SCHEDULED FOR ORAL ARGUMENT OCTOBER 7, 2008

No. 07-1385

In the
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

COUNTY OF DELAWARE, PENNSYLVANIA, a political subdivision of the Commonwealth of Pennsylvania; THE HONORABLE ANDREW J. REILLY, individually and in his official capacity as Chairman of the Delaware County Council; THE HONORABLE LINDA A. CARTISANO, individually and in her official capacity as Vice-Chair of the Delaware County Council; THE HONORABLE MARY ALICE BRENNAN, individually and in her official capacity as a Member of the Delaware County Council; THE HONORABLE MICHAEL V. PUPPIO, individually and in his official capacity as a Member of the Delaware County Council; THE HONORABLE JOHN J. WHELAN, individually and in his official capacity as a Member of the Delaware County Council; FRIENDS OF THE HEINZ WILDLIFE REFUGE AT TINICUM, INC., a Pennsylvania Non-Profit Corporation; HANK HOX, individually and in his official capacity as President of the Friends of Heinz Wildlife Refuge at Tinicum, Inc.; CITY OF LAS VEGAS, NEVADA, a political subdivision of the State of Nevada; and NEVADA ENVIRONMENTAL COALITION, INC., a Nevada nonprofit corporation,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; MARY E. PETERS, Secretary of Transportation; FEDERAL AVIATION ADMINISTRATION; and BOBBY STURGELL, Acting Administrator, Federal Aviation Administration,

Respondents

On Petition for Review of an Order of the Federal Aviation Administration

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PETITIONERS' FINAL OPENING BRIEF

[Petitioners' Request for Judicial Notice Filed Concurrently]

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

[*Fed. R. App. Proc*. 26.1; *Circuit Rule* 26.1]

Petitioner Nevada Environmental Coalition, Inc. is a Nevada non-profit corporation that is not publically held and does not have a parent organization.

Petitioner Friends of the Heinz Wildlife Refuse at Tinicum, Inc. is a Pennsylvania non-profit corporation that is not publically held and does not have a parent organization.

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TABLE OF AUTHORITIES

Authorities upon which we chiefly rely are marked with astericks. [*Cir. R.* 28(a)(2)]

Cases

Statutes

Other Authorities

GLOSSARY

Airspace Redesign	New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign
APA	Administrative Procedures Act, 5 U.S.C. § 551, *et seq*.
County	County of Delaware, Pennsylvania
DEIS	Draft Environmental Impact Statement
EDMS	Emissions and Dispersion Modeling System
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FONSI	Finding of No Significant Impact
Friends	Friends of the Heinz Wildlife Refuge at Tinicum, Inc.
FSEA	Final Supplemental Environmental Assessment
FTCA	Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680
General Conformity Rule	Determining Conformity of General Federal Actions to State or Federal Implementation Pans, 40 C.F.R. § 93.150, *et seq*.
LAS	McCarran International Airport, Las Vegas, Nevada
LTO	Landings and Takeoffs

NAAQS	National Ambient Air Quality Standards
NACAA	National Association of Clean Air Agencies
NEC	Nevada Environmental Coalition
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.
PHL	Philadelphia International Airport
Presumed to Conform Rule	Federal Presumed to Conform Action Under General Conformity 72 Fed. Reg. 41,565-580 (2007)
Reply	Respondents' Reply in Support of Respondents' Motion to Dismiss for Lack of Jurisdiction
ROD	Record of Decision
SIP	State Implementation Plan

I. STATEMENT OF JURISDICTION.[1]

Petitioners seek review of the Federal Aviation Administration's ("FAA") Presumed to Conform Action under General Conformity ("Presumed to Conform Rule"), published in the July 30, 2007 Federal Register. 72 Fed.Reg. 41,565-580 (2007) [AR 16:1-32; Def.App. 1-32] ("Final Notice").[2] This Court possesses jurisdiction over this matter under § 46110 of the Federal Aviation Act, as amended [49 U.S.C. § 40101 *et seq.*] which states, in pertinent part:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (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 [or] Part B . . . 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 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.

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[1] On November 21, 2007, Respondents Federal Aviation Administration, *et al.*, ("FAA") filed a Motion to Dismiss for Lack of Jurisdiction and Response to Petitioners' Motion for Stay Pending Review in this case. In its February 14, 2008 Order, this Court referred the Motion to Dismiss to the Merits Panel and directed the parties to address the issues presented in the Motion to Dismiss in their Briefs, rather than incorporate their arguments by reference. Petitioners' response to the Motion to Dismiss is set forth in this section.

[2] Petitioners timely filed their Petition for Review of Agency Order on September 14, 2007.

49 U.S.C. § 46110(a) [Emphasis added.] Section 46110 continues "[T]he court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the . . . Administrator to conduct further proceedings." 49 U.S.C. § 46110(c). [Addendum A, p. 24].

A. The Presumed to Conform Rule is a Final Order Over Which this Court May Exercise Jurisdiction.

The Presumed to Conform Rule falls squarely within the definition of an Order reviewable by this Court under § 46110. In *City of Dania Beach v. FAA*, 485 F.3d 1181 (D.C. Cir. 2007),[3] this Court held that "the term 'order' in this provision should be read 'expansively.'" *Id*. at 1187, *citing Aviators for Safe and Fairer Regulation v. FAA*, 221 F.3d 222, 225 (1st Cir. 2000) and *New York v. FAA*, 712 F.2d 806, 808 (2nd Cir. 1983). "A reviewable order under 49 U.S.C. § 46110(a) 'must possess the quintessential feature of agency decisionmaking

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[3] In *Dania Beach*, the FAA argued that this Court lacked jurisdiction because the letter from the FAA changing air traffic procedures at Fort Lauderdale-Hollywood International Airport at issue in that case was not a final order. The Court held that "the letter provides a new interpretation of the noise compatibility program and thus we hold that it is a reviewable 'final order.'" 485 F.3d at 1187. Here, "the FAA has interpreted how the exemptions in the [General Conformity] Rule apply to FAA actions associated with airport facilities and aviation planning." 72 Fed.Reg. 41,567 (2007) [AR 16:5; Def.App. 5] [Emphasis added.] The Presumed to Conform Rule is, thus, the FAA's interpretation of the Environmental Protection Agency's ("EPA") General Conformity Rule, and, therefore, a "final order" under *Dania Beach*.

suitable for judicial review: finality.'" *Id*. at 1188, *citing Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006). "To be deemed 'final' an order must mark the 'consummation' of the agency's decisionmaking process, and must determine 'rights or obligations' or give rise to 'legal consequences,'" *Id*., *quoting Bennett v. Spear*, 520 U.S. 154, 177-178 (1997); *see also*, *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3rd Cir. 1998) [defining "order" in § 46110 as an agency action that "impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship"].

The Presumed to Conform Rule indisputably meets these tests. First, it is the consummation of the FAA's decisionmaking process, as its purpose, as stated in the Final Notice is to "finalize" the catalogue of 15 FAA airport development projects that will, immediately upon approval of the Presumed to Conform Rule, be "presumed to conform" to state air quality standards, as required by the Clean Air Act conformity provision, 42 U.S.C. § 7506 [Addendum A, p. 12], and, thus, be effectively exempt from further Clean Air Act analysis and determination of conformity.

Second, and conversely, the Presumed to Conform Rule contains no contrary indication that the FAA's statements and conclusions are "tentative, open to further consideration, or conditional on future agency action." *Dania Beach*, 485 F.3d at 1188.

Third, the Presumed to Conform Rule determines rights and obligations and "creates legal consequence." For example, Project Category No. 14, "Air Traffic Control Activities and Adopting Approach, Departure and Enroute Procedures for Air Operations," 72 Fed.Reg. 41,578 (2007) [AR 16:25-26; Def.App. 25-26] ("Category 14") is a final determination that emissions impacts of Air Traffic Control procedures are always *de minimis*. The dramatic legal consequence is thus created that all FAA changes to Air Traffic Control procedures are effectively exempt from further compliance with the Clean Air Act's conformity provision, as well as its implementing regulations, 40 C.F.R. § 93.150, *et seq.*, ("General Conformity Rule") [Addendum A, pp. 29-53].

Finally, the "legal consequences" and "finality" of the Presumed to Conform Rule are patently manifest in the FAA's recent reliance on the rule to exempt new departure procedures at McCarran International Airport, Las Vegas, and the proposed New York/New Jersey/ Philadelphia Metropolitan Area Airspace Redesign ("Airspace Redesign") from a detailed assessment of air quality impacts and a positive conformity determination under the EPA's General Conformity Rule. [*See* Section III below].

