[ORAL ARGUMENT NOT YET SCHEDULED]

No. 11-1444

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS; TEAMSTERS JOINT COUNCIL NO. 7; TEAMSTERS JOINT COUNCIL NO. 42; PUBLIC CITIZEN; and SIERRA CLUB, Petitioners, vs. UNITED STATES DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; RAY LAHOOD, Secretary of the U.S. Department of Transportation; ANNE S. FERRO, Administrator of the Federal Motor Carrier Safety Administration; and THE UNITED STATES, Respondents.	On Petition for Review of Final Agency Action of the Federal Motor Carrier Safety Administration

PETITIONERS' REPLY BRIEF

STEPHEN P. BERZON
JONATHAN WEISSGLASS
BARBARA J. CHISHOLM
DIANA S. REDDY
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel.: (415) 421-7151

Attorneys for All Petitioners

SCOTT L. NELSON
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
Tel.: (202) 588-1000

Attorney for Petitioner Public Citizen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

* Authorities upon which Petitioners chiefly rely are marked by asterisks.

Statutes and Regulations

Federal Register

Miscellaneous

GLOSSARY

2007 Act	U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007
APA	Administrative Procedure Act
DEA	Draft Environmental Assessment
DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
FMVSSs	Federal Motor Vehicle Safety Standards
FONSI	Finding Of No Significant Impact
IBT	International Brotherhood of Teamsters
NAFTA	North American Free Trade Act
NEPA	National Environmental Policy Act
NHTSA	National Highway Traffic Safety Administration

SUMMARY OF ARGUMENT

1. This Court held that IBT has standing based on economic injury and safety risks to challenge a rule allowing more cross-border trucking. *IBT v. Peña*, 17 F.3d 1478 (D.C. Cir. 1994). As to environmental injury for purposes of Petitioners' NEPA claim, given that U.S. emissions standards are more stringent than Mexico's and that Mexico-domiciled trucks will make thousands of trips into the U.S. under the pilot program, FMCSA does not dispute that the pilot program will cause pollution. IBT members are uniquely affected by the pilot program, and Petitioners have submitted declarations from IBT members demonstrating economic, safety, and environmental injury (negative health effects) resulting from the program. IBT therefore has standing.

2. FMCSA's pilot program fails to comply with several federal requirements governing highway safety and the grant of long-haul operating authority. FMCSA argues that these standards should not apply to Mexico-domiciled carriers and that the Court should adopt the agency's presumption that long-haul trucking by Mexico-domiciled carriers will have no effect on highway safety. These arguments cannot overcome plain statutory and regulatory language and congressional intent to ensure trucking safety.

3. FMCSA also violated NEPA. First, FMCSA delayed the NEPA analysis until it no longer mattered. Moreover, because FMCSA made choices with environmental implications in designing the pilot program, including negotiating emissions controls, the agency had authority to consider alternatives with respect to the pilot program's environmental effects. But FMCSA failed to take a "hard look" at environmental effects and potential alternatives.

4. Given the safety violations, the Court must set aside the pilot program. 5 U.S.C. §706(2)(A). The Court should also enter an injunction to remedy the NEPA violations.

ARGUMENT

I. PETITIONERS HAVE ESTABLISHED STANDING

1. With respect to Petitioners' standing to bring claims under laws that govern Mexico-domiciled carriers and the operation of trucks on the nation's highways, FMCSA misses the import of the closest case on point: *IBT v. Peña*, 17 F.3d 1478 (D.C. Cir. 1994).

First, *IBT v. Peña* addressed a standing claim based in part on *economic injury* resulting from a DOT rule recognizing Mexico's commercial drivers' licenses. The Court found that economic injury resulting from "extra competition" occasioned by easing the conditions under which drivers from Mexico could

operate (*id.* at 1483) gave IBT standing, noting that the statute at issue protected "employment opportunity." *Id.* at 1484.

Similar to the rule at issue in *IBT v. Peña*, the pilot program will necessarily allow more Mexico-domiciled trucks into the United States – that is the only reason for the program. Therefore, this is not a case like those FMCSA cites where the alleged competitive injury is speculative. *See DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (rejecting standing to challenge agency decision allowing plaintiff's competitor to sell gas because there was only a "vague probability that any gas will actually reach [plaintiff's] market"); *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 26-28 (D.C. Cir. 1995) (rejecting standing where "it is wholly speculative that [petitioner] will ever 'compete'" in area at issue). These cases are aimed at ensuring that the asserted injury is imminent and concrete. *DEK Energy*, 248 F.3d at 1194, 1196; *El Paso Natural Gas*, 50 F.3d at 26-28. Here, the pilot program has already started (*see* Resp. Br. at 10) allowing Mexico-domiciled trucks to conduct long-haul trips in the United States. As *IBT v. Pena* recognized, this competition injures IBT members' wages and job security. *E.g.*, Kimball Dec., ¶10.

FMCSA attempts to distinguish *IBT v. Peña* on the ground that it involved the entry of more trucks than will participate in the pilot program. Resp. Br. 31.

