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April 14, 2008

The Honorable Stephen L. Johnson
Administrator,
Air and Radiation Docket and Information Center,
Environmental Protection Agency
Docket ID No. EPA–HQ–OAR–2006–0669
Mail Code: 6102T
1200 Pennsylvania Avenue, NW.
Washington, DC 20460.

Re: Docket ID No. EPA–HQ–OAR–2006–0669; Comments Regarding United States Environmental Protection Agency's Revisions to the General Conformity Regulations, 40 C.F.R. Parts 51 and 93, 73 Fed.Reg. 1401 *et seq.*, January 8, 2008

Dear Administrator Johnson:

The following constitutes the comments of Tempe Land Company, Riversville Aircraft Corporation, City of Inglewood, California, City of Highland, California, Delaware County, Pennsylvania, Village of Beecher, Illinois, Airport Working Group of Orange County, Inc., and City of Las Vegas, Nevada, ("Commenters") on the United States Environmental Protection Agency's ("EPA") proposed "Revisions to the General Conformity Regulations," 40 C.F.R. Parts 51 and 93, Federal Register, 73 Fed.Reg. 1401, *et seq.*, January 8, 2008 ("Proposed Rule").

I. SUMMARY OF ISSUES.

At the most fundamental level, the Proposed Rule, rather than further facilitating Federal agencies' compliance with the Clean Air Act's purpose of protecting and enhancing the quality of the nation's air resources,[1] and with the related mandate of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, ("NEPA") of making "available . . . advice and information useful in restoring, maintaining and enhancing the quality of the environment," actually tips the balance against such compliance. 42 U.S.C. § 4332. Ignoring the Congressional mandate that the

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[1] Clean Air Act § 101(b)(1) states that the purpose of the Clean Air Act's programs and activities is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . ." 42 U.S.C. § 7401(b)(1) (emphasis added).

"assurance of conformity" is the "affirmative responsibility" of the Federal agency,[2] the Proposed Rule purports to reduce the "burden" of compliance on Federal agencies by revising the regulations implementing the Clean Air Act's conformity provision to: (1) enhance exemptions and "presumptions" of conformity; (2) allow project sponsors to create their own emissions standards and then decide if their own projects have complied with those standards; (3) allow pollution tradeoffs that leave vital criteria pollutants unaccounted for; and (4) allow the EPA to delegate its duties to other Federal agencies in contravention of the Clean Air Act § 176(c)(4)(A), 42 U.S.C. § 7506(c)(4)(A). In short, the liberalization effected by the Proposed Rule creates a Conformity Rule that strays far afield from the clear language of 42 U.S.C. § 7506, the Clean Air Act's conformity provision, and allows Federal agencies to disregard, in the following ways, the Clean Air Act's unequivocal mandates.

II. THE EPA SHOULD RECONSIDER ITS GRANTING OF AN EXEMPTION TO AIR TRAFFIC CONTROL PROCEDURES ABOVE 3,000 FEET ABOVE GROUND LEVEL.

In response to the Federal Aviation Administration's (FAA) request for clarification of the language in the 1993 General Conformity Preamble, the Proposed Rule includes a proposal to exempt "air traffic control activities and adopting approach, departure and enroute procedures for aircraft operations above 3,000 feet AGL." 73 Fed.Reg. at 1406. The proposal is based on a 2000 FAA Report[3] that concluded that aircraft operations at or above 3,000 feet Above Ground Level (AGL) have a very small direct effect on ground level air quality. While the 2000 FAA Report might have been accurate at the time it was conducted, there are several reasons why it should not be relied upon by the EPA for granting such an exemption in 2008. Absent any other evidence, Commenters strongly object to such an exemption.

First, the study's applicability is self-limited. It states on p.2 that "it is possible that regional or long range impacts, such as the formation of ozone, could result from these operations but only microscale impacts that are required to be analyzed for a specific airport action are discussed in this report." 2000 FAA Report, p. 2 (emphasis added). Thus, the impact of the study does not extend to neighborhoods and communities beyond the airport and does not offer any insight into regional issues of ozone formation. Moreover, the conclusions of the 2000

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[2] "The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality." 42 U.S.C. § 7506(c)(1) (emphasis added).