B. The Presumed to Conform Rule is a Final Order Issued by the FAA Administrator Under, in Whole or in Part, 49 U.S.C. § 40101, *et seq.*

The Final Notice also confirms that the Presumed to Conform Rule directly implicates FAA's "aviation duties and powers" under 49 U.S.C. Subtitle VII "Aviation Programs," Parts A and B, thus bringing it directly within the scope of § 46110(a). Part A contains the statutory framework for FAA's basic programs such as use of airspace, regulation of air carriers and foreign air transportation, safety, security and enforcement and penalties. Part B governs airport development and improvement, project grant authority [Chapter 471] and noise abatement. Chapter 471 is the vehicle through which most airports in the United States acquire grant funds for airport improvement.

The Presumed to Conform Rule contains a list of actions which the FAA may take pursuant to its authority under Parts A and B. For example, in Part A, 49 U.S.C. § 40103(b)(2) provides that "[t]he administrator shall prescribe air traffic regulations on the flight of aircraft . . ." Category No. 14 in the Presumed to Conform Rule is entitled "Air Traffic Control Activities in Adopting Approach,

Departure and En Route Procedures for Air Operations."[4] 72 Fed.Reg. 41,578 (2007) [AR 16:25-26; Def.App. 25-26].

Other categories in the Presumed to Conform Rule such as Pavement Markings, Non-Runway Pavement Work, Lighting Systems, Terminal and Concourse Upgrades, Airport Signage and Installation of Airport Navigational Aides (*see* generally 72 Fed.Reg. 41568-578 (2007) [AR 16:9-28; Def.App. 9-28]) are examples of airport construction and development projects that are eligible for funding under the Airport Improvement Program described in Part B. All of these purported "presumed to conform" actions fall within the ambit of the FAA's "aviation duties and powers" as well as "in whole or in part under" Parts A and/or B.

The Final Notice expressly confirms that the Presumed to Conform Rule directly applies to the FAA's "aviation duties and powers" under Parts A and B,

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[4] Actions covered by Category 14, Air Traffic Control actions, are directly and exclusively governed by 49 U.S.C. § 40103 "Sovereignty and use of Airspace", which is part of Subtitle VII, Part A: The United States Government has exclusive sovereignty of airspace of the United States. 49 U.S.C. § 40103(a)(1) . . . The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest. 49 U.S.C. § 40103(b)(1). The Administrator shall prescribe air traffic regulations on the flight of aircraft . . . 49 U.S.C. § 40103(b)(2)

thus bringing it directly within the scope of § 46110(a). The Final Notice states: "[i]n this Notice, the Federal Aviation Administration (FAA) is identifying a list of actions involving agency approval and financial assistance for airport projects that are presumed to conform." 72 Fed.Reg. 41,566 (2007) [AR 16:2; Def.App. 2] [Emphasis added.] The Final Notice continues, "[a]s part of this Federal Register notice, the FAA has interpreted how the exemptions in the rule [the General Conformity Rule, 40 C.F.R. 93.150, *et seq.*] apply to FAA actions associated with airport facilities and aviation planning. . ." 72 Fed.Reg. 41,567 (2007) [AR 16:5; Def.App. 5] [Emphasis added.] Thus, the FAA is clearly applying "the [conformity] rule" to the actions it takes pursuant to Parts A and B, such as "financial assistance for airport planning" and "airport facilities and aviation planning."

In addition, case law strongly supports this Court's jurisdiction. In *National Parks and Conservation Association v. FAA*, 998 F.2d 1523 (10th Cir. 1993), the court accepted the FAA's argument that the court has jurisdiction to adjudicate a challenge to the FAA's determination of the sufficiency of environmental documents for funding and construction of a new airport, even though the environmental documents were created pursuant to the mandate of the National Environmental Policy Act, 42 U.S.C. § 4321 ("NEPA").

In finding for the FAA, the court held that "while these determinations were made under statutes other than the FAA Act, all were taken under the FAA's organic statute and in regard to the FAA's basic mission: the regulation of the nation's air transport system." *Id*. at 1528; *see also*, *Sutton v. Department of Transportation*, 38 F.3d 621, 625 (2nd Cir. 1994) [If decision of administrative agency is based in substantial part on statutory provision providing for exclusive review by court of appeals, entire proceeding must be reviewed by court of appeals]; *Suburban O'Hare Commission v. Dole*, 787 F.2d 186, 192-193 (7th Cir. 1986) [Where FAA decision is based on two authorities, one of which provides for exclusive jurisdiction in court of appeals, entire decision is reviewable exclusively in appellate court].

Similar, but even more compelling, circumstances militate for jurisdiction in this case. While the FAA's determination of what belongs in the Presumed to Conform Rule may have been made with reference to the technical standards set forth in the Clean Air Act and General Conformity Rule, all 15 of the specified airport development actions in the Presumed to Conform Rule were derived from the FAA's "organic statute," § 40101, *et seq.*, as amended, in general, and, with respect to Category 14, from § 40103 specifically. The Final Notice confirms the

connection between Category 14, Air Traffic Control procedures, and the FAA's "basic mission":

> Air traffic control activities are defined as actions that promote the safe, orderly, and expeditious flow of aircraft traffic, including airport, approach, departure, and en route air traffic control. Airspace and air traffic actions (*e.g.*, change in routes, flight patterns and arrival and departure procedures) are implemented to enhance safety and increase the efficient use of airspace by reducing congestion, balancing controller work load, and improving coordination between controllers handling existing air traffic, among other things.

72 Fed. Reg. 41,578 (2007) [AR 16:26, Def.App. 26].

Having argued for appellate court jurisdiction when it served its purpose in *National Parks*, the FAA now attempts to distinguish this case from *National Parks* by arguing that, while the decisions in *National Parks* were "necessary components to the decision to approve construction of the airport, this case is different because the Presumed to Conform List does not implement any of the provisions of the Act." Respondents' Reply in Support of Respondents' Motion to Dismiss for Lack of Jurisdiction ("Reply"), p. 4. FAA's argument is, however, belied by its own Environmental Impact Policies and Procedures, FAA Order 1050.1E,[5] which directs that conformity determination be part of any action the

[5] FAA Order 1050.1E governs all actions "directly undertaken by the FAA and where the FAA has sufficient control and responsibility to condition the

FAA takes pursuant to Parts A or B. "Before the FAA can fund or support in any way any activity, it must address the conformity of the action with the applicable SIP . . ." FAA Order 1050.1E, Appendix A, § 2.2b [Pet. RJN, Section III.B.; Exhibit 6, p. A-7].[6] "It is also the FAA's affirmative responsibility under section 176(c) of the [Clean Air Act] to assure that its actions conform to applicable SIPs." *Id*.

Finally, § 46110 does not require that the FAA's order be issued exclusively under either Part A or B, as the FAA implied in its Reply. To support its argument, the FAA cites to *Committee to Stop Airport Expansion v. FAA*, 320 F.3d 285 (2nd Cir. 2003) ("*CSAE*"). In *CSAE*, the court rejected the reasoning in *National Parks* on the ground that "it ignores the distinction that Congress has drawn between Parts A and B." *CSAE*, 320 F.3d at 289. The *CSAE* court rejected jurisdiction under § 46110 because the FAA was providing funding for the construction of an airport, which falls under Part B.

At the time of the decision in *CSAE*, Part B was not included in § 46110 as a basis to Appellate Court jurisdiction. However, Congress has since amended

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licence or project approval of a non-Federal entity." [AR 10:1; Def.App. 33].

[6] Petitioners' Request for Judicial Notice in Support of Petitioners' Opening Brief ("Pet. RJN") is filed concurrently with this Brief.

§ 46110(a) to include final agency actions issued "in whole or in part under this part [Part A] or part B," which underscores Congressional intent to read the provisions of § 46110 expansively. Dec. 12, 2003, P.L. 108-176 [*see* Addendum A, p. 24]. Therefore, a showing that the Presumed to Conform Rule was issued "in part" under either Part A or B (or both) is now sufficient. [". . . an order issued by the . . . Administrator in whole or in part under this part [or] part B . . . 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 . . ." 49 U.S.C. § 46110(a) [Emphasis added]].

In summary, the FAA cannot escape the legal reality that a determination of conformity is just as "necessary" a "component to approve the decision" to implement air traffic procedures, as NEPA compliance was to the airport construction in *National Parks*. The FAA should be held to its argument in favor of Appellate Court jurisdiction on which it prevailed in *National Parks*.

C. Even If There Were Ambiguity With Regard to Jurisdiction, the Weight of Authority Supports this Court's Jurisdiction to Hear this Matter.

If there were any ambiguity as to jurisdiction in this matter, which there is not, this Court has long come down in favor of its jurisdiction over administrative matters, even where jurisdiction is less than clear. In *Media Access Project v. FCC*, 883 F.2d 1063 (D.C. Cir. 1989), this Court held that "statutory review in the

agency's specially designated forum prevails over general federal question jurisdiction in the district courts." *Id*. at 1067 [internal citation omitted]. This follows the preference for review of administrative actions in the courts of appeals expressed by this Court in *Gen. Elec. Uranium Mgmt. Corp. v. Dept. of Energy,* 764 F.2d 896, 903 (D.C. Cir.1985). "It frequently has been noted that, in administrative appeals, 'where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter.'" *Id.*, *quoting Denberg v. United States R. Retirement Board*, 696 F.2d 1193, 1197 (7th Cir. 1983), *cert. den.*, 466 U.S. 926 (1984).

