No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, vs. UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, Respondents.	) Petition for Review of Final) Agency Action by Federal) Motor Carrier Safety) Administration

PETITIONERS' EMERGENCY MOTION FOR STAY UNDER CIRCUIT RULE 27-3; DECLARATION OF JONATHAN WEISSGLASS

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, petitioners state as follows:

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(ii) The nature of the emergency is as follows:

Currently, Mexico-domiciled trucks are permitted in the United States only in limited areas close to the United States-Mexico border. Respondents Department of Transportation ("DOT"); Federal Motor Carrier Safety Administration ("FMCSA"); Mary E. Peters, the Secretary of DOT; and John H. Hill, the Administrator of FMCSA, will soon initiate a pilot program to open the border for the first time to permit Mexico-domiciled trucks to operate throughout the United States. 72 Fed. Reg. 46263-64 (Aug. 17, 2007). But respondents have failed to comply with Congress' explicit statutory prerequisites for the program, including the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110-28), and 49 U.S.C. §31315(c).

Petitioners bring this motion as an emergency motion because the time frame for hearing and resolution of a regular motion is too lengthy. Counsel for respondents has stated that the first few grants of operating authority for Mexico-

domiciled trucks to operate throughout the United States will occur on September 1, 2007. The first trucks will start entering at some point thereafter.

(iii) Counsel for respondents were notified of the emergency motion on August 27, 2007, as set forth in the accompanying declaration of Jonathan Weissglass. Petitioners' counsel on that date asked respondents' counsel if respondents would stay implementation of the program that is the subject of this emergency motion, and respondents' counsel responded that respondents would not stay implementation of the program. Counsel for respondents will be served with the motion by e-mail the morning of August 29, 2007.

EMERGENCY MOTION FOR STAY

To protect the public health and safety and to ensure compliance with Congress' statutory mandates, petitioners respectfully move for a stay as follows:

(1) prohibiting respondents from granting authority to a Mexico-domiciled motor carrier to operate beyond United States municipalities and commercial zones on the United States-Mexico border until respondents have:

(a) complied with the mandate under 49 U.S.C. §31315(c)(2)(C) that the plan for the pilot program "yield statistically valid findings," which is a prerequisite to granting such authority under the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110-28), §6901(a)(2), and

(b) demonstrated that U.S.-domiciled motor carriers have "simultaneous and comparable" authority to operate in Mexico as explicitly required in the same 2007 Act, §6901(a)(3); and

(2) prohibiting respondents from initiating any pilot program that would allow Mexico-domiciled motor carriers to operate beyond the border zone until the Secretary of Transportation has published in the Federal Register information regarding inspections of Mexico-domiciled motor carriers granted authority to operate beyond the border zone and provided "sufficient opportunity for public notice and comment," as mandated by the 2007 Act, §6901(b)(2)(B)(i).

This motion is based on the accompanying memorandum of points and authorities and declaration, and the complete files in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On August 17, 2007, the Federal Motor Carrier Safety Administration ("FMCSA") issued a notice and response to public comments in the Federal Register announcing that it intends to open the U.S.-Mexico border for the first time to allow Mexico-domiciled trucks to operate in the United States beyond existing commercial zones on the U.S.-Mexico border. 72 Fed. Reg. 46263 (Aug. 17, 2007).[1] In May of this year, Congress passed the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110-28 ("2007 Act"). In so doing, Congress expressly mandated that Mexico-domiciled motor carriers could operate beyond the border zone *only* if "granting such authority is first tested as part of a pilot program." 2007 Act, §6901(a)(1). Congress simultaneously imposed strict conditions on the initiation of any such pilot program. 2007 Act, §6901.

These conditions are critical to Congress, petitioners, and the general public. Allowing Mexico-domiciled trucks into this country for the first time poses significant concerns. The August 17, 2007 Federal Register Notice is replete with comments from petitioners and others highlighting the safety, environmental, security, economic, and other risks that opening the border raises.

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[1] The Federal Register notices and congressional enactments petitioners cite are included in a separately-filed Appendix of Congressional Enactments and Federal Register Notices in Support of Emergency Motion for Stay.

E.g., 72 Fed. Reg. at 46266 (summarizing comments in opposition). For instance, petitioners Public Citizen and International Brotherhood of Teamsters raised significant concerns about the capacity of inspection facilities at the border and FMCSA's ability to ensure compliance with U.S. traffic and safety laws. *Id.* at 46267, 46269. Petitioners also raised environmental issues about the emissions from Mexico-domiciled trucks. *Id.* at 46273. Other comments discussed problems with the drug testing regime for drivers. *Id.* at 46275, 46282. As a final example, commenters discussed concerns that such illegal activity as drug trafficking and illegal immigration will increase. *Id.* at 46286.

In their rush to open the border, FMCSA and the Department of Transportation ("DOT") are commencing a pilot program that does not comply with the congressional requirements that are statutory prerequisites for the program to begin. The point of a pilot program is to be a test to determine whether and to what extent to allow cross-border trucking. Congress *mandated* that the program be conducted in a manner that will provide Congress, the agencies, and the public with usable, statistically valid data about how cross-border trucking will work in practice. That information will enable interested parties to evaluate safety and other issues. Respondents, however, have put in place a pilot program that does not meet critical statutory mandates. A stay is needed so that the program is conducted the way Congress mandated and that proper data is obtained.

