

Sierra Club (“Sierra Club”), APVA Preservation Virginia (formerly called the Association for the Preservation of Virginia’s Antiquities), National Trust for Historic Preservation in the United States (“National Trust”), and individual-plaintiff Larry Allamong, are directly and adversely affected by the decision of Defendants J. Richard Capka, Administrator, Federal Highway Administration (“FHWA”), Roberto Fonseca-Martinez, FHWA Virginia Division Administrator, Mary Peters, Secretary, U.S. Department of Transportation, and Intervenor-Defendant the Commonwealth of Virginia to approve the Tier 1 Final Environmental Impact Statement (“FEIS”) and Record of Decision (“ROD”) to expand Interstate 81 (“I-81”) through Virginia. See Declarations of John Hutchinson (“Hutchinson Decl.”); Kim Sandum (“Sandum Decl.”); Stewart Schwartz (“Schwartz Decl.”); Alexia Smith (“Smith Decl.”), Laura Neale (“Neale Decl.”), Joseph A. Szakos (“Szakos Decl.”), Eugenia Anderson (“Anderson Decl.”); LaFayette C. Richardson (“Richardson Decl.”), Robert K. Egbert (“Egbert Decl.”), Donald J. Hasfurther (“Hasfurther Decl.”), Robert Nieweg (“Nieweg Decl.”), Larry Allamong (“Allamong Decl.”), and (attached hereto as Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11). Each of these Plaintiffs have suffered and will continue to suffer injury in fact due to the Defendants’ current and continuing failure to comply with federal environmental laws as specifically outlined below.

2. Plaintiff SVN member groups along the I-81 corridor include the Community Alliance for Preservation (“CAP”), an organization that has 45 members in Rockingham County and Harrisonburg; the Shenandoah Forum, an organization with more than 40 members in Shenandoah County; and Preserve Frederick, with more than 45 members in Frederick County. Their interests in using, protecting, and appreciating the historic and natural resources along the I-81 corridor is threatened and adversely affected by the Defendants’ actions and omissions complained of herein. *See* Hutchinson Decl.; AR 5180, Bates # 048853-54; AR 6340, Bates #

054235-56; AR 6792, Bates # 060324-63.

3. Plaintiff CSG is an unincorporated association of local, regional and national conservation and civic groups, whose mission is to ensure that transportation and development decisions accommodate growth while revitalizing communities, providing more housing and travel choices, and conserving natural and historic areas. CSG coordinates the “Reconnecting Virginia” project to promote improved land use and transportation planning in Virginia and provides advice and support to individuals and groups in the Shenandoah Valley who have participate in VDOT’s transportation study and proposed alternatives. Sandum Decl. ¶ 3-4; Schwartz Decl. ¶ 3-5. The Piedmont Environmental Council (“PEC”), a nonprofit organization incorporated under the laws of Virginia, is a member of CSG and serves as the fiscal agent for CSG. CSG and PEC members use, enjoy, and appreciate the scenic, natural, historic, and ecological resources in the lands along the I-81 corridor. Sandum Decl. ¶ 2; Schwartz Decl. ¶ 2. Their interests in using, protecting, and appreciating those historic and natural features is threatened and adversely affected by the Defendants’ actions and omissions complained of herein. *Id.*; AR 6343, Bates # 054259-312; AR 6792, Bates # 060324-63.

4. Plaintiff RACC is a nonprofit organization whose mission is to promote the wise stewardship and sustainable use of natural and cultural resources through education, advocacy, and action to protect and enhance the quality of life for present and future inhabitants of Rockbridge County, Virginia. I-81 bisects Rockbridge County, and the Defendants’ actions and omissions complained of herein will have a direct effect on RACC’s and its members’ ability to use, enjoy, and appreciate the scenic, natural, and cultural resources in Rockbridge County. Smith Decl. ¶ 2; Neale Decl. ¶ 2. Among other things, the widening of I-81 will increase commercial truck traffic and lead to severe effects on air quality in the region. *Id.* Additionally,

members' ability to use, enjoy, and appreciate the aesthetic, historic, and cultural resources, including the views of the rural landscapes, small cities and towns, and the Valley's Civil War battlefields, will be irreparably damaged by the increased commercial truck traffic resulting from the expansion of I-81. *See id.* Members' ability to appreciate, use, and enjoy these historic and cultural resources, such as the Shenandoah Valley's Civil War battlefields, will be degraded. *Id.* Members' appreciation and use of natural resources, including "wildlife populations, pristine watersheds, and national forests, parks, wilderness and Class I areas that enrich the Valley will also be degraded by increased noise, water, and air pollution." *Id.*; AR 4888, Bates # 048191-200; AR 6551, Bates # 056142.

5. Plaintiff VOP, a Virginia nonprofit corporation, is a statewide grassroots organization dedicated to challenging injustice by empowering people in local communities to address issues that affect the quality of their lives. Szakos Decl. ¶ 3. VOP has three offices located within the I-81 corridor – in Shenandoah County, Salem and Abingdon – and serves more than 1,500 members in those areas. *Id.* VOP has numerous members that reside along the I-81 corridor whose interests in using, protecting, and appreciating the scenic, historic, and natural features in and around the I-81 corridor will be threatened and adversely affected by the Defendants' actions and omissions complained of herein. *Id.* VOP members will also suffer other injuries, such as "an increase in secondary traffic, which will increase local delays and disrupt [their] mobility, and increased transportation-related fuel consumption, resulting in continued oil dependence and global climate change." *Id.* ¶ 5; AR 4533, Bates # 047305.

