

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**COUNTY BOARD of ARLINGTON,  
VIRGINIA,  
2100 Clarendon Blvd. Suite 300  
Arlington, VA 22201**

**Plaintiff,**

**vs.**

**UNITED STATES DEPARTMENT  
OF  
TRANSPORTATION  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590**

**and**

**HONORABLE RAYMOND H.  
LAHOOD,  
in his official and individual capacity,  
Secretary of the United States  
Department of Transportation  
1200 New Jersey Avenue S.E.  
Washington, DC 20590**

**and**

**FEDERAL HIGHWAY  
ADMINISTRATION  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590**

**and**

**VICTOR MENDEZ,  
in his official and individual capacity,  
Federal Highway Administrator,  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590**

**Civil Case No. 09-1570CRMC**

**FIRST AMENDED COMPLAINT**

**and**

**EDWARD SUNDRA,  
in his official and individual capacity,  
Planning/Environmental Program  
Manager  
Federal Highway Administration,  
400 North 8<sup>th</sup> Street  
Suite 750  
Richmond, VA 23219**

**and**

**VIRGINIA DEPARTMENT OF  
TRANSPORTATION  
1401 E. Broad Street  
Richmond, VA 23219**

**and**

**HONORABLE SEAN J.  
CONNAUGHTON  
in his official capacity,  
Secretary of the Virginia Department  
of Transportation  
Patrick Henry Building  
3<sup>rd</sup> Floor  
111 East Broad Street  
Richmond, VA 23219**

**and**

**HONORABLE PIERCE R. HOMER  
in his individual capacity, former  
Secretary of the Virginia Department  
of Transportation  
c/o Patrick Henry Building  
3<sup>rd</sup> Floor  
111 East Broad Street  
Richmond, VA 23219**

**Defendants.**

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**FIRST AMENDED COMPLAINT**

COMES NOW the County Board of Arlington, Virginia (“Arlington County”), for its First Amended Complaint against the defendants, states the following:

**INTRODUCTION**

1. Arlington County seeks declaratory and injunctive relief against defendants based on defendants’ arbitrary and capricious failure to comply with environmental obligations relating to their submission for approval, and subsequent improvident approval, of a proposed “HOV/HOT” highway project in Northern Virginia, and defendants’ blatant and intentional derogation of Federal and State anti-discrimination laws, resulting in disparate and adverse impacts to the direct and unlawful detriment of Arlington County and its residents, particularly its minority communities.

2. This action arises under and alleges violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*; the Air Pollution Prevention and Control Act (“Clean Air Act”), 42 U.S.C. § 7401, *et seq.*; the Federal-Aid Highway Act (“FAHA”), 23 U.S.C. § 109; the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*; Title VI of the Civil Rights Act, 42 U.S.C. § 2000d; 42 U.S.C. § 1983; the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution; and Article 1 § 11 of the Commonwealth of Virginia Constitution.

3. In October 2006, pursuant to the Virginia Public-Private Transportation Act of 1995 (as amended), the Virginia Department of Transportation (“VDOT”) entered into a partnership with private vendors -- Fluor Virginia, Inc. (“Fluor”) and Transurban (USA) Development, Inc. (“Transurban”) (collectively “Fluor-Transurban”) -- sanctioned and recognized by the Federal Highway Administration (“FHWA”) -- for the funding, construction and operation of a new transportation facility and operations, involving the introduction of toll

lanes, major infrastructure modifications and additions, including but not limited to, exit/entrance ramps, interchanges, parking lots, bus facilities, fly-overs and additional travel lanes along the entire 56-mile length of the Interstate 95/Interstate 395 (“I-95/I-395”) corridor in Northern Virginia from Spotsylvania County to the jurisdictionally complex, security-laden Eads Street/Pentagon Reservation interchange in Arlington County, Virginia (the “Project”), and connecting to the 14<sup>th</sup> Street bridge access into the District of Columbia. The partnership agreement would cede control of the Commonwealth’s public infrastructure to Fluor-Transurban, private vendors, for eighty (80) years. Without Fluor-Transurban’s funding and economic rationale, and as VDOT has acknowledged, no part of the Project would be constructed. Accordingly, Arlington County seeks to stay further implementation of any agreement between VDOT and Fluor-Transurban pending a full and comprehensive environmental, public health and transportation review of the Project’s impacts, as required by law, and a full, accurate understanding of the Project’s discriminatory impacts and disparate treatment of minority populations.

4. Acting in concert with and for the private interests of Fluor and Transurban, VDOT, FHWA and the individual defendants (collectively “defendants”), deliberately, artificially and without reasoned justification, narrowly defined the Project unrelated to Fluor-Transurban’s proposal, the financial imperative of its 56-mile unity and the reality of its geographic and environmental scope. The defendants then determined that this narrowly defined Project could be segmented and its “Northern Section” deemed a “Categorical Exclusion” from the comprehensive review and public scrutiny requirements of NEPA and the Clean Air Act. In doing so, defendants relied on the inaccurate and artificial construct that this Project is a conventional FHWA-VDOT controlled, operated and funded

project. Defendants also ensured that the full environmental and public health impacts along with the potential degradation of the existing transportation system in the corridor and the disparate impacts of the Project on minority and low-income communities, including within Arlington County, the study area identified by the defendants, and the study area that should be relied upon pursuant to FHWA guidelines and common practice, would not be adequately analyzed, or analyzed at all, and disclosed to the public.

5. By artificially segmenting the Project, by invoking deliberately deficient, inaccurate and woefully inadequate traffic analyses and environmental reviews to support their determination, and by approving the Project's "Northern Section," the defendants (i) failed to fully, accurately and properly analyze the air quality impacts, and therefore, public health consequences of the Project within and on the adjacent and nearby neighborhoods and communities, including within Arlington County, within the study area identified by the defendants as well as the study area that should be relied upon pursuant to FHWA guidelines and common practice; (ii) did not analyze at all the environmental, public health and societal impacts on minority communities, such as Arlington View, Nauck, Hall's Hill and Green Valley, low-income populations, other vulnerable groups in schools, day care facilities, elderly homes and residences, including those owned, operated, financed or supported by Arlington County and supervised, visited and attended by Arlington County employees and residents, within, adjacent to or nearby the Project; (iii) failed to provide any analysis of the highly probable and plainly disruptive impacts of the Project on the operation of the existing, highly efficient and environmentally beneficial high occupancy vehicle ("HOV") lanes facility and related, thoughtfully engrained and effective commuter behavior throughout the entire I-95/I-395 corridor, relied upon and used by Arlington County residents and employees and

supported by Arlington County through its various laws and formally approved policies, including those related to street, roadway and parking, off-highway bus lanes and bus stops; and (iv) ignored the physical impacts on the general purpose lanes of the existing highway and on local street networks, owned, controlled and operated by Arlington County and under the legal authority and direction of the elected County Board, putting at risk traditional and historic neighborhoods and communities, including Fairlington, Shirlington and Parkfairfax.

6. On June 16, 2006 (revised September 1, 2006) and June 20, 2007 (revised July 11, 2007), the Federal defendants deliberately rushed to a substantively and procedurally constrained determination, executed by defendant Sundra, to artificially and unjustifiably “segment” into a so-called “Northern Section” (Prince William County to the Pentagon Reservation in Arlington County) and a so-called “Southern Section” (Stafford and Spotsylvania counties) the evident and recognized inextricable cohesion and financial interdependence of the so-called components of the Project, as determined by the Project’s proponent and essential funding source, Fluor-Transurban. These components also must be viewed -- and have been so viewed in other settings by the defendants -- in the context of and cumulative effects on the regional transportation system, *e.g.*, the Capitol Beltway HOV/HOT lanes project, the 14<sup>th</sup> Street Bridge into the District of Columbia and local road networks. The artificial and arbitrary segmentation of the Project is evidenced by (i) the absence of any discernible, independent loci related to the tolling/funding sources to pay for the “Northern Section”, (ii) by the defendants’ relocation of the boundary between the sections to a point further south after the submission by VDOT and June 16, 2006 determination by FHWA, and (iii) by the absence of any written explanation as to why the addition of a flyover and 6.9 mile lane extension would have no environmental or other effects so as to modify the June 16, 2006

determination. Both determinations also were made before any public hearings were held. The so-called “Northern Section” would not be constructed or financed by Fluor-Transurban, VDOT or FHWA without the construction of the “Southern Section”. Put differently, the financial imperatives and viability of the Project link the “Northern Section” and the “Southern Section” as an undeniable single project and to the Capitol Beltway project. The determinations of June 16, 2006 and June 20, 2007 artificially and deliberately ignored the necessary and unavoidable financial underpinnings in order to rationalize “segmentation” for political reasons.

7. Like all government agencies, FHWA is prohibited from approving a project such as the transportation project at issue here, unless it first conducts an environmental analysis of the entire project to determine if such a project is likely to impact the environment, through either an “Environmental Impact Statement” (“EIS”), detailing those impacts, or an “Environmental Assessment” (“EA”) detailing why the project will not have a significant impact on the environment. The purpose of the FHWA analysis is to ensure that any environmental impacts will be considered, both by the FHWA itself and, as importantly, by the public, during FHWA’s deliberations on whether to approve a project. Only a small class of projects is considered by law to be so clearly unlikely to impact the environment that even an EA is not required — an agency may declare such projects to be eligible for a “Categorical Exclusion” from such review.

8. On January 7, 2009, after a contrived and cursory review, outgoing and continuing head officials in the previous and current administrations at FHWA announced the agency’s determination that it did not need to examine, independently, the full environmental impacts of even the “Northern Section” because that segmented component of the entire



Project, in deference to VDOT's intentionally inadequate and artificial study, was eligible for a "Categorical Exclusion" and approval. This January 7, 2009 determination constitutes approval of the "Northern Section," as set out in the document signed by defendant Sundra, through which no further analysis of the "Northern Section's" effects is required for any purpose.

9. Despite plaintiff's written request to officials of the current FHWA administration to rescind the January 7, 2009 approval and the notice to defendants through plaintiff's Complaint of the approval's defects and illegalities, defendants chose to affirm, ratify and defend the legal validity of the January 7<sup>th</sup> determination and its constituent elements, *e.g.*, segmentation.

10. The FHWA's determination was not only incorrect, but outlandish and rationally indefensible. Any reasonable technical analysis of the Project would show that it is likely to worsen air pollution in Arlington County's densely populated communities that border the relevant portions of the I-95/I-395 corridor, by drastically increasing automobile volume, traffic delays and queues that, among other harm, directly and adversely affect Arlington County's streets, roadways, neighborhoods and its employees and residents with new traffic patterns and additional traffic on and off the highway. Indeed, the Project is designed to *encourage* commuters from the farthest-flung exurban "sprawl" communities of the "Southern Section" -- without which the Project would not occur since it is financially dependent on the toll revenue from these exurban commuters -- and throughout Northern Virginia, to use this corridor more frequently, without need of carpooling. The air pollution resulting from this increased traffic would disproportionately impact Arlington's minority communities.

Defendants' analysis, which led to their implausible conclusion, was designed in a manner that suggests that its result, and the Categorical Exclusion, were predetermined.

11. There are at least two reasons for the defendants' deliberate failure to act rationally. First, the so-called "Southern Section" will largely provide the financial support and rationale for the entire Project and Fluor-Transurban's private financial imperatives, which required the continued expediency to use the NEPA process to "segment" and facilitate a CE approval for the "Northern Section." FHWA and VDOT have facilitated this expediency by deliberately ignoring, and ensuring a legal shield to ignore elementary notions of civil rights and constitutional due process and equal protection. Second, defendants Secretary LaHood, Administrator Mendez, Project Manager Sundra, Secretary Connaughton and former Secretary Homer, acting under color of law, seek, through the deceptive misnomer of "HOT" (High Occupancy Toll) lanes, to invidiously and deliberately support, encourage and enable a financially-able, privileged class of suburban and rural, primarily Caucasian residents from Stafford and Spotsylvania counties, operating single occupancy vehicles ("SOV"), unimpeded access on toll lanes to the detriment of the minority communities in Arlington. Cumulative, historic, disparate and significant adverse impacts on minority and low-income families within, adjacent to and nearby the Project, especially in the so-called Northern Section, including to the interests of Arlington County, as described elsewhere in this First Amended Complaint, result from the increases in air pollution from the Project (even the "Northern Section" taken alone) that are scientifically well-documented and include respiratory and cardio-vascular illnesses.

12. The defendants' January 7, 2009 determination and approval, especially in its definition of the Project, is totally at odds with the precise manner in which this Project has

been described and presented in every other official publication, presentation, report and agreement. Prior to and since January 7, 2009, the defendants and Fluor-Transurban have recognized, examined and presented, and continue to do so, a unified proposal that consists of both the “Northern Section” and the “Southern Section” -- from Massaponax, Spotsylvania County, Virginia through the jurisdictionally-complex, security-laden Eads Street/Pentagon Reservation interchange in Arlington County. This fact is plain from, among other things, circumstances and events elaborated and identified below: (i) Fluor-Transurban’s proposal and funding imperatives are dependent on the so-called “Southern Section”, without which it could not fund the “Northern Section”, (ii) VDOT’s I-95/I-395 Transit/TDM Study, Final Report (February 29, 2008); (iii) the Project’s approval and formal transmittal to Arlington County and other local jurisdictions in May 2007; (iv) the presentation of the full 56-mile Project to the five (5) counties along the I-95/I-395 corridor, the City of Alexandria and regional transportation committees and boards, including the Washington Metropolitan Area Transit Authority, the National Capitol Region Transportation Planning Board, the Northern Virginia Transportation Commission and the Northern Virginia Transportation Authority, all of which include representatives from Arlington County; (v) the series of Design Public Hearings in February 2009; and (vi) VDOT’s presentation at the Commonwealth Transportation Board Workshop, July 16, 2009. Furthermore, the contours and components of the Project purportedly identified in the FHWA’s approval document have evolved and continue to evolve, making the Project an elusive, arbitrarily-defined target for agency, judicial and public review, let alone analysis of impact.

13. Political expediency, *i.e.*, the financial imperatives of Fluor-Transurban’s private interests and the need for expeditious implementation of the “Northern Section” to

serve Fluor-Transurban's purpose and not a reasoned basis in geography, logical termini or other legally-defensible factors, have removed the Project, properly defined, from public scrutiny and legitimate, legally justifiable agency determination and approval. This political expediency and the abject failure of defendants to recognize that a private imperative cannot be a substitute for or a shield against their public duty and full disclosure of essential financial information underpin the arbitrary, capricious and invidious conduct of the defendants in their violation of law and unwillingness to undertake the necessary, comprehensive review of the environmental, public health, cultural, discriminatory and social impacts of the entire length and breadth of the Project.

14. Upon information and belief, the defendants eschewed a well-reasoned analysis of whether the "Northern Section" would impact the environment or, in the fullness of the entire Project, violate civil rights, because their goal was to avoid public scrutiny. Such scrutiny would have revealed that the Project is designed in a manner that not only harms the environment but also causes disproportionate harm to minority and low-income communities. Based on the defendants' deliberately inappropriate and artificially constrained traffic data and environmental analysis, including the absence of any analysis of the physical and health impacts on minority and low-income communities, and the deliberate failure to properly identify the Project, it is not possible, logical or reasonable to claim, as the defendants have done, that the "Northern Section" of the Project will not significantly impact the human environment or that the Project can be fully, properly and legally understood and analyzed without examining it in its entirety.

15. By discriminating against minority communities, particularly in Arlington County, FHWA, VDOT and the individual defendants violated federal civil right statutes and

federal and state constitutional equal protection and due process rights. Defendants also violated federal environmental obligations governing the procedure and analysis to be used in evaluating applications for transportation projects. In addition, defendants' goals were antithetical to the goals of the federal statutory framework, which is designed to maximize public disclosure and scrutiny and informed deliberation by decision makers.

16. As more fully set out below, Arlington County seeks (i) a declaration that FHWA's January 7, 2009 "Categorical Exclusion" determination and approval of the "Northern Section" were arbitrary, capricious and contrary to law; (ii) a declaration that the defendants, including Secretary LaHood, Administrator Mendez, Program Manager Sundra (in their individual capacities), Secretary Connaughton and former Secretary Homer (in his individual capacity) are in violation of Title VI of the Civil Rights Act and the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and, for Secretary Connaughton and former Secretary Homer, in his individual capacity, also Article 1 § 11 of the Virginia Constitution; (iii) to enjoin defendants VDOT and Secretary Connaughton from entering into any further agreements or contracts with Fluor-Transurban; and (iv) to enjoin defendants, including Secretary LaHood, Administrator Mendez, Program Manager Sundra and Secretary Connaughton, from proceeding with the Northern Section until the defendants engage in a lawfully sufficient analysis of the entire Project's impacts, including disparate impacts on minority communities, and prepare a comprehensive and detailed Environmental Impact Statement pursuant to NEPA and all FHWA and Council on Environmental Quality ("CEQ") regulations and policies for the Project from Spotsylvania County to the jurisdictionally complex, security-laden Eads Street/Pentagon Reservation interchange in Arlington County.

### **JURISDICTION AND VENUE**

17. Jurisdiction of this action is based on 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201, 2202 (declaratory and further relief); 28 U.S.C. § 1343 (redress of civil rights); 5 U.S.C. §§ 701 *et seq.* (Administrative Procedure Act); and 28 U.S.C. § 1367 (supplemental jurisdiction). Plaintiff claims that defendants have acted in an arbitrary and capricious manner and in violation of law.

18. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(2) because this is an action against agencies of the United States.

