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 REPLY BRIEF

[Petitioners' Request for Judicial Notice in Support of Petitioners' Reply Brief Filed Concurrently]

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TABLE OF AUTHORITIES

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

Cases

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GLOSSARY

Airspace Redesign	New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign
ATC	Air Traffic Control
CAA	Clean Air Act, 42 U.S.C. § 7401, *et seq.*
Corps	U.S. Army Corps of Engineers
County	County of Delaware, Pennsylvania
DEIS	Draft Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FLL	Fort Lauderdale Airport
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
NAAQS	National Ambient Air Quality Standards
NWPs	Nationwide Permits
Presumed to Conform Rule	Federal Presumed to Conform Action Under General Conformity 72 Fed. Reg. 41,565-580 (2007)

PTC	Presumed to Conform Rule
ROD	Record of Decision
SIP	State Implementation Plan

I. SUMMARY OF ARGUMENT.

Respondent Federal Aviation Administration ("FAA") strenuously avoids the essential issues in this Petition. Petitioners' first issue is procedural: challenging FAA's failure to follow the required procedures for establishing categories of actions "presumed to conform" with the conformity provision of the Clean Air Act, 42 U.S.C. § 7506 ("CAA"), as mandated in the Environmental Protection Agency's ("EPA") implementing regulations, 40 C.F.R. § 93.150 *et seq.* ("General Conformity Rule"), §§ 93.153(f)-(j). Specifically, neither the Draft[1] [Pet.RJN, Exhibit E] nor the Final Notice[2] of FAA's Presumed to Conform ("PTC") Rule mentions that the FAA based its presumption of conformity on experience with "similar actions taken over recent years," as required by § 93.153(g)(2), or provides documentation of the basis of that experience and the consequent presumption, as required by § 93.153(f). FAA's omissions constitute not only facial violations, but also deprive the public of the opportunity to evaluate and comment on the actions and analyses purportedly relied upon, in violation of § 93.153(h).

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[1] 72 Fed.Reg. 6641-656 (February 12, 2007).

[2] 72 Fed.Reg. 41,565-580 (July 30, 2007).

Petitioners' second issue is substantive, challenging the validity of § 93.153(f), which allows "presumption" of conformity for entire categories of actions, as inconsistent with the CAA, which requires that Federal actions be analyzed, and their conformity determined, on a case-by-case basis. *See, e.g.*, *Sierra Club v. EPA*, 129 F.3d 137, 138 (D.C. Cir. 1997).

Rather than face these issues head-on, FAA claims Petitioners do not meet this Court's fundamental standards for appearance before it: jurisdiction, standing and ripeness. FAA misses the mark on each.

First, this Court possesses jurisdiction. The PTC Rule is a "final" order on its face,[3] and thus marks the "consummation of the decisionmaking process." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007). Moreover, the PTC Rule was issued under 49 U.S.C. § 40101, *et seq.*, ("Aviation Act"), pursuant to the FAA Administrator's power to issue regulations under 49 U.S.C. § 40113. Finally, the PTC Rule has already been applied in the Record of Decision ("ROD") approving New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign ("Airspace Redesign"). The PTC Rule has replaced conformity review such that the emissions impacts of specific Air Traffic Control ("ATC") changes

[3] 72 Fed.Reg. 41,565-580 (2007), labeling "Federal Presumed to Conform Actions Under General Conformity" a "Final Notice."

are left unanalyzed. The absence of analysis required by the CAA has "a direct and immediate effect on the day-to-day business of the party challenging it." *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1278 (D.C. Cir. 2005).

Second, Petitioners' standing is unassailable. As Petitioners' challenge to FAA's failure to comply with § 93.153(f), *et seq.*, is procedural, Petitioners have shown the requisite risk arising from the absence of required regulatory procedures to their various particularized interests. *Dania Beach*, 485 F.3d at 1186. Petitioners' standing arises either from impacts on personal health and quality of life for individual Petitioners, or from damage to public-entity Petitioners' ability to fulfill their statutory responsibilities to protect the local economy, and the health and welfare of their citizens. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002).

Petitioners have also established the requisite "causal connection between the agency action and the alleged injury." *Dania Beach*, 485 F.3d at 1186. That connection arises out of FAA's designation of categories of actions presumed to conform, rather than performing the individualized conformity analysis required by the CAA, without compliance with even the attenuated requirements of §§ (g)(1) or (g)(2) and (h).

Third, this challenge is indisputably "ripe." Not only has FAA already applied the PTC Rule in the Airspace Redesign ROD, but it has expressed its intention to apply it if it should lose Petitioners' challenge to the LAS Airspace Redesign in *City of Las Vegas, Nevada, et al., v. United States Department of Transportation, et al.*, Ninth Circuit Court of Appeals Docket No. 07-70121. In addition, the issues challenged here, both procedural and substantive, are purely legal, allowing this Court to "assume [their] threshold suitability for judicial determination." *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985).