If the pilot program proceeds, it would violate the 2007 Act in several ways, the most blatant of which are set forth in this emergency motion. First,

respondents have failed to demonstrate that the pilot program will involve a sufficient number of participants to yield statistically valid findings, a required, minimum element of the pilot program. 2007 Act, §6901(a)(2); 49 U.S.C. §31315(c)(2)(C). Second, respondents intend to initiate the pilot program without publishing in the Federal Register information about the inspections of the Mexico-domiciled motor carriers that will have authority to operate beyond the border zone and without providing sufficient opportunity for public comment, in violation of the 2007 Act's public notice and comment provisions. 2007 Act, §6901(b)(2)(B)(i). Finally, respondents have not demonstrated that there will be simultaneous and comparable authority for U.S. carriers to operate in Mexico, which is a prerequisite for the pilot program. 2007 Act, §6901(a)(3).

Despite these and other failures, FMCSA plans to proceed with the pilot program once the DOT Inspector General provides a report to Congress and the Secretary of DOT ("Secretary") takes any actions required by that report. 72 Fed. Reg. at 46263-64. The DOT Inspector General and the Secretary are expected to take these actions soon, and respondents intend to grant authority to the first few Mexico-domiciled motor carriers to operate in the U.S. beyond the border zone on September 1, 2007. Declaration of Jonathan Weissglass ("Weissglass Dec.") ¶2. The trucks will enter the country at some point thereafter.

Congress required that the first grant of operating authority to Mexico-domiciled trucks to operate beyond the border zone be made as part of a pilot program, under strict procedures to permit a true test of whether the dramatic step

of opening the border will work – or not. FMCSA will soon initiate a program that fails to comply with statutory mandates and that will not allow any real measure of the risks in opening the border. Thus, the Court should enter a stay.

FACTUAL AND STATUTORY BACKGROUND

The Secretary first announced a pilot program that would grant operating authority to Mexico-domiciled motor carriers to operate beyond the limited border zone on February 23, 2007. *See* 72 Fed. Reg. at 46264. At that point, FMCSA had provided no public information whatsoever about the proposed program and had not complied with public notice and comment provisions set out in 49 U.S.C. §31315(c), which regulates pilot programs conducted by FMCSA and DOT. On April 23, 2007, petitioners filed a Petition for Review in this Court, seeking to compel compliance with the notice and comment requirement. *Sierra Club, et al. v. United States Dep't of Transp., et al.*, Ninth Circuit Case No. 07-71609.

Respondents then published a Federal Register notice providing limited information about the proposed pilot program and requesting public comment. 72 Fed. Reg. 23883 (May 1, 2007). Petitioners withdrew their April 23, 2007 Petition for Review, and commented on the proposed program's legal deficiencies and inadequacies in the information provided. *See* 72 Fed. Reg. at 46265.

On May 25, 2007, the 2007 Act took effect. Section 6901(a) of the 2007 Act identifies three prerequisites that must be satisfied before any funds may be used to grant authority to a Mexico-domiciled motor carrier to operate beyond the U.S.-Mexico border commercial zones:

(1) granting such authority is first tested as part of a pilot program;

(2) such pilot program complies with the requirements of section 350 of Public Law 107-87 and the requirements of section 31315(c) of title 49, United States Code, related to pilot programs; and

(3) simultaneous and comparable authority to operate within Mexico is made available to motor carriers domiciled in the United States.

2007 Act, §6901(a)(1)-(3). Subsection (2) above incorporates 49 U.S.C. §31315(c), which governs the Secretary's authority to implement pilot programs relating to commercial motor vehicles and requires the Secretary to "include, at a minimum," six "elements in each pilot program plan," including "[a] reasonable number of participants necessary to yield statistically valid findings." 49 U.S.C. §31315(c)(2)(C).[2]

Section 6901(b) of the 2007 Act further identifies three acts that must be taken "[p]rior to the initiation of the pilot program." 2007 Act, §6901(b). These are: (1) transmission of a report by DOT's Inspector General to Congress and the Secretary verifying compliance with the safety and inspection requirements of Section 350 of Public Law 107-87 (2007 Act, §6901(b)(1)); (2) action by the Secretary needed to address the Inspector General's report, and submission to

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[2] Subsection 2 also incorporates Section 350 of the 2002 DOT Appropriations Act, which has been reenacted in each subsequent year. Section 350 requires compliance with public safety and inspection procedures and requires the DOT Inspector General to issue annual reviews of border operations and verify compliance with safety factors. Compliance with Section 350 is not at issue in this emergency stay motion, although it is encompassed in the Petition for Review.

Congress of a report detailing any such action (2007 Act, §6901(b)(2)(A)); and (3) publication in the Federal Register of, and opportunity to comment on, five categories of information, including "comprehensive data and information on the preauthorization safety audits conducted before and after the date of enactment of this Act of motor carriers domiciled in Mexico that are granted authority to operate beyond the United States municipalities and commercial zones on the United States-Mexico border" (2007 Act, §6901(b)(2)(B)).

On June 8, 2007, FMCSA published another notice in the Federal Register purporting to respond to the additional requirements of the 2007 Act. 72 Fed. Reg. 31877 (June 8, 2007). This notice included information about Pre-Authorization Safety Audits ("PASAs") performed on those Mexico-domiciled motor carriers, which had – as of the time of the notice – applied to participate in the proposed pilot program. *Id.* at 31886-94.

On August 17, 2007, FMCSA published in the Federal Register a response to public comments provided on the pilot program and asserted that FMCSA intends to proceed with the program as soon as the DOT Inspector General has submitted his report to Congress and the Secretary has taken any required action in response. 72 Fed. Reg. at 46263-64. Those two steps are expected to occur soon. Weissglass Dec. ¶2.

STANDARD OF REVIEW

Petitioners seek a stay until their case is heard. The standard is analogous to that for temporary injunctions, which is that a plaintiff must "demonstrate either:

(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). These are not two separate tests, but a continuum. *Id.*

On the merits, courts set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is taken "without observance of procedure required by law." 5 U.S.C. §706(2)(A), (D). Although resolution of factual disputes implicating substantial agency expertise are generally subject to the "arbitrary and capricious" standard of review, "[p]urely legal questions are reviewed *de novo*." *Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000) (internal citations omitted).

