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

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (CORRECTED)

Introduction

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") submit this memorandum of points and authorities and attached Statement of Material Facts ("SMF") in support of their motion for summary judgment in the above-captioned action, which challenges the decision of Defendants Secretary of Transportation and Federal Highway Administration ("FHWA") and the Virginia Department of Transportation ("VDOT") to approve the Tier 1 Final Environmental Impact Statement ("FEIS") and Tier 1 Record of Decision ("ROD") for the Interstate 81 ("I-81") corridor improvement study in Virginia. This lawsuit challenges the Tier 1 ROD under the National Environmental Policy Act ("NEPA"), 42

U.S.C. § 4321 *et seq*., and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Summary of Argument.

The I-81 corridor in Virginia extends 325 miles through the Shenandoah Valley in Western Virginia from the Tennessee border to the West Virginia panhandle, and includes an extraordinary wealth of natural and historic properties. The crown jewel of the corridor is the newly established Cedar Creek and Belle Grove National Historical Park, but the corridor also includes numerous other Civil War Battlefields, historic landscapes, Main Street historic districts, and hundreds of unique historic places throughout the Shenandoah Valley. Administrative Record ("AR") 6373, Bates # 54355. [1] From Winchester to Abingdon, the historic "Main Street" communities along Route 11, known as the "String of Pearls," have an enormous economic investment in heritage tourism, which is dependent on protecting the traditional rural character of the Shenandoah Valley. *Id.* The potential expansion of I-81 would be devastating to the historic character of these communities, and could also result in significant, irreversible adverse effects on natural, scenic, and ecological resources, as well as communities and property owners, by potentially destroying up to 7400 acres of developed land; 1062 acres of prime farmland; between 1600 and 2400 homes; 662 businesses; 33 acres of wetlands; 361 acres of floodplains; 23 miles of streams; and 13 threatened or endangered species; and by stimulating sprawl development; and by exacerbating air pollution and greenhouse gases, with attendant impacts on public health and global warming. FEIS, Table 5-1 (AR 6738, Bates # 059756).

Nonetheless, this case is not a typical challenge by environmental groups to a decision to

[1] Citations are to the Statement of Materials Facts ("SMF"), and to administrative record ("AR") filed by Defendant Federal Highway Administration ("FHWA") on July 3, 2008, consisting of an index and 6,821 documents in pdf format scanned and downloaded onto a DVD [Document # 26] and the Administrative Record Supplement ("AR Supp.") filed by the FHWA on October 1, 2008 [Document # 54]. Administrative record references include the document number and the page references ("Bates #").

build a highway. As the Defendants have repeatedly stated, the decision under review -- a "Tier 1" ROD -- supports only conceptual decisions about the type of corridor-length improvement concepts that could be advanced in the future within I-81 corridor. The Tier 1 ROD makes no commitment to move forward with construction of any particular projects within the I-81 corridor. ROD, at 3 (Bates # 060525). Actual highway projects have not yet been designed or proposed for individual segments of independent utility ("SIUs") along I-81, and will not be approved, until after the completion of discrete "Tier 2" NEPA studies for each segment. Therefore, Defendants contend that the Plaintiffs' concerns about the potential for serious, irreversible impacts on natural and cultural resources, including numerous Civil War Battlefields within the I-81 corridor, are purely conjectural. [2]

However, the danger to these irreplaceable resources, while not immediate, is real and potentially irreparable because of an unusual factor in this case -- the FHWA's decision to issue a Statute of Limitations ("SOL") Notice for the Tier 1 ROD pursuant to the recently-enacted Safe, Accountable, Flexible, Equitable Transportation Act: A Legacy for Users ("SAFETEA-LU"), which requires claims challenging transportation decisions to be filed within 180 days after publication of a notice of the decision in the Federal Register. 23 U.S.C. § 139(*l*). It is Defendants' position that the SOL Notice issued for the Tier 1 ROD should be construed very broadly to include not only specific "Tier 1" decisions that apply to the corridor as a whole (such as the decision not to evaluate multi-state rail as a corridor-length improvement concept), but also to preclude the future consideration of alternatives for individual segments of I-81.

Under the Defendants' proposed interpretation of the Tier 1 ROD and SOL Notice, the

[2] As VDOT's counsel represented to the Court during an earlier motions hearing in this case, "we may never get to the battlefields issues. The road project may never impact the battlefield. The issue may never arise." Transcript, at 17 [Document # 51]. "As to which will be built, or what is going to be considered to be built, that is an evolving process. That is what Tier 2 will look at." *Id.* at 18.

FHWA has no obligation to consider alternatives for individual Tier 2 projects other than adding highway capacity to I-81, and the obligatory "no build" base-line alternative, and judicial review of any challenges to future "Tier 2" decisions alleging that Defendants violated NEPA by failing to consider alternatives other than adding highway capacity to I-81 would be barred. *See* Stipulation of Partial Dismissal, at C.2 [Document 56]. Thus, the Tier 1 ROD, under Defendants' interpretation of the Statute of Limitations Notice, will prospectively insulate the FHWA from any future NEPA obligation to evaluate alternatives during Tier 2, which is the heart of NEPA's "action-forcing" ability to avoid or reduce harm to protected resources from a proposed action. 40 C.F.R. § 1500.1(a).

As a result, the primary issue in this case is whether Defendants have misused SAFETEA-LU's new statute of limitations to attempt to insulate future decisions approving highway projects from judicial review, undermining the statutory protections afforded by NEPA and violating the fundamental principle that rights to judicial review cannot be precluded except by express legislative language. As Plaintiffs demonstrate herein, neither the plain language of the SOL Notice nor the Tier 1 NEPA studies can lawfully be construed to constitute a final decision to prospectively eliminate reasonable alternatives from consideration during future Tier 2 NEPA studies for any specific Tier 2 projects that may be proposed on individual segments of I-81. The administrative record simply does not support any such interpretation of the Tier 1 ROD. Instead, the record demonstrates that the purpose of the Tier 1 NEPA studies was to consider only *corridor-length* improvement concepts, and explicitly asserted that non-corridor-length improvement concepts (*i.e.*, alternatives targeted to address the needs for one or more segments of I-81) would be appropriate for consideration as alternatives during Tier 2.

The Defendants' arguments create a "Catch -22" for Plaintiffs, because at the same time

as Defendants would apply the SOL Notice to bar future judicial review of these alternatives, principles of constitutional ripeness would bar judicial review of these issues in the context of the current case. The Tier 1 NEPA study does not describe the need for or design features of these future highway projects, or evaluate any site-specific impacts, or make any final decision to approve construction of any particular project. Judicial review on the present record would embroil this court in abstract questions over hypothetical future governmental decisions. Since judicial review of this issue would be improper now, the SOL Notice cannot be applied, as Defendants suggest, to bar timely future challenges to Tier 2 decisions raising claims concerning the range of alternatives considered for individual segments, during Tier 2 decisions, since to do so would have the effect of unlawfully precluding judicial review altogether of the FHWA's future NEPA obligations.

As Count III of the Complaint alleges, neither the Tier 1 ROD nor the SOL Notice specifies whether and to what extent the FHWA will rely on the Tier 1 ROD to preclude consideration of alternatives for specific projects advanced during Tier 2. The Tier 1 ROD and SOL Notice potentially deprives aggrieved persons and property owners of their statutory rights to seek judicial review of future decisions to approve Tier 2 projects without considering reasonable alternatives that might avoid impacts to their property, thereby violating their constitutional rights under the Due Process Clause of the Fifth Amendment to the U.S. Constitution. It is imperative that this Court clarify the applicability of the SOL Notice to future Tier 2 NEPA decisions in order to avoid such an unconstitutional result.

Finally, Plaintiffs complaint includes a claim that does relate to a Tier 1 Decision: whether Defendants violated NEPA by failing to consider the alternative of postponing a final decision on "Tier 1" improvement concepts until the completion of the multi-state rail study

mandated by the Virginia General Assembly. The FHWA's primary rationale for refusing to evaluate this alternative, articulated in a memorandum prepared by an FHWA staff member in May 2004 -- that a multi-state rail study would be too costly and impracticable to undertake -- became wholly obsolete when, in 2006, the Commonwealth of Virginia endorsed – and funded – a study of the feasibility of undertaking rail improvements in 12 states as a means of diverting truck traffic off of I-81, as well as the enactment in 2005 of substantial new grant and loan provisions for funding rail improvements as part of SAFETEA-LU. The FHWA's failure to consider the alternative of postponing issuance of the FEIS in order to incorporate the findings of this multi-state rail study, in contravention of the specific directive of the Virginia Commonwealth Transportation Board, violates NEPA.

Statement of the Case

A. Statutory and Regulatory Framework of NEPA Review of the Tier 1 ROD.

1. General Framework for NEPA.

The National Environmental Policy Act of 1969 ("NEPA"), as amended, declares a national policy in favor of the protection and promotion of environmental quality. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (citing 42 U.S.C. §§ 4321, 4331(a)). NEPA implements this policy by requiring 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." 42 U.S.C. § 4332(2)(C). Although NEPA establishes environmental quality as a substantive goal, "it is well settled that NEPA does not mandate that agencies reach particular substantive results." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d at 443. As explained by the Supreme Court, the substantive goals of NEPA "are thus realized through a set of 'action forcing' procedures that require that agencies 'take a

"hard look" at environmental consequences.' " *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

The regulations promulgated by the Council on Environmental Quality ("CEQ")[5] provide that the detailed statement required by NEPA, which is called an Environmental Impact Statement ("EIS"), must rigorously explore and objectively evaluate all reasonable alternatives to the proposed action. 40 C.F.R. § 1502.14 (a). The evaluation of alternatives is considered the "heart of the environmental impact statement," *id.* § 1502.14, by "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *North Buckhead Civic Ass'n v. Skinner***,** 903 F.2d 1533, 1541 (11th Cir. 1990). While the range of alternatives that must be considered is not infinite, the EIS must examine all "reasonable" or "feasible" alternatives. *Id.*; 40 C.F.R. § 1502.14(a)(-(c). An agency is not permitted "to disregard alternatives merely because they do not offer a complete solution to the problem." *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972); *see also Town of Matthews v. U.S. Dep't of Transp.*, 537 F. Supp. 1055, 1057 (W.D.N.C. 1981).