Finally, FAA's claim that Petitioners' substantive challenge to § 93.153(f)'s validity is time-barred is directly contradicted by this Court's doctrine of "continuing application." *Independent Community Bankers of America v. Board of Governors of the Federal Reserve System*, 195 F.3d 28, 34 (D.C. Cir. 1999).

> We have frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, <u>including claims that an agency lacked the statutory authority to adopt the rule</u>, even where the Petitioner had notice and opportunity to bring a direct challenge within the statutory time limits. [Emphasis added.]

Nor is Petitioners' substantive argument waived because, under the Aviation Act, this Court may consider an argument not made originally to the agency "if

there is reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d). The required "reasonable grounds" are present here. Petitioner Delaware County had no reason to know of the PTC Rule, and could not have been harmed by it, until four months after closure of the comment period on the Draft PTC Rule, when the Final Environmental Impact Statement ("FEIS") for the Airspace Redesign revealed, for the first time, FAA's reliance on the PTC Rule to justify approval of the Airspace Redesign FEIS.

In summary, FAA has failed to address, let alone refute, Petitioners' claims. As their own jurisdictional challenges are unsupported by law or fact, this Court has good grounds to grant the requested Petition and set aside the PTC Rule, in its entirety, as based on an EPA regulation that is inconsistent with the mandates of the CAA; or, in the alternative, remand the PTC Rule to FAA for further analysis and public comment consistent with General Conformity Rule §§ 93.153(f)-(j), and enjoin all actions taken in reliance on the PTC Rule until revision and public review is completed.

II. ARGUMENT.

A. FAA's Claim That this Court Lacks Jurisdiction Ignores Aviation Act § 46110.

For this Court to possess jurisdiction, Petitioners must show: (1) a

"substantial interest"[4] (2) in a final order (3) issued "in whole or in part" under the Aviation Act. 49 U.S.C. § 46110(a).

1. The PTC Rule Is a Judicially Reviewable "Final" "Order."

Although FAA does not dispute that the PTC Rule is an "order" under § 46110,[5] it does dispute that the PTC Rule is "final." "A reviewable order under 49 U.S.C. § 46110(a) 'must possess the quintessential feature of agency decisionmaking suitable for judicial review: finality.'" *Dania Beach*, 485 F.3d at 1187. "[T]o be deemed 'final,' an order [1] must mark the 'consummation' of the agency's decisionmaking process, and [2] must determine 'rights or obligations' or give rise to 'legal consequences." *Dania Beach*, 485 F.3d at 1187, *quoting Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The PTC Rule meets both tests.

a. The PTC Rule Consummated FAA's Decisionmaking Process.

While FAA claims "[N]o consummation of decision-making can occur until FAA takes concrete action applying the list in some way by approving a project and finding that such project is presumed to conform," Resp.Br.p.30, FAA is wrong for at least two reasons. First, on its face, the Final Notice is exactly what it

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[4] *See* Petitioners Opening Brief § V and § III of this Brief re: standing.

[5] *See* Petitioners' Opening Brief, p.2.

says, *i.e.*, final. Nothing in the PTC Rule indicates that "FAA's statements and conclusions are tentative, open to further consideration, or conditional on future agency action." *Dania Beach*, 485 F.3d at 1188. FAA may now apply the PTC Rule without further administrative process.

Second, "[A]n agency action is final if, as the Supreme Court has said, it is definitive and has 'a direct and immediate effect on the day to day business of the party challenging it.'" *Home Builders*, 417 F.3d at 1278. FAA has already "take[n] concrete action" by basing its air quality finding in the Airspace Redesign on the PTC Rule "[B]ased upon the EIS . . . the proposed Airspace Redesign Alternatives and the selected project are either exempt or presumed to conform under the General Conformity Rule." Corrected ROD, pp.43-44. [Pet.RJN, Exhibit A].[6]

In *Home Builders*, the issuance of "nationwide permits" (NWPs) which allow any party who meets certain water quality criteria to avoid obtaining an individual project permit, was challenged under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* The Army Corps of Engineers ("Corps") claimed that the NWPs were not "final" because additional action was necessary by the party desiring

[6] "Pet.RJN" refers to Petitioners' Request for Judicial Notice in Support of Petitioners' Reply Brief filed concurrently with this Brief.

inclusion in the NWP. This Court found that there is "nothing 'tentative' or 'interlocutory' about the issuance of permits allowing any party who meets certain conditions to discharge fill and dredged material into navigable waters." *Id.* at 1279. Here, the PTC Rule presents an even more extreme situation, because additional individual permits are not required. The PTC Rule, in its current form, allows FAA to implement ATC procedures, whatever they consist of and wherever they occur, after having been subject to a collective determination of conformity, on the assumption that all, en masse, have met the conditions established in either Conformity Rule §§ 93.153(g)(1) or (g)(2).