But Petitioners need not demonstrate the magnitude of the injury. *See, e.g., IBT v. Peña*, 17 F.3d at 1483 ("Though the scale of the Implementing Rule's effect may not be clear, its direction is: easing the criteria for Mexican nationals driving here seems sure to increase their number."). FMCSA's assertion that IBT members will not face competition because most cross-border trucking is likely to be in the border zone (Resp. Br. 29) ignores that the whole point of the pilot program is to allow trucking *beyond* the border zone. *E.g.*, 76 Fed. Reg. 40420, 40423 (July 8, 2011) ("the pilot program will allow Mexico-domiciled motor carriers to operate throughout the United States"). Petitioners' declarations address the injury to IBT members who operate in the same market as will Mexico-domiciled trucks under the pilot program. Allen Dec., ¶¶3, 5, 8, 9; Cawood Dec., ¶¶3, 11; *see also* Kimball Dec., ¶¶7, 10.[1]

Second, beyond economic injury, *IBT v. Peña* recognizes that IBT members "spend far more time on the roads than most other Americans," and "[r]eductions in highway safety would cause more harm to them." 17 F.3d at 1483. Petitioners'

[1] FMCSA's argument on prudential standing with respect to economic injury (Resp. Br. 29-30) overlooks that the statutory schemes, while contemplating cross-border trucking, were meant to ensure parity in treatment of U.S. and Mexico-domiciled trucks. Opening Br. 21. FMCSA also misses that the test is "not meant to be especially demanding." *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1279 (D.C. Cir. 2004) (citation omitted); *see also* Opening Br. 20-21.

declarations establish that the safety of drivers and trucks disproportionately affects IBT members, particularly members, such as declarants Deane Allen and Jack Cawood ,who drive in the west, southwest, and south – where much pilot-program activity will occur. Opening Br. 17 & n.2.

Thus, Petitioners are not claiming an injury that would apply equally to any member of the public. FMCSA relies primarily on two decisions that deny standing where "after an agency takes virtually *any* action, virtually *any* citizen – because of a fractional chance of benefit from alternative action – would have standing to obtain judicial review of the agency's choice." *Public Citizen v. NHTSA*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (emphasis in original); *accord Public Citizen v. NHTSA*, 513 F.3d 234, 237 (D.C. Cir. 2008).[2] That is not the situation here. IBT members are not just *any* citizens, but those most likely to be harmed by highway safety problems. *IBT v. Peña*, 17 F.3d at 1483. The concerns expressed in *Public Citizen v. NHTSA* are not present. The proper test is that used in *IBT v. Peña*.

---

[2] The other two cases on which FMCSA relies – *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), and *NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006) – both find standing and support Petitioners' position. Under *Mountain States Legal Foundation*, "incremental risk is enough of a threat of injury to entitle plaintiffs to be heard." 92 F.3d at 1235. Under *NRDC v. EPA*, the "risk must be 'non-trivial'" and not hypothetical. 464 F.3d at 6 (quoting *Mountain States Legal Foundation*, 92 F.3d at 1235).

FMCSA's argument seeks to minimize the number of long-haul trips Mexico-domiciled trucks will take throughout the United States. Resp. Br. 27-28. The argument is flawed in two major respects. First, FMCSA elsewhere argues, in contending that the pilot program will yield statistically valid results, that the program will involve a sufficiently large "number of inspections performed on the pilot program participants." 76 Fed. Reg. at 40435. The total number of inspections FMCSA expects – a number that correlates to border crossings under the pilot program – is 2,800 to 4,100. 76 Fed. Reg. 20807, 20817 (Apr. 13, 2011). FMCSA cannot argue both that the program will be statistically valid because there will be thousands of border crossings and that there will be so few border crossings that associated harms will be insubstantial. Second, FMCSA's claim that some pilot program participants already operate within the border zones is irrelevant. Whether or not they do, the point of the pilot program is to permit participants to operate throughout the country, traveling many more miles – and on more roads – than if they were limited to the border zones. FMCSA ignores this substantial increase in traffic – and the resulting injury to IBT members.

2. As to NEPA standing, FMCSA does not dispute that the pilot program will increase pollution. Opening Br. 19. FMCSA concedes that "Mexico's [emissions] standards are not as stringent" as those for U.S. trucks.

Resp. Br. 18. Nor does FMCSA dispute that diesel engine exhaust causes cancer, particularly among truck drivers. Opening Br. 19. Finally, FMCSA concedes that two IBT members have submitted declarations that "suggest injury or risk of injury" from pollution. Resp. Br. 31.

Despite these concessions, FMCSA argues that Petitioners have not shown injury from the pilot program. Resp. Br. 31. But as just demonstrated, the total number of trips into this country that pilot program participants will take is substantial. Because Mexico-domiciled trucks concededly have more polluting emissions than U.S. trucks, the pilot program will result in more pollution in the United States. An IBT member whose asthma is aggravated by diesel exhaust from trucks regularly travels on a highway with significant trucking traffic from the border zone. Cawood Dec., ¶¶3, 8. He – and the many other IBT members who drive trucks in the west, southwest, and south (Kimball Dec., ¶7) – will be particularly harmed by the pollution the pilot program causes. That is enough to satisfy the requirement that NEPA petitioners show that they are "uniquely susceptible to injury." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007).

