



U.S. Department of
Transportation

DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Weighs Level of Deference Owed to an Agency's Regulatory Preemption Pronouncements

On November 29 the Supreme Court heard oral argument in Wachovia Bank, N.A. v. Watters, (Supreme Court No. 05-1342), an appeal from a decision of the U.S. Court of Appeals for the Sixth Circuit holding that a statement in regulations promulgated by the Office of the Comptroller of the Currency to the effect that OCC regulations preempt State banking regulations is entitled to Chevron deference. In agreeing to hear the case the Court is poised to decide a split among the circuits concerning whether Chevron deference or a lesser deferential standard should be utilized in challenges concerning regulatory preemption pronouncements.

While the Department has not been directly involved in the litigation we are monitoring the matter closely since the deference issue is one that directly affects DOT programs. As an example, NHTSA's proposed rule on automobile roof standards states in the preamble that "if the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law." Similarly, NHTSA's new CAFE standard for light trucks, which currently is being challenged in Center for Biological Diversity v. NHTSA, (9th Cir. No. 06-71891), has a preemption provision in its preamble.

We are now awaiting the Court's decision.

The Sixth Circuit's decision in Wachovia is available at:

<http://www.ca6.uscourts.gov/opinions.pdf/05a0476p-06.pdf>

NHTSA's proposed rule on automobile roof standards is available at:

http://dmses.dot.gov/docimages/pdf92/342723_web.pdf

Supreme Court Hears Challenge to EPA Refusal to Regulate CO₂ Emissions

On November 29, the Supreme Court heard oral argument in Massachusetts v. EPA, (Supreme Court No. 05-1120), an appeal of a decision of a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit affirming EPA's denial of rulemaking petitions asking the agency to regulate CO₂ emissions, which are alleged to contribute to global warming, under the Clean Air Act.

EPA had decided that it lacked authority under the Clean Air Act to regulate CO₂ and other emissions that have been associated with climate change, and that, even if it had such authority, it would exercise its discretion not to regulate such emissions at this time because of the uncertainty surrounding the scientific

research in this area. Before both the D.C. Circuit and the Supreme Court, the Justice Department defended the merits of EPA' decision and also argued that the petitioners lacked standing to bring their claims.

Although the Department is not a party to this case, DOT reviewed the briefs and participated in oral argument preparation because the outcome could have an impact on NHTSA's CAFE standards, which limit vehicle CO₂ emissions by regulating vehicle fuel economy, and on the ongoing litigation in the U.S. Court of Appeals in the Ninth Circuit, Center for Biological Diversity v. NHTSA, (9th Cir. No. 06-71891), challenging NHTSA's light truck CAFE standards. Petitioners in that case argue, among other things, that NHTSA improperly failed to consider the impact of CO₂ emissions on climate change in promulgating those regulations.

The Supreme Court is expected to decide this case by June of this year.

The D. C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200507/03-1361a.pdf>.

Supreme Court Invites Participation of the United States in Maine Motor Carrier Preemption Case

On January 8 the Supreme Court invited the Solicitor General to file a brief setting forth the views of the United States in Rowe v. New Hampshire Motor Transport Association, (Supreme

Court Certiorari Petition No. 06-457), which is pending before the Court on a certiorari petition. The petition seeks review of a decision by the U.S. Court of Appeals for the First Circuit holding that a Maine law forbidding motor carriers from knowingly delivering tobacco products to minors was preempted by provisions of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c)(1). Those provisions prohibit State regulations "related to a price, route, or service" of motor carriers. The State of Maine argued unsuccessfully below that the law did not attempt to regulate a rate, route or service and was not preempted since it resulted from a legitimate exercise of Maine's sovereign police powers.

We are working with the Office of the Solicitor General to determine the position the United States will take before the Court.

The First Circuit's decision is available on-line at:

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=05-2136.01A>

Settlement Precludes Court from Deciding Applicability of Carmack Amendment to Inland Segment of Through Transportation

On January 5, the Supreme Court in Altadis USA, Inc. v. Sea Star Line LLC, (Supreme Court No. 06-606), agreed to review a decision of the U.S. Court of Appeals for the Eleventh Circuit which addressed the applicability of the Carmack Amendment to the inland

United States segment of cargo moving on a through bill of lading from San Juan, Puerto Rico to Tampa, Florida. Oral argument was set for March 27, however, in mid-February the parties agreed to a settlement proposal that removed the case from the Court's docket.

The Carmack Amendment, 49 U.S.C. § 11706 (rail carriers) and 14706 (motor carriers), imposes various cargo liability rules for cargo moving in interstate commerce subject to the jurisdiction of the Surface Transportation Board. The Eleventh Circuit's decision concluded that Carmack was inapplicable to the inland motor carrier segment from the port of Jacksonville to Tampa because no separate bill of lading had been issued for the inland segment and the cargo, instead, moved pursuant to a through bill of lading from its point of origin in Puerto Rico to its ultimate destination point.

The application of Carmack to inland segments of multi-modal movements has been an area of some confusion. In 1950 the Supreme Court in Reider v. Thompson, 339 U.S. 113 (1950) held that provisions of the Carmack Amendment did not apply to the inland U.S. segment of transportation of cargo that originated in Buenos Aires, Argentina, was shipped by ocean to New Orleans, and was then shipped again by railroad to Boston where there was no through bill of lading and a separate railroad bill of lading covered the inland transportation in the United States. Since the Reider decision circuit courts in the United States have split on the issue of applicability of the Carmack

Amendment in the context of through movements.

In addition to the Eleventh Circuit's decision in the present case, four other Circuits have held that a U.S. inland segment of a through movement in foreign commerce is not subject to the Carmack Amendment unless, as in Reider, a separate bill of lading has been issued for the inland U.S. segment. See Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986); Capitol Converting Equipment, Inc. v. LEP Transport, Inc., 965 F.2d 391 (7th Cir. 1992); Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700 (4th Cir. 1993); and American Road Service Co. v. Consolidated Rail Corp., 348 F.3d 565 (6th Cir. 2003).

By contrast in Neptune Orient Lines, Ltd. v. Burlington Northern R.R. Co., 213 F.3d 1118 (9th Cir. 2000) and Sompo Japan Ins. v. Watkins Motor Lines, Inc., 456 F.3d 54 (2d Cir. 2006) the Second and Ninth Circuits have held that the Carmack Amendment does apply to the inland U.S. segment of any movement from or to a foreign port even when all transportation has been provided under a through bill of lading.