6. Plaintiff Scenic Virginia, Inc. is a private, non-profit organization that works to preserve, protect, and enhance the scenic beauty and community character of Virginia, particularly relating to Virginia's most significant viewsheds and vistas. As the sole statewide

advocate for conservation of Virginia's scenic resources, Scenic Virginia encourages, promotes, and supports public and private actions that enrich Virginia's extraordinary scenic beauty, particularly along its highways and byways; and works to demonstrate the economic, social, physical and cultural benefits of preserving Virginia's scenic assets. Scenic Virginia has 1,200 members, many of whom reside along the I-81 corridor. Scenic Virginia and its members use, enjoy, and appreciate the scenic, natural, historic, and ecological resources in the lands along the I-81 corridor. Their interests in using, protecting, and appreciating those historic and natural features is threatened and adversely affected by the Defendants' actions and omissions complained of herein. *See* Anderson Decl.

7. Plaintiff VCC is non-profit, member-supported land trust dedicated to protecting the Shenandoah Valley region's natural, agricultural and cultural resources through private action and public planning. Richardson Decl., ¶ 5. VCC holds conservation easements for more than 14,000 acres of permanently protected land within the Valley, and VCC has helped to establish and maintain agricultural and forest districts that protect approximately 100,000 acres of productive land in six counties along the I-81 corridor – Frederick, Shenandoah, Rockingham, Augusta, Rockbridge and Botetourt. *Id.* VCC holds a conservation easement on at least one member's property that will be directly impacted by the expansion of I-81. *Id.* ¶ 1-4. Plaintiff Member LaFayette C. Richardson owns and resides on 62 acres of land in Augusta County that is adjacent to I-81, including more than 3,000 feet of frontage immediately contiguous to the I-81 corridor. *Id.* ¶ 2-3. Mrs. Richardson's property was placed in permanent conservation easement with VCC and Virginia Outdoors Foundation in 2002 "to preserve the land, its natural resources, and [her] family's heritage." *Id.* ¶ 4. The proposed I-81 expansion will directly and adversely affect Mrs. Richardson's property interest by taking farm property and affecting her ability to

use, enjoy, and appreciate the protections she considered when she conveyed the conservation easement for her property to VCC. *Id.* ¶ 6; AR 6342, Bates # 054258; AR 6390, Bates # 054449.

8. Plaintiff Sierra Club is a national, non-profit environmental and conservation organization incorporated under the laws of the State of California. The Sierra Club is dedicated to the protection of public health and the environment. The Sierra Club has more than 1.3 million members and supporters nationwide, including 17,000 members in Virginia and 5,859 members who live in the counties along the I-81 corridor. Egbert Decl. ¶¶ 3-4. For many years, the Sierra Club and its members have been engaged in transportation planning processes on state, regional and local government levels in Virginia. *Id.* Sierra Club members use, enjoy, and appreciate the scenic, natural, cultural, and ecological resources in the lands along the I-81 corridor. *Id.* ¶ 4. Sierra Club and its members' ability to visit, use, and appreciate these resources through a variety of activities, including hiking and bicycling, will be degraded by the Defendants' actions and omissions complained of herein. *Id.*; AR 6068, Bates # 052887-90.

9. Plaintiff APVA Preservation Virginia is a non-profit Virginia corporation dedicated to preserving and promoting Virginia's irreplaceable historic structures, landscapes, collections, communities and archaeological sites. Established in 1889, APVA Preservation Virginia is the nation's oldest statewide preservation organization. APVA Preservation Virginia has 6,000 members in Virginia, with five branch chapters in western Virginia representing the counties along the I-81 corridor. In 2006, APVA Preservation Virginia named the I-81 Corridor in the Shenandoah Valley as one of the "Most Endangered Historic Sites in Virginia" because the proposed I-81 expansion threatens rural places, including communities and farmland. Has further Decl. ¶ 3. APVA Preservation Virginia and its members use, enjoy, and appreciate the scenic, natural, and historic resources in the lands along I-81 corridor. *Id.* ¶ 4. Defendants' actions and

omissions complained of herein will impact APVA Preservation Virginia and its members' ability to use, protect, and appreciate the historic and natural features within the I-81 corridor. *Id.* ¶¶ 4-9.

10. Plaintiff National Trust is a private charitable, educational, non-profit corporation chartered by Congress in 1949 to protect and defend America's historic resources, to further the historic preservation policy of the United States, and to facilitate public participation in the preservation of our nation's heritage. *See* 16 U.S.C. § 468. AR 6373, Bates # 054356. The National Trust, which is headquartered in Washington, D.C., owns and operates 30 historic sites open to the public and has nine regional and field offices around the country, including the Southern Field Office which is responsive to historic preservation issues in Virginia. The National Trust has approximately 283,000 individual members across the country, including more than 18,000 members in Virginia. The National Trust also owns property, Belle Grove Plantation, which as an historic site open to the public and located adjacent to I-81. Nieweg Decl. ¶ 2. Belle Grove is a 1797 National Historic Landmark house and includes 283 acres of historic battlefield, which is the heart of the 3,500-acre Cedar Creek & Belle Grove National Historical Park. Belle Grove and the National Historical Park are directly threatened by the Defendants' actions and omissions complained of herein. *Id.* ¶¶ 5, 8.

11. Belle Grove Plantation and the Cedar Creek & Belle Grove National Historical Park provide prime examples of the direct and indirect impacts of the expansion of I-81 on historic Civil War battlefields and historic landscapes. *See id.* ¶¶ 5, 7, 9, 17. For example, expanding I-81 will require the direct use of property from Harmony Hall, owned by Belle Grove, Inc., which is located approximately 500 feet from the current I-81 right-of-way. *Id.* ¶ 7; *see* Nieweg Decl., Attachment A (Map 1). I-81 currently bisects the Cedar Creek & Belle Grove National

