(b). *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

1. The LAS ROD Predates the Presumed to Conform List and Does Not Rely On It.

The LAS FSEA and ROD for the modified departure procedure at LAS were both issued in November 2006, months before the FAA's Presumed to Conform List was proposed. The chronology alone demonstrates that the LAS decision did not rely on the Presumed to Conform List. Any injury that Petitioners allege as the direct result of the LAS ROD cannot sustain a challenge to the Presumed to Conform List, because there is no causal link between the two decisions.

Nevertheless, Petitioners proceed before this Court on the theory that FAA did, indeed, rely on the unwritten Presumed to Conform List when issuing the LAS ROD.⁴ Both Petitioners from Nevada -- Hall and Selby -- claim injury based exclusively on the new departure procedure at McCarran airport, and their unsubstantiated claim that the effects of this procedure are unknown. Petitioner

⁴ Petitioners fail to demonstrate that FAA relied on the Presumed to Conform List when issuing the LAS ROD. Petitioners' reliance on an out-of-context quotation from the government's brief in Petitioners' Ninth Circuit challenge to the LAS ROD (where some of these same Petitioners are currently suing the FAA to challenge the LAS ROD directly), Br. at 18-19, is misplaced because in that sentence, the FAA explains that it published the Presumed to Conform List *after* the LAS ROD had been issued. Petitioners also submit two affidavits in which they allege that the LAS ROD relied, not on the FAA's Presumed to Conform List, but on the EPA's Preamble to its Rule allowing agencies to create such a list. Hall Aff. at 2 ¶ 7; Selby Aff. at 2 ¶ 6. The Hall Affidavit acknowledges that the Presumed to Conform List was published after the LAS ROD was issued, Hall Aff. at 2-3 ¶ 8, and the Selby Affidavit never mentions it. Neither affidavit can establish that FAA determined that its decision complied with the Clean Air Act based on a list that had not even been published in draft form yet.

Hall does not even allege that he is harmed by his lack of knowledge as to the air quality effects of this decision, only that the possible effects were not disclosed to him. Hall Aff. at 3 ¶ 10. Petitioner Selby claims that the alleged lack of disclosure “affects the City’s ability to comply with applicable State and Federal statutes, and impairs the City’s ability to effectively perform its mandated environmental planning functions.” Selby Aff. at 3 ¶ 10. He makes no attempt to identify what functions the City would have difficulty performing as a result of the reinstated departure procedure.

None of the alleged injuries result from the publication of the FAA’s Presumed to Conform List. As Petitioners’ own affidavits demonstrate, they claim injury from the decision made in the LAS ROD, not from the Presumed to Conform List. Thus, these Petitioners, along with others represented by the same counsel as in this case, are currently challenging that ROD on precisely these grounds. Where Petitioners allege no injury from the Presumed to Conform List, they lack standing and cannot simply mount a collateral attack on the LAS ROD in this proceeding.

2. The Airspace Redesign ROD Also Predates The Presumed to Conform List and Does Not Rely On It.

The Airspace Redesign FEIS was issued before the Presumed to Conform List was finalized. That FEIS noted that the FAA had published a draft Presumed

to Conform List, and that the list included “Air Traffic Control Activities and Adopting Approach, Departure and Enroute Procedures for Air Operations.” [Airspace Redesign FEIS at 5-132]. However, because the final notice for the Presumed to Conform List had not been issued, the FAA independently analyzed the airspace redesign and provided substantial evidence demonstrating that the selected project would not result in emissions that would exceed the applicable *de minimis* emission levels for nonattainment and maintenance areas. As described above, the FAA conducted a fuel consumption analysis for the preferred alternative with and without mitigation, as well as the future no-action alternative, which demonstrated that the selected alternative “would clearly reduce rather than increase emissions.” [Airspace Redesign Corrected ROD at 43]. FAA’s conclusion that the Airspace Redesign project did not require a full conformity determination, like its similar determination concerning the modified departure procedure at LAS, has a sound basis independent of the Presumed to Conform List, *i.e.*, that the project will reduce air emissions.

