1 STEPHEN P. BERZON (SBN 46540) JONATHAN WEISSGLASS (SBN 185008) 2 BARBARA J. CHISHOLM (SBN 224656) Altshuler Berzon LLP 3 177 Post Street, Suite 300 San Francisco, CA 94108 4 Telephone: (415) 421-7151 Facsimile: (415) 362-8064 5 E-Mail: sberzon@altshulerberzon.com E-Mail: jweissglass@altshulerberzon.com 6 E-Mail: bchisholm@altshulerberzon.com 7 Attorneys for All Plaintiffs except Owner-BONNIE I. ROBIN-VERGEER Public Citizen Litigation Group Operator Independent Drivers Association 8 1600 20th Street, N.W. ALBERT H. MEYERHOFF (SBN 54134) Washington, D.C. 20009 9 Telephone: (202) 588-1000 Lerach Coughlin Stoia Geller Rudman & Facsimile: (202) 588-7795 Robbins, LLP 10 E-Mail: bonnierv@citizen.org 9601 Wilshire Blvd., Suite 510 Los Angeles, CA 90210 11 Attorney for Plaintiff Public Citizen Telephone: (310) 859-3100 Facsimile: (310) 278-2148 12 E-Mail: alm@lerachlaw.com 2210 13 Attorney for All Plaintiffs 14 UNITED STATES DISTRICT COURT 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA 16 SAN FRANCISCO/OAKLAND DIVISION 17 SIERRA CLUB; PUBLIC CITIZEN; Case No. ENVIRONMENTAL LAW FOUNDATION; 18 COMPLAINT FOR DECLARATORY AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS; BROTHERHOOD OF INJUNCTIVE RELIEF 19 TEAMSTERS, AUTO AND TRUCK Administrative Procedure Act Case DRIVERS, LOCAL 70; and OWNER-20 OPERATOR INDEPENDENT DRIVERS ASSOCIATION, 21 Plaintiffs, 22 V. 23 UNITED STATES DEPARTMENT OF 24 TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; 25 MARY E. PETERS, Secretary of the U.S. Department of Transportation; JOHN H. 26 HILL, Administrator of the Federal Motor Carrier Safety Administration; and THE 27 UNITED STATES, 28 Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the federal government's adoption and implementation of a pilot program authorizing up to 100 trucking companies based in Mexico to perform long-haul operations within the United States, in violation of public notice and comment requirements federal law imposes on such pilot programs. 49 U.S.C. §31315. The pilot program is a matter of significant public concern with serious environmental and public safety repercussions. Plaintiffs seek a declaratory judgment and an injunction requiring the United States Department of Transportation ("DOT") and the Federal Motor Carrier Safety Administration ("FMCSA") to comply with the law by providing public notice of the pilot program and an opportunity for the public, including Plaintiffs and their members, to comment on the program, or else to set aside the pilot program as unlawful.

JURISDICTION

- 2. This action arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§701-06. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1331 (federal question), 28 U.S.C. §1361 (original jurisdiction of district courts in mandamus actions), and 5 U.S.C. §§701-06 (Administrative Procedure Act).
- 3. The relief sought is authorized by 28 U.S.C. §2201 (declaratory judgment) and 28 U.S.C. §2202 (injunctive relief).
- 4. The Court has authority to review the actions of Defendants and to grant the relief requested pursuant to 5 U.S.C. §§701-06 (Administrative Procedure Act).

VENUE

5. Venue is proper in this District pursuant to 28 U.S.C. §1391(e) because this is a civil action in which Defendants are officers or employees of the United States acting in their official capacity or under color of legal authority or an agency of the United States and because several Plaintiffs reside in this District. Venue is also proper within this District because members of the Plaintiff organizations who have an interest and desire to comment on the pilot program, and who reside in this District, have been denied the opportunity to do so by Defendants' failure to comply with 49 U.S.C. §31315.