While the Altadis decision concerns the non-contiguous domestic offshore trades, and not transportation in foreign commerce as in all of the decisions discussed above, many of the issues underlying the split among the circuits are poised to be decided by the Supreme Court.

The United States did not participate in the litigation previously, and we were working with the Office of the Solicitor

General in order to determine whether to appear as an amicus party prior to the time the case was settled.

The Eleventh Circuit's decision is available on-line at:

<http://www.ca11.uscourts.gov/opinions/ops/200514988.pdf>

Supreme Court Will not Review Nevada Airport Taking Case

On February 19 the Supreme Court denied a certiorari petition in McCarran Int'l Airport v. Sisolak, (Supreme Court Certiorari Petition No. 06-658). In its petition McCarran International Airport had sought review of a decision by the Supreme Court of Nevada holding that a county height restriction ordinance effected a "per se" taking of property rights that, in the Nevada court's view, respondent Sisolak possessed in the airspace above his property located within the airport's landing approach zone. Based upon this finding the Nevada Supreme Court upheld an award of over \$16 million in compensation, costs and attorneys' fees.

The court's decision was premised on provisions of the Nevada Constitution although Sisolak had argued that the limitation on the use of his property violated the just compensation provision of the Fifth Amendment of the U.S. Constitution as well.

The United States was not a party to the Nevada litigation. We had been monitoring the case before the Supreme Court, however, since it raised potential concerns for the FAA and the Department regarding the use of zoning

ordinances to preserve airport operations and expansion.

Supreme Court Declines to Review Ninth Circuit Decision Upholding Honolulu Ban on Aerial Banner-Towing

On December 4, the Supreme Court denied a petition for certiorari in Center for Bio-Ethical Reform v. Honolulu, (Supreme Court Certiorari Petition No. 06-479), which involved an effort by an advocacy group to overturn on both preemption and First Amendment grounds a local ordinance banning aerial banner towing.

The case was begun in 2004 by an organization seeking to tow an anti-abortion banner. The group challenged the ordinance arguing that State regulation of banner towing operations was preempted by FAA regulations, and that in any event the protection afforded political speech by the First Amendment outweighed enforcement of the Honolulu ordinance. The United States did not participate in this case, but in an earlier case decided five years ago we successfully argued that FAA regulations did not preempt Honolulu from imposing signage restrictions on aircraft seeking to tow banners. See Skysign Intern., Inc. v. City and County of Honolulu, 276 F.3d 1109 (9th Cir. 2002).

The U.S. Court of Appeals for the Ninth Circuit last May affirmed a prior district court decision and held that (1) FAA regulations generally allowing operations by aircraft towing banners do not preempt a local Honolulu ordinance

restricting the display of signs, and (2) the ordinance was not an impermissible restriction on political speech under the First Amendment because it was a reasonable, viewpoint-neutral restriction on speech in a non-public forum for which alternative avenues were available. The Supreme Court's decision denying certiorari leaves that decision standing.

The Ninth Circuit's decision is available at:

<http://caselaw.lp.findlaw.com/data2/circs/9th/0417496ap.pdf>

Departmental Litigation in Other Federal Courts

D.C. Circuit Upholds Most of Department's Findings in Newark Airport Rates Case But Holds That Only U.S. Air Carriers May Invoke Department's Statutory Airport Rates and Charges Complaint Procedures

On March 2, in Port Authority of New York and New Jersey v. DOT, (D.C. Cir. No. 05-1122), the U.S. Court of Appeals for the District of Columbia Circuit upheld in most respects the Department's June 14, 2005 Final Decision in an airport rates and charges case involving rate increases at Newark Liberty International Airport, Terminal B, but vacated the Department's decision insofar as it allowed refunds to foreign air carriers utilizing the airport.

The complaint before the Department was filed by one domestic and twelve foreign air carriers against the Port Authority of New York and New Jersey ("Port Authority"), which operates Newark airport. While the relevant statutory provisions state that complaints

may be filed by an "air carrier," a term that by statute otherwise only encompasses an air carrier that is "a citizen of the United States," the Department's decision concluded that a fair reading of the term, particularly in light of our international bilateral commitments, should allow complaints by foreign air carriers as well. The D.C. Circuit, however, disagreed, holding that "DOT makes a compelling case for the more inclusive approach, which might indeed fit better with the United States' international obligations, but it is Congress, not the courts, that has the power to expand [the statute] to include foreign air carriers."

On the merits, the Department's Final Decision found the Port Authority's fee methodology in most respects to be both reasonable and not unjustly discriminatory. The D.C. Circuit largely upheld those conclusions, including the Department's determination that no unjust discrimination had been shown. The court remanded one issue, concerning whether the Port Authority's attempted re-classification of signage

expenses was justified, for further consideration by the Department.

The litigation involved challenges by both the Port Authority by a group of U.S. and foreign air carriers to various findings set forth in the Department's 2005 final decision issued by the Deputy Assistant Secretary for Aviation and International Affairs involving airport charges at Newark. Mary Withum, a senior trial attorney in the Office of the Assistant General Counsel for Litigation, argued the case on behalf of the Department.

The D.C. Circuit's March 2 decision is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200703/05-1222a.pdf>

The Department's final decision is available at:

http://dmses.dot.gov/docimages/pdf92/335643_web.pdf

Seventh Circuit Denies Constitutional Challenge to Illinois DBE Program

On January 8 the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the U.S. District Court for the Northern District of Illinois in Northern Contracting, Inc. v. Illinois, (7th Cir. No. 05-3981), thereby upholding the constitutionality of Illinois' Disadvantaged Business Enterprise (DBE) Program.

The district court had separately ruled that the Federal DBE program, including

DOT's DBE regulations, was constitutional. In analyzing the State's implementation of its DBE program the district court specifically found that there was ample evidence that Illinois' DBE Program was narrowly tailored to serve the compelling interest of remedying the effects of racial and gender discrimination within the construction industry in Illinois. In so ruling, the court repeated its prior summary judgment determination that the Federal DBE Program was facially constitutional as a program narrowly tailored to serve a compelling governmental interest. The court expressly held that the appropriately high level of DBE participation on contracts resulted from the success of IDOT's program and not from a lack of discrimination.