[3] "Consideration of Air Quality Impacts by Airplane Operations at or Above 3000 Feet AGL." Wayson, Roger L. and Fleming, Gregg G. Office of Environment and Energy, Washington, D.C., September, 2000. FAA-AEE-00-01, DTS-34.

FAA Report only concern carbon monoxide, hydrocarbons and NO_2.[4] The report also fails to mention other types of particulate matter, ozone precursors (other than NO_2) or SO_x.

Second, the 2000 FAA Report does not take into account the changes in the EPA's NAAQS regulations since 2000. For example, the 2000 FAA Report does not take into account the 8-hour ozone standard that the EPA proposed in 2004 and implemented in 2005, nor does it take into account the particulate matter standard that the EPA implemented in 2007. For that matter, it does not mention the EPA's 2006 addition of *de minimis* levels for $PM_{2.5}$ in the Conformity Rules. In fact, the 2000 FAA Report does not mention PM_{10} at all, but simply mentions hydrocarbons, presumably as a surrogate for particulate matter. But PM_{10} and $PM_{2.5}$ are more than just hydrocarbons, since they consist of *all* particulate matter with an aerodynamic diameter equal or less than 10 or 2.5 microns. Thus, the study reaches no conclusions concerning the potential effects of aircraft emissions of PM_{10}, $PM_{2.5}$ or ozone precursors on ground level air quality.

Third, the 2000 FAA Report does not take into account the *indirect* effect emissions above 3,000 feet may have on ground level air quality. The specific question not addressed in the 2000 FAA Report is whether air traffic below 3,000 feet is affected by air traffic above 3,000 feet. The FAA, in its report, fails to demonstrate the absence of emissions impacts below 3,000 feet caused either by induced demand due to increased airspace efficiency, or by shifts in airspace procedures above 3,000 feet that translate into corresponding shifts below 3,000 feet. The FAA assumes instead that air traffic demand is inelastic, and, thus, reduction in delay and corresponding increases in efficiency which opens more airport capacity, will not cause concomitant increases in aircraft traffic, and, thus, emissions.

Finally, basing an exemption on one eight-year old study that relies on data that is even older is not defensible. The study itself does not rely on measurements taken at or near the airport. Rather, it relies on deduction and logic based on certain presumed qualities about aircraft engines and the three pollutants under scrutiny. In order to receive an exemption, the research ought to be at least as rigorous as that which is required to demonstrate conformity. Indeed, the Clean Air Act specifically states that "the determination of conformity shall be based on the most recent estimates of emissions . . ." 42 U.S.C. § 7506(c)(1). For example, instead of using a "conventional small-scale Gaussian model," like the 2000 FAA Report, H.J. Jung used a "complex Lagrangian model" to show in his simulations of aircraft emissions at Frankfurt airport in Germany that there was an increase in of both O_3 *and* NO_2 at some distance from the airport as

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[4] *See*, 2000 FAA Report, pp.10-11: " . . . the increase in ground level concentrations of CO and HC are negligible due to mixing . . . . the impact on NO_2 ground level concentrations is also very small . . ."

a result of the airport's emissions.[5] Thus, before the EPA is willing to accept the FAA's contention that aircraft emissions above 3,000 feet AGL have no impact, direct or indirect, it should at least ensure that any such determination is based on the best science currently available and the "most recent estimates of emissions," as required by the Clean Air Act.

III. "FACILITY-WIDE EMISSIONS BUDGET" ALLOWS THE FOX TO GUARD THE HEN HOUSE.

The most notable of the "burden reducing" revisions in the Proposed Rule is the establishment of a "facility-wide emissions budget" in § 93.161. This "facility-wide emissions budget" allows a Federal agency, "in anticipation of major actions," to set its own standard for acceptable emissions (the budget), and then go on to decide: (1) whether the actions later proposed by the agency as part of the contemplated project are "*de minimis*," and, thus, "could proceed with no conformity determination;" or (2) if obviously not *de minimis*, whether the emissions from the proposed project comport with the emissions standards established in the budget. 73 Fed.Reg. 1405. "By using the facility-wide emissions test, the action would be presumed to conform, and a conformity determination would not be necessary." *Id.*

This would seriously diminish, if not eliminate not only all project level conformity determinations, but also all project level applicability analyses, thus effectively eliminating any air quality analysis by Federal agencies for their actions. That the facility-wide budget would eventually have to be incorporated in the SIP is almost beside the point, as the emission standards incorporated in the facility-wide budget are being developed by the project proponent - the party with the most to gain from emission standards favorable to future projects.

