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Dr. Jake A. Plante
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Re: Federal Presumed to Conform Actions Under General Conformity
Comments - 72 Fed.Reg. 6,641, *et seq.* - F.R. Doc. E-7-2241

Dear Dr. Plante:

The following constitute the comments of the City of Las Vegas, Nevada ("City") concerning the Notice of Proposed Rulemaking for the Federal Aviation Administration's ("FAA") "Federal Presumed to Conform Actions Under General Conformity" ("NPRM"), with specific reference to the portion of the NPRM relating to Air Traffic Control ("ATC") activities, § III.14, 72 Fed.Reg. 6,641, 6,654 ("§ III.14"). The City requests that the cited § III.14 be deleted from the NPRM for the following reasons.

I. THE NPRM MISSTATES THE EPA'S POSITION ON THE "EXEMPT" STATUS OF ATC ACTIONS.

As a threshold matter, the NPRM bases its conclusion that ATC actions should be "presumed to conform" with the Clean Air Act at least partially on a misstatement of the Environmental Protection Agency's ("EPA") Final Conformity Rule ["The FAA concurs with the EPA determination that ATC activities are *de minimis*," 72 Fed.Reg. 6,641, 6,654 [emphasis added], thereby attempting to justify the inclusion of ATC actions on the "Presumed to Conform" list through the EPA's imprimatur. The EPA takes no such position.

The EPA expressly excluded ATC actions from the text of the Conformity Rule. *See*, 40 C.F.R. 93.153(c)(2). What EPA did say, referring to the list of actions in the preamble cited by

FAA as support for its position, was that "in addition to the list in the rule, the following actions are 'illustrative' of *de minimis* actions". 58 Fed.Reg. 63,214, 63,229. [Emphasis added.] The difference is significant from both a legal and factual perspective.

First, from a legal perspective, the role of a preamble in agency rulemaking is limited.

> "The preamble to a rule is not more binding than a preamble to a statute. A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569-570 (D.C. Cir. 2002).

Second, from a practical perspective, the list of "illustrative" actions in the preamble is comprised exclusively of: (a) paper transactions (*see, e.g.*, (5) ["Deposit or account insurance for customer's financial institutions and flood insurance"]; (9) ["Advisory and consultative activities such as legal counseling and representation"]); (b) activities that maintain or restore the status quo (*see, e.g.*, (1) ["Routine monitoring and/or sampling of air, water, soils, effluent, etc."]; (11) ["Regeneration of an area to native tree species"]; (12) ["Timber stand and/or habitat improvement activities . . ."]); or (c) temporary or episodic activities (*see, e.g.*, (7) ["Participating in 'air shows' and 'flyovers' by military aircraft"]). It is clear from this context that the EPA intended "illustrative" activities to be limited to categories of action without ongoing operational ramifications such as, in the case of ATC actions, potential for operational increases. The FAA, moreover, takes largely the same position as the EPA.

> "In general, FAA Presumed to Conform actions involve maintenance, navigation, construction, safety, security activities and new technology and vehicle systems that do not modify or increase airport capacity or change the operational environment of the airport in such a way as to increase air emissions above *de minimis* thresholds." 72 Fed.Reg. at 6,645.

ATC activities, other than "adopting approach, departure and en route procedures for air operations", 58 Fed.Reg. 63,214, 63,229(2) fit in none of those categories because they are ongoing activities that direct aircraft in a manner which is capable of controlling, or at least contributing to, or detracting from, the emissions resulting from aircraft operations. Moreover,

while FAA acknowledges that "increased efficiency and delay reduction would allow *traffic volumes to increase*", *Id.*, [emphasis added], it inexplicably denies that "traffic volume increase" equates to "increased annual aircraft operations", *Id.*, and ascribes such increased operations solely to unnamed "market forces". The FAA's position flies in the face of basic economic theory.

Dating back as far as Jeremy Bentham, it has been recognized that increased supply gives rise to increased demand, at least in the short run, *i.e.*, "If you build it, they will come." Airport capacity, like other economic assets, is determined by the integration of the specific landside and airside characteristics characteristics of each airport. This includes features such as off-site access, on-site parking, landside terminal design, the number of aircraft gates, the configuration of aircraft gates, runway design and configuration, etc. While overall airport capacity will be determined by the integration of these features, any one of them may be a constraining factor on overall capacity. Undertaking an action that loosens any given constraining factor will lead directly to an increase in both capacity and operations.

Further, any action that serves to increase the efficiency of movement into and out of the landside or airside of any airport carries the potential to move actual activity closer to unconstrained activity, and thereby increase emissions to a level that is dependent on the specific undertaken action. To presume that the level of airport operations, and consequent emissions, will not be influenced by an action that disrupts the balance between all these factors, such as Air Traffic Control activity, is at its fundament an unreasonable assumption that cannot be used to justify the inclusion of ATC activities on the Presumed to Conform list.

II. THE NPRM INCORRECTLY PRESUMES THAT VIRTUALLY ANY ATC ACTION BELOW THE "MIXING HEIGHT" WILL CONFORM.

The NPRM presumes conformity for virtually every ATC activity above 1,500 feet AGL, or 1,500 feet below the 3,000 foot AGL altitude at which emissions are typically dispersed by airflow, *i.e.*, the inversion layer, 72 Fed.Reg. at 6,654. The ATC actions presumed to conform below 1,500 feet include undefined and unlimited categories such as those that "increase safety, enhance fuel efficiency, or reduce community noise impacts through engine thrust reductions."

Aside from the overbroad nature of terms like "safety" and "efficiency", the NPRM fails to provide a shred of analytic support for the proposition that ATC actions that increase "efficiency" do not also have the potential to increase emissions below the mixing height. This is particularly the case in a location such as Southern Nevada, a region in severe or extreme nonattainment for criteria pollutants, CO, VOC and NO_x. Without rain, and surrounded by

populated mountains in excess of 1,500 feet AGL, pollution between 1,500 feet and 3,000 AGL is a serious issue.

The NPRM nevertheless fails to establish analytically that: (1) increased "efficiency" will not lead to increased operations, and resulting emissions; and (2) that the creation of additional emissions at altitudes below 3,000 feet in areas like Las Vegas will not lead directly to violations of the Conformity Rule.

In summary, the City strongly urges the FAA to exclude ATC activities from the NPRM, and confront the potential air quality issues they raise by working with communities in good faith to ensure that ATC actions meet the fundamental purposes of the Conformity Rule, to eliminate, reduce or prevent the occurrence of new violations of ambient air quality standards.

Sincerely,

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