On appeal Northern Contracting, a non-DBE highway subcontractor, contested this holding, arguing instead that the evidence showed that DBE subcontractors would be fully utilized in the State without the use of race-conscious DBE goals, and that, in any event, Illinois employed a flawed methodology in calculating its race-conscious goal.

The Seventh Circuit panel rejected all of appellant's arguments and agreed with the State that the evidence before the district court supported the court's holding and that Illinois' DBE plan and annual race-conscious goals were narrowly tailored because the program relied heavily on race-neutral components and the State's goal-setting methodology complied with all applicable DOT regulations.

The appellant did not appeal the district court's earlier summary judgment decision that the Federal DBE Program was facially constitutional and accordingly, the Department did not participate in this appeal. This case was the last pending challenge to the constitutionality of the DBE program.

The Seventh Circuit's decision is available at:

<http://www.ca7.uscourts.gov/tmp/060TN2NF.pdf>.

Summary Judgment Briefing and Argument Completed in D.C. HazMat Litigation

After more than a year of discovery, the parties in CSX Corp., Inc. v. Fenty, (D.D.C. No. 05-338 (EGS)), filed cross-motions for summary judgment addressing whether a District of Columbia ordinance that purports to restrict any through rail or highway movements of certain hazardous materials within 2.2 miles of the United States Capitol is preempted by Federal law. The motions were argued on January 23.

CSX Transportation ("CSX") originally brought this case against the District, arguing that the ordinance is preempted. The United States filed Statements of Interest supporting CSX. The Sierra Club intervened in the case in support of the District. CSX had sought injunctive relief in February 2005 against the emergency version of the D.C. ordinance, arguing that it was preempted under the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials

Transportation Act ("HMTA"), and that it violated the Commerce Clause of the Constitution.

The district court denied CSX's motion for a preliminary injunction, but in May 2005, the U.S. Court of Appeals for the District of Columbia Circuit in CSX Transportation, Inc. v. Williams, (D.C. Cir. No. 05-5131) reversed the district court and ordered it to enjoin enforcement of the emergency measure. The D.C. Circuit's decision rested solely on the FRSA, administered by the FRA, although a concurring opinion suggested that the ordinance is likely preempted as well under the HMTA, administered by PHMSA.

Following the D.C. Circuit's decision, the District enacted new but substantively identical temporary and permanent hazmat ordinances, and the latter is now in effect. However, pending the outcome of the litigation CSX has agreed not to haul hazmat on one of its two rail lines that enter the ordinance's exclusion zone, while the District has agreed not to enforce the ordinance against CSX.

Discovery (which the United States had vigorously opposed) and responses to requests for admissions were completed by early September 2006. The majority of responsive documents were withheld as either privileged or Sensitive Security Information.

The Court did not indicate when it might issue a decision on the cross motions for summary judgment.

The D. C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200505/05-5131a.pdf>.

United States Appeals District Court's Rejection of EPA Clean Water Act Exception for Vessel Discharges

On March 5, the United States filed its opening brief in Northwest Environmental Advocates v. EPA, (9th Cir., No. 06-17187), an appeal of the decision of the U.S. District Court for the Northern District of California that vacated EPA's longstanding regulatory exclusion of ballast water and other discharges incidental to the normal operation of a vessel from the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting requirements. The court ordered EPA to issue permitting regulations by September 2008.

Environmental groups had challenged the exclusion, focusing on the fact that the exclusion allowed ballast water discharges, which potentially introduce invasive species into U.S. waters. DOT has a strong interest in ensuring the safety and efficiency of the U.S. maritime transportation system, which is fulfilled primarily through the work of MarAd and the Saint Lawrence Seaway Development Corporation. Although we were not a party in this litigation, DOT officials submitted declarations in support of EPA's briefs in the remedies phase of the case.

In the merits phase of the case, the environmental groups argued that the exclusion exceeded EPA's authority under the CWA, which requires that the discharge of pollutants, including invasive species, into U.S. waters is subject to NPDES permitting requirements and does not generally except discharges from commercial vessels. EPA contended that its construction of the CWA was reasonable because it would be unworkable to subject vessels to the NPDES permitting regime. EPA also argued that, in any event, there is strong evidence in the legislative record that Congress has acquiesced to the exclusion and intends invasive species issues to be addressed in a different manner under a separate statutory scheme.

In a March, 2005 decision, the court rejected all the government's merits arguments. The court read the CWA's NPDES permit provisions as providing no basis for a regulatory exclusion of discharges incidental to the normal operations of vessels and rejected the government's evidence of congressional acquiescence as falling short of that required under recent Supreme Court precedence.

In the remedies phase of the case, plaintiffs and a group of state intervenors sought an injunction imposing an accelerated rulemaking schedule on EPA and the immediate imposition of certain vessel discharge controls. EPA countered that such a remedy exceeded the court's authority under the Administrative Procedure Act and would unduly involve the court in internal agency affairs. EPA proposed instead that the Court vacate the agency's

decision denying plaintiffs' rulemaking petition and remand the case to EPA to take further action on the petition consistent with the court's 2005 decision on the merits without specifying a timetable for such action. EPA also argued that the court should modify its merits decision by limiting its reach to ballast water discharges.

In a September, 2006 decision, the court rejected EPA's argument, vacated the rule, and gave EPA two years to issue permitting regulations for all discharges incidental to the operation of vessels, a longer period of time than requested by plaintiffs and intervenors. The court declined to require EPA to impose any immediate restrictions on vessel discharges. The court also denied, without prejudice, a request by an intervenor group for a stay of its decision pending appeal.

**Appeal Sought of New York
State Court Decision Striking
Federal Vicarious Liability
Provision as Unconstitutional**

On September 11 in Graham v. Dunkley, (Sup. Ct., Queens County N.Y., No. 6123/2006), Judge Thomas Plolizzi

issued a decision holding unconstitutional provisions of SAFETEA-LU set forth at 49 U.S.C. § 30106. The decision concludes that those provisions, which bar a State such as New York from imposing vicarious liability on anyone leasing or renting motor vehicles in circumstances where there is an accident and where such person is not negligent, are contrary to New York statutory and common law and are unconstitutional under the Tenth Amendment.