In short, prior to the PTC Rule publication, FAA could not approve changes in ATC procedures without at least a nod at establishing conformity. After the publication, FAA can (and has already) conclusively done just that. No more "concrete action" is required.

b. The PTC Rule Has Manifest Legal Consequences.

FAA further claims that the PTC Rule "has no independent legal significance." Resp.Br.p.30. This Court has disagreed. It held that "the Corps' NWPs create legal rights and impose binding obligations insofar as they authorize certain discharge of dredge or fill material into navigable waters without any detailed project specific review by the Corps of Engineers." *Home Builders*, 417

F.3d at 1279-1280 (emphasis added). The same situation exists here. The PTC Rule also authorizes the implementation of ATC procedures "without any detailed project specific review," and, thus, creates legal rights and obligations analogous to those addressed in *Home Builders*.

Moreover, in *Dania Beach*, this Court held that FAA's 2005 letter authorizing the use of secondary runways to relieve congestion had independent legal significance because it provides "new marching orders" about how air traffic would be managed at Fort Lauderdale Airport ("FLL"). 485 F.3d at 1188. Here, the PTC Rule provides entirely new "marching orders" for determining the conformity of ATC procedures.[7]

c. FAA's Argument that the PTC Rule's Application Is Discretionary Ignores *Dania Beach*.

In *Dania Beach* this Court held that the FAA's Letter at issue there "now makes clear that controllers *may* [in the future] use 'all available runways' for jet traffic to reduce delays." 485 F.3d at 1188 (emphasis added). The "may" in that quote is critical: controllers at FLL were <u>not required</u> to use the secondary runways, but they were <u>permitted</u> to use them if desired. The ruling in *Dania*

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[7] FAA took the position in some studies that ATC procedures were "exempt" from proving conformity. EPA and FAA have acknowledged that the exemption is now improper. Airspace Redesign FEIS, p.ES-10. [Pet.RJN, Exhibit B].

Beach is directly on point here, as FAA need not use the PTC Rule in its projects, but is now permitted to do so. Thus, its discretionary component does not render the PTC Rule any less "final."[8]

2. The PTC Rule Was Issued "Under" the Aviation Act.

FAA claims the PTC Rule "does not mark the approval of any action that FAA is authorized to undertake under Parts A or B." Resp.Br.p.32.[9] FAA, once again, misses the point. FAA does not dispute that the FAA Administrator has the authority, pursuant to 49 U.S.C. § 40113(a), to "carry out this part [the Aviation Act], including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders." Nor can FAA contest that, pursuant to that provision, the Administrator promulgated regulations governing compliance with

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[8] All of the cases FAA cites on Resp.Br. pp.31 and 32 are inapposite. They involve matters in which the applicability of the agency order is contingent upon some future action. *See, EDF v. Johnson*, 629 F.2d 239, 240 (2nd Cir. 1980), involving a future allocation of funds by the Corps to a particular project; *Appalachian Energy Group v. EPA*, 33 F.3d 319 (4th Cir. 1994) concerning future requirement of permits for storm water discharges; *Nationwide Mutual Insurance Co. Cisneros*, 52 F.3d 1351 (6th Cir. 1995) regarding the future imposition of a new impact analysis.

[9] Although § 46110(a) refers to both Part A or Part B, the Aviation Act contains only Parts A and B. Therefore, it is simpler to say that the order at issue must arise "under the Aviation Act." *See*, Subtitle VII, "Aviation Programs," of Title 49 of the United States Code. Thus, we refer to the requirement under § 46110(a) as being an order "under the Aviation Act" instead of "under Parts A or B of the Aviation Act."

the CAA, including the PTC Rule. *See, e.g.*, FAA Order 1050.1E, Appendix A, § 2.2b [Pet.RJN, Exhibit F].

Moreover, FAA's claim that the PTC Rule was also issued, in part, under EPA's General Conformity Rule is irrelevant because, to be reviewable under § 46110, the PTC Rule need only be "issued . . . in whole *or in part* under this part . . ." 49 U.S.C. § 46110(a) (emphasis added). Thus, the PTC Rule can be promulgated "under" both and still be reviewable under § 46110(a).

B. Petitioners Have Established Risk to Their Interests Sufficient to Support Standing.

FAA argues that Petitioners lack standing, on the ground that injuries suffered by Petitioners are not caused by the PTC Rule, since neither the LAS ROD nor the Airspace Redesign ROD relied on the PTC Rule. On the contrary, Petitioners have met the requirements of standing by establishing "procedural injury" resulting from FAA's failure to comply with the Conformity Rule, §§ 93.153(f), (g)(2) and (h) in promulgating the PTC Rule.

