

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

SHENANDOAH VALLEY NETWORK, )  
COALITION FOR SMARTER GROWTH, )  
ROCKBRIDGE AREA CONSERVATION )  
COUNCIL, VIRGINIA ORGANIZING PROJECT, )  
SCENIC VIRGINIA, INC., VALLEY )  
CONSERVATION COUNCIL, SIERRA CLUB, )  
NATIONAL TRUST FOR HISTORIC )  
PRESERVATION IN THE UNITED STATES, )  
APVA PRESERVATION VIRGINIA, AND )  
LARRY ALLAMONG, )

Plaintiffs, )

v. )

Civil Action No.: 3:07cv00066

J. RICHARD CAPKA, ADMINISTRATOR, )  
FEDERAL HIGHWAY ADMINISTRATION )  
400 Seventh Street S.W. )  
Washington, DC 20590 )

SERVE: John L. Brownlee )  
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Western District of Virginia )  
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MARY PETERS, SECRETARY, UNITED )  
STATES DEPARTMENT OF )  
TRANSPORTATION, )

400 Seventh Street S.W. )  
 Washington, DC 20590 )  
 )  
 SERVE: Same as above. )  
 )  
 ROBERTO FONSECA-MARTINEZ, )  
 VIRGINIA DIVISION ADMINISTRATOR )  
 FEDERAL HIGHWAY ADMINISTRATION, )  
 400 North 8th Street, Suite 750 )  
 Richmond, Virginia 23219-4825 )  
 )  
 SERVE: Same as above. )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF**

**I. Introduction**

1. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201 and injunctive relief pursuant to 28 U.S.C. § 1651 against Defendants J. Richard Capka, Administrator of the Federal Highway Administration (øFHWAö), Mary Peters, Secretary of the U.S. Department of Transportation, and Roberto Fonseca-Martinez, FHWA Virginia Division Administrator (hereinafter collectively referred to as øFHWAö) challenging the adequacy of compliance with the National Environmental Policy Act (øNEPAö), 42 U.S.C. § 4321 *et seq.*, prior to approving a Tier 1 Final Environmental Impact Statement (øFEISö) and Record of Decision (øRODö) for the Interstate 81 corridor improvement study in Virginia. The Tier 1 ROD will be the basis for approving specific projects for Sections of Independent Utility in the I-81 corridor (hereinafter the øI-81 Projectsö) during the Tier 2 stage. The FHWAø decision to publish notice of the Tier 1 ROD in the Federal Register for the express purpose of precluding any legal claims relating to Tier 1 decisions also violates Plaintiffsørights under the Due Process

Clause of the Fifth Amendment to the U.S. Constitution, since neither the Tier 1 ROD nor the Federal Register notice specifies whether and to what extent the FHWA will rely on the Tier 1 ROD to preclude consideration of alternatives for the I-81 Projects in the Tier 2 NEPA documents.

2. As approved by the FHWA, each of the build concepts carried forward for further study in the Tier 1 ROD will result in significant, irreversible, adverse effects on natural, scenic, cultural, historic, and ecological resources and communities, and property owners, by taking 7400 acres of developed land; 1062 acres of prime farmland; between 1600 and 2400 residences; 662 businesses; 1238 acres of civil war battlefields; 33 acres of wetlands; 361 acres of floodplains; 23 miles of streams; and 13 threatened or endangered species, and by stimulating sprawl development; and exacerbating air pollution and greenhouse gases, with attendant impacts on public health and global warming. The I-81 corridor contains some of the most scenic, historic and sensitive rural and natural landscapes in the nation, including the Shenandoah Valley Battlefields National Historic District.

3. Plaintiffs seek a declaratory order pursuant to 28 U.S.C. § 2201 that the FHWA's approval of the Tier 1 ROD is unlawful and invalid, and seek injunctive relief pursuant to 28 U.S.C. § 1651 prohibiting FHWA from providing financial assistance for any individual I-81 Projects that rely on the Tier 1 ROD to justify rejection of reasonable, feasible, and prudent alternatives, and prohibiting the FHWA from approving any funding for individual I-81 Projects and its contractors from contracting for, commencing, or continuing construction of the I-81 Projects, unless and until such time as FHWA has complied with all requirements of applicable law.