The United States was not a party to the litigation originally, but when a motion for re-argument was filed the United States filed a motion to intervene and a brief in support of the Constitutionality of the Federal law, arguing that the provisions are a proper exercise of Federal interstate commerce authority and that they preempt New York law under the Supremacy Clause of the Constitution.

The court ultimately denied the reargument request and the United States now intends to participate as an intervenor in defense of the statute on appeal.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Repair Station Contractors Challenge FAA Drug Testing Program

In March 2006 the Aeronautical Repair Station Association, Inc. ("ARSA") filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit in Aeronautical Repair Station Association v. FAA, (D.C. Cir. No. 06-1091), challenging the FAA's final rule clarifying certain aspects of the agency's drug testing requirements.

Historically, the FAA has required drug testing for "regulated employers," which includes Part 121 or 135 certificate holders (air carriers), as well as aviation maintenance facilities that contract with the carriers, so long as these facilities were certified to accept airworthiness responsibility for the work they performed, rather than having to rely upon the carriers' certification.

The FAA originally did not expressly mandate drug testing of uncertified contractors or the subcontractors of these regulated employers, although the agency later issued guidance that employees who performed safety-sensitive work were indeed subject to testing, regardless of the contracting tier of their employers. After years of purported industry uncertainty about the application of the rules, the FAA devoted a rulemaking specifically to this subject, and in early 2006 adopted a rule making testing explicitly applicable to

safety-sensitive workers regardless of contracting tier.

On behalf of the "newly-covered" maintenance facilities ARSA challenged the rule and sought an emergency stay in court, contending that the agency had exceeded its statutory authority, failed to comply with the Regulatory Flexibility Act (RFA), violated the Administrative Procedure Act, and promulgated a rule that was unconstitutionally vague. The D.C. Circuit granted a short administrative stay but, following consideration of the government's opposition to the motion, dissolved that stay and denied ARSA's motion for a stay pending resolution of the merits. The rule has been in effect since October 20.

ARSA's opening brief was filed December 13. It argues that Congress only empowered the FAA to test air carriers and certificated maintenance facilities, that the agency had failed to conduct the analysis of the rule's effects on small businesses required by the RFA, that the FAA violated the APA because it did not address significant objections raised in the rulemaking proceeding and because the rule was unreasonable, and finally that the rule violated the Fourth Amendment because it swept too broadly and because there was no factual evidence of drug usage in the relevant portion of the industry.

The United States' brief was filed on January 25. The government argued that Congress had clearly provided the FAA with authority to extend testing to all those performing safety-sensitive functions, that the RFA did not apply because the agency did not directly

regulate the facilities brought within the rule (and that even then the FAA substantially complied with the statute), that all pertinent comments were addressed and the APA was otherwise fully satisfied, and that substantial precedent affirmed drug testing of safety-sensitive personnel in the aviation industry against constitutional challenges similar to those at issue.

ARSA's reply brief was filed on February 23.

D.C. Circuit Denies Rehearing En banc in Challenge to FAA's Decision on Chicago O'Hare Modernization Program

On December 15, the U.S. Court of Appeals for the District of Columbia Circuit refused to grant rehearing, or rehearing en banc in Village of Bensenville v. FAA, (D.C. Cir. No. 05-1383).

This ruling leaves standing the August 4 decision by the D.C. Circuit denying petitioners' challenge to the FAA's approval of the City of Chicago's airport layout plan (ALP); the FAA's Record of Decision (ROD) approving the O'Hare International Airport Modernization Program (OMP), and the FAA Letter of Intent (LOI) to fund part of the OMP. The OMP is a major undertaking of the City of Chicago aimed at addressing overcrowded airspace and delays at O'Hare, which often create delays throughout the National Airspace System.

Petitioners filed their request for rehearing on September 15, arguing that

the panel's conclusion that there was no Federal action for purposes of the Religious Freedom Restoration Act (RFRA), does not comport with applicable Supreme Court precedent.

Chicago's approved ALP called for realigning three of the seven existing O'Hare runways and adding an eighth runway. To accomplish this, the ALP provides that the City will acquire 440 acres of adjacent land, and will relocate one cemetery. Two towns adjacent to the airport and other parties challenged the ALP and the ROD.

In its August 4th decision the panel held that RFRA, upon which the petitioners principally relied in support of their argument that the relocation of the cemeteries would infringe on their religious freedoms, was inapplicable since the relocation of the cemeteries during construction of the project would be by the City of Chicago, not by the FAA. The court had noted that RFRA is applicable only to actions taken directly by the Federal government, and concluded that "the FAA's peripheral role in the City's relocation of [the cemeteries] is not sufficient to hold the agency responsible for purposes of RFRA."

The court also rejected the challenge to FAA's Letter of Intent, which expresses FAA's intention to obligate Federal funds to carry out the OMP once Chicago has submitted its grant application. The court held that the LOI was not final agency action and that, in any event, any harm caused by the project would not be redressable in a challenge to the LOI since the OMP would likely go forward even were there

no Federal funding. Thus, the court found petitioners lacked Article III standing to challenge the LOI. The court also rejected challenges under the Administrative Procedure Act and the Due Process provisions of the Constitution.

In related litigation a petition for review was filed on November 20 in the D.C. Circuit by mostly the same petitioners from the previous Bensenville case challenging the first FAA grant issued under the LOI for \$29.3 million. St. John's United Church of Christ, Helen Runge, Shirley Steele, Village of Bensenville, and Elk Grove Village v. FAA. (D.C. Cir. No. 06-1386). The petitioners sought summary reversal of the grant decision or in the alternative expedited review. The City of Chicago intervened in the case and the FAA and the City requested that the case be assigned to the same panel that heard the prior Bensenville case.

On January 24 the Court denied petitioners' motion for summary reversal, denied their request for expedited review, and dismissed a companion motion for judicial notice as moot. The Court also denied the motion to assign the case to the prior panel. The Court directed the clerk to calendar the case for presentation to the merits panel.

The D.C. Circuit's August 4 decision is available at:

<http://pacer.cadc.uscourts.gov/docs/commopinions/200608/05-1383a.pdf>

United States Asserts that Tennessee's Attempted Regulation of Avionics in Air Ambulances is Preempted

On November 29 the United States filed a Statement of Interest in Air Evac EMS, Inc. v. Robinson, (M.D. Tenn., No. 3:06-0239), arguing that Tennessee regulations purporting to require the installation of specific avionics equipment on FAA-certificated air ambulances are preempted by Federal law.