The CEQ regulations provide for a number of different steps that an agency may take to determine whether a proposed action will have a "significant" environmental impact. First, an agency may promulgate regulations classifying certain actions as normally requiring an EIS. Alternatively, any agency may prepare an Environmental Assessment ("EA"), which "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. §§ 1501.3, 1501.4, 1508.9(a). If an agency determines no EIS is necessary, the agency must prepare and make publicly

[5] The CEQ regulations implementing NEPA, which are found in 40 C.F.R. Part 1500, are binding on all federal agencies. *Id.* § 1500.1(a).

available a Finding of No Significant Impact ("FONSI") explaining why an action will not have a significant effect on the human environment. *Id.* §§ 1501.4(e), 1508.13.

Agencies are permitted to identify, by regulation, classes of actions that have been found by the agency not to individually or cumulatively have a significant impact on the environment, and thus are categorically excluded from NEPA and from the requirement of either an EA or and EIS. *Id.* §1508.4. The FHWA has developed a list of environmentally benign actions that are designated as "categorical exclusions" (CEs), such as landscaping, ridesharing activities, and construction of bicycle and pedestrian lanes. 23 C.F.R. § 771.117(c). The FHWA's regulations provide that additional activities may be designated as CEs following the submission of "documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result." *Id.* § 771.117(d).

2. "Tiering" of NEPA Review in the Context of Linear Highway Projects.

The I-81 Corridor Improvement Study is a "tiered" NEPA study. "Tiering" is a mechanism for dividing NEPA's analytical process into multiple phases, so as to cover general matters in broader environmental impact statements with subsequent narrower statements or environmental analyses (such as site-specific statements) incorporating by reference the general discussions in the initial, first- tier NEPA document, and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. 1508.28. "Tiering" allows agencies "to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review" and "exclude from consideration issues already decided or not yet ripe." *Id.* § 1502.20.

Because Tier 1 NEPA documents do not describe any specific proposed action, the courts have held that "site-specific impacts need not be fully evaluated until a 'critical decision'

has been made to act on site development." *'Ilio'ulaokalani Coalition v. Rumsfeld***,** 464 F.3d 1083, 1096 (9th Cir. 2006). Instead, "detailed analysis" is deferred "until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences." *Id.* at 1095-6. "This threshold is reached when, as a practical matter, the agency proposes to make an 'irreversible and irretrievable commitment of the availability of resources' to a project at a particular site." *Id.* at 1097 (citing *California v. Block,* 690 F.2d 753 (9th Cir. 1982).

The FHWA's regulations provide that "the tiering of EISs" may be appropriate "[f]or major transportation actions." 23 C.F.R. § 771.111(g). These regulations further provide that "[t]he first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures." *Id.*

The FHWA's guidance directs the FHWA to exercise its discretion in tiering its NEPA review of a linear highway project "to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated" and avoid making decisions that would "restrict consideration of alternatives for other reasonably foreseeable transportation improvements." AR 428, Bates # 6169 (referencing 23 U.S.C. § 771.111(f)). To ensure that core NEPA values are not compromised through a "tiered" NEPA process, the FHWA guidance for the use of "tiered" NEPA studies for a lengthy, interstate highway directs that the "tiered" NEPA decision-making process be structured so as to safeguard the public's interest in understanding what decisions are made, and to avoid constricting the range of alternatives for addressing environmental impacts during the second tier. AR 428 (Bates # 6168-9).

3. Section 6002 of SAFETEA-LU

NEPA has no express statute of limitations on judicial review of actions to enforce the Act. Instead, the timing of judicial review of NEPA claims has been traditionally limited only by the equitable doctrine of laches. *See Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1329-30 (4th Cir. 1972). However, in August 2005, Congress passed SAFETEA-LU, a comprehensive transportation legislation that included a number of changes intended to "streamline" compliance with NEPA in the context of transportation decision-making. One of the provisions of SAFETEA-LU was Section 6002, which provides that

> a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken.

23 U.S.C. § 139(l)(*1*).

The FHWA has issued non-binding guidance governing the circumstances during which the Section 6002 Statute of Limitations ("SOL") Notice could be applied to decisions made in a tiered EIS. SAFETEA-LU Guidance, Appendix E-62 (AR 6627, Bates # 056541, 056601). This guidance provides specifically as follows:

> Because Tier 1 proceedings decide a narrower range of issues than a regular EIS process, it is important that the ROD clearly describe which decisions are being made that are considered final within the meaning of the SOL provision of SAFETEA-LU. . . . The Tier 1 SOL Notice may refer generally to the Tier 1 FEIS and ROD for detailed discussions of the decisions made. However, because of the "phased" nature of tiered proceedings, the notice should also include information informing the public of the decisions covered by the Tier 1 Notice. The objective is to advise the public of the issues that will not be open for further analysis or discussion in the Tier 2 proceedings absent substantial changes in the proposed action or significant new and relevant information. *For example, it is appropriate to list the Tier 1 alternatives eliminated from Tier 2 analysis, using the same names and alternative numbers that are used in the FEIS.*

Id., Bates # 56604 (emphasis added).

B. Factual Background

1. Initial Project Development

In 2001, VDOT began to explore opportunities to work with private entities to fund the construction, operation, and/or maintenance of improvements on all or parts of the 325-mile portion of I-81 in Virginia. These discussions were prompted by the passage of Section 1216(b) of the Transportation Equity Act of 2001 ("TEA-21"), which authorized the selection of no more than three pilot projects that would be permitted to convert from a free interstate highway segment into a toll facility in order to fund reconstruction or rehabilitation projects of interstate highway corridors.[3] In February 2003, VDOT submitted an application to FHWA for approval of I-81 as a toll pilot facility under Section 1216(b), pursuant to which improvements to I-81 would be funded by instituting tolling for heavy trucks. SMF, ¶ 16. The FHWA gave conditional provisional acceptance to VDOT's application in March 2003. SMF, ¶ 17. One of the FHWA's conditions was the timely completion of the NEPA process evaluating the environmental impacts of tolling, including potential changes in travel patterns, construction of toll collection facilities, and economic equity issues, before final approval under the pilot program. *Id.*

The conditional approval of I-81 as a toll pilot project created a need to develop a NEPA framework that would expeditiously inform the FHWA's decision on whether to approve tolling on I-81, even though no proposals had been developed for any specific improvement projects within the corridor. The FHWA decided that the appropriate framework for making these decisions would be to undertake a "tiered" NEPA process and entered into discussion with VDOT to develop a project agreement that would "define the decisions to be granted for a tiered

[3] Until the passage of Section 1216(b) of TEA-21 in 2001, federal law prohibited state transportation agencies from converting interstate highways, such as I-81, into toll roads. FEIS, at ES-IX (AR 6744, Bates # 059998)

environmental study for improvements to the I-81 corridor and to define the study process and elements to be included with each stage of the tiered effort." SMF, ¶¶ 19, 20.

On November 6, 2003, VDOT and the FHWA entered into a "Process Streamlining Agreement," which agreed to a "tiered" NEPA decision-making process for the I-81 Corridor Improvement Study. SMF, ¶ 20. Under the agreement, the Tier 1 studies would consist of a broad, first-tier Draft and Final EIS and a Record of Decision ("ROD") to address "long range needs," followed by second-tier NEPA studies (either EISs , EAs, or documented Categorical Exclusions) to address "specific location and design decisions for much shorter 'projects' on the interstate highway. *Id.* The Tier 1 NEPA studies were intended to support the following decisions: the improvement concept to be advanced; whether to advance I-81 as a toll pilot project under Section 1216(b) of TEA-21; the specific Segments of Independent Utility ("SIUs") that would be the basis for projects during the Tier 2 NEPA studies; the types of Tier 2 NEPA documents; the location of the corridor to be studied for improvements to I-81 during Tier 2; and possible advance purchases of right-of-way. ROD, at 1 (AR 6816, Bates # 060523).

2. The Tier 1 NEPA Studies

The FHWA issued a Tier 1 Draft EIS for public comment on November 28, 2005, and a Tier 1 Final EIS on March 21, 2007 ("Tier 1 NEPA studies"). The Tier 1 NEPA studies stated that the focus of the studies would be on the following "corridor-length improvement concepts:" "No build"; "Transportation Systems Management" ("TSM"),[4] 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

[4] The TSM concept 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. SMF, ¶ 34.

"Roadway Concepts" with the Rail Concepts; and five "Separated Lane concepts." For each of these improvement concepts, the Tier 1 NEPA studies evaluated the effects of various tolling options. SMF, ¶ 33. The Tier 1 NEPA studies emphasized that these improvement concepts were different from "the traditional term *alternative*" because the improvements developed for the Tier 1 study were conceptual only. Only corridor-length improvement concepts were considered 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. SMF, ¶ 24.

The Tier 1 NEPA Documents also identified the Segments of Independent Utility ("SIUs") that would be the basis for advancing projects during the Tier 2 NEPA studies. Nine SIUs were identified, ranging in length from nine to 78 miles. FEIS, at 6-7 [AR 6739, Bates # 059854] The Tier 1 NEPA studies determined that the Tier 2 projects for seven of these SIUs would be located within the I-81 corridor, but that for that two of these SIUs, the Tier 2 NEPA studies would look at corridors on new location. *Id.*

In response to the Tier 1 DEIS, a number of commenters urged the FHWA to consider the improvement concept of multi-state rail extending beyond Virginia, based on the conclusions of a 2003 study commissioned by the Virginia Department of Rail and Public Transportation, which studied the potential to divert truck traffic from I-81 by making improvements to freight rail infrastructure in 12 states from New York to New Orleans. SMF, ¶ 47. This study concluded that freight rail could divert trucks from highway primarily with respect to trips longer than 500 miles. SMF, ¶ 18.