Jurisdictional provisions such as those found in § 46110(a), are also construed by other courts in favor of jurisdiction in the courts of appeals. In *NRDC v. Abraham*, 355 F.3d 179 (2nd Cir. 2004), the Second Circuit held that "[w]hen there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals." *Id*. at 193. *See also, Clark v. Commodity Futures Trading Commission,* 170 F.3d 110, 114 (2nd Cir. 1999) [same]. The Tenth Circuit, in *Nat'l Parks & Conservation,* also held that "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals." 998 F.2d at 1529. Finally, in *Ind. & Mich. Elec. Co. v. EPA*,

733 F.2d 489 (7th Cir.1984), the Seventh Circuit invoked "the judge-made presumption in favor of court of appeals review in doubtful cases" in determining its jurisdiction. *Id*. at 491.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Whether the Presumed to Conform Rule is a final order issued under U.S. Code Title 49, Subtitle VII, "Aviation Programs," Parts A or B, thus vesting this Court with jurisdiction under 49 U.S.C. § 46110(a).

2. Whether 40 C.F.R. 93.153(f) is an invalid regulation where: (a) it relies on a "presumption" of conformity, where no such presumption exists in the conformity provision of the Clean Air Act [42 U.S.C. § 7506(c)]; (b) it allows Federal agencies other than the EPA to determine which categories of activities should be effectively exempt from compliance, present and future, with § 7506.

3. Whether the FAA's Presumed to Conform Rule, as a direct product of the EPA's invalid regulation, is of no force and effect.

4. Whether the FAA's Presumed to Conform Rule fails to comply with: (a) General Conformity Rule § 93.153(g)(1) by failing to demonstrate that the total of direct and indirect emissions from the designated project category would not violate the air quality restrictions set forth in 42 U.S.C. § 7506(c); or (b) General Conformity Rule, § 93.153(g)(2) by failing to provide documentation, based on

"similar actions that the agency has taken over recent years" that emissions from the designated category are below applicable *de minimis* levels established in 40 C.F.R. § 93.153(b)(1).

III. STATEMENT OF FACTS.

Section 7506(c) of the Clean Air Act, 42 U.S.C. § 7401 *et seq*., requires that all Federal actions conform to the applicable State Implementation Plan ("SIP"). Clean Air Act § 7410(a)(1) requires that States submit to the Environmental Protection Agency ("EPA") a SIP. which provides for implementation, maintenance, and enforcement of National Ambient Air Quality Standards ("NAAQS") for certain air pollutants for which EPA has issued "air quality criteria." *See, generally, Environmental Defense v. Environmental Protection Agency*, 489 F. 3d 1320, 1322 (D.C. Cir. 2007). The Clean Air Act requires the EPA to promulgate rules setting the "criteria and procedures" that the Federal agencies are to use to ensure that all of their actions conform with the applicable SIP. [42 U.S.C. § 7506(c)(4)(A); Addendum A, p. 14]. On November 30, 1993, the EPA published a Final Rule, *Determining Conformity of General Federal Actions to State or Federal Implementation Plans* ("General Conformity Rule") in the Federal Register [58 Fed.Reg. 63,214 (Nov. 1993)]. The General Conformity Rule adds a new Subpart B to Title 40, Part 93 of the Code of Federal Regulations.

[*See*, Addendum A, p. 29]. 40 C.F.R § 93.153(f) allows Federal agencies to specify actions that are presumed to conform to a SIP. [Addendum A, p. 40].

On October 30, 2001, the FAA distributed "Presumed to Conform Survey" forms to its Regional Environmental Specialists, requesting air quality information on airport projects in nonattainment or maintenance areas nationwide for use in developing a "presumed to conform list." [AR 8; Def.App. 38-47] The Survey was to be completed by December 3, 2001. [AR 8:1; Def.App. 38] Survey results showed air quality data for four Air Traffic Control Departure and/or Arrival Procedures projects at two airports: one project at Boston-Logan International Airport and three projects at T. F. Green Airport, Providence, Rhode Island. [AR 8:11; Def.App. 11].

In November, 2006, the FAA issued a Final Supplemental Environmental Assessment ("FSEA") for proposed new departure procedures for aircraft departing McCarran International Airport, Las Vegas, to the west for eastern destinations ("Las Vegas Project"). On November 24, 2006, the FAA published a Finding of No Significant Impact ("FONSI") and Record of Decision ("ROD") for the Las Vegas Project simultaneously in the Federal Register. [71 Fed.Reg. 67,949 (November 2006)] [Pet. RJN, Section III.A.; Exhibit A]. In approving the Las Vegas Project, the FAA relied upon a statement in the Preamble to the General

Conformity Rule that lists "air traffic control activities and adopting approach, departure, and en route procedures for aircraft operations" as illustrative of Federal projects that are exempted from the General Conformity Rule. [FSEA, Section 4.3 "Air Quality", p. 4-22, § 4.3.1.1; AR19:3; App. A, p. 59].

On or about February 12, 2007, more than five years after completion of the FAA Presumed to Conform Survey, the FAA published a Draft *Federal Presumed to Conform Actions Under General Conformity* in the Federal Register. [72 Fed.Reg. 6641-6656 (February 2007)] [Pet. RJN, Section III.A., Exhibit B] ("Draft Presumed to Conform Rule"). Petitioners submitted comments on the Draft [AR 13:1-4; Def.App. 49-52], stating, among other things, that the proposed Presumed to Conform Rule (1) misstates the EPA's position on the "exempt" status of Air Traffic Control actions [AR 13:1-3; Def.App. 49-51] and (2) incorrectly presumes that virtually any Air Traffic Control action below the "mixing height" will conform. [AR 13:3-4; Def.App. 51-52].

On June 11, 2007, a group of petitioners, including Petitioners herein City of Las Vegas and Nevada Environmental Coalition, Inc., filed a Petition for Review of the Las Vegas Project ROD in *City of Las Vegas, et al. v. U.S. Department of Transportation, et al.*, U. S. Court of Appeals for the Ninth Circuit, Case No. 07-

70121. The FAA implemented the new departure procedures at LAS on March 20, 2007.

In its July 2007, Response to Comments on the Draft Presumed to Conform Rule, the FAA "declin[ed] to respond to the comment concerning the legal significance of listing Air Traffic Control actions in the preamble and not the rule. This issue is the subject of pending litigation in City of Las Vegas et al. v FAA et al., [sic] Docket No. 07-7-121, 9th Cir CA" [AR 14:14; Def.App. 54]

Also in July 2007, the FAA released a Final Environmental Impact Statement ("FEIS") for the New York/New Jersey/ Philadelphia Metropolitan Area Airspace Redesign ("Airspace Redesign"). [Pet. RJN, Section III.D.; Exhibit E]. The Airspace Redesign makes modifications to Air Traffic Control procedures and arrival and departure routes at major airports in the FAA's Eastern Region [Pet. RJN, Exhibit E]. The Airspace Redesign includes introduction of new westbound departure headings for aircraft departing Philadelphia International Airport ("PHL") whereby westbound air traffic will overfly a larger, more heavily populated section of Delaware County, at low altitudes, as compared to previous PHL westerly departures. [Pet. RJN, Exhibit E, pp. ES-3, ES-21]. *See*, Affidavit of Hank Hox, Addendum B-2 and Affidavit of Andrew J. Reilly, Addendum B-3.

In the FEIS, the FAA states that "[s]ince issuance of the DEIS, the FAA was advised by the EPA that it should not use the Preamble to the [General Conformity Rule] to determine de minimis actions for 'air traffic control activities and adopting approach, departure, and en route procedures for air operations.'" [FEIS, p. ES-10; Pet. RJN, Exhibit E, p. ES-10].

On July 30, 2007, the FAA published a Final Presumed to Conform Rule in the Federal Register. [72 Fed.Reg. 41,565-580 (2007); AR 16; App. A, pp. 1-32]. The Presumed to Conform Rule contains a list of fifteen Airport Project categories which the FAA "presumes" to conform to applicable SIPs, without the need for individual, future conformity review and analysis prior to the implementation of each project within the specified category. Project Category No. 14, *Air Traffic Control Activities and Adopting Approach Departure Enroute Procedures for Air Operations*, [72 Fed. Reg. 41,578 (2007) [AR 16:25-26; Def.App. 25-26]] stands out from among all of the others in that it is the only Project Category that: (1) involves aircraft operations and engine emissions; (2) extends off-airport; and (3) has not specifically been demonstrated to have *de minimis* impacts.