When reviewing an agency's compliance with procedure required by law, this Court applies an "exacting" standard, "review[ing] de novo but . . . limited to ensuring that statutorily prescribed procedures have been followed." *Kern Co. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (internal citations omitted); *see also NRDC v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002) ("On a petition for review from an agency decision, we determine in the first instance the adequacy of the agency's notice and comment procedure, without deferring to an agency's own opinion of the adequacy.").

Here, respondents' failure to comply with their statutory obligations and their failure to abide by the statutorily prescribed procedures under the 2007 Act and 49 U.S.C. §31315(c) are reviewed *de novo* and without deference.

ARGUMENT

I. PETITIONERS HAVE A STRONG PROBABILITY OF SUCCESS ON THE MERITS

Petitioners have a strong probability of demonstrating that initiation of the pilot program will violate federal law and result in a pilot program taking place under conditions that Congress did not permit.

A. Respondents Have Failed To Meet The Minimum Elements Of A Pilot Program

The pilot program that FMCSA is about to commence is a show-trial designed to support a pre-determined outcome – unlimited cross-border trucking. Accordingly, the pilot program is not designed to "yield statistically valid findings," as mandated by the 2007 Act and 49 U.S.C. §31315(c).

The 2007 Act requires respondents to comply with the requirements of Section 31315(c) before expending any funds for the pilot program. 2007 Act, 49 U.S.C. §6901(a)(2). Section 31315(c) establishes "minimum elements" of a pilot program plan, one of which is that there be "[a] reasonable number of participants necessary to yield statistically valid findings." 49 U.S.C §31315(c)(2)(C).[3]

Nowhere in any of the three Federal Register notices FMCSA issued about the pilot program does FMCSA assert that the program will "yield statistically

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[3] The August 17, 2007 Federal Register Notice contends that the proposed program is not a "pilot program" under 49 U.S.C. §31315(c). 72 Fed. Reg. at 46288. This is irrelevant because the 2007 Act incorporates the requirements of 49 U.S.C. §31315(c), and respondents concede they must meet those requirements. *Id.* Whatever the program is called, it must meet the same requirements.

valid findings." FMCSA has failed to satisfy this minimum required element, and proceeding with the pilot program will directly violate the statutory mandates of Section 31315(c)(2)(C) and the 2007 Act, §6901(a)(2).

Respondents may attempt to rely on statements in the August 17, 2007 Federal Register Notice regarding FMCSA's belief that there will be "sufficient interest" in the pilot program to "ensure an appropriate number of participants" (72 Fed. Reg. 46271), or that the planned one-year duration of the program will be "sufficient" to ascertain whether Mexico-domiciled trucks are safe. *Id.* at 46270-71. These statements fall well short of the statutory mandate that the "number of participants [will] yield significantly valid findings." 49 U.S.C. §31315(c)(2)(C).

The phrase "statistically valid findings" must be given its plain meaning. *Queen of Angels/Hollywood Presbyterian Medical Ctr. v. Shalala*, 65 F.3d 1472, 1477 (9th Cir. 1995); *see also Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000) (words Congress chose to implement its wishes, if not specifically defined, carry their ordinary meaning and accurately express Congress' intent).[4] "Statistically

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[4] Where the meaning of a term is clear, courts do not defer to the agency's interpretation of the term. For instance, the First Circuit explained that the question of whether an agency had complied with its statutory obligation to "consult" with a regional council was one for the court:

> Although the agency can in the first instance conclude that it has engaged in consultation, this self-serving conclusion cannot be the end of the judicial inquiry if a party properly makes a challenge, as has happened in this case. As to the so-called "specialized experience" of the agency, it would appear that it is the courts that qualify for such a title on an issue of legislative interpretation. Interpretation of the word "consult" is a purely legal

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valid" is a term of art, and reflects Congress' intent that a pilot program yield information that would provide a scientific basis for assessing the program's results – something more than a self-serving belief by FMCSA that the pilot program will involve a "sufficient" number of participants.[5]

FMCSA's "goal" is that 100 motor carriers will participate in the program. 72 Fed. Reg. at 46271. But FMCSA never asserts that, even were the program to meet the goal, this level of participation would result in statistically valid findings. FMCSA does not, for example, compare 100 participants to the number of U.S.-domiciled carriers or trucks operating in this country, or to the number of Mexico-domiciled carriers or trucks that may eventually be granted operating authority, following the conclusion of the pilot program.[6] FMCSA never states how many

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[4](...continued)
question for the courts . . . . Such a legal determination does not require deference to the agency.
Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 120 (1st Cir. 2002) (holding that, based on plain meaning of the term "consult," agency had failed to comply with "Congress' explicit procedural requirements").

[5] *Cf. Friends of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 824 (8th Cir. 2006) (concluding that agency's reliance on surveys that were not statistically valid was unreasonable); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir. 1985) (finding that, even where agency did not have an express statutory obligation to verify statistical validity of its proposal, "it is an agency's duty to establish the statistical validity of the evidence before it prior to reaching conclusions based on that evidence").

[6] FMCSA does assert that the "goal" of 100 participating carriers would be approximately 10% of the overall applications received from Mexico-domiciled
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carriers, individual trucks, separate trips across the border, or total miles traveled are necessary to make statistically valid findings about safety.

The August 17, 2007 Federal Register Notice dances around the statutorily required minimum element because FMCSA has not yet decided how many carriers or vehicles will participate and thus can draw no conclusions as to the statistical validity of the program. FMCSA acknowledges that it may not meet its "goal" of having 100 motor carriers participate. 72 Fed. Reg. at 46271.[7] And only 155 *vehicles* are presently "intended for use in the United States, for operations beyond the commercial zones during the demonstration project." *Id.* at 46268.