The Tennessee Board of Emergency Medical Services regulates the provision of EMS within the State. Among other things, the Tennessee agency specifies that helicopter air ambulance pilots must have a certain amount of experience (expressed in a minimum number of flight hours) and that air ambulance helicopters must be equipped with specific navigational equipment (such as two omnidirectional ranging receivers), which allows for operations in instrument flight rule (IFR) conditions.

Air Evac EMS, Inc. is an air ambulance provider within the State; although at least some of its helicopter fleet does not have the equipment prescribed by the Tennessee Board, the carrier is fully certified by the FAA to operate under visual flight rule (VFR) conditions. When the State Board cited Air Evac EMS for failing to comply with State equipment requirements, the carrier countered in administrative proceedings that the Tennessee regulations are preempted by Federal law. The Board ruled against Air Evac, which then

commenced this lawsuit raising the same claim.

The complaint sought declaratory and injunctive relief and Air Evac moved for summary judgment. The United States' statement of interest explained that the FAA has exclusive authority over the field of aviation safety, and that there is thus no room for State regulation even though the avionics equipment required by the Board was acceptable by the FAA for use in aircraft.

Our brief also contended that the Tennessee regulations were preempted because they would act to prevent Air Evac from flying at all in the State, and thus conflicted with the FAA's certification of Air Evac to operate with different avionics equipment under VFR.

Finally, the United States also asserted that the State regulations ran afoul of the express preemption provision of the Airline Deregulation Act (now codified at 49 U.S.C. § 41713(b)), which bars States from enacting or enforcing laws "related to a price, route, or service of an air carrier." The Board's regulations, we argued, would impose an entry barrier and would also effectively require air ambulance carriers to offer services under IFR conditions.

The United States noted that the State was free to regulate the medical aspects of air ambulance operations, such as the provision of qualified medical personnel or equipment.

In its brief, filed on January 13, the State Board asserted that the FAA had not regulated air ambulances or their equipment in a comprehensive manner

and hence there was no field preemption. The Board also argued that various FAA notices and advisory circulars on the subject of operations in unforeseen IFR conditions were consistent with the State's regulations mandating specific IFR avionics, and thus there was no conflict preemption. Lastly, the State agency denied that equipment requirements "related to" air carrier services within the meaning of the statute.

Oral argument took place on March 5 and we are now awaiting the court's decision.

Former FAA Employees Challenge Outsourcing; FAA's Dispositive Motions Denied

In January 2007 the U.S. District Court for the District of Columbia in Breen v. Peters., (D. D.C. No. 1:05CV00654-RWR), denied the FAA's motion to dismiss and motion for summary judgment. Plaintiffs are approximately 800 former Flight Service Specialists (FSS) who were RIF'd by the FAA as a result of the competitive sourcing of the AFSS function to Lockheed-Martin (L-M). They filed suit in 2005 alleging that the FAA discriminated against them by targeting their jobs for outsourcing and terminating their Federal employment in violation of the Age Discrimination in Employment Act (ADEA).

Plaintiffs filed a motion for a preliminary injunction to stop the RIF from occurring in October 2005. The court denied the motion and plaintiffs appealed the denial to the U.S. Court of

Appeals for the District of Columbia Circuit, which affirmed the denial.

FAA filed a motion to dismiss for lack of jurisdiction and a motion for summary judgment in 2005. The motion to dismiss argued that plaintiffs' ADEA claims were an impermissible collateral attack on the FAA's July 2005 order awarding the contract to L-M after the Office for Dispute Resolution for Acquisitions (ODRA) had ruled on challenges to the award process. Review of such an order is vested solely in the court of appeals under 49 U.S.C. § 46110(a). The court disagreed, however, holding that district court jurisdiction is not precluded because plaintiffs' ADEA claim was not inescapably intertwined with the July 2005 order.

Our motion also argued that the FAA is immune from plaintiffs' ADEA claim based upon a theory of disparate impact. The court held, however, that Congress waived sovereign immunity for both intentional discrimination and disparate impact claims under the ADEA.

Finally, the court denied the FAA's motion for summary judgment because discovery has not yet occurred and plaintiffs, in the court's view, have not had an opportunity to adequately develop the facts of the case.

A scheduling order has not yet been issued.

Petition for Review Challenges FAA Determination that Wind Farm Poses No Air Hazard

On November 15, 2006, Clark County Nevada filed a petition for review in the

U.S. Court of Appeals for the District of Columbia Circuit of the FAA's "No Hazard to Air Navigation Determinations," under 14 CFR part 77, regarding a wind farm (approximately 80 wind turbines and 3 meteorological towers) proposed for construction by Table Mountain L.L.C. (now known as Acciona Wind Energy USA) on the Table Top Mountains in the vicinity of Good Springs, Nevada as well as the FAA's denial of Clark County's request for discretionary review of the "no hazard" determinations. The case is Clark County, Nevada v. FAA, (D.C. Cir., No. 06-1377).

Clark County, through the Clark County Department of Aviation, operates airports in Nevada. The FAA has started work with the Bureau of Land Management on an environmental impact statement (EIS) for a new supplemental commercial service airport in the Ivanpah Valley, Nevada. Clark County would be the operator of that airport, if construction of a new airport is the action selected by the decision makers after completion of the EIS.

According to its preliminary statement, Clark County raises a variety of issues. First, whether the FAA exceeded its authority or otherwise erred by relying on an interpretation of its pre-1987 regulations (codified at Part 77 of Title 14 of the Code of Federal Regulations) which interpretation is not consistent with 1987 amendments to the enabling statute, now codified at 49 U.S.C. 44718. Second, whether the FAA exceeded its authority or otherwise erred by failing to consider whether the almost 400-foot-high proposed wind turbines may interfere with radar facilities that

are necessary for aircraft landing and taking off from existing and planned Clark County airports. Third, whether the FAA otherwise exceeded its authority or otherwise erred by arguably failing to comply with the controlling statute, or with established procedures in regulations and/or guidelines.

At this stage no briefing schedule has been set in the case.

Complaint Seeks Authority for Land Fill Adjacent to Williamsport Airport Project

A declaratory judgment action has been commenced in Kibler Development Corp. v. FAA, (N.D. Ill. No. 06 C 4221) seeking a judgment that a proposed Marion Ridge Landfill, sited two miles from the Williamson County Regional Airport, should be allowed under the "grandfather" provision of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century, 49 U.S.C. § 44718. FAA had been in discussions with Kibler concerning the landfill at the time the declaratory judgment action was brought.