3. FMCSA argues that Petitioners must identify individual members who have the requisite injury. Resp. Br. 28, 29, 32. IBT has done so. Among

other declarations, Petitioners have submitted detailed declarations from IBT members who live and drive in the area the pilot program will most affect and who are subject to the safety and environmental effects FMCSA has ignored. Allen Dec., ¶¶2-4, 7-8; Cawood Dec., ¶¶2-4, 8-10. That showing is more than sufficient to meet the requirements of *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), and *Public Citizen v. NHTSA*, 489 F.3d at 1296.[3]

II. THE PILOT PROGRAM DOES NOT COMPLY WITH FEDERAL SAFETY REQUIREMENTS

A. Pilot Program Participants Are Excused From Mandatory Certification Requirements

FMCSA admits that rather than requiring participating Mexico-domiciled motor vehicles to comply with the Motor Vehicle Safety Act's certification requirements, the agency has decided to rely on safety regulations. Resp. Br. 33. The agency is *not* contending that compliance with those regulations constitutes compliance with the certification requirements, which require display of decals

[3] In *Summers*, the Supreme Court held that where standing to challenge Forest Service regulations that permitted projects to be exempted from notice and comment was based on a generalized claim of harm to recreational use and esthetic enjoyment of National Forests that would actually occur in a particular place and only affect members who went there, the plaintiffs had "to identify members who have suffered the requisite harm – surely not a difficult task." 555 U.S. at 499. Here, although the harmful condition is not similarly confined, IBT, unlike the plaintiffs in *Summers*, nonetheless has identified examples of members who are directly exposed to that harm.

certifying compliance with Federal Motor Vehicle Safety Standards ("FMVSSs"). 49 U.S.C. §§30112(a), 30115(a). FMCSA's sole argument is that Mexico-domiciled motor vehicles are not subject to the statutory requirements. Resp. Br. 33-38. But trucks that come into the U.S. to carry goods throughout the country are both (1) "introduc[ed] . . . in interstate commerce" and (2) "import[ed] into the United States," either of which requires compliance with the mandatory certification requirements set forth in 49 U.S.C. §§30112(a) and 30115(a).

1. "Interstate commerce" for these purposes means "commerce between a place in a state and a place in another State or between places in the same State through another State." 49 U.S.C. §30102(a)(4); Resp. Br. 33. FMCSA asserts that trucks in the pilot program are not in interstate commerce. Resp. Br. 33-34. FMCSA is wrong.

In *National Association of Motor Bus Owners v. Brinegar*, 483 F.2d 1294 (D.C. Cir. 1973), this Court construed the term "interstate commerce" as it was defined at the time, which was virtually the same as now: "commerce between any place in a State and any place in another State, or between places in the same State through another State." *Id.* at 1303 (quoting Pub. L. No. 89-563, 80 Stat. 729, §102(a)).

At issue in *Brinegar* were DOT regulations governing the use of regrooved tires. 483 F.2d at 1300-01. The statute provided that "'[n]o person shall . . . deliver for introduction in interstate commerce'" a regrooved tire or a motor vehicle equipped with such tires. *Id.* at 1300 (quoting Pub. L. No. 89-563, §204(a)). The regulations' challengers argued that the regulations were overbroad because they applied to motor carriers operating wholly in intrastate commerce. *Id.* at 1301. DOT responded, contrary to its current argument, that "virtually all public roads are pathways of interstate commerce, and that buses traveling those roads become inseparably intermingled with interstate traffic and thus are 'introduc[ed]' into interstate commerce." *Id.* at 1306 (Robinson, J.).

In an opinion for the majority of the panel, Judge Spottswood Robinson adopted DOT's position, holding that the relevant inquiry was whether the tires or vehicles at issue "'[were] actually in or so closely related to the movement of the [interstate] commerce as to be part of it.'" *Id.* at 1311 (quoting *McLeod v. Threlkeld*, 319 U.S. 491, 497 (1943)). A vehicle "on a public highway upon which interstate traffic is moving" is, "in the most literal sense," introduced "in interstate commerce." *Id.* (internal quotation marks omitted). This is true "irrespective of where [the] vehicle is going or coming from." *Id.* at 1310.

Brinegar's interpretation of the Motor Vehicle Safety Act's prohibition on "introduc[ing]" non-compliant motor vehicles in "interstate commerce" is controlling. As in *Brinegar*, Mexico-domiciled trucks will travel on U.S. highways that bear interstate traffic. These trucks are therefore introduced into interstate commerce and subject to the statutory certification requirements, regardless of whether their carriage of goods from Mexico to U.S. destinations is characterized as "interstate."

2. FMCSA offers no reasonable interpretation of the term "import" that would excuse Mexico-domiciled trucks entering the United States from complying with the certification requirements.