### **PARTIES**

19. Plaintiff County Board of Arlington, Virginia (“Arlington County”) is the governing body of Arlington County, Virginia, a political subdivision of the Commonwealth of Virginia, and a jurisdiction which is traversed by FHWA’s and VDOT’s proposed “Northern Section,” whose residents will be adversely affected and whose legislatively-approved land use plans and long-range economic development goals will be compromised. Arlington County also:

- (i) commented on, participated in and expressed its opposition to the proposed Project to VDOT and the FHWA in various forums and processes provided by federal law, including the NEPA process;
- (ii) has been precluded, itself and on behalf of its employees and residents, from meaningful participation in (a) the NEPA process because of the arbitrary, capricious and wholly unjustified approval of a CE, the absence of an adequate analysis and study and the improper segmentation of the Project, and (b) the requirements imposed on FHWA under the

Constitution, Title VI and related regulations and directives because of FHWA's and VDOT's illegal actions and approvals, including the improper segmentation of the Project;

- (iii) owns, controls and operates streets, roadways and sidewalks and other properties that are adjacent to, near and within the study area identified by FHWA and VDOT and within the study area that should be relied upon pursuant to FHWA guidelines and common practice, and that will be adversely affected, used and harmed (including to residents and citizens through motor vehicle and pedestrian accidents) by the proposed Project and the use of the related exit and entrance ramps to I-95/I-395;
- (iv) funds the operation and maintenance of the public schools (and related parking lots, sidewalks and health services), including the predominately minority and/or low income Hoffman-Boston, OakRidge and Drew Model elementary schools, that are adjacent to, near and within the study area identified by FHWA and VDOT and within the study area that should be relied upon pursuant to FHWA guidelines and common practice, and that will be adversely affected and harmed by the proposed Project and the use of the related exit and entrance ramps to I-95/I-395;
- (v) regulates in various manners and provides financial or personnel support for elderly homes and day-care centers (including through County-financed or -supported services to individual members or residents or patrons), including the predominately minority and/or low income elderly homes and day care centers, such as, among others, the Pentagon City

Hospital, The School of Children, Queen of Peace Early Learning Center, Anderson Orthopaedic Clinic, Aurora Hills Senior Center, Walter Reed Senior Center, Drew Senior Center and Gunston Senior Center, that are adjacent to, near and within the study area identified by FHWA and VDOT and with the study area that should be relied upon pursuant to FHWA guidelines and common practice, and that will be adversely affected and harmed by the proposed Project and the use of the related exit and entrance ramps to I-95/I-395;

- (vi) has authority to expend funds for economic development and, pursuant to its charter, is obligated to ensure Arlington's fiscal sustainability and taxation revenue by preserving, enhancing and protecting attractiveness and accessibility of its employment and development centers;
- (vii) employs county and regionally-based individuals who (a) perform government services, (b) use and rely upon I-95/I-395 (especially its HOV lanes and interchanges) through personal automobiles, buses and vans, and (c) are and will be subject to delays and adverse health effects at costs in absences, efficiency and health care to the County government and the quality of services provided to residents of the County;
- (viii) has approved ordinances and policies related to land use, neighborhood preservation and rehabilitation, roadway and street design, public safety, public health, environmental protection, transit usage, commuter and pedestrian safety, the use of police, fire and rescue services, water quality and storm-water run-off (including from airborne pollutants such as those



from the highway into adjacent watercourses), and school, day-care and elderly home safety and health that will be adversely affected, used at County expense, or damaged, destroyed or require additional roadway, signal or signage changes and related municipal and health services and expenses from the air borne pollution, increased and predictably errant automobile usage, construction, automobile, bus and individual automobile accidents (including to pedestrians), and tree and natural resource destruction from the proposed Project and the widening, alteration or use of the related I-95/I-395 interchanges;

- (ix) may be sued and can sue in a manner similar to or consistent with any person, corporation or non-profit entity authorized to operate in Virginia;
- (x) has officials elected by its residents, and spokespersons that articulate and represent its interests and on behalf of its purposes for existence, including purposes directly and adversely affected by the Project; and
- (xi) pursuant to the Virginia Constitution, enacts laws and polices pursuant to a public participatory process that recognizes, accepts and sanctions its right and duty to represent its residents who have voluntarily chosen to remain within its jurisdiction and who participate and are free to participate in its decision-making processes in a manner provided by law and custom.

20. Defendant United States Department of Transportation (“USDOT”) is the executive department of the Federal government responsible for oversight of the transportation

planning process pursuant to the Department of Transportation Act that resides in Washington, District of Columbia.

21. Defendant Secretary Raymond H. LaHood is the United States Secretary of Transportation and the head of the United States Department of Transportation. Secretary LaHood is being sued in his official and individual capacities.

22. Defendant Federal Highway Administration (“FHWA”) is an agency of the United States Department of Transportation that resides in Washington, District of Columbia.

23. Defendant Federal Highway Administrator Victor Mendez is the head of the Federal Highway Administration. Administrator Mendez is being sued in his official and individual capacities.

24. Defendant Edward Sundra is currently the Planning/Environmental Program Manger of FHWA Virginia. At all times relevant to the issues set out in this Complaint, Mr. Sundra was the Senior Environmental Specialist for the FHWA, responsible for review and approval of the segmentation determination, the “Northern Section” extension and the January 7, 2009 CE. Mr. Sundra is being sued in his official and individual capacities.

25. Defendant Virginia Department of Transportation (“VDOT”) is an agency created under the laws of the Commonwealth of Virginia.

26. Defendant Secretary Sean Connaughton is the Virginia Secretary of Transportation and the head of VDOT. Secretary Connaughton is being sued in his official capacity.

27. Defendant Pierce Homer is the former Virginia Secretary of Transportation and is being sued in his individual capacity.

## SUMMARY OF LAW

### Civil Rights: Federal Claims

28. The Fifth Amendment to the United States Constitution provides: “. . . nor shall [any person]. . . be deprived of life, liberty, or property, without due process of law.”

29. Title VI of the Civil Rights Act of 1964 (“Title VI”) provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

30. The basis for these claims, as discussed, *infra*, is the fact that defendants failed to analyze the disparate, historic, cumulative, construction and public health impacts of the Project on historically minority communities along the Project corridor, in particular in Arlington County.

31. The Project will have lasting, cumulative, easily foreseeable disparate impacts on the residents and communities of Arlington County, adjacent to and nearby the I-395 corridor and its interchanges, whose right to be free from unlawful discrimination has been vitiated by defendants under the Fifth Amendment and Title VI by their approval of the Project without appropriate scrutiny and oversight to safeguard minority residents’ rights, and the furtherance of the Project in violation of those rights.

### Civil Rights: State Claims

32. Section 1 of the Fourteenth Amendment of the United States Constitution provides that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws.” Article 1, § 11 of the Virginia Constitution provides: “That no person shall be deprived of his life, liberty or property without due process of law. . . .”

33. Section 1983 of Title 42 of the United States Code (“Section 1983”) provides: “Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .”

34. Defendants’ artificial segmentation of the Project into two tactically separate entities; lack of appropriate scrutiny and oversight of the impacts the Project would have on minority residents residing and working adjacent to and nearby the I-395 corridor; and formal approval and continued planning of the Project, in spite of its obvious disparate impacts, cannot proceed without depriving the rights of Arlington residents under Section 1983.

#### NEPA

35. The National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (“NEPA”), requires FHWA and VDOT, through NEPA and the FHWA regulatory framework, to consider the environmental impacts of any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332 (2)(C) and 42 U.S.C. § 4332 (2)(D). NEPA compliance is triggered by the Project in this case because, among other reasons, FHWA must approve any new points of access to or exits from the interstate highway system. 23 U.S.C. § 111(a).

36. Although a public highway, this is not a publicly-funded or publicly-operated project. It is a privately-funded, for-profit project, operated by a private entity -- Fluor-Transurban. It was neither proposed, nor can it be constructed or operated, except in its entirety and profitably. Accordingly, the revenue related to the entire Project has been considered, and must be realized, for the integrity of the Project's development, operation, maintenance and private earnings. Neither the FHWA nor VDOT would construct this Project, or segments thereof, without the private funding basis. Nor can their rationale, without Fluor-Transurban, be the basis for understanding and ensuring compliance with NEPA.

37. Construction of the 56-mile Project cannot proceed until, among other requirements, NEPA review is satisfied through (i) the issuance of a final Environmental Impact Statement ("EIS"); (ii) the issuance of a final Environmental Assessment ("EA") finding "no significant impact;" or (iii) a finding that the Project is categorically excluded from the class of action for which an EIS or EA is required. 40 C.F.R. § 1508.4.

38. An EIS is a detailed written statement concerning the environmental and public health impacts of the proposed action and its alternatives, adverse environmental effects which cannot be avoided, the relationship between local short term use of the environment and the maintenance and enhancement of long term productivity and any irreversible and any irretrievable commitments of resources. 42 U.S.C. § 4332(2)(C). Agencies must consider and disclose the environmental and public health impacts to the public so that the public and the decision-makers may be fully informed and may adequately determine and address the consequences of a proposed action.

39. If it is uncertain whether the proposed action may have a significant effect on the environment, the agency must prepare an EA analyzing the effects of the action. 40

C.F.R. § 1501.3. An EA is a public document that provides significant evidence and analysis to determine whether to prepare an EIS. The EA must include an analysis of alternatives of the action and sufficient analyses of the environmental and public health impacts of the action and its alternatives. 40 C.F.R. § 1508.9. VDOT is currently preparing an EA for the so-called “Southern Section” of the proposed Project originally scheduled for public review in mid-2010.

40. In addition, NEPA and FHWA Orders, regulations and interpretive directives require the FHWA and the VDOT to identify and consider disproportionately high and adverse health and environmental impacts on minority and low-income populations.

41. A Categorical Exclusion (“CE”) may be authorized only for a very limited “category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [its] regulations.” 40 C.F.R. § 1508.4.

42. Whether the impact of an action will be deemed significant and therefore ineligible for a Categorical Exclusion “requires considerations of both context and intensity.” 40 C.F.R. § 1508.27. The significance of an action in context “must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” *Id.* A project’s intensity is weighed with reference to the severity of its impact, *e.g.*, degree of impact on geography, public health or safety. *Id.* Intensity also considers “whether the action is related to other actions with individually insignificant but cumulatively significant impacts.” *Id.* “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7). Cumulative actions are defined as “actions, which when viewed with other proposed actions have

cumulatively significant impacts.” 40 C.F.R. §1508.7. This includes impacts resulting from “individually minor but collectively significant actions taking place over a period of time.” *Id.*

43. The significance of an action cannot be avoided by “breaking it down into small component parts or artificially ‘segmenting’ it.” 40 C.F.R. § 1508.27. Rather, an agency must consider “connected” or “cumulative” actions in a single unitary environmental review document. 40 C.F.R. § 1508.25(a)(1)-(2). This includes, but is not limited to, any series of interrelated steps constituting an integrated plan or an activity that has an inextricable unity, whether physical or financial, or cannot or will not proceed until other actions are taken previously or simultaneously. *Id.* In this and other contexts, the unitary private proposal, funding, operation and essential need for profitability by Fluor-Transurban must be the determinative facts for FHWA decision-making on “segmentation” and all its environmental approvals.

44. Subject to these universal principles, and the non-public nature of the Project financing, rationale and operation, each Federal agency may develop its own criteria for determining the appropriate level of environmental review for different types of actions that come within its purview. 40 C.F.R. § 1507.3(b)(2). FHWA has implemented its own regulations describing the appropriate circumstances for application of each of the three classes of environmental review. 23 C.F.R. § 771.115. FHWA cannot treat the Project as if it is publicly-financed and operated.

45. Under FHWA’s NEPA regulations, a categorical exclusion may be used for actions that “do not involve significant environmental impacts” and do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural,

recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts. 23 C.F.R. § 771.117(a).

46. The FHWA regulations specify two types of actions that satisfy these criteria and thus may be excluded from detailed environmental review. 23 C.F.R. § 711.115(b).

- (i) The first type consists of a list of twenty actions that are deemed to meet the criteria for a Categorical Exclusion without any NEPA documentation. 23 C.F.R. § 771.117(c). The Project does not fit within this list of twenty actions.
- (ii) The second type is comprised of additional actions that may be deemed eligible for a Categorical Exclusion after further administrative review and approval.

47. The second type of Categorical Exclusion is only intended for certain types of actions that satisfy the overarching criteria of a categorical exclusion set forth in 40 C.F.R. § 1508.4 and 23 C.F.R. § 771.117(a). To obtain this type of Categorical Exclusion, the applicant must submit documentation demonstrating that its proposal complies with such criteria and that significant environmental effects will not result from the proposal. 23 C.F.R. § 771.117(d). Acting as if this was a publicly-owned and operated Project, VDOT recommended, and the FHWA approved, this second type of Categorical Exclusion for the so-called “Northern Section” of the proposed Project.



48. Under FHWA's statutory and regulatory requirements, including the implementation of Title VI (49 C.F.R. Subtitle A, including § 21.5(d), Discrimination Prohibited by VDOT) and NEPA (23 U.S.C. § 109(h)), and its own interpretive orders (*i.e.*, 62 F.R. 1837-18381b) and public descriptions of its duty under both statutes, VDOT and the FHWA also must formally integrate all civil rights and anti-discrimination requirements into its NEPA compliance, independent of its duty not to deliberately cause disparate impacts on minority populations.

#### CLEAN AIR ACT

49. The Clean Air Act prohibits any action or project that does not conform to the relevant state implementation plan ("SIP") for achieving the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7506 (c)(1). This "conformity" analysis must demonstrate that the Project will not "cause or contribute to any new violation of any standard in any area; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." 42 U.S.C. § 7506 (c)(1)(B). If the Project does not conform to the SIP, it cannot be approved or allowed to proceed.

50. The conformity rule requires air quality conformity determinations for transportation projects in non-attainment or maintenance areas for the criteria pollutants for which the area is designated non-attainment or maintenance. 40 C.F.R. § 93.102(b).

51. The conformity rule sets forth requirements for determining conformity including that the transportation project not cause or contribute to any new "localized" -- hot spot -- CO and/or PM<sub>2.5</sub> violations. 40 C.F.R. §§ 93.116(a), 93.123. Compliance with the Clean Air Act's conformity rule is independent of FHWA-VDOT's compliance with NEPA or the evidentiary and review standards of the APA.

FAHA

52. The FAHA requires that before approving a transportation project, Federal agencies must consider alternative courses of action and make a decision in the “best overall interest” based in great part on the social, economic and environmental impacts of the proposed transportation project and on national, State and local environmental protection goals. 23 U.S.C. § 109(a), (h); 23 C.F.R. § 771.105, including compliance with Title VI and all equal treatment requirements and directives based, in any part, on Title VI. In undertaking this analysis, FHWA must acknowledge and analyze, with a heightened scrutiny, the constraints on the public interest imposed by the private financing, rationale and operation.

53. A Federal agency may not approve a transportation project unless it first makes the public interest determination and findings set out in 23 U.S.C. § 109(a) and (h), and 23 C.F.R. § 771.101, 105 and 107(b), and is in compliance with Title VI and all equal treatment requirements and directives based, in any part, on Title VI.

54. Compliance with the FAHA is independent of the FHWA’s compliance with NEPA or the evidentiary or review standards of the APA.

**PROJECT BACKGROUND – THE PRETENSE OF HIGH OCCUPANCY**

55. From the outset of I-395 (Shirley Highway, previously I-95), the roadway was often considered in the regional context by Federal planners and Congress (inclusive of the 14<sup>th</sup> Street Bridge and the District of Columbia) for traffic going into the District of Columbia and from the southern terminus of the highway). Prior to 1969, dedicated commuter lanes in and out of the District of Columbia were ensured at different times of the day.

56. The HOV lanes were first created in Northern Virginia in 1969, along what is now the I-95/I-395 corridor. Arlington County has a documented historical commitment to such HOV lanes – including the goal of achieving the maximum number of

people into the fewest number of motor vehicles and related forms of transit. The southern terminus of the HOV lanes is currently the Town of Dumfries in Prince William County, while the northern terminus is at the approach to the 14th Street Bridge into the District of Columbia. The HOV lanes are separate, segregated lanes that are restricted during the morning and evening rush hours to automobiles carrying multiple passengers (three or more), vans and buses, with the exception of law enforcement and emergency vehicles. The purpose of the HOV lanes is to reduce traffic congestion and air pollution by encouraging carpooling, vanpooling and mass transit use along the I-95/I-395 corridor.

57. Running south from the northern terminus of the HOV lanes, Arlington County straddles the so-called “Northern Section” of the Project. For decades, Arlington County has followed a policy of encouraging high-density, mixed-use and transit-oriented development — also known as “smart growth.” This type of development concentrates growth while combining residential and commercial buildings in the same area. The goals of “smart growth” include community (residential and commercial) revitalization and preservation, and maximizing pedestrian, bicycle and mass transit access, and, in turn, reducing the adverse environmental, public health and public safety effects of heavy, single-occupancy automobile use. As the HOV facility arises out of similar policy goals, Arlington County and its residents have strongly supported, through practice and legislative mandate, the use and maintenance of the HOV lanes and policies for coordinated and interrelated roadways and infrastructure under Arlington County’s control and ownership.

58. According to VDOT’s High Occupancy Vehicle Enforcement Task Force (“Task Force”) in 2005, the HOV system in Northern Virginia is one of the most successful in the country. It carries more peak-hour passengers than the general purpose lanes, bus systems,

Metrorail or Virginia Railway Express. According to the Task Force, the I-95/I-395 HOV facility is the single most important element of the regional transportation network. The Task Force unequivocally stated that the viability of the entire Northern Virginia transportation network is directly linked to the continued success of the HOV lanes.