Historical Park between Mileposts 299 to 301, and thus it would be impossible to expand this section of I-81 without directly taking portions of the National Historical Park. *Id.* ¶ 9. Even if the expansion of I-81 could be designed to avoid taking property directly from the National Trust, any expansion would adversely affect Belle Grove Plantation, due to an increase in noise and visual intrusion, and increased traffic on local roads attempting to avoid tolls. *Id.* The expansion of I-81 could also lead to a decrease in visitorship and rentals, which are the National Trust's primary source of revenue from this property. *Id.* In addition, the National Trust and its members use, enjoy, and appreciate the many scenic, natural, and historic resources along the I-81 corridor. *See id.* ¶¶ 14-17. Members visit and enjoy the numerous historic Main Street towns and Civil War sites throughout the Shenandoah Valley, which are in close proximity to I-81. *Id.* ¶ 15. Members travel to many of the historic communities along I-81's parallel state route – Route 11, know as Virginia's "String of Pearls." *Id.* The expansion of I-81 would harm the interests of the National Trust and its members in using, enjoying, and appreciating these historic resources by directly encroaching on historic sites adjacent to the I-81 corridor, such as the Cedar Creek & Belle Grove National Historical Park; by visually intruding on historic battlefields, landscapes and Main Street historic districts; and by indirectly inducing a surge of commercial, industrial, and residential development at interchanges that would negatively alter Virginia's "String of Pearls." *Id.* For example, more than 1,200 acres of battlefield land from roughly a dozen Civil War battlefields would be taken by the I-81 expansion. *Id.*

12. Individual Plaintiff Larry Allamong, a full-time farmer who raises beef cattle, resides on and owns 32.439 acres of land on the south side of Battlefield Road (State Route 601), adjacent to I-81 on the west side, in Shenandoah County, Virginia. Allamong Decl. ¶¶ 2, 4. Mr. Allamong's property includes all of Shenandoah County Tax Map number 23 (A) 157. *Id.* ¶ 1.

Mr. Allamong's property is an important part of Fisher's Hill battlefield, including an area known as Ramseurs Hill, a critical part of the Shenandoah Valley Battlefields National Historic District, which was designated in 1996. *Id.* ¶¶ 3-4. He acquired his property specifically because of the property's historical significance and his commitment to the protection of the property's history. *Id.* ¶ 3. The expansion of I-81 between Edinburg (Milepost 279) and Interstate 66 (Milepost 300) would encroach upon his property and require a taking of a deeded right-of-way that Mr. Allamong has over the Shenandoah Valley Battlefield Foundation's property, which is approximately 3,400 feet long and 50 feet wide. *Id.* ¶¶ 3-4. Mr. Allamong's protected property interest, including his ability to raise beef cattle as his livelihood, will be substantially impacted by Defendants' actions and omissions complained of herein. *Id.*

FACTS

13. I-81 is an interstate highway extending 855 miles from Tennessee to New York at the Canadian border serving local, regional, and interstate travel in the eastern United States. In Virginia, I-81 extends 325 miles through the Shenandoah Valley in a northeast to southwest direction in western Virginia, and currently consists of a predominantly four-lane, limited access interstate divided highway with two small six-lane cross sections from Mileposts 0 to 7 near Bristol and from Mileposts 72 to 81. I-81 has 91 interchanges in Virginia, which provide local access to numerous cities and towns in Virginia, including Bristol, Radford, Wytheville, Christiansburg, Blacksburg, Roanoke, Salem, Lexington, Staunton, Harrisonburg, and Winchester. Virginia Department of Transportation ("VDOT") Answer, ¶ 25 [Document 19].

Initial Development of the Tier 1 NEPA Document

14. In 2002, the Virginia Department of Transportation ("VDOT") solicited conceptual proposals from private entities that may wish to fund, construct, operate and/or maintain

improvements on all or parts of I-81 pursuant to Virginia's Public Private Transportation Act of 1995. AR 483, Bates # 007014; AR 501.

15. In January 2003, conceptual proposals were submitted by two private firms -- Fluor-Virginia and STAR Solutions -- in response to VDOT's solicitation. AR 1339, Bates # 003094. These proposals sought to finance the improvements in part by tolling I-81. *Id.*, Bates # 003098. Federal law normally would prohibit VDOT from converting I-81 to a toll facility, unless FHWA approves I-81 as a toll pilot project under Section 1216(b) of TEA-21, which authorized the creation of no more than three pilot programs to convert free interstate highways into toll facilities. FEIS, at ES-ix (AR 6744, Bates # 059998).

16. On or about March 20, 2003, VDOT submitted an application under Section 1216(b) of TEA-21, requesting approval from the Secretary of Transportation to participate in the Interstate Reconstruction and Rehabilitation Pilot Program, in order to convert I-81 to a toll facility from the Tennessee/Virginia state line to the West Virginia/Virginia state line. AR 545, Bates # 008337. VDOT's application acknowledged that acceptance as a toll pilot project would be conditional upon completing NEPA reviews of the impacts associated with converting a free interstate highway to a toll facility, such as potential changes in travel patterns, construction of toll collection facilities, and economic equity issues, and that FHWA acceptance as a pilot project could be withdrawn if the NEPA process was not completed in a timely manner. AR 545, Bates # 008344.

17. On March 23, 2003, the FHWA gave "conditional provisional acceptance" to VDOT's request to toll I-81 pursuant to Section 1216(b)(5) of TEA-21, agreeing to reserve one of three slots for VDOT. AR 548, Bates # 008348. The FHWA's "conditional provisional acceptance" was based on the assumption that a satisfactory timeline for subsequent actions

would be developed, that the proposal would continue to be advanced in a timely manner, and that VDOT would comply with the terms governing toll pilot projects under Section 1216(b) of TEA-21, including completion of the NEPA process evaluating the impacts of tolling before final approval under the pilot program. AR 547, 548.

18. In 2003, the Virginia Department of Rail and Public Transportation (“VDRPT”) commissioned a study of the potential for improvements to freight rail infrastructure in 12 states from New York to New Orleans to divert truck traffic from I-81. This study was completed in December 2003, and concluded that freight rail could divert trucks from I-81 primarily with respect to trips longer than 500 miles. AR Supp. 27, Bates # A-003413; AR 4204, Bates # 045480-81.

19. In 2003 and 2004, the FHWA and VDOT considered various options for “tiering” I-81 NEPA studies, which would “define the decisions to be granted for a tiered environmental study for improvements to the I-81 and to define the study process and elements to be included with each stage of the tiered effort.” AR 623, Bates # 009466.