In the FAA's August 9, 2007, Opening Brief in *City of Las Vegas v. Dept. of Transportation, supra*, the FAA stated, "[a]fter the FONSI/ROD and FSEA were issued, the FAA published such a list under which air traffic control procedures,

among other activities, are presumed to conform and therefore do not require an applicability analysis . . . " [Pet. RJN, Section III.C., Exhibit D, p. 37].

On September 5, 2007, the FAA issued a ROD approving the Airspace Redesign. [*See*, Pet. RJN, Exhibit F, p. i]. On September 28, 2007, the FAA issued a Corrected ROD which incorporated and approved the Redesign FEIS. [Pet. RJN, Section III.D., Exhibit F]. In the Corrected ROD, the FAA relies on the Presumed to Conform Rule to avoid performing "a detailed assessment [of air quality impacts] under [the National Environmental Policy Act] and a positive conformity determination under the Clean Air Act." [Pet. RJN, Exhibit F, p. 44]. The FAA began implementation of the new PHL departure procedures on or about December 17, 2007.

IV. SUMMARY OF ARGUMENT.

The FAA's "Presumed to Conform Rule" is a creative solution to what EPA believes is an inconvenient burden for Federal agencies: compliance with the Clean Air Act's conformity provision, § 7506. The problem for the FAA is that its solution, as well as the source of that solution, the EPA's General Conformity Rule § 93.153(f), purporting to allow such "presumptions" of conformity, is in blatant violation of the face of § 7506 which does not allow for such an exception to compliance with conformity, as well as the intent of Congress in enacting § 7506.

The FAA's Presumed to Conform Rule is invalid for at least three reasons. First, it is the product of an EPA regulation inconsistent with the face of the Clean Air Act. It is axiomatic that an implementing regulation that does not conform to its statutory mandate "cannot stand [as] it is arbitrary, capricious, and manifestly contrary to the statute." *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 86 (2002). Here, the face of § 7506 lacks any mention of, or reference to, a "presumption" of conformity. The EPA concedes this point in the Preamble to the General Conformity Rule which states, in pertinent part, referring to the "presumption", newly devised in § 93.153(f):

> This separate procedure is necessary since exemptions under NEPA or other statues may not be appropriate as exemptions from the [Clean Air] Act. That is, section 176(c) does not specifically exempt any activities, and, thus, separate analysis is needed to show that any activity to be presumed to conform has no air quality impacts.

58 Fed.Reg. 63,232. The FAA's Presumed to Conform Rule therefore creatively circumvents the face of § 7506 by creating what amounts to an effective if not explicit exemption from the requirements of conformity.

In addition, § 93.153(f) allows other Federal agencies to "determine" what actions within their jurisdiction should be "presumed" to conform. In delegating the responsibility for implementing § 93.153(f) to other Federal agencies, the EPA has improperly delegated to an "outside party", the task the Clean Air Act assigns

to CPA places the responsibility for developing "criteria and procedures" for "determining" conformity in the hands of the EPA Administrator, § 7506(c)(4)(A). Section 93.153(f), therefore, constitutes "an impermissible alteration of the statutory framework", *Ragsdale*, 535 U.S. at 96, and is, therefore, arbitrary and capricious.

Second, the Presumed to Conform Rule also contradicts Congress' express intent in enacting the Clean Air Act. Congress made it clear that its primary purpose was and remains "pollution prevention", 42 U.S.C. § 7401(c), but only by "reasonable Federal, State and local governmental actions consistent with the provisions of this Chapter." *Id*. [Emphasis added.] EPA's stated purpose in promulgating § 93.153(f) could not diverge further from Congress' purpose: "to assure that [the General Conformity Rule is] 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. 63,228. The ultimate result of EPA's violation of statutory mandate and intent is that the FAA's derivative Presumed to Conform Rule, the direct recipient of the invalid delegation and product of § 93.153(f) is "void and has no legal effect." *See*, *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir. 1987).

Finally, even if for argument's sake, the Presumed to Conform Rule were consistent with both the face of the statute and the intent of Congress, which it is not, it still violates EPA's Conformity Rule. First, the Administrative Record is devoid of evidence that the FAA "clearly demonstrate[d] using methods consistent with this subpart that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not" affect the region's compliance with its State's SIP, § 93.153(g)(1). For evidence, FAA relies entirely on a single report, dating back to the year 2000, that addresses air quality impacts of Air Traffic Control procedures only above 1,500 feet Above Ground Level ("AGL"). This is so even though Air Traffic Control procedures patently involve landings and takeoffs which obviously occur much closer to the ground that 1,500 feet.

The FAA's Presumed to Conform Rule also fails to comply with the alternative provision, § 93.153(g)(2), which allows

> the Federal agency [to] provide documentation that the total of direct and indirect emissions from such future actions would be below the emissions rates for conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

[Emphasis added.] In this case, the FAA provided a survey of four Air Traffic Control projects nationwide, taking place at two airports, over a period of seven

years. In none of those cases, however, was even the most preliminary air quality analysis performed. Instead, all four projects relied on "exemption" from the requirements of the General Conformity Rule, derived from the Federal Register Preamble to the EPA's Conformity Rule, that EPA has since deemed improper and inapplicable. *See*, FEIS, p. EN-10; Pet. RJN, Exhibit E, p. ES-10.

Compliance with §§ 93.153(g)(1) and (g)(2) is a predicate to a "presumption" of conformity, but there is no evidence in the Administrative Record that these requirements were ever met. Therefore, because the FAA's Presumed to Conform Rule is based on an invalid regulation and improper delegation of authority and is not supported by the Administrative Record, it is consequently, "not in accordance with the law;" and may properly be vacated pursuant to the Administrative Procedures Act, 5 U.S.C. § 706; or at minimum be vacated and remanded to the FAA for additional investigation or explanation. *See*, *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 599 (D.C. Cir. 2007).

V. STANDING.

Petitioners are comprised of public entities[7], associations[8] and individuals[9], all of whom have suffered, and continue to suffer substantial concrete and direct injury caused by the issuance of the FAA's Presumed to Conform Rule and sufficient to establish standing in this case.[10]

A. Standard of Review.

The irreducible constitutional minimum of standing contains three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *International Brotherhood of Teamsters v. Transportation Security Administration*, 429 F.3d 1130, 1133 (D.C. Cir. 2005). In order to demonstrate standing, 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), citing *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63

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[7] County of Delaware, Pennsylvania; City of Las Vegas, Nevada

[8] Friends of the Heinz Wildlife Refuge at Tinicum, Inc.; Nevada Environmental Coalition, Inc.

[9] Andrew J. Reilly; Linda A. Cartisano; Mary Alice Brennan; Michael V. Puppio; John J. Whelan; Hank Hox

[10] Petitioners filed a Statement of Basis for Petitioners' Standing pursuant to Circuit Rule 15(c)(2) in this case on October 29, 2007. Affidavits of Andrew J. Reilly, Hank Hox, Douglas Selby and Robert W. Hall are attached as Addendum B to this Brief.

(D.C. Cir. 2000). "In order to satisfy the 'irreducible constitutional minimum of standing,' a litigant must show that it has suffered a 'concrete and particularized' injury that is actual or imminent, caused by or fairly traceable to the act being challenged in the litigation, and redressable by the court." *City of Dania Beach v. Federal Aviation Administration*, 485 F.3d 1181, 1185 (D.C. Cir. 2007), citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc).

In cases of procedural injury, the standard is somewhat less restrictive. "In cases in which a party has been accorded a procedural right to protect his concrete interests, 'the primary focus of the standing inquiry 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.'" *Id*., citing *Fla. Audubon, supra*, 94 F.3d at 664, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)

"To establish injury-in-fact in a 'procedural injury' case, 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.'" *Id*., 94 F.3d at 664, quoting *Fla. Audubon Soc'y*. "In other words, petitioners must be seeking to 'enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.'" *Id.,* quoting *Lujan, supra*, 504 U.S. at 572. "We have

held that '[a] violation of the procedural requirements of a statute is sufficient to grant a plaintiff standing to sue, so long as the procedural requirement was designed to protect some threatened concrete interest of the plaintiff.'" *Id*.,quoting *City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (internal quotation marks omitted).

B. Public Entity Standing.

The County of Delaware ("County") and the City of Las Vegas ("Las Vegas") are public entities. This Court has held that public entities have standing to sue a Federal agency when the public entity alleges harm to itself (*e.g.*, "as city *qua* city" and "states as states"), and where a Federal action makes it more difficult for the public entity to comply with or enforce mandatory statutes and regulations. *City of Olmsted Falls v. Federal Aviation Administration*, 292 F. 3d 261, 268 (D.C. Cir. 2002) ["We have found standing for a city suing an arm of the federal government when a harm *to the city itself* has been alleged." *Id*. at 268. [Emphasis in original.]