59. The environmental benefits of the I-95/I-395 HOV system are clear. They effectively and predictably manage congestion and, therefore, facilitate attainment of the region's clean air goals. The I-395 HOV lanes accommodate nearly twice as many commuters in a third as many vehicles over the adjacent conventional lanes. Upon information and belief, the Project will contribute to a degradation of the hugely successful HOV facility.

60. The regional bus services rely on dependable HOV lanes as do thousands of commuters in Arlington and surrounding communities who take advantage of the enormously successful phenomenon of "slugging." "Slugging," *i.e.*, dynamic ride sharing or instant carpooling, refers to drivers who pick up passengers at formally and informally designated locations, both in morning and evening peak-hour periods, in order to travel legally in the HOV lanes. A "slug" is an individual who accepts a ride. The "slugging" system helps to ensure that the largest number of people will utilize the HOV lanes in the smallest number of cars.

61. A February 1999 study entitled *I-95/I-395 HOV Restriction Study* concluded that reducing the HOV lane restriction from 3+ passengers to 2+ passengers would result in increased traffic volumes on the HOV facility, disincentives to the slugging system, decreases in public and private bus usage and a 60% decrease in vanpool ridership. The study also concluded that if two-person vehicles shifted from the general purpose lanes to the HOV lanes, the extra capacity on the general purpose lanes would be filled by diverted automobile

trips previously using other local roadways. These same results could be anticipated if single-occupancy vehicles were allowed to use the HOV lanes.

62. In 2006, Fluor and Transurban proposed the Project to alter and expand a fifty-six-mile stretch of the I-95/I-395 corridor, which traverses five Northern Virginia counties (Arlington, Fairfax, Prince William, Stafford and Spotsylvania), as well as the City of Alexandria, Virginia. A key component of the proposal – the *raison d’etre* for the Fluor-Transurban involvement -- is the alteration of the current HOV lanes into a shared HOV/HOT facility with collection of the tolls, largely from the south, for Fluor-Transurban’s financial benefit for the next eighty (80) years.

63. On October 24, 2006, pursuant to the PPTA, VDOT and Fluor-Transurban entered into a preliminary Project agreement titled “Interim Agreement To Develop And/Or Operate The I-95/395 HOT Lanes Project In Virginia” (the “Interim Agreement”). The Interim Agreement contemplates that the current HOV lanes on the corridor will be transformed into HOV/HOT lanes, and that these HOV/HOT lanes will be further extended southward through Spotsylvania County in order to justify the financing and profitability of the entire 56-mile Project. The difference between the two types of lanes is that while access to HOV lanes is restricted to multi-passenger and transit vehicles, HOT lanes are also open to single-passenger vehicles who pay a toll. Fluor-Transurban would build and operate the HOT lanes, collect the tolls for their financial benefit, and directly affect the use, safety and harm in the HOV lanes.

64. In submitting to FHWA the proposed Project in its narrowly defined form and ignoring its private nature and financing, VDOT recommended that the Project be subdivided into two separate undertakings for NEPA environmental analysis purposes, and FHWA (through defendant Sundra) approved this recommendation in 2006 and 2007. This

approval was the basis of FHWA's conditional approval, through defendant Sundra, of the CE status for the "Northern Section." Specifically, the conversion of the existing HOV lanes into HOT lanes (the "Northern Section") and the extension of these HOT lanes into Spotsylvania County (the "Southern Section") were deemed to be two entirely separate projects. In its initial proposal, Fluor-Transurban argued for a level of review documentation not included in a CE. In its determination of 2006, however, the FHWA and defendant Sundra -- in an oddly parsed, wholly illogical, and factually detached manner-- stated: "Certainly, making one improvement (the "Northern Section") without the other, while it may not be desirable from a tolling perspective, will represent a reasonable expenditure and be usable." (Emphasis added.) Fluor-Transurban will not expend anything on the "Northern Section" without the anticipated revenue from the "Southern Section" and a partial "toll lane" would certainly not be a "reasonable expenditure." In its determination of 2007, following the need for major additions (6.9 miles of highway and a flyover) in the "Northern Section" to merge with the "Southern Section" (and to refute further any pretense of rational termini), the FHWA said -- without reasons or explanation -- that it "did not see any issues." Although its contours and precise phasing are still in flux, the 36-mile "Northern Section" also includes the construction of this new approximately seven-mile travel lane and flyover, as well as modified and new access and exit points along the entire corridor, with construction of flyover ramps, pedestrian bridges, parking lots and bus transfer stations. Recently, VDOT acknowledged the need for additional, significant scoping reviews and substantive analyses for the jurisdictionally-complex, security-laden Eads Street/Pentagon, Shirlington Rotary and Seminary Road interchanges that will require more time and analysis and likely result in an artificially-constructed "supplement" to fit into (or actually render further irrelevant and inadequate) the CE documentation.

Defendants artificially, deliberately and permanently defined the “Northern Section”, thereby delaying true and meaningful scrutiny of the accuracy and legitimacy of the definition and the real impacts of the entire Project -- and the “Northern Section” -- as required by NEPA until after the CE determination was made. Having artificially defined the “Northern Section”, defendants now attempt to rectify their acknowledged legal deficiencies in what should have been studied, without acknowledging their failure to comply with NEPA. Defendants were wholly and deliberately irresponsible in recommending and adopting a Categorical Exclusion for the “Northern Section”.

65. VDOT further requested that the so-called “Northern Section” be deemed a “Categorical Exclusion” for purposes of NEPA environmental review, on the theory that it was so clearly unlikely to result in a significant environmental impact that even an Environmental Assessment detailing the absence of such an impact was unnecessary. On August 31, 2006, FHWA approved, with conditions, VDOT’s recommendation for the “Northern Section”. In so doing, FHWA and VDOT failed to base their approval on any serious, or even cursory, traffic and environmental analyses sufficient to show that the Project would not (i) result in significant impacts to the human or natural environment, including to HOV users or those living, working, receiving health care or education along the highway corridor; (ii) significantly impact travel patterns (diversion of traffic off the highway into adjacent neighborhoods, queuing or impacting the “slugging” system); and/or (iii) affect the roadway network at either terminus, or at critical highway interchanges (*e.g.*, Shirlington Circle, Seminary Road) forcing additional improvements or new security requirements beyond the scope of the Project. As set out in Fluor-Transurban’s original proposal, the Project’s magnitude, high visibility, need for a toll (recovery of private investment and on-going profit

revenue), issues such as induced sprawl, air quality and commuting patterns, and the need to extensively analyze alternatives all argue against a CE.

66. On January 7, 2009, at the recommendation of VDOT and purportedly in accordance with 23 C.F.R. § 771.117(d), FHWA approved the final Categorical Exclusion status for the “Northern Section” signed by defendant Sundra. *See* Documentation of FHWA Review, I-95/I-395 HOV/Bus/HOT Lanes Project, 0095-96A-107, PE101; UPC #70849 (“Documentation of Review”), attached hereto as Exhibit A. FHWA based its approval on documentation submitted by VDOT that purportedly demonstrated that the specific Categorical Exclusion criteria were satisfied, that significant environmental effects would not result, and that FHWA’s conditions to its earlier, preliminary approval had been satisfied even though that documentation was woefully inadequate and misleading on its face.

67. The Documentation of Review-- all done after the Project was segmented -- sets out the following supporting data and analyses: (i) Noise Analysis Technical Report, December 2008; (ii) Air Quality Analysis Technical Report, November 2008; (iii) Joint Permit Application, October 2008; (iv) Draft Interchange Justification Report, October 2008; (v) Existing Conditions Report, March 2008; and (vi) Section 4(f) Application Analysis, December 2007.

68. In its Documentation of Review, FHWA explained the basis for its final approval of the “Northern Section’s” Categorical Exclusion status. Specifically, FHWA stated: (i) there would only be marginal increases in mobile source air toxics (“MSAT”) pollutants as a result of the “Northern Section”; (ii) the Project would not cause or contribute to any new localized fine particulate matter (“PM<sub>2.5</sub>”) violations or increase the frequency or severity of any existing violations or delay timely attainment of the National Ambient Air Quality



Standards (“NAAQS”) for PM<sub>2.5</sub>; (iii) one- and eight-hour carbon monoxide (“CO”) concentrations resulting from the “Northern Section” would be well below the NAAQS for CO; and (iv) the “Northern Section” satisfied transportation air quality conformity requirements. The FHWA did not address the impacts of any other pollutant specific to mobile sources and resulting from this Project, such as the criteria pollutant nitrogen dioxide (“NO<sub>2</sub>”), or the public health risks in communities along the corridor, particularly minority communities in Arlington.

69. Furthermore, FHWA stated that greenhouse gas (“GHG”) emissions, as they impact climate change, did not need to be evaluated because climate change is more appropriately addressed for transportation systems at the regional level. The FHWA further stated that “any change to greenhouse gas levels as a result of the project are *likely* to be insignificant.” [Emphasis added]. There is no documentation to support why the “Northern Section” alone is not a “regional level” project (individually or cumulatively), or (ii) such “likely to be insignificant” conclusion.

70. FHWA concluded that significant environmental effects would not result, finding specifically that the Project would not (i) induce significant impacts to planned growth or land use for the area; (ii) result in significant air impacts; (iii) have significant impacts on travel patterns; or (iv) otherwise have, either individually or cumulatively, any significant environmental impacts.

71. FHWA’s approval of the Categorical Exclusion and the process that led to that approval were inadequate and irrational for numerous reasons, including, but not limited to the following: (i) VDOT’s submission of the Project to FHWA misstated and, in fact, excluded essential facts and lacked any basis for segmenting the Project into a “Northern Section” and a

“Southern Section” for environmental analysis purposes; (ii) defendants failed to adequately calculate pollutants emissions as a result of the Project to determine whether local and regional air quality standards were satisfied; and (iii) defendants deliberately restricted their analysis of the impacts of the Project on public health, ignoring completely impacts on vulnerable populations and on minority and/or low-income communities in adjacent neighborhoods and intersections.

**PROJECT IN FACT – FALSE SUBMISSION AND IMPROPER SEGMENTATION**

72. The Interim Agreement between VDOT and Fluor-Transurban describes the Project as the addition of up to three (3) HOT lanes on I-95/I-395, beginning south of the U.S. Route 17 By-Pass at Massaponox, Spotsylvania County and continuing north to south of the 14th Street Bridge in Arlington County. Similarly, in its May 2009 Project Summary and July 16, 2009 presentation to the Commonwealth Transportation Board, the VDOT identified the Project as beginning in Massaponox, Spotsylvania County and extending north fifty-six miles to the Eads Street/Pentagon Reservation interchange in Arlington. For purposes of NEPA, however, FHWA and VDOT have segmented the Project into the “Northern Section” and the “Southern Section” and presented them as separate projects. The FHWA approved Categorical Exclusion status for the “Northern Section”; the “Southern Section” is undergoing an Environmental Assessment. In practical, operational, financial and philosophical terms, the “Northern Section” and the “Southern Section” are interdependent and inextricably linked. Upon information and belief, the “Southern Section” is vital in the economic viability of the entire Project and cannot be evaluated or constructed separately from the “Northern Section”. Put simply, the private-sector financial imperatives dictate that the “Southern Section” be constructed if there is a “Northern Section.”

73. The actual scope of the Project, including the “Northern Section”, is greater than what was first presented to FHWA in 2006; the Project changed before the FHWA’s January 2009 Categorical Exclusion determination, and is still evolving. The Project’s current elements are as follows:

- (i) expansion of the HOV facility from 2 to 3 lanes and construction of approximately twenty-eight miles of new highway lanes;
- (ii) construction of six (6) new parking lots accommodating at least 3,000 (possibly as many as 6,000) vehicles, all located in low-income, minority areas, with three (3) planned in the “Northern Section” and three (3) planned in the “Southern Section”;
- (iii) construction of at least twelve (12) bus station expansions, improvements and related roadway alterations, including locations in both the “Northern Section” and the “Southern Section”;
- (iv) construction of a new pedestrian bridge across I-95 as part of the Lorton, Fairfax County bus station construction;
- (v) construction of thirteen (13) to twenty-two (22) new or expanded access points along the I-95/I-395 corridor;
- (vi) construction of a new reversible lane bus ramp at Seminary Road;
- (vii) construction of a new access flyover, including a 1.5 mile ramp for HOT lane users directly into the Aquia Creek/Harbor residential development;
- (viii) the replacement of existing sound walls and addition of new sound walls along the entire length of the I-95/I-395 corridor in the Project; and

(ix) modifications to the Bus Rapid Transit (“BRT”) operations and facilities. In addition, as part of VDOT’s Springfield interchange expansion project in Fairfax County (intersection of I-95, I-395 and I-495), there are to be seven bridges built into the Springfield interchange to accommodate traffic to and from the I-95/I-395 “HOT” lanes.

74. Dozens of acres of existing trees, plants and habitats will be destroyed within the existing right-of-way to accommodate the required merger of the Northern and “Southern Sections.”

75. The components of the Project also cannot be fully accommodated within the existing variable 300-800 foot state-owned right-of-way. The direct, flyover and slip ramps required for the new and expanded access points and requisite storm water management areas warrant the acquisition of additional right-of-way for the Project. A modified pedestrian bridge over the Shirlington Rotary to accommodate universal access, not included in any analysis, will also require additional right-of-way and cause disruption to adjacent communities. The proposed parking lots and new or expanded access points and the requisite additional rights-of-way will adversely impact communities located in census tracts that are predominately minority or minority/below poverty income level.

76. Vollmer Associates, LLP, a consultant to the Project, advised that the I-95/I-395 HOT lanes facility should be considered and evaluated in its entirety in the context of the overall HOV/HOT lanes network in Northern Virginia, *i.e.*, including the “Southern Section” and the I-495 (Capital Beltway) projects. Moreover, in light of defendant’s stated goal to develop a regional and reliable transportation facility, it would be irrational and, at a minimum unwise, to undertake the “Northern Section” if the “Southern Section” were not

completed. Yet, that remains a distinct possibility as defendants have approved the “Northern Section” before even finishing preliminary review on the “Southern Section”.

77. VDOT made a deliberate decision not to provide the full definition of the Project in its submissions to FHWA. Furthermore, VDOT continues to modify certain component designs such as those for the Shirlington Rotary and the Seminary Road interchanges. Thus, even if, assuming *arguendo*, the Categorical Exclusion determination was proper when issued, the Project no longer resembles that which was approved. Defendants’ willful disregard of that fact is further evidence of their arbitrary and capricious conduct in derogation of duty.

78. All of the impacted local jurisdictions either have opposed the “Northern Section” due to the limited review and analysis or withheld support and identified substantive traffic, environmental and social community issues related to the Project as now understood. FHWA and VDOT have not addressed such concerns.

79. On October 21, 2009, Arlington formally requested that the new FHWA administration, *i.e.*, Secretary LaHood and Administrator Mendez, rescind the Categorical Exclusion for the “Northern Section”. On November 19, 2009, the FHWA denied Arlington’s request.

**SOCIO-ECONOMIC HAVES AND HAVE NOTS**  
**A NEW PROTECTED CLASS**

80. The Project has created a new protected class -- the largely Caucasian, exurban, single-occupancy rider of sufficient wealth to be able to afford the payment of significant tolls to use the I-95/I-395 corridor. In his May 7, 2009 letter to regional planning and transportation organizations, Secretary Homer laid bare the pretense of this Project as a high occupancy facility. “The HOT lanes project is part of an emerging network of managed

lanes that will serve the major public and private job centers in the region. The combined project will enable a reliable single-seat ride in a managed facility from Garrisonville to Tysons Corner or to the Pentagon. Neither is possible today.” Secretary Homer’s letter did not address the disproportionate cost to the minority communities in the vicinity of the “Northern Section” for the benefit of this reliable single-seat ride.

81. In support of this class and its unique desire for the privileged HOT lanes, the defendants, including Secretary LaHood, Administrator Mendez, Program Manager Sundra, Secretary Connaughton and former Secretary Homer, deliberately and knowingly decided to: (i) authorize the private control, operation and funding of Shirley Highway; (ii) ignore their obligations, procedural and substantive, under NEPA, the CEQ regulations, Title VI of the Civil Rights Act, the FAHA, FHWA’s Orders and national precedents in other communities governing its duty in matters of race and poverty, and of Article 1, § 11 of the Virginia Constitution and the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution; (iii) propose to dramatically alter the I-95/I-395 corridor, a regional transportation facility through five Northern Virginia counties and the City of Alexandria, that encompasses approximately forty (40) census tracts that are predominately minority or minority/below the poverty income level; (iv) degrade the air quality and unnecessarily place at risk the health of Arlington County’s residents, particularly minorities, poor, elderly and working-class people and families living, working, and going to schools, day care centers and health care facilities proximate to the “Northern Section”; and (v) risk the safety and health of those working-class, civil servant, minority and low-income people whose commutes to and from work, day care, school and hospitals using the HOV lanes will be restricted or curtailed or overburdened. In seeking to fulfill its goal, VDOT, Secretary Connaughton and former Secretary Homer, acting under color

of law and with the acquiescence and support of the FHWA and Fluor-Transurban, have impacted the minority families of Arlington County specially, harmfully, insidiously and disparately in order to provide HOT lanes for the benefit of defendants' new, protected, largely Caucasian, single-seat rider class.