20. On November 6, 2003, FHWA and VDOT adopted a “Process Streamlining Agreement” for the I-81 Corridor NEPA studies, which adopted a “tiered” decision-making structure, pursuant to which the FHWA would make specific decisions in a Record of Decision at the end of the Tier 1 NEPA process, including the decision to approve the location of improvements to I-81 and acquire right of way in advance of the development of project-specific NEPA documents. AR 691, Bates # 010016; VDOT Answer, ¶ 26.

21. The Tier 1 NEPA studies were intended to provide support for decisions on those issues that were ripe for decision at the time the Tier 1 ROD was issued. DEIS, at ES-1 (AR 4196, Bates # 043263); FEIS, at 1-1; ROD, at 1 (AR 6817, Bates # 060523).

22. Under the “Process Streamlining Agreement,” this “tiered” NEPA study consisted of a Tier 1 Draft EIS, a Tier 1 Final EIS, and a Tier 1 Record of Decision (“ROD”), to be followed by Tier 2 NEPA documents. AR 691, Bates # 010016. The Tier 1 studies would result in the following Tier 1 Decisions: (1) identification of the improvement concepts for highway and rail facilities; (2) approval to advance I-81 as a toll pilot project in accordance with the “conditional provisional acceptance” under Section 1216(b) of TEA-21; (3) roadway and rail components to be evaluated in the Tier 2 NEPA document(s) and the type(s) of Tier 2 NEPA documents; and (4) possible purchase of right-of-way parcels on a case-by-case basis. *Id.* The decisions following the completion of the Tier 2 studies would be: (1) approval of the conceptual design features of the improvements; (2) authority to use federal funds on final design; (3) authority to acquire right-of-way; (4) eligibility for federal funding for construction; and (5) approval to modify access to I-81. *Id.*

Tier 1 NEPA Studies

23. On January 5, 2004, VDOT and the FHWA initiated the Tier 1 EIS for the I-81 Corridor Improvement Study. AR 803, Bates # 011255.

24. During 2004, an interagency “I-81 Team” undertook a “scoping process” to screen various improvement concepts for consideration in the Tier 1 NEPA documents. AR 851-AR 855; AR 878; FEIS, at 3-2 (AR 6736, Bates # 059634); FEIS, at 7-1 to 7-4 (AR 6740, Bates # 059858-61). Only corridor-length improvement concepts were retained for study as stand-alone concepts in the Tier 1 NEPA study because the purpose of the Tier 1 NEPA study was limited to evaluating deficiencies and potential solutions on a corridor-length basis. DEIS, at 3-2 (AR 4188, Bates # 042471).

25. As part of the scoping process, comments were received about evaluating multi-state

rail improvement concepts extending beyond Virginia as part of the Tier 1 NEPA process, based on the conclusions in the 2003 multi-state rail study commissioned by VDRPT. AR 1868, Bates # 017133. In response to these comments, the FHWA prepared a memorandum explaining its decision. *Id.* The memorandum stated that “we are not aware of any currently available federal highway funding categories that can be used to implement privately-owned rail improvements,” and that any improvements to privately-owned railroads would be outside of the FHWA’s jurisdiction. *Id.*, Bates # 017134. The Memorandum acknowledged that the regulations of the Council on Environmental Quality required the FHWA to consider alternatives that were outside of its jurisdiction, but concluded that it would not be “reasonable or practicable” to conduct a NEPA study in more than one state. *Id.* This conclusion was based, in part, on the belief that each state would need to undertake its own analysis of its own needs, and that the costs of studying the out-of-state rail improvement concept would be too high to justify “spending public dollars” on the NEPA studies of rail improvements in numerous states that the FHWA could not fund and Virginia could not implement. *Id.* The FHWA memorandum also justified its refusal to evaluate any multi-state rail concepts based on the assumption that rail could divert at most 12 percent of the truck traffic from I-81. *Id.*

26. However, an internal FHWA memorandum subsequently acknowledged that, according to the 2003 multi-state rail study commissioned by VDRPT, multi-state rail would divert 30 percent of long-distance truck traffic from I-81. AR 6554, Bates # 056153.

27. There is interest in Tennessee in coordinating with Virginia to explore a cooperative program to study multi-state rail improvements to divert truck traffic from the Memphis-to-Bristol, TN section of I-81. AR 5074, Bates # 048435-36.

28. SAFETEA-LU, which was signed into law on August 10, 2005, provided for a

number of sources of designated funding as well as a number of general freight finance provisions that offer possible funding mechanisms to improve privately-owned rail facilities. FEIS, at 3-9 to 3-10 (AR 6736, Bates # 059641-42). Additional freight provisions made available to finance privately-owned freight rail by SAFETEA-LU include capital grants for rail line relocation projects (Section 9002), tax-exempt financing for rail truck transfer facilities (Section 11143), and rail rehabilitation and improvement financing (Section 9003). *Id.*, Bates # 059642. SAFETEA-LU also has a number of project programs that now offer the possibility of funding freight rail improvements. *Id.* This funding includes \$41.5 million in designated funding to manage freight movement and freight improvements along I-81. AR 4303, Bates # 046635 and 046642.

29. The Tier 1 Draft Environmental Impact Statement (“DEIS”) was issued on November 28, 2005, and the Tier 1 FEIS for the I-81 Corridor Improvement Study was issued on March 21, 2007. FHWA Answer ¶ 26; VDOT Answer ¶ 26.

30. The primary purpose of the Tier 1 NEPA studies was to inform decision-making on corridor-length issues associated with I-81 in Virginia, such the potential use of tolls as a funding source for improvements, and consideration of opportunities for the separation of trucks and passenger vehicles. FEIS, at 1-1; FEIS, Appendix E, Response 39.7 (AR 6729, Bates # 058909).