Among other things, the Ford Act bars the construction of a "putrescible waste landfill" within six miles of an airport unless the landfill was "constructed" or "established" prior to April 5, 2000. Kibler's contention is that the landfill meets that test because monitoring wells were drilled on the property prior to that date.

The FAA has filed a motion to dismiss for lack of jurisdiction, arguing that to the extent there is any court jurisdiction,

it lies in the circuit court pursuant to the FAA's special review statute. That statute, 49 U.S.C. § 46110, vests exclusive jurisdiction for the review of FAA actions in the courts of appeal. The issue has been briefed and is awaiting decision.

Las Vegas Seeks Ninth Circuit Review of McCarran Airport ROD

In City of Las Vegas v. DOT, (9th Cir. No. 07-70121) the City of Las Vegas and other local petitioners have challenged the Record of Decision for the modification of the Four-Corner Post Plan ("4CP") for McCarran International Airport in Las Vegas, Nevada.

In October 2001, the FAA issued a Finding Of No Significant Impact/Record Of Decision (FONSI/ROD) for the original 4CP. The plan was developed to address growing airspace and air traffic control inefficiencies caused by increases in air traffic in the Las Vegas Terminal Radar Approach Control (TRACON) airspace. Prior to implementation of 4CP, FAA permitted departures from Runway 25, which went west for four miles then turned right to head east. After 4CP, the procedure was rarely used (but remained a published procedure) and 95% of aircraft departing Runway 25 made a left-hand turn. Eastbound departures from Runway 25 converged with eastbound departures from Runway 19 at a single waypoint.

In order to meet separation and spacing requirements, air traffic controllers had to provide sufficient time between departures to avoid simultaneous

convergence on the same waypoint. A significant rise in traffic demand combined with the constraint of routing aircraft over the same waypoint caused departure delays at the airport.

For various reasons, including the need to correct delay problems and airspace inefficiencies, FAA sought to re-institute the right turn procedure. Through a letter of agreement, FAA received a shelf of space from Nellis Air Force Base to safely allow for the operation of such a procedure. FAA prepared a supplemental environmental assessment and issued a FONSI/ROD on November 14.

The City of Las Vegas then filed a petition for review of the FONSI/ROD on January 10. The petition alleges that FAA failed to comply with NEPA and the Clean Air Act (CAA). On January 15, the City requested FAA to stay the effectiveness of the FONSI/ROD. It also requested a meeting during the stay to attempt to resolve the environmental issues. The FAA is compiling the administrative record and record index and responding to the request for the stay.

FAA Florida Airport Relocation Project Challenged on Environmental Grounds

The National Resources Defense Council (NRDC), Defenders of Wildlife, and Friends of PFN filed a Petition for Review in Natural Resources Defense Council v. FAA (2d Cir. No. 06-5267) on November 14 challenging the Record of Decision (ROD) signed by the FAA on September 15, 2006 and the Final EIS

issued by the FAA in May of 2006. The ROD approved the relocation of the Panama City-Bay County International Airport (PFN) to a new site in west Bay County Florida (West Bay Site). According to the petition, NRDC alleges violations of the Airport and Airway Improvement Act (AAIA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). The airport sponsor is an intervenor in the case.

NRDC sent a letter dated October 19, 2006 to the FAA requesting supplementation of the Final EIS for the project based on several alleged sightings of the thought-to-be extinct Ivory-billed Woodpecker (IBW) along the Choctawatchee River in northwest Florida, an area approximately 20-30 miles north of the proposed airport relocation site. The FAA immediately began discussions with the U.S. Fish and Wildlife Service (USFWS) to consider what action should be taken relative to the proposed project. Importantly, USFWS issued a press release on September 26, saying that, though promising, the alleged sightings were not enough to confirm the existence of the IBW. In coordination with USFWS, then, the FAA has developed a Biological Assessment analyzing the possible impacts to the IBW in terms of potential habitat on- and off-airport as well as possible affects from noise in the area where the bird is alleged to have been sighted.

Finally, by letter dated December 21, NRDC has also requested that the FAA stay implementation of the ROD. The FAA is in the process of responding to the request for a stay.

Eighth Circuit Upholds Pilot Certificate Revocation Order

The U.S. Court of Appeals for the Eleventh Circuit in Coghlan v. NTSB, (11th Cir. No. 06-11118), reported at 470 F.3d 1300 (11th Cir. 2006), affirmed an NTSB order upholding the FAA's revocation of Harold Coghlan's airline transport pilot certificate. The FAA based its revocation on allegations that Mr. Coghlan, a former FAA Aviation Safety Inspector, falsified his military competency on a 1998 application for type ratings and that he falsified other documents he later provided to the FAA in an attempt to corroborate the false information on his 1998 application.

The sole issue Mr. Coghlan presented to the court was whether the FAA's revocation action was time-barred under the 5-year statute of limitations set forth at 28 U.S.C. § 2462, which pertains to the filing of actions or proceedings for the enforcement of a civil fine, penalty, or forfeiture. The court held that 28 U.S.C. § 2462 does not apply to remedial actions, such as the FAA's revocation of Mr. Coghlan's certificate for lack of qualifications, and that "even if § 2462 were applicable to Coghlan's revocation proceedings, he engaged in sufficient prohibited conduct within the statute of limitations to sustain the NTSB's decision upholding the [Administrator's] order of revocation." The court concluded that Mr. Coghlan failed to demonstrate reversible error and denied the petition for review.

The Eleventh Circuit's decision is available at:

www.ca11.uscourts.gov/opinions/ops/200611118.pdf

Ninth Circuit Reverses Certificate Revocation Order On Service of Process Grounds

In Chin Yi Tu v. NTSB, (9th Cir. No. 04-76454), reported at 470 F.3d 941 (9th Cir. 2006), the U.S. Court of Appeals for the Ninth Circuit held that the FAA denied Mr. Tu due process by not providing him with adequate notice of two orders suspending his pilot certificate for low flight activity in violation of the Federal Aviation Regulations.