82. FHWA and VDOT and its predecessor agencies, over an approximately 75 year period, have engaged knowingly and particularly in disrupting, displacing, and causing harm and disparate treatment to the historic minority communities and various of their residential structures, including churches, in what, today, are Arlington View, Nauck, Green Valley, Hall's Hill and other communities (including minority communities now dispersed) for the purpose of the original construction and subsequent expansions of I-395/I-95 (Shirley Highway) and, now, through disease-causing and unhealthy air contaminants resulting from the creation of HOT lanes. Each of these communities, in a forced iteration, remains near or adjacent to I-395/I-95 (Shirley Highway), and are largely isolated from the purported benefits of the proposed reliable, southern-based, single-seat rider on the highways of Northern Virginia.

83. Arlington County is a community that has methodically followed a policy of (i) increasing transit and transit usage, (ii) encouraging true HOV usage and the "slugging" system of commuters gathering in designated locations to use the HOV lanes -- all deliberate and coordinated, and ultimately successful efforts to decrease air pollution and related public health and public safety risks, and (iii) supporting the conservation and rehabilitation of existing residential neighborhoods, especially in its minority neighborhoods near and adjacent to the "Northern Section". In this context, the conversion of HOV lanes into HOT lanes-- and related decisions of segmentation and approval -- by the defendants reflects a deliberate

decision to dismiss Arlington County's long-held, legislatively-approved programs and policy goals and instead support continued suburbanization and sprawl. Most of the current users of the existing public transit, HOV lanes and slugger systems believe, and documentation so supports, that the Project will disrupt the current facility and transportation system and discourage drivers from using HOV lanes and picking up sluggers. This outcome is totally antithetical to the choices these people and their local government have made. FHWA and VDOT are informed fully that most of these people will not use the proposed HOT lanes. The effects of the disruption to the delicate transportation balance in what is the I-95/I395 HOV system are plainly set out in the February 1999 *I-95/I-395 HOV Restriction Study* and in the public comments opposing this Project.

84. The deliberate, disparate and discriminatory nature of this publicly-supported Project is clearly illustrated by the distinct racial and income demographics of the "Northern Section" and the "Southern Section". I-95 and I-395 are publicly funded highways. FHWA's and VDOT's deliberate discrimination is not merely directed against those who cannot afford this privilege but is also directed against those in Arlington County and adjacent jurisdictions who must pay a cost in terms of their health and quality of life. Forty census tracts of minority and low-income families and individuals are located along the I-95/I-395 corridor within the study area of the Project. In Arlington County, most of the census tracts immediately adjacent to the "Northern Section" comprise minority communities. There are also enclaves of other populations of concern – schools, day care centers, senior citizen facilities, hospitals and clinics that are in close proximity to the "Northern Section" and subject to its adverse public health impacts.



85. Along the “Northern Section” in Arlington County, there are four (4) elementary schools that are vulnerable to the adverse impacts of the Project – Hoffman-Boston Elementary, Oakridge Elementary and Drew Model are in designated minority/below poverty income level residential areas and minority census tracts; Abingdon Elementary also is located proximate to the “Northern Section” and the proposed new and expanded access points for the Shirlington Rotary interchange and two (2) of the proposed Project parking lots.

86. In census tracts adjacent to the “Northern Section” and to the jurisdictionally complex, security-laden Eads Street/Pentagon Reservation terminus of the Project are centers of populations that are particularly vulnerable to compromised air quality -- the Arlington Urgent Care Center, Crystal City Children’s Center and the Child Care Center. Each facility cares daily for a vulnerable population, the racial composition of which fluctuates over time.

87. The “Northern Section” of the Project impacts the counties of Arlington, Fairfax, Prince William, the City of Alexandria and the northern area of Stafford County. With respect to Arlington County, the local jurisdiction most impacted by the deficiencies in local roadway and air quality impacts analyses, the demographics, as described elsewhere in this First Amended Complaint and in the census tract data, inform the conclusion of inherent inequity in the implementation and operation of the Project. (The City of Alexandria, also near the northern terminus of the Project, is similarly impacted.)

88. Arlington County is 40% minority, with 7.8% of residents below the poverty line. It has four (4) census tracts of families that are predominately minority and/or below the poverty level along the “Northern Section” portion of the Project. In fact, all along the “Northern Section”, there are numerous census tracts that are predominately minority

and/or minority/below the poverty line -- an overwhelming majority of the people and families residing along the I-95/395 corridor within the “Northern Section” area, with the schools, day care centers and health care facilities that serve this same population, independent of pockets of similarly-conditioned families outside of the designated census tracts but within the scope of the corridor.

89. Arlington County has a population density of 8,112 people per square mile and a housing density of 3,495 housing units per square mile.

90. Arlington County’s minority neighborhoods, including, among others, Arlington View, Nauck, Green Valley, and Hall’s Hill already have a long history of the deliberate imposition of unique and massive disruption, destruction and relocation and dispersion of residents because of the decisions made by FHWA and VDOT and their predecessor agencies due to the original placement and subsequent expansion of I-395/I-95 (Shirley Highway).

91. By contrast, the “Southern Section” traverses most of Stafford County and Spotsylvania County, with only 21% and 19% minority populations, respectively. Between 2.4% of families and 4.2% of individuals in Stafford County are below the poverty level; 4.7% of the residents of Spotsylvania County live below the poverty line. Stafford County has two census tracts of minority and/or below the poverty income level populations, both located adjacent to I-95. Spotsylvania has no census tract along I-95 that is predominately minority or poor.

92. Growth rates in Spotsylvania and Stafford counties have been astronomical: between 1990 and 2000, Stafford County increased in population by 50%; Spotsylvania County by 57.5%. Both counties are largely suburban and rural in character.

They are characterized by the “subdivision” -- an exclusive single-use, residential zoning classification which, as a practical, architectural and historical matter, is automobile dependent and oriented. Generally, these communities epitomize a particular way of living and a culture of significant difference to communities within the “Northern Section” of the Project, including Arlington County. With minor exceptions and by deliberate local jurisdiction and VDOT choice, both counties largely lack conventional street grids or transit systems. Among Spotsylvania County’s commuters, 52.5% to 64% of all commuters work outside the county and 79% of all county commuters drive to work alone. In Stafford County, 55.9% of all commuters work outside the county. Almost all commuters using the I-95/I-395 corridor travel north in the morning rush period and return south in the evening. It is clear whom the Project benefits and which culture and lifestyle are furthered by the HOT lanes.

93. Stafford County has a population density of only 342 people per square mile and a housing density of 83 units per square mile. Spotsylvania County has a population density of 226 people per square mile and a housing density of 83 units per square mile.

94. The growth experienced by these two “Southern Section” counties is a direct result of the policy choices they have made in zoning (single-use zoning), forms of roadway construction (the curvilinear street), housing patterns (primarily single family subdivision) and transit (the absence thereof), along with other social trends such as white flight from core urban and inner-ring suburban areas and cultural mores rejecting the value of the urban grid and closely knit, mixed-use neighborhoods. These choices, and local government and VDOT decisions to support if not encourage these choices and characteristics, have imposed significant environmental consequences upon the residents and government of Arlington County especially its minority and low income families who reside within the census

tracts along the I-395 corridor study area – consequences that would now be exacerbated as a result of the implementation of the “Northern Section”.

95. The plan to create new HOT lanes for single-seat riders is designed to permit unabated growth in Stafford County and Spotsylvania County, without regard to the externalities that others will suffer as a result. Specifically, HOT lanes will encourage, open and support new frontiers for real estate development and increase the pressures on land use patterns, particularly in the region along the “Southern Section”, that also will have discernible and egregious impacts on Arlington County. The Project will validate and encourage an exponential increase in environmentally harmful, vehicle-dependent development and growth patterns already prevalent in Prince William, Stafford and Spotsylvania counties and areas further south along the I-95 corridor. Defendants deliberately excluded from any analysis the impacts on land use -- sprawl -- of the “Southern Section” and its corresponding, inescapable and inexorable effect on traffic volumes (and corresponding air quality) on the “Northern Section”. This induced growth in the “Southern Section” counties will have an exponential adverse effect on the minority communities along the “Northern Section”, particularly in Arlington County.

96. Defendants’ imperative for a reliable, regional “single-seat ride” will only increase the size and demands of the new, protected class and exacerbate disparate impacts on minority and low-income populations along the corridor, in particular in Arlington County.

97. A study by Environmental Defense and Breakthrough Technologies, dated September 21, 2005, recognized the likelihood of sprawl and increased air pollution as a result of the Project. According to the study, HOT lanes could exacerbate sprawl development, boost dependence on costly foreign oil and counter progress in addressing the region’s continuing

serious air quality problems. The study further projects a likely increase of traffic congestion on the local roads throughout the corridor, in areas in which there are predominately minority and low-income populations.

98. The acknowledged sprawl, local road congestion and commuting choices by residents in Prince William, Stafford and Spotsylvania counties belie any purported neutrality or ignorance on the part of FHWA and VDOT of the Project's impacts with respect to race and income. These agencies and Fluor-Transurban participated in the Environmental Defense study's formulation and provided substantive comments. FHWA's and VDOT's knowledge of its content and conclusions now precludes them from asserting that the Project, and the harm it likely will cause, are anything other than deliberate actions on their part.

#### **TRAFFIC ANALYSIS - DATA ON THE MOVE**

99. The January 2009 "Documentation of FHWA Review" relies on VDOT's Interchange Justification Report ("IJR") for (i) analyses of traffic capacity and congestion along the I-95/I-395 corridor, (ii) traffic flow and delays at entry/exit points between the general purpose travel lanes (*i.e.*, non-HOV lanes) and the proposed HOV/HOT lanes facility, and (iii) comparison of the "No-Build" and "Build" alternatives. The IJR purports to support a goal of the Project to expand and enhance the existing I-95/I-395 corridor to relieve congestion and reduce travel delays to meet future transportation demand of the general purpose lanes along the corridor. The constraints and artificiality of the alternatives available and the conclusions are driven by the private-sector financial construction and operational imperatives of the Project, not the "public interest."

100. VDOT deliberately has not released pertinent financial and development Project information to local stakeholders, preferring to shield such information from public scrutiny based on commercial proprietary status.

101. The IJR's comparison of the "Build" and "No-Build" alternatives incorrectly assumes that if the "Build" alternative, *i.e.*, the Project, is not implemented, then the current capacity of the facility and its characteristics will remain unchanged through the 2030 design year. This approach contradicts standard practice for major transportation projects by ignoring comparison of the "Build" scenario with several viable alternatives, including simple modification to existing conditions, to determine the best operations for the driving public at the most favorable cost, *i.e.*, the best overall public interest. In light of current modeling methodology, it is simple in the extreme, and irresponsible, to limit an alternative analysis to merely the "Build" and "No Build." Despite its acknowledgement of the need for an alternative analysis generally, the IJR also dismisses the lack of alternatives analysis as being unnecessary for projects that qualify for a Categorical Exclusion. This is bootstrapping. The IJR must justify the CE. Here it does not. The IJR also is another example of the defendants skewing the process to improperly invoke the Categorical Exclusion to avoid generally accepted engineering practices, *i.e.*, conducting a proper alternative analysis for a transportation project of this magnitude, and refusing to conduct such accepted practices because the "Northern Section" was deemed a Categorical Exclusion.

102. Furthermore, even taken at face value, the IJR makes numerous unsupported conclusions in favor of the "Build" alternative. For example, improvements at only one intersection (Shirlington Rotary and Shirlington Road) in the "No-Build" alternative would result in less total vehicle delay for all intersections on the Shirlington Rotary than that

provided by the “Build” alternative, *i.e.*, defendants’ Project. The “Build” alternative also increases the total number of vehicle stops at the six intersections on the Shirlington Rotary by over 7000 stops, approximately 200% more than the “No-Build” alternative. The single modification to the “No-Build” alternative would result in less delay and fewer stops (and therefore lower emissions and fuel consumption) at the Shirlington Rotary intersections than defendants’ preferred “Build” alternative.

103. Upon information and belief, defendants’ traffic modeling also is flawed, unreliable and not consistent with generally accepted engineering practices for a transportation project of this scope and duration. Defendants failed to apply the most basic procedure for ensuring traffic projection accuracy by not calibrating the travel demand model prior to projecting traffic data – data on which proper calculations of air emissions are based. Flawed data provide deficient air emissions analyses and misjudgments on public health impacts. The IJR’s unreliability extends to the modeling procedure applied to Project intersections with the improper effect of significantly overstating the approach delays at the Shirlington Rotary for the “No-Build” alternative.

104. Traffic modeling and data for the “Northern Section” are used merely to achieve a favorable result and are woefully inadequate to support a credible environmental analysis. The deficiencies include: (i) a traffic model that was not properly calibrated and modeling procedures that deviated from standard and generally accepted engineering practices; (ii) modeling assumptions that were not validated with Arlington County traffic engineers and those of other local jurisdictions most impacted by the Project; (iii) no analysis of the impacts of the “Northern Section” on Arlington’s local street network, the mitigation of which will be borne solely by Arlington; (iv) an analysis that under-predicts the impacts at the north terminus

of the Project – the jurisdictionally complex, security-laden Eads Street/ Pentagon Reservation interchange -- of a third HOV lane with additional traffic volume merging when the HOV facility narrows to two lanes at the 14<sup>th</sup> Street Bridge; (v) no analysis of the impacts on Arlington’s local street network during security alerts at the Pentagon Reservation; (vi) no analysis of traffic delays and queues (and therefore lack of data for air emissions calculations) as a result of vehicle breakdowns or accidents in the HOV/HOT lanes – particularly relevant due to the elimination of safe-width shoulder lanes along most of the “Northern Section”; and (vii) no analysis of the impact of the “Northern Section” on traffic delays and levels of service (and therefore lack of data for air emissions calculations) on both general purpose lanes and HOV/HOT lanes at the southern terminus until the “Southern Section” is implemented.

105. Due to the flawed methodology and deceptive analysis, the IJR understates traffic volume and neglects impacts on adjacent and nearby local roads and intersections. There will be increased congestion on local roadways and decreased levels of service at these intersections that will adversely impact the fabric, nature and public health of the historically minority communities such as Arlington View, Nauck, Green Valley, Hall’s Hill, adjacent to or nearby the “Northern Section”.

106. Due to the flawed methodology and deceptive analysis, the IJR understates traffic volume and neglects impacts on adjacent and nearby local roads and intersections. There will be increased congestion on local roadways and decreased levels of service at these intersections that will adversely impact the fabric, nature and public health of the historic communities such as Shirlington, Fairlington and Parkfairfax, adjacent to and nearby the “Northern Section”.



107. The IJR's comparative analysis of positive and negative impacts of the Project is flawed because it suggests that a positive impact on the volume to capacity ratio (V/C) at one location offsets a negative impact elsewhere. Because of the nature of traffic flow, the vehicle throughput of the general purpose lanes decreases dramatically once capacity is reached. This will increase traffic delays and vehicle queues resulting in elevated pollutants emission levels (that increase at a much greater rate than the volume levels increase). The IJR reveals that the worst section of the general purpose lanes studied (northbound north of Garrisonville Road in the AM peak), which already exceeds capacity, is further worsened in the "Build" alternative. The IJR then relies on the construction of the "Southern Section" to remedy this situation, which is further evidence of defendants' deliberate deception in segmenting the Project. The fact that the Project offers no improvement (and, in fact, exacerbates a failing condition) to this general purpose lane congestion is inconsistent with good engineering practice and proper analysis would reveal a significant increase in pollutants emissions.

108. The IJR fails to calculate the effects (capacity, traffic flow, congestion, traffic queues, air emissions) or the movement of single-occupancy vehicles from the general purpose lanes to the HOV/HOT lanes and the resultant movement onto the general purpose lanes of diverted traffic previously using other roadways.

109. Other traffic analysis deficiencies include: (i) travel volumes presented in the travel demand model outputs and in the IJR are inconsistent; (ii) traffic volumes presented in the Air Quality Analyses are inconsistent with those presented in the IJR; (iii) impacts to intersections on arterial streets with interchanges to I-95/I-395 were not analyzed because they

fell outside the study area, despite projected increases in traffic volumes at those intersections, and (iv) no clearly defined basis for the scope of the study area used.

110. The nature of the design and implementation, *i.e.*, design-build approach, of the Project is such that its components have been and continue to be modified, at times significantly, throughout the review and evaluation process. In fact, VDOT's July 16, 2009 presentation before the Commonwealth Transportation Board Workshop identifies extensive scope reviews on the "Northern Section" due to construction costs, revenue forecast and the current financial market. These scope reviews could significantly impact the current designs for the Shirlington Rotary, the Seminary Road interchange and other roadway segments, interchanges and local intersections not fully evaluated. The scoping review also will include consideration of phasing options for the "Northern Section" exacerbating further the improper segmentation of the Project. The additional scoping review alone supports the conclusion that defendants acted rashly and prematurely in determining that the "Northern Section" would not significantly impact the human environment.

111. In selecting the Categorical Exclusion status, defendants explicitly commit the Project to having no significant impact on travel patterns. It is axiomatic that the Project cannot simultaneously relieve traffic congestion, facilitate the construction of a new HOV lane and significant extension of existing HOV lanes, construct ancillary transit system infrastructure and be an integral component of a regional system to "enable a reliable single seat ride in a managed facility from Garrisonville to Tysons Corner or to the Pentagon," and yet have no significant impact on travel patterns. The defendants' entire analysis is inconsistent with good engineering practice and, in fact, contradicts standard practice for evaluation of major transportation projects such as the proposed HOT lanes.

