**ORAL ARGUMENT HEARD ON MAY 11, 2009**
**PANEL DECISION ISSUED JUNE 10, 2009**

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**In the**
**UNITED STATES COURT OF APPEALS**
**For the District of Columbia Circuit**

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No. 07-1363
(Consolidated with Nos. 07-1437, 07-1493, 07-1494, 07-1495, 07-1496, 07-1497, 07-1498, 07-1499, 08-1105, 08-1106, and 08-1107)

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COUNTY OF ROCKLAND, NEW YORK, *et al.*,

*Petitioners,*

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,

*Respondents.*

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# PETITIONERS IN CASE NO. 07-1493'S (COUNTY OF DELAWARE, PENNSYLVANIA, et al.) PETITION FOR REHEARING OR REHEARING *EN BANC*

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Petitioners Delaware County, Pennsylvania, *et al.*, ("Delaware County"), Case No. 07-1493, seeks rehearing or rehearing *en banc* of the Judgment and supporting Memorandum Opinion in *County of Rockland, et al. v. FAA* ("Panel Decision") filed on June 10, 2009, dismissing the consolidated Petitions for Review in the above-captioned matter (*see* Addendum attached hereto). This Petition for Rehearing is made on the grounds that: (1) the Panel Decision conflicts with the decision of the United States Supreme Court in *DOT v. Public Citizen*, 541 U.S. 752 (2004) and relevant D.C. Circuit cases *Environmental Defense v. EPA*, 467 F.3d 1329 (D.C. Cir. 2006) and *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) which require scrupulous compliance with the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA") and the Environmental Protection Agency's ("EPA") implementing regulations; (2) the Panel Decision presents an issue of exceptional public importance in that it contravenes the express purpose of Congress in enacting the CAA and its conformity provision, 42 U.S.C. § 7506; (3) the Panel misapprehended the fact that Petitioners did argue the applicability of the CAA within specific nonattainment and maintenance areas in their Opening Brief [Pet.Br. at 93; Pet. Final Joint Br. at 121]; (4) the Panel misapprehended the law governing (a) "harmless" error, which holds that the mere potential for a violation of a party's substantial rights is sufficient to demonstrate the prejudicial nature of the error, particularly, where, as here, the existence of the

error, the Federal Aviation Administration's ("FAA") failure to consider or calculate emissions, is not disputed; and (b) burden of proof which, under *Alabama Power v. Costle*, 636 F.2d 323, 360 (D.C.. Cir. 1979) and *Assn. of Admin. Law Judges v. Fed. Labor Relations Auth.*, 379 F.3d 957 (D.C. Cir. 2005), ascribes the burden to the agency where the *de minimis* nature of an agency action is at issue.

## I. BACKGROUND.

Petitioners challenged FAA's redesign of the airspace above a five state region including Connecticut, New York, New Jersey, Delaware and Pennsylvania ("Project"). The Project was aimed at reducing delay and increasing efficiency of the airspace, but in doing so also increased the distances aircraft would have to fly at some airports. Despite these increased distances, and potential for other operational changes resulting from the Project, the Draft Environmental Impact Statement ("DEIS") did not include an air quality conformity analysis pursuant to CAA requirements and EPA regulation 40 C.F.R. § 93.150, *et seq.* ("Conformity Rule").

As a surrogate for a conformity analysis, FAA performed a study of the change in the amount of fuel burned by aircraft at each airport throughout the study area resulting from the Project ("Fuel Burn Report"). The Fuel Burn Report purported to show an aggregate reduction of 194.4 metric tons of fuel burned

throughout the entire study area, although the amount of fuel burned increased at at least two of the study's airports in the State of New Jersey [Fuel Burn Report, Table 2; AR 9304:3746; JA 1742]. The Fuel Burn Report did not include any calculation of the emissions resulting from the Project, but merely concluded in a summary sentence that the decrease in fuel burn would result in a decrease in emissions, and, therefore, the Project should be considered exempt as *de minimis* pursuant to the Conformity Rule. [Fuel Burn Report, p. 11; AR 9304:3750; JA 1746].