31. The Tier 1 DEIS and Tier 1 FEIS (collectively referred to as the “Tier 1 NEPA Documents”) identified a need to make corridor-length improvements to I-81 in Virginia, based on a finding that over 90 percent of I-81 is projected to operate below the level of service standard in 2035. FEIS, at ES-iii (AR 6744, Bates # 059992). Corridor-length improvements to I-81 were also needed to address substandard geometric features throughout I-81, such as inadequate inside shoulder widths, inadequate sight distances, and conditions that slow truck

traffic to speeds below the minimum for interstate travel due to steep grades. DEIS, at ES-iv (AR 4196, Bates # 043267). These substandard geometric features, when combined with the traffic demands placed on I-81 (including substantial truck traffic), speeds, and weather conditions, may contribute to safety problems along I-81. FEIS, at ES-iii (AR 6744, Bates # 059992).

32. Trucks constitute a substantial percentage of the current and expected future traffic volumes on all segments of I-81 within Virginia. DEIS, at 2-10 to 2-11 (AR # 4187, Bates # 042467-68).

33. The corridor-length improvement concepts evaluated in the Tier 1 NEPA Documents were: “No build”; “Transportation Systems Management” (“TSM”), four “Rail Concepts” for improving Norfolk Southern Railroad’s Shenandoah and Piedmont rail lines in Virginia; five “Roadway Concepts” consisting of adding from one to six lanes and upgraded shoulder widths to each direction of I-81 for its entire length in Virginia; five “Combination Concepts,” combining “Roadway Concepts” with the Rail Concepts; and five “Separated Lane concepts.” DEIS, at ES-iv to ES-vi (AR 4196, Bates # 043267-69); FEIS, at ES-iv to ES-vi (AR 6744, Bates # 059993-95). The Tier 1 NEPA Documents also evaluated the effects of various tolling options on these improvement concepts. *Id.*

34. The TSM concept considered in the Tier 1 NEPA Documents consisted of safety improvements (e.g. lengthening of acceleration lanes at interchanges), truck climbing lanes, Intelligent Transportation System (“ITS”) elements, law enforcement, park-and-ride projects, and Traffic Demand Management (“TDM”) measures. DEIS, at ES-iv (AR 4196, Bates # 043267).

35. The Rail Concepts considered in the Tier 1 NEPA Documents were limited only to

rail improvements within the Commonwealth of Virginia. DEIS, Figures ES-1 and 3-4 (AR 4196, Bates # 043265).

36. In May 2006, the Virginia General Assembly passed legislation (HB 1581), signed into law by the Governor of Virginia, establishing “the Interstate Route 81 Corridor Multistate Transportation Planning Initiative, potentially involving 13 states.” The legislation found, among other things, that “the transportation of freight and passengers by rail frequently provides a less expensive, safer, and more environmentally friendly and fuel efficient alternative to the construction of additional highway capacity,” and that “Interstate Route 81 has been found to be overutilized by commercial truck traffic, more than half of which consists of long-haul through-trucks beginning and ending their trips outside of Virginia.” HB 1581 also contains legislative findings that “the 600-mile Interstate Route 81 Corridor between Knoxville, Tennessee, and Harrisburg, Pennsylvania, may be a suitable market in which to deploy a modern, higher-speed intermodal concept using ‘roll on/roll off’ technology in the United States” and that “a higher-speed dual-track railway would enable the diversion of a significant portion of the through-truck traffic from interstate highways to rail.” The law sets an “objective of maximizing diversion potential to rail and minimizing future Interstate Route 81 highway capacity construction needs.” AR 6566; Bates # 056253 and 056254). *See* Exhibit 12, attached hereto. *See also*

<http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+CHAP0934>.

37. To carry out the foregoing legislative findings and objectives, H.B. 1581 requires VDOT and the Rail Advisory Board to conduct a study of multi-state rail as a means of diverting truck traffic off of I-81 (“the I-81 Freight Rail Study”). The study must “[e]xtend at least 500 miles, creating or expanding logical termini in Tennessee and Pennsylvania or New York with at least one intermediate terminal in Virginia.” H.B. 1581, § 1.A.2. The study must also evaluate

various financing alternatives, “including funds available through SAFETEA-LU, the Federal Railroad Administration’s \$35 billion ‘Railroad Rehabilitation and Improvement Financing’ loan program, public and private sector bond financing, and public-private partnership capital investment.” H.B. 1581, § 1.B.4.

38. The Tier 1 NEPA Documents found that, because of the varying traffic demands along the I-81 corridor, no single consistent corridor-length highway concept satisfied the needs for the entire I-81 corridor in Virginia without providing excess capacity (more lanes than are needed) for projected future traffic. DEIS, ES-viii (AR 4196, Bates # 043270); FEIS, ES-vii (AR 6744, Bates # 059996).

39. The Tier 1 NEPA Documents found that, while the TSM and Rail Concepts, as “stand alone” concepts, would not satisfy the purpose and need for the project, both could complement roadway improvements. FEIS, ES-vii (AR 6744; Bates # 059996); FEIS, Appendix E, at Response 39.8 (AR 6729, Bates # 058912); FEIS, at 3-29 to 3-30 (AR 6736; Bates 059661-62).

40. The Tier 1 NEPA Documents found that, based on varying traffic demands, a concept with a variable number of lanes would most efficiently address the capacity needs for I-81. DEIS, at ES-viii (AR 4196, Bates # 043270); FEIS, at ES-viii (AR 6744, Bates # 059997).

41. The Tier 1 NEPA Documents acknowledge that the widening of I-81 and the Rail Concepts could potentially affect a number of historic sites, including buildings and structures, historic districts, battlefields, and archaeological sites. *See* FEIS, at 5-36 (AR 6738, Bates # 059789).