**ENVIRONMENTAL AND PUBLIC HEALTH RISKS - OPAQUE ANALYSES**

112. Air quality analyses requirements are addressed independently by NEPA and the Transportation Conformity Rule of the Clean Air Act. Before defendants recommended and adopted the Categorical Exclusion, they had a responsibility to identify the “Northern Section” impacts on air quality and to ensure that the “Northern Section” conformed to the Virginia and regional air quality implementation plans. To satisfy conformity requirements, the “Northern Section” must not cause or contribute to any new violations of any air quality standard, increase the frequency or severity of any existing violation of such standard or delay timely attainment of any air quality standard. The IJR and the Air Quality Analysis do not provide the data and analyses to comply with NEPA and to determine whether the conformity requirements are satisfied. In fact, the base traffic volumes presented in the Air Quality Analyses are not consistent with the traffic volumes derived from the IJR.

113. The Air Quality Analysis that supports the FHWA’s Categorical Exclusion determination identifies its scope of review as encompassing the approximately thirty-six miles of the I-95/I-395 corridor from the Garrisonville Road interchange in Stafford County to the jurisdictionally complex, security-laden Eads Street/Pentagon Reservation interchange in Arlington County, *i.e.*, the “Northern Section”. The “Southern Section” is currently undergoing an environmental assessment. The Air Quality Analysis further identifies that the “Northern Section” lies within a moderate 8-hour ozone and PM<sub>2.5</sub> nonattainment area. Portions of the “Northern Section”, *i.e.*, within the City of Alexandria and Arlington County, are in a CO maintenance area.

114. Defendants present the Air Quality Analysis as the basis for the FHWA’s determination that the “Northern Section”, with its roadway changes, new and modified access

and exit ramps and flyovers, parking lots and bus stations, does not significantly affect the environment and warrants a CE.

115. As presented in the Air Quality Analysis, however, the operation of the “Northern Section” will increase (i) vehicle miles traveled; (ii) peak hour traffic volumes; and (iii) emissions of Mobile Source Air Toxic (“MSAT”) pollutants, including particulate matter. Strongly-correlated indicators suggest that the “Northern Section” also will increase emissions of carbon monoxide (“CO”), nitrogen oxide (“NO<sub>x</sub>”), volatile organic compounds (“VOCs”), PM<sub>2.5</sub> and greenhouse gases (“GHG”). The Air Quality Analysis does not address, at all, the concentrations and, therefore, health risks of exposure to nitrogen dioxide (“NO<sub>2</sub>”), a criteria pollutant generated by motor vehicle emissions, which impact would be felt most significantly in communities adjacent to and nearby the Project. If the defendants’ congestion mitigation prediction for the “Northern Section” were accurate, air emissions for the “Northern Section” would decrease from current conditions, *i.e.*, the “No-Build” alternative. The prediction is not accurate and, therefore, emissions do not decrease with the “Build” alternative but likely will *increase*.

116. Exposure to air toxic pollutants increases the risks of cancer and other serious human health effects. As much as half of all cancers arising from exposure to outdoor sources of air toxic pollutants derive from the emissions of mobile sources -- cars, buses and trucks. Since MSATs are known to cause cancer and other serious health effects, people who live or work near major roads are likely to experience greater exposures and higher health risks, particularly among the vulnerable populations. Additionally, ambient exposure to air toxic pollutants can have long-term effects to ecological systems through uptake by plants and ingestion by animals. Reductions of MSATs will annually prevent premature mortality for a

significant number of people. The United States Environmental Protection Agency (“EPA”) identified these human health risks in recently initiating its regulatory program to control and reduce MSAT emissions.

117.  $PM_{2.5}$  is classified as both an MSAT and a criteria pollutant. It poses a significant risk to human health because it easily penetrates the human respiratory system’s defenses. The Air Quality Analysis sets out the relationship between  $PM_{2.5}$  pollution exposure and a variety of health issues such as: (i) increased respiratory symptoms and difficulty of breathing; (ii) decreased lung function; (iii) aggravated asthma; (iv) chronic bronchitis; (v) irregular heartbeat; and (vi) nonfatal heart attacks. Furthermore, scientific studies have associated exposure to  $PM_{2.5}$  pollution with overall increased morbidity, mortality and exacerbation of existing cardio-vascular and respiratory conditions, particularly in vulnerable populations. Studies have also shown that a reduction in exposure to  $PM_{2.5}$  contributed to significant and measurable improvements in life expectancy. The background levels of  $PM_{2.5}$  in the metropolitan Washington, DC region provide little leeway for additional  $PM_{2.5}$  emissions from the operation of the “Northern Section”. The Project must demonstrate conformity with both regional and local requirements to attain and maintain the  $PM_{2.5}$  standards. Defendants’ Air Quality Analysis does not make this demonstration.

118. For conformity purposes, the Project is deemed “regionally significant,” requiring  $PM_{2.5}$  and CO emissions analyses. The “Northern Section” alone is also “regionally significant.” On a local-scale, the Project is considered a project of air quality concern because of its potential to create localized (“hot spots”) violations of  $PM_{2.5}$  air quality standards. The Project warrants then localized analyses to determine if it conforms to requirements under the Clean Air Act to not: (i) cause or contribute to any new violation of any standard in any area;

- (ii) increase the frequency or severity of any existing violation of any standard in any area; or
- (iii) delay timely attainment of any standard in any area. 42 U.S.C. § 7506(c)(1)(B); 40 C.F.R. §§ 93.109, 93.116 and 93.123.

119. For  $PM_{2.5}$ , the conformity regulations require consideration of local impacts. The Air Quality Analysis incorrectly relies only on a regional air monitor in Muirkirk, Maryland as a surrogate monitor to fully satisfy the conformity analysis. The area of the surrogate monitor and the Project area should be comparable in terms of (i) traffic volumes and percentages of diesel fuel emissions; (ii) distance between the monitor and the roadway source of pollutants; (iii) land use and surrounding terrain; and (iv) prevailing wind direction. However, there are significant distinctions between the Muirkirk monitor and the Project rendering the Muirkirk monitor an inappropriate surrogate. The Muirkirk monitor is over 1.5 miles from the nearest large roadway and the area surrounding it is largely rural. A readily accessible database of peer-reviewed scientific and medical reports shows the positive correlation between proximity (within 1,500 feet) to high volume roadways and health impacts of children, and these data provide the basis for transportation conformity procedures that dictate that surrogate monitors' locations be representative of project locations. Land use characteristics of the Muirkirk monitor are at extreme variance with the most heavily-impacted areas along the "Northern Section" where homes, schools and hospitals lie within 200 to 500 feet of the Project, and land use is primarily of urban density, consisting mostly of historically minority and low-income communities with specific impacted locations with vulnerable populations. It is both physically impossible and a misinterpretation of statutory requirements for the Muirkirk monitor to provide the data with which to evaluate whether the Project causes or contributes to localized pollutant violations at these close-in locations.

120. The United States Environmental Protection Agency (“EPA”) has set forth short- and long-term standards for exposure to NO<sub>2</sub>, the criteria pollutant most directly related to vehicle and traffic-related emissions which dominate personal exposure to NO<sub>2</sub>. EPA’s scientific basis consists of extensive and deliberate peer-reviewed studies and analyses detailing the significant, adverse human health impacts due to exposure to NO<sub>2</sub>, particularly on susceptible and vulnerable populations. Of the five criteria pollutants, NO<sub>2</sub> likely has the strongest association among lower socio-economic groups.

121. Increases in traffic volumes and changes in traffic patterns, such as those likely associated with the Project, can lead to traffic congestion. Long vehicle queues, typical of congestion, occur along roadway segments, interchanges and intersections where levels of service are poor. These long queues and conditions of congestion lead to concentrated emission corridors along roadway segments. Air quality impacts are more severe as traffic congestion worsens and vehicle queues lengthen. The Project’s increases in vehicle volumes and vehicle-miles-travelled contradict the *regional* goal of improvement in air quality through the concomitant Project-wide increase in emissions. Increased traffic congestion caused by the Project along roadway segments and interchanges and at nearby intersections also will result in decreased “levels of service” at many locations, also *locally* increasing pollutants and exacerbating air quality. To ensure that air standards are not violated locally, transportation conformity requires that the Project apply hot-spot procedures to intersections where levels of service are poor due to increased traffic volumes caused by the Project. 40 C.F.R. § 93.123(a)(1)(ii). The Air Quality Analysis that supports FHWA’s Categorical Exclusion determination fails to analyze, in both extent and detail, the Project’s potential to violate air quality standards in these adjacent and nearby areas, many of which are minority and/or low-

income communities. In fact, it is these communities, due to socio-economic constraints and hindrances, that are most susceptible to the adverse health conditions imposed by poor and contaminated air quality.

122. For air toxic pollutants, including PM<sub>2.5</sub>, the Air Quality Analysis relies on the overly broad, average measure of the Project's increase in total vehicle miles travelled to characterize the potential health and environmental effects at all locations and time periods at which the population will be exposed. It does not predict pollutant concentrations at specific locations or evaluate the number of people exposed to the Project's emissions. Both of these factors are necessary, however, to determine the full environmental and public health impacts of the "Northern Section" on affected local communities, many of which are minority and/or low-income populations.

123. The Air Quality Analysis shows an increase in toxic air emissions based on the projected increases in vehicle miles traveled as a result of just the "Northern Section" of the Project. Any increase in air toxic emissions in the Project area will reduce anticipated gains in air quality from recently promulgated federal standards for the control of hazardous air pollutants from motor vehicles and motor vehicle fuels. The Project will cause an *increase* in toxic air emissions, and this increase will impact the public health, particularly for affected vulnerable populations and minority, low-income communities at the many close-in locations of greater concentrations and exposure.

124. Actual increases in toxic emissions concentrations caused by the Project will be very uneven among specific locations and at specific times along the "Northern Section". The Air Quality Analysis identifies increases in traffic volumes during peak hours of up to 14% along certain roadway segments and 7% at certain interchanges, compared to the



no-build alternative. The IJR also shows that these increased volumes lead to a *decrease* in levels of service as a result of the “Northern Section” in many areas; in some cases from already-low levels of service to even more congested and poorer levels of services. Such significant increases in traffic volumes and decreases in levels of service will cause greater emissions and significant increases in toxic concentrations, and greater duration of exposure to such concentrations for the communities adjacent to and nearby these intersections and segments, many of which are in low-income, minority communities. Yet, the defendants apply an average measure of increase of MSATs along the full length of the “Northern Section” within the Air Quality Analysis, allowing no evaluation of localized emissions, concentrations and population exposed.

125. Heavily populated residential areas line the length of the “Northern Section”. Many of these residential areas are minority and/or low-income communities. In addition to residences, schools and other locations of vulnerable populations are also adjacent or within close proximity to the Project. For example, the Hoffman-Boston Elementary School in Arlington County, with a majority minority population, is located only about 300 feet from the western edge of I-395, and just south of the Washington Boulevard interchange of the Project, where peak hour volumes are forecast to increase by about 5% to 7% as a result of the Project. Not only is Hoffman-Boston immediately adjacent to the “Northern Section”, it is also located at a point that is in a direct line with a currently heavily-travelled segment of I-395 resulting in downwind impacts of an accumulated emissions queue. The Air Quality Analysis does not evaluate the Project’s added impacts at the Hoffman-Boston school, where current impacts of PM<sub>2.5</sub> are likely already much higher than the region’s high PM<sub>2.5</sub> background

levels. Concentrations well in excess of the NAAQS for PM<sub>2.5</sub> likely will occur at that location as a result of the added PM<sub>2.5</sub> impacts from operation of the “Northern Section”.

126. The Air Quality Analysis also does not evaluate other important locations that are in close proximity to the Project and are aligned with wind directions that will exacerbate the accumulation of emissions at those locations. These other locations in Arlington County include, but are not limited to: (i) Oakridge Elementary School (approximately 1,300 feet from the eastern edge of I-395, north of the Glebe Road interchange), Drew Model Elementary School (approximately 1,500 feet from the western edge of I-395, west of Glebe Road interchange) -- both of which serve predominately minority populations -- and Abingdon Elementary School (approximately 1,600 feet from the western edge of I-395, north of the King Street interchange); (ii) Pentagon City Hospital, immediately adjacent to the Project, north of the Glebe Road interchange; and (iii) Lynne House of Potomac Valley, approximately 1,000 feet from the Project near the Seminary Road interchange.

127. The Air Quality Analysis does not include information concerning the reliability of predictions of traffic volumes, an important overall parameter in determining congestion and, therefore, pollutant emissions and concentrations. Nor does it evaluate potential changes in driver behavior, *e.g.*, induced single occupancy vehicle usage, abandonment of transit and carpools and movement of diverted traffic onto the general purpose lanes, as a result of access to HOT lanes and how such behavior will impact the operation of the HOT facility, the general purpose lanes, the new access points, the modified interchanges and the local intersections and the resultant environmental and public health consequences. The traffic analysis forms the underpinnings of the air quality analysis by supplying its basic emissions source input data. In this HOT lanes project, the traffic analysis fails to analyze or

predict levels-of-service (or levels of congestion) at multiple intersections that are expected to be significantly impacted by the Project. It also underestimates traffic volumes -- and, therefore, emissions -- by not accounting for changes in driver behavior, and presents conclusions on traffic volumes for the "Build" condition that are not reproducible using standard traffic analysis techniques. Consequently, confidence in and reliance on the conclusions of the Air Quality Analysis are wholly unwarranted.

128. Defendants rely on the results of a study of the operation of highway SR-91, a HOV/HOT lanes facility in southern California, but such reliance is inappropriate. The SR-91 circumstances differ significantly from those of the Project. The SR-91 is a ten (10) mile stretch of roadway that did not have any HOV facility prior to its commencement as HOV/HOT lanes. The study shows the positive correlation between the HOT lanes and upper levels of income for the SR-91 commuters. It also shows that middle income commuters are particularly sensitive to pricing and are less willing to pay higher tolls despite worsening congestion. There are no other data in the VDOT Air Quality Analysis or the IJR that may indicate behavioral patterns among commuters as a result of the toll lanes, an important determinate in projecting traffic volumes, congestion, levels of service on roadway segments and adjacent intersections, and the resultant impacts on air quality, and a review of such impacts on minority communities. There are no analyses relied on by defendants to show the impact of the HOT lanes on the original intended purpose of the HOV system to provide a travel incentive for transit, vanpools and carpools.

129. Traffic congestion and roadway vehicle speeds are integral factors in proper air quality analysis for the "Northern Section" because these factors relate directly to air emissions. The Categorical Exclusion supporting documentation does not include (i) single

occupancy vehicle volumes; (ii) emissions in tons per year or pounds per day for air pollutants; or (iii) average vehicle speeds on any segments of the “Northern Section” over the course of the Project timeline. Without a presentation of these data, the Project’s overall premise of congestion reduction cannot be demonstrated and the “Northern Section’s” environmental and public health impacts cannot be fully evaluated and disclosed to the public. In fact, it is the increase in traffic congestion and queues in certain locations of the “Northern Section” that are the most pertinent and, in these analyses, the most deficient to a review of impacts on minority communities.

130. The Air Quality Analysis does not present air emissions that are specific to its current design and scope and that are necessary to determine if the Project’s current design and scope conform to Virginia’s and regional air quality plans, or instead, if the Project has been significantly altered since defendants’ initial conformity evaluations. 42 U.S.C. § 7506 (c)(2)(C). In fact, recent acknowledgement by VDOT of the need for additional scoping review and modifications will alter the Project and require a new air emissions analysis.

131. The Air Quality Analysis does not present Project emissions data or predictions of background air quality over the Project’s operational timeframe. Project emissions and background data are necessary to ensure that all conformity tests, *i.e.*, both for regional SIPs and localized hot spot conformity requirements, are met for the year of highest expected cumulative emissions, which includes both background emissions and the Project’s emissions. Emission tallies are not correctly identified, however, for legitimate conformity analysis. Furthermore, due to the lack of adequate and correct underlying traffic projections, air emissions cannot be accurately calculated to determine whether conformity requirements are satisfied and the public health protected.

132. Traffic volumes and other design features for the “Northern Section” likely will change during and following review of the “Southern Section”. Therefore, the hot spot analysis of the Air Quality Analysis cannot currently satisfy the Clean Air Act requirement for evaluation of the Project in its entirety. 40 C.F.R. § 93.123(c)(2).

133. Acute effects from CO exposure occur from the formation of carboxyhemoglobin in blood, inhibiting oxygen intake. At low concentrations, health effects of carbon monoxide exposure range from fatigue for healthy people to chest pain for people with heart disease. Moderate to high levels of exposure can lead to impaired vision and coordination, headaches, dizziness, confusion, nausea and reduced brain function. The Clean Air Act requires that the Project show that CO emissions will not increase to the extent to cause or contribute to any new violation of the CO NAAQS or increase the severity and frequency of any existing violation of the CO NAAQS in any area. 42 U.S.C. § 7506 (c)(1)(B). This showing must be based on a quantitative analysis using the applicable air quality models, data bases and other requirements set out in 40 C.F.R. Part 51, Appendix W (Guidelines on Air Quality Models). 40 C.F.R. § 93.123(a).