INTRADISTRICT ASSIGNMENT

6. Assignment of this case to the San Francisco and Oakland Division is proper under N.D. Cal. Local Rule 3-2(c) and (d). Plaintiff Sierra Club is headquartered in San Francisco, California. Plaintiffs Environmental Law Foundation ("ELF") and Brotherhood of Teamsters, Auto and Truck Drivers Local 70 ("Local 70") are headquartered in Oakland, California. Plaintiffs have numerous members adversely affected by Defendants' failure to comply with the statutorily required notice and comment provisions of 49 U.S.C. §31315, who live in the counties encompassed by the San Francisco and Oakland Division of this Court.

THE PARTIES

- 7. Plaintiff Sierra Club is a monprofit public benefit corporation based in San Francisco, California, and is the largest and oldest environmental organization in the United States. The purposes of the Sierra Club are to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club has more than 750,000 members nationwide, including thousands of members in this District and in the states affected by the agency action challenged here. Sierra Club members live, work, and recreate in the areas affected by implementation of the cross-border trucking pilot program, are at risk of concrete injuries posed by the program's implementation, and seek participation in a public process on the approval of the program.
- 8. Plaintiff Public Citizen is a consumer advocacy non-profit organization founded in 1971 that has a long history of advocacy on matters relating to highway safety and environmental protection before Congress, administrative agencies, and the courts. Public Citizen has approximately 100,000 members nationwide, including members in the U.S.-Mexico border region and in this District. Public Citizen's members are adversely affected by implementation of the pilot program.
- 9. Plaintiff ELF is a California nonprofit founded on Earth Day, 1991, dedicated to the preservation and enhancement of human health and the environment, and headquartered in Oakland, California. ELF is dedicated to working for environmental justice through a program of effective enforcement of federal, state, and local environmental laws on behalf of people who are

disproportionately affected by environmental harm, including workers, communities without power, minority communities, women of child-bearing age, and children. ELF is adversely affected by implementation of the pilot program.

- 10. Plaintiff International Brotherhood of Teamsters ("Teamsters") is a labor union as that term is defined by the National Labor Relations Act, 29 U.S.C. §151 et. seq. The Teamsters represents the interests of 1.4 million members (approximately 10 percent of the entire unionized workforce in the United States) and is one of the largest and most diverse labor unions in the world. These members are located in all 50 states of the union, including in this District. The Teamsters' broad purposes include furthering the interests of its members and advancing the welfare of all people, including by protecting the environment and the safety and health of its members. The Teamsters' members are adversely affected by implementation of the pilot program.
- Plaintiff Local 70 is a labor union as that term is defined by the National Labor Relations Act, 29 U.S.C. §151 et. seq. Local 70 is headquartered in Oakland, California, and has jurisdiction in Alameda County, California. Local 70 has approximately 4,000 members residing primarily in this District and its primary jurisdiction is truck drivers. Local 70's broad purposes include furthering the interests of its members and advancing the welfare of all people, including by protecting the environment and the safety and health of its members. Local 70's members are adversely affected by implementation of the pilot program.
- 12. Plaintiff Owner-Operator Independent Drivers Association ("OOIDA") is a not-for-profit 501(c)(6) corporation organized under the laws of Missouri and headquartered in Grain Valley, Missouri. OOIDA is an international trade association representing the interests of professional truckers. OOIDA has more than 150,000 members across the United States and Canada with approximately 5,300 of those members residing in California. OOIDA's mission is to serve owner-operators, small fleets, and professional truckers; to work for a business climate where truckers are treated equally and fairly; to promote highway safety and responsibility among all highway users; and to promote a better business climate and efficiency for all truck operators. OOIDA's members are adversely affected by implementation of the pilot program.