In *State of West Virginia v. Environmental Protection Agency*, 362 F.3d 861 (D.C. Cir. 2004), this Court held that states had standing to challenge an EPA rule requiring states to revise SIPs, which in turn lowered states' emission budgets. The Court found that "the states [were] suing as states . . . [claiming that] . . . the

lower the emissions budget, the more difficult and onerous is the states' task of devising and adequate SIP . . . caus[ing] injury to the states as states." *Id*. at 868 The Court held that "[t]his injury is sufficient to confer standing." *Ibid*.

In *City of Los Angeles, et al. v. National Highway Traffic Safety Administration*, 912 F.2d 478 (D.C. Cir. 1990), this Court held that the Cities of New York and Los Angeles and the State of California had standing to challenge a NHTSA rule setting a minimum Corporate Average Fuel Economy (CAFE) miles per gallon standard based on their claims that the CAFE standard "adversely affects air quality in their urban areas, making it more difficult for them to comply, as they must, with the air quality standards imposed upon them by the Clean Air Act." *Id*. at 485-86

1. Delaware County Standing.

The County of Delaware is a political subdivision of the Commonwealth of Pennsylvania with a population of approximately 550,000 persons. [Reilly Affidavit, ¶ 2]. The County is responsible for, among other things, preparing and implementing environmental policies consistent with State and Federal regulations and providing assistance to municipalities in environmental protection matters. [Reilly Affidavit, ¶¶ 3,4]. *See, Pennsylvania Municipalities Planning Code Act of 1968*, P.L. 805, No. 247, p. 1, §105; Pet. RJN, Section III.F.; Exhibit I.

The New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign ("Airspace Redesign") includes new departure headings for aircraft departing Philadelphia International Airport ("PHL"). [Reilly Affidavit, ¶ 6; Exhibit A, p.5; Figures 2.9, 2.32]. The western portion of PHL is located within the County. [Reilly Affidavit, ¶ 2]. Under the Airspace Redesign, aircraft departing PHL to the west or northwest will impact a larger, more heavily populated section of the County, at lower altitudes, thus creating an imminent risk to the County's environment and its residents [Reilly Affidavit, ¶ 7; Exhibit A, Exhibits 2.9, 2.32], and particularly those residents who live within that part of the County closest to the Airport [Reilly Affidavit, ¶ 8] and for whom and over which the County possesses responsibility to ensure the environmental integrity. As a result of the FAA's dependence on a presumption of air quality conformity, rather than a careful evaluation of the Airspace Redesign's air quality impacts, there is an imminent risk to the County's ability to comply with applicable State and Federal statutes, which impairs the County's ability to protect its citizens and to effectively perform its mandated Countywide environmental planning functions. [Reilly Affidavit, ¶¶ 10, 11, 12].

2. Las Vegas Standing.

Las Vegas is a political subdivision of the State of Nevada, located approximately five miles northeast of McCarran International Airport ("LAS"). Nevada law authorizes Nevada cities to act to promote the health, safety and general welfare of the community. [Selby Affidavit, ¶ 2, Exhibit A]. The City is tasked with environmental planning and environmental protection for the City, including areas surrounding LAS. [Selby Affidavit, ¶ 2].

The new departure procedures for aircraft departing LAS to the west for eastern destinations ("Project") redirect flights from less populated areas of the Las Vegas Valley to highly populated areas, including over the heart of the City. Departing flights now overfly high occupancy buildings and some of the City's most densely populated, low-income minority residents, and impact over 180,000 homes, approximately 450,000 residents, seven hospitals and an estimated 92 schools in the Las Vegas Valley. [Selby Affidavit, ¶ 3]. Due to the FAA's reliance on a presumption of air quality conformity, rather than a careful evaluation of the Project's air quality impacts, there is a distinct risk of adverse air quality impacts resulting from the new LAS departure procedures which directly impacts City officials' ability to perform their responsibilities for land management and

environmental planning, and to protect City residents and visitors. [Selby Affidavit, ¶¶ 9, 10].

C. Associational Standing.

Friends of the Heinz Wildlife Refuge ("Friends") and Nevada Environmental Coalition ("NEC") are associations whose members have suffered injury sufficient to establish standing in their own right[s]. An association has standing to sue on behalf of its members if (1) at least one of its members would have standing to sue in his own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. *Sierra Club*, 292 F. 3d at 898; *accord, American Library Ass'n. v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). "With regard to the injury-in-fact prong of the standing test, petitioners need not prove the merits of their case in order to demonstrate that they have Article III standing . . . Rather, in order to establish injury in fact, petitioners must show that there is a substantial probability that [a Federal agency rule] will harm the concrete and particularized interests of at least

one of their members. . ." *American Library,* 401 F. 3d at 492-493 [citations omitted].[11]

1. Friends.

Friends will be impacted by the PHL Project. Friends is a Pennsylvania Non-profit Corporation. Its mission is to protect the health, safety and welfare of its wildlife, and preserve and protect and natural lands of the Refuge. The Refuge is the largest urban wildlife refuge in the country. [Hox Affidavit, ¶ 2]. The Refuge was established by an act of Congress in 1972 to protect the last 200 acres of freshwater tidal marsh in Pennsylvania. It is a refuge and resting and feeding area for more than 280 species of birds, in addition to, *inter alia*, a wide variety of fox, deer, muskrat, turtles, fish, frogs, wildflowers and plants. [Hox Affidavit, ¶ 4]. The Refuge is located approximately 1 mile west of the Philadelphia International Airport ("PHL"). [Hox Affidavit, ¶ 3].

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[11] *See also, Warth v. Seldin*, 422 U.S. 490, 511 (1975) (for an association to have representational standing, "[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action that would make out a justiciable case had the members themselves brought suit."); *Horsehead Resource Development. Co. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994) [EPS's failure to regulate used oil as hazardous waste constituted injury-in-fact to members of environmental group who live in communities potentially impacted by oil, therefore environmental group had standing to challenge EPA rule].

Petitioner Hox' visits to, and enjoyment of, the Refuge is at risk of being adversely impacted by the increased, but unquantified, aircraft emissions which will affect the quality of the air that he and other Friends Members breathe. [Hox Affidavit, ¶¶ 5,8,9,12].

Under the PHL West Departure Airspace Redesign, aircraft departing PHL to the west or northwest will overfly the Refuge at low altitudes, as compared to the existing PHL airspace structure. [Hox Affidavit ¶ 8; Exhibit A, Figures 2.9, 2.32]. The FAA's failure to demonstrate, or provide documentation based on similar actions by the FAA, that emissions caused by air traffic control activities will be *de minimis* [Hox Affidavit, ¶ 11; Reilly Affidavit, ¶ 10; Exhibit A, p. 43] creates a distinct risk to the Refuge, its inhabitants and its visitors of increased aircraft emissions under the new PHL airspace redesign. [Hox Affidavit ¶ 9].

2. Nevada Environmental Coalition, Inc.

Nevada Environmental Coalition, Inc. ("NEC") is a Nevada coalition of citizens and organizations, including the City of Las Vegas, who coalesce on Southern Nevada environmental issues. [Hall Affidavit, ¶ 2]. Many of the citizens who coalesce with NEC live, work and recreate in areas directly under or near the new LAS departure flight paths. [Hall Affidavit, ¶ 4]. Without adequate documentation supporting the *de minimis* conclusion of the Presumed to Conform

Rule, there is a distinct risk that they will be directly affected by increased air pollution under, or near, the new departure flight paths caused by departing aircraft engine emissions, which will adversely impact the quality of the air they breathe and reduce visibility. [Hall Affidavit, ¶¶ 4,10]. Petitioner Hall is similarly impacted, both individually and as a Member of NEC. [Hall Affidavit, ¶¶ 1,4,10].

D. Individual Standing.

Petitioner Reilly (as well as Petitioners Cartisano, Brennan, Puppio and Whelan) is a resident of that portion of Delaware County immediately west of PHL. [Reilly Affidavit, ¶¶ 1,2]. He and other Petitioners will be personally subjected to increased, but unquantified, aircraft emissions which will potentially affect the quality of the air they breathe. [Reilly Affidavit, ¶ 8]. They are at distinct risk of personal and particularized injuries which are fully redressable by this Court.

VI. ARGUMENT.

42 U.S.C. § 7506, the Clean Air Act's conformity provision states, in pertinent part: "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, <u>any activity</u> which does not conform to an implementation plan . . ." 42 U.S.C. § 7506(c)(1) [Emphasis added]. Section 7506

does not, on its face provide for the "presumption" that "any activity" will conform, or that a determination of conformity can be made for a collection of activities, under circumstances that may exist now or in the future. In fact, "presumption" of conformity, like exemption and waiver of the requirements of § 7506, do not exist in § 7506. In seeming contradiction to that mandate, the EPA's General Conformity Rule, 40 C.F.R. § 93.153(f), delegates to other Federal agencies the task of determining whole categories of actions which should be "presumed to conform".