## **II. Jurisdiction and venue**

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1367 (supplemental jurisdiction) 28 U.S.C. §§ 2201-2202 (declaratory judgment and further relief), 28 U.S.C. § 1361 (mandamus), and 5 U.S.C. § 702 (right of review under Federal Administrative Procedure Act (öAPAö)).

5. For purposes of the declaratory relief sought in this Complaint, an actual case or controversy within the meaning of 28 U.S.C. § 2201 exists between the parties as to whether the Defendants complied with the requirements of NEPA as part of their approval of the Tier 1 ROD.

6. Venue is proper in this district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 for the Western District of Virginia, the district wherein Defendant Fonseca-Martinez resides and is found and where a substantial part of the property that is the subject of this action is situated.

## **III. Parties**

7. The Shenandoah Valley Network (öSVNö) is an unincorporated association whose mission is to link community groups working on land protection, land use, and transportation issues in the six counties of Frederick, Warren, Shenandoah, Page, Rockingham, and Augusta. SVN member groups along the I-81 corridor include the Community Alliance for Preservation (öCAPö), which has 45 members in Rockingham County and Harrisonburg, and the Shenandoah Forum, with more than 40 members in Shenandoah County, and Preserve Frederick, with more than 45 members in Frederick County. The Piedmont Environmental Council (öPECö), a nonprofit organization incorporated under the laws of Virginia, serves as the fiscal agent for the Shenandoah Valley Network.

8. The Coalition for Smarter Growth (öCSGö) 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 our natural and historic areas. CSG coordinates the "Reconnecting Virginia" project to promote improved land use and transportation planning in Virginia. The PEC, a nonprofit organization incorporated under the laws of Virginia, is a member of CSG and serves as the fiscal agent for the CSG.

9. The Rockbridge Area Conservation Council ("RACC") is a nonprofit, tax exempt organization founded in 1976 whose mission is to promote the wise stewardship of natural resources and cultural heritage through education, advocacy, and action in order to protect and enhance the quality of life for present and future inhabitants of Rockbridge County, Virginia, which is bisected by I-81. RACC has 350 members, nearly all of them located along the I-81 corridor in Rockbridge County

10. The Virginia Organizing Project ("VOP"), a nonprofit Virginia corporation, is a statewide grassroots organization with three offices in the I-81 corridor -- in Shenandoah County, Salem and Abingdon -- serving more than 1,500 members in those areas, dedicated to challenging injustice by empowering people in local communities to address issues that affect the quality of their lives. Numerous members of VOP reside along the I-81 corridor.

11. Scenic Virginia, Inc. is a private, non-profit organization incorporated in the Commonwealth of Virginia that works to preserve, protect, and enhance the scenic beauty and community character of the Commonwealth, 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.

12. The Valley Conservation Council (VCC), a non-profit Virginia corporation, is a member-supported land trust dedicated to protecting the Shenandoah Valley region's natural, agricultural and cultural resources through private action and public planning. Founded in 1990 and serving 11 counties, including Allegheny, Botetourt, Frederick, Rockbridge, Rockingham, Shenandoah and Warren, along or close to I-81. VCC's mission is to promote land use that sustains the farms, forests, open spaces and cultural heritage of the Shenandoah Valley. VCC shares stewardship responsibility for more than 12,000 acres of permanently protected land in the Valley and VCC has helped the Virginia Outdoors Foundation to protect an additional 70,000 acres of private farm and forest land in the region. Another 125,000 acres is protected through agricultural and forestal districts which VCC helps to promote. VCC works with localities throughout the region to encourage compact development, respecting the traditional small town growth patterns that give the Valley its unique rural character. VCC is supported by 470 member households, many of whom reside along the I-81 corridor.

13. Plaintiff Sierra Club (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 brings this action on behalf of itself and its adversely affected members. The Sierra Club has more than 1.3 million members and supporters nationwide, 26,000 of whom live in Virginia and 5,859 who live in the counties along the I-81 corridor. For many years, the Sierra Club and its members have been engaged in transportation planning processes on state, regional and local government

levels. The activities of plaintiff and its members in land use, transportation and air quality issues have taken the form of community organizing, submitting comments, attending and speaking at public meetings, explaining the problems of the proposed plan to the local media, and holding educational forums ó all in support of air quality-improving land use and transportation options that promote social justice, sustainable economic development and environmental integrity.