42. On October 11, 2006, the Virginia Commonwealth Transportation Board passed a resolution acknowledging the Virginia General Assembly’s directive to conduct a “freight rail

study [that] will examine freight impacts along 500 miles of the Interstate 81 Corridor,” and finding that, “in refining the Tier I [EIS] and in developing the Tier II [EIS], the findings of the ongoing, independent Interstate 81 Freight Rail Study should be fully utilized.” FEIS, Appendix D (Bates # 058813).

43. Numerous commenters, including the U.S. Department of the Interior, the Shenandoah Valley Battlefields Foundation, the National Trust for Historic Preservation, and other groups pointed to the significant number of studies and maps documenting Civil War Battlefields and other historic resources, parks, and trails, including 23 of the 30 downtown historic districts located in towns along Route 11, known as the “String of Pearls, all of which would be potentially affected by the expansion of I-81, but were not adequately assessed in the Tier 1 NEPA Documents. AR 4353, Bates # 046928-31; AR 6373, Bates # 054359-61.

44. The Tier 1 NEPA Documents repeatedly acknowledge that the actual impacts of individual projects that may be advanced into Tier 2 is currently unknown and will be subject to detailed, site-specific evaluation in the Tier 2 NEPA studies. FEIS, Appendix E (AR 6729, Bates # 058835, 058840-41, 058905).

45. The Tier 1 NEPA Documents did not undertake a detailed assessment of the impacts of any of the improvement options because the level of detail about proposed future projects that would be needed in order to evaluate those effects was unavailable during Tier 1, based on the assumption that Tier 2 NEPA studies are the appropriate stage at which to provide this level of information. AR 691, Bates # 010016; DEIS, at 6-8 (AR 4190, Bates # 042585); FEIS, at 6-7 (AR 6739, Bates # 059854); FEIS Appendix E, Response 58.2. (AR 6729, Bates # 059006).

46. The Tier 1 NEPA Documents did not make any determinations under Section 4(f) of the Department of Transportation Act, 23 U.S.C. § 138. FEIS, at 5-42 (AR 6737, Bates #

059795). Instead, detailed information on the significance and boundaries of potential Section 4(f) properties was deferred until Tier 2. *Id.* Consideration of alternatives to completely avoid Section 4(f) resources was also deferred to Tier 2. FEIS, at 5-43 (AR 6737, Bates # 059796). For Section 4(f) resources that are particularly constrained because they are located on both sides of I-81, additional alternatives such as alignment shifts or bypasses will be considered at the Tier 2 stage. FEIS, at 5-44 (AR 6737, Bates # 059797). Tier 2 analyses will also evaluate avoidance and minimization measures and unavoidable impacts to jurisdictional waters of the United States (including wetlands). FEIS, at 5-55 (AR 6737, Bates # 059806).

47. Numerous commenters, including the Virginia Department of Rail and Public Transportation (“VDRPT”) and Norfolk Southern Railroad, advocated the consideration of multi-state rail improvement concepts in the Tier 1 NEPA studies. FEIS, at 7-24 (AR 6740, Bates # 059881); AR 4412, Bates # 047098-104; AR 6729, Bates # 058862-63.

48. The position of VDRPT was that a viable rail alternative to address I-81 corridor needs would require a multi-state approach, and that rail in combination with highway widening could address project needs. FEIS, at 7-24 (AR 6740, Bates # 059881). VDRPT also disagreed that the study of multi-state rail could be rejected based on the notion that FHWA funds could not be used to fund improvements to private railroads, as inconsistent with the applicable regulations governing the study of alternatives. AR 1779, Bates # 016862.

49. VDOT acknowledged that the diversions of trucks to rail differ significantly when comparing the Tier I Corridor Improvement Study, which includes in-state rail improvements, with previous analyses that assumed the construction of multi-state rail improvements. The memo also noted that a very high percentage of trucks (68%) have both an origin and a destination outside of Virginia indicating long-distance travel. (AR4173, Bates # 042337)

50. Throughout the NEPA process, SVN, CSG, and numerous other commenters, including eleven counties, cities, and towns, and 20 civic groups, formally endorsed a similar range of alternatives urged the FHWA to consider “composite” scenario of targeted safety improvements, local land use and local road investments, enhanced traffic safety enforcement, and multi-state rail improvements, as a reasonable improvement concept to address the purpose and need for the project and to avoid or reduce harm to historic, community and environmental resources that would result from extensive widening of the highway, a under the rubric of “Reasonable Solutions: A Six-Point Plan for I-81.” FEIS, at 7-15 (AR 6740, Bates # 059872); AR 6343, Bates # 054259-81; FEIS, at 7-21 (AR 6740, Bates # 059878); AR 6343, Bates # 054312. This composite improvement concept relied on multi-state rail improvements to divert long-distance freight from trucks to rail, and relied on local road and land use changes to reduce local traffic congestion on I-81 in the urban areas. AR 6343, Bates # 054282-311. These commenters also urged the FHWA to defer the Tier 1 decisions until the completion of the multi-rail study mandated by the Virginia General Assembly. *See* FEIS, at 7-15 (AR 6740, Bates # 059872); AR Supp. 33, Bates # A-003648; FEIS, Appendix E, Letter 63.1 (AR 6729, Bates # 05906); AR # 6796, Bates # 060373.

51. The Tier 1 NEPA Documents acknowledged that “non-corridor length solutions,” such as interchange improvements, were eliminated from consideration during Tier 1, but could be considered during Tier 2 studies for individual segments of independent utility. DEIS, at 3-2 (AR 4188, Bates # 042471); FEIS, at 3-2 (AR 6736, Bates # 059634). These non-corridor-length alternatives include elements of the TSM improvement concept, such as park-and-ride facilities, truck climbing and auxiliary lanes, and interchange improvements. DEIS, at 3-2 (AR 4188, Bates # 042471).

52. The Tier 1 NEPA Documents acknowledge that TSM measures, including short-term safety and improvement measures, “contribute to the reduction of the amount of capacity needed by 2035 and to the reduction of safety problem locations along the corridor.” FEIS, Appendix E, at Response 39.8 (AR 6729, Bates # 058912). *See also* FEIS, Appendix E, Response 62.10 (AR 6729, Bates # 059026).