Given that FMCSA does not assert that its goal will yield statistically valid findings, cannot even guarantee meeting the goal, and never shows that the number of carriers that will participate (and the number of trips made and miles

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[6](...continued)
carriers prior to the announcement of the pilot program. 72 Fed. Reg. at 46271. FMCSA's claim that this 10% goal is a "significant percentage" (*id.*) is in no way an assertion under the governing statute that there will be sufficient participants to yield statistically valid findings.

[7] Even were FMCSA to meet its goal of 100 carriers, most of those carriers would not begin operation at the start of the pilot program. The agency intends to add carriers as the program progresses (*see* 72 Fed. Reg. at 46273), apparently at the rate of 25 carriers per month (*see id.* at 46270). Thus, some carriers will operate for less than the full year of the pilot program – yielding even less data than if they had operated for the full year. A pilot program may last as long as three years. 42 U.S.C. §31315(c)(2)(A). By unnecessarily limiting the term of the pilot program to one year, FMCSA limits the amount of data that will be gathered.

covered) will result in statistically valid findings, FMCSA has failed to demonstrate that the pilot program will result in statistically valid findings.

This failure is significant because what is at stake are such weighty issues as safety of trucks and drivers, added pollution in heavily polluted areas, and whether entry of the trucks at issue will cause additional smuggling of people or drugs into this country. Congress demanded that a statistically appropriate sample of trucks be used so that the results of the pilot program will be representative and thus predictive of what will happen if the border is opened entirely. Because the pilot program will not meet this requirement, the program should be stayed.

B. Respondents Have Failed To Provide Public Notice And Comment On Inspection Information For Motor Carriers That Are Granted Operating Authority

Respondents have not provided the public notice and comment on motor carrier inspections that the 2007 Act requires. "*Prior* to the initiation of the pilot program," the Secretary must provide notice in the Federal Register and an opportunity for public comment on "comprehensive data and information on the pre-authorization safety audits conducted before and after the date of enactment of this Act of motor carriers domiciled in Mexico *that are granted authority to operate* beyond the United States municipalities and commercial zones on the United States-Mexico border." 2007 Act, §6901(b)(2)(B)(i) (emphases added).

The 2007 Act refers to the "initiation of the pilot program" as an event that takes place *after* operating authority is granted to Mexico-domiciled carriers, and *after* data and information regarding the inspections of those carriers is published

in the Federal Register and opportunity for public comment given. As such, Congress could only have intended the "initiation of the pilot program" to refer to the final act of permitting the trucks to enter the U.S. beyond the border zone.[8]

FMCSA concedes that the 2007 Act requires publication of information regarding motor carriers that are granted operating authority. For example, FMCSA's June 8, 2007 Federal Register Notice states:

> No carriers have yet been granted authority to operate beyond the municipalities and commercial zones as part of this demonstration project. Consequently, at this time there is no requirement to publish data or information from any of the PASAs conducted.

72 Fed. Reg. at 31879. What FMCSA disputes is the timing, arguing that "[t]he statute is satisfied, if prior to the program's initiation, such notice and opportunity for comment is provided with respect to PASAs for all carriers that will *initially participate*." 72 Fed. Reg. at 46273 (emphasis added). Then, "[a]dditional carriers can be added to the ongoing program after PASA information about them is published and an adequate opportunity for comment on it is provided." *Id.*

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[8] Respondents' assertion that a grant of operating authority "represent[s] the start of the demonstration project" (72 Fed. Reg. at 46273), must be disregarded as it conflicts with the language of the 2007 Act. Congress distinguished the initiation of the pilot program, on the one hand, from the grant of operating authority, on the other. They cannot therefore be understood to refer to the same act. *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) (courts should avoid statutory interpretations which render language inconsistent, meaningless, or superfluous); *see also Heckler v. Chaney*, 470 U.S. 821, 829 (1985) ("sections of a statute generally should be read to give effect, if possible, to every clause") (internal quotation marks omitted).

This turns the statutory requirement on its head. The statute requires authority to have been granted, and notice and comment completed, "[p]rior to the initiation of the pilot program" (2007 Act, §6901(b)) – that is, before the first Mexico-domiciled motor carriers are permitted to travel into the U.S. beyond the border zone. There is no room to contend that some of the required notice and comment may be carried out after the first wave of trucks have already come over.

The statute is designed to ensure that the public and Congress have full information about *all* participating carriers *before* the pilot program commences. Absent such full information, there is no way for the public to comment – or Congress to intercede – if the final list of carriers is skewed in a manner that casts doubt on the validity of the pilot program. For instance, if the final list of carriers is not diverse enough by region of Mexico, the vast majority may enter through one state, thereby not properly testing procedures at all of the border crossings.[9]

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[9] FMCSA suggests that providing information on all PASAs conducted to date is equivalent to providing information on those motor carriers granted operating authority: "The Agency has selected carriers from among those that submitted an application for authority to operate beyond commercial zones since the Agency began accepting applications under its 2002 application regulation. The Agency will allow into the program only those carriers that meet the safety criteria, as demonstrated through the successful completion of the PASA." 72 Fed. Reg. at 46271. Yet none of the Federal Register notices regarding the pilot program identify which carriers have actually been "allow[ed] into the program," and the notice further indicates that "additional carriers" will be added to the program. *Id.* at 46273. Thus, it is impossible for the public to know which carriers will actually be granted operating authority.