Dania Beach holds that where, as here, 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.* at 1185. "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." *City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003).

1. The Violation Challenged Here is Procedural.

Violations challenged by Petitioners are "procedural injuries," as defined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)("where plaintiffs are seeking to enforce a procedural requirement . . ."). Section 93.153(f) requires that an agency seeking to designate actions as "presumed to conform" meet the criteria set forth in §§ 93.153(g)(1) or (g)(2) and publish the basis for the presumptions for public review pursuant to § 93.153(h). Petitioners challenge FAA's compliance with those procedural requirements.

2. The Procedural Requirements Were Specifically Designed to Protect Petitioners' Interests.

Petitioners reside, work, and recreate in areas that have been designated by EPA as nonattainment or maintenance for the National Ambient Air Quality Standards ("NAAQS").[10] An area is designated "nonattainment" when air quality "does not meet (or contributes to ambient air quality in a nearby area that does not

[10] EPA Criteria Pollutant Area Summary Report [Pet.RJN, Exhibit C].

meet) the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. § 7407(d)(1)(A)(i). NAAQS for each pollutant is established at a level that is "requisite" to protect the public health. 42 U.S.C. § 7409(b)(1). Air quality that does not meet one or more NAAQS is, therefore, *per se* harmful to the health of those who reside, work, or recreate in such area. Because of the harmful nature of the air they already breathe, Petitioners have a particularized interest in receiving assurance that FAA's action will conform to State Air Quality Standards, and that they will have an opportunity to comment on whether that assurance is sufficient.

3. Each Petitioner Has Suffered Injury-In-Fact From FAA's Violation of the Conformity Rule's Procedural Requirements.

FAA claims that "Petitioners fall short of" making a showing of injury-in-fact. Resp.Br.p.17. The affidavits attached as Addendum B to Petitioners' Opening Brief, however, provide concrete evidence of injury. First, FAA ignores the application of independent standing requirements to the two governmental Petitioners. Case law does not. In *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004), the court clarified that a municipality "has an interest in, *inter alia*, its ability to enforce land-use and health regulations, and its power of revenue collection and taxation. A municipality also has a proprietary interest in

protecting its natural resources from harm." After reviewing the declarations explaining that the proposed project would affect municipal management and public-safety functions as well as aesthetic, economic, and natural -resources harms, the Court in *Sausalito* found that each of these injuries constituted a proprietary interest of the municipality. *Id.* at 1199.

Moreover, this Court in *Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) held that a city adequately challenging harm to itself as "city *qua* city" has standing, and that harm to economic interests based on a project's environmental impacts is sufficient to support standing. *Id*.

This case is on all fours with *City of Sausalito*. The City Manager of Las Vegas and the Chairman of the Delaware County Council have opined that the absence of environmental documentation and analysis, required under the CAA and FAA's own Orders 1050.1E and 5050.4B, makes it difficult to quantify the impacts of FAA's decision on City and County residents, thus impairing their ability to comply with state and local laws.[11]

[11] For Delaware County, see Reilly Affidavit, ¶¶ 3,4,and 12, and 53 PA.CONS.STAT. § 10105 (Pet.Br.pp.27-28). For City of Las Vegas, see Selby Affidavit, ¶¶ 2,10 and NEV.REV.STAT. § 278.070 (Pet.Br.pp.29-30).

4. Petitioners Have Met Their Burden of Establishing Causation.

FAA also claims that Petitioners' injuries are not caused by the PTC Rule. Resp.Br.pp.18-22. *Dania Beach* is again instructive here: "though this court will assume a causal relationship between the procedural defect and the final agency action, the Petitioners must still demonstrate a causal connection between the agency action and the alleged injury." *Id*. at 1186. Based on the location of their homes in nonattainment areas, Petitioners are especially vulnerable to injury arising from unanalyzed emissions from ATC changes.

Even though this Court has held that the CAA governs individual sources of pollution, *see, e.g., Sierra Club*, 129 F.3d at 138, FAA has undertaken, through the PTC Rule, to establish categories that allow a collective designation of conformity. The lack of individual analysis mandated by the CAA's conformity provision and the consequent lack of region-specific information on the air quality impacts of the subject procedures firmly establishes the "causal connection" to the adverse impacts on individual Petitioners' health, and public entity Petitioners' ability to comply with their public responsibilities.

By failing to comply with the procedures prescribed by §§ 93.153(f)-(j), including (g)(2) and (h), FAA has created uncertainty about the potential local and regional impacts of ATC procedures, and compliance with the state air quality

plans. Thus, FAA has circumvented the fundamental purpose of the CAA: "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare . . ." 42 U.S.C. § 7401(b)(1).