A number of commenters, including Plaintiffs SVN and CSG, also urged the FHWA to consider the option of studying a "reasonable solutions" composite alternative, consisting of

targeted safety improvements, local land use and local road investments, enhanced traffic safety enforcement, and multi-state rail improvements, 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. SMF, ¶ 50. 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 congestion on I-81 in the urban areas. *Id.*

In addition, comments to the Tier 1 FEIS also urged the FHWA to defer finalizing the Tier 1 NEPA documents until the completion of the multi-rail study mandated by HB 1581, enacted by the Virginia General Assembly in May 2006. SMF ¶¶ 36-37, 50. H.B. 1581 requires VDOT and the Rail Advisory Board to study multi-state rail as a means of diverting truck traffic off of I-81 ("the I-81 Freight Rail Study"). *Id.* ¶36-37, and SJ Exhibit 12. 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." *Id.* ¶ 37. 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." *Id.*

The Tier 1 NEPA studies 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. SMF, ¶ 38. Instead, the Tier 1 NEPA studies determined that a concept that varied the number of lanes based on traffic demands on individual segments of I-81

would most efficiently address the capacity needs of I-81. SMF, ¶ 40.

The Tier 1 NEPA studies also concluded that, while the TSM and Rail Concepts, as stand-alone concepts, would not address projected needs, these concepts, in combination with highway widening, could be effective in reducing the number of additional lanes that may be needed on any given segment of I-81. SMF, ¶ 39. Nonetheless, the FHWA opted to advance to Tier 2 the improvement concept consisting of a variable lane separated highway with no more than two general purpose lanes in each direction for each SIU, with the number of lanes varying from segment to segment depending on 2035 traffic needs for each segment. SMF, ¶ 62.1. The FHWA also opted to advance to Tier 2 independent safety and operational improvements, such as truck climbing lanes, the extension of exit and entrance ramps, and the installation of guard rails SMF, ¶ 62.2

Thus, each of the improvement concepts that were advanced to Tier 2 is a non-corridor-length improvement concept. The Tier 1 NEPA studies did not evaluate the improvement concept of multi-state rail improvements, the composite "reasonable solutions" alternative urged by Plaintiffs CSG and SVN, or seriously consider the alternative of postponing issuance of the FEIS until completion of the I-81 Freight Rail Study mandated by the Virginia General Assembly.

3. The Tier 1 ROD and Statute of Limitations Notice.

On June 6, 2007, the FHWA signed a Tier 1 ROD approving the I-81 Corridor Study. The Tier 1 ROD included a section entitled "Tier 1 Decisions," indicating that the following decisions had been made:

1. That the improvement concept that the FHWA is advancing to Tier 2 would be a non-separated variable-lane highway facility that involves constructing up to two, additional general purpose lanes in each direction, where needed, to address 2035 travel demands.

2. That there was a need for additional, independent safety and operational improvements, such as truck climbing lanes, on I-81.

3. That I-81 would be advanced as a toll pilot project under Section 1216(b) of TEA-21.

4. That the Tier 2 NEPA studies would divide I-81 into eight separate Segments of Independent Utility, whose location and end points were pre-determined by the Tier 1 ROD.

5. That Environmental Assessments would be the type of Tier 2 NEPA document prepared for each of the SIUs, and that documented Categorical Exclusions would be appropriate Tier 2 NEPA documents for independent safety and operational improvements.

6. That the corridor for most of the Tier 2 studies would be the existing I-81 corridor, with the exception of two locations on I-81 near Wytheville (Milepost 72 to 81) and near Harrisonburg (Milepost 243 to 251), where the FHWA would evaluate corridors on new location as well as widening of I-81.

7. That case-by-case hardship acquisitions or protective purchases were authorized within the I-81 corridor.

SMF, ¶ 62.

On 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 (hereinafter referred to as "SOL Notice"), pursuant to Section 6002 of SAFETEA-LU. AR 6821, Bates # 060618. 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.

Id. The SOL Notice stated that the decisions made as a result of the Tier 1 NEPA studies "*include* the following: 1. Improvement concept to be advanced; 2. Advancing I–81 as a toll pilot facility under Section 1216(b) of the Transportation Equity Act of the 21st Century (TEA–

21); 3. Projects with independent utility and logical termini to be studied in Tier 2; 4. Types of Tier 2 NEPA document(s); 5. Location of the corridor for studying alignments in Tier 2; and 6. Possible purchase of certain right of-way parcels on a case-by-case basis." *Id.* (emphasis added).

The SOL Notice directed interested parties to the Tier 1 ROD, the Tier 1 FEIS, and other documents in the FHWA project records "for further information on each of the decisions above." *Id.* These Tier 1 NEPA documents acknowledged that the purpose of the Tier 1 NEPA study was to address only issues that were "ripe for decision," and did not describe the design features, footprint, or site-specific impacts of the Tier 2 projects. However, due to the vague nature of the explanatory test in the description of the Tier 1 "Decisions" in the Tier 1 ROD and FEIS, these documents also appeared to make decisions concerning the future NEPA studies to be undertaken during Tier 2 to which the SOL Notice might apply.[5] As a result of this vagueness, it was virtually impossible to determine, on the basis of the SOL Notice and the Tier 1 NEPA documents, which of the "decisions" identified in these documents were presently ripe for judicial review and must be challenged now or be forever barred by the Statute of Limitations, and which "decisions" related to the future Tier 2 NEPA studies, and must therefore await judicial review until the issuance of final decisions approving Tier 2 projects.

4. Initiation of this Litigation and Development of the Stipulation of Partial Dismissal.

This action was filed by Plaintiffs on December 17, 2007, and was thus within the period of limitations specified by the SOL Notice. Plaintiffs raised two counts that are addressed

[5] For example, the SOL Notice indicated that a decision had been made as to the type of NEPA document to be prepared during Tier 2, raising questions about whether the SOL Notice would be applied to preclude future challenges to Tier 2 decisions, such as challenges raising the failure to prepare EAs, in the case of documented categorical exclusions, or EISs, where EAs were prepared, and challenges to the failure to consider an appropriate range of alternatives, despite the fact that the Tier 1 NEPA studies failed to describe the location, design, or site-specific impacts of these projects. AR 6817, Bates # 060524-7.

to decisions that are properly made at Tier 1: the failure to consider, in the Tier 1 NEPA Document, whether multi-state rail was an improvement concept that would address the corridor-length needs for the project and should therefore have been considered in the Tier 1 NEPA studies (Count 1), and whether the FHWA should have postponed issuance of the Tier 1 FEIS and ROD pending completion of the multi-rail study mandated by the Virginia General Assembly (Count II). Count III of the complaint alleged that the SOL Notice violates the Due Process Clause of the U.S. Constitution by failing to give Plaintiffs notice of which claims relating to the enforcement of federal environmental laws are subject to the statute of limitations and will be barred unless raised now, and by potentially compelling Plaintiffs to litigate claims without adequate information about the extent to which these "decisions" might affect their property and other interests.

Following the initiation of this litigation, the parties proceeded to engage in discussions for the purpose of attempting to clarify the questions raised by Count III of the complaint -- which "decisions" made during the Tier 1 NEPA studies were presently subject to judicial review and which "decisions" related to issues that would not be ripe for review until the completion of Tier 2 NEPA studies and the approval of specific Tier 2 projects. Ultimately, the parties reached an agreement on a list of "Tier 1" NEPA decisions that were subject to the SOL Notice, and a list of Tier 2 NEPA decisions that would not be subject to the SOL Notice. *See* Stipulation of Partial Dismissal (Document # 56).[6] This stipulation clarified that, despite the Tier 1 "decisions" to advance independent safety and short-term improvement projects on I-81 during Tier 2 and the "decision" that the Tier 2 NEPA documents would consist of EAs and

[6] As part of this stipulation, Plaintiffs agreed to dismiss Count I of their complaint, challenging the Defendants' failure to consider multi-state rail as a Tier 1 improvement concept, although Plaintiffs continue to challenge the Defendants' refusal to consider the alternative of postponing the FEIS until the completion of the Virginia-mandated multi-state rail study.

documented Categorical Exclusions, the SOL Notice would not bar any future claims challenging final Tier 2 decisions approving these projects. However, the parties were unable to reach an agreement on one, crucial issue: whether the tier 1 ROD made a final decision to limit the range of alternatives that must be considered in future Tier 2 NEPA studies to only "no build" and highway improvements to I-81.

Specifically, it was Plaintiffs' position that, while the Tier 1 ROD is a final decision with respect to the improvement concept to be advanced to Tier 2, the Tier 1 ROD *cannot*, consistent with NEPA, be considered a final decision with respect to the range of alternatives that must be considered under NEPA if and when those Tier 2 projects are actually proposed as federal actions. Stipulation of Partial Dismissal, ¶ C. 2 [Document # 56]. In the Stipulation, Plaintiffs expressly reserved their position that the SOL Notice could not properly be read as precluding future challenges to Tier 2 decisions alleging failure to consider any alternatives under NEPA or any other law. *Id.* Instead, it is Plaintiffs' position that future challenges to Tier 2 NEPA documents are not ripe for judicial review until a final decision is made to approve that Tier 2 project, and cannot properly be construed as being subject to the Tier 1 SOL Notice. *Id.*

Defendants' contrary position is likewise made clear in the stipulation. According to Defendants, only alternatives that are consistent with the Tier 1 improvement concept, such as widening by one lane in each direction, widening by two lanes in each direction, widening within the median, widening to the outside of the existing roadway, and, in two locations realigning the highway to a new location, (in addition to the obligatory "no build" option), will be considered in the Tier 2 NEPA documents, except where a substantial change in the proposed action for a specific SIU or significant new and relevant information requires consideration of an additional alternative. *Id.*, ¶ *C.1* Further, according to Defendants, challenges to future decisions based

on the failure to consider any other alternatives would be barred unless filed on or before December 17, 2007. *Id.*

As a result of this stipulation, the primary issue in this litigation is now whether the Tier 1 ROD represents a final "decision" to constrain the range of alternatives that will be considered if and when Tier 2 projects are advanced, and whether the SOL Notice can be used to force Plaintiffs to challenge in advance the extent to which reasonable alternatives must be considered during future Tier 2 NEPA studies. Plaintiffs disagree that Defendants' interpretation is a permissible use of a Statute of Limitations Notice under Section 6002 of SAFETEA-LU. As the Tier 1 NEPA documents acknowledge, the primary purpose of the Tier 1 NEPA studies was to evaluate corridor-length improvement concepts, and the Tier 1 NEPA documents acknowledge that non-corridor-length alternatives would be considered during Tier 2. Moreover, the current record contains no information describing the design features or the footprint of particular projects that may be advanced during Tier 2, what transportation demands must be met at the time these projects are proposed, and what environmental impacts would result from these possible projects. Therefore, there is no basis for determining, based on this administrative record, the range of alternatives that could be required to address these future needs and avoid these future impacts when and if Tier 2 projects on independent segments of independent utility are advanced.