It is through the lens of Clean Air Act §§ 7506 and 7601 that both the General Conformity Rule § 93.153(f) and the FAA's Presumed to Conform Rule must be reviewed. *Ragsdale*, 535 U.S. at 86. In this case, the FAA's Presumed to Conform Rule is inconsistent with the requirements of the Clean Air Act not only because it fails to provide the requisite documentation to satisfy either §§ 93.153(g)(1) or 95.153(g)(2), but also because it is the product of General Conformity Rule § 93.153(f), both an improper delegation of the EPA Administrator's powers and duties to other than "an officer or employee of the Environmental Protection Agency . . .", 42 U.S.C. § 7601(a)(1), and a regulation "manifestly contrary to the statute." *Ragsdale*, 535 U.S. at 86.

A. The FAA's Presumed to Conform Rule is Invalid as the Product of an EPA Regulation That Is Inconsistent With the Face of the Clean Air Act and Congress' Intent in Enacting It.

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). [Emphasis added.] Nevertheless, in 1993, the EPA promulgated the General Conformity Rule, and specifically, § 93.153(f), which allows Federal agencies, other than the EPA, to "determine" actions that are "presumed to conform" with the Clean Air Act, thereby escaping individual analysis or compliance with the strict mandate of the Clean Air Act's conformity provision § 7506(c)(1).

1. Standard of Review.

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the U.S. Supreme Court set forth a two-step test for determining the validity of regulations, such as the one at issue in this matter. First, this Court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. In the event Congress has not directly spoken to the precise

question and thus the statute is silent or ambiguous on the issue, the Court must determine if "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Constructions that are contrary to clear congressional intent must be rejected because "that intention is law and must be given effect." *Id.* at 843, n.9.

Where dealing with the question of whether a particular regulation fits within the parameters of the enabling statute, "a regulation cannot stand if it is 'arbitrary, capricious, or manifestly contrary to the statute,'" *Ragsdale*, 535 U.S. at 86, *quoting Chevron USA*, 467 U.S. at 844. While "[t]he secretary's judgment that a particular regulation fits within the statutory constraint must be given considerable weight . . . to conclusively determine whether [a regulation] is a valid exercise of the secretary's authority, we must consult the act, viewing it as a 'symmetrical and coherent regulatory scheme.'" *Id*., *quoting Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

2. Section 93.153(f) is Inconsistent With the Face of the Clean Air Act.

General Conformity Rule § 93.153(f) is inconsistent with the face of § 7506, the Clean Air Act's conformity provision, in that: (1) it allows Federal agencies other than the EPA to promulgate orders effectively waiving the unequivocal compliance requirements of § 7506, while ignoring the requirement of § 7506(c)(4)

which places the formulation of "criteria and procedures" for "determining" conformity in the hands of the EPA Administrator; (2) it allows the development of, and reliance on, "presumptions" of conformity where § 7506 omits any mention of, and in fact does not sanction, such "presumption;" and (3) it allows presumptions that whole "categories" of future actions may be deemed to conform, where § 7506 requires individualized determination of conformity.

The Clean Air Act is very specific about who may promulgate rules and regulations. Section 7601(a) specifically states that:

> Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. 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.

Section 7506(c)(4)(A) is equally specific that it is the Administrator's duty to promulgate regulations for "determining" conformity. The Clean Air Act provides for the Administrator's waiver of certain of its mandates. *See, e.g.*, 42 U.S.C. §§ 7405(c)(1), 7411(j), 7412(f)(4)(B), 7419(d), and 7420(a)(2)(C). Section 7506, however, does not allow waiver of any of its requirements. In a transparent attempt to circumvent this proscription on waiver/exemption from the conformity

provisions the EPA promulgated § 93.153(f). As the EPA explained in the Preamble to the General Conformity Rule:

> The Final Rule allows Federal agencies to establish their own presumptions of conformity through separate rule making actions, as proposed in section [93.153]. This separate procedure is necessary since exemptions under NEPA or other statutes may not be appropriate as exemptions from the [Clean Air] Act. That is, section 176(c) does not specifically exempt any activities and, thus, a separate analysis is needed to show that any activity to be presumed to conform has no air quality impacts.

58 Fed.Reg. 63,233 (1993).

In other words, the EPA created a "presumption" to artificially loosen the stringent requirements of § 7506, even though no waiver, or exemption, or presumption of conformity with those requirements is permitted by the Clean Air Act. *Environmental Defense, Inc. v. EPA*, 509 F.3d 553, 559 (D.C. Cir. 2007) ["EPA does not dispute that it cannot waive the requirements of CAA section 176(c)(1)(A) and (B)"], *see also*, *Sierra Club v. EPA*, 129 F.3d 137, 140-141 (D.C. Cir. 1997). Moreover, compounding its transgression, EPA delegated the "determination" of which activities should be "presumed to conform" to other Federal agencies, even though the responsibility for developing "criteria and procedures" for "determining" conformity strictly belongs to the EPA Administrator. 42 U.S.C. § 7506(c)(4)(A) [*see also*, § 7601(a)(1) delegating

exclusively to an "officer or employee of the Environmental Protection Agency", *Id*., the exclusive authority to promulgate "such regulations as are necessary to carry out his functions under this chapter." *Id*.].

It is true that the Clean Air Act permits collaboration with other Federal agencies under very limited circumstances. For example, 42 U.S.C. § 7506(c)(4)(B), which concerns the development of the General Conformity Rule, provides that the EPA "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." 42 U.S.C. § 7506(c)(4)(B) [Emphasis added.] Ultimately, however, the EPA Administrator promulgates the regulations, not the Secretary of Transportation. "[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities - private or sovereign - absent affirmative evidence of authority to do so." *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554, 566 (D.C. Cir. 2004). [Emphasis added.]

In *U.S. Telecom*, the FCC possessed exclusive authority to "'determine[ ]' which network elements [would] be made available to competitive local exchange

carriers ('CLEC') on an unbundled basis," *Id.* at 565, citing 47 U.S.C. § 251(d)(2). Nevertheless, fearing that a nationwide determination "would be unlawfully overbroad, " the FCC "delegated authority to state commissions . . . to make more nuanced determinations . . ." *Id*. at 564.

This Court found that the FCC's "subdelegation" to the state commissions was unlawful and, in doing so, rejected the FCC's argument that "when a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary Congressional intent." *Id*. at 565.

Instead, the Court held

> [T]he cases recognize an important distinction between subdelegation to a subordinate and subdelegation to an outside party. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of Congressional authorization.

Id. [Emphasis in original.]

The same invalid delegation has occurred here. First, the EPA, through § 93.153(f) has delegated to the FAA and other Federal agencies the power to effectively waive the conformity provisions of the Clean Air Act, a power not

granted in the Act itself. Second, § 93.153(f) sanctions the development by other Federal agencies of categories of actions that are collectively presumed to meet the conformity requirement, where § 7506(c)(1) specifically prohibits implementation of "any activity" individually that does not conform, and does not contemplate collective designation of activities by groups, especially where the designation extends not only horizontally across categories of activities, but vertically, over time. Essentially, this categorical designation means that a group of activities, evaluated, if at all, at a single point in time, may be "presumed" to conform, for all time, no matter how the law, regulations or circumstances change and evolve. Finally, § 7506 does not mention, refer on its face to, or imply that, Federal agencies may escape compliance with each and every Federal activity through collective "presumption" of conformity.[12] The term "presumption" or any implication of a procedure giving rise to a presumption, like "waiver" or "exemption" are omitted from § 7506. Thus, the delegation allowed by General Conformity Rule § 93.153(f) "affects an impermissible alteration of the statutory framework" and is, therefore, arbitrary and capricious. *Ragsdale*, 535 U.S. at 96.

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[12] The EPA's General Conformity Rule § 93.153(c), (d) and (e) contains a list of those actions specifically exempted from the requirements of the General Conformity Rule. None of the actions in the FAA's Presumed to Conform List are included in those specific EPA exemptions. *See*, Addendum A, pp. 37-40.

3. Section 93.153(f) Contravenes Not Only the Face but Also the Intent of Congress in Enacting the Clean Air Act.

If, for argument's sake, there were any ambiguity in the Clean Air Act's statutory language, which there is not, this Court would look to the intent of Congress in enacting the statute under which the regulation is promulgated. *See, GAF Corporation v. United States*, 818 F.2d 901, 917 (D.C. Cir. 1987) [courts "examin[e] the statutory scheme Congress adopted and its statement of purpose"].

Congress' purpose in enacting the Clean Air Act generally, and the conformity provision, § 7506, specifically, is clear in the language of the statute itself. "A primary goal of this Chapter is to encourage or otherwise promote reasonable federal, state and local governmental actions, consistent with the provisions of this Chapter, for pollution prevention." 42 U.S.C. § 7401(c) [Emphasis added]. Moreover, Congress has taken the position that

> each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program with air quality related transportation consequences shall give priority in the exercise of such authority, consistent with statutory requirements for allocation among States or other jurisdictions, to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air quality standard.