5. Petitioners' Procedural Injury Can Be Redressed by this Court.

The final prong in the standing analysis is redressability. This Court, in *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (en banc) held that procedural injuries are "easily redressable, as a court may order the agency to undertake the procedure," *Id.* at 668.

The same is true in this case where the PTC Rule can be set aside and remanded back to the FAA for compliance with the General Conformity Rule. By adhering, at minimum, to the procedures set forth in §§ 93.153(f)-(j), Petitioners will have at least a modicum of protection from the unanalyzed emissions impacts of ATC procedures from which they now already suffer by virtue of the Airspace Redesign.

6. FAA's Argument that Both the LAS ROD and Airspace Redesign Predate the PTC Rule is Factually Inaccurate.

FAA repeatedly claims that it did not rely on the PTC Rule for air quality analysis in the Airspace Redesign ROD (*see*, Resp.Br.pp.12,18,20-21), Instead, it claims to have relied on a "Fuel Consumption Analysis," Respondents Brief, p.21.

That claim is belied by the Corrected ROD, which states only that: "Based upon the EIS . . . the proposed airspace redesign alternatives and the selected project are either exempt or presumed to conform under the General Conformity Rule." Corrected ROD, pp.43-44. [Pet.RJN, Exhibit A].

Moreover, in August, 2007, FAA asked the court to apply the PTC Rule in rendering its decision in its Opposition Brief in *City of Las Vegas et al. v. Department of Transportation*, Case No. 07-70121, (Ninth Circuit),

> Because the Presumed to Conform List had not been proposed, must less finalized, when the FONSI/ROD was issued, the FAA did not rely upon it at that time. However, a court is to apply the law in effect at the time it renders its decision. [Citations omitted.] Petitioners' arguments regarding the legal effect of EPA's Preamble are no longer relevant because the exemption for departure procedures has been included in a list of exempt actions that is expressly authorized by EPA's Rule [referring to the PTC Rule]. [Pet.RJN, Exhibit D].

In short, Petitioners have provided evidence that each of them possesses the requisite injury from, and causal relationship to, the application of the PTC Rule, sufficient to support standing. Where any one petitioner has standing, this Court possesses jurisdiction. *City of Waukesha*, 320 F.3d at 235.

C. Petitioners' Challenge Is Ripe Because it Raises Purely Legal Issues.

FAA claims that the PTC Rule is not ripe because it has never been applied. Resp.Br.p.23. In *Home Builders*, the Corps made precisely the same argument, that the challenge remained "hopelessly abstract," until "a member submits an actual individual permit application proposing a specific project, has its application denied or unlawfully conditioned, and completes the administrative appeal process provided by the Corps regulations." *Id* at 1282. Leaving aside that the PTC Rule has already been applied in the Airspace Redesign, this Court's response applies equally in this case: "we see no reason here to 'wait for a rule to be applied to see what its effect will be.'" *Id*. This Court should rely on its two-prong test for determining ripeness: "fitness of the issues for judicial decision" and "hardship to the parties of withholding court consideration." *Id.*, at 1281.

1. The Petition is Patently "Fit" for Decision.

"[T]he fitness of an issue for judicial decision depends on whether it is 'purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.' " *Id.*

First, this Court has held that "if the issue raises a purely legal question" the court will "assume its threshold suitability for judicial determination." *Eagle-Picher*, 759 F.2d at 916. In *Home Builders*, this Court found that the appellant's

challenge was "purely legal," where it alleged "the Corps exceeded its statutory authority in drafting the NWPs and that the Corps failed to offer a reasoned basis for their conditions and restrictions." 417 F.3d at 1281-1282. Under the *Home Builders* holding, the parallel issues raised by Petitioners' challenge are purely legal.

This case is distinguishable from *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), where the Supreme Court rejected the National Wildlife Federation's challenge to Bureau of Land Management regulations on the ground that "respondent cannot seek wholesale improvement of this program by court decree." *Id*. at 891. Here, by contrast, Petitioners' challenge is narrowly tailored to apply only to §§ 93.153(f)-(j), which have already been applied in the Airspace Redesign.[12]

2. The FAA Will Not be Disadvantaged If Review Is Immediate.

The second prong of the *Home Builders* test is evaluation of the hardship to the parties of withholding court consideration. *Home Builders*, 417 F.3d at 1281. As a threshold matter, there is a strong argument that consideration of this prong is

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[12] This case is similarly distinguishable from *Atlantic States Legal Foundation v. EPA*, 325 F.3d 281 (D.C. Cir. 1997) cited in FAA's Brief, where the additional hurdle of adoption by New York State of EPA's regulations was required in order for the regulation to become effective.

not necessary where, as here, the issues are "fit" for review and Congress has provided for direct judicial review under a deadline. "Where the first prong of the ripeness test is met and Congress has emphatically declared a preference for immediate review . . . no purpose is served by proceeding to the second [or hardship] prong.'" *General Electric Co. v. EPA*, 290 F.3d 377, 381(D.C. Cir. 2002). Here Congress has declared a preference for immediate review by providing that a challenge to an FAA order must be brought within 60 days of the issuance of the order. 49 U.S.C. § 46110(a).