Summary Judgment Standard

Summary judgment should only be granted if, viewing the record as a whole in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Terry's Floor Fashions, Inc. v. Burlington Indus., Inc.*,

763 F.2d 604, 610 (4th Cir. 1985). However, in a case such as this, where the Court is reviewing the decision of an administrative agency, a motion for summary judgment "stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review." *Krichbaum v. Kelly*, 844 F. Supp. 1107, 1110 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. July 31, 1995) (unpublished table decision). Because the Court's review is restricted to the administrative record and limited supplements thereto, the movant's "burden on summary judgment is not materially different from his ultimate burden on the merits." *Id.* As a result, in order to prevail by summary judgment, the parties "must point to facts in the administrative record–or to factual failings in that record–which can support [their] claims under the governing legal standard." *Id.*

Argument

I. The SOL Notice Cannot Lawfully Be Applied to Claims Challenging the Scope or Range of Alternatives Considered by the FHWA for Any Tier 2 Projects That May in the Future be Approved.

As the Stipulation of Partial Dismissal makes clear, the parties were unable to reach an agreement on whether the SOL Notice requires Plaintiffs to raise in the present lawsuit or else be forever barred by the SOL Notice all future claims relating to the scope or range of alternatives that must be considered with respect to future Tier 2 highway projects advanced on SIUs, even though the Tier 1 NEPA studies evaluated only corridor-length improvement concepts, and failed to identify or evaluate the location, design, traffic needs, and site-specific property or environmental impacts of future Tier 2 projects. Thus, there is no basis for determining the range of alternatives that should be evaluated when and if these future projects are proposed. As the complaint alleges, the SOL Notice runs afoul of the Due Process Clause because it falls to give notice to persons who may, in the future, be adversely affected by specific

Tier 2 projects proposed on SIUs, that they must protect their property and other interests by filing a challenge to the Tier 1 ROD on or before December 17, 2007.[7]

However, this Court need not reach this constitutional issue since this question can be resolved on statutory grounds alone. *See Southeast Legal Defense Group v. Adams,* 436 F. Supp. 891, 895 (D. Or. 1977), *aff'd*, 657 F.2d 1118 (9th Cir. 1981) (court declined to rule on Plaintiffs' due process claim but held that the FHWA's failure to hold a hearing prior to approving a highway was in violation of federal statutory law). Here, the broad applicability of the SOL Notice to future Tier 2 decisions proposed by Defendants lacks support in the plain language of the SOL Notice and the Tier 1 ROD, and is contrary to Defendants' own Guidance on applying the SOL Notice and undertaking "tiered" NEPA studies.

Moreover, requiring Plaintiffs to litigate in the context of the Tier 1 NEPA studies hypothetical questions involving which alternatives Defendants may be required to consider during future Tier 2 NEPA studies would embroil this Court in abstract controversies over projects that may never be advanced, where there is no basis in the current administrative record for resolving these potential future disputes, and which are therefore not yet ripe for judicial review until Tier 2 NEPA studies are complete. The Defendants' view that the SOL Notice will bar future Tier 2 challenges raising claims regarding the lawfulness of Defendants' consideration of alternatives in Tier 2 NEPA studies would therefore preclude established rights of judicial

[7] The Fifth Amendment provides that the United States shall not deprive any person of "life, liberty, or property without due process of law." U.S. CONST. amend. V. "While 'many controversies have raged about…the Due Process Clause,'… it is fundamental that except in emergency situations due process requires that when a State seeks to terminate [a protected] interest…, it must afford 'notice and opportunity for hearing appropriate to the nature of the case.'" *Id. citing Bell v. Burson*, 402 U.S. 535, 542 (1971). An attempt to cut-off statutory rights to judicial review without providing adequate notice and hearing procedures violates these principles. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Here, persons whose property is taken by specific Tier 2 projects would have a statutory right under the Administrative Procedures Act to challenge any future Tier 2 decisions on the grounds that the Tier 2 NEPA studies fail to consider an appropriate range of alternatives for avoiding these impacts. The Tier 1 NEPA studies and the current administrative record provides no information that would give notice to persons that their statutory rights must be exercised prospectively, based on abstract future possibilities that Tier 2 projects will impact their property, or be forever lost. Defendants' proposed application of the SOL Notice to cut off rights of judicial review of future decisions to approve Tier 2 projects runs afoul of this basic tenet of Due Process.

review at the point at which this issue does finally become ripe for review.

A. The Plain Language of the Tier 1 ROD Cannot Be Construed As a Final Decision Limiting the FHWA's Future Obligations to Consider Alternatives During Tier 2 NEPA Studies.

The plain language of the SOL Notice itself fails to support the Defendants' view that the Tier 1 NEPA studies resulted in a final decision to eliminate all alternatives other than highway improvements from consideration during future Tier 2 NEPA studies that may be undertaken for individual projects on I-81 Segments of Independent Utility ("SIUs"). Neither the SOL Notice nor the list of "Tier 1 Decisions" in the ROD specifically state that one of the final Tier 1 decisions is to limit or constrain the range of alternatives to be considered in Tier 2 NEPA studies. Nor do these documents specifically state that non-corridor-length alternatives such as rail alternatives, Transportation Systems Management ("TSM"), or combined TSM, highway improvements, or rail alternatives have been eliminated from consideration during the Tier 2 NEPA studies.

This lack of clarity was specifically noted by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers in their respective comments on the Tier 1 Draft Environment Impact Statement ("DEIS"). The EPA pointed out that "it is not clear whether each of the numerous improvement concepts will be carried forward for more detailed study with each SIU." AR 4352, Bates # 46920. Likewise, the Army Corps of Engineers stated that the "DEIS is unclear concerning whether all possible build improvement concepts are simply to be identified in Tier 1 or will be reduced in number, and what information will serve as the basis for any such reduction." AR 4254, Bates # 046936. The FHWA tersely responded in an appendix to the FEIS by simply reiterating that "the number of concepts to be advanced into Tier 2 has been reduced." FEIS, Appendix E Bates # 058829, 058841**.** This response does not address the

question of what *alternatives* will be considered during Tier 2 studies for individual SIUs (as distinct from what corridor-length improvement concepts will be considered during the Tier 1 studies).

There is no support for Defendants' attempt to infer that the Tier 1 ROD can be construed as narrowing the range of *alternatives* to be considered in Tier 2 NEPA studies for SIUs simply by virtue of the Tier 1 NEPA decision to advance as the Tier 2 *project* the improvement concept of a variable-lane highway facility of no more than two lanes in each direction. Making such an inference is directly contrary to the FHWA's own Guidance for applying SAFETEA-LU's Statute of Limitations notice to a tiered EIS, which emphasizes the need for the SOL Notice to be very specific about "the issues that will not be open for further analysis or discussion in the Tier 2 proceedings absent substantial changes in the proposed action or significant new and relevant information." SAFETEA-LU Environmental Review Process Final Guidance, Appendix E-62, AR 6627, Bates # 56604. This Guidance specifically states that, if the Statute of Limitations is to be applied to limit the number of alternatives that will be considered in Tier 2, the SOL Notice should "list the Tier 1 alternatives eliminated from Tier 2 analysis, using the same names and alternative numbers that are used in the FEIS." *Id.*

As this Guidance makes clear, had the FHWA intended for the Tier 1 ROD to be a final decision limiting the range of alternatives that would be considered during Tier 2 – in other words, to comply with its Guidance -- the FHWA would have had to list, as a Tier 1 decision, "the Tier 1 alternatives eliminated from Tier 2 analysis, using the same names and alternative numbers that are used in the FEIS," (*e.g.*, "Rail Concepts," "TSM," "Combined Rail/Highway Concepts," etc.) SAFETEA-LU Environmental Review Process Final Guidance, Appendix E-62, AR 6627, Bates # 56604. Here, however, the SOL Notice does not list, describe, or limit the

range of alternatives that will be evaluated when (and if) these future Tier 2 project are proposed. Nor does the section of the Tier 1 ROD purporting to describe "Tier 1 Decisions" do so.

To the contrary, the administrative record shows that the purpose of the Tier 1 NEPA studies was to consider *corridor-length* improvement concepts, and the FHWA explicitly acknowledged that "non-corridor length solutions," including TSM measures, could be considered during Tier 2 studies for individual segments of independent utility. SMF, ¶¶ 30, 51, 52. Thus, the SOL Notice on its face does not support Defendants' view that the Tier 1 ROD represents a final decision to prospectively foreclose alternatives such as rail, TSM (including short-term safety measures and capacity-enhancing design features such as truck climbing lanes) or combined rail-highway improvements during Tier 2 NEPA studies, regardless of whether these measures might satisfy the traffic needs identified at the time the Tier 2 projects are advanced.

Defendants' overly broad reading of the Tier 1 ROD is also contrary to the FHWA's guidance on "tiering" NEPA statements. This guidance likewise emphasizes the need for the FHWA to explain the "tiered" decision-making "so that the parties are fully aware of their opportunities to influence outcomes at various decision points," and also stresses the need "to avoid, to the extent possible, a decision on one section forcing an undesirable outcome on another section." AR 428, Bates # 6168. The Defendants' view that the Tier 1 ROD is a decision to limit the range of alternatives to be considered in future Tier 2 NEPA studies violates these basic tenets. Nowhere in the Tier 1 ROD does the FHWA assert that one of the Tier 1 "Decisions" is that only "no build" and highway improvement alternatives will be considered if when and if individual Tier 2 projects are proposed. Moreover, the artificial limits on the Tier 2 NEPA studies that Defendants now propose would foreclose virtually all substantive

opportunities for avoiding the potentially devastating impacts on natural, cultural, and scenic resources that lie in the path of the widening projects or re-aligned I-81. While the Tier 1 NEPA studies promise that those site-specific impacts will be evaluated in the Tier 2 NEPA studies when specific Tier 2 projects are advanced, these Tier 2 NEPA studies will be meaningless if Defendants have prematurely precluded consideration of any alternatives for avoiding or minimizing these impacts.[8]

In fact, Defendants' proposed interpretation of the SOL Notice is not a necessary consequence of the Tier 1 Decision to advance to Tier 2 the improvement concept of a variable lane highway facility with up to two general purpose lanes in each direction. The purpose of this Tier 1 NEPA decision was to consider *corridor-length* improvement concepts and decide which improvement concept(s) to advance as proposed projects during Tier 2, not to make a final decision as to which alternatives would address travel demands when and if specific highway widening projects are advanced on individual segments of I-81 in the future. Indeed, the Tier 1 ROD emphasizes that the improvement concepts evaluated in the Tier 1 ROD are *not* "the traditional NEPA" alternatives. ROD, at 2 n.1 (AR 6817, Bates # 060524). Instead, the Tier 1 ROD asserts that the purpose of the Tier 1 NEPA study was to "evaluate conceptual improvements . . . consistent with the Tier 1 level of analysis." Tier I ROD, at 5 (Bates # 60527) (emphasis in original).