14. Plaintiff National Trust for Historic Preservation in the United States (óNational Trustö) 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. 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 287,000 individual members across the country, including more than 18,000 members in Virginia. The statutory powers of the National Trust include the power to bring suit in its corporate name. *Id.* § 468c(b). The National Trust has participated in numerous cases against federal agencies seeking to enforce federal laws that protect historic and cultural resources, including NEPA. The National Trust also owns Belle Grove as an historic site open to the public. 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 Park are directly threatened by this project.

15. Plaintiff APVA Preservation Virginia (formerly called the Association for the

Preservation of Virginia's Antiquities) is a non-profit Virginia corporation dedicated to preserving and promoting the state's irreplaceable historic structures, landscapes, collections, communities and archaeological sites. Established in 1889, the 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 on 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" to focus attention on the Commonwealth's most at-risk historic resources.

16. These organizational plaintiffs and/or their individual members have been actively involved in community organizing, administrative advocacy, and lobbying to secure adequate consideration of the severe and irreversible impacts of the I-81 Projects to the region's natural, cultural, and historic resources, and in advocating for the consideration of reasonable, feasible, and prudent alternatives that do not involve unacceptable adverse impacts to the area's natural, scenic, and cultural resources, and that would meet the goals of the proposed project.

17. These organizational plaintiffs and their respective members are within the zone of interests intended to be protected by NEPA. These organizational plaintiffs and their members use, enjoy, and appreciate the scenic, natural, and ecological resources in the lands that will be traversed by the I-81 Projects. Their interest in using, protecting, and appreciating those historic and natural features is threatened and adversely affected by the Defendants' actions and omissions complained of herein. These members would thus have standing to sue in their own right. These organizational plaintiffs and their members are and will continue to be aggrieved and adversely affected by the actions of the Defendants, and they have suffered and will continue to suffer injury in fact due to the Defendants' past, current, ongoing, and prospective failure to

comply with the law.

18. Individual Plaintiff Larry Allamong resides on and owns 32.439 acres of land on the south side of Battlefield Road (State Route 601), on the west side of Interstate 81, in Shenandoah County, Virginia and within the Fisherø Hill battlefield, a critical part of the Shenandoah Valley Battlefields National Historic District, designated by Congress in 1996. Mr. Allamongø property occupies a portion of the Fisherø Hill battlefield called Ramseurs Hill, which is considered a core area of the battlefield. Mr. Allamongø property includes all of Shenandoah County Tax Map number 23 (A) 157, and is improved by a circa 1930 Farm House. Mr. Allamongø property will be taken if I-81 is widened with the addition of four or more lanes between Edinburg (Mile Marker 279) and Interstate 66 (Mile Marker 300), as is planned for in the Tier 1 FEIS.

19. The organizational plaintiffs and their respective members and individual Plaintiff Larry Allamong have been and continue to be irreparably harmed by the acts and omissions of Defendants as alleged herein, have suffered a legal wrong, and are adversely affected and aggrieved by such acts and omissions within the meaning of the APA, 5 U.S.C. § 702. Plaintiffsø interests herein fall within the zone of interest protected by the laws sought to be enforced in this action.

20. Defendant J. Richard Capka is Administrator of the Federal Highway Administration and is sued in his official capacity.

21. Defendant Mary Peters is Secretary of the United States Department of Transportation and is sued in her official capacity.

22. Defendant Roberto Fonseca-Martinez is Virginia Division Administrator of the Federal Highway Administration and is sued in his official capacity.

23. Defendants Capka, Peters, and Fonseca-Martinez are responsible for the approval, authorization, environmental review, and administration of federally funded and assisted transportation projects, and are responsible for compliance with NEPA and implementing regulations.

24. At all relevant times, the Defendants acted in their official capacity and under color of state and/or federal law.

#### **IV. Facts**

25. I-81 is an interstate freeway 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 in a north to south 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.

26. On November 6, 2003, the FHWA and the Virginia Department of Transportation (VDOT) entered into an agreement to follow a tiered NEPA decision making process for the I-81 Corridor Improvement Study. The Tier 1 decision-making included the issuance of a Tier 1 Draft Environmental Impact Statement (DEIS) on November 28, 2005, a Tier 1 FEIS on March 21, 2007, and a Tier 1 ROD on June 6, 2007.