As with the LAS ROD, Petitioners fail to demonstrate injury that is the result of the Presumed to Conform List, focusing instead in their affidavits on the direct result of the Airspace Redesign ROD. Hank Hox, President of the Friends of the Heinz Wildlife Refuge, alleges injury based exclusively on new departure headings for aircraft departing Philadelphia International Airport (“PHL”). Hox

Aff. at 2 ¶¶ 7, 8, 12. Andrew Reilly, Chairman of the County Council of the County of Delaware, PA, alleges injuries resulting from those same departure headings. Reilly Aff. at ¶¶ 6, 7, 8. Where these headings did not change based upon the Presumed to Conform List, the list is simply not the cause of Petitioners' injuries.

In sum, all of Petitioners' alleged injuries are caused by the LAS and Airspace Redesign RODs. Thus, Petitioners cannot demonstrate any injury stemming from the List and lack standing to challenge the Presumed to Conform List.

C. Petitioners Also Cannot Establish Redressability Because Remand of the Presumed to Conform Rule Would Not Alter Either the LAS or Airspace Redesign Decisions.

For similar reasons, Petitioners fail to meet the redressability prong for standing. "The redressability inquiry poses a simple question: If plaintiffs secured the relief they sought, would it redress their injury?" *The Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (quoting *Mountain States Legal Found. v. Glickman*, 92 F.d 1228, 1233 (D.C. Cir. 1996)) (alterations omitted). In this case, it would not. Petitioners allege injuries based on either actions taken pursuant to the LAS ROD or the Airspace Redesign ROD. They seek vacatur of the FAA's Presumed to Conform List and remand back to the FAA for additional investigation. Br. at 57-58. As neither decision is dependent on the Presumed to

Conform List, a decision holding the List invalid would have no effect on those decisions, which are already in place. As Petitioners cannot demonstrate that they have established this basic element of Constitutional standing, the petition for review should be dismissed.

II. Petitioners' Challenge to the List is Unripe.

As Petitioners lack standing to proceed in this matter, this Court need go no further to dismiss the petition for review. However, when evaluating multiple threshold jurisdictional questions, each of which is dispositive, “there is no mandated ‘sequencing of jurisdictional issues.’” *Grand Council of Crees (Of Quebec) v. Federal Energy Regulatory Commission*, 198 F.3d 950, 954 (D.C. Cir. 2000) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). Therefore, this Court may also dismiss the petition for review because its challenge to the Presumed to Conform List is not yet ripe, or because this Court lacks jurisdiction to review the petition under the Aviation Act.

The FAA’s Presumed to Conform List may only be challenged in the context of its application to an FAA order that actually approves an action taken under Part A or Part B of the Aviation Act, as Petitioners have challenged elsewhere. Petitioners’ challenge here is, in effect, premature, because they attempt to bring a facial challenge to a mere step within a broader decision-making process that may eventually result in an order taken under Parts A or B.

Petitioners' failure to demonstrate that their injuries flow from the publication of the Presumed to Conform List, *see supra* at 18-22, further demonstrates why this Court should withhold review of the List until it is applied in a concrete manner as part of a final FAA decision.

A "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, (1990), *quoted in Atlantic States Legal Foundation v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003). Ripeness is assessed both by the fitness of the issue for judicial review, and whether Petitioners will endure any hardship if adjudication is delayed until an appropriate time. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57-58 (1993); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). A case is not ripe, even if it presents a purely legal issue, "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). *See Atlantic States Legal Found.*, 325 F.3d at 284 (holding challenge to regulations allowing utilities to collect hazardous waste without a permit unripe when State government had not adopted procedures and no utilities

had acted under the policy yet); *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 167 (D.C.Cir.1997) (holding challenge to an agency manual unripe when policies in manual were discretionary and had not been applied to petitioners).

Here, the issues are not yet fit for review. The Presumed to Conform List authorizes no action by the FAA. A future decision by the FAA to take one of the types of actions described in the List might rely, in part, on a presumption that the action conforms with applicable CAA provisions because of its presence on the List where the presumption is not rebutted. Were that the case, Petitioners might then use that ground to challenge that decision when it is made in final form. Until such time as the agency reaches a final decision, however, the challenge is not yet ripe for review, as it has not been determined how, if at all, the presumption of conformity described in the Presumed to Conform List will be applied to any decision.