[8] It is also worth pointing out that this interpretation of the Tier 1 ROD is contrary to the representations by VDOT's counsel to the Court that the Tier 2 NEPA studies would take a "hard look" at all alternatives to avoid impacts to Civil War Battlefields and other protected properties that might be impacted by a particular SIU. Transcript, p. 13 [Document # 51. In a motions hearing on August 26, 2008, in which Defendants opposed the motion of *amici curiae* to participate in this case, Defendants affirmatively represented to the Court that the interests of *amici* in ensuring full consideration of alternatives to any projects that might impact Civil War Battlefields were Tier 2 issues, stating "if we decided to build a particular road ***and a particular alternative***, and we put in for a segment, then that would be part of the tier 2 analysis." *Id.* at 16 (emphasis added). Those reassurances to the Court are belied by the Defendants' position, subsequently articulated in the Stipulation of Partial Dismissal [Document 57], that the Tier 1 ROD precludes consideration of non-highway alternatives (other than "no build") at Tier 2.

The fact that highway improvement concepts were selected as the preferred corridor-length improvement concept to advance to Tier 2 does not mean that this is the only improvement concept that can satisfy project needs and travel demands for individual segments of independent utility. As the Tier 1 NEPA documents made clear, no single corridor-length improvement concept was capable of satisfying the needs for the project. Indeed, the improvement concepts that were advanced to Tier 2 – the variable-lane highway concept and the independent safety and improvement projects – are each non-corridor length alternatives. As the Tier 1 NEPA Documents acknowledge, "non-corridor length solutions" could be considered during Tier 2 studies for individual segments of independent utility. FEIS, at 3-2 (AR 6736, Bates # 059634).

Both the Rail Concepts and the TSM improvement concept are non-corridor-length concepts in the context of the SIUs that are appropriate for consideration during Tier 2. Indeed, the Tier 1 NEPA documents acknowledge that the Rail Concepts, by accomplishing the "[d]iversion of truck volumes may have a bearing on future highway needs." ROD, at 12, AR 6817, Bates # 60534. The same holds true for TSM options, as well as the "composite" or "reasonable solutions" alternative advocated by Plaintiffs. Depending on the traffic demands and needs identified for the particular SIU that is advanced during Tier 2, any of these improvement concepts may well be reasonable alternatives that would reduce or even avoid the adverse impacts associated with a particular highway widening project. As will be discussed in more detail below, if these "non-corridor length" alternatives are found to satisfy the project needs for a given segment of independent utility, NEPA *requires* the FHWA to consider these alternatives during Tier 2 NEPA studies. However, the Defendants' proposed interpretation of the SOL Notice would preclude the very consideration that NEPA would require.

Nor can a decision to limit the range of Tier 2 alternatives be inferred from the Tier 1 "decision" that the chosen alignment for most of the Tier 2 studies, with only two exceptions, would be the existing I-81 corridor. Again, the fact that the FHWA's Tier 2 projects will be within the I-81 corridor does not mean that the Tier 2 NEPA studies will not be required to examine any alternatives outside the existing I-81 corridor for undertaking those Tier 2 projects. As the U.S. Army Corps pointed out in its comments, "How can the Tier 1 EIS be used to identify the corridors to be carried forward when there has been no analysis of the impacts associated with new location sections, which could result in the greatest impacts of any of the options?" AR 4354, Bates # 046935**.** The answer is that NEPA *does* require the FHWA to evaluate alternative corridors during Tier 2 NEPA studies where there is an identified need to avoid or minimize impacts on natural or historic resources.[9]

What Defendants have done is to conflate the Tier 1 decision concerning which improvement concept to advance as proposed Tier 2 *projects* in Tier 2 SIUs, with the Tier 2 question of what range of alternatives to those proposed projects must be considered. This "confusion" was pointed out by the EPA in its comments on the DEIS, which pointed out:

> The document is unclear as to exactly what improvement concept decisions will be made as a result of this study. This confusion in part appears to stem from the undefined relationship between the corridor-long improvement concepts found in Chapter 3 and the SIUs identified in the Executive Summary. The improvement concepts identified in Chapter 3 are not targeted to solve location specific issues. However, near the end of Chapter 3 more focus is put on location specific issues through the identification of highway stretches requiring one additional lane in each direction.

AR 4352, Bates # 46920.

The only interpretation of the SOL Notice and the Tier 1 ROD that is consistent with

[9] Indeed, as the Stipulation of Partial Dismissal makes clear, the SOL cannot be applied to bar Tier 2 claims arising under laws other than NEPA, such as Section 4(f) of the Department of Transportation Act, which requires the FHWA not only to consider alternatives to avoid and minimize impacts on protected parks, recreation areas, wildlife refuges, and historic resources, but actually to select such an alternative if it is feasible and prudent. 23 U.S.C. § 138.

NEPA is simply that the *projects* to be proposed during Tier 2 action will be highway or independent safety and improvement projects.[10] Had the Tier 1 ROD determined that one of the Rail Concepts would best satisfy the corridor-length needs for the project, there would have been no Tier 2 NEPA studies at all, since the FHWA believes that jurisdiction to advance this concept lies with a different set of agencies (*i.e.*, the Federal Railroad Administration and the Virginia Department of Rail and Public Transportation.)[11] What the Tier 1 ROD did not decide – and could not properly decide -- was that widening I-81 was the *only* way to address the needs for improvements to specific SIUs. The Tier 1 ROD expressly and appropriately left this issue unresolved – as it must under NEPA -- until such time (if ever) the Tier 2 projects for the specific SIUs are advanced and Tier 2 NEPA studies are initiated. Accordingly, the plain language of the SOL Notice does not support Defendants' broad reading.

B. The Tier 1 ROD Cannot Be Construed as Making A Final Decision With Respect to Tier 2 Issues That Are Not Presently Ripe for Judicial Review.

Another important reason why the Tier 1 ROD cannot be construed as a final decision to consider only highway improvement/widening alternatives in Tier 2 NEPA studies is that this issue would not be amenable to judicial review within the time frame specified by the SOL Notice because the issue is not presently ripe for judicial review. Since judicial review of this issue is not proper now, the SOL Notice cannot be applied, as Defendants suggest, to bar timely challenges to Tier 2 decisions raising claims concerning the range of alternatives considered in Tier 2 NEPA studies, since to do so would have the effect of precluding judicial review

[10] As the FHWA's own administrative record states: "One of the purposes of the Tier 1 EIS is to serve as the basis for the identification of individual, independent *projects*." AR 6729, Bates # 058911 (emphasis added).

[11] Magistrate Judge Crigler properly recognized this distinction, in responding to Defendants' claim that the interests of *amici curiae* would not be affected until Tier 2 decisions were made to approve construction of specific projects, "What if amici just doesn't want it to go that far [i.e. to Tier 2] and they want to have input here in order to stave off any idea there is going to be a Tier 2 review?" Transcript, p. 13 [Document # 51], excerpts attached hereto.

altogether of the FHWA's NEPA obligations to consider alternatives prior to approving Tier 2 projects. There is no evidence that Congress intended such a preclusion of review, and such a preclusion cannot be implied. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680-81 (1986). Accordingly, because the Tier 1 ROD by its own terms does not support decisions that are not ripe for judicial review, it cannot be construed as a final decision to eliminate alternatives from future Tier 2 NEPA studies.

1. Until Specific Tier 2 Projects Are Approved, and Tier 2 NEPA Studies Are Complete, There is No Final Decision Concerning the Range of Tier 2 Alternatives, and No Concrete Dispute Having A Direct, Immediate Effect on Plaintiffs.

The Defendants' view that the Tier 1 ROD can be construed as a final decision to limit the range of alternatives that the FHWA must consider in the future, if and when Tier 2 projects are advanced, is inconsistent with established principles governing judicial review of agency decisions. The Tier 1 ROD, by its terms, decides only those issues that are presently ripe for a decision. ROD, at 1. Reading the SOL Notice in the manner advocated by Defendants would compel Plaintiffs to anticipatorily seek judicial review in the abstract, without any supporting administrative record, of future decisions that the FHWA may (or may not) make to approve highway widening projects. There is simply no basis in the current administrative record demonstrating that Defendants will advance any particular highway widening project; in fact, the Tier 1 ROD specifically disavows making any decision to approve any particular Tier 2 project. Tier 1 ROD, at 3. Nor is there any basis now for evaluating what the range of reasonable alternatives to a Tier 2 project might be at the time the project is advanced. Indeed, there is no evidence that Defendants will *not* exercise their discretion to comply with their NEPA obligations to evaluate alternatives when (and if) the projects are advanced.

Moreover, the identification of which alternatives could avoid and minimize impacts

natural and historic resources cannot be done until Defendants identify the site-specific impacts and assess the traffic demands of the SIUs proposed during Tier 2. None of the information needed to identify reasonable alternatives is in the Tier 1 NEPA Studies, but instead, will not be assembled until the future Tier 2 projects are proposed and Tier 2 NEPA studies are undertaken. SMF, ¶¶ 44-46, 56. It is therefore premature, at this point, to review the legality of Tier 2 decisions that the FHWA has not yet made, and perhaps never will make. Instead, judicial review of the appropriate scope of reasonable alternatives in Tier 2 NEPA studies cannot be made until actual Tier 2 projects are proposed, with specific design features and footprints, and until after Defendants identify the traffic demands and site-specific impacts for the specific SIUs.