FMCSA relies on a part of a dictionary definition of "import": to "'bring[] (as wares or merchandise) into a . . . country from another country.'" Resp. Br. 36 (quoting Webster's Third New Int'l Dict. 1135 (1993)). Although "import" may be limited in this particular manner, the definition from that dictionary is broader: "to bring from a foreign or external source." Webster's Third New Int'l Dict. 1135 (1993). Mexico-domiciled motor carriers bring trucks into the United States from Mexico. Even if "import" were ambiguous, congressional intent controls, and that intent was "'to reduce traffic accidents and deaths and injuries resulting from traffic accidents.'" 70 Fed. Reg. 50277, 50285 (Aug. 26, 2005) (quoting 49

U.S.C. §30101). It is the trucks coming into the country that causes these problems, not what they are carrying.[4]

Further, FMCSA's request that the Court defer to the 2005 withdrawal of a proposed rule is unwarranted. *See* Resp. Br. 34-35.[5] That withdrawal reversed a longstanding policy of the National Highway Traffic Safety Administration ("NHTSA") interpreting the term "import" as applying to "all vehicles *entering* the United States." 70 Fed. Reg. at 50279 (emphasis added). NHTSA continues to consider that interpretation a reasonable one, and has noted that the statutory scheme is "the strongest evidence that Congress intended the term 'import' to apply to all vehicles brought into the United States." *Id.* at 50284, 50285. That NHTSA decided to withdraw this definition because it would be "less cumbersome" not to require Mexico-domiciled motor carriers to comply with the

[4] FMCSA's reliance on *The Conqueror*, 166 U.S. 110, 118 (1897), is misplaced. That case involved a "ship[] or vessel[]," which are treated as "sui generis" for purposes of calculating tariffs. *Id.* at 118. The decision distinguishes vessels from "vehicles used upon land." *Id.*

[5] Petitioners do not challenge the withdrawal of the proposed rule itself, but FMCSA's decision to waive the certification requirement in the pilot program. Therefore, FMCSA is incorrect that Petitioners' challenge is untimely. *See* Resp. Br. 36.

certification requirements (*id.* at 50277) is not a sufficient reason to override the statutory scheme.[6]

B. FMCSA Failed To Engage In A Reasoned Analysis Of Whether Accepting Mexico-Domiciled Drivers Who Recognize Only The Color Red Will Ensure An Equivalent Level Of Safety

FMCSA does not dispute that 49 U.S.C. §31315(c)(2) requires it to design its pilot program to achieve levels of safety at least equivalent to full compliance with otherwise applicable safety regulations. Yet FMCSA points to *no* evidence that permitting drivers with red-only vision into the U.S. is as safe as requiring compliance with the U.S. requirement that drivers be able to recognize all three colors used in traffic signals. Nor does FMCSA respond to decades of fact-finding confirming that the ability to recognize red, green, and yellow is a minimum safety requirement. Opening Br. 41. Instead, FMCSA erroneously suggests that Petitioners are claiming that the countries' standards must be

[6] Because FMCSA does not contend that the pilot program's self-certification complies with statutory certification requirements, the agency's repeated claims that inspections will ensure compliance with safety regulations are therefore irrelevant. *See, e.g.*, Resp. Br. 35-36. FMCSA's argument that its decision to excuse compliance with certification requirements is supported by a reasoned conclusion that "'model year 1996 and later CMVs manufactured in Mexico meet the FMVSSs'" (Resp. Br. 15 n.3 (quoting 76 Fed. Reg. at 40434)) is also incorrect. The purported basis for that claim is only that "*most* model year 1996 and later CMVs manufactured in Mexico meet the FMVSS[s]." JA 304 (emphasis added).

identical or that FMCSA erred in deciding to accept Mexico's driver licenses. *See* Resp. Br. 38-40. Neither is the case.

The relevant issue is the safety effects of accepting drivers with red-only vision. Opening Br. 38-39. FMCSA defends its decision not to analyze these safety effects by arguing that U.S. regulations permit drivers to "have some type of color perception deficiency" *so long as they* are still able to satisfy the "minimum standard" of being able to "*recognize and distinguish among* traffic control signals and devices showing standard red, green and amber.'" Resp. Br. 40 (quoting 49 C.F.R. §391.43) (emphasis added by Respondents).[7] But that does not qualify as a reasoned explanation for how the agency concluded that Mexico's vision test, which "only requires red color vision" (76 Fed. Reg. at 20814) – and therefore does *not* require drivers to "recognize and distinguish" all three colors in traffic signals – will result in an equivalent level of safety.

Given the agency's failure to address the key issue, its assertions that some other Mexican physical qualification standards are more stringent than U.S. standards and that standards need not be identical are beside the point. *See* Resp.

[7] The ability to "recognize" each color is certainly important for road safety: A blinking red light has a very different meaning in the U.S. than a blinking yellow light.

Br. 39, 40. FMCSA had a statutory obligation to provide a reasoned basis for concluding that differences in standards will not affect safety. Opening Br. 40.