In the end, the Proposed Rule requires the State to certify the budgets of local sponsors in advance of Federal action. If the Federal agency should change its action after the submission of the budget, that change would not be accommodated in the SIP. In the meantime, the Federal agency is relieved from providing potentially impacted communities with the assurance they need that their rights under the Clean Air Act to safe and healthful air are being protected. For these reasons, the Commenters urge that this proposal be dropped from consideration.

Finally, the proposed facility wide budget regulation is unclear as to what is required. The Preamble states that "[o]nce approved, minor actions under the control of the facility *where*

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[5] Rogers, H.L., Lee, D.S., Raper, D.W., Forster, P.M. de F, Wilson, C.W., and Newton, P. (2002). The Impacts of Aviation on the Atmosphere. Cambridge, United Kingdom. pp. 31-32. *See also*, Jung, H..J. (2000). Entwicklung und Erpropung einer Method zur Bewertung der Schadstoffimmisionen in der Umgebung von Flugplätzen. Band II Ermittlung der Imissiononen. Umweltbundesamt Forschungbericht 294 436 89, Berlin.

an applicability analysis results in a determination that the emissions are below a de minimis threshold could proceed with no conformity determination." 73 Fed.Reg. 1405 (emphasis added). However, § 93.161 does not contain any language mandating that a Federal agency perform an "applicability analysis" prior to proceeding with the action without a conformity determination. In addition, the Preamble is internally contradictory: "[i]n these cases [where Federal actions exceed the facility-wide budget], or under any circumstances, a Federal agency may determine applicability or demonstrate conformity with the standard requirements contained in §§ 93.153 through 93.160 and 93.162 through 93.165 of the General Conformity regulations." 73 Fed.Reg. at 1416. This seems to indicate that an applicability analysis is only required when the facility-wide budget is going to be exceeded. While Commenters staunchly oppose the creation of facility-wide emissions budgets, at a minimum, the provisions should include that an applicability analysis is required of any Federal action before such a provision is approved.

IV. THE EPA'S PROPOSED DEFINITION OF APPLICABILITY ANALYSIS LACKS SPECIFICITY AND APPROPRIATE DETAIL.

Although the current General Conformity Rules lack a definition entirely, the proposed definition of "applicability analysis" in the Proposed Rule lacks specificity and appropriate detail. The Proposed Rule simply defines "applicability analysis" as "the process of determining if your Federal action must be supported by a conformity determination." 73 Fed.Reg.1422. The term, however, is more thoroughly defined in the Preamble where the steps a Federal agency must go through in order to determine conformity applicability are clearly outlined. 73 Fed.Reg. 1404.[6] As the Preamble does not have regulatory force and effect, without a more explicit definition of "applicability" analysis in the Rule itself, the door is left open to differing interpretations and even more lax enforcement of the Conformity Rule. *See, e.g., International Union v. Mine Safety and Health Administration*, 68 Fed.App. 205 (D.C. Cir. 2003) ("it is well-settled that preambles, though undoubtedly 'contributing to a general understanding' of statutes and regulations, are not 'operative parts' of statutes and regulations"). At the very least, the definition of "applicability analysis" should contain the wording contained in the Preamble.

In addition, neither the proposed definition of "applicability analysis" nor the Preamble provides any indication of what sort of documentation and analysis is required of a Federal agency to establish that the Federal action's "total direct and indirect emissions are below or above the *de minimis* levels." 73 Fed.Reg. 1404. In an applicability analysis, the Federal agency

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[6] "In the applicability analysis phase, the Federal agency determines: (1) Whether the action will occur in a nonattainment or maintenance area; (2) Whether one of the specific exemptions apply to the action; (3) Whether the Federal agency has included the action on its list of "presumed to conform: actions; or (4) Whether the total direct and indirect emissions are below or above the de minimis levels." 73 Fed.Reg. 1404.

must be required to quantify the Federal action's emission so that it can show the project's emissions are below the *de minimis* levels. To show less would allow the Federal agency to circumvent its "affirmative responsibility" to assure conformity. Since the applicability analysis is often the final air quality analysis for a Federal action, it must provide the scientific basis for the Federal agency's conclusion, including that it is "based on the most recent estimates of emissions," as required by § 176(c)(1) of the Clean Air Act. Thus, the Commenters support the inclusion of a definition of "applicability analysis," but suggest strongly that it be much more detailed than proposed by the EPA.