Furthermore, Petitioners will endure no hardship if the Presumed to Conform List is not reviewed at this time. As the List has not been applied in any decision, Petitioners have not demonstrated that they currently suffer any injury resulting from its publication. *See supra* at 18-22. “[M]ere uncertainty as to the validity of a legal rule does not constitute a hardship for purposes of the ripeness analysis.” *Munsell v. United States Dept. of Agriculture*, 509 F.3d 572, 586 (D.C. Cir. 2007) (quoting *Natl. Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803,

811 (2003). Petitioners have not petitioned the FAA directly to ask the agency to address what Petitioners believe to be a lack of documentation in Category 14 of the List. *See Munsell*, 509 F.3d at 585 (Dismissing claims as unripe and finding a lack of hardship to petitioners that had not exercised their right under 5 U.S.C. § 553(e) to first petition the agency to address their claims). Furthermore, “[t]here are no obvious adverse consequences that will flow from requiring” Petitioners to challenge the Presumed to Conform List “in the context of concrete . . . actions.” *Id.* at 586. Therefore the petition should be dismissed as unripe.

Petitioners place great emphasis on a Tenth Circuit case, *National Parks & Conservation Ass’n v. FAA*, 998 F.2d 1523, 1528 (10th Cir. 1993), but that case is inapposite. *National Parks & Conservation Ass’n* involved a challenge by a group of environmental organizations to the FAA’s approval of the construction, operation, and funding of a replacement airport in San Juan County, Utah, adjacent to the boundary of Glen Canyon National Recreation Area. 998 F.2d at 1525. Before the FAA approved the airport, it first prepared an environmental impact statement, in which FAA considered its compliance with other statutes, such as section 4(f) of the Transportation Act, 49 U.S.C. § 303(c) (1988), section 2208 of the Airport and Airways Improvement Act, 49 U.S.C. App. § 2208(b)(5) (1988) (now 49 U.S.C. § 47106(c)(1)(B) (1994)), and section 308 of the Aviation Act, 49 U.S.C. App. § 1349(a) (now 49 U.S.C. § 44502(b) (1994)). The Tenth Circuit held

that it had jurisdiction over the FAA's approval of the airport pursuant to the jurisdictional provision of the Federal Aviation Act, *id.* at 1526, because the basis of the suit was FAA's approval of the airport project, which was an action taken pursuant to the Federal Aviation Act. Petitioners' challenge to FAA's compliance with NEPA and other statutes was encompassed within that challenge. *Id.* at 1528.

This conclusion is wholly consistent with general principles of ripeness and finality as they apply to review of a federal agency's compliance with NEPA. An environmental impact statement is not, in itself, a final agency action made reviewable by the Administrative Procedure Act. Rather, a challenge to a final agency decision that rests, in part, on an EIS (or other documents produced pursuant to NEPA and its implementing regulations, such as an environmental assessment) may be based on a challenge to the contents of that environmental document. Thus, the Tenth Circuit held that the agency's compliance with various procedural statutes (such as NEPA) was done as part of an ultimate decision taken under the Aviation Act, and thus the Aviation Act provides the relevant grant of jurisdiction to the courts of appeals to hear that claim. Similarly, a challenge to an FAA action might include, as one of its claims, the argument that FAA inappropriately relied on the Presumed to Conform List in rendering that decision. But that claim cannot be brought until an action is challenged that relied on the List, and Petitioners have identified no such action in this suit.

The matter is not nearly as simple as the FAA “[h]aving argued for appellate court jurisdiction when it served its purpose in *National Parks*,” Br. at 9, but now arguing otherwise. *Nat’l Parks & Conservation Ass’n* involved a challenge to an actual decision taken under the appropriate chapter of the Federal Aviation Act, but there is no such decision in this case. Rather, the only decision at issue here is the FAA’s issuance of a List as per EPA’s regulations permitting federal agencies to identify future actions that are presumed to conform. The insurmountable obstacle to Petitioners’ suit is that they are not challenging any of those future actions within this suit, and thus they challenge no application of the List.

III. This Court Lacks Jurisdiction to Hear This Petition.

Simply put, until the Presumed to Conform List is applied in a manner that affects Petitioners, the Aviation Act provides no jurisdiction for judicial review. In this petition for review, Petitioners have identified no final FAA action taken under Part A or Part B of the Aviation Act. The Presumed to Conform List is not reviewable by the Aviation Act. Therefore, the petition should be dismissed.