## II. THE PANEL DECISION CONFLICTS WITH THE U.S. SUPREME COURT'S DECISION IN *DOT V. PUBLIC CITIZEN*, 541 U.S. 752 (2004).

In *Public Citizen*, the Supreme Court reaffirmed what was already clear from the face of the CAA and Conformity Rule §§ 93.153(c)(1) and (b), "[A]n agency is exempt from the general conformity determination under the CAA if its actions would not cause new emissions to exceed certain threshold emission rates set forth in § 93.153(b)," *Id*. at 771. The Supreme Court further confirms the Conformity Rule standard for determining whether a conformity determination is required or an exemption is appropriate pursuant to 93.153(b):

> "The EPA's rules provide that 'a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed' the threshold levels established by the EPA. 40 CFR § 93.153(b) (2003)."

*Id*. The Supreme Court then held that:

> "the emissions from the Mexican trucks are neither 'direct' nor 'indirect' emissions caused by the issuance of [the agency's] proposed regulations. Thus, [the agency] did not violate the CAA or the applicable regulations by failing to consider them when it evaluated whether it needed to perform a full 'conformity determination.'"

*Id.* at 773.

The Panel Decision acknowledged that, as Petitioners repeatedly argued in their Opening and Reply Briefs: (1) a project may only be exempted from the conformity requirement if it will result either in *de minimis* emission of criteria pollutants within each nonattainment and maintenance area, Conformity Rule §§ 93.153(c)(1) and (b), or is in a list of actions expressly exempted, § 93.153(c)(2); and (2) "FAA did not directly calculate the level of emissions resulting from the project, but rather relied upon a fuel burn analysis that showed the redesign will 'reduce fuel consumption by just over 194 metric tons per day' in the <u>study area</u>," [Mem. Op. at 7] [emphasis added] (although not within each of the SIPs). The Panel also assumed that FAA "erred where it failed to inventory emissions," [Mem. Op. at 8]. Despite these acknowledgments, the Panel found that: (1) "the FAA reasonably concluded the redesign is exempt from a conformity determination under the *de minimis* exemption . . .," [Mem. Op. at 7]; and (2) "[t]he agency did not need to quantify the reduction [in emissions] in order to

conclude the redesign was exempt from a conformity determination," [Mem. Op. at 8].

To reach its finding, the Panel expressly adopted FAA's equation of fuel burn with emissions [Mem. Op. at 7] ["Because reducing fuel consumption reduces aircraft emissions, the FAA concluded the redesign will reduce emissions in the study area."]. It is undisputed in the Record that changes in fuel burn, and, under the Court's and FAA's rationale, changes in emissions, result directly from the airspace changes mandated by FAA in the Project. Because FAA is delegated by Congress the sole authority over the use of airspace, 49 U.S.C. § 40103(a)(1), the Project's emissions fall squarely within EPA's definition of "indirect emissions," *i.e.*, those "[t]he Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency," *citing* 40 C.F.R. § 93.153(b); *Public Citizen,* 541 U.S. at 772.

Thus, the Panel's holding that FAA "reasonably" concluded the Project's air quality impacts are *de minimis*, without requiring that FAA "inventory emissions," or "directly calculate the level of emissions resulting from the project," let alone do so in each nonattainment or maintenance area in each relevant SIP, is in direct conflict with the Supreme Court's holding in *Public Citizen*, requiring that an agency calculate a project's direct or indirect emissions, for each criteria pollutant, within each nonattainment or maintenance area, within individual SIPs, and

compare them with the thresholds in § 93.153(b), to establish a project's *de minimis* status.

## III. THE PANEL DECISION CONFLICTS WITH OTHER CIRCUIT DECISIONS AND FAILS TO CONSIDER AN ISSUE OF EXCEPTIONAL IMPORTANCE, THE INTENT OF CONGRESS.