FMCSA suggests that its 1991 agreement with Mexico regarding reciprocity in treatment of commercial drivers' licenses resolves this claim. Resp. Br. 38-39. That agreement, however, was not based on a determination that differences between the countries' physical qualification standards would not affect road safety. Instead, the agreement notes that Mexico does not require a separate medical certificate, and provides that the countries will identify "differences between [their] processes" for "review[ing] medical qualifications of drivers of commercial vehicles." 57 Fed. Reg. 31454, 31457, Annex to Appendix A, ¶III.4 (July 16, 1992).

Finally, FMCSA argues that its decision not to require Mexican drivers to possess a medical card is dispositive. Resp. Br. 39. That decision, however, was *not* based on evaluation of the effect of the differences in the countries' medical requirements, but on the incorrect statement that Mexico's driver's license "is evidence that the driver has met medical standards as required by the United States." 57 Fed. Reg. at 31455. FMCSA's incorrect assertion cannot support its claim to have made a valid equivalence finding (Resp. Br. 39) because Mexico's

license does *not* reflect that a driver satisfies the U.S. minimum requirement of recognizing red, yellow, and green.

C. The Pilot Program Is Not Designed To Yield Statistically Valid Findings On Safety

FMCSA fails to acknowledge its obligations to design a pilot program that will "test" the safety of granting Mexico-domiciled motor carriers authority to conduct long-haul trips throughout the United States, and will yield statistically valid findings that those carriers will be at least as safe as their U.S. counterparts. U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112 ("2007 Act"), §6901(a); 49 U.S.C. §31315(c)(2)(C); Opening Br. 29-30.

1. FMCSA concedes that its pilot program cannot prove that Mexico-domiciled carriers are as safe as U.S. carriers. Resp. Br. 46. Instead, the program adopts a "*presumption* that Mexico-domiciled motor carriers are as safe as U.S. motor carriers." 76 Fed. Reg. at 40435 (emphasis added). FMCSA defends this "null hypothesis" as common practice. Resp. Br. 46. But Congress required "statistically valid findings" demonstrating that a grant of operating authority to Mexico-domiciled motor carriers is as safe as granting authority to U.S. carriers.

49 U.S.C. §31315(c)(2)(C)); 2007 Act, §6901(a)(1); Opening Br. 34-38.[8] That it may be common in other settings to use a methodology that does not satisfy that statutory requirement is irrelevant.

2. FMCSA also fails to establish that it has designed a pilot program that will include a sufficiently representative sample of Mexico-domiciled motor carriers, as Congress required in 49 U.S.C. §31315(c)(2)(C). *See* Opening Br. 30-33. Although FMCSA itself has acknowledged that "sufficient participation" is necessary "to allow for a statistically valid demonstration" of Mexico-domiciled carriers' ability to comply with U.S. safety standards (76 Fed. Reg. at 40433), the pilot program fails to establish any minimum number of participants as necessary to produce statistically valid results.[9]

Moreover, FMCSA has recognized the risk of relying on the number of inspections, which may not be representative of the participating carriers, and may not yield statistically valid findings. 76 Fed. Reg. at 40435 ("statistical validity of . . . findings [will] hinge[] upon the representativeness of the study data"). Yet

---

[8] The question is thus not whether Mexico-domiciled motor carriers that do *not* receive operating authority will be as safe as U.S. carriers. *See* Resp. Br. 43-44.

[9] FMCSA misconstrues this point, erroneously suggesting that Petitioners object to its reliance on "out-of-service" violations as a measure of carriers' safety. Resp. Br. 45.

FMCSA fails to explain why it was reasonable to design the pilot program to assess whether the data is representative only upon the program's conclusion. Petitioners are *not* asking the agency to "guarantee in advance" how many carriers will participate. Resp. Br. 44. Petitioners seek only to enforce the congressional mandate that the program be "*designed*" to produce statistically valid results. 49 U.S.C. §31315(c)(2)(C).

D. FMCSA's Plan To Grant Permanent Operating Authority Is Invalid

FMCSA regulations require all motor carriers, including Mexico-domiciled carriers, to operate under provisional operating authority for 18 months. 76 Fed. Reg. at 40432. This period runs from the date the carrier receives provisional operating authority, and if that authority is "revoked," the carrier must reapply and is subject to a "new 18-month monitoring period." 73 Fed. Reg. 76472, 76478 (Dec. 16, 2008); 49 C.F.R. §385.115(a), (b). Opening Br. 42-46. Further, Congress intended to test the grant of operating authority through a pilot program that complies with 49 U.S.C. §31315(c) not through a deficient program that was revoked. *See* 2007 Act, §6901(a); Opening Br. 46.

FMCSA does not dispute that it intends to grant permanent operating authority to Mexico-domiciled motor carriers less than 18 months after they

receive provisional operating authority through the current pilot program. Nor does the agency dispute that it will credit carriers with provisional operating authority possessed under the previous, terminated pilot program, even though that authority was revoked in 2009.

Instead, FMCSA argues that a grant of permanent operating authority through the pilot program will not be real because it remains subject to the terms of the pilot program. Resp. Br. 42. But the permanent operating authority granted pursuant to the pilot program is *not* provisional operating authority; and it can be converted to standard permanent authority in the event the program is terminated. 76 Fed. Reg. at 40426.