134. A primary purpose of Appendix W procedures is to ensure that modeled simulations predict a project’s worst case potential impacts. In great part, emissions impacts are determined by proximity to the roadway source, the height of the location and orientation with respect to wind direction, in addition to roadway strength factors like volumes, all factors, which when considered together, warrant the placement of as many receptors as the model allows to evaluate all of the potential worst case conditions. The United States Environmental Protection Agency’s guidelines for project level analysis and modeling roadway intersections recommends placement of receptors at property lines of schools, hospitals, rest homes and

other areas to which the general public has access. The Air Quality Analysis relies on only eleven analysis receptors at a few selected interchanges and local intersections to attempt to capture the potential worst-case CO impacts along the full 36-mile length of the “Northern Section”. However, not all impacted intersections in Arlington County are addressed by these receptors and, in other cases, certain impacted intersections are inadequately covered by too few receptors. The Clean Air Act requires that the CO hot spot analysis include intersections that the Project will affect with existing Levels-of-Service of D, E or F or those that will change to Levels-of-Service D, E or F because of increased traffic volumes related to the Project. 40 C.F.R. § 93.123 (a)(1)(ii). This project affects multiple intersections in this way, but the Air Quality Analysis does not include these in the CO hot spot analysis. In fact, because the IJR analysis is deficient, the number of impacted intersections is understated in the IJR and the Air Quality Analysis.

135. The category of cars, trucks and buses is one of the largest source contributors to nitrogen oxide (“NO<sub>x</sub>”) emissions. Transportation projects adversely impact air quality through their NO<sub>x</sub> emissions’ local and regional impacts, *e.g.*, contributions to ozone production. NO<sub>x</sub> is strongly associated with a number of adverse respiratory health effects. The large database of peer-reviewed reports of the human health effects associated with exposure to ambient NO<sub>x</sub> informed the development of the annual one-hour air quality standards for NO<sub>x</sub>. Yet, the Air Quality Analysis fully ignores any localized impacts by the Project’s NO<sub>x</sub> emissions, and fails to show if the Project will or will not cause or contribute to an exceedance of the NO<sub>x</sub> standard.

136. The Air Quality Analysis presents estimates for the Project’s maximum CO impacts at several locations for the “Build” condition. When these predicted maximum

CO impacts are converted to estimates of NO<sub>x</sub> impacts, using EPA data for mobile sources, results show that this Project will likely cause or contribute to an exceedance of the short-term NO<sub>x</sub> standard at many public locations adjacent to or nearby the Project. This result occurs even though the Air Quality Analysis underestimates the Project's worst-case air quality impacts through its failure to analyze many areas where congestion will increase.

137. In 2008, prior to the approval of the Categorical Exclusion for the Project, EPA issued an "Advance Notice of Potential Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act." The EPA set out a litany of overwhelming evidence of environmental degradation caused by GHGs and identified vehicle use as the dominant source of carbon dioxide ("CO<sub>2</sub>"), a primary GHG pollutant. The EPA also has issued a finding that GHGs contribute to air pollution and pose a threat to the public health. The Metropolitan Washington Council of Governments ("COG") has identified the regional impacts from climate change if GHGs are not reduced. These impacts include, but are not limited to, increased flooding, shoreline loss, degraded water quality, increased health risks, increases in harmful algae blooms, more frequent forest fires and degraded water quality. Arlington has a number of streams and waterways that are at risk and for which there is no evaluation in defendants' Air Quality Analysis.

138. The current I-95/I-395 corridor is a significant source of regional GHGs. The Air Quality Analysis does not show emission totals of GHGs for the Project or its "No-Build" alternative. The Air Quality Analysis sets out factors that are strong evidence of an increase of GHGs if the Project were to be built: (i) increases in vehicle miles traveled; (ii) increases in peak hour traffic volumes along roadway segments and at interchanges; and (iii) increases in closely-correlated MSAT emissions. Such an increase in GHG emissions for the

Project over its “No-Build” alternative fully undermines the defendants’ premise of congestion reduction.

139. The Air Quality Analysis does not include an analysis of GHGs. In its Documentation of Review, the FHWA specifically states that, because they are more appropriately addressed minimally at the regional level and as they relate to climate change do not readily lend to analysis at the local level, GHGs were not addressed. However, this explanation is illogical given that the “Northern Section” alone, and the entire Project properly defined, is a regional transportation project that has been deemed “regionally significant” for purposes of Federal conformity analysis. In fact, transportation projects are recognized as large sources of GHG emissions. And there are other transportation projects of similar scale, including with HOT lanes, that have been quantitatively analyzed by other states and metropolitan planning organizations to calculate and evaluate the impacts of GHGs from such projects. In December, 2009, the EPA took action to regulate motor vehicle-induced GHG emissions because they cause or contribute to climate change. The EPA also implemented an upgraded mobile source emissions model, in part to improve estimation of GHG emissions for transportation projects.

**CLAIMS FOR RELIEF**

**COUNT I**

**(Violation of NEPA-Invalid Categorical Exclusion)**

140. Plaintiff realleges and incorporates by reference paragraphs 1 through 139 as set forth fully herein.

141. NEPA requires defendants to evaluate the potential environmental impacts of the Project and to consider the environmental impacts of a Federal action that will



significantly affect the quality of the human environment through issuance of an environmental impact statement. 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1502.3.

142. NEPA compliance is triggered with respect to the “Northern Section” of the Project as a result of, among other reasons, the requisite approval by the FHWA of new points of access to or exit from I-95/I-395. 23 U.S.C. § 111(a).

143. In the event a determination cannot be made concerning the scope of impacts, NEPA requires the preparation of an Environmental Assessment to determine whether an Environmental Impact Statement is warranted. 40 C.F.R. § 1501.4(b). The Environmental Assessment must “provide sufficient evidence and analysis for determining whether” the project will have a significant impact on the environment. 40 C.F.R. § 1508.9 (a)(1).

144. Defendants prepared neither an Environmental Impact Statement nor an Environmental Assessment but determined that the “Northern Section” should be categorically excluded from the NEPA environmental review requirements.

145. The Categorical Exclusion does not provide a reasonable basis on which FHWA and VDOT may make a fair and rational determination that the entire Project or the “Northern Section” does not significantly affect the human environment.

146. In selecting a Categorical Exclusion classification for the “Northern Section,” defendants sought to ensure a desired outcome, *i.e.*, no extensive environmental review and public scrutiny. The Categorical Exclusion determination was pushed through quickly before the end of the outgoing administration in the Federal government and is based on a knowingly inaccurate description of the Project, and woefully inadequate and flawed data, to further ensure the desired outcome and obviate the need for further environmental review and public scrutiny through an Environmental Assessment process. The current

Administration, in response to plaintiff's formal request to set the decision aside, and in defendants' defense of their actions, have ratified and agreed knowingly in these illegalities.

147. Defendants' determination that the "Northern Section" of the Project would not have a significant impact on the human environment and therefore is excluded from the requirement for a comprehensive environmental review is arbitrary, capricious and not in accordance with law.

148. This Court should set aside the Categorical Exclusion for the "Northern Section" of the Project and order a full and comprehensive environmental review of the entire Project, or, in the alternative, order a full Environmental Assessment of the so-called "Northern Section".

**COUNT II**  
**(Violation of NEPA-Improper Segmentation)**

149. Plaintiff realleges and incorporates by reference paragraphs 1 through 148 as set forth fully herein.

150. NEPA requires defendants to evaluate the potential environmental impacts of the Project and to consider the environmental impacts of a federal action that will significantly affect the quality of the human environment through issuance of an environmental impact statement. 42 U.S.C. § 4332(C), 40 C.F.R. § 1502.3.

151. The regulations that implement and construe NEPA have clarified that an environmental impact is "significant" if "it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7).

152. "Cumulative impact is the impact on the environment which results from the incremental impacts of the action when added to other past, present, and reasonably

foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

153. The regulations have clearly prohibited the tactic of segmenting a single project into “small component parts.” 40 C.F.R. § 1508.27.

154. To the contrary, an agency must consider connected or cumulative actions in a single environmental review document. 40 C.F.R. § 1508.25(a)(1)-(2).

155. The “Northern Section” and the “Southern Section” of the Project are artificial subdivisions of a project that, in reality, is and always has been considered single, unitary and interdependent in financing, profitability, construction, rationale, operation and use. The two sections are adjacent to one another, and serve the same goal of permitting continuous HOT access from Spotsylvania County to Arlington County. The “Northern Section” will not be built without the “Southern Section”. The entire Project was designed by Fluor-Transurban and sanctioned by the same principals (namely, defendants), who have, in numerous other settings and on numerous other occasions, presented the Project as if it were unitary and interdependent. Defendants’ initial inaccuracies in defining the Project and the “Northern Section” and, despite a final Categorical Exclusion determination, their acknowledged need for a significant post-determination alteration in the scope for the “Northern Section”, are inherently arbitrary and capricious actions.

156. Upon information and belief, defendants attempted to subdivide the Project into these two segments for the sole purpose of skewing the results of FHWA’s and VDOT’s analyses of whether an Environmental Impact Statement would be required under NEPA for the entire Project.

157. Upon information and belief, defendants desired to avoid a full and comprehensive environmental review for the “Northern Section” to avoid revelations that the Project will disproportionately endanger the health and welfare of the residents of Arlington County, including its minority and low-income residents and vulnerable populations, for the purpose of granting nearly exclusive benefits to affluent Caucasian residents of southern exurban areas who chose to live in exurban sprawl and to their developers.

158. NEPA’s analysis of the “Northern Section” of the Project was inadequate and, hence, the Categorical Exclusion does not provide a reasonable basis on which FHWA and VDOT may make a fair and rational determination that the Project does not significantly affect the human environment.

159. Defendants’ determination that the “Northern Section” of the Project would not have a significant impact on the human environment and therefore is excluded from a comprehensive environmental review is arbitrary, capricious and not in accordance with law.

160. This Court should set aside the Categorical Exclusion classification for the “Northern Section” of the Project and order a full environmental review of the entire Project or, in the alternative, an Environmental Assessment of the “Northern Section”.

**COUNT III**  
**(Violation of Clean Air Act)**

161. Plaintiff realleges and incorporates by reference paragraphs 1 through 160 as set forth fully herein.

162. Section 176(c) of the Clean Air Act establishes mandatory requirements that must be satisfied before any department, agency or instrumentality of the Federal Government may engage in, support in any way or provide financial assistance for, a license or permit, or approve any activity, including a transportation project. 42 U.S.C. § 7506(c). Any

such activity must conform to an implementation plan after it has been approved or promulgated under 42 U.S.C. § 7410.

163. Defendants were required to demonstrate conformity for the Project “according to the consultation requirements of [40 C.F.R.] § 93.105(c)(1)(i) and the methodology requirements of [40 C.F.R.] § 93.123.” 40 C.F.R. § 93.116(a).

164. Defendants failed to demonstrate conformity following these requirements, particularly the methodological requirements for determining PM<sub>2.5</sub> concentrations pursuant to 40 C.F.R. § 93.123(b) and for CO concentrations pursuant to 40 C.F.R. § 93.123(a).

165. Defendants’ grant of a Categorical Exclusion for the “Northern Section” of the Project is evidence that defendants engaged in, supported and approved the Project within the meaning of 42 U.S.C. § 7506(c).

166. Defendants’ grant of a Categorical Exclusion for the “Northern Section” of the Project violates the Clean Air Act and causes disparate impacts on minority populations in Arlington County.

**COUNT IV**  
**(Title VI of the Civil Rights Act)**  
**(Secretary LaHood, Administrator Mendez, Program Manager Sundra,**  
**FHWA, Secretary Connaughton, former Secretary Homer and VDOT)**

167. Plaintiff realleges and incorporates by reference paragraphs 1 through 166 as set forth fully herein.

168. Title VI of the Civil Rights Act provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be

denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

169. Section 1983 of Title 42 of the United States Code further provides: “Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress. . . .”

170. Defendants’ deliberate and insidious actions and their related failure to act, will have harmful, disparate and discriminatory impacts on and the denial of benefits to minority and low-income minority people within, along and near the Project, including, but not limited to, the Arlington View, Nauck, Green Valley and Hall’s Hill neighborhoods.

171. Under Title VI of the Civil Rights Act of 1964, discrimination on the ground of race, color, or national origin may not occur in connection with programs and activities receiving Federal assistance.

172. The Act requires that public funds not be spent in a manner that encourages, entrenches, subsidizes or results in racial discrimination whether on the basis of color or national origin.

173. The legal requirements of the Act have been explicitly and intentionally violated by the segmentation of the Project, and subsequent approval and planned implementation.

174. The implication of the I-95/I-395 corridor from its earliest inception and, now, in a project that has been segmented and inadequately studied to serve the interests of

more affluent, largely Caucasian citizens from the “Southern Section” of the Project over less affluent, minority citizens, historically and currently harmed, is an overt violation of this Act.

175. By serving the needs and interests of the more affluent, largely Caucasian persons affected by the Project and failing to consider the negative impacts upon certain minority populations along the corridor of the Project, including Arlington County, defendants’ actions have been undertaken with the explicit intent of effecting discrimination upon a protected class of minority persons and in order to perpetuate and ensure a specially disfavored category of persons.

**COUNT V**  
**(Violations of the Fifth Amendment and Title VI of the Civil Rights Act)**  
**(Secretary LaHood, Administrator Mendez, and Program Manager Sundra)**

176. Plaintiff realleges and incorporates by reference paragraphs 1 through 175 as set forth fully herein.

177. The Fifth Amendment to the United States Constitution provides: “. . .nor shall [any person]. . . be deprived of life, liberty, or property, without due process of law.”

178. Title VI of the Civil Rights Act of 1964 (“Title VI” or the “Act”) prohibits discrimination on the ground of race, color, or national origin in connection with programs and activities receiving Federal financial assistance, providing that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

179. In violation of both of these laws, public funds have been spent in a manner that encourages, entrenches, subsidizes and results in racial discrimination and ensures a specially disfavored category of people on the basis of color and national origin.

180. The legal requirements of both the Act and the Constitution have been explicitly and intentionally violated by the defendants' approval and planned implementation of the Project.

181. The I-95/I-395 Project has been segmented and inadequately studied to serve the interests of more affluent, largely Caucasian citizens from the southern portion of the Project while harming the quality of life and vitiating the civil rights of less affluent, minority citizens.

182. By serving the needs and interests of the more affluent, predominantly Caucasian Virginia residents affected by the Project and failing to consider the adverse effects upon certain minority populations along the Project corridor, particularly in Arlington County, defendants' actions have been undertaken with the explicit intent of effecting discrimination upon a protected class of minority persons.

183. Defendants' deliberate and insidious actions and their related failure to act, will have harmful, disparate and discriminatory impacts on and the denial of benefits to minority and low-income people within, along and near the Project, including but not limited to those working and residing in the neighborhoods of Arlington View, Nauck, Green Valley and Hall's Hill.

184. In failing to adequately examine the resulting health and environmental effects among minority populations, defendants have disregarded their duties under the Act and the Fifth Amendment, imposing unlawful discrimination upon those minority persons.



**COUNT VI**

**(Violations of the Fourteenth Amendment and Section 1983 of U.S.C. Title 42)  
(Former Secretary Homer, Secretary Connaughton, and VDOT)**

185. Plaintiff realleges and incorporates by reference paragraphs 1 through 184 as set forth fully herein.

186. Section 1 of the Fourteenth Amendment of the United States Constitution provides that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

187. Section 1983 of Title 42 of the United States Code (“Section 1983”) further provides: “Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .”

188. Based on the facts set forth, *supra*, it can be inferred that State defendants acted with an invidious discriminatory purpose, ignoring or circumventing proper policies and procedures, segmenting the Project to serve a discriminatory end, and choosing to willfully overlook obvious, requisite deficiencies, considerations, alternatives and mitigation measures.

189. The deliberate, disparate and discriminatory nature of this publicly-supported and owned Project is clearly illustrated by the distinct racial demographics and history of the “Northern Section” in relation to the “Southern Section” of the Project.

190. Defendants have spearheaded the Project, and invoked the use of public funding, to serve the interests of wealthy, predominantly Caucasian Virginia residents from the southernmost counties affected by the Project and at the obvious expense of the largely less affluent, predominantly minority populations that reside in and along the corridor of the “Northern Section”, in particular in Arlington County.

191. The Project will likely increase traffic congestion on the local roads throughout the corridor, in areas in which there are predominately minority and low-income populations. The Project’s increase in air pollutants emissions, particularly in areas with high concentrations of minority and low-income citizens, will be to the detriment of public health, particularly for affected vulnerable populations and historically minority and low-income communities.

192. Defendants also have precluded Plaintiff Arlington County, as well as its employees and residents from meaningful participation in the NEPA process and related requirements imposed on FHWA in violation of the Fourteenth Amendment and Section 1983.

193. The explicit discriminatory intent that can be inferred from defendants’ actions, and the discriminatory impact that will result from implementation of this improperly segmented and approved Project, violate Arlington County’s and its minority residents’ constitutional and statutory due process rights.

**COUNT VII**  
**(Virginia Constitution – Due Process/Equal Protection)**  
**(VDOT, Secretary Connaughton and former Secretary Homer)**

194. Plaintiff realleges and incorporates by reference paragraphs 1 through 193 as set forth fully herein.

195. Article 1, § 11 of the Virginia Constitution provides: “That no person shall be deprived of his life, liberty, or property without due process of law... and that the right

to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged...”

196. Based on the facts set forth above, defendants acted with an invidious discriminatory purpose, ignoring or circumventing proper policies and procedures, segmenting the Project to serve a discriminatory end, and choosing to willfully overlook obvious, requisite inquiries and reviews.

197. The deliberate disparate and discriminatory nature of this publicly-supported Project is clearly illustrated by the distinct racial and income demographics of the “Northern Section” in relation to the “Southern Section” of the Project.