27. In 2006, the Virginia General Assembly passed legislation (HB 1581), signed into law by the Governor, which requires VDOT to study multi-state rail as a means of diverting truck traffic off of I-81 (the I-81 Freight Rail Study), finding, among other things, 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, 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.

28. Both the DEIS and FEIS identify the purpose of the project as the need for improvements to I-81 in Virginia to address existing and future capacity and safety conditions on I-81. The DEIS and FEIS show that most of the I-81 mainline operates above the Level of Service (LOS) standards, except for 57 miles of I-81 that currently have a LOS lower than acceptable (defined as below LOS B for rural areas and LOS C for urban areas), and 91-92 percent of I-81 is projected to have an unacceptable LOS in 2035. I-81 overall has a lower rate of accidents than the state-wide average for Virginia's interstates, but 45 miles of I-81 currently have a higher than the state-wide average rates of accident, and geometric deficiencies in the roadway.

29. The DEIS and FEIS identified a series of corridor-length improvement concepts along the entire 325-mile corridor of I-81 in Virginia as well as improvements to Norfolk Southern Railroad's rail lines in Virginia.

30. The corridor-length improvement concepts identified in the DEIS and FEIS were: No build; Transportation Systems Management (TSM), consisting of safety improvements, truck climbing lanes, Intelligent Transportation System (ITS) elements, and

Traffic Demand Management (TDM) measures; 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. The DEIS and FEIS also evaluated the effects of various tolling options on these improvement concepts.

31. During the initial scoping process, the FHWA decided not to evaluate the alternative of multi-state rail improvements based on an FHWA memorandum dated May 4, 2004, asserting that improvements to privately-owned railroads would be outside of FHWA's jurisdiction and that we are not aware of any currently available federal highway funding categories that could be used to implement privately owned rail improvements as a result of this study.

32. Both the DEIS and FEIS concluded that no single corridor-length concept satisfies the needs of I-81 in Virginia without providing more lanes than are needed.

33. Both the DEIS and FEIS concluded that the Rail Concepts would only slightly decrease the capacity needs on I-81 in 2035 and therefore do not satisfy the purpose and need for the project.

34. Both the DEIS and FEIS Transportation Technical Report show traffic volume peaks in the urban areas along the corridor, reflecting local traffic immediately in and around the cities and towns of Winchester, Harrisonburg, Staunton, Roanoke, Salem, Christiansburg, and Bristol. FEIS, Chapter 8, Figure 2-4. In addition to four new general purpose lanes, the FEIS also projects that On sections of I-81 that need two lanes in each direction, the need can be met by different means including various operational scenarios can be implemented (e.g., separation of general purpose lanes and truck lanes) that would meet the needs, but would require the

construction of up to eight additional lanes to operate efficiently.ö FEIS, at 5-7

35. Both the DEIS and FEIS concluded that the addition of one lane to I-81 in each direction satisfies the purpose and need for approximately 37 percent of the corridor, while the remainder of the I-81 corridor will require two or more additional lanes in each direction. The FEIS concluded that öthe ÆBuildøconcept that is, therefore, proposed to be advanced into Tier 2 is a non-separated highway facility that involves constructing no more than two general purpose lanes in each direction, where needed, to address 2035 travel demands.ö FEIS, at ES-xv.

36. The FEIS acknowledges that the footprints for I-81 and the rail concepts could potentially affect a number of historic sites, including buildings and structures, historic districts, battlefields, and archaeological sites, as well as parks and trails. Neither the DEIS nor the FEIS examines indirect or cumulative impacts on historic properties. *See* DEIS at 5-38, 5-86, 5-87; see also FEIS, at 5-36, 5-85, 5-86. The DEIS and FEIS only quantify the number of acres of historic properties potentially impacted directly from the alternatives advanced in the Tier 1 EIS. FEIS, at 5-36; See also FEIS, at Sections 5.6, 5.7, and 5.8. Yet, the Shenandoah Valley Battlefields Foundation, 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 that would be affected by expansion of the highway. In response, the FHWA simply dismissed such information, cross-referencing the FEISø section on environmental consequences, which does not take a øhard lookö at the impacts. *See, e.g.*, FEIS, at Appendix E ó Response 46.6 through 46.16.

37. The FEIS then stated that the applicability of Section 4(f) to historic sites would be evaluated in Tier 2, and alternatives to completely avoid Section 4(f) resources would be evaluated in Tier 2 prior to the use of any Section 4(f) resources. 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. The FEIS also defers all consultations required by Section 106 on the National Historic Preservation Act, 16 U.S.C. § 470f. FEIS, at 5-36.