The Panel Decision also fails to consider the overriding issue of Congressional intent and prior decisions of this Circuit when it allowed FAA to substitute the Fuel Burn Report for the required *de minimis* process in Conformity Rule §§ 93.153(c)(1) and (b). "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." CAA § 7401(c). EPA regulations included in §§ 93.153(c)(1) and (b) were enacted to further that purpose. *Sierra Club v. EPA*, 129 F.3d 137, 142 (D.C. Cir. 1997) [confirming "the Act's delegation of authority to EPA to specify the criteria and procedures for determining conformity. . ."].

This Court has consistently taken the position that strict compliance with the CAA and EPA regulations is not elective. *See, e.g.*, *Environmental Defense,* 467 F.3d at 1336. "[FAA] may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Id., quoting Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006). Congress made no provision in the CAA, nor did EPA in the

Conformity Rule, for substitution of a surrogate such as the Fuel Burn Report for the mandated process to determine conformity or exemption as *de minimis*. The Panel Decision allowing such substitution therefore directly conflicts with: (1) the intent of Congress; (2) the regulations promulgated by the agency to which Congress delegated that authority; and (3) this Circuit's prior decisions in *Environmental Defense* and *Friends of the Earth*, requiring scrupulous compliance with the intent of Congress and EPA's implementing regulations.

## IV. THE PANEL MISAPPREHENDS THE FACTS AND LAW ON HARMLESS ERROR AND PETITIONERS' BURDEN OF PROOF.

### A. The Panel Misapprehends the Fact That Petitioners Did Argue in Their Opening Brief FAA's Failure to Evaluate Emissions Within Each Nonattainment and Maintenance Area.

The Panel found that the FAA's failure to quantify emissions within relevant nonattainment and maintenance areas was not raised in Petitioners' Opening Brief [Mem. Op. at 8] and was, in any event, "harmless" error. *Id.* The Panel erred on both counts. First, at page 93 of their Joint Opening Brief [Pet. Final Joint Br. at 121], Petitioners first cited 40 C.F.R. § 93.153(b), underscored the words "nonattainment or maintenance area's total emissions" for emphasis, and then argued that "FAA provides no data or analyses in the FEIS, ROD, or any other part of the Record memorializing the total emissions of criteria pollutants for the project in any of the relevant non-attainment or maintenance areas." This is

the very argument which the Panel incorrectly stated was not raised until Petitioner's Reply Brief.

Thus, this case is readily distinguishable from *Sitka Sound Seafoods, Inc. v. National Labor Relations Board*, 206 F.3d 1175 (D.C. Cir. 2000) cited by the Panel. In *Sitka*, this Court found that "[i]n its opening brief . . . [petitioner] merely refers to this argument; only in its reply brief does it actually argue the point." *Id*. at 1181 Here, the issue of the FAA's failure to comply with 40 C.F.R. § 93.153(b) was raised and expressly argued in Petitioners' Opening Brief. There was no "sandbagging" [*Sitka*, 206 F.3d at 1181] of Respondents because Respondents were expressly made aware of Petitioners' argument in the Opening Brief. That Respondents did not respond to this argument is purely a function of the absence from FAA's Fuel Burn Report or any other part of the Record of any reference to, let alone analysis of, the Project's emissions impacts on separate nonattainment or maintenance areas.

### B. The Panel's Conclusion That FAA's Errors are Harmless Seriously Prejudices Petitioners' Substantial Rights.

The Panel's assertion that FAA's failure to follow the strict dictates of the Conformity Rule is "harmless" error, results in extreme prejudice to the public's substantial right to expect that Federal projects will further Congress' purpose in enacting the CAA, *see, e.g.*, § 7401(b)(1), as well as to Petitioners' substantial

right to a judgment untainted by factual or legal error.[1] Here, the Panel not only misapprehends the existence of Petitioners' clear argument in their Opening Brief concerning the absence of emissions analysis for each nonattainment area, but also the fact that, according to the Fuel Burn Report, fuel burn, and thus emissions, will be increased within at least one nonattainment area, around Teterboro Airport and Morristown Municipal Airport [Fuel Burn Report, Table 2; AR 9304:3746; JA 1742] in the State of New Jersey, within the New Jersey SIP. Under the Panel's and FAA's rationale, if fuel burn increases, emissions must also increase within the New Jersey SIP, thus raising the issue of prejudicial impacts, at minimum, on New Jersey Petitioners.