A. The List Is Not An “Order” Of The FAA Administrator Within the Meaning of the Federal Aviation Act.

The Federal Aviation Act provides for original jurisdiction in the United States Courts of Appeals for judicial review of an “order” of the FAA

Administrator issued “under” specified sections of the Act. In relevant part, the statute provides that:

[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part *under this part, part B, or subsection (l) or (s) of section 114* may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a) (emphasis added). Petitioners purport to proceed exclusively under this provision. Br. at 1. This statute does not provide this Court with original jurisdiction to review the FAA’s Presumed to Conform List.

Petitioners argue that the Presumed to Conform List meets the well-established criteria for “finality,” arguing that the publication of the List represents the “consummation of the agency’s decision-making process.” Br. at 2-4 (quoting, *inter alia*, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). “The cases dealing with judicial review of administrative actions have interpreted the ‘finality’ element in a pragmatic way.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The action must not only conclude the agency’s decision-making process – it must also “be one by which rights or obligations have been determined, or

from which legal consequences will flow.” *Id.* Under these standards, FAA’s Presumed to Conform List is not a “final agency action.”⁵

First, the Presumed to Conform List does not consummate FAA’s decision-making. Rather, the list simply provides categories of actions that are presumed to conform to applicable SIPs, but for which there is a case-by-case rebuttable presumption available. No consummation of decision-making can occur until FAA takes concrete action applying the list in some way by approving a project and finding that such project is presumed to conform. The list is simply a starting point for FAA’s compliance with the Clean Air Act for certain categories of actions.

Next, no legal consequences flow to Petitioners (or anyone else) from the mere existence of the Presumed to Conform List. The list itself does not impose any rights or obligations and has no independent legal significance. It is simply not “final agency action.” Because the list itself has no independent legal force, it is therefore not final agency action. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 240-41 (1980) (holding that the Federal Trade Commission’s issuance of a complaint averring reason to believe that plaintiff was violating the Federal Trade Commission Act was not final agency action). In *Standard Oil*, the Court

⁵ Although the “final agency action” standard derives from the Administrative Procedure Act, 5 U.S.C. § 704, the courts routinely apply this case law to the question of what constitutes a reviewable order under the Aviation Act. See, e.g., *Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006).

explained that where an administrative action is merely a “prerequisite to a definitive agency position” that serves “only to initiate the proceedings,” such action has no legal force or effect so as to constitute final agency action. *Id.* The Court further explained that “[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise” and “leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.” *Id.* at 242-43. (citations omitted). Thus, this situation is unlike that in *City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007), where this Court held that a letter offering a “new interpretation” of agreements for runway use was a reviewable order. In that case, a petitioner alleged that, as a direct result of the policy stated in the letter, he was “subject to piercing noise that sounds like a missile.” *Id.* at 1186 (alterations and quotation marks omitted). No such allegations appear in this case, and for the same reason that Petitioners lack standing and have not brought a ripe claim, so too have they failed to challenge a final “order” from which legal consequences will flow to them.

It is axiomatic that where, as here, the List itself does not automatically exempt categories of actions but, instead, remains subject to further consideration during the process of applying it in the context of decision-making, the List itself cannot be considered final for purposes of judicial review. See, *e.g.*,

Environmental Defense Fund v. Johnson, 629 F.2d 239, 240-41 (2d Cir. 1980).

Because the list inventory serves only as a “predictor of future action, it is not yet a ‘final action’ subject to judicial review.” See, e.g., *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994) (holding that an EPA memorandum signaling a position EPA might eventually take was not final where no action had been taken). See also *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995) (holding that mere contemplation of a future course of action cannot constitute final agency action).