It bears emphasis that the requirement Congress put in place is very easy to meet. All that has to be done is to decide which carriers will participate before the pilot program starts and provide public information on those carriers. In respondents' haste to start the pilot program, they have simply decided to bypass this requirement. Their attempt to subvert the congressionally mandated notice and comment procedure should be rejected.

C. Respondents Have Failed To Show That Simultaneous And Comparable Authority Is Available To U.S. Motor Carriers

The August 17, 2007 Federal Register Notice indicates that, once the DOT Inspector General submits his report and the Secretary takes any necessary action, FMCSA will proceed with the pilot program. 72 Fed. Reg. at 46263-64. But respondents may not grant operating authority to Mexico-domiciled trucks to participate in the pilot program unless and until Mexico makes "simultaneous and comparable authority" available to U.S. motor carriers. 2007 Act, §6901(a)(3). There is *no* finding or evidence that this prerequisite has been satisfied.

The August 17, 2007 Federal Register Notice comments that "FMCSA continues to work closely with the Mexican government to ensure that up to 100 U.S.-domiciled carriers are granted authority to operate in Mexico during the demonstration project." 72 Fed. Reg. at 46272. This statement certainly does not satisfy the "simultaneous and comparable" requirement. Assurances of cooperation are far from a guarantee of simultaneous grants of operating authority, and there is no way of assessing whether a goal of "up to 100 U.S.-domiciled

carriers" is comparable to the number of Mexico-domiciled motor carriers that will participate in the program. FMCSA makes a further claim that the "exchange of information" between the Mexican government and U.S. trucking companies will be reciprocal with the exchange between the U.S. government and Mexico-domiciled carriers. *Id.* An exchange of information does not equate to actual grants of authority.[10]

The fundamental problem with FMCSA's position is that it does not satisfy the congressional mandate. Congress insisted that there be simultaneous, comparable action, not soothing assurances of cooperation.[11] Because respondents have not demonstrated that Mexico is making simultaneous and comparable operating authority available to U.S. motor carriers, the Court should issue a stay.

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[10] FMCSA misses the point entirely in claiming that it "is not required to provide notice and comment on the Mexican government's application process for obtaining operating authority." 72 Fed. Reg. at 46272. FMCSA still must establish that it has satisfied the prerequisite of the 2007 Act that there will be "simultaneous and comparable authority" for U.S.-domiciled motor carriers.

[11] Even if FMCSA had asserted (or belatedly asserts) that simultaneous and comparable authority to operate in Mexico will be granted to U.S. motor carriers, "an action will not be upheld . . . where there is nothing in the record to support the agency's decision." *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993); *see also Asarco, Inc. v. U.S. Environmental Protection Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("Consideration of [evidence outside the record] to determine the correctness or wisdom of the agency's decision is not permitted."). The record does not support an assertion that FMCSA has satisfied the "simultaneous and comparable" requirement.

II. THE BALANCE OF HARMS WEIGHS STRONGLY IN FAVOR OF GRANTING A STAY

A. Harm To Petitioners And The Public

If this Court does not stay the pilot program, Congress' express and unambiguous intent will have been thwarted. Congress mandated that any grant of operating authority to Mexico-domiciled trucks be conducted in the context of a scientifically-based pilot program plan. The strict parameters Congress set enable the results of the program to be assessed and evaluated before any decision is made to allow Mexico-domiciled motor carriers to enter the U.S. on a broader scale. The entire statutory scheme of the 2007 Act points to this intent. Not only did Congress require that a grant of operating authority first be tested as part of a pilot program (2007 Act, §6901(a)(1)), but it also mandated compliance with the requirements for pilot programs established in 49 U.S.C. §31315(c) (2007 Act, §6901(a)(2)), and required the DOT Inspector General to submit a report assessing the results of the pilot program (2007 Act, §6901(c)).

If respondents are permitted to undertake their planned one-year pilot program, despite their blatant failure to comply with congressional requirements, Congress' intent will be stymied and the significant risks posed by cross-border trucking will not be properly assessed. By the time petitioners' challenge to the program's sufficiency is resolved, the one-year pilot program will be over or close to conclusion. It will be too late to ensure that the program was conducted in a way to ensure "statistically valid findings." Similarly, it will be too late to ensure

that the public and Congress are provided with complete information about the entire set of Mexico-domiciled motor carriers that will enter the U.S. to evaluate those carriers – and their safety records – as a whole. And it will be too late to prohibit FMCSA from granting operating authority to Mexico-domiciled trucks unless and until "simultaneous and comparable authority" exists for U.S.-domiciled trucks to operate in Mexico. In short, without a stay, there will be no meaningful way of ensuring compliance with the 2007 Act. The result would be that the significant concerns of petitioners and others including about safety, the environment, security, and other issues would be ignored.

Additionally, this Court must consider "[t]he difficulty of stopping a bureaucratic steam roller, once started." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989); *see also National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 n.18 (9th Cir. 2001) (citing *Marsh* and concluding that failure to abide by procedures required by law justifies injunctive relief). Even if the pilot program is later found to have been in violation of federal law, FMCSA and DOT are unlikely to expend the resources to conduct a second pilot program. Instead, the agencies will be eager to push forward with opening the border entirely, discounting deficiencies in the pilot program. The opportunity to proceed in the reasoned and measured way Congress required will have been lost.

The pilot program may also lead to significant public safety and other concerns, as Mexico-domiciled trucks travel throughout the U.S. for the first time. By failing to ensure that the program will generate statistically valid findings,

respondents make it impossible to monitor or assess the effect of the program on public safety – which is supposed to be respondents' primary concern.