42 U.S.C. § 7506(d). [Emphasis added.]

It is plain from these expressions of Congressional intent that a waiver or exemption, *i.e.*, a presumption of conformity, would not further these purposes, but rather, aid in circumventing them. In this case, the EPA did not even pretend to further the express intent of Congress. Its stated purpose in promulgating § 93.153(f) "to assure that [the General Conformity Rule is] 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. 63,228.

While seeking to lessen the administrative burden on Federal agencies may be a laudable goal, it cannot do violence to the administrative structure of the Clean Air Act. "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988); *see also, Ragsdale*, 535 U.S. at 91 [same]. Thus, irrespective of any burden posed by the conformity requirements of 42 U.S.C. § 7506, Congressional intent cannot be construed to allow promulgation of regulations that allow Federal agencies other than EPA to establish "criteria and procedures" to the mandates of § 7506.

GAF Corporation, is on all fours with the case now before this Court. In *GAF*, this Court considered procedures promulgated by the Department of Justice ("Justice Department") pursuant to its authority under § 2672 of the Federal Tort Claims Act ("FTCA")[13] to establish settlement procedures for tort claims brought against the United States. In enacting the FTCA, Congress imposed only one condition on filing a claim against the United States, that being submission of a written notice of claim. The regulations promulgated by the Justice Department, 28 C.F.R. §§ 14.1-14.11, added requirements including claimant's legal theories for the claim, Social Security number, date of birth, witnesses who would likely testify on behalf of the claimant, and claimant's insurance carrier, address and policy numbers.

This Court reversed the District Court's denial of *GAF's* claim on the grounds that, by requiring information in addition to that set forth explicitly in FTCA § 2675(a), the Justice Department had added prerequisites which were "contrary to congressional intent." *GAF*, 818 F.2d at 919. This Court held that "'[i]f Congress intended to authorize the promulgation of jurisdictional regulations, it would have created that authority directly. Congress has never delegated that authority under section 2675(a).'" *Id*. at 920, fn. 110, quoting *Warren v. United*

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[13] 28 U.S.C. §§ 1346(b), 1402(b), 2401(b) and 2671-2680.

States Department of the Interior Bureau of Land Management, 724 F.2d 776, 778 (9th Cir. *en banc* 1984). On that ground, the Court further held that the District Court's reliance (along with that of Federal agencies) on the Justice Department's regulations could not stand. *Id*. at 923.

An analogous situation exists here. While General Conformity Rule § 93.153(f) is not jurisdictional, as was the statute at issue in *GAF*, in the sense that it is not a threshold to the applicability of the statute, its effect is as unequivocal as the statutory mandate in *GAF*, in that § 93.153(f) allows: (1) an agency "outside" the EPA, *i.e.*, the FAA, to "determine" the application of what amounts to an effective waiver from compliance with § 7506, where none exists in the Clean Air Act and in a manner contrary to § 7601; (2) a "presumption" of conformity nowhere sanctioned in the Clean Air Act's conformity provision; and (3) determination of conformity on a "wholesale" basis rather than for individual Federal actions as required by § 7506(c)(1). Section 93.153(f) is therefore facially inconsistent with the express language and intent of Congress and, consequently, "cannot stand [as] it is 'arbitrary, capricious, and manifestly contrary to the statute.'" *Ragsdale*, 535 U.S. at 86.

B. The Administrative Record is Devoid of the Documentation Required to Support the Inclusion of Air Traffic Control Procedures, in Violation of 40 C.F.R. § 93.153(g)(1) and (g)(2).

Congress' mandate in Clean Air Act § 7506 is unequivocal: proof of conformity of each individual action is required before its approval or funding. Here, even if, for argument's sake, the FAA's Presumed to Conform Rule were the progeny of a proper delegation of EPA authority, which it is not, it lacks the supporting evidence required by the EPA's General Conformity Rule § 93.153(g)(1) or (g)(2) as a predicate to presumption of conformity.

1. Standard of Review.

This Court has consistently held that claims that a Federal agency has acted in a manner contrary to the mandates of the Clean Air Act (42 U.S.C. § 7401, *et seq*.) are reviewed under the Administrative Procedure Act ("APA") (5 U.S.C. § 551, *et seq*.) "arbitrary and capricious standard." *City of Olmsted Falls v. FAA*, 292 F. 3d 261, 269 (D.C. Cir. 2002). *See also*, *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) (standard for judicial review under Clean Air Act taken directly from the APA). An agency's action is "arbitrary and capricious" if an agency has not articulated "a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Owner-Operator Independent Drivers Assn., Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188, 203 (D.C. Cir. 2007); *see also, Motor Vehicle Manufacturers' Association v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) [same].

In order for the court to determine whether the agency has made a rational connection between the "facts found and the choice made," "'the focal point for judicial review should be the administrative record already in existence.'" *Safe Extensions,* 509 F.3d at 599, quoting, in part, *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is, "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id*. And if the court finds that the agency's decision is not supported by substantial evidence, then the agency's decision is arbitrary and capricious. *Safe Extensions*, 509 F.3d at 604, *citing Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 684 (D.C. Cir. 1984) ("The agency's decision . . . must be supported by substantial evidence - otherwise it would be arbitrary and capricious").

Moreover, the agency's decision must be supported by the documents in the record, otherwise there is no "substantial evidence" to support the agency's decision. *Safe Extensions,* 509 F.3d at 605, quoting *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991) ["'[a]n agency's unsupported assertion does not amount to substantial evidence'"]. The remedy for failing to properly support the agency's decision is equally clear:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Safe Extensions, 509 F.3d at 599.

2. The Record Lacks Any Evidence That the Presumed to Conform Rule Complies with the Predicate Requirements of § 93.153(g)(1).

Section 93.153(g)(1) states in relevant part that: "[t]he Federal agency must clearly demonstrate using methods consistent with this subpart that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not" affect the surrounding area's compliance with its State Implementation Plan. 40 C.F.R. § 93.153(g)(1). [Emphasis added.]

Section 93.159 of the General Conformity Rule requires that the "analyses required under this subpart must be based on" four factors: (1) the latest planning assumptions (§ 93.159(a)); (2) the latest and most accurate emission estimation techniques available (§ 93.159(b)); (3) the applicable air quality models, databases, and other requirements specified in the most recent version of the *Guideline on Air Quality Models (Revised)* (1986), including supplements (EPA Publication No. 450/2-78-027R) (§ 93.159(c)); and (4) the total of direct and indirect emissions

from the action which must reflect emission scenarios that are expected to occur (§ 93.159(d)). Any exceptions to these specific requirements may be made "only with the written approval of the EPA Regional Administrator." 40 C.F.R. §§ 93.159(b) and (c)(2).

The FAA has failed to establish that any of these requirements was met in promulgating the Presumed to Conform Rule, Category 14.[14] In the Final Notice, the FAA mentions an article,[15] two reports,[16] and two FAA circulars[17] in footnotes in its discussion of its decision to place Air Traffic Control procedures in the Presumed to Conform Rule. Only one of these documents, "Consideration of Air Quality Impacts by Airplane Operations above 3,000 feet AGL," FAA-AEE-00-01 September 2000 ("FAA Report")[18] is included in the Administrative Record. [Appendix A, pp. 60-72]. The omitted documents cannot, therefore, either individually or collectively, meet the explicit requirements of § 93.159, or serve as

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[14] The Court owes no deference to the FAA's interpretation of the General Conformity Rule. *United States Air Tour Association v. FAA*, 298 F.3d 997, 1015-16 (D.C. Cir. 2002) ("deference is inappropriate when [an agency] interprets regulations promulgated by a different agency").

[15] 72 Fed.Reg. 41,578, fn. 50

[16] 72 Fed.Reg. 41,578, fns. 49, 51

[17] 72 Fed.Reg. 41,578, fn. 52

[18] 72 Fed.Reg. 41,578, fn. 51

support for FAA's position before this Court. *See*, *Safe Extensions*, 509 F.3d at 599.

First, as a result of the absence from the Record of this supporting documentation, the Administrative Record lacks any reference to the "planning assumptions" used. It is therefore impossible to determine if they are the latest planning assumptions required by § 93.159(a). Second, 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).

Third, the documents relied upon by FAA cannot qualify as using the "latest and most accurate emission estimation techniques" as required by § 93.159(c), because they date back to 1975, 32 years ago, with the latest and the only one included in the Record no more recent than the year 2000, almost eight years ago. Since that time, FAA has issued twelve new versions of its air quality model, the Emissions and Dispersion Modeling System ("EDMS")[19] [Pet. RJN, Exhibit J] which FAA's own regulations require that it use in the determination of air quality impacts, and which EPA sanctions for use in aviation related analyses. [FAA Order 1050.1E, Appendix A, p. 7, § 2.2c; Pet. RJN, Exhibit C, p. A-7].