Petitioners’ jurisdictional argument does not focus on the nature of the List itself, or the statutory and regulatory authority for its publication. Rather, Petitioners first assert that the Presumed to Conform List is issued “under” either Part A or Part B because it “directly implicates FAA’s ‘aviation duties and powers.’” Br. at 5. However, the List does not mark the approval of any action that FAA is authorized to undertake under Parts A or B. Petitioners identify a number of potential *future* FAA actions contained in the list “which the FAA may take pursuant to its authority under Parts A and B.” Br. at 5. For example, Petitioners point out that FAA could approve grants to fund certain future actions, such as pavement markings and airport signage, under the Airport Improvement Program described in Part B of the Aviation Act. *Id.* at 6. What Petitioners do not acknowledge is the Presumed to Conform List does not itself approve any such

actions.⁶ No single instance of any of the types of actions described in the 15 categories of the List was actually authorized by the publication of the List. The List only establishes that *if* any such actions *are* authorized, FAA *may* consider them presumed to conform with the applicable SIPs provided they meet the terms of the appropriate category of the List and the presumption is not rebutted under 40 C.F.R. § 93.153(j).

Petitioners mistakenly point to FAA Order 1050.1E, which requires that FAA address the conformity of any proposed action with applicable SIPs before supporting or funding that action. Br. at 9-10. The List itself is not an action and does not support or fund any action. Petitioners quote a single sentence of the Appendix addressing CAA issues to claim that a conformity determination must “be part of any action the FAA takes pursuant to Parts A or B,” which indicates that the FAA must comply with the CAA before taking action. *Id.* Petitioners mistakenly read FAA Order 1050.1E to mean that any conformity-related decision by FAA is therefore inextricably linked with actions taken under Parts A or B and therefore are orders “under” those sections of the statute, reviewable in the courts of appeals under 49 U.S.C. § 46110(b).⁷ This is incorrect.

⁶ If FAA takes any such actions, judicial review may be sought under the Aviation Act, 49 U.S.C. § 46110(b), and such review could address FAA’s reliance on the Presumed to Conform List.

⁷ Petitioners likewise err in arguing that under the Aviation Act, as revised, a decision is reviewable if it is made partially under Part A and partially under Part

B. Jurisdiction Cannot be Assumed Where No Statutory Grant of Jurisdiction Exists.

Petitioners argue for a jurisdictional rule of lenity from this Court, asking it to err on the side of taking jurisdiction over the petition for review even though such jurisdiction is not authorized by statute. Petitioners urge this Court to exercise its “preference for review of administrative actions in the courts of appeals.” Br. at 12 (citing *Gen. Elec. Uranium Mgmt. Corp. v. Dept. of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985)). Petitioners cite several cases for this proposition, all of which are distinguishable. Each of the cases relied on by Petitioners in their brief addressed the very specific question of which venue to prefer when a court is faced with two possible sources of jurisdiction: a specific statute granting jurisdiction to the court of appeals, and a statute without a jurisdictional provision which would result in general federal question jurisdiction in the district court. In that specific situation, this Court (as well as its sister circuits) construe a specific statutory grant of jurisdiction to the court of appeals in favor of jurisdiction vesting there rather than in the district court. *See, e.g.*, Br. at 12 (citing cases).

This case presents no such issue or choice, because Petitioners cannot maintain their claim in any court. Thus, to the extent that Petitioners are correct

B, rather than exclusively under Part A. Br. at 11. The Presumed to Conform List was not issued under either part.

that the cases they cite stand for the proposition that competing statutory grants of jurisdiction should result in the selection of the more specifically-designated venue, this has no applicability to a case such as this where *no* statute has designated a venue for judicial review, and where the only statute granting exclusive jurisdiction to the courts of appeals is wholly inapplicable.

IV. Petitioners’ Challenge to the EPA’s General Conformity Regulations Are Time-Barred And Have Been Waived.

On the merits, Petitioners first argue that the FAA’s Presumed to Conform List is *per se* invalid because “it is the product of an EPA regulation that is inconsistent with the face of the Clean Air Act.” Br. at 20. Petitioners failed to timely challenge the EPA’s regulations themselves within sixty days under 42 U.S.C. § 7607(b). Their claim is therefore time-barred. Also, where this argument was not presented to the FAA in the comment period on the Presumed to Conform List, Petitioners have waived the right to argue it before this Court.

A. Petitioners’ Challenge to the EPA’s General Conformity Rule is Time-Barred.

The petition clearly identifies only the FAA’s Presumed to Conform List as the subject of Petitioners’ challenge. [Petition for Review at 1; Br. at 57-58]. Petitioners do not (and cannot) ask this Court to invalidate the EPA’s General Conformity regulations; indeed, in their stay motion they specifically stated that they were not challenging those regulations in this proceeding. Stay Mot. at 13 n.