B. Harm To Respondents

There is no harm to respondents from a stay pending a decision from the Court on the merits as there is no magic date by which the border must be opened. At least as early as May *2001*, DOT has been predicting various dates for starting cross-border trucking. In May 2001, DOT said that the border would be opened "before the end of this year." Weissglass Dec. Exh. 1 at 1. In March 2002, DOT stated a "commitment to open the border to Mexican-domiciled commercial vehicles by midyear 2002." *Id.* Exh. 2 at 2. And this February, DOT announced that the pilot program would begin "[i]n about 60 days." *Id.* Exh. 3 at 2.

There is no harm from delaying the program for a short time to make sure it is done right in compliance with the requirements Congress imposed. Petitioners are prepared to brief and argue this case on an expedited schedule to minimize any delay. Respondents can point to no harm that would result if they were required to wait to begin implementation of the pilot program until the Court has an opportunity to determine whether the pilot program complies with federal law.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court issue a stay preventing respondents from granting authority to Mexico-domiciled trucks to operate beyond the border zone and initiating the pilot program until they have complied with their statutory obligations.

Dated: August 29, 2007

Respectfully submitted,

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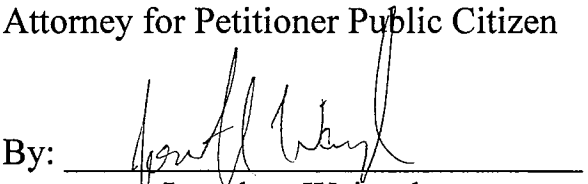
By: 
Jonathan Weissglass

DECLARATION OF JONATHAN WEISSGLASS

I, Jonathan Weissglass, declare as follows:

1. I am an attorney at Altshuler Berzon LLP. I am counsel for petitioners in this action.

2. On August 27, 2007, I spoke to Irene Solet, an attorney on the Appellate Staff of the Civil Division of the U.S. Department of Justice, who is representing respondents. Ms. Solet informed me that FMCSA and DOT intend to start granting the first few Mexico-domiciled motor carriers authority to operate in the U.S. beyond the current commercial border zones on September 1, 2007. She further stated that FMCSA and DOT will start granting authority after the DOT Inspector General issues a report to Congress and the DOT Secretary takes any action required by that report, and that these actions are expected to occur by Friday, August 31, 2007.

3. I also asked Ms. Solet on August 27, 2007, whether respondents would stay implementation of the program that will permit Mexico-domiciled motor carriers to operate in the U.S. beyond the current commercial border zones until after this Court has a chance to consider petitioners' challenge on the merits. Ms. Solet informed me that respondents would not agree to such a stay.

4. I notified Ms. Solet that petitioners intended to file a motion for an emergency stay in this Court on the morning of August 29, 2007, unless I heard from her by 9:00 a.m. California time that morning that there was a change in the timing we had discussed.

5. A copy of petitioners' motion for an emergency stay will be e-mailed to respondents' counsel on the morning of August 29, 2007.

6. Attached as Exhibit 1 is a true and correct copy of an FMCSA press release dated May 1, 2001, that I printed from the following location: http://www.dot.gov/affairs/fmcsa801.htm.

7. Attached as Exhibit 2 is a true and correct copy of an FMCSA fact sheet dated March 14, 2002, that I printed from the following location: http://www.dot.gov/affairs/fmcsa0502factsheet.htm.

8. Attached as Exhibit 3 is a true and correct copy of a speech dated February 23, 2007, that I printed from the following location: http://www.dot.gov/affairs/cbtsip/peters022307.htm.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct to the best of my knowledge.

Executed at San Francisco, California, this 29 day of August, 2007.

Jonathan Weissglass

News
U.S. Department of Transportation

FOR IMMEDIATE RELEASE
Tuesday, May 1, 2001
Contact: Dave Longo
Telephone: 202-366-0456
FMCSA 08-01

Transportation Department Proposes Rules to Ensure Safety of Mexican Trucks and Buses Operating in U.S.

The U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) today proposed three separate rules addressing the safe operation of Mexican trucks in the United States and requirements that they comply with U.S. safety regulations.

"President Bush has made a firm commitment to implement the NAFTA trucking provisions, and his Administration has begun doing that," U.S. Transportation Secretary Norman Y. Mineta said. "These rulemakings will help ensure that all Mexican trucks and drivers entering the United States will be subject to the same safety standards that apply to U.S. and Canadian carriers."

According to a timetable outlined at a meeting with representatives from the Government of Mexico on March 22, the United States will permit authorized Mexican carriers to operate throughout the United States before the end of this year.

If adopted, the proposals posted at the Federal Register today would:

· Establish an application form and process for Mexican carriers seeking USDOT authority to operate only in U.S. municipalities and commercial zones adjacent to Mexico in Texas, New Mexico, Arizona, and California.

· Establish an application form and process for Mexican carriers seeking USDOT authority to operate beyond municipalities and commercial zones at the U.S.-Mexico border.

· Establish a safety monitoring system and enforcement regime, the *Safety Monitoring System and Compliance Initiative for Mexican Motor Carriers Operating in the U.S.,* to help determine whether Mexican carriers conducting business anywhere in the United States comply with applicable safety regulations and conduct safe operations.

The first two proposals would establish new application procedures for Mexican motor carriers seeking operating authority, require carriers to provide detailed information about their safety practices, and require carriers to certify compliance with U.S. motor carrier safety regulations. The application is necessary for a carrier to obtain a USDOT number, which will allow them to operate in the U.S. All motor carriers seeking to do business in the U.S. must obtain operating authority and a USDOT number before they will be permitted to operate in the United States. Mexican carriers will be subject to the same safety standards that now apply to U.S. and Canadian carriers.