38. Throughout the NEPA process, SVN, CSG, and other commenters urged the FHWA to consider a 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. This composite improvement concept relied on the 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 crowding I-81 in the urban areas. The composite scenario was based on the analysis of a nationally recognized transportation modeler, who reviewed FHWA's traffic modeling data. This analysis was submitted in comments to the DEIS. Eleven counties, cities and towns, and 22 civic groups formally endorsed a similar range of alternatives under the rubric of "Reasonable Solutions: A Six-Point Plan for I-81." The 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.

39. On June 6, 2007, the FHWA signed a Tier 1 ROD approving the I-81 Corridor Study. The ROD made the following decisions: The ROD stated that the Tier 1 decisions being made were: "the improvement concepts to be advanced; advancing I-81 as a toll pilot project; projects with independent utility and logical termini to be studied in Tier 2; the types of NEPA documents; the location of the corridor for studying alignments in Tier 2; and possible purchase

of right-of-way parcels on a case-by-case basis.ö Tier 1 ROD, at 1-2. The ROD stated that the FHWA does not intend to revisit any Tier 1 decisions during the Tier 2 NEPA process òunless substantial new information arises that is material to these decisions.ö *Id.*, at 2.

40. The ROD selected the following improvement concept to advance to the Tier 2 NEPA documents: òa 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.ö Tier 1 ROD, at 2. The FHWA advanced I-81 as a toll pilot facility in order to allow tolling to be considered as a possible funding mechanism for improvements to I-81 during the Tier 2 stage. *Id.* The ROD also identified two areas in which a new corridor on new location would be considered: Milepost 72 to 81 near Wytheville, and Mileposts 243 to 251 in Harrisonburg. *Id.*

41. The ROD identified eight òSections of Independent Utilityö (òSIUö) which would be the subject of lane expansion at the Tier 2 stage. The SIUs typically run between major intersecting highways, for example from I-66 south to Route 33 in the center of the City of Harrisonburg. The ROD states that the impacts of the individual SIUs are unknown, therefore the environmental impacts of the SIUs would be evaluated in Environmental Assessments (òEAö) during the Tier 2 studies to determine whether the impacts are significant enough to warrant full Environmental Impact Statements. The ROD also advanced a number of short-term improvements independent of the Sections of Independent Utility, including the construction of truck climbing lanes, the extension of exit and entrance ramps, and the installation of guard rails. According to the ROD, these short-term improvements would likely be processed under NEPA as documented Categorical Exclusions.

42. On or about June 18, 2007, notice was published in the Federal Register advising the

public that the FHWA's approval of the Tier 1 ROD was final for purposes of 23 U.S.C. §139(l)(1), and that a claim seeking judicial review of the Tier 1 ROD will be barred unless the claim is filed on or before December 17, 2007. Mr. John Simpkins, FHWA environmental manager, is identified as the point of contact for the Federal Register notice. The official I-81 website did not include notification that the FHWA had published this notice in the Federal Register or the date on which the statute of limitations for filing claims seeking judicial review of the Tier 1 ROD would expire.

43. On or about July 20, 2007, in response to a specific inquiry to Mr. Simpkins made by a CSG representative about whether notice of the Tier 1 ROD had been published in the Federal Register, Mr. Simpkins failed to disclose that the Federal Register notice of the Tier 1 ROD had been published, and instead informed CSG's representative that "We typically don't publish a notice of availability for Records of Decision in the Federal Register."

## **V. Claims**

### **COUNT I**

(Violation of the National Environmental Policy Act, Evaluation of Alternatives, Impacts)

44. Plaintiffs repeat and incorporate herein by reference the foregoing allegations.

45. The National Environmental Policy Act of 1969 ("NEPA"), as amended, establishes that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources." 42 U.S.C. § 4332(2)(C).

46. Among other things, NEPA requires that federal agencies prepare a detailed statement on every proposal for a major federal action that may "significantly affect the quality of the human environment." *Id.*

47. NEPA further requires that every environmental document must be prepared with objective good faith and must fully and fairly discuss, among other things, the adverse environmental effects of the proposed action and the alternatives to the proposed action which may avoid or minimize these adverse effects. *Id.* §§ 4332(2)(C) and (E).