FMCSA also contends that it does not consider the provisional operating authority of carriers that participated in the terminated program to have been "revoked." Resp. Br. 42-43. Yet FMCSA stated that it had "*revoked* all registrations issued in connection with the [terminated] cross-border demonstration project." 74 Fed. Reg. 11628, 11628 (Mar. 18, 2009) (emphasis added). FMCSA's argument that "revoked" does not mean "revoked" is untenable. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551

U.S. 644, 672 (2007) (no deference due interpretation plainly inconsistent with regulations).[10]

E. FMCSA Did Not Demonstrate That Simultaneous And Comparable Authority Is Available To U.S. Motor Carriers

FMCSA would nullify the requirement that long-haul operating authority only be granted to Mexico-domiciled trucks when "simultaneous and comparable authority" is available to U.S. motor carriers. 2007 Act, §6901(a)(3). According to FMCSA, so long as Mexico grants formal authority to U.S. motor carriers, whether carriers are able to use that authority is irrelevant. Resp. Br. 47-48. This interpretation is at odds with FMCSA's previous assertion that U.S. carriers should have the "ability to . . . operate within Mexico" in a manner "similar to that

[10] During the notice-and-comment process, IBT and others raised concerns with FMCSA's plan to grant permanent operating authority to Mexico-domiciled carriers after less than 18 months of provisional operating authority. JA 18, 38-39. FMCSA's argument that this flaw was waived because it is based in part on an uncited regulation is incorrect. *See* Resp. Br. 41. "[C]ommenters must be given some leeway in developing their argument before this court, so long as the comment to the agency was adequate notification of the general substance of the complaint. . . . Moreover, for aggrievement that reaches key assumptions of an agency, even the failure to object during the comment period is insufficient to bar review." *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 891-92 (D.C. Cir. 2006) (internal quotation marks and citations omitted). FMCSA cannot be heard to contend that it did not understand Petitioners' claim because it was not on notice of its own regulation.

of Mexico-domiciled motor carriers in the United States." 76 Fed. Reg. at 40431. It also contradicts congressional intent to ensure equal access.

Beyond its assertion that merely formal operating authority is sufficient, FMCSA has no answer to Petitioners' showing that the agency failed to establish the availability of fuel in Mexico necessary for U.S.-domiciled trucks. Nor did FMCSA engage in a reasoned analysis of whether U.S. carriers have the ability to operate within Mexico in a manner comparable to the operating ability that Mexico-domiciled trucks will possess within the United States. Opening Br. 47-48.

III. FMCSA DID NOT COMPLY WITH NEPA

A. FMCSA Did Not Undertake NEPA Compliance In A Timely Manner

FMCSA undisputedly issued its Draft Environmental Assessment ("DEA") and Finding Of No Significant Impact ("FONSI") only after closing notice and comment on the pilot program, after publishing the final notice of intent to proceed, and concurrently with the execution of an agreement with Mexico regarding the program. *See* Opening Br. 51.[11] Performing NEPA analysis only

[11] This timeline and Petitioners' claim do not depend on what constitutes the Record of Decision. *See* Resp. Br. 60.

after reaching a decision does not meet the requirements of regulations and case law. Opening Br. 50-51.

The requirement that an agency conduct a NEPA analysis while still "contemplating" action serves two "action-forcing" purposes. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). First, it "ensures that the agency, in reaching its decision, will have available, and will carefully consider" likely environmental consequences of its actions. *Id.* Second, "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id*.

FMCSA argues that its untimely publication of the DEA did not act to "'limit [its] choice of reasonable alternatives.'" Resp. Br. 60 (quoting 40 C.F.R. 1506.1(a)). But by the time the DEA was made available, the pilot program was finalized. In particular, FMCSA had already reached an agreement with Mexico on the terms of the pilot program – including the emissions requirements. JA 372, 430. Therefore, the agency was committed to those terms and the public, in commenting on the DEA, had no role to play in influencing FMCSA's decisions. Contrary to FMCSA's position (Resp. Br. 61), this goes to the heart of NEPA.

B. FMCSA's Failure To Conduct An Adequate NEPA Analysis Is Not Excused By Its Excessively Narrow Construction Of Its Authority

FMCSA concedes that *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), did not decide the issues Petitioners raise. Resp. Br. 49.[12] Nonetheless, FMCSA argues that it correctly limited review to the environmental effects of inspection of vehicles at the border because it had no authority or discretion to consider any other alternatives that might have altered the environmental effects of the pilot program. Resp. Br. 50-54.

NEPA requires federal agencies to comply with its directives "to the fullest extent possible." 42 U.S.C. §4332. Congress sought to ensure that no agency would "utilize an excessively narrow construction of its existing statutory authorizations to avoid" compliance. *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976); *see also NRDC v. Berklund*, 609 F.2d 553, 558 (D.C. Cir. 1980) ("[A]n agency cannot escape the requirements of NEPA by excessively constricting its statutory interpretation."). This is exactly what FMCSA has done.