The third USDOT proposal would to require, as a condition of registration, that all Mexican new

entrant carriers undergo at least one satisfactory safety audit within 18 months of receiving authority to operate in the United States. The purpose of the safety audit would be to evaluate a Mexican carrier's safety performance and basic safety management controls. It would accomplish this by reviewing information about the carrier, including records related to driver medical qualifications, driver hours of service, drug and alcohol testing, and vehicle inspection, maintenance and repair.

According to the proposed rule, if an audit determines that a carrier does not satisfactorily exercise basic safety management controls, its operating authority would be suspended and it would be required to cease operation in the United States.

The FMCSA also is developing a proposal to establish a comparable safety monitoring system for all new entrant U.S. and Canadian-based carriers as required by the Motor Carrier Safety Improvement Act of 1999.

The three notices of proposed rulemakings are in the USDOT docket (Docket Numbers FMCSA-98-3297, FMCSA-98-3298, FMCSA-98-3299) Written comments on the notices of proposed rulemaking should be sent by July 2, 2001 to the USDOT Docket Facility, Attn: Docket No. FMCSA-98-3297, 3298, 3299, Room PL-401, 400 Seventh Street, S.W., Washington, DC 20590-0001. The proposed rules also are on the Internet and can be viewed after searching at http://dms.dot.gov/. Comments also may be submitted electronically at this site.

# # #

Briefing Room

News
U.S. Department of Transportation

March 14, 2002
Contact: Dave Longo
Telephone: 202-366-0456

North American Free Trade Agreement – U.S. Department of Transportation Regulations

- Regulations issued today explain how Mexican-domiciled carriers may apply for operating authority beyond the U.S.-Mexico border commercial zones. The rules include requirements that meet the terms of the Transportation and Related Agencies Appropriations Act, 2002.

- Mexican-domiciled carriers and U.S. and Canadian carriers are governed by the same safety standards when operating in the U.S.

- Mexican-domiciled carriers applying to operate to and from the United States are required to have a distinctive USDOT number, undergo safety monitoring initially and during an 18-month provisional period.

- During operations under provisional operating authority, and for 36 months after receiving permanent authority, Mexican vehicles operating beyond the border commercial zones into the U.S. must display a valid Commercial Vehicle Safety Alliance inspection decal.

- The regulations require all Mexican-domiciled carriers entering the United States to have a drug and alcohol-testing program, a system of compliance with U.S. federal hours-of-service requirements, adequate data and safety management systems, and valid insurance with a U.S. registered insurance company.

- Mexican commercial vehicles with authority to operate beyond the commercial zones will be permitted to enter the United States only at commercial border crossings and only when a certified motor carrier safety inspector is on duty.

- Federal and state safety inspectors will be required to inspect and verify the status and validity of the license of each driver of a long-haul Mexican-domiciled motor carrier (1) when carrying a placardable quantity of hazardous material; (2) when undergoing a full vehicle driver Commercial Vehicle Safety Alliance inspection; and (3) 50 percent of other long-haul Mexican drivers engaged in cross-border operations.

- Mexican-domiciled carriers planning to operate solely within the commercial zones along the U.S-Mexico border will be required, within 18 months, to apply for provisional Certificates of Registration, which grant temporary authority to operate in the United States. The provisional Certificate of Registration cannot be made permanent for at least 18 months, until the carrier has successfully completed a safety audit.

- DOT will provide all Mexican-domiciled carriers educational and technical assistance before the restrictions on Mexican carrier operations are lifted.

- DOT and States will also do the following:
  - Equip all U.S.-Mexico commercial border crossings with scales suitable for enforcement action.
  - Equip five of the ten locations with the highest volume of commercial vehicle crossings with weigh-in-motion (WIM) scales before reviewing or processing carrier applications beyond the border zones. Three are operational (Otay Mesa, Nogales, Bridge of Americas/El Paso) and two more (Columbia-Solidarity Bridge/Laredo and Eagle Pass, Texas) should be in place by April 1.
  - Equip the remaining five of the highest volume of commercial vehicle crossings (World Trade Bridge/Laredo; Pharr, Texas; Veterans' Bridge/Brownsville; Calexico, Calif. and Ysleta/El Paso) with weigh-in-motion devices within 12 months. An additional five will be in place by December 2002.

NAFTA – Truck and Bus Provisions

- Approved by Congress in 1993 and entered into force in 1994, the North American Free Trade Agreement was based on a simple premise -- that all of the countries in North America would be integrated into one free trade area.
- Under NAFTA's original timeline, the U.S. and Mexico agreed to permit access to each other's border states by December 18, 1995. Reciprocal access beyond the border states was promised by January 1, 2000. (Canadian carriers have been operating throughout the United States since 1982.)
- The NAFTA timetable also called for the United States and Mexico to lift all restrictions on regular route, scheduled cross-border bus service by January 1, 1997.
- In December 1995, President Clinton postponed implementation of NAFTA cross-border trucking provision, which continued to limit Mexican trucks to operations in designated commercial zones within Arizona, California, New Mexico, and Texas.
- A NAFTA arbitration panel concluded in February 2001 that the U.S blanket refusal to process the applications of Mexican carriers seeking U.S. authority because of concerns over the carriers' safety was in breach of its NAFTA obligations. President Bush has assured President Fox that the U.S. will move in a timely manner to meet our NAFTA obligations.
- In February 2001, the Bush Administration announced it would fully comply with NAFTA obligations regarding truck and bus access.
- U.S. Congressional concerns regarding safety compliance and monitoring of Mexican-domiciled commercial vehicles were resolved in the Transportation and Related Agencies Appropriations Act, 2002, which President Bush signed on December 18.
- Since then, the United States announced its commitment to open the border to Mexican-domiciled commercial vehicles by midyear 2002 and to implement a regime of regulations to ensure safety.

DOT has been inspecting Mexican trucks and buses at the border since 1995. By mid-2002, DOT will

have 274 enforcement personnel in place, more than four times the number it had in place in mid-2001.