48. The environmental document must include the specific information required by the NEPA regulations of the Council on Environmental Quality (CEQ). 40 C.F.R. Part 1500, *et seq.* These regulations are binding on all federal agencies. *Id.* § 1500.1(a).

49. The "detailed written statement" required by NEPA is known as an "Environmental Impact Statement" (EIS). *Id.* § 1508.11.

50. The EIS must rigorously explore and objectively evaluate all reasonable alternatives to the proposed action. *Id.* § 1502.14(a).

51. The CEQ regulations require that the EIS consider reasonable alternatives even if they are not within the jurisdiction of the lead agency. *Id.* § 1502.14(c).

52. The CEQ regulations encourage agencies to "tier" their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. 40 C.F.R. § 1502.20.

53. "Tiering" is appropriate when the sequence of statements or analyses is: . . . (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). "Tiering" in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe. *Id.* § 1508.28.

54. The FHWA's regulations recognize that a Tier 1 study is an appropriate vehicle for

evaluating "mode choice" alternatives such as a "rail concept." 23 C.F.R. § 771.111(g).

55. A multi-state rail improvement concept is a reasonable alternative that would address the need for the project and which can only be given meaningful consideration at the Tier 1 stage.

56. Given that the NEPA documents concede that no corridor-length improvement concept satisfied the purpose and need for I-81 in Virginia, the TSM alternative and/or targeted safety improvements, local land use and local road investments, enhanced traffic safety enforcement, and multi-state rail improvements, may be a reasonable improvement concept to address the transportation needs of any given Section of Independent Utility, and should have been advanced to the Tier 2 stage as a reasonable alternative that would address the need for the I-81 Projects.

57. Defendants failed to take the requisite "hard look" at direct, indirect, and cumulative impacts on historic properties, and on human health and the environment, including Shenandoah National Park, from air pollution, and failed to consider the adverse impacts of increased transportation-related fuel consumption resulting from the I-81 Projects on oil dependence and global climate change.

58. Defendants' failure to thoroughly evaluate the multi-state rail concept, either alone or in combination with other improvement concepts, and to take the requisite "hard look" at direct, indirect, and cumulative impacts on historic properties, air quality and climate change issues prior to issuing the Tier 1 ROD was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Accordingly, Defendants should be enjoined from any and all activities in connection with the I-81 Projects that may adversely affect Virginia's unique natural, scenic, and historic resources until such time as Defendants have fully complied with

NEPA. Unless Defendants are so enjoined, Plaintiffs and their members and the individual Plaintiffs will be irreparably harmed.

## COUNT II

(Violation of the National Environmental Policy Act, Evaluation of Alternatives)

59. Plaintiffs repeat and incorporate herein by reference the foregoing allegations.

60. The CEQ regulations provide that where there are gaps in relevant information or scientific uncertainty in an environmental impact statement, and the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement. 40 C.F.R. § 1502.22(b).

61. The FHWA's approval of the Tier 1 ROD was premature in light of the fact that VDOT is currently tasked by the Virginia General Assembly with the preparation of the I-81 Freight Rail Study to study multi-state rail as a means of diverting truck traffic off of I-81.

62. In light of the highly relevant information that will be afforded by the I-81 Freight Rail Study bearing on the reasonableness of a multi-state rail concept, the FHWA should have evaluated the alternative of postponing approval of the Tier 1 ROD until this study was completed.

63. Defendants' failure to thoroughly evaluate the alternative of postponing approval of the Tier 1 ROD until completion of the I-81 Freight Rail Study was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Plaintiffs will be immediately, actually, and irreparably harmed unless this Court immediately enjoins Defendants from proceeding with all activities in connection with the I-81 Projects until such time as Defendants comply with NEPA and its implementing rules and regulations.

**COUNT III**

(Violation of Due Process, 42 U.S.C. § 1983)

64. Plaintiffs repeat and incorporate herein by reference the foregoing allegations.

65. The Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law.

66. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

67. Plaintiffs have a right to judicial review of the lawfulness of Defendants' decisions made in the Tier 1 ROD pursuant to the Administrative Procedure Act, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

68. Section 6002 of the Safe, Accountable, Flexible, Equitable Transportation Act: A Legacy for Users ("SAFETEA-LU") provides that claims arising under Federal law seeking judicial review of FHWA decisions are barred unless filed within 180 days after publication of the notice of the decision in the Federal Register. 23 U.S.C. § 139(l)(1).