V. AN EXEMPTION OF "SHORT-TERM" CONSTRUCTION PROJECTS LASTING 2-5 YEARS GIVES A FREE PASS TO CONFORMITY TO A LARGE COMPONENT OF PM_{10} AND $PM_{2.5}$ EMISSIONS SOURCES (PROPOSED § 93.152).

The EPA is seeking comment on the possibility of "exempting short-term construction projects," which it defines as either "short-term emissions . . . lasting no more than 2 years" or construction projects lasting "no longer than 5 years at individual sites." 73 Fed.Reg. 1406, 1408. Currently, a Federal agency must consider construction projects in its applicability analysis and conformity determination. Commenters firmly oppose any change or the addition of an exemption. First, large construction projects, including airport construction projects such as new or extended runways or taxiways, which can last less than 5 years, are potentially significant emitters of particulate matter, both PM_{10} and $PM_{2.5}$ from construction equipment, as well as dust from the movement of the earth itself. At present, those impacts are required to be mitigated by, among others, the use of best available control technology ("BACT"), lower-emitting vehicles, and watering. If so-called "short-term" construction projects are exempted, those mitigation measures may not be required.

Further and even more fundamentally, the substantial emissions contributions from construction projects would not be included in any "applicability analysis," let alone in an ultimate determination of conformity. Moreover, a blanket exemption based on duration of construction is not appropriate to attain and maintain the NAAQS "as expeditiously as practicable," as is required by Clean Air Act § 172(a)(2).

Finally, by virtue of the anticipated omission of construction emissions, the public would be kept in the dark about the true emissions impacts of a project. For all the above reasons, Commenters firmly oppose an exemption from conformity for purported "short-term" construction projects of either 2 or 5 years in duration.

VI. INTER-PRECURSOR TRADE-OFFS LEAVE SOME PRECURSORS UNACCOUNTED FOR (PROPOSED § 93.164).

The Proposed Rule § 93.164 allows the use of an inter-precursor offset and mitigation measures where they are allowed by the SIP. 73 Fed.Reg. 1418. The Commenters oppose such a change in the General Conformity Rules. The Proposed Rule states that these offsets would only be allowed if they are "technically justified" and have a "demonstrated environmental benefit." *Id.* However, the EPA does not offer any explanation either in the Preamble or in the regulation itself as what it means by "technically justified" or "demonstrated environmental benefit." As the EPA notes, "the evaluation of the inter-precursor offsets may in some cases be difficult . . ." Therefore, explaining what EPA means by "technically justified" and "demonstrated environmental benefit" would assist the Commenters in devising comments about how such offsets or mitigation measures should be evaluated. Before this approach is adopted adequate guidance for technical evaluations of inter-precursor trading for a variety of programs not using these types of offsets should be developed.

Even without such clarification additional problems are raised, especially for NOx, which is both a precursor for ozone and for PM2.5. At an airport, a Federal action that would increase the number of takeoffs, and decrease the amount of taxi time could lead to substantial NOx increases, while decreasing the emission of hydrocarbons, which is a component of particulate matter. While there may be a decrease in the particulate matter at an airport, there may be an increase in ozone production due to the increase in NO_x emissions. By allowing agencies to offset "inter-precursors," new issues are being created through the increase in emissions from the uncontrolled precursor.

VII. ALLOWING CREDIT FOR "EARLY EMISSIONS REDUCTIONS" IS AN INVITATION TO THE VIOLATION OF CONFORMITY (PROPOSED § 93.162)

The Proposed Rule adds a new § 93.162, which allows Federal agencies to establish conformity for emissions that extend beyond the term of the then-existing State Implementation Plan ("SIP") by "requesting" an "enforceable commitment" from the state to include the emissions in a future SIP emissions budget. In other words, it appears that the project at issue could achieve conformity, and, thus, proceed with implementation, if the State promises to include the emissions in a future SIP revision, purportedly to occur "within 18 months."