53. The Tier 1 FEIS proposed to advance to Tier 2 the improvement concept of a non-separated highway facility that involves constructing up to two additional general purpose lanes in each direction, with the number of lanes for each SIU to be determined based on projected 2035 travel demands. FEIS, at ES-xv (AR 6744, Bates # 060004).

54. In addition, the Tier 1 FEIS proposed to advance to Tier 2 additional, independent safety and operational improvements on I-81, including the construction of truck-climbing lanes, the extension of exit and entrance ramps, and the installation of guard rails. Tier 1 ROD, at 2-3 (AR 6817, Bates # 060524-25); Stipulation of Partial Dismissal, ¶ A.2 [Document # 56].

55. The improvement concepts advanced to Tier 2 will vary from SIU to SIU, and therefore are “non-corridor-length” improvement concepts.

56. In order to determine the number of additional lanes that may be needed for each segment of independent utility to address 2035 traffic demands, an updated traffic analysis will be prepared during the Tier 2 NEPA studies for each SIU. FEIS, at 6-7 (AR 6739, Bates # 059854); AR 6795, Bates # 060369; FEIS Appendix E, Response 38.4 (AR 6729, Bates # 058889).

57. The decision to advance this improvement concept to Tier 2 was based in part on the fact that revenue from tolling could only be used to fund highway improvements. FEIS, ES-ix (AR 6744, Bates # 059998).

58. The Tier 1 NEPA Documents conceded that the diversion of truck volumes through “funded rail improvements may have a bearing on future highway needs,” and that, “if funded rail improvements emerge from the I-81 Freight Rail Study, FHWA and VDOT would evaluate the effects of those rail improvements on the projections of future travel demand along I-81 as appropriate during Tier 2.” ROD, at 12 (AR 6817, Bates # 060534); FEIS, Appendix E, Response 62.1 (AR 6729, Bates # 059023); ROD, at 7 (AR 6817, Bates # 060529).

59. The Tier 1 NEPA document failed to consider the “composite” or “reasonable solutions” improvement concept advocated by CSG, SVN, and others. FEIS, Appendix E, Response 39.35 (AR 6729, Bates # 058921). While highway and Virginia-only rail combinations were considered, the composite improvement concept linking TSM, safety, local road and land use, and multi-state rail was not considered in the Tier I NEPA documents. AR 6736; Bates ## 059633 to 059664.

60. Relying on the May 4, 2004 Memorandum (AR 6726, Bates # 058798), the FHWA continued to assert that it was “unreasonable” to evaluate the improvement concept of multi-state rail improvements in the Tier 1 NEPA Documents. FEIS, ES-xvi (AR 6744, Bates # 060005); FEIS, Appendix E, Response 49.1 (AR 6729, 058960).

61. On June 6, 2007, the FHWA signed a Tier 1 ROD approving the I-81 Corridor Study. FHWA Answer ¶ 26; VDOT Answer, ¶ 26.

62. The Tier 1 ROD made the following final decisions:

- (1) that the improvement concept to be advanced to Tier 2 was “a non-separated variable lane highway facility that involves constructing no more than two general purpose lanes in each direction, where needed, to address 2035 traffic demands.” Tier 1 ROD, at 2, AR 6817, Bates # 060524); Stipulation of Partial Dismissal, ¶

A.1 [Document # 56].

- (2) that there is a need for additional, independent safety and operational improvements, including the construction of truck climbing lanes, the extension of exit and entrance ramps, and the installation of guard rails, on I-81. Tier 1 ROD, at 2-3 (AR 6817, Bates # 060524-25); Stipulation of Partial Dismissal, ¶ A.2 [Document # 56].
- (3) to advance I-81 as a toll pilot facility under § 1216(b) of the Transportation Equity Act of the 21st Century (TEA-21), which allows tolling to continue to be pursued as a possible funding mechanism for improvements to I-81. Tier 1 ROD, at 3 (AR 6817, Bates # 060525); Stipulation of Partial Dismissal, ¶ A.3 [Document # 56].
- (4) to determine the number and length of the eight Sections of Independent Utility (“SIUs”) that would be the subject of Tier 2 NEPA studies as separate, independent, and useful improvement projects. Tier 1 ROD, at 4 (AR 6817, Bates # 060526); Stipulation of Partial Dismissal, ¶ A.4 [Document # 56].
- (5) to prepare an Environmental Assessment in accordance with 23 C.F.R. § 771.119 and 40 C.F.R. § 1502.20 as the initial level of NEPA documentation for each SIU, and a documented Categorical Exclusion in accordance with 23 C.F.R. § 771.117 for safety and operational improvement projects. Tier 1 ROD, at 4 (AR 6817, Bates # 060526); Stipulation of Partial Dismissal, ¶ A.5 [Document # 56].
- (6) that the proposed corridor for Tier 2 projects will be the existing I-81 highway corridor, except for two sections – one near Wytheville (Milepost 72 to 81) and one in Harrisonburg (Milepost 243 to 251) – where FHWA will evaluate corridors

on new location as well as widening the existing roadway. Tier 1 ROD, at 4 (AR 6817, Bates # 060526); Stipulation of Partial Dismissal, ¶ A.6 [Document # 56].

(7) that the Tier 1 EIS provides sufficient information to support future decisions regarding hardship acquisitions or protective purchases of specific right-of-way parcels, to be approved on a case-by-case basis. Tier 1 ROD, at 4 (AR 6817, Bates # 060526); Stipulation of Partial Dismissal, ¶ A.7 [Document # 56].

63. On June 6, 2007, the FHWA signed a Tier 1 ROD approving the I-81 Corridor Study. FHWA Answer ¶ 26; VDOT Answer, ¶ 26. The Tier 1 ROD stated that the FHWA does not intend to revisit any Tier 1 decisions during the Tier 2 NEPA process “unless substantial new information arises that is material to these decisions.” Tier 1 ROD, at 2.