- 13. Plaintiffs bring this action on their own behalf and on behalf of their members. Plaintiffs and Plaintiffs' members have an interest in receiving public notice of the pilot program and in commenting on the pilot program. Moreover, the pilot program involves the entry of Mexico-domiciled trucks into the United States beyond the current commercial border zones, including into the communities in which Plaintiffs' members reside and work. The program will thus have environmental, economic, public health, and public safety consequences for Plaintiffs' members, including by threatening the air Plaintiffs' members breathe every day and by increasing the risks of traveling on the nation's roadways.
- 14. Defendant DOT is a federal agency of the United States within the meaning of 42 U.S.C. §§4332 and 7506(c), and 40 C.F.R. §§51.852, 93.152, and 1508.12. Leadership of the DOT is provided by the Secretary of Transportation and the Office of the Secretary, which oversee the formulation of national transportation policy.
- Defendant FMCSA was created as part of the DOT on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999). FMCSA is a federal agency of the United States within the meaning of 42 U.S.C. §§4332 and 7506(c), and 40 C.F.R. §§51.852, 93.152 and 1508.12. The Secretary of DOT has delegated to FMCSA authority to carry out the Secretary's functions with respect to the registration and operation of motor carriers. 49 C.F.R. §1.73.
- 16. Defendant Mary E. Peters is sued in her official capacity as the Secretary of DOT ("Secretary"). Secretary Peters announced the pilot program at issue in this Complaint in February 2007.
- 17. Defendant John H. Hill is sued in his official capacity as the Administrator of the FMCSA within the DOT. On information and belief, Administrator Hill has ordered or caused FMCSA personnel to begin implementing the pilot program announced by the Secretary.

FACTUAL ALLEGATIONS

The Pilot Program

18. Presently, Mexico-domiciled motor carriers operate in the United States mainly in commercial zones along the southern borders of California, Arizona, New Mexico, and Texas. These zones vary in size from approximately three to 20 miles inland from the United States border.

- 19. On or about February 22, 2007, the Secretary announced a pilot program that will authorize up to 100 Mexican trucking companies to perform long-haul operations within the United States, beyond the current commercial zone. The Secretary announced that safety inspectors from the FMCSA were traveling to Mexico as part of the pilot program.
- 20. On or about February 23, 2007, the Secretary specifically announced a "year-long pilot program" that authorizes a "select group of Mexican trucking companies . . . to make deliveries beyond the 20-25 mile commercial zones currently in place along the Southwest border." The Secretary further stated: "In about 60 days, when the initial safety audits are done and proof-of-insurance verified, the first Mexican trucks to be authorized under the pilot program will begin traveling beyond the border areas."
- On or about March 8, 2007, the Secretary testified before the United States Senate Transportation, Housing and Urban Development, and Related Agencies Appropriations Subcommittee that "the Administration is implementing a limited one-year demonstration project to authorize up to 100 Mexican trucking companies to perform long-haul operations within the U.S." The Secretary further testified that DOT expected "the 100 Mexican trucking companies in this program [to] operate approximately 1,000 trucks in the U.S.," and that, pursuant to the pilot program, FMCSA is conducting 100 percent of pre-authorization safety audits of Mexico-domiciled trucks in Mexico.
- 22. On information and belief, DOT and FMCSA have begun implementing the pilot program, including by conducting safety inspections in Mexico of trucks that will take part in the pilot program, and by reviewing, accepting, and processing applications from trucking companies that will be participants in the pilot program.
- 23. The Secretary has not provided detailed information about the pilot program to the public. Indeed, despite numerous requests by Congress and by environmental, public interest, labor, and industry organizations to the Secretary and DOT for information about the pilot program, the details of the pilot program have been shrouded in secrecy.

24. 49 U.S.C. §31315 governs the Secretary's authority to implement pilot programs relating

to commercial motor vehicle operators. The statute provides in part:

The Secretary may conduct pilot programs to evaluate alternatives to regulations relating to, or innovative approaches to, motor carrier, commercial motor vehicle, and driver safety. . . . The Secretary shall publish in the Federal Register a detailed description of each pilot program, including the exemptions to be considered, and provide notice and an opportunity for public comment before the effective date of the program.

49 U.S.C. §31315(c)(1). The statute also specifies several elements that must be included in each pilot program plan. *Id.* §31315(c)(2).