This approach is fraught with danger to the very concept of conformity and is strenuously opposed by Commenters. The Proposed Rule provides no definitions of the required form of a "commitment" or what constitutes "enforcement" of that commitment. Absent such clarification, a Federal agency's project could be well on the way to completion before the failure to fulfill the "commitment" becomes evident, or "enforcement" could be commenced. A noncompliant

project under that circumstance could escape a conformity analysis on the mere promise by the relevant Federal and state agencies.

In short, the proposed § 93.162 allows a demonstration of conformity to rely on nothing more than a mere "promise" and, thus, defies the primary goal of the Clean Air Act "to encourage or otherwise promote reasonable federal, state, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." Clean Air Act § 7401 (emphasis added). Moreover, this "promise" effectively transfers the responsibility of assuring conformity from the Federal agency to the State, in clear violation of the Clean Air Act. 42 U.S.C. § 7506 ("[t]he assurance of conformity . . . shall be an affirmative responsibility of the head of such [Federal] department, agency or instrumentality).

Finally, it would seem that the Proposed Rule would allow credit to be given for reductions that would have occurred anyway. The facility may have other reasons to adopt the measures and therefore the credit would be given for routine business reductions. For all of the above reasons, Commenters oppose credit for "early emissions reduction."

VIII. FEDERAL AGENCIES SHOULD NOT TAKE ACTION IN ADVANCE OF PROJECT ENVIRONMENTAL REVIEW AT THE EXPENSE OF COMMUNITIES AFFECTED BY THE ACTION.

The Proposed Rule states that "several of the proposed revisions encourage both the Federal agencies and the States or Tribes to take actions in advance of the project environmental review." 73 Fed.Reg.1405. The EPA specifically invited comment on this approach. While Commenters are mindful of the need to reduce bureaucratic waste, the EPA must also be mindful of the Clean Air Act's mandate to provide current, accurate and scientifically relevant information about an activity's air quality and NEPA's requirement that such information be made available for environmental review before project implementation. 40 C.F.R. § 1502.5 The Clean Air Act envisions that the public play a vital role in the development and carrying out of Clean Air Act programs and initiatives.[7] To create regulations that would allow Federal agencies to avoid the scrutiny of the communities and neighborhoods affected by the Federal action would be contrary to the Clean Air Act. Any provision in the Proposed Rule advocating avoidance of this responsibility blatantly violates its governing statutory mandate, and is opposed by the Commenters.

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[7] *See, e.g.*, 42 U.S.C. § 7607(h).

IX. THE REQUIREMENT OF SPECIFYING A PROJECT AS BEING "REGIONALLY SIGNIFICANT" SHOULD BE RETAINED (PROPOSED §§ 93.152, 93.153(I))

The EPA is proposing to delete the definition of "regionally significant action" (§ 93.152) and the requirement that regionally significant actions have conformity determinations, regardless of exemptions or presumptions of conformity. The EPA states that this action makes sense because "in over 12 years since promulgation of the existing regulations, no action has been determined to be regionally significant." However, in light of the fact that the EPA is required to designate $PM_{2.5}$ Non-attainment Areas by December 18, 2008, pursuant to the 2006 NAAQS revisions, and in light of the newly-finalized more stringent 8-Hour Averages Ozone primary and secondary standards, there may come a point in the near future for Federal projects may be "regionally significant." The EPA's original concept that conformity determinations were necessary for regionally significant actions in order to "capture those actions that fall below the de minimis emission levels, but have the potential to impact the air quality of the region" is a good one and should be preserved. With the advent of the new ozone standards, 345 counties in the United States are projected to become non-attainment areas. Many less urbanized portions of the United States will fall under these regulations and require the protection of the Clean Air Act. Instead of looking at the past, the EPA should be looking at the future, and the future points to retaining the requirement that "regionally significant actions" be subjected to a conformity determination.

X. THE DE MINIMIS LEVEL FOR $PM_{2.5}$ IS LESS STRINGENT WHEN COMPARED TO PM_{10} LEVELS AND SHOULD BE CHANGED (PROPOSED § 93.153).