198. Defendants have undertaken the Project, a public roadway, and invoked the use of public funding, to serve the interests of wealthy, predominantly Caucasian Virginia residents from the southernmost counties affected by the Project and at the obvious expense of the largely less affluent, predominantly minority and ethnic populations that reside in and along the corridor of the “Northern Section”, in particular in Arlington County.

199. The Project will increase traffic congestion on the local roads throughout the corridor, in areas in which there are predominately minority and low-income populations. The Project’s increase in air pollutants emissions will be to the detriment of public health, particularly for affected vulnerable populations and low-income, minority communities. In violation of those residents’ Constitutional rights, proper inquiry has not been done regarding the health and environmental effects that would result from such an increase.

200. The government interest being served by the Project has not been adequately balanced by the appropriateness of the government’s inquiry and method of implementation, especially in light of the history of disparate treatment perpetuated by

defendants. In fact, defendants' actions are arbitrary and a violation of minority residents' fundamental due process and equal protection rights.

201. The defendants have precluded plaintiff Arlington County, its employees and residents, from meaningful participation in the NEPA process and related requirements imposed on FHWA and VDOT under Title VI and related regulations and directives and in violation of the Article 1, Section 11 because of the arbitrary, capricious and wholly unjustified approval of a CE, the absence of an adequate analysis and study, and the improper segmentation of the Project.

202. The discriminatory impact that will result from implementation of this improperly segmented Project, *i.e.*, the "Northern Section", coupled with the explicit discriminatory intent of defendants' actions, is a violation under Article 1, § 11 of the Virginia Constitution of the rights of residents of minority communities, particularly in Arlington County.

**COUNT VIII**  
**(Federal-Aid Highways Act ("FAHA"))**

203. Plaintiff realleges and incorporates by reference paragraphs 1 through 202 as set forth fully herein.

204. The FAHA requires that before approving a project, defendants consider alternative courses of action and make a decision in the "best overall public interest." 23 U.S.C. §§ 109(a), (h); 23 C.F.R. § 771.105(b).

205. FAHA requires the defendants to base their determination "upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of

national, State, and local environmental protection goals.” 23 U.S.C. §§ 109(a), (h); 23 C.F.R. § 771.105(b).

206. Neither the Project nor the “Northern Section” may be approved unless defendants first make the findings required by 23 U.S.C. §§ 109(a), (h); 23 C.F.R. §§ 771.101, and 771.105(b) and all other FHWA regulations.

207. Defendants violated 23 U.S.C. § 109(h) and 23 C.F.R. § 771.105(b) by failing to make a public interest determination under 23 U.S.C. § 109(h) which addressed all of the statutory factors set out at § 109(h).

208. Defendants violated 23 U.S.C. § 109(h) and 23 C.F.R. § 771.105(b) by failing to make a public interest determination that is sufficient as a matter of law.

209. To the extent defendants approved the “Northern Section” as in the “best overall public interest,” that determination was arbitrary and capricious as a matter of law.

210. Defendants acted in an arbitrary and capricious manner when they failed to consider alternatives and to pick from among alternatives that which was in the “best overall public interest” in accordance with their statutory obligations.

211. Defendants acted in an arbitrary and capricious manner when they approved the “Northern Section” without adequate record on which to make a determination that the “Northern Section” was in the “best overall public interest.”

212. Defendants acted in an arbitrary and capricious manner when they failed to determine the costs of minimizing or eliminating adverse effects and impacts of the proposed “Northern Section” contrary to their statutory and regulatory obligations.

213. Defendants acted in an arbitrary and capricious manner when they ignored adverse effects and impacts of the “Northern Section”.

214. Defendants acted in an arbitrary and capricious manner when they failed to incorporate mitigation measures and ignored those proposed.

215. The effect of each failure and omission individually, as well as their effect in combination and cumulatively, illustrate that defendants acted in gross derogation of duty and, therefore, that their approval of the Project was arbitrary and capricious and in violation of FAHA.

**RELIEF REQUESTED**

WHEREFORE, premises considered, Arlington County respectfully requests that the Court:

- A. Declare defendants' determination that the "Northern Section" of the Project is categorically excluded from a comprehensive NEPA environmental review to be arbitrary, capricious and not in accordance with the law;
- B. Declare that the segmentation of the Project into the "Northern Section" and the "Southern Section" is arbitrary, capricious and not in accordance with the law;
- C. Enter judgment in favor of plaintiff that defendants have violated Title VI of the Civil Rights Act of 1964, the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, and the Constitution of the Commonwealth of Virginia;
- D. Hold defendants in their individual capacities in violation of Title VI of the Civil Rights Act of 1964, the 14<sup>th</sup> Amendment of the United States Constitution and the Constitution of the Commonwealth of Virginia;
- E. Hold unlawful and set aside agency action found to be (i) arbitrary and capricious; (ii) contrary to constitutional rights; and (iii) without observance of procedure required by law;
- F. Enjoin defendants from entering into an agreement with Fluor-Transurban for the "Northern Section" pending a comprehensive environmental and public health review for the entire Project;
- G. Enjoin defendants from continuing with the "Northern Section";
- H. Order defendants to perform their duties in accordance with the law; and

I. Reward plaintiff costs, disbursements and attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and 28 U.S.C. § 1988, against defendant agencies and damages against defendants in their individual capacities.

Dated: August 13, 2010

Respectfully submitted,

COUNTY BOARD OF ARLINGTON  
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**EXHIBIT A**

## **Documentation of FHWA Review**

### **I-95/I-395 HOV/Bus/HOT Lanes Project 0095-96A-107, PE101; UPC #70849**

Based on the preliminary environmental impact information compiled by VDOT through the State Environmental Review Process and extended discussions with our Headquarter's Office regarding a variety of environmental issues including independent utility and logical termini, FHWA approved this project as a Categorical Exclusion (CE) on August 31, 2006, with conditions. In June of 2007, FHWA reconsidered and affirmed its decision to prepare a CE when we were made aware of proposed changes to the scope of the project at the southern end to address one of these conditions. Based on my review of the CE and supporting documentation submitted by VDOT as well as additional discussions and the resolution of issues with them, I find this documentation acceptable and sufficient to support the original CE determination.

The scope of the project covered by the CE and supporting document includes the following components:

Re-stripe the existing two-lane HOV facility from Eads Street to 0.6 miles south of the Route 234 interchange to three HOV/HOT lanes;

Construct two new HOV/HOT lanes in the median from the existing terminus south of Route 234 to just south of Joplin Road and extend a single HOV/HOT lane to just north of Route 610 (Garrisonville Road);

As identified in the draft Interchange Justification Report dated October 2008, add new entry/exit points between the general purpose lanes and the HOV/HOT lanes at eleven locations; modify four existing entry/exit points; and upgrade an existing ramp to a direct flyover ramp;

New structures include a Lorton Bus-rail Transfer Station pedestrian bridge and the structures associated with the flyovers that will provide access between the HOV/HOT lanes and the general purpose lanes; existing structures at Telegraph Road over I-95 and the Franconian-Springfield pedestrian bridge will be replaced.

The CE supporting documentation reviewed to support this decision consisted of the following:

Noise Analysis Technical Report, December 2008;  
Air Quality Analysis Technical Report, November 2008;  
Joint Permit Application, October 2008;  
Draft Interchange Justification Report, October 2008;  
Existing Conditions Report, March 2008;  
Section 4(f) Applicability Analysis, December 2007;

As referenced above, FHWA concurred with VDOT's recommendation to prepare a CE on August 31, 2006, with conditions. Those conditions were as follows:

1. FHWA required that a series of Citizen Information Meetings (CIM) be held (at least three) in the corridor to present the project to the public and solicit their input prior to the completion of the CE. Based on the results of these CIMs, FHWA would reassess its decision to prepare a CE. In addition, even though no right-of-way acquisition was anticipated, FHWA also required a public hearing be held upon completion of the environmental documentation.

**Status:** Five CIMs were held in the corridor on July 23, 24, 25, 26, and 30, 2007. A summary of the CIMs and the issues raised were presented to FHWA for consideration. While the CIMs tried to focus the public on environmental issues, only 26 of the 427 comments submitted addressed environmental issues. In addition, a lot of questions were submitted via e-mail on the project, which were then synthesized into 97 questions. Of these, only three related to environmental matters. In all, none of the environmentally-related comments or questions that were submitted raised any issues that were not already considered or being addressed as part of the development of the environmental documentation for the project. Accordingly, FHWA saw no cause to change its decision to prepare a CE based on the results of the CIM. Finally, public hearings will be held in early 2009.

2. FHWA required that an analysis be conducted to demonstrate that the proposed project would not have a significant impact on travel patterns, which is one of the regulatory requirements that must be met for a CE.

**Status:** An analysis has been conducted and is ongoing as part of the interchange justification report process that addresses the travel pattern issue. This analysis shows that the project will not have a significant impact on travel patterns but identified eight locations where there would be a negative impact on operations. At these locations, improvements are proposed and identified in the draft Interchange Justification Report to mitigate these negative impacts on operations. A final decision on these proposed improvements will be made by FHWA when the Interchange Justification Report is formally submitted by VDOT for review and approval. Generally speaking, the majority of proposed improvements involve geometric improvements, signalization, and the modification of ramps that do not normally have a significant impact on the environment. To the extent that these proposed improvements are not already considered within the existing scope of the project, a decision will be made when they are approved whether additional environmental analysis is needed to account for them in the project scope.

3. FHWA required that the consultant identify the design exceptions that would be needed to accommodate the project and initiate the process for seeking approval of those design exceptions prior to the completion of the NEPA process.

**Status:** Possible design exceptions have been identified, and the design exception process was initiated on a parallel track with the development of the environmental documentation. Many discussions, meetings, reviews and workshops have been held related to design exceptions, and VDOT and their general engineering consultant are conducting their final reviews before approval and submittal to FHWA. The supporting documentation for the CE for the current scope assumes that the design exceptions that appreciably affect the footprint and assessment of direct impact will be approved, which appears to be a reasonable assumption at this point in the project development process.

4. FHWA required that the consultant work with WashCOG to determine if the proposed project represented by the re-striping and shoulder reconstruction represented a regionally significant project subject to conformity.

**Status:** The project was added to the long range plans for both the Washington D.C. metropolitan area and the Fredericksburg region and subject to conformity. The project is currently in a conforming transportation improvement program and long range transportation plan for these two areas and is consistent with the scope and concept used to demonstrate conformity.

5. FHWA required that the consultant demonstrate that the proposed project represented by the re-striping and shoulder reconstruction did not point the proverbial loaded gun at the roadway network at either termini forcing additional improvements be made beyond the scope of our project. Should the project trigger additional problems needing resolution, the project would need to be designed accordingly to preclude them.

**Status:** This has been done with the documentation submitted by VDOT on December 18, 2008, which adequately demonstrates that the HOT Lanes project will not point the proverbial loaded gun at the transportation network at the northern end creating operational issues that worsen traffic conditions above and beyond what can be expected at these locations if the HOT Lanes project was not developed (i.e. No-Build condition) and thereby, requiring/triggering the need for additional improvements that are not already included in the scope of the project. At the southern end of the project, approximately nine miles of additional improvements have been added to the scope of the project to address this issue.

Prior to submitting the CE and supporting documentation to FHWA for review, VDOT received a handful of letters asking that they refrain from submitting the documentation to FHWA for approval pending the resolution of several concerns that were identified. These letters came from the Northern Virginia Transportation Commission, Potomac and Rappahannock Transportation Commission, and the Northern Virginia Transportation Authority. FHWA has reviewed these letters and determined that they do not raise any

environmental issues that would prevent FHWA from completing its review of the CE and the supporting documentation. The issues raised involve design, safety, enforcement, public outreach, operational, toll and revenue, commuter parking, etc. that are being addressed by the project sponsors. Should the resolution of these issues or concerns result in changes to the scope of the project, additional environmental analysis may be required.

There are a few specific environmental issues that are worth highlighting as well as the manner in which the issues were resolved.

A variety of air quality-related issues were addressed in the Air Quality Analysis Technical Report:

1. A quantitative mobile source air toxics (MSAT) analysis was prepared for six toxics which showed that there would be marginal increases in the production of MSAT pollutants between the No-Build and the Build alternatives on the affected network (less than two percent in 2030). However, this increase would be more than offset by the reduction in MSAT pollutant production predicted to occur when the Build alternative is compared to the existing year condition. Therefore, despite increases in traffic between 2006 and 2030, the overall MSAT emissions in the corridor are expected to decrease significantly during this period in the magnitude of 30% or more.
2. Regarding PM<sub>2.5</sub>, the project is considered a project of air quality concern and a qualitative analysis was prepared which showed that the project would not cause or contribute to any new localized PM<sub>2.5</sub> violations or increase the frequency or severity of any existing violations or delay timely attainment of the National Ambient Air Quality Standards for PM<sub>2.5</sub>.
3. A micro-scale carbon monoxide (CO) analysis was prepared which demonstrated that the predicted one and eight-hour CO concentrations for the project would be well below the National Ambient Air Quality Standards for CO.
4. The project was subjected to the transportation air quality conformity requirements. In this regard, the project comes from the FY 2008-2013 TIP and 2007 CLRP for the Washington, D.C. Metropolitan Area found to conform with the Clean Air Act requirements for the 8-hour ozone standard and regional PM<sub>2.5</sub> by FHWA and FTA on June 11, 2008. The project also comes from the FY 2007-2010 TIP and FY 2030 CLRP for the Fredericksburg region found to conform with the Clean Air Act requirements for the 8-hour ozone standard by FHWA and FTA on September 16, 2008.

Greenhouse gas emissions (as they relate to global climate change) were not addressed as part of the Air Quality Analysis. Climate change is inherently a global issue that is more appropriately addressed, minimally, at the regional level or even more appropriately at the state or national level by assessing the impact of transportation systems as opposed to individual projects. Further, climate change does not readily lend itself to an analysis at


the local level, and national standards have not been established. Relative to the scope of global climate change, any change in greenhouse gas levels as a result of the project are likely to be insignificant. The magnitude of the changes in climate caused by the project and any corresponding impacts on environmental resources would be too small to measure since current analytical tools are not sophisticated enough to accurately reflect minute differences. Attributing any environmental consequences to the differences in emissions or assessing how they contribute to impacts occurring around the world is not possible in any meaningful way. As a result, we cannot have confidence that the assessment of greenhouse gas emissions from the project will yield information that will be helpful to the public or relevant to project decision making.

A noise analysis was prepared for the project which determined that there are a total of 5,023 dwelling units exposed to noise impacts under the existing condition in the project corridor. Under the 2030 No-Build condition, 5,107 homes are predicted to be impacted. Under the 2030 Build condition, 5,225 homes will be exposed to noise impacts. In all cases, the noise impact is one where the FHWA Noise Abatement Criteria will be approached or exceeded. For the overwhelming majority of receptors, the difference in noise levels between the 2030 Build condition and the 2030 No-Build condition or the 2006 existing condition will be marginal (less than 3 dB(A)). In no instance will the noise impact be one of a substantial increase over existing noise levels. To address these noise impacts, noise barriers are being considered. It is estimated (based on a cost of \$45/sq. ft.) that approximately \$60 million worth of reasonable noise barriers can be constructed, which would protect 3,874 impacted receptors and benefit another 4,467 receptors not currently impacted. Further, approximately \$8.7 million worth of noise barriers will be needed to replace existing noise barriers. Finally, approximately \$8.5 million worth of barriers are under consideration to protect recreational land uses. These noise barrier estimates are considered preliminary at this point; a final decision on noise barriers will be made after additional design information is developed and reviewed by the joint FHWA-VDOT Noise Abatement Committee.

The project, including stormwater management measures, will impact approximately 5.5 acres of wetlands which includes impacts to forested, scrub-shrub, and emergent wetlands. The majority of these impacts will occur south of Dumfries Road where the project will construct new lanes within the existing undisturbed median, which is characterized primarily by vegetation and forested resources. North of Dumfries Road where the project consists of restriping the existing HOV lanes, wetland impacts are minimal and for the most part, limited to stream crossings and wetlands located in forested areas along the edge of the existing facility. Wetland impacts will be mitigated through the purchase of wetland and stream bank credits as well as the restoration and buffering of streams. A review of the joint permit application demonstrates that the project has avoided and minimized impacts to wetlands to the extent practicable given the scope of the project. For example, wetlands located in the median have been avoided where sufficient width exists in the median to accommodate both the proposed project and wetlands. Elsewhere, at stream and creek crossings, wetland impacts have been minimized by perpendicular crossings while avoidance is impractical since the crossings traverse the entire right-of-way. Therefore, in accordance with Executive Order 11990, *Protection of Wetlands*, it has been determined that there is no practicable alternative to the proposed construction in wetlands and that the proposed action includes all planning to minimize harm to wetlands which may result from such use as demonstrated by the joint permit application under review by the USACE.

There are no known archeological sites within the archeological area of potential effect that will be impacted by the project. Several previously recorded sites within the area of potential effect were reviewed in the field but most of them have been destroyed. Several new archeological deposits/sites were identified during the surveys for this project, but most of them are not considered eligible for the National Register. A handful of sites within the area of potential effect were determined to be potentially eligible, but these sites are outside the area of disturbance for the project and will be avoided. Therefore, additional work necessary to make a formal determination of eligibility is not needed. Six existing architectural resources were identified within the architectural area of potential effect (Farlington Historic District, Marumscro Acres Subdivision, Cardinal Drive area, Van Buren Drive, Prince William Forest Park, and Aquia Church), and the Virginia State Historic Preservation Officer (SHPO) concurred with a conditional no adverse effect determination on August 5, 2008. Of particular interest to the SHPO is the design and placement of the noise barriers in the vicinity of Fairlington Historic District, a National Register of Historic Places-listed property. As a condition of the no adverse effect determination, VDOT will submit information to the SHPO on the location and design of sound barriers if they are included in the project to protect the Farlington Historic District.