The ripeness doctrine limits the power of federal courts to adjudicate disputes. Its roots are found in the "case or controversy" requirement of Article III of the U.S. Constitution and prudential limitations on the exercise of judicial authority. *See State Farm Mutual Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986). The basic rationale behind the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U. S. 136, 148-49 (1967). *See also Village of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (quoting *Abbott Labs.*, 387 U.S. at 149); *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281 (D.C. Cir 2005).

Here, of course, as Defendants strenuously argued at the motions hearing on August 26, 2008, [12] the Tier 1 NEPA studies do not have a direct and immediate effect on Plaintiffs,

[12] *See* note 1, *infra.*

inasmuch as the Tier 1 Decisions do not approve any specific Tier 2 projects that will impact protected resources, and any subsequent approval of such projects will be preceded by Tier 2 NEPA studies. In the context of challenges to agency decisions, the Supreme Court has held that the finality requirement of the APA (5 U.S.C. § 704) is to be interpreted in "a pragmatic way," with an eye toward protecting agencies from the disruption of piecemeal appeals and toward insuring that judicial review involves concrete disputes over meaningful interests, rather than abstract disputes over hypothetical governmental actions. *Abbott Laboratories v. Gardner*, 387 U. S. at 148-9.

Although a Record of Decision generally represents a final and appealable agency decision, "[e]ven where an agency action is considered final, however, a claim may not be ripe if there is no direct, immediate effect on plaintiffs." *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1094 (10th Cir. 2004) (challenge to a ROD for a federally-funded transportation project was not ripe for review where portion of project that could harm park could not take place until voters approved a local referendum, which was not imminent). *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 188 (4th Cir. 1999) (acknowledging that ripeness concerns might prevent judicial review of a challenge to FHWA's approval of a highway where there is an "obvious factual contingency that put construction [of the highway] in doubt"). Numerous courts have held that lawsuits challenging the FHWA's issuance of a final EIS were not ripe for judicial review where construction of the highway in question was dependent upon future uncertainties or further administrative proceedings.[13]

[13] *See National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982) (action not ripe because the FHWA's approval of the project was conditional upon the preparation of supplemental NEPA documents, stating "A decision by us at this stage would resolve a dispute about a hypothetical highway. Courts have no business adjudicating the legality of non-events."); *Save South Kona Coalition v. Dole*, 575 F. Supp. 277 (D. Haw. 1983) (even though the project has received "corridor approval, Plaintiffs "cannot 'establish a justiciable controversy by simply asserting that the risk of future harm causes them a present injury.'," since "location and design approval are somewhere in the future," and "any work to be done will probably be prefaced by another [EIS]"); *Eastern*

In this case, any "finality" of the Tier 1 ROD is undercut by its express terms indicating that the Tier 1 ROD represents a final decision only with respect to "decision-making on issues that are ripe for decision." Tier 1 ROD, at 1. As the FHWA has emphasized, the primary purpose of the Tier 1 NEPA study is to be "the vehicle for fact-based analyses that support informed decision-making on *corridor-length issues* associated with I-81 in Virginia, such as consideration of the use of tolls as a funding source for improvements and consideration of opportunities for separation of trucks and passenger vehicles." AR 6729, Bates # 058909 (emphasis added). As Defendants have acknowledged in the Stipulation of Partial Dismissal, the SOL Notice does not apply to most claims relating to the adequacy of any Tier 2 NEPA studies that may be undertaken by Defendants in the future. There is no basis for treating differently future claims that may be brought relating to the appropriate range of alternatives that the FHWA must consider prior to approving Tier 2 projects.

In fact, issues relating to the FHWA's future obligations to consider alternatives during any Tier 2 NEPA studies are simply not amenable to judicial review in the context of the present administrative record. As noted above, the administrative record supporting the Tier 1 Decisions does not describe the design, location, traffic needs, or site-specific impacts of any future Tier 2 projects that Defendants may propose, but asserts that this information will be provided in the Tier 2 NEPA documents. SMF, ¶¶ 44-46, 56. As the CEQ regulations recognize, an EIS should "present the environmental impacts of the proposal and the alternatives in comparative form, providing a clear basis for choice among options." 40 C.F.R. § 1502.14. Without an understanding of the environmental impacts of a particular Tier 2 project, which must await completion of the Tier 2 NEPA studies, it is not possible to identify the range of alternatives that

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Connecticut Citizens Action Group v. Dole, 638 F. Supp. 1297 (D. Conn. 1986) (challenge to a highway was not ripe despite the fact that the FHWA had issued a [EIS] where additional federal permits were still required).

should be explored to avoid those impacts. Indeed, the Tier 1 ROD concedes this, by acknowledging that "[a]dditional environmental analysis will be conducted in Tier 2 as appropriate, *and practicable measures to minimize environmental harm will be developed and incorporated at that point when the actual environmental impacts of individual projects are known*." Tier 1 ROD, at 5 (AR 6817, Bates # 060527) (emphasis added).

Moreover, as the courts have recognized, "the goals of an action delimit the universe of the action's reasonable alternatives." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). While the Tier 1 NEPA documents studied the corridor-length needs for improvements to I-81 by assembling traffic demand and accident data for the corridor as a whole (FEIS, at 2-9 to 2-11), the Tier 1 ROD makes no determination of the needs for any particular segment. Accordingly, the Tier 1 ROD makes only a general decision to advance 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 travel demands*." ROD, at 2 (emphasis added). As the FHWA acknowledges, the Tier 2 NEPA studies will need to update the traffic analysis to make a determination of what the 2035 travel demands are for each segment of independent utility when detailed site-specific information is developed. SMF, ¶ 56. Not only is it premature to determine how many lanes are needed until the Tier 2 studies assess the 2035 travel demands, it is equally premature to determine whether there are any other alternatives (such as TSM, rail, or a "composite" alternative) that may satisfy the needs for a particular segment of independent utility until the Tier 2 NEPA studies assess those needs.

Finally, the courts have held that, in determining whether ripeness concerns are present, the court must also evaluate "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 87 U.S. at 149 (1967). Here, deferring judicial review of the

range of alternatives that the FHWA must consider in Tier 2 NEPA studies when (and if) Tier 2 projects are advanced will result in no hardship to either VDOT or the FHWA. Deferral of judicial review on this issue will not interfere with VDOT's ability to advance the Tier 2 projects, or finalize approval of the I-81 project as a toll pilot project under Section 1216(b) of TEA-21. While Defendants may prefer to resolve the issue of the scope of Tier 2 alternatives now, as the Court found in *Eastern Connecticut Citizens Action Group v. Dole,* any "uncertainties" resulting from deferral of judicial review on this issue "are substantially outweighed by the benefits that may be gained by deferring judicial review until the administrative decision to build the proposed highway becomes truly 'final.'" *Eastern Connecticut Citizens Action Group v. Dole,* 638 F. Supp. 1297, 1298 (D. Conn. 1986).

Here, the uncertainties over whether, when, and in what form any proposed Tier 2 projects will move forward render the Tier 2 issues particularly unfit for judicial resolution at this time. Deferral of judicial review until these uncertainties are resolved is warranted in order to "avoid[] the issuance of what could effectively become an advisory opinion." *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 426 (D.C. Cir. 2007). Any interest that VDOT might have in an early resolution of its proposal to limit the scope of alternatives to be considered in Tier 2 is outweighed by the need to ensure "that judicial review involves concrete disputes over meaningful interests, rather than abstract disputes over hypothetical governmental action." *Eastern Connecticut Citizens Action Group v. Dole,* 638 F. Supp. at 1298.

2. Because Challenges to the FHWA's Consideration of Alternatives During Tier 2 NEPA Studies Are Not Presently Ripe for Judicial Review, Application of the Tier 1 SOL Notice To Bar Timely Claims Challenging the Adequacy of Future Tier 2 NEPA Studies Would Unlawfully Preclude Judicial Review.

Plaintiffs are entitled to judicial review of any future Tier 2 decisions pursuant to Chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*. ("A person suffering

legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."). This right of review can only be limited "to the extent that statutes preclude review." *Id.* § 701(a). Since constitutional ripeness concerns prevent this Court from adjudicating the lawfulness of the FHWA's future Tier 2 NEPA studies on the basis of the present administrative record altogether, the application of the SOL Notice to bar any such future claims would preclude judicial review of these future NEPA compliance issues. Such a preclusion of judicial review would be plainly unlawful.

As the Supreme Court has emphasized, the argument that administrative action should be not subject to any judicial review at all "is an extreme position, and one we could be most reluctant to adopt without 'a showing of clear and convincing evidence' to overcome the 'strong presumption that Congress did not mean to prohibit *all* judicial review of executive action.'" *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680-81 (1986) (emphasis added). As the Court stated in *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), "given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action . . . it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review." *Id.* at 496.

In this case, there is no evidence whatsoever, much less clear and convincing evidence, that Congress in any way intended to preclude judicial review. The only legislation on which Defendants can possibly rely to infer such a preclusion is the "limitation of actions" contained in Section 6002 of SAFETEA-LU, 23 U.S.C. § 139(*l*). However, this provision is plainly a statute of limitations, governing only the *timing* of judicial review. There is no evidence that Congress in any way intended for the FHWA to rely on this statute of limitations to preclude judicial review under NEPA. Accordingly, unless this Court were to determine that issues concerning

the scope of alternatives to be considered in Tier 2 NEPA studies are presently ripe for judicial review – a position that Plaintiffs believe cannot be supported – the SOL Notice cannot be applied to bar future judicial review of this issue. Instead, judicial review of this issue must wait until final Tier 2 decisions are made.

II. The FHWA's Attempt to Prospectively Limit Its Future Obligations to Consider Alternatives For Individual Segments of Independent Utility During Tier 2 Violates NEPA.

As discussed above, Defendants' view that the Tier 1 ROD made a final decision to limit the range of alternatives to be considered in Tier 2 NEPA studies for individual segments of I-81 is not supported by the plain language of the Tier 1 ROD and SOL Notice, and claims challenging the adequacy of the FHWA's future Tier 1 NEPA studies are not presently ripe for judicial review. This Court also must refrain from construing the Tier 1 ROD and SOL Notice as making a final decision to prospectively limit the range of alternatives that the FHWA must consider during Tier 2 NEPA studies because a Tier 1 decision to foreclose the future consideration of reasonable, non-corridor-length alternatives during Tier 2 NEPA studies would violate NEPA, and would unlawfully exempt the FHWA from complying with its core responsibilities under NEPA during the Tier 2 NEPA studies.