Briefing Room

Cross Border Truck Safety Inspection Program

Speech

REMARKS FOR
THE HONORABLE MARY E. PETERS
SECRETARY OF TRANSPORTATION

MEXICAN TRUCKS NEWS CONFERENCE
EL PASO, TX

FEBRUARY 23, 2007
9:30 AM

Good morning, everyone.

We are here today to announce that the United States and Mexico are beginning a cross-border trucking pilot program that will build on our nation's legacy of seizing opportunity, embracing trade, and leading the world as an economic superpower, while protecting safety, security, and the environment.

As President Bush made clear earlier this month in his *State of the Economy* address, the United States is the envy of the world when it comes to job growth, economic expansion, and quality of life.

Our country has never shied away from opportunities to compete, to open new markets, and to trade with the world.

Our ancestors fought and died to keep the world's trade free. Our forefathers saw the value in dropping tariffs and opening the flow of capital across our borders. And during the dark days of the Cold War, our parents held firm in the belief that free markets and free trade would win over command and control economies every time. And they were right.

If we are to continue to thrive, we must continue to embrace economic opportunity. This is especially true here at the border, where trade is an essential part of economic life.

New Mexico's Governor, Bill Richardson, has talked about "the need for more border trade and more border contact," noting "we're so close to Mexico here, it's almost as if there's an intermingling of countries." And Texas Governor Rick Perry has observed, "When we allow for the free flow of commerce, energy, and ideas, jobs and opportunity are created on both sides of our shared border."

That is why I am here today. Now that safety and security programs are in place, the time has come for us to move forward on a long-standing promise with Mexico by taking the trucking provision of the North American Free Trade Agreement off hold.

Having Mexican trucks cross the United States border is nothing new. In fact, until 1982, trucks from Mexico could drive anywhere in the country. Since that time, Mexican trucks have been restricted to the border commercial zones in California, Arizona, New Mexico, and Texas.

As a result, every day thousands of Mexican trucks must drive across our border, through cities like El

Paso, and then come to a stop at an imaginary line. There, these trucks must sit idle until a U.S. truck arrives and the cargo is switched from one to the other.

Even worse, U.S. trucks cannot even go into Mexico. It is a process that wastes precious time, energy, and money.

But that is about to change. Today, I am announcing a limited, year-long demonstration program that will permit up to 100 Mexican trucking companies to make deliveries beyond the commercial zones. An equal number of U.S. trucking companies will be able to cross the border and compete in the Mexican marketplace for the first time ever.

While seizing commercial opportunities is important, doing it safely is vital. That is why I traveled to Monterrey, Mexico, yesterday to announce that U.S. inspectors will conduct in-person safety audits to make sure that participating Mexican companies meet every United States safety regulation on the books.

The inspection program is tough, and it is meant to ensure safe operation of trucks crossing our border. Drivers must have a valid commercial driver's license, carry proof that they are medically fit, and comply with United States hours-of-service rules. And they must be able to understand and respond in English to questions and directions from inspectors.

The trucks must be insured by a U.S.-licensed firm. And from hood to tail-lamps, they must meet United States safety standards, including brakes, turn signals, and cargo-securing equipment.

Companies that satisfy these safety standards and are accepted into the demonstration program will be allowed to operate beyond the border areas to make international deliveries and pick-ups only. Mexican trucks will not be able to pick up goods in one U.S. city for delivery to another. And no trucks hauling hazardous materials or buses carrying passengers will be involved.

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.

As we move forward with this test program, let me assure you – safety will be the top priority.

In 2001, the Congress approved and President Bush signed legislation spelling out 22 safety requirements that had to be met before putting this program in operation. They are comprehensive. And I can tell you today that the Department's independent Inspector General has confirmed our success in meeting the congressional requirements.

We are ready with modern inspection facilities, and we have hired and trained hundreds of inspectors. All told, 540 federal and state inspectors are already on the job, standing by to screen trucks coming across the border from Mexico to ensure that both the drivers and their vehicles are safe to make deliveries in the United States.

And under our safety inspection plan, each and every truck in the demonstration program will be checked, and any unsafe vehicle or unfit driver will be taken off the road.

Our records show that Mexican trucks currently operating in the commercial zone are as safe as the trucks operated by companies here in the United States. We know this because federal and state inspectors are already screening the trucks crossing into our country from Mexico.

We have years of experience, we have a rigorous safety inspection plan in place, and we have the facilities and the trained professionals to carry it out.

Through this new pilot program, we are finding a better way to do business with one of this nation's largest trading partners, and in doing so, bringing U.S. drivers more opportunity, U.S. consumers more buying power, and the U.S. economy even more momentum.

We will take your questions about this demonstration program in just a few minutes.

But first, I have invited Mexican Secretary of Communications and Transportation Luis Tellez, Deputy Secretary of Homeland Security Michael Jackson, and Deputy Secretary of Commerce Dr. David Sampson to address the important security, commerce, and trade issues associated with this trucking demonstration program.

Secretary Tellez ...

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PROOF OF SERVICE

CASE: *Sierra Club, et al. v. United States Department of Transportation, et al.*

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 **August 29, 2007**, I served the following document(s):

1. **PETITION FOR REVIEW; AND**

2. **PETITIONERS' EMERGENCY MOTION FOR STAY UNDER CIRCUIT RULE 27-3; DECLARATION OF JONATHAN WEISSGLASS;**

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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Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7324
Washington, D.C. 20530
Telephone: (202) 514-3542
Facsimile: (202) 514-9405

I declare under penalty of perjury that the foregoing is true and correct. Executed this August 29, 2007, at San Francisco, California.

Sally Mendez