If hardship is considered, FAA suffers none, as the case has already been fully briefed on the merits. Petitioners, on the other hand, would suffer a dual hardship if review is deferred: (1) continued exposure to unanalyzed emissions impacts; and (2) the potential for further unanalyzed changes in ATC procedures without adequately establishing their conformity. This flies in the face of this Court's holding that an agency acts "arbitrarily and contrary to law by not requiring conformity determinations for individual projects to meet the conditions of CAA 176(c)(1)(B) at the local level." *EDF, Inc. v. EPA*, 509 F.3d 553, 560 (D.C. Cir. 2007). In addition, Petitioners will be unable to raise their argument that FAA failed to comply with § 93.153(f) in a later lawsuit, since that argument will be time-barred.

D. Petitioners' Substantive Challenge to § 93.153(f)'s Validity Is Not "Time Barred" as it Is Subject to "Continuing Application."

FAA does not dispute Petitioners' claim that the PTC Rule is invalid as the product of an EPA regulation, § 93.153(f), that is inconsistent with the CAA. Instead, FAA argues that Petitioners' action is time-barred and/or waived. Neither argument withstands scrutiny. As Petitioners timely challenged the application of § 93.153(f) in the PTC Rule, Petitioners may challenge the validity of § 93.153(f) on the grounds of its "continuing application."

1. 40 C.F.R. §93.153(f) Allows for Continuing Application.

Longstanding precedent holds that agency rules can be challenged on substantive grounds when they are applied, even though the statutory period for judicial review has expired. *Graceba Total Communications, Inc. v. Federal Communications Commission*, 115 F. 3d 1038, 1040 (D.C. Cir. 1997). Because "'administrative rules and regulations are capable of continuing application,'" *Id.*, limiting review of a rule to the period immediately following rule-making 'would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.'" *Id.*

Petitioners' challenge is precisely the sort envisioned by this Court as the subject of "continuing application." Section 93.153(f) allows agencies to apply the PTC Rule to actions that were undetermined at the time of § 93.153(f)'s enactment

and were later designated by other Federal agencies, not the EPA. Any earlier action by Petitioners, before specific application and resulting harm, would not have been ripe.

2. Petitioners' Invalidity Claim is Not Waived Because it Falls Within Statutorily and Judicially Recognized Exceptions.

FAA claims that Petitioners failed to raise the challenge to § 93.153(f)'s validity during the administrative process and have, thus, waived it. Petitioners, however, had "reasonable grounds" for not doing so, and, thus, fall within 49 U.S.C. § 46110(d) which explicitly provides that the Court may consider an objection that was not made to the Administrator "if there was a reasonable ground for not making the objection in the proceeding."

Moreover, Petitioners' claim also falls within "traditionally recognized exceptions to the exhaustion doctrine." *Washington Ass'n for Television and Children v. F.C.C.*, 712 F.2d 677, 682 (D.C. Cir. 1983) ("*WATCH*"). The general rule on exhaustion of administrative remedies is "ultimately an exercise of judicial discretion." *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 156 (D.C. Cir. 1985). Courts have "sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied." *WATCH*, 712 F.2d at 681.

In considering "the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion", this Court "recognized [that there are] exceptions to the exhaustion doctrine." *WATCH*, 712 F.2d at 682 In *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409 (D.C. Cir. 1998) the Court stated that "an objection may be raised for the first time in court if petitioner has good grounds for not raising it before the agency." *Id.* at 412. "A safety-valve of this sort makes sense when, for example, the allegedly erroneous ground for the agency's decision was neither argued nor reasonably anticipated during the administrative process." *Ibid*.

Petitioners here have such "good grounds," because they could not have "reasonably anticipated" the application of, and harm from, the PTC Rule during the administrative process. FAA published the Draft PTC Rule on February 12, 2007, allowing 45 days for comment. In the Draft, FAA relied exclusively on an alleged exemption from the requirements of conformity for ATC procedures which EPA has now deemed inapplicable. Airspace Redesign FEIS, p.ES-10 [Pet.RJN, Exhibit B]. On or about August 1, 2007, FAA stated in the Airspace Redesign FEIS that it would not rely on the exemption for ATC procedures, but would rely instead on a "proposed list of presumed to conform actions." FEIS, p.5-132.