8. Also, Petitioners did not sue the EPA in this or any other proceeding in an attempt to invalidate the regulations. Nevertheless, Petitioners argue that the EPA's regulations are invalid. Br. at 35-46 (arguing exclusively about the validity of the presumed to conform provisions in EPA's General Conformity Regulations). The time for bringing that argument has long since passed, and Petitioners may not now circumvent the statute of limitations by raising those arguments in this context. *See* 42 U.S.C. § 7607(b) (CAA's sixty-day statute of limitations).

EPA promulgated the General Conformity Regulations, including the Presumed to Conform Rule, in their final form on November 30, 1993.

Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214 (November 30, 1993). Under the CAA, challenges to a final action of the EPA Administrator must be brought within sixty days of that publication.⁸ Having failed to timely challenge the regulations at issue here, Petitioners' claim is time-barred.

⁸ "Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b). Petitioners may not now argue that the latter exception applies, as they have not proceeded pursuant to this provision at all, and any attempt to claim otherwise in a Reply Brief must be rejected. *General Carbon Co. v. Occupational Safety and Health Admin.*, 854 F.2d 1329, 1329-30 (D.C. Cir. 1988) (rejecting attempt in reply brief to flesh out a "skeleton" of an argument).

B. Petitioners Have Waived the Argument that the Presumed to Conform List is Invalid Because EPA’s Regulations are Invalid.

Petitioners City of Las Vegas submitted comments on the proposed Presumed to Conform List on March 29, 2007. [AR Tab 12]. However, nowhere in those comments do Petitioners argue that EPA’s General Conformity Rule is invalid, either entirely or with respect only to the provision permitting federal agencies to create a presumed to conform list. *Id.* No other commenters presented this argument to the agency during the comment period. “[R]espect for agencies’ proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency’s interpretation of its governing statute are first raised in the administrative forum.” *Natural Resources Defense Council v. EPA*, 25 F.3d 1063, 1073-74 (D.C. Cir. 1994) (citing *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308-09 (D.C. Cir. 1991)). The argument is therefore waived, and this Court should not consider it.

V. Assuming It Is Reviewable, the FAA’s Presumed to Conform List Is Reasonable.

The petition for review should be dismissed for lack of subject matter jurisdiction. Nevertheless, should this Court reach the merits, it should uphold the FAA’s Presumed to Conform List, as it complies with the requirements of EPA’s General Conformity Rule, and is not arbitrary or capricious.

A. Standard of Review

Under the Administrative Procedure Act (“APA”), agency action may be set aside only if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Bennett v. Spear*, 520 U.S. 154, 174 (1997); 5 U.S.C. § 706(2)(A). When reviewing determinations by an agency, especially with respect to judgments within the agency’s area of expertise, a reviewing court “must generally be at its most deferential.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983). *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989) (where analysis “requires a high level of technical expertise,” court must defer to informed discretion of agency, even if, as an original matter, court might find contrary views more persuasive). This standard of review is narrow, and when reviewing the agency’s reasoning, “[t]he court is not empowered to substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). “[T]he standard mandates judicial affirmance if a rational basis for the agency’s decision is presented . . . even though [a court] might otherwise disagree.” *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir.1981) (citations omitted).

B. FAA’s Presumed To Conform List Complies With All Provisions of the EPA’s General Conformity Rule.

1. The FAA Articulated a Rational Basis for the Inclusion of Category 14, As Demonstrated By the Administrative Record.

EPA’s regulations provide two separate means by which a federal agency might establish activities that are presumed to conform. The regulation states that a “Federal agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in *either* paragraph (g)(1) or (g)(2) of this section.” 40 C.F.R. 93.153(g) (emphasis added). FAA chose the second subsection to support the Presumed to Conform List and its inclusion of Category 14. That subsection provides that a “Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination . . . based, for example, on similar actions taken over recent years.” 40 C.F.R. § 93.153(g)(2). To support the List, FAA relied on surveys of similar actions taken over recent years as well as air quality studies and analyses conducted on representative activities, and therefore provided the documentation required by the regulation. [AR Tabs 17-22].