The Commenters note with concern that the EPA has established the *de minimis* emission level for $PM_{2.5}$ as 100 tons per year for the direct emissions and precursors of $PM_{2.5}$. This is the same *de minimis* level as PM_{10}, of which $PM_{2.5}$ is a subset. This seems to be an anomaly, since the $PM_{2.5}$ *de minimis* level should be set somewhere below the level of PM_{10}. It has been suggested that the $PM_{2.5}$ *de minimis* level be adjusted "based on the ratio of the 24-Hour standards, particle sizes, and particle distributions. Based on the current standards without consideration of particle sizes and distributions, the new $PM_{2.5}$ *de minimis* level for direct emissions should not exceed 25 tons/year." The Commenters would support such a recommendation.

XI. THE PROPOSED REVISION OF § 93.153(f) - (j), THE "PRESUMED TO CONFORM" SECTION, VIOLATES THE CLEAN AIR ACT AND CONSTITUTES AN UNLAWFUL DELEGATION OF AUTHORITY.

The Clean Air Act expressly requires the "Administrator shall promulgate criteria and procedures for determining conformity . . . of, and for keeping the Administrator informed about, the activities referred to in paragraph 1 [of § 7506(c), the Clean Air Act conformity provision]."

42 U.S.C. § 7506(c)(4)(A). Nevertheless, in 1993, the EPA promulgated regulations implementing the Conformity Rule, and specifically, § 93.153, the "presumed to conform" rule, which allows Federal agencies, other than the EPA, to draft a list of actions they believe will be "presumed to conform" with the Clean Air Act, without any further review or approval from the EPA, so long as the Federal agencies comply with current sections (g)(1), (g)(2) or the newly proposed sections (g)(3) and (h). The Presumed to Conform Rule violates the Clean Air Act ¶ 7506(c)(4)(A) because it unlawfully delegates the EPA's statutory responsibility to develop "criteria and procedures" to others than the Administrator of the EPA.

A. The Clean Air Act Does Not Allow the EPA to Delegate Its Duties to Other Federal Agencies.

The Clean Air Act is very specific about who may promulgate rules and regulations: Section 7601(a) specifically states that the "Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 7601(a). The Clean Air Act is equally specific as to whom the Administrator may delegate those duties. "The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations, subject to section 7607(d) of this title, as he may deem necessary or expedient." 42 U.S.C. § 7601(a). Nowhere does the Clean Air Act allow the Administrator to delegate his duties to another agency.

When the Clean Air Act mentions other Federal agencies it is very clear that the EPA should retain the duty to promulgate regulations. For example, § 176(c)(4), which concerns the development of the General Conformity Rules, states that the "Administrator, with the concurrence of the Secretary of Transportation, shall promulgate criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects."[8] Ultimately, however, the Administrator promulgates the regulations, not the Secretary of Transportation. The Congress, then, was very clear that the EPA would be the agency that

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[8]There can be no question that a "presumed to conform list" that is developed by a Federal agency is a "regulation" or "rule" within the meaning of the Clean Air Act The Administrative Procedures Act defines "rule" as: "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). *See, also, e.g., Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006); *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007). The terms "rule" and "regulation" are used interchangeably in the Clean Air Act. *Cf.,* 42 U.S.C. § 7601(a)(1) and 42 U.S.C. § 7607(d). Moreover, Black's Law Dictionary uses each term to define the other. *See,* BLACK'S LAW DICTIONARY 1156, 1195 (5th Ed. 1979).

promulgates the "criteria and procedures for demonstrating assuring conformity." Because the Presumed to Conform Rule delegates that authority to other federal agencies without any oversight by the EPA, it is an improper delegation of duty by the EPA.

B. The Presumed to Conform Provisions of the General Conformity Regulations Shift the Burden from the Federal Agency to Affected Community.

In essence, the presumed to conform provisions of the General Conformity regulations are burden-shifting measures. The presumed to conform provisions, especially the revisions to § 93.153(j), shifts the burden of assuring conformity from the Federal agency to "third parties," normally the residents of the area affected by the Federal agency's action. Revised § 93.153(j) states that a Federal action shall not be presumed to conform only if a "third party" can show that the Federal action would:

(I) Cause or contribute to any new violation of any standard in any area;
(ii) Interfere with provision in the applicable SIP for maintenance of any standard;
(iii) Increase the frequency or severity of any existing violation of any standard in any area; or
(iv) Delay timely attainment of any standard or any required interim emissions reduction or other milestones in any area . . .