[Pet.RJN, Exhibit B]. This was the first time FAA connected Airspace Redesign with the proposed PTC Rule, long after the comment period closed.[13]

At or about the same time, on July 30, 2007, FAA published the Final PTC Rule. It was only in the September 5, 2007 Record of Decision ("ROD") that FAA stated that the Airspace Redesign was "presumed to conform" under the PTC Rule. [Pet.RJN, Exhibit A]. Thus, Petitioners could not have known during the brief 45 day comment period on the PTC Rule, and could not reasonably have foreseen at the time of the DEIS or FEIS, that FAA would later apply the PTC Rule in a way that would directly and significantly impact them.[14]

Finally, the issue of § 93.153(f)-(j)'s inconsistency with the CAA is a matter of national significance. The PTC Rule will apply to an unlimited number of FAA mandated ATC operations throughout the United States, now and in the future, with impacts on countless communities and populations, without any conformity

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[13] FAA's reliance on *Natural Resources Defense Council v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994) ("*NRDC*"), for the proposition that Petitioners waived their claim [Resp.Br., p.37, § IV.B.] is misplaced because *NRDC* was not brought under 49 U.S.C. § 46110 and the Section 46110(d) exception did not apply in that case.

[14] This transition from exemption in the DEIS to PTC Rule in the FEIS and ROD constitutes a material change in circumstances which also falls within another exception for "material change in circumstances." *WATCH*, 712 F.2d at 682.

review, or compliance with its intended surrogate, §§ 93.153(g)(1) or (g)(2) and (h). Since the PTC Rule's substantive and procedural violations undermine the "primary goal of [the CAA] . . . 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), the validity of the PTC Rule is a matter of great public importance.

The Court should, therefore, rule in this case as it did in *Foundation* that "[g]iven the public importance of this issue, we refuse to find that the decision to hear plaintiffs' challenge is an abuse of discretion . . . In these circumstances, a failure to object during the administrative process should not bar plaintiffs." *Foundation*, 756 F.2d. at 156.

E. FAA's Reliance on § 93.153(g)(2) Runs Afoul of § 93.153(f), (h)(1) and (h)(3).

Section 93.153(f)[15,16] requires that, for an action to be deemed "presumed to conform," it must meet, in addition to the documentation requirements of

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[15] FAA concedes Petitioners' first argument that the PTC Rule did not present sufficient documentation to comply with § 93.153(f). "Although Subsection (g)(1) *might* require the performance of new air quality analyses, thus triggering the requirements of 40 C.F.R. 93.159, *the FAA did not purport to base its inclusion of activities on the List on subsection (g)(1).*" Resp.Br.p.40.

[16] ATC procedures are included in the PTC Rule as Category 14.

subsection (g)(1) or (g)(2), "the procedures set forth in paragraph (h) . . ." 40 C.F.R. § 93.153(f). Subsection (g)(2), upon which FAA now claims reliance, states: "(2) 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." "[T]he federal agency must identify through publication in the FEDERAL REGISTER its list of proposed activities that are presumed to conform and the basis for the presumptions." 40 C.F.R. § 93.153(h)(1). In addition, the agency must receive and respond to comments on its publication. § 93.153(h)(3).

1. Neither the Draft nor Final Notice Provide the Bases for the Presumption for ATC Procedures.

FAA states that "FAA chose the second subsection (g)(2) to support the [PTC Rule] and its inclusion of Category 14." Resp.Br.p.39. In addition, FAA claims, for the first time, that "to support the [PTC Rule], FAA relied on surveys of similar actions taken over recent years as well as air quality studies and analyses conducted on representative activities . . ." Resp.Br.p.39. There is, however, no mention in either the Draft or Final Notice of FAA's "choice" of (g)(2) or of surveys and related air quality studies or analyses. Absent explicit reference to the

surveys and/or analyses in the Draft or Final Notice, the PTC Rule is in violation of §§ 93.153(f) and (h)(1), since FAA failed to state the basis for its presumptions.

Even EPA, whose view in its field of expertise deserves deference, *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 223 (D.C. Cir. 2008), stated in its original Federal Register Notice for the General Conformity Rule, that it anticipated the evidence supporting any proposed presumed to conform rule "should be described in the Federal Register and should document compliance with the criteria and procedures for such rulemaking." 58 Fed.Reg. 13,843 (March, 1993). [Pet.Supp.RJN, Exhibit G]. The PTC Rule, Draft or Final, is devoid of such documentation, as required by § 93.153(h)(1).

2. FAA's Submission of Air Quality Analyses from Several Airports Throughout the Country Does Not Vitiate its Violation of § 93.153(h)(3).

Recognizing that it did not have any documentation either on the face of the Rule or in the Record to support its claim of compliance with § 93.153(g)(2), FAA tried to bolster its position by supplementing the Record, with the complete surveys[17] and additional air quality analyses from several airports throughout the

[17] The full surveys were only submitted after specific request by Petitioners. FAA originally submitted only excerpts of the surveys from projects that had never been the subject of analyses. All of these projects stated that a conformity determination was not necessary because they were exempt, a position that FAA has now repudiated. *See* Opening Brief, § VI.B.3, pp.55-57.

country. None of these documents was included in the original Record or mentioned in either the Draft or Final Notice.

