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January 7, 2008

Via Messenger

Molly Dwyer
Acting Clerk of Court
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

**Re: Sierra Club, et al. v. U.S. Department of Transportation, et al.,
Ninth Circuit Case No. 07-73415
Submission Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure**

Dear Ms. Dwyer:

Petitioners respectfully submit new authority affording a ground to set aside the pilot program beyond those in petitioners' briefs. Section 136 of Title I of Division K of the 2008 Consolidated Appropriations Act, signed into law on December 26, 2007, forbids funding the pilot program. Attachment A, Exh. 1. FMCSA nonetheless intends to continue the program. Attachment A, ¶2.

Section 136 prohibits expenditures "to establish a cross-border motor carrier demonstration program to allow Mexico-domiciled motor carriers to operate beyond the commercial zones." This prohibition encompasses maintaining the program. The definition of "establish" includes "to introduce and cause to grow and multiply." *Merriam-Webster Collegiate Dictionary* at 397 (10th ed. 1998).

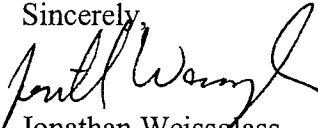
If there were any doubt, however, legislative history conclusively demonstrates that Section 136 bars continuation of the pilot program. Extensive debate on the Senate floor, spanning two days and more than 20 pages in the Congressional Record (Attachment B), shows that Congress meant to forbid FMCSA from continuing the program. Senator Byron Dorgan

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introduced the amendment that became Section 136 four days after FMCSA began the program, explaining that the provision would “prohibit the use of funds to continue this pilot project.” 153 Cong. Rec. S11299 (Sept. 10, 2007). He stated that the amendment means “[DOT] may not go forward with this pilot project” *Id.* at S11393 (Sept. 11, 2007); *see also id.* at S11389, S11391 (Sen. Dorgan: provision would “stop this pilot project”); *id.* at S11315 (Sept. 10, 2007) (Sen. Lott: provision would “stop this temporary pilot program”); *id.* at S11468 (Sept. 12, 2007) (Sen. McCain: provision “prevent[s] the pilot from going forward”). Other statements confirm this conclusion. Attachment A, Exh. 2 (Sen. Dorgan Sept. 10, 2007 news release stating provision “would cut off funds for implementing the program”), Exh. 3 (Sen. Dorgan Jan. 3, 2008 letter attaching Legislative Counsel statement that “amendment we drafted” was “intended to preclude the carrying out of . . . the pilot program put into effect in September 2007”).

In contrast, FMCSA’s reading of Section 136 ignores the legislative history and renders the provision meaningless.

Petitioners will submit supplemental briefing if the Court so requests.

Sincerely,

Jonathan Weissglass

cc: All Counsel (proof of service attached)

PROOF OF SERVICE

CASE: *Sierra Club, et al. v. United States Department of Transportation, et al.*
U.S. Court of Appeals, Ninth Circuit, Case No. 07-73415

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On **January 7, 2008**, I served the following document(s):

1. Submission Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure

- (A) By United Parcel Service: I am readily familiar with the practice of Altshuler Berzon LLP for the collection of overnight courier deliveries and I caused each such envelope to be delivered to the United Parcel Service at San Francisco, California, to be delivered to the office of the addressee on the next business day.
- (B) By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed this January 7, 2008, at San Francisco, California.



Sally Mendez