---

[12] FMCSA seeks to justify its reliance on *Public Citizen* as an application of the "rule of reason." Resp. Br. 50. FMCSA did not rely on the "rule of reason" in the agency proceedings and cannot defend a decision based on a reason the agency did not rely upon when making the decision. *See International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 814 (D.C. Cir. 1983).

First, FMCSA claims that its statutory authority is strictly circumscribed. Resp. Br. 50. The governing statutes belie FMCSA's attempt to deny its authority and discretion to design the pilot program. Unlike in *Public Citizen*, where FMCSA was constrained by a statutory requirement that it register any Mexico-domiciled motor carrier "'willing and able to comply'" with applicable safety regulations (541 U.S. at 766 (quoting 49 U.S.C. §13902(a)(1)), here FMCSA's authority is grounded in the 2007 Act and in 49 U.S.C. §31315(c), which empower the agency to design the pilot program, including determining the participants, the duration of the program, and the conditions of participation. *See* Opening Br. 56.

FMCSA further argues that, to the extent it had discretion to design the pilot program, it could only exercise that discretion to promote safety, and not to consider environmental effects. Resp. Br. 50-51. But NEPA supplements an agency's authority to impose environmental standards when exercising its discretion. "[W]here Congress delegates a discretionary decision to an agency, NEPA may, within the boundaries set by Congress, authorize the agency to make decisions based on environmental factors not expressly identified in the agency's underlying statute." *Village of Barrington v. Surface Transportation Board*, 636 F.3d 650, 665 (D.C. Cir. 2011) (internal quotation marks omitted); *see also* 42 U.S.C. §4335 ("The policies and goals set forth in this chapter are supplementary

to those set forth in existing authorizations of Federal agencies."). In exercising its discretion to design the pilot program, including by establishing minimum standards for participation, FMCSA could have made decisions to benefit the environment.

FMCSA also presents a new argument: that the goals of the pilot program prohibited the agency from considering any aspects of the program other than those related to border inspections. Resp. Br. 52. This argument is without merit.

FMCSA claims that the purpose of the pilot program "is to test whether FMCSA has established sufficient mechanisms to ensure that Mexican carriers comply with the laws and regulations *applicable to motor carriers generally*," and that therefore the imposition of any "new substantive rule uniquely upon Mexican carriers" would be "beyond the scope of FMCSA's action." Resp. Br. 57 (internal quotation marks omitted; emphasis added). In the Environmental Assessment, however, FMCSA described the purpose of the pilot program as to "test and demonstrate the ability of Mexico-domiciled long-haul motor carriers to operate safely in the United States." JA 255-56, 431; *see also* 76 Fed. Reg. at 20807 (pilot program will "test and demonstrate the ability of Mexico-based motor carriers to operate safely in the United States").

FMCSA *never* stated, nor could it, that the pilot program was required to test whether Mexico-domiciled trucks could operate safely without being subject to any additional regulations. The pilot program – as Congress mandated – includes many conditions applicable *only* to participating Mexico-domiciled motor carriers. 2007 Act, §6901(a); 49 U.S.C. §31315(c); Resp. Br. 15 ("FMCSA has imposed additional conditions on Pilot Program participants."); 76 Fed. Reg. at 20808 ("Mexico-domiciled motor carriers participating in the program will be required to comply with the existing motor carrier safety regulatory regime plus certain additional requirements."). FMCSA's post-hoc attempt to re-frame the goals of the pilot program to excuse its failure to conduct an adequate NEPA review should be rejected.[13]

[13] FMCSA also implies that NAFTA might prohibit it from addressing "environmental outcomes" through "safety regulations" because NAFTA requires the United States to accord "service providers domiciled in Mexico 'treatment no less favorable' than it accords its own service providers in 'like circumstances.'" Resp. Br. 51 (quoting NAFTA, Article 1202). The "like circumstances" language defeats FMCSA's suggestion that NAFTA restricts the agency's discretion to consider additional safety or environmental requirements. FMCSA concedes that "Mexico-domiciled carriers that purchase vehicles and fuel in Mexico might operate vehicles with greater emissions than vehicles operated by U.S. carriers." Resp. Br. 18-19. Given this and other "unlike circumstances," regulatory efforts addressing relevant differences by imposing additional requirements would be consistent with NAFTA.

The strongest evidence that FMCSA is not as constrained as it professes is what the agency *actually did*: make choices in designing the pilot program, including negotiating emissions controls on participating vehicles. Only Mexico-domiciled vehicles whose engines conform to U.S. emissions standards for 1998 or later may participate in the pilot program. 76 Fed. Reg. at 20811. And FMCSA has chosen to collect environmental information from participating vehicles, including whether "environmental post-treatment equipment or other emissions-related equipment has been installed." *Id*. at 20813.

FMCSA nonetheless argues that the emissions control standards do not reflect its authority to make decisions with environmental effects because it could not have imposed such conditions unilaterally, but only through negotiations with Mexico. Resp. Br. 58-59. The agency, however, was an active participant in reaching the agreement with Mexico that governed the terms of the pilot program, including the emissions control standards. *See* 76 Fed. Reg. at 20810. Because FMCSA played "a legally relevant" role in creating these emissions standards (*Public Citizen*, 541 U.S. at 770), NEPA requires analysis of their effects and alternative standards.