This CE is approved in accordance with 23 CFR 771.117(d). VDOT submitted documentation which demonstrates that the specific conditions or criteria for CEs are satisfied and that significant environmental effects will not result. Specifically, the project will not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, or historic or other resource; do not involve significant air, noise or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts. As with any CE and supporting documentation which is presented to the public at a public hearing following FHWA approval, FHWA's approval is contingent upon FHWA not receiving any comments that raise environmental issues not already considered or raise the prospect of significant environmental impacts.

  
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Approving FHWA Official 1/7/09

### Categorical Exclusion (CE)

Project Information			
<b>Project Name:</b>	I-95/I-395 PPTA HOT Lanes	<b>Federal Project#:</b>	NH-095-2(487)
<b>Project Number:</b>	0095-96A-107, P101	<b>Project Type:</b>	Construction
<b>UPC:</b>	70849	<b>Charge Number:</b>	00070849, Activity 605
<b>Route Number:</b>	95	<b>Route Type:</b>	Interstate
<b>Project Limit—From:</b>	Eads St. Interchange - Arlington, VA	<b>To:</b>	Garrisonville Road Interchange - Stafford, VA
<b>Additional Project Description:</b>	Re-striping existing two-lane HOV facility from Eads Street to 0.6 mi south of Rte. 234 interchange to three HOV/HOT Lanes; from Rt. 234 south to Rt. 610 Garrisonville exit, new HOV/HOT lanes construction in median. Flyovers and slip ramps will connect HOV/HOT lanes to existing general purpose lanes.		
<b>District:</b>	<b>City/County:</b>	<b>Residency:</b>	
Northern Virginia	Northern Virginia District Wid		
<b>Date CE level document approved by VA Division FHWA:</b> 08/31/2006			
<b>FHWA Contact:</b> Sundra, Edward S			
<b>Project in STIP:</b> Yes		<b>In Long Range Plan?</b> Yes	
<b>CE Category 23 CFR 771.117:</b> d01			
<b>Description of Category:</b> Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g. parking, weaving, turning, climbing).			
<b>Logical Termini and Independent Utility:</b> Yes			
<b>Comments:</b> FHWA concurred with proj. issues of scope, logical termini & independent utility on Aug 31, 2006. FHWA identified 5 conditions to be met for approval of a CE: 1) Citizen Information Meetings, 2) traffic analysis without significant impact on travel patterns, 3) design exceptions identified & approval process initiated prior to completion of CE, 4) if proj. is regionally significant & include in conforming CLRP for construction, & 5) demonstrate proj. does not force additional improvements be made beyond scope of this project (if operational problems are identified, project must be designed to preclude them). Documentation addressing compliance with 5 conditions is provided with CE. Springfield Interchange Phase VIII which provides HOV connections between I-95/395/495 is under construction. No final decision has been made to convert Ph VIII HOV to HOT for continuous HOT Lane system. When oper. analyses are complete & decision is made, need for more env. documentation will be assessed			
<b>Typical Section:</b> Eads St. to Shirlington Rotary - three 11' lanes with variable shoulders. Shirlington Rotary to Prince William Pwy. - 2.5' left shoulder-11'lane-12'lane-11'lane-10'right shoulder. Prince William Pwy. to Dumfries Rd. - three 12' lanes with 12' shoulders. Dumfries Rd. to Garrisonville Rd. - two 12' lanes with 12' shoulders.			
<b>Structures:</b> New structures: Lorton Bus-rail Transfer Station Pedestrian Bridge; 7 General purpose lane-to-HOT Lanes/HOT-to-GP flyovers at various locations; new HOT Lanes bridges over Aquia, Chopawamsic Creeks, Russell Rd. & Joplin Road. Structures to be replaced: Telegraph Rd. over I-95; Franconia-Springfield Pedestrian Bridge.			



**SOCIO-ECONOMIC**

**Minority/Low Income Populations:** Present with no impact    **Disproportionate Impacts to Minority/Low Income Populations:** No  
**Source:** I-95/I-395 HOV/Bus/HOT Lanes Project, Existing Conditions, March 2008

**Existing or Planned Public Recreational Facilities:** Present with no impact

**Community Services:** Present with no impact

**Consistent with Local Land Use:** Yes

**Source:** I-95/I-395 HOV/Bus/HOT Lanes Project, Existing Conditions, March 2008

**Existing or Planned Bicycle/Pedestrian Facilities** Not Present

**Source:** I-95/I-395 HOV/Bus/HOT Lanes Project, Existing Conditions, March 2008

**Socio-Economic Comments:** Seventy-seven community facilities and services, primarily places of worship, and schools are within the project study corridor. Eleven emergency services facilities are present in the study corridor. No community service would be directly affected by the proposed project.

Twenty recreational facilities are in close proximity to the proposed project. Based on the most current design plans available, the proposed project will not impact any of the facilities.

No bicycle or pedestrian facilities are incorporated into the proposed interstate system project.

**SECTION 4(f) and SECTION 6(f)**

**Use of 4(f) Property:** No

**Source:** Section 4(f) Applicability Analysis, December 2007. Twenty-five 4(f) properties are in close proximity to the proposed project. Based on the most current design plans available, the proposed project will not require the use of any of the properties and a formal 4(f) evaluation will not be required.

**6(f) Conversion:** No      **Acres of Conversion:**

**4(f) and 6(f) Comments:** No 6(f) property was identified in proximity to the proposed project.

**CULTURAL RESOURCES**

**Section 106 Effect Determination:** NO ADVERSE EFFECT

**Name of Historic Property:** Fairlington Historic District

**DHR Concurrence date:** 08/05/2008

**MOA Execution Date:** None

**Cultural Resource Comments:** As a condition of VDHR's No Adverse Effect, it will be necessary to coordinate any Fairlington Historic District noise barrier plans with local governments and VDHR for review and consideration and provide any local government's comments to VDHR for consideration.

**NATURAL RESOURCES****Waters of the U.S.:** Present with impacts Compensatory Mitigation Required**Linear Feet of Impact:** 10727**Federal Threatened or Endangered Species:**

Bald Eagle (*Haliaeetus leucocephalus*)-Federal:LT-Present with no impact  
 Dwarf Wedgemussel (*Alasmidonta heterodon*)-Federal:LE-Present with impacts  
 Harperella (*Ptilimnium nodosum*)-Federal:LE-Present with no impact  
 Sensitive Joint-vetch (*Aeschynomene virginica*)-Federal:LT-Present with no impact  
 Small Whorled Pogonia (*Isotria medeoloides*)-Federal:LT-Present with no impact

**T&E Review:****100 Year Floodplain:** Present with no impact**Regulatory Floodway Zone:** Not Present**Public Water Supplies:** Not Present**Tidal Waters/Wetlands:** Present with impacts**Wetlands:** Present with impacts**Wetlands: Acres of Impact:** 5.45**Wetland Type:** Forested**Permits Required:** Yes

**Natural Resource Comments:** According to the Virginia Department of Health, Office of Drinking Water, the Study Corridor contains no public drinking water supplies; no raw water intakes downstream, no treatment units, and no distribution system components. Responses to scoping letters from the DEQ did not contain reference to the groundwater mapping system, wellhead protection areas or groundwater recharge areas, however, according to the Virginia Department of Health, Office of Drinking Water, there are no groundwater sources in the Study Corridor that will be directly impacted by the proposed project. Locations of wetlands and streams within the project limits and their impacts are listed in the Summary of Impacts to Jurisdictional Wetlands and Other WOUS as an attachment to this CE. Demonstrated minimization of wetland and other WOUS impacts as well as required compensatory mitigation for unavoidable impacts will be coordinated with federal and state regulatory agencies during the permitting process.

**AGRICULTURAL/OPEN SPACE****Open Space Easements:** Not Present**Agricultural/Forestal Districts:** Not Present**Source:** I-95/I-395 HOV/Bus/HOT Lanes Project, Existing Conditions, March 2008

**Agricultural/Open Space Comments:** According to Virginia Department of Agriculture and Consumer Services, only Fairfax and Prince William counties have Agricultural and Forestal Districts. There are no agricultural or forestal districts in the Fairfax County or Prince William County portions of the Study Corridor.

**FARMLAND****NRCS Form CPA-106 Attached?** No**NRCS Form CPA-106 not attached because:**

Land already in Urban use.

Entire project in area not zoned agriculture.

**Alternatives Analysis Required?** No**Source:** I-95/I-395 HOV/Bus/HOT Lanes Project, Existing Conditions, March 2008

**Farmland Comments:** Soils data for Arlington, Fairfax, Prince William, and Stafford counties indicate that Prime Farmland soils are present in the Study Corridor. Soils categorized as prime farmland are present within the Study Corridor, however, the land is already converted or committed to urban development. It is not being actively farmed and no farmland would be affected.

**INVASIVE SPECIES****Invasive Species in the project area?** Yes

**VDCR indicated that the potential exists for some VDOT projects to further the establishment of invasive species. All seeds used will be tested in accordance with the Virginia Seed Law to ensure there are not prohibited Noxious Weed-Seeds in the seed mixes.**

**Invasive Species Comments:**

**AIR QUALITY****Carbon Monoxide**

This project is located in: A Carbon Monoxide Maintenance Area (Arlington and Alexandria Cos.)

CO Microscale Analysis Required for NEPA? Yes

- ✓ The design year 24-hour forecasted traffic exceeds the thresholds outlined in the VDOT's Memorandum of Understanding with FHWA dated August 4, 2004, and therefore a CO air quality analysis is required.

The portion of the project that lies outside of Alexandria city and Arlington county is located in a CO attainment area.

**Ozone**

This project is located in: An 8-hour Ozone Nonattainment Area

- ✓ This project is modeled properly for conformity in the 2007 LRP.

The majority of the project is located in the VA-DC-MD moderate 8-hour ozone nonattainment area, and was found to conform to TPB's FY 09-14 TIP and 2007 CLRP. The portion that lies in Stafford county is within the Fredericksburg 8-hour ozone maintenance area, and was found to conform to FAMPO's FY 07-10 TIP and 2030 CLRP.

**Particulate Matter**

This project is located in: A PM2.5 Nonattainment Area

- ✓ This project is modeled properly for conformity in the 2007 LRP.

PM Hotspot Analysis Required for NEPA? Yes

The portion of the project that lies within Stafford county is located within a fine particulate matter attainment area.

**Mobile Source Air Toxics**

This project requires: A quantitative MSAT analysis

- ✓ This project creates or adds significant capacity to urban highways such as interstates, urban arterials, or urban collector-distributor routes with traffic volumes where the AADT is projected to be in the range of 140,000 to 150,000, or greater, by the design year.
- ✓ This project is proposed to be located in proximity to populated areas in rural areas or in proximity to concentrations of vulnerable populations (i.e., schools, nursing homes, hospitals).

The I-95/395 HOV/Bus/HOT Lanes project was assessed for potential air quality impacts and conformity with all applicable air quality regulations and requirements. The models, methods, and assumptions used in this assessment, as well as the findings, are documented in a separate Air Quality Analysis. The Analysis evaluated the project's anticipated impact on carbon monoxide, fine particulate matter, mobile source air toxics (MSAT), and ozone concentrations and/or emissions in the vicinity of the project. The findings indicate that the project would meet all applicable air quality requirements of the National Environmental Policy Act (NEPA) and transportation conformity rule. As such, this project was not found to cause or contribute to a new violation, increase the frequency or severity of any violation, or delay timely attainment of national ambient air quality standards (NAAQS) as established by the US Environmental Protection Agency.

**NOISE**

**Noise Scoping Decision:** Type I - Noise study required

**Barriers Under Consideration?** Yes

**Noise Comments:** The potential noise impact for the I-95/395 HOT Lanes Project was assessed in accordance with FHWA and VDOT noise assessment guidelines. The FHWA guidelines are set forth in 23 CFR Part 772. VDOT's regulations are contained within the State Noise Abatement Policy, and are consistent with the FHWA guidelines. Under existing conditions, 5023 receptors are exposed to noise impact. In the 2030 No-build condition, 5107 receptors are predicted to be impacted; in the 2030 Build condition, 5225 receptors are predicted to be impacted. Parks and recreational areas were also predicted to be impacted. Noise abatement was evaluated wherever an impact was predicted. New cost-reasonable barriers would protect 3874 dwellings and benefit 4467; replacement barriers would protect 160 and benefit 298 receptors. Additional barriers would benefit recreational land use. See attached Noise Technical Report for details.

**RIGHT OF WAY AND RELOCATIONS**

**Residential Relocations:** No

**Commercial Relocations:** No

**Non-Profit Relocations:** No

**Right of Way required?** No

**Septic Systems or Wells:** Not Present

**Hazardous Materials:** Not Present

**Source:** I-95/I-395 HOV/Bus/HOT Lanes Project, Existing Conditions, March 2008

**ROW and Relocations Comments:** Minor amounts of temporary construction easements may be required along the project length for utility relocation, drainage, and construction access. No privately-owned structures are present within the right of way.

Six hazardous materials sites were identified within or adjacent to the existing right of way following searches of 31 Federal and 18 Commonwealth and local databases. All hazardous materials sites have been closed or remediated.

**CUMULATIVE AND INDIRECT IMPACTS**

**Present or reasonably foreseeable future projects (highway and non-highway) in the area:** Yes

**Impact same resources as the proposed highway project (i.e. cumulative impacts):** No

**Indirect (Secondary) impacts:** No

**Source:** VDOT Transportation Planning

**Cumulative and Indirect Impacts Comments:** Past actions (trans. proj & residential, comm, and gov. development) in the proj area have destroyed most of the historical env. resources; those remaining are degraded and fragmented. Resources will continue to be impacted by present and reasonably foreseeable actions, including extension of HOV/HOT lanes to Spotsylvania area to the south and a possible 14th St bridge across Potomac Rvr to the north. Other large-scale present and reasonably foreseeable actions include 4th-lane widening on I-95, extension of FFX Cnty Pkwy and development associated with BRAC at Fort Belvoir, and proposed residential/comm development such as Potomac Town Ctr and Woodstream. These will continue to reduce forested resources and may have added impacts on wetlands. However, the incremental impacts from this proposed proj on forested and wetland resources, when considered within the context of the cumulative impacts from past, present and reasonably foreseeable future actions, are not considered significant.

**PUBLIC INVOLVEMENT**

**Substantial Controversy on Environmental Grounds:** No

**Source:** Summary Report Citizen Information Meetings, July 23, 24, 25, 26, & 30, 2007.

**Public Hearing:** Yes **Type of Hearing:** Combined Hearing

**Other Public Involvement Activities:** Yes

**Type of Public Involvement:** Citizen Information Meetings in Alexandria, Arlington, Fairfax, Prince William, Stafford on July 23, 24, 25, 26, & 30, 2007.

**Public Involvement Comments:** The preponderance of comments from the CIM's regarded tolling, slugging, carpooling, safety issues and operation of electronic toll collection system. There were no new environmental issues raised other than those already identified as a result of the scoping process.

**COORDINATION**

**State Agencies:**

DEQ - Air Division  
 Department of Game and Inland Fisheries  
 Department of Forestry  
 Dept. of Mines, Minerals and Energy  
 Department of Health  
 Department of Conservation and Recreation  
 VA Marine Resources Commission  
 Department of Historic Resources  
 DEQ - Water Division  
 DEQ - Waste Division  
 Virginia Outdoors Foundation

**Federal Agencies:**

National Park Service  
 Environmental Protection Agency  
 NRCS  
 U.S. Army Corps of Engineers  
 U.S. Fish and Wildlife Service  
 US Dept. of Housing and Urban Dvlmnt.

**Local Entity:**

Stafford Parks and Recreation  
 Prince William County/City Planner  
 Stafford County/City Planner  
 Prince William Regional Park Authority  
 Northern Virginia District Regional Park Authority  
 Fairfax Regional Park Authority  
 Alexandria Parks and Recreation  
 Prince William Planning District  
 Dumfries Town/City Manager  
 Alexandria Economic Development Office  
 Arlington Economic Development Office  
 Fairfax Economic Development Office  
 Prince William Economic Development Office  
 Alexandria County Health Department  
 Fairfax County Health Department  
 Arlington Community Development  
 Fairfax County Administrator  
 Stafford County Administrator  
 Alexandria County/City Planner  
 Fairfax County/City Planner  
 Alexandria Housing Director  
 Alexandria Office of Transportation  
 Fairfax Office of Transportation  
 Prince William Office of Transportation  
 Stafford Parks and Recreation  
 Prince William Public Works  
 Dumfries Public Works  
 Fairfax Superintendent of Schools  
 Alexandria Town/City Manager  
 Arlington Town/City Manager  
 Fairfax Public Works  
 Arlington Parks and Recreation  
 Fairfax Parks and Recreation

**Other Coordination Entities:**

Northern Virginia Soil & Water Conservation Dist.  
 Northern Virginia Transportation Commission  
 Metropolitan Washington Area Transit Authority  
 Metropolitan Washington Council of Governments  
 Northern Virginia Planning District Commission  
 Northern Virginia Regional Commission

This project meets the criteria for a Categorical Exclusion pursuant to 40 CFR 1508.4 and 23 CFR 771.117 and will not result in significant impacts to the human or natural environment.