69. The FHWA's decision to publish this Federal Register notice under 23 U.S.C. § 139(l)(1), and thereby start the statute of limitations, is discretionary, and the FHWA's decision to do so depends on a number of "risk management" factors. [www.fhwa.dot.gov/hep/section](http://www.fhwa.dot.gov/hep/section)

[6002/3.htm](#). These factors do not include any consideration of the unique factors applicable to Tier 1 Environmental Impact Statements, which evaluate environmental impacts and alternatives for a variety of broad improvement concepts, but do not approve the construction of any specific projects. Nor does the FHWA guidance require the FHWA to identify with specificity in either the ROD or the Federal Register notice those claims which will be barred unless asserted within 180 days of the Federal Register notice, or include any consideration of the possible foreclosure of the public's rights to seek judicial review with respect to subsequent agency decisions that do approve the construction of specific projects.

70. The FHWA's publication of the notice of the Tier 1 ROD in the Federal Register under 23 U.S.C. § 139(l)(1) will have the effect of generally barring Plaintiffs from raising claims challenging the FHWA's failure to consider alternatives when specific I-81 Projects (*i.e.*, the Sections of Independent Utility) are considered in the Tier 2 NEPA documents, without affording Plaintiffs notice of what specific claims will be barred at the Tier 2 stage.

71. The Tier 1 ROD fails to specify whether and to what extent the FHWA intends to rely on decisions made in the Tier 1 ROD to preclude consideration of alternatives or impacts when the FHWA considers any I-81 Projects during the Tier 2 stage for purposes of any federal law, including but not limited to NEPA, Section 4(f) of the Department of Transportation Act, 23 U.S.C. § 138, and Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. For example, while the FEIS asserts that alternatives to completely avoid Section 4(f) resources would be evaluated in Tier 2 prior to the use of any Section 4(f) resources, it is unclear whether the FHWA's decision in the Tier 1 ROD not to advance various improvement concepts, and composite concepts, such as rail, TSM/TDM measures, local road network upgrades, and targeted safety improvements will foreclose consideration of these alternatives during Section

4(f) reviews at the Tier 2 stage, and whether Plaintiffs will be barred from seeking judicial review of any refusal to consider these measures as alternatives when the FHWA considers any I-81 Projects at the Tier 2 stage. Likewise, it is unclear whether Plaintiffs will be barred from seeking judicial review of the adequacy of the FHWA's consideration of the direct, indirect, or cumulative impacts on natural and cultural resources of the I-81 Projects in any subsequent challenge to Tier 2 decisions because these impacts were considered in the Tier 1 FEIS.

72. The FHWA's decision to publish notice of the Tier 1 ROD in the Federal Register under 23 U.S.C. § 139(l)(1) may therefore foreclose Plaintiffs' right to seek judicial review of Tier 2 decisions without affording Plaintiffs with meaningful notice of what claims or issues may be precluded by decisions made in the Tier 1 ROD, in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

73. Defendants' decision to publish notice of the Tier 1 ROD in the Federal Register was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Plaintiffs will be immediately, actually, and irreparably harmed unless this Court immediately enjoins Defendants from proceeding with all activities in connection with the I-81 Projects until such time as Defendants comply with NEPA and its implementing rules and regulations.

## **VI. Relief Requested**

WHEREFORE, Plaintiffs respectfully request this Court to grant the following relief:

1. Declare the obligations and duties of Defendants and their employees, grantees, agents, and contractors, to comply fully with the requirements of NEPA and the Due Process Clause prior to acquiring right-of-way, financing or contracting for construction of the I-81 Projects.

2. Issue temporary, preliminary, and permanent injunctive relief directing all Defendants

and their grantees, employees, agents, and contractors, to refrain from any acquisition of right-of-way, financing, contracting, or construction of the I-81 Projects other than previously-planned safety projects identified as part of the no-build alternative until Defendants have fully complied with the requirements of NEPA and the Due Process Clause, and any other applicable laws.

3. Award Plaintiffs their attorneys' fees, costs, and disbursements; and
4. Award such other and further relief as the Court may deem appropriate.

DATED this 14th day of February, 2008.

Respectfully submitted,

/s/

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