It is true that, in the absence of any evidence of emissions analysis in the Record, it is not possible for Petitioners to establish with absolute certainty that the Project's air quality impacts will not be *de minimis*. But certainty is not required to establish prejudicial error. In *PDK Laboratories Inc. v. U.S. Drug Enforcement Administration*, 362 F.3d 786, 799 (D.C. Cir. 2004), this Court held:

> "The Deputy Administrator stated that it was 'the totality of circumstances' that lead him to sustain the suspension orders, and four of the 'circumstances' . . . were PDK's export violations [citation omitted]. What weight he gave to those circumstances (or any others) is impossible to discern. The decision upholding the suspension orders must therefore be set aside and the case remanded."

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[1] "[R]eviewing court normally should 'determine whether the error affected the judgment,'" *Shinseki v. Sanders*, 129 S.Ct. 1696, 1705 (April 2009).

### C. The Panel Also Misapprehends the Law Governing Burden of Proof.

Finally, in holding that "the burden is on petitioners to demonstrate that [the FAA's] ultimate conclusions are unreasonable" [Mem. Op. at 8, citing *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002)], the Panel confused two separate and distinct burdens of proof. The burden of showing that emissions caused by the Project are *de minimis* is on the FAA. This Court held in *Alabama Power,* 636 F.2d at 360 that "Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing."[2] *See also*, *Assn. of Admin. Law Judges*, 379 F.3d at 963 [Same].

The FAA did not make the required "assessment of particular circumstances" necessary to meet its burden in this case. The Record is devoid of evidence that the FAA calculated the level of emissions caused by the Project [Mem. Op. at 7], inventoried emissions [Mem. Op. at 8], or did either in nonattainment or maintenance areas [Pet. Br. at 93; Pet. Joint Final Br. at 121] required for such assessment under Conformity Rule § 93.153(c)(1) and (b).

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[2] *Alabama Power* is still the applicable law even though in *Environmental Defense Fund v. EPA*, 82 F.3d 451, 467 (D.C. Cir. 1996) ("*EDF*"), this Court held that it is superceded by *Chevron v. NRDC*, 467 U.S. 837 (1984) where "an agency [is] acting within the scope of its delegated authority." The holding in *EDF* does not apply here because EPA, not FAA, is the agency to which Congress delegated authority for implementation of the CAA.

Absent the required evidence, or any evidence, of emissions in the record, there is no basis upon which Petitioners could meet the burden of establishing the unreasonableness of FAA's actions, which can only be based on an assessment of evidence in the record. "[A]n agency's 'declaration of fact that is capable of exact proof but is unsupported by any evidence' is insufficient to make the agency's decision non-arbitrary." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007), quoting *McDonnell Douglas Corp. v. Department of Air Force*, 375 F.3d 1182, 1191 (D.C. Cir. 2004).

The Panel erroneously shifted the burden of showing that emissions from the Project are *de minimis* from the FAA to Petitioners to show that they are not. However, because the FAA has not met its initial burden under *Alabama Power* and *Assn. of Admin. Law Judges*, the FAA's action was *per se* unreasonable. The Panel's error resulted in prejudice to Petitioners because applying the *Olmsted Falls* standard constituted a basis for the Panel Decision against Petitioners. The Panel Decision misapprehended the law governing the proper burden of proof, and is in direct conflict with *Alabama Power* and *Assn. of Admin. Law Judges*.

## V. CONCLUSION.

Based on the mistakes of fact and law, and the manifest conflicts with the decisions in *Public Citizen*, *Environmental Defense*, *Friends of the Earth*, *Alabama Power* and *Assn. of Admin. Law Judges* in the Panel Decision, Delaware

County respectfully requests rehearing or rehearing *en banc* of the June 10, 2009 Panel Decision.

Dated: July 23, 2009

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ADDENDUM
[Circuit Rule 35(c)]

1. United States Court of Appeals for the District of Columbia Circuit, Case No. 07-1363, Judgment filed June 10, 2009

2. Certificate of Parties and Amici

3. Corporate Disclosure Statement