A. The FHWA Cannot Rely on Its Tier 1 Decision to Foreclose Consideration of Reasonable Alternatives During Tier 2 NEPA Studies.

The FHWA cannot use "tiering" to avoid its obligation under NEPA to consider reasonable alternatives during Tier 2, especially in this case where the administrative record shows that the Tier 1 NEPA studies considered only *corridor-length* improvement concepts, and concluded that specific improvement concepts, such as the Rail and TSM Concepts, would not meet project needs as "stand-alone" concepts. SMF, ¶ 39. The Tier 1 NEPA Documents

explicitly acknowledge that "non-corridor length solutions" could be considered during Tier 2 studies for individual SIUs. SMF, ¶ 51. In fact, the FHWA ultimately advanced independent safety and improvement projects, such as truck climbing lanes, which the FHWA acknowledges *are* components of the rejected, corridor-length TSM improvement concept. *Id.* ¶¶ 34, 51. Thus, in the context of Tier 2 projects, the TSM and Rail Concepts, along with short-term safety projects and targeted improvements to the local roadway network, are all non-corridor length solutions that may well satisfy the individual needs on these SIUs. Nonetheless, the FHWA inexplicably now takes the position that it will not consider such reasonable, non-corridor-length solutions for Tier 2 projects.

In fact, there is ample support in the Tier 1 administrative record that non-corridor length alternatives, such as TSM and Rail Alternatives, either alone or in combination with widening alternatives, may satisfy the needs for improvements to individual SIUs during the Tier 2 studies. The administrative record demonstrates that a combined rail/widening alternative is likely to be effective in avoiding reducing the number of lanes that would need to be added to I-81, and thus reducing impacts on protected natural and historic resources. For example, the FHWA itself claims that "[t]he Tier 1 EIS does not dismiss the TSM Concept," and acknowledges that TSM measures, including the 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). Likewise, the Tier 1 ROD 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).

In light of the Defendants' admissions, the issue before this court is similar to *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006). In *'Ilio'ulaokalani Coalition,* the Ninth Circuit Court of Appeals rejected the Army's argument that decisions about a project's purpose and need made in a first-tier Programmatic EIS (PEIS) implicitly limit the scope or range of alternatives the agency was obligated to consider in a second-tier Supplemental EIS (SEIS). *Id.* at 1097. As the court explained, "[t]he Army can't have it both ways . . . the Army cannot simultaneously argue that the decision had been made in the PEIS and that it had not. Somewhere, the Army must undertake site-specific analysis, including consideration of reasonable alternatives." *Id.* The Ninth Circuit's reasoning applies equally here. The Tier 1 NEPA Documents rejected improvement concepts such as TSM, Rail, and the Combined Rail and widening concepts only as corridor-length improvement concepts, and TSM and Rail were only found not to satisfy the project needs as stand-alone alternatives. The Tier 1 NEPA Documents repeatedly assure that "Tier 1 decisions do not preclude future avoidance and minimization measures as part of Tier 2." FEIS, at 1-2 (AR 6730, Bates # 059576).

Moreover, if the FHWA's division of the I-81 Tier 2 projects into discrete SIUs and logical termini is to have any validity, the FHWA's own "tiering" guidance emphatically directs that under no circumstances may "tiering" be employed to constrain or foreclose reasonable alternatives during the Tier 2 NEPA studies. This FHWA guidance specifically stresses the need, in the first-tier analysis, for "structuring the decision making so that the first tier strategic choices made concerning an improvement strategy for [the interstate highway] *not restrict the*

second tier location and design decisions to alternatives which have highly undesirable consequences, such as unusually severe impacts to communities or the natural environment that might have been avoided with a different first tier strategy." AR 428, Bates # 6169 (emphasis added). If Defendants are permitted to rely on the Tier 1 ROD to evade core NEPA responsibilities to consider alternatives during Tier 2 NEPA studies for individual SIUs, Defendants' "tiering" proposal will result in a shell game that undermines core NEPA values. *See Hoosier Environmental Council v. U.S. Dept. of Transp.* Slip Copy, 2007 WL 4302642, * 8 (S.D. Ind. 2007) ("use of tiering may result in a 'shell game' if not carefully managed . . . Such a result would be impermissible.").

B. The Rail Concepts Are Reasonable Alternatives Even Though The FHWA Believes That They Are Outside of Its Jurisdiction.

The administrative record also makes clear that the combination of Rail Concepts and highway concepts were not selected in part based on the FHWA's view that these concepts were beyond their "control or responsibility," and not because the FHWA determined that the combined rail/highway widening alternative would not satisfy the purpose and need for Tier 2 projects. FEIS, ES-XIV (AR 6744, Bates # 060003); ROD, at 12 (AR 6817, Bates # 060534). The FHWA states in the Tier 1 FEIS and ROD that it has "no control or responsibility over privately owned rail lines and, pursuant to Title 23 USC, cannot fund improvements to those lines," *Id.* However, this position by the FHWA is without legal support and is contrary to the requirements of NEPA.

The CEQ regulations for NEPA clearly state that an EIS must "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c). CEQ guidance for NEPA explains: "Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may

serve as the basis for modifying the congressional approval or funding in light of NEPA's goals and policies." Council on Environmental Quality, "Questions and Answers About the NEPA Regulations," Question 2b. *See Natural Resources Defense Council v. E.P.A.*, 822 F.2d 104, 128 (D.C. Cir. 1987) (an EIS must take a hard look at any alternative that achieves the broad objectives of the proposed action, even if that agency lacks the authority to carry out such an alternative). Therefore, NEPA requires the FHWA to consider the combined Rail/Highway alternative as a means of reducing the environmental impacts associated with a given SIU, notwithstanding the fact that the FHWA believes that implementation of this alternative is outside of its jurisdiction. The FHWA cannot simply dismiss out of hand rail alternatives.

The Commonwealth of Virginia's high level of interest in studying rail improvements to divert truck traffic from I-81 heightens the importance of the FHWA's consideration of rail alternatives as a means of reducing the need for adding highway capacity to I-81 during the Tier 2 NEPA studies. Indeed, the Virginia General Assembly's mandated study of rail improvements is presently underway by the Virginia Department of Rail and Public Transportation. Moreover, Congress established numerous new sources of federal funding for rail projects. SMF, ¶ 28. Given the existence of these funds, a study of rail concepts in the Tier 2 NEPA studies may well be the impetus for considering rail alternatives and ultimately securing funding for rail projects. For these reasons, NEPA requires that this reasonable alternative be considered during the Tier 2 NEPA studies, and cannot be dismissed on the premise that the Tier 1 Decisions allows the FHWA to avoid the consideration of these reasonable alternatives at the Tier 2 stage.

C. Defendants' View of The Tier 1 ROD Would Unlawfully Imply an Exemption from NEPA.

As the foregoing demonstrates, this Court must reject Defendants' interpretation of the Tier 1 ROD, which provides an unlawful exemption from NEPA, because it would result in a

"shell game," which relies on conceptual Tier 1 Decisions concerning which corridor-length improvement concept would best meet the corridor-length needs for I-81 to foreclose the consideration of reasonable, non-corridor-length alternatives during Tier 2 NEPA studies for segments of independent utility advanced as actual projects. This interpretation effectively exempts the FHWA from its core NEPA responsibilities "to rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

As noted above, the stated goal of a project necessarily dictates the range of "reasonable" alternatives, provided that the agency cannot define its objectives in unreasonably narrow terms. *Citizens Against Burlington, Inc,* 938 F.2d at 196. "'A viable but unexamined alternative renders [the] environmental impact statement inadequate.'" *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999) (holding that the agency violated NEPA when it considered only a "no action alternative along with two virtually identical alternatives," and rejected an alternative that would have achieved the stated purposes of the project just as well as the alternatives that were the subject of final consideration). Again, there is no evidence in the Tier 1 administrative record that would support a finding that the future needs for Tier 2 projects on independent SIUs cannot be met by a variety of alternatives, including TSM, rail, or the combination "reasonable solutions" alternatives advanced by Plaintiffs. By prematurely declaring its refusal to consider these reasonable alternatives during Tier 2, and by attempting to rely on the SOL Notice to insulate this future decision from judicial review, the FHWA is attempting to exempt itself from this core NEPA obligation.

It is established law that the courts may not imply an exemption from NEPA. The Supreme Court has repeatedly stated the "cardinal rule" that repeals by implication are disfavored. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978) (quoting *Morton v.*

Mancari, 417 U.S. 535, 549 (1974)). This is particularly true in the context of NEPA, which imposes a mandate that federal agencies comply with the procedural duties imposed by the Act to the "fullest extent possible." *Calvert Cliff's Coord. Comm.v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). Several courts have held that "[a]bsent very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA, or a direct contradiction between that Act and the new legislation, claims under NEPA should be reviewed." *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 367-68 (D.C. Cir. 1981). *See Ely v. Velde*, 451 F.2d 1130, 1134-35 (4th Cir. 1971) **(**compliance with NEPA was not inconsistent with granting statute, stating "there is a strong presumption against one statute repealing or amending another by implication").

Here, there is no evidence that Congress, in enacting SAFETEA-LU's statute of limitations, in any way intended for the statute of limitations to be applied so as to exempt the FHWA from any of its obligations under NEPA. To the contrary, the SOL provision at issue here explicitly provides that "[n]othing in this section shall be construed as superseding, amending, or modifying the National Environmental Policy Act of 1969 or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute." 23 U.S.C. § 391(k)(2). The FHWA's guidance on "tiering" also specifically emphasizes the need to structure the "tiered" NEPA decision-making process so as to avoid constricting the range of alternatives for addressing environmental impacts during the second tier. AR 428 (Bates # 6168-9). Defendants' interpretation would violate that guidance.

As noted above, the Tier 1 NEPA Documents merely consider various corridor-length improvement concepts to determine which concept(s) should be advanced to Tier 2, and do not limit the range of non-corridor-length alternatives that must be considered in Tier 2 NEPA

studies for individual SIUs. The administrative record clearly suggests that a composite rail/highway alternative, or a composite rail/TSM alternative, would very likely address the needs for specific Tier 2 projects on individual SIU, and potentially reduce the need to add additional highway capacity onto I-81. SMF, ¶¶ 51, 52, 58. These alternatives would significantly reduce the impacts on natural and cultural resources abutting I-81, as well as the air pollution, noise, secondary impacts, and fuel-related consumption. SMF, ¶ 49.