Subsection (h)(3) states that the Federal Agency shall respond to comments, document its response and make its responses available to the public. Here, neither the public nor EPA were given an opportunity to comment on the additional analyses provided long after conclusion of the administrative process in violation of § 93.153(h).

3. The Belated Inclusion of the Analyses May Properly Be Ascribed to "*Post Hoc* Rationalization by Counsel."

As the Supreme Court stated in *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962): "[*SEC v.*]*Chenery* [*Corp.*, 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the *same basis articulated in the order by the agency itself*." (emphasis added). This Court explained in *Connecticut Department of Public Utility Control v. FERC*, 484 F.3d 558 (D.C. Cir. 2007), that since *Chenery*, "[i]t is a fundamental precept of administrative law that we may not accept appellate counsel's *post hoc* rationalizations for agency action." *Id*. at 560 ("*CDPUC*").

As there is no mention in the Final Notice of: (1) reliance on § 93.153(g)(2) as the basis for a presumption of conformity of ATC procedures; or (2) surveys or analyses supporting that reliance, FAA cannot claim that its "basis" for the

presumption of conformity now lies within the parameters of the Final Notice. In *CDPUC*, this Court stated:

> In both its brief and at oral argument, FERC abandoned its earlier reliance on the ISO tariff and the Participants Agreement, . . . As FERC conceded at oral argument, however, this new basis for statutory authority appears nowhere in either of its orders.

CDPUC, 484 F.3d at 560. This Court granted CDPUC's petition for review because it found that the newly articulated basis for FERC's statutory authority was a *post hoc* rationalization of FERC's counsel. *Id*. at 561. This matter presents the same situation. FAA's reliance on (g)(2) and the surveys and analyses appear nowhere in either the Draft or Final Notice.

FAA will claim that its compliance with § 93.153(g)(2) is supported by the Record.[18] The mere fact, however, that the analyses are now included in the Record does not vitiate the *post hoc* rationalization, because the focus of the Court's inquiry under § 93.153 is not what is in the Record, <u>but what is in the order</u> and whether the decision made in the order is supported by the Record. *See*, *CDPUC*, 484 F.3d at 560; *see also*, *Chenery*, 332 U.S. at 196-197. FAA would,

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[18] "To support the List, FAA relied on surveys of similar actions taken over recent years as well as air quality studies and analyses conducted on representative activities, and therefore provided the documentation required by the regulation. [AR 17-22]." Resp.Br.,p.39.

but cannot, have it the other way around. This Court may not assume under prevailing authority that the FAA's position is as articulated in its Brief because there is now, belatedly, support for that position in the Record, absent compliance with the clear mandates of §§ 93.153(f), (g)(2) and (h).

III. CONCLUSION.

FAA attempts to avoid the merits of this matter with claims of lack of jurisdiction, standing and ripeness, because it knows that it has failed to comply with the procedural requirements of § 93.153(f)-(j) and has not disputed that § 93.153(f)-(j) is incompatible with the CAA. Moreover, it knows that should it be successful in that regard, its procedural failures will never be questioned again, since they will be time-barred. Petitioners in their Opening Brief and here, in their Reply Brief, have shown that FAA's attacks on jurisdiction, standing and ripeness lack merit: the PTC Rule was issued under the Aviation Act; Petitioners have shown all the elements of standing for a procedural injury; and this matter would not benefit from being deferred.

In the end, FAA does not offer any substantive challenge to Petitioners' arguments. Instead, FAA offers a few procedural hoops to jump through, claiming that Petitioners' argument that § 93.153(f) is invalid is time-barred and/or waived. In fact, since the invalidity argument is subject to "continuing application" it is not

time-barred. And since Petitioners did not have a chance to comment on the Draft Notice, they did not waive the argument. Likewise, FAA's new claim that it is relying on § 93.153(g)(2), is easily shown to be a sham, since that reliance is not mentioned in the Draft or Final Notice, which is a violation of § 93.153(h)(1) and (h)(3).

Thus, this Court should grant this Petition for Review. Should this Court find that the PTC Rule is the product of an invalid regulation, then the Court should, as the Supreme Court did in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002), vacate the PTC Rule in its entirety. If the Court decides that FAA has failed to meet its obligations under § 93.153(f)-(j) with respect to the inclusion of ATC procedures in the PTC Rule (*i.e.*, "Category 14"), then the Court should vacate the Category 14 portion of the PTC Rule, and remand it back to FAA.

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 6,930 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.

I certify that on July ___, 2008, a copy of the **PETITIONERS' FINAL REPLY BRIEF** was sent, via U.S. Mail, postage prepaid to:

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