C. FMCSA Failed To Take A "Hard Look" At Areas Of Environmental Concern

FMCSA fails to demonstrate it took the required "hard look" at the environmental effects associated with its design of the pilot program or at potential alternatives to that design. *See* Opening Br. 49.

1. FMCSA had authority and discretion to design and negotiate numerous aspects of the pilot program that may affect the environment, including: the type and number of vehicles that may participate, the length and duration of the program, and the safety and environmental standards applicable to participating carriers and how compliance is enforced. *See id.* 56-57, 59-64.

FMCSA's suggestion that its decisions regarding such aspects of the pilot program would not affect the environment (*see* Resp. Br. 56-57) is implausible. In particular, FMCSA's assertion that its decision to waive the statutory FMVSS certification requirement for post-1996 Mexico-domiciled vehicles "had no environmental effects" (Resp. Br. 56) cannot be credited. The requirement is intended to enforce safety standards designed to prevent accidents and crashes, which FMCSA acknowledges constitute environmental harm. JA 457.

2. FMCSA's attempts to excuse its failure to consider any alternative designs of the pilot program are unavailing. First, FMCSA dismisses most of the

alternatives Petitioners suggested on the basis that the agency could not impose any additional regulatory requirements on Mexico-domiciled motor carriers – either with respect to the environment directly or through safety regulations that affect the environment. Resp. Br. 57-59. As shown above, that assertion is inaccurate. *See supra* at 24-28. Moreover, the alternatives Petitioners suggested to FMCSA would *not* impose additional requirements on Mexico-domiciled participants, but would hold them to the same standards applicable to U.S. motor carriers. Petitioners urged FMCSA to consider: (i) not waiving the FMVSS certification requirements; (ii) requiring compliance with more recent emissions standards; and (iii) requiring pilot program participants to use the same low-sulfur diesel fuel U.S. trucks are required to use. Opening Br. 59-62.[14] Even if the purpose of the pilot program were regulatory equality (which it is not), these suggested alternatives would further that purpose.

Second, FMCSA mischaracterizes Petitioners' claim about the agency's duty to consider alternatives outside of its jurisdiction, suggesting that such alternatives would only redress environmental harms that FMCSA's actions did

[14] FMCSA asserts that requiring pilot program participants to use low-sulfur fuel would not be "feasible" because it lacks the ability to "siphon off and store and dispose excess fuel." Resp. Br. 58 n.10. But that would not be the consequence of Petitioners' suggested requirement, which would simply mean that certain trucks would be denied entry.

not cause. Resp. Br. 54. Yet the environmental effects Petitioners asked FMCSA to address are directly associated with FMCSA's design of the pilot program, such as its decisions regarding certification and emissions control requirements. Under 40 C.F.R. §1502.14, FMCSA was obligated to consider all reasonable alternatives that might mitigate these effects, including alternatives that might involve actions beyond the agency's jurisdiction. Opening Br. 64.

IV. THE PILOT PROGRAM SHOULD BE SET ASIDE AND ENJOINED

The APA provides that the Court "*shall*" "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A) (emphasis added). Although FMCSA (and its *amici*) plead with the Court to take into account how Mexico will react, that is not a proper consideration under the APA. Were there any doubt, Congress has provided that U.S. laws prevail over any contrary provisions of NAFTA. 19 U.S.C. §3312(a)(1), (2). There is no basis to claim that NAFTA obligations override the APA or truck safety statutes.

As to injunctive relief under NEPA: "Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself

into compliance." *Realty Income Trust v. Eckerd*, 564 F. 2d 447, 456 (D.C. Cir. 1977). Petitioners ask only for the standard remedy. *See* Opening Br. 65.

CONCLUSION

For the foregoing reasons and the reasons in the Opening Brief, the Court should find that FMCSA's pilot program violates the law and should set aside the program and enjoin further implementation until the violations are remedied.

Dated: March 7, 2012

Respectfully submitted,

STEPHEN P. BERZON
JONATHAN WEISSGLASS
BARBARA J. CHISHOLM
DIANA S. REDDY
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

Attorneys for All Petitioners

SCOTT L. NELSON
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
Telephone: (202) 588-1000

Attorney for Petitioner Public Citizen

By: */s/ Jonathan Weissglass*
Jonathan Weissglass

CERTIFICATE OF COMPLIANCE

I certify that the reply brief is proportionately spaced in Times New Roman font, 14 point type, and, according to the word count provided in Word Perfect, contains 6,638 words.

Dated: March 7, 2012

/s/ Jonathan Weissglass
Jonathan Weissglass

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I filed and served the foregoing brief by causing a copy to be electronically filed and served via the appellate CM/ECF system to Respondents' following counsel of record:

Michael S. Raab
michael.raab@usdoj.gov
Michael P. Abate
michael.abate@usdoj.gov
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Room 7226
Washington, D.C. 20530

Dated: March 7, 2012

/s/ Jonathan Weissglass
Jonathan Weissglass