The FAA's statute, 49 U.S.C § 46103(b), requires service of documents by certified mail. Consistent with the statute, the FAA sent all of the documents in the case to Mr. Tu by certified mail. It also served most of the documents by regular mail as well. Mr. Tu, however, rejected most of the documents served by certified mail. The FAA only served its orders of suspension by certified mail, and the orders were returned as unclaimed.

The FAA then sent letters to Mr. Tu demanding the return of his airman certificate. Copies of the orders of suspension for both cases were enclosed with those letters. The FAA sent the demand letters by both certified and regular first-class-mail. The demand letters sent by certified mail were returned to the FAA as unclaimed. Mr. Tu received the demand letters sent

by regular mail. He stated that this was the first time he had received the orders of suspension.

Mr. Tu then mailed a notice appealing both of the orders to the NTSB. The FAA filed a motion to dismiss Mr. Tu's appeal as untimely, observing that Mr. Tu failed to appeal from the orders within the 20-day timeframe specified at 49 C.F.R. § 821.30(a).

The ALJ granted the FAA's motion, finding that Mr. Tu did not have good cause for filing his notice of appeal after the twenty day appeal period. A three-member majority of the NTSB served an Opinion and Order affirming the ALJ's order dismissing Mr. Tu's appeal as untimely.

In reviewing the Board's decision, the Ninth Circuit relied on Jones v. Flowers, 126 S. Ct. 1708 (2006), a decision that was issued after the parties had briefed the Tu case. In Jones, the Arkansas Commissioner of State Lands had attempted to notify a homeowner that his home would be sold if he did not pay delinquent taxes. The Commissioner sent the notices by certified mail only, and both were return as "unclaimed." The Commissioner also published a notice of public sale in a local newspaper. The home was sold at an auction for a price well below its fair market value. The Supreme Court held in those circumstances that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." 126 S. Ct. at 1713.

Applying that holding to the present case, the Ninth Circuit concluded that the FAA denied Mr. Tu due process when it failed to use both certified and regular mail to send the orders of suspension. The court observed that the FAA knew certified mail sent to Mr. Tu had previously been returned on two separate occasions as "refused" or "unclaimed," and that "[f]irst class mail worked." 470 F.3d at 946.

The Ninth Circuit's decision is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/30F3350F9CB7940B8825724300810230/\\$file/0476454.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/30F3350F9CB7940B8825724300810230/$file/0476454.pdf?openelement)

The Supreme Court's decision in Jones v. Flowers is available at:

<http://www.supremecourtus.gov/opinions/05pdf/04-1477.pdf>

Challenge Filed Concerning NEPA Issues in Olympia Runway Project

On September 8 a complaint was filed in West v. DOT, (D. W.D. Wash. No. 3:06-cv-05516-RBL) against DOT, the FAA, the Corps of Engineers, the Washington State Department of Transportation and the Port of Olympia challenging a runway rehabilitation project to be constructed at the Olympia Regional Airport.

The FAA and DOJ were not served with a copy of the complaint until December 12, and the complaint itself has apparently been filed in a court lacking

jurisdiction. The improvements project was authorized in a decision issued pursuant to NEPA on July 10, 2006. That decision could have been challenged within 60 days by filing a petition for review in a Federal Circuit Court. The FAA is working with the Department of Justice in order to determine whether the filing and service errors provide a basis for dismissal of the complaint.

Federal Highway Administration

Two Complaints Challenge ROD Approving Maryland Inter- County Connector

On December 20, a lawsuit was filed in U.S. District Court for the District of Maryland, Southern Division, Audubon Naturalist Society v. DOT, (D. Md. No. 8:06-cv-03386-RWT), challenging the Department's Record of Decision ("ROD") approving the construction of the Inter-County Connector ("ICC"), an EO 13274 Priority Project. On the same day a second complaint was filed challenging the same project in the U.S. District Court for the District of Columbia. Environmental Defense v. DOT, (D. D.C. No. 06-2176(GK)).

The ICC project involves the construction of a new 2.6 billion dollar 18-mile six-lane limited access highway between the I-270 Corridor, near Rockville in Montgomery County, and the I-95/US-1 Corridor, near Laurel in Prince George's County. The complaint does not name the Maryland State

Highway Administration, the Maryland Department of Transportation, or the Maryland Transportation Authority as defendants. However, the State of Maryland has filed to intervene in the Maryland action.

Both complaints contain multiple allegations that the government failed to carry out its responsibilities under the National Environmental Policy Act ("NEPA"), Section 4f of the Transportation Act, the Clean Air Act (CAA) the Clean Water Act ("CWA"), the Freedom of Information Act (FOIA), and the Administrative Procedure Act ("APA").

On February 21, the United States filed a motion in the District of Columbia case seeking to transfer the complaint to the district court in Maryland, where it can be consolidated with the related case filed in that jurisdiction. The plaintiffs opposed the transfer. The current schedule calls for the United States to file its answers to both complaints in mid-March.

Challenge Filed to New Hampshire I-93 Highway Project

On February 6, 2006, a new lawsuit was filed in United States District Court in New Hampshire, Conservation Law Foundation v. FHWA., (D. N.H. No. 06-45-PB) challenging FHWA's decision to proceed with improvements to Interstate 93 from Salem to Manchester, an EO 13274 Priority Project.

The project involves a 19.8-mile segment of I-93 from the

Massachusetts/New Hampshire State line northward through the towns of Salem, Windham, Derry and Londonderry, and ending at the I-93/I-293 interchange in the City of Manchester. The purpose of the project is to increase transportation efficiency within the corridor by reducing congestion and enhancing safety. The selected alternative involves widening I-93 from the existing limited access two-lane highway in each direction to a limited (fully controlled) access four-lane highway in each direction. Five existing interchanges and cross roads within the project corridor will also be reconstructed. In addition, three new park-and-ride facilities will be constructed, bus service and ride sharing opportunities will be enhanced, and space will be reserved in the median to accommodate future commuter light rail trains or other mass transit opportunities.

In its complaint the Conservation Law Foundation ("CLF") alleges that in approving the project FHWA failed to carry out its responsibilities under the National Environmental Policy Act the Federal Aid Highways Act and the Administrative Procedure Act. CLF also alleges that the agency failed to produce a complete set of records in response to several Freedom of Information Act requests made during August and September 2005. CLF is seeking declaratory judgment that FHWA has violated FOIA, NEPA, FAHA, and the APA, an injunction on any contracting or ground disturbing activities, the preparation of a Supplemental EIS, and attorney's fees and costs.