73 Fed.Reg. 1424. These are the exact same requirements that the Clean Air Act requires a Federal agency to assure that its action will *not* create. *See*, 42 U.S.C. § 7506(c)(1)(B). This clearly shifts the burden of assuring conformity from the Federal agency responsible for the action to the third party. This is not what the Clean Air Act intended, since, as stated above, the Clean Air Act states that "the assurance of conformity to the [SIP] . . . shall be an affirmative responsibility of such [Federal agency]." 42 U.S.C. § 7506(c)(1).

Because of those burden-shifting provisions and the expense that the residents would have to go through to (1) study the issues; (2) develop a report; and (3) make the Federal agency actually pay attention to the report it generated, the EPA needs to consider very carefully when it grants exemptions and allows Federal agencies whose primary mission is not the protection of the environment to presume that certain of its actions will conform. Moreover, if the EPA shifts the burden to third parties, a correlative regulation should be enacted mandating that the Federal agency pay all of the third parties' expenses related to performing the conformity determination that the Federal agency should have done in the first place, including all expert and attorneys' fees.

In general, when the burden of proof is shifted from one party to another, it is because the party to whom the burden has been shifted is in possession of the information. Such is not the case where, as here, the Federal agency, already bound by NEPA to perform an environmental

assessment, is in a unique position to develop at least an applicability analysis. If no applicability analysis is performed, most environmental assessments and impact statements would not have any information about air quality in them. It is the Federal agency who has the burden of proving that its actions will *not* affect the air quality of the surrounding area, not the residents' burden of proving the Federal agency's action *will* have an effect on the air quality.

C. If EPA Retains Oversight of the Presumed to Conform List, It Will Pass Statutory Muster and Resolve the Issues Concerning Judicial Review.

Because the EPA is the agency with the expertise in dealing with air quality issues in general, and conformity issues in particular, it is the EPA that must decide whether or not a federal action should be "presumed to conform," not another Federal agency without the requisite environmental expertise. In *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) the court held that the "Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation." *See also, Michigan Pork Producers Association, Inc. v. Campaign for Family Farms*, 174 F.Supp.2d 637, 645-646 (W.D.Mich. 2001). This interpretation of the statutory framework is consistent with the principle that agency interpretations are entitled to deference given the "specialized experience and broader investigations and information" available to the designated agency. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944); *United States v. Mead Corp.*, 533 U.S. 218, (2001).

The EPA, in addition to its proposed revisions, should also revise the General Conformity regulations such that the EPA retains oversight of the Presumed to Conform program and issues any Presumed to Conform list as an EPA regulation. The current regulation mandates that federal agencies perform certain specific actions when developing a presumed to conform list. Section 93.153(g) states that the Federal agency must either: (1) clearly demonstrate, using methods consistent with the General Conformity Rules that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not cause or contribute to any new violation of any standard in any area; or (2) provide documentation that the total of direct and indirect emissions from such future actions would be *de minimis*, based on similar actions taken over recent years. *See*, 42 C.F.R. § 93.153(g). The federal agencies should submit this documentation to the EPA for review and approval to ensure that it meets the criteria set forth in the rules and will be protective of the Clean Air Act. Then, any presumed to conform lists submitted for approval by a federal agency should be promulgated by the EPA into a regulation so that the public is aware of what Federal actions are "presumed to conform." This would comply with the Clean Air Act, since the EPA will maintain its oversight of the Conformity program and it will provide the public with additional information regarding the activities of the Federal agencies and their efforts to comply with the environmental laws.

XII. CONCLUSION.

The EPA should keep in mind that, at least with respect to a Federal agency's compliance with NEPA, the applicability analysis and conformity determination is often the only analysis of air quality that the public will get. Thus, the Federal agency's desire for a "streamlined" and "burden reducing" approach should not be made at the expense of the express purposes of the Clean Air Act. The purposes of the Clean Air Act will be circumvented if the revisions are instituted since Federal agencies will be able to hide emissions that their projects create away from the scrutiny of the communities and neighborhoods that those projects will affect.

Sincerely,

CHEVALIER, ALLEN & LICHMAN, LLP

Steven M. Taber

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