FAA included Category 14 of the FAA’s Presumed to Conform List after gathering information regarding past air traffic control activities at airports nationwide, as well as after consulting recent studies and analyses of the emissions

from air traffic control activities. *Id.* All available information before the FAA indicated that the emissions effects of activities described by Category 14 would likely be *de minimis* or result in a decrease in emissions, and therefore FAA reasonably included such activities in its list of actions presumed to conform.

2. FAA Did Not Have to Conduct New Air Quality Analyses.

Petitioners complain that “there is no evidence in the Record, including the Final Notice, that FAA conducted *any* emission testing for Category 14, let alone testing consistent with § 93.159(b),” a regulation describing EPA’s requirements for the conduct of air quality analyses. Br. at 50. There is no legal requirement that FAA conduct such a test. The EPA regulations require that FAA comply *either* with subsection (g)(1) or (g)(2). 40 C.F.R. 93.153(g). Although Subsection (g)(1) *might* require the performance of new air quality analyses, thus triggering the requirements of 40 C.F.R. 93.159, the FAA did not purport to base its inclusion of activities on the List on subsection (g)(1). Thus, Petitioners’ contention that the List is not consistent with these requirements, Br. at 48-54, is irrelevant.

3. FAA Clearly Demonstrated That Past Events Meeting the Description in Category 14 Had *De Minimis* Air Emissions.

The administrative record demonstrates that FAA’s decision to include Category 14 in the Presumed to Conform List was reasonable. All of the available information before the FAA indicated that the air traffic control activities described

in Category 14 would have a *de minimis* effect on air emissions, or in many cases would have a positive effect (meaning air emissions would decrease as a result of the action). There was no evidence before the FAA to suggest otherwise, and Petitioners have pointed to no evidence that FAA should have considered but did not.⁹ Given that all available information supported the agency's decision, the agency's decision was reasonable, and this Court should defer to the agency's expertise in this technical matter.

Although Petitioners suggest that the agency's decision is totally undocumented, that is not the case. The Wayson Study (referred to by Petitioners as the "FAA Report," Br. at 49) provided a broad analysis of aircraft emissions. [AR Tab 6]. It concluded, using very conservative assumptions, that "changes in air traffic procedures above 1,500 ft. AGL [above ground level] and below the

⁹ The one exception is Petitioners' attempt to rely on statements made by William Becker, Executive Director of the National Association of Clean Air Agencies, at a hearing before the EPA on March 14, 2008. Br. at 53-54. Petitioners submitted this document as part of their second request for judicial notice in this suit, and have cited it substantively to advance their argument that FAA's decision was not reasonable. This further indicates the inappropriateness of Petitioners' use of judicial notice motions in lieu of seeking supplementation of the record. Nevertheless, Mr. Becker's testimony cannot demonstrate that FAA's decision was arbitrary and capricious, because it was given almost eight months *after* publication of the Presumed to Conform List, and therefore could not have been considered by the agency during the decisionmaking process. Contrary to Petitioners' allegations, the Wayson Study cites EPA's "Mixing Heights, Wind Speeds, and Potential for Urban Air Pollution Throughout the Contiguous United States," PB 207103, Research Triangle Park, NC (1972) as scientific support for determining the mixing height. [AR Tab 6 at 3 n. 2].

mixing height would have little if any effect on emissions and ground concentrations.” *Id.* at 5. This study was cited in the Presumed to Conform List. 72 Fed. Reg. at 41,578.

This conclusion was further confirmed and documented by the air quality analysis performed as part of the development of the EIS for the Chicago Terminal Airspace Project. [AR Tab 11]. That EIS specifically analyzed aircraft emissions related to approach, takeoff, climbout, taxiing, and idling, which include activities occurring well below 1,500 feet AGL. FAA utilized its (EPA-approved) Emissions Dispersion Modeling System (EDMS) to quantify these emissions, and the analysis showed that the changes in air traffic control procedures were not only below *de minimis* levels, but that they resulted in a decrease in emissions below 3,000 feet AGL. *Id.* at 4-43 through 4-50. In addition, the air quality analyses contained in the 2006 Miami EA [AR Tab 17], the 2001 Atlanta-Hartsfield 5th Runway Written Reevaluation [AR Tab 18], and the Las Vegas 4 Corner Post Supplemental EA [AR Tab 19], all contained in the administrative record for the Presumed to Conform List, reached similar conclusions that air traffic procedures of the type described in the List resulted in *de minimis* levels of emissions. The LAS and Airspace Redesign RODs, much discussed by Petitioners in this case, provide further documentation of the same thing.