Summary judgment briefing was completed on January 12, and oral

argument has been scheduled for March 16.

District Court Dismisses Challenge to Connecticut Interchange Project Finding No Federal Involvement

On September 26, the U.S. District Court for the District of Connecticut in Sadler v. Mineta, (D. Conn. No. 3:05-CV-1189 (MRK)), granted the government's motion for summary judgment and dismissed plaintiff's cross motion for summary judgment and its motion for injunctive relief. Essentially, the plaintiffs challenged the failure of the FHWA to act to approve or disapprove a modification to an interstate interchange, which entailed adding a right turn lane at the end of the ramp to facilitate traffic movements resulting from construction of a large shopping center in the vicinity of the ramp.

The modification to the ramp was required by order of a State agency and was a condition of a permit to the developer for construction of the mall. The ramp modification was being financed and constructed by the developer under the supervision of the State. The Connecticut Division Office determined that the modification to the ramp did not require the approval of the FHWA due to an agreement with the State regarding actions not requiring FHWA approval and since there was no funding or approval required, NEPA was not applicable.

The Division Office based their action on the 1998 Joint Policy on Interstate

Access Modifications entered into by FHWA and Connecticut. That policy excluded this type of proposal from FHWA approval requirements.

In its decision the court held that the division office acted well within its discretion in issuing a local joint policy statement and adhering to that policy. The court held that the Connecticut Division Office had not been required to undertake notice and comment rulemaking prior to issuing the policy, and also held that the fact that its policy differs from other divisions presented no issue for the court to decide. In this regard the court noted that policies may differ from region to region in decentralized Federal agencies, and if the judiciary were to attempt to evaluate these types of differing approaches, that would amount to an unwarranted intrusion into agency discretion.

Indiana District Court Dismisses FTCA Complaint

On January 27 the U.S. District Court for the Southern District of Indiana in Brines v. United States, (S.D. Ind. No. 3:06-cv-0-008-SEB-WGH) dismissed a \$10 million tort action claiming that the FHWA was negligent in failing to follow its own rules, regulations and guidelines during the design and construction of the Kings Mine road ramp and signage project. The complaint alleged that the plaintiff's grandmother, following directional signs and guidance, drove southbound onto the northbound U.S. 41 ramp, colliding with another vehicle and permanently injuring herself.

In dismissing the action the district court held that a negligence claim premised on a violation of Federal duties is insufficient to constitute a cause of action under the Federal Tort Claims Act (FTCA). Plaintiff also requested leave to amend its complaint to allege that the FHWA assumed a duty of reasonable care when it allegedly participated in the approval and design of the ramp. In denying this request, the court held that this theory would run head-long into the discretionary act exemption to the FTCA.

Environmental Groups Challenge Congaree National Park Bridge Replacement Project

On September 12 a number of environmental groups in Friends of Congaree Swamp, South Carolina v. South Carolina, (D. S.C. No. 3:06-cv-02538MJP) filed a complaint alleging 4(f) and NEPA violations against both the South Carolina DOT and FHWA in connection with a bridge replacement project planned near the boundary of the Congaree National Park. Plaintiffs have requested a declaratory judgment and other injunctive relief. The case is still in its early stages. The administrative record was filed on February 28.

Federal Railroad Administration

Former Locomotive Engineer and Union File Bivens Suit Against FRA, LERB, and Railroad

On May 18, Charles Daniels, a former Union Pacific Railroad Company (UP) locomotive engineer, and the Brotherhood of Locomotive Engineers and Trainmen filed a lawsuit, Daniels v. Union Pacific Railroad Company, (D.D.C. No. 1:06-CV-00939), against FRA, FRA's Locomotive Engineer Review Board (LERB), and the railroad in the U.S. District Court for the District of Columbia.

The suit alleges that the defendants committed constitutional torts against Mr. Daniels. In particular, the complaint alleges that UP, acting under color of Federal law (FRA's locomotive engineer certification regulations), denied Mr. Daniels' certification without a pre-deprivation hearing or a prompt post-deprivation hearing, in violation of the Due Process clause. The complaint further alleges that FRA and the LERB acquiesced in UP's denial decision and were biased against Mr. Daniels in denying his petitions for administrative review.

Meanwhile, Mr. Daniels filed an administrative appeal of FRA's administrative hearing officer's adverse ruling, which the Administrator affirmed on July 31 in a decision that constitutes final agency action. To date, Mr. Daniels has not filed a petition for

judicial review of the Administrator's decision. The plaintiffs seek monetary damages as well as equitable relief.

On August 24, the United States filed a dispositive motion to dismiss the lawsuit on the grounds that (i) the complaint improperly identifies Government entities as named defendants, (ii) an alternative administrative remedy is available to the plaintiffs, and (iii) FRA and the LERB did not violate Mr. Daniels' procedural due process rights. The plaintiffs' response to the motion was filed on September 27, and the United States' reply was filed on October 30. The district court has not yet scheduled a date for a hearing.

National Highway Traffic Safety Administration

United States Files Brief in Consolidated Challenges to NHTSA's Light Truck CAFE Standards

On February 23, the United States filed its brief in Center for Biological Diversity v. NHTSA, (9th Cir. No. 06-71891), which consolidates several suits challenging NHTSA's final rule setting Corporate Average Fuel Economy (CAFE) standards for light trucks. NHTSA issued the standards on April 6, 2006.

The suits were brought by the Center for Biological Diversity, the Sierra Club, Public Citizen, Environmental Defense, Natural Resources Defense Fund, the State of Minnesota, and a coalition of twelve States and cities (including

California, the State and City of New York, and the District of Columbia). The petitioners, who filed their opening briefs on November 15, 2006, challenge the sufficiency of NHTSA's environmental review of the standards, including whether NHTSA improperly failed to consider the impact of CO₂ emissions, NHTSA's position that the standards preempt State requirements limiting CO₂ emissions, and the merits of the standards themselves. Additionally, in a separate motion, petitioners challenge the completeness of the administrative record for the standards. The motion challenging the record will be decided by the merits panel.

In granting a joint motion of the parties for expedited oral argument, the court ordered oral argument to be scheduled between May 7 and 18.

NHTSA's Final Rule is available at:

<http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=608335319654