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[19] Versions 4.0, 4.1, 4.11, 4.1 GSE, 4.12, 4.2, 4.21, 4.3, 4.4, 4.5, 5.0, and 5.0.1 as having come into existence since 2000. http://www.faa.gov/about/office _org /headquarters/aep/models/edms_model/previous_edms.

Consequently, FAA has failed to establish that inclusion of Air Traffic Control procedures in Category 14 is based on the total direct and indirect emissions expected to occur as specified in § 93.159(d).

Finally, there is no evidence in the Final Notice or the Record that recently approved estimates were "unavailable" or that the FAA sought and received the "approval of the EPA Regional Administrator," pursuant to § 93.159(b), to deviate from these unequivocal requirements.

Instead of the evidentiary elements required by § 93.159 to support a presumption of conformity, FAA relies on the FAA Report. The FAA Report cannot, however, compensate for the absence of required evidence that Air Traffic Control procedures in general should be presumed to conform precisely because, similar to the Presumed to Conform Rule, the FAA Report purports to substantiate a presumption of conformity only for operations occurring above 1,500 feet Above Ground Level ("AGL"). The Presumed to Conform Rule only refers to documents analyzing Air Traffic Control procedures that take place above 1,500 feet AGL:

> Project-related aircraft emissions released into the atmosphere above the inversion base for pollutant containment, commonly referred to as the "mixing height," (generally 3,000 ft. above ground level) do not have an effect on pollution concentrations at ground level. Therefore, air traffic control actions above the mixing height are presumed to conform. In addition, the results of FAA research on mixing heights indicate that

> changes in air traffic procedures above 1,500 ft. AGL and below the mixing height [*i.e.*, 3,000 feet] would have little if any effect on emissions and ground concentrations.

72 Fed.Reg. 41,578. The FAA Report is cited by FAA only to support that proposition. Thus, the Record contains no evidence on the conformity of Air Traffic Control actions below 1,500 feet AGL.

Nevertheless, the FAA attempts unsuccessfully to escape this dispositive omission to present any evidence in the Record of the *de minimis* character of emissions <u>below 1,500 feet</u>, by a cursory explanation, lacking any documentary evidence in the Record, of the presumption of conformity's extension to ground level.

> Such actions in the vicinity of the airport are tightly constrained by runway alignment, safety, aircraft performance, weather conditions, terrain, and vertical obstructions. [Footnote omitted.] Accordingly, air traffic actions below the mixing height are also presumed to conform 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.

72 Fed.Reg. 41,578. FAA ignores the fact that Air Traffic Control procedures include landing and takeoffs ("LTO"), the largest component of which occur on or near runway/ground level. While many of the other categories of "airport

development projects" in the Presumed to Conform Rule were the subject of additional reported detailed analysis, the Record contains no such independent analysis for Category 14, Air Traffic Control procedures below 1,500 feet. In short, the Administrative Record is devoid of evidence of the technical basis of the FAA's presumption of the conformity of Air Traffic Control procedures either above or below 1,500 feet as required by § 93.153(g)(1).

Finally, testimony offered by William Becker, Executive Director of the National Association of Clean Air Agencies (NACAA), the national organization of state air pollution control officials and agencies, strongly supports the contrary conclusion - that the effect of aircraft operations even above 1,500 feet are not *de minimis* with respect to ground level air quality. In recent testimony before the EPA, testifying on EPA's proposed exemption from conformity of aircraft operations above 3,000 feet, Becker opined that "many states know from experience that even above 3,000 feet, such emissions can have adverse air quality effects." [*See*, Pet. RJN, Section III.E., Exhibit G, p. 14]. In addition, the NACAA in their written comments in the same proceeding opined that the FAA's theory that aircraft emissions above 3,000 feet have no impact on ground level air quality, "has no scientific basis:"

> Extensive air quality modeling conducted for the Ozone Transport Assessment Group, modeling completed by the

> University of Maryland and air quality sampling conducted by the University of Maryland all confirm the presence and transport of pollutants at middle and high altitudes over long distances. On September 12, 2001, several areas in Pennsylvania were predicted to experience potentially unhealthful ozone levels. However, due to the total absence of aircraft emissions on that day, ozone concentrations remained below applicable National Ambient Air Quality Standards (NAAQS). Aircraft emissions have both local and long-distance impacts, and NACAA believes that such emissions should continue to be among those that undergo general conformity review.

[*See*, Pet. RJN, Section III.E., Exhibit H, p. 3]. Thus, an organization whose members have direct responsibility over compliance with Federal, state and local air quality regulations questions whether conformity is appropriately presumed even above 3,000 feet, let alone at 1,500 feet or below.

In summary, where, as here, the Administrative Record lacks any coherent, technical or scientific explanation for a presumption of conformity, FAA has failed in its obligation to articulate "a satisfactory explanation for its action," and, thus, its action is patently arbitrary and capricious.

3. The Administrative Record Also Lacks Any Evidence of FAA's "Recent Experience" with Conformity Adequate to Satisfy the Alternative Requirements of § 93.153(g)(2).

As an alternative to the requirements of subsection (g)(1), subsection 93.153(g)(2) provides that: "the 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 that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years." 40 C.F.R. § 93.153(g)(2) [Emphasis added]. The FAA's Final Notice states that the categories of actions described in the Presumed to Conform Rule are "based on the survey of airport projects, the additional evaluations, and quantitative analyses." 72 Fed.Reg. 41,568.

The recently provided surveys, particularly those for Air Traffic Control procedures, do not constitute evidence of FAA's having met the requirements of 93.153(g)(2).

FAA's surveys consist of only four Air Traffic Control projects nationwide, at only two airports over a period of seven years (one airport with three projects and the other airport with one project). Most notably, in none of these four cases was an applicability analysis, conformity determination or any air quality analysis of any kind performed. Instead, all four relied on "exemption" from the requirements of the Conformity Rule derived from the Federal Register Preamble to the EPA's Conformity Rule, that EPA has since deemed improper and inapplicable.[20]

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[20] *See*, FEIS, p. EN-10; Pet. RJN, Exhibit E, p. ES-10.

The surveys are inadequate for other reasons. First, they were sent out on October 30, 2001. The Memo accompanying the surveys states that the surveys were to be completed and returned by "Monday, December 3, 2001." Assuming that the surveys were returned on or about the date they were due, the most recent information used for the presumed to conform list is almost seven years old. There is no indication on the returned surveys when they returned, or, for that matter who completed them.

Second, the breadth of the information requested is limited. The Instructions for the surveys state that "the survey focuses on the past two years of airport development projects" and thus, the airports should use "information from the past two years."

Third, surveys were returned for only 325 projects, almost half of them - 129 - related to runway projects. These include 33 projects to construct new, replace, extend, resurface, or provide routine maintenance to runways; 23 concerned lighting systems; 45 related to constructing new, replacing, extending, or resurfacing taxiways; two related to installing a GPS Antenna; and 26 to construct new, replace or upgrade the airport's tarmac. Except for "lighting systems," none of the "runway related" work is included in the final presumed to conform rule as a category of action. Thus, the Administrative Record lacks any evidence of "similar

actions," sufficient to comply with, or support any reasonable inference of compliance with, § 93.153(g)(2).

VII. CONCLUSION.

"It is self-evident that an agency decision based upon an invalid regulation or the misapplication of a regulation is 'otherwise not in accordance with law.'" *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 2006 WL 5483382, at *3 (Aug. 3, 2006); *see, Bowen*, at 1505 ["Agency action taken under a void rule has no legal effect"]; *cf. Ragsdale*, 535 U.S. at 95. In this matter, as shown above, the FAA's the Presumed to Conform Rule is based on an invalid regulation (§ 93.153(f)) and therefore, the FAA's decision to promulgate the Presumed to Conform Rule is "not in accordance with law" and should be vacated as a matter of law under the APA. *See*, 5 U.S.C. § 706.

Moreover, the FAA's Presumed to Conform Rule is not supported by the documents in the record, and thus, there is no "substantial evidence" to support the agency's decision. *Safe Extensions,* 509 F.3d at 605, quoting *Algonquin Gas Transmission Co. v. FERC,* 948 F.2d 1305, 1313 (D.C. Cir. 1991). Because of these facts, the Court should, at the very least, vacate the Presumed to Conform Rule and remand it back to the FAA for additional investigation or explanation. *Safe Extensions*, 509 F.3d at 599.

Dated: July ___, 2008 CHEVALIER, ALLEN & LICHMAN, LLP

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(3)(C) FOR CASE NO. 07-1385

I certify, pursuant to *Fed.R.App.P.* 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 12,748 words.

Dated: July ___, 2008

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CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2600 Virginia Avenue, N.W., Suite 1111 - The Watergate, Washington, DC 20037-1931.

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