64. The Tier 1 ROD does not make any irreversible and irretrievable commitment of resources to any Tier 2 project at a particular site. Tier 1 ROD, at 3 (AR 4718, Bates # 060525)

65. The Tier 1 ROD did not make any decision to eliminate non-corridor-length alternatives from future consideration during Tier 2 NEPA studies as alternatives to any segments of independent utility advanced during Tier 2. AR 4718; FEIS, at 3-2 (AR 6736, Bates # 059634).

66. TSM, and rail, alone or in combination with other alternatives, are also non-corridor-length alternatives in the context of Tier 2 NEPA studies for segments of independent utility. AR 4718; FEIS, at 3-2 (AR 6736, Bates # 059634).

67. The Tier 1 NEPA Studies made a final decision not to consider a multi-state rail concept as corridor-length improvement concept. AR 6726, Bates ## 058797-99.

Statute of Limitations Notice

68. On or about June 18, 2007, the FHWA published a Statute of Limitations (“SOL”)

Notice in the Federal Register for the Tier 1 FEIS and ROD for the I-81 Corridor Improvement Study in Virginia, pursuant to 23 U.S.C. § 139(l)(1). AR 6821, Bates # 060618.

69. The SOL Notice states that “By this notice, the FHWA is advising the public that it has made decisions that are subject to 23 U.S.C. § 139(l)(1) and are final with respect to Tier 1 within the meaning of that law. A claim seeking judicial review of the Tier 1 Federal agency decisions on the Interstate 81 Corridor Improvement Study will be barred unless the claim is filed on or before December 17, 2007.” AR 6821, Bates # 060618.

70. As a result of the publication of the SOL Notice, any claims challenging final decisions made in the Tier 1 ROD brought after December 17, 2007 will be barred by the statute of limitations. AR 6821.

71. The SOL Notice applies only to final decisions in the Tier 1 ROD made under NEPA and Section 1216(b) of TEA-21. AR 6821; Stipulation of Partial Dismissal, ¶ B.3 (Document # 56).

72. The SOL Notice does not bar claims filed after December 17, 2007, alleging that any of the Tier 1 decisions set forth in ¶ 62, above, should be reconsidered on the basis that substantial new information has arisen that is material to those decisions. AR 6821; Stipulation of Partial Dismissal, ¶ B.1 (Document # 56).

73. The SOL Notice does not bar claims filed after December 17, 2007, challenging final agency decisions to approve independent safety and operational improvements in connection with the I-81 Corridor Improvement Study including truck-climbing lanes, the extension of entrance and exit ramps at various interchanges, and the installation and upgrading of guardrails. AR 6821; Stipulation of Partial Dismissal, ¶ B.2 (Document # 56).

74. The SOL Notice does not bar Tier 2 challenges filed after December 17, 2007, that

allege claims under laws other than § 1216(b) of TEA-21 relating to future final agency decisions to install toll facilities and appurtenant structures within an SIU. AR 6821; Stipulation of Partial Dismissal, ¶ B.3 (Document # 56).

75. The SOL Notice does not bar Tier 2 challenges filed after December 17, 2007, alleging claims relating to the level of NEPA documentation prepared for individual Tier 2 projects. AR 6821; Stipulation of Partial Dismissal, ¶ B.4 (Document # 56).

76. The SOL Notice does not bar Tier 2 challenges filed after December 17, 2007, challenging the environmental analyses within Tier 2 NEPA documents, mitigation of Tier 2 impacts, public involvement during the Tier 2 process, and final decisions in Tier 2 NEPA documents. AR 6821; Stipulation of Partial Dismissal, ¶ B.5 (Document # 56).

77. The SOL Notice does not bar Tier 2 challenges filed after December 17, 2007, challenging future approvals of hardship acquisitions or protective purchases on the grounds that the requirements for hardship or protective acquisitions under 23 C.F.R. Part 771 have not been met, to the extent that those claims are allowed, or on the grounds that an advanced acquisition does not comply with the Uniform Relocation Assistance and Real Property Acquisitions Policies Act or other relevant laws and regulations concerning real property acquisition, to the extent that those claims are allowed. AR 6821; Stipulation of Partial Dismissal, ¶ B.6 (Document # 56).

78. The SOL Notice does not bar Tier 2 challenges filed after December 17, 2007, challenging Tier 2 claims under laws other than NEPA and Section 1216(b) of TEA-21. AR 6821; Stipulation of Partial Dismissal, ¶ B.7 (Document # 56).

79. The SOL Notice does not bar any claims challenging Tier 2 decisions based on the FHWA's failure to consider non-corridor-length alternatives during Tier 2 NEPA studies as

alternatives to any independent segments of independent utility. AR 6821; FEIS, at 3-2 (AR 6736, Bates # 059634).

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

SHENANDOAH VALLEY NETWORK, <i>et al.</i>)	
)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.: 3:07cv00066
)	
J. RICHARD CAPKA, ADMINISTRATOR,)	
FEDERAL HIGHWAY ADMINISTRATION,)	
<i>et al.</i> ,)	
)	
Defendants.)	
)	

PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P., Rule 56, Plaintiffs Shenandoah Valley Network, Coalition for Smarter Growth, Rockbridge Area Conservation Council, Virginia Organizing Project, Scenic Virginia, Inc., Valley Conservation Council, Sierra Club, APVA Preservation Virginia, and National Trust for Historic Preservation in the United States (hereinafter referred to collectively as “Plaintiffs”) hereby move for summary judgment. Plaintiffs are entitled to judgment as a matter of law and there is no genuine issue as to any material fact.

In support of this motion, the Plaintiffs submit the accompanying memorandum of points and authorities, and the attached statement a statement of material facts. This motion also is supported by the documents in the administrative record, and by Plaintiffs' Exhibits 1 through 12.

For the reasons stated herein, Plaintiffs respectfully request that this motion be granted.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel and any other counsel entitled to service:

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