The Administrative Procedure Act

49 U.S.C. Section 31315

- 25. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." 5 U.S.C. §702. The APA further provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. §704. The APA defines "agency action" as an "agency rule, order . . . or the equivalent or denial thereof, or failure to act." 5 U.S.C. §551(13).
- 26. The APA provides that a reviewing court "shall (1) compel agency action unlawfully withheld " 5 U.S.C. §706(1). The APA further provides that a reviewing court "shall . . . (2) hold unlawful and set aside agency action, findings and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (D) without observance of procedure required by law."

The Pilot Program Does Not Comply with 49 U.S.C. §31315

- 27. Defendants have not complied with the requirements of 49 U.S.C. §31315.
- 28. Defendants have proposed, approved, adopted, and begun implementing a pilot program that would authorize up to 100 trucking companies based in Mexico to perform long-haul operations within the United States. This pilot program is a pilot program within the meaning of 49 U.S.C. §31315.
- 29. The Secretary has provided very little public information about the pilot program. The Secretary has not issued any public decisional document regarding the pilot program.

- 30. The Secretary has stated that the first trucks would be authorized under the pilot program to begin traveling beyond the commercial zones approximately 60 days after February 23, 2007.
- 31. The Secretary is obligated under 49 U.S.C. §31315 to publish a detailed description of the pilot program in the Federal Register. She is further obligated to provide notice and an opportunity for public comment on the pilot program prior to the effective date of the program.
- 32. As of the date of the filing of this Complaint, the Secretary has not published any description, let alone a detailed description, of the pilot program in the Federal Register. Nor has the Secretary provided notice and an opportunity for public comment on the pilot program.

PLAINTIFFS' CLAIM FOR RELIEF

First Claim

(5 U.S.C. §706)

- 33. Plaintiffs incorporate by reference paragraphs 1 to 32, above.
- 34. By proposing, approving, adopting, and implementing the pilot program without complying with the procedural requirements of 49 U.S.C. §31315, Defendants have withheld agency action that is required by law, have acted in a manner that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and have acted without observance of procedure required by law, in violation of the APA, 5 U.S.C. §706(1), (2)(A), and 2(D).
- 35. Defendants' failure to comply with 49 U.S.C. §31315 and their violations of the APA, 5 U.S.C. §706, are injuring Plaintiffs as described in paragraphs 7 through 13 above.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- 1. Enter a declaratory judgment that Defendants' failure to publish a detailed description of the pilot program in the Federal Register and their failure to provide notice and an opportunity for public comment prior to the pilot program's effective date violate 49 U.S.C. §31315 and the APA, 5 U.S.C. §706;
- 2. Preliminarily and permanently enjoin Defendants from further implementing the pilot program unless and until they have complied with the requirements of 49 U.S.C. §31315;

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- 3. Award Plaintiffs their costs, attorneys' fees, and other disbursements in this action pursuant to the Equal Access Justice Act, 28 U.S.C. §2412(d), and other authority; and
 - 4. Grant Plaintiffs such other and further relief as the Court may deem just and proper.

Dated: April 23, 2007

STEPHEN P. BERZON JONATHAN WEISSGLASS BARBARA J. CHISHOLM ALTSHULER BERZON LLP 177 Post Street, Suite 300 San Francisco, CA 94108 Telephone: (415) 421-7151 Facsimile: (415) 362-8064

Attorneys for All Plaintiffs except Owner-Operator Independent Drivers Association

ALBERT H. MEYERHOFF LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP 9601 Wilshire Blvd., Suite 510 Los Angeles, CA 90210 Telephone: (310) 859-3100 Facsimile: (310) 278-2148

Attorney for All Plaintiffs

BONNIE I. ROBIN-VERGEER PUBLIC CITIZEN LITIGATION GROUP 1600 20th Street, N.W. Washington, D.C. 20009 Telephone: (202) 588-1000 Facsimile: (202) 588-7795

Attorney for Plaintiff Public Citizen

Barbara J. Chisholm