Accordingly, any "decision" in the Tier 1 ROD purporting to limit the FHWA's future obligations to consider only alternatives adding new highway capacity during Tier 2 NEPA studies violates NEPA. This court should reject the FHWA's interpretation that the Tier 1 ROD and SOL Notice forecloses all consideration of reasonable alternatives, including rail, TSM, and "composite" alternatives, from future Tier 2 NEPA decisions as a violation of NEPA.

III The FHWA Violated NEPA By Failing to Consider the Alternative of Postponing Issuance of the FEIS Pending Completion of the I-81 Multi-State Freight Rail Study Mandated by the Virginia General Assembly.

As the FHWA's own regulations recognize, one of the primary purposes of a first-tier NEPA document is to "focus on broad issues such as . . . mode choice. 23 C.F.R. § 771.111(g). Thus, an appropriate role of the Tier 1 NEPA studies was to consider different modes of transportation, including rail, in assessing how to meet the needs for improvements within the I-81 corridor. Because a substantial amount of the traffic on I-81 consists of interstate truck traffic, numerous commenters, including the Virginia Department of Rail and Public Transportation ("VDRPT"), urged the FHWA to consider whether improvements to rail corridors and railroad operations could divert truck traffic from I-81, particularly given the fact that freight rail was becoming a competitive alternative to trucking due to the escalating cost of diesel fuel. SMF, ¶¶ 32, 47.

The FHWA responded by considering four Rail Concepts in the Tier 1 DEIS, consisting of improvements to Norfolk Southern Railroad's Shenandoah and Piedmont rail lines, on which Norfolk Southern currently operates freight rail service, located solely within the Commonwealth of Virginia. SMF, ¶¶ 33, 35. However, the Tier 1 DEIS did not include a rail concept involving improvements to rail corridors in more than one state, based on a May 2004 memorandum asserting that the costs of studying the multi-state rail improvement concept is too high to justify "spending public dollars" on the NEPA studies of rail improvements in numerous states "that the FHWA cannot fund and Virginia cannot implement." FHWA memorandum dated May 4, 2004, at 2 (AR 1868, Bates # 058799). The memorandum therefore concluded that it would not be "reasonable or practicable" to conduct a NEPA study in more than one state. *Id.*

In May 2006, the Virginia General Assembly passed legislation (HB 1581), signed into law by the Governor of Virginia, requiring VDOT and the Rail Advisory Board to study multi-state rail as a means of diverting truck traffic off of I-81 ("the I-81 Freight Rail Study"). The I-81 Freight Rail 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. *See* SMF, ¶ 36 and Exhibit 12. The study is also required to 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.

Accordingly, numerous commenters urged the FHWA to defer finalizing the Tier 1 NEPA studies until the completion of the I-81 Freight Rail Study mandated by the General Assembly so as to incorporate the findings of this study into the Tier 1 NEPA process. SMF, ¶

50. Indeed, 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 Environmental Impact Statement and in developing the Tier II [EIS], the findings of the ongoing, independent Interstate 81 Freight Rail Study should be fully utilized*." FEIS, Appendix (AR 6728, Bates # 058813) (emphasis added).

Despite the availability of new sources of federal funding for rail improvements enacted as part of the 2005 transportation reauthorization legislation (SAFETEA-LU) (SMF ¶ 28), the FHWA continued to rely on the May 2004 memorandum to justify its refusal to evaluate the multi-state rail improvement concept. In an appendix to the FEIS, the FHWA continued to insist that this alternative was "unreasonable" due to its costs, and also asserted that the action of the General Assembly in mandating the I-81 Freight Rail Study did not meet the standards in the FHWA's regulations for supplementing an EIS (23 C.F.R. § 771.130). While the FEIS briefly acknowledges the resolution of the Virginia Commonwealth Transportation Board ("CTB"),[14] the administrative record contains no evidence that the FHWA ever responded to the specific directive in the CTB resolution that the I-81 Freight Rail Study should be fully utilized in both the Tier 1 and Tier 2 NEPA studies.

In fact, the I-81 Freight Rail Study has been funded by the General Assembly and is well underway, and thus the FHWA's primary rationale for refusing to evaluate multi-state rail as an improvement concept has been eliminated. Nowhere in the administrative record does the FHWA acknowledge that the I-81 Freight Rail Study eliminates one of the primary rationales in the FHWA's May 2004 memorandum for refusing to consider multi-state rail. Moreover, the FHWA's argument that the existence of this study does not satisfy the standards in the FHWA's

[14] *See* FEIS, at ES-xiv (AR 6744, Bates # 060003).

regulations for supplementing an EIS is irrelevant, inasmuch as the standard for supplementation of an EIS is not applicable to the question of whether an alternative is reasonable and should have been evaluated in the original EIS. The FHWA's view that the I-81 Freight Rail Study is wholly independent of the I-81 NEPA studies, and its suggestion that rail projects that are already *funded* will be considered in assessing the traffic demands on SIUs (SMF, ¶ 58) ignores the "action-forcing" role of NEPA's study of alternatives. 40 C.F.R. § 1500.1(a). Thus, the FHWA has failed to provide any cogent, relevant reason why the FEIS should not be deferred pending the completion of the I-81 Freight Rail Study.

There is no compelling reason why the FHWA needed to make a final decision on the improvement concept(s) to be advanced to Tier 2 in the Tier 1 ROD. One of primary reasons why a "tiered" EIS process was adopted in the first instance was to comply with the terms of the FHWA's conditional provisional acceptance of I-81 as a toll pilot project, which was conditioned on timely completion of 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. SMF, ¶¶ 16, 17. This purpose could have been met by the issuance of the Tier 1 ROD supporting the decision to toll I-81, based on the thorough evaluation of this issue in the Tier 1 NEPA Documents. Given the fact that the Tier 1 NEPA documents ultimately determined that none of the corridor-length improvement concepts evaluated in the Tier 1 NEPA documents would, on their own, have satisfied the corridor-length needs for the project, the high level of public interest in evaluating multi-state rail, and the fact that such a study of multi-state had now been funded and was underway, the Tier 1 ROD should have refrained from making a final decision on the improvement concepts to advance to Tier 2 until after the completion of the I-81 Freight Rail Study.

By the same token, there are numerous, compelling reasons why postponing the issuance of the FEIS in order to take into account the findings of the I-81 Freight Rail Study is a reasonable alternative. The I-81 Freight Rail Study will offer substantial insight into the question of whether and to what degree multi-state rail can be used to address the transportation needs within the I-81 corridor, and incorporating these findings in the I-81 NEPA studies may serve as an impetus for securing funding for this concept, and encouraging states such as Tennessee to explore cooperative programs to study rail improvements to address I-81 corridor issues in their states. SMF, ¶ 27. And yet, the FHWA has proceeded to advance only highway capacity-enhancing projects to Tier 2 while dismissing rail as a possible improvement concept, without waiting for the very study that would inform the decision. The FHWA will now make irretrievable commitments of resources to Tier 2 projects that will enhance highway capacity on individual segments of independent utility without any consideration of the possibility that multi-state rail would be a better solution to the overall transportation needs on I-81.

Moreover, as the FHWA has already pointed out, the FHWA does not believe that completion of this study will satisfy the standard in the FHWA's regulations for a supplemental EIS, since completion of the I-81 Freight Rail Study would not constitute a "change[] to a proposed action" that "would result in significant impacts not evaluated in an EIS." 23 C.F.R. § 771.130. While the FHWA does have discretion to revisit Tier 1 Decisions if "substantial new information arises that is material to these decisions," by the time the I-81 Freight Rail Study is completed, it will be too late for this study to actually inform the real world decisions about whether to invest public funds in rail as a reasonable, feasible improvement concept that will lessen our country's reliance on fossil fuels, reduce the need for additional lanes on I-81, and reduce the substantial contribution to global warming made by the heavy pollutants emitted from

trucks.

The FHWA's failure to address in any meaningful way the CTB's request that the Tier 1 *and* Tier 2 NEPA studies incorporate the findings of the I-81 Freight Rail Study is a fatal flaw. As numerous courts have held, "Comments from responsible experts or sister agencies disclosing new or conflicting data or opinions . . . may not simply be ignored. There must be good faith, reasoned analysis in response." *Silva v. Lynn,* 482 F.2d 1282, 1285 (1st Cir. 1973). *See Hughes River Conservancy v. Glickman*, 81 F.3d 437, 443, 445 (4th Cir. 1996) (agency failed to take a hard look under NEPA when it failed to address, in environmental document, comments of EPA and Fish & Wildlife Service).[10]

In particular, the FHWA should have formally responded to the official comments of the Commonwealth Transportation Board. Appointed by the governor, the 17-member Commonwealth Transportation Board ("CTB") establishes the administrative policies for Virginia's transportation system. http://www.ctb.virginia.gov/. The *pro forma* acknowledgment of this issue in the appendix to the FEIS is not legally sufficient. The CEQ regulations require that opposing views be reflected at the "appropriate point." 40 C.F.R. § 1502.9(b). The placement of agency criticisms in comments appendix is not the "appropriate point" to reflect important conflicting views of responsible agencies. *Friends of the Earth v. Hall*, 693 F. Supp. 904, 924 (W.D.Wash.1988). The FHWA's failure to respond to the request of the CTB and others that the FHWA incorporate the findings of the state-funded I-81 multi-state freight rail study into the

[10] *See also Sierra Club v. United States Army Corps of Eng'rs,* 701 F.2d 1011, 1030 (2d Cir. 1983) ("the court may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise"); *Sierra Club v. Marsh,* 816 F.2d 1376, 1388 (9th Cir. 1987) (court deferred to the "more appropriate expertise" of Fish & Wildlife Service, rather than Army Corps, regarding protection of endangered species from highway and flood control project); *State of Alaska v. Andrus*, 580 F.2d 465, 475 n.44 (D.C. Cir. 1978) (heightened obligation to respond to the contrary views of "mission oriented" agencies).

Tier 1 NEPA process therefore violates NEPA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2008, I electronically filed the foregoing Memorandum of Points and Authorities in Support of Summary Judgment (Corrected) 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 persons entitled to such notification:

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