In their arguments, Petitioners do not account for the important qualifications limiting the applicability of Category 14. Not every air traffic control activity or procedure will be automatically presumed to conform. Air traffic actions are presumed to conform only “when modifications to routes and procedures are designed to enhance operational efficiency (*i.e.*, to reduce delay), increase fuel efficiency, or reduce community noise impacts by means of engine thrust reductions.”¹⁰ 72 Fed. Reg. at 41,578. Air traffic activities are also presumed to conform when they “have no effect on air emissions or result in air quality improvements, such as gate hold procedures which reduce queuing, idling, and flight delays.” *Id.* Therefore, by definition, the types of activities that are presumed to conform under Category 14 are those about which there can be no question of conformity, as air emissions either will not be affected or will be decreased, and thus Petitioners’ concerns are misplaced.

The Category proceeds to explain which types of activities are *not* presumed to conform. These would include changes resulting in “airport planning and development of new runway or terminal projects,” which would require a conformity analysis. *Id.* In addition, a conformity analysis must still be performed for any action on the List that would be “regionally significant,” a term of art under

¹⁰ Reducing runway delays at airports reduces the amount of time that airplane engines are idling on the ground waiting to taxi onto or off of the runway. This idling produces emissions that could affect air quality in the same manner as an idling car.

the CAA that means that the total direct and indirect emissions of the action would represent ten or more percent of total emissions of a pollutant in a nonattainment or maintenance area. 72 Fed. Reg. at 41,580.

As the EPA has described it, an agency's list of presumed to conform activities merely creates a "rebuttable presumption" of conformity. 58 Fed. Reg. at 63,229. Had Petitioners brought a ripe challenge to an application of the FAA's List, they might be able to point to some information regarding the specific challenged decision indicating that a conformity analysis was needed. However, Petitioners' attempt to discredit the List in the abstract fails. The administrative record documents examples of past FAA activities meeting the description of activities in Category 14 that readily conformed to all applicable CAA requirements, and the agency was presented with no evidence suggesting that the result would differ in other situations. In that circumstance, the FAA's decision was documented, reasonable, and should be upheld.

C. Petitioners Do Not Challenge The Other 14 Categories of the List on the Merits.

Petitioners raise several arguments about whether the FAA's Presumed to Conform List complies with the requirements of 40 C.F.R. § 93.153(g)(1)-(2), which establish how a federal agency may go about producing a list of activities presumed to conform to any applicable SIP. However, all of Petitioners' arguments are specific to Category 14, which involves changes to air traffic control

procedures. Petitioners acknowledge that the administrative record contains support for “many of the other categories,” Br. at 53, and do not point to a single weakness in any of the fourteen other categories of activities on the List.

Petitioners present no reason for this Court to invalidate the entirety of the Presumed to Conform List, even if it agrees with all of the arguments made in the merits portion of Petitioners’ Opening Brief. Therefore, should this Court ultimately agree with Petitioners’ arguments on the merits, the appropriate remedy would be to sever Category 14 from the remainder of the List and remand only that category.

In assessing severability, the question is whether the agency would have enacted the other regulatory provisions in the absence of the provision being challenged. *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990) (citing *Brockett*, 472 U.S. at 506 n. 15). “In such an inquiry, the presumption is always in favor of severability.” *Community for Creative Non-Violence*, 893 F.2d at 1393 (citing *Regan v. Time*, 468 U.S. 641, 653 (1984)). Here, FAA would clearly have promulgated the List with the other fourteen categories, as the design of the List does not make the different numbered categories interdependent, and each category is independently documented.

CONCLUSION

The petition for review should be dismissed for lack of subject matter jurisdiction. Should this Court hold that it has jurisdiction over this petition for review, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(a)(3)(C), that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 10,933 words.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(1)(B), I hereby certify that on this 20th day of June, 2008, I caused to be served two copies of the preceding Brief of Federal Respondents on counsel of record at the address listed below, by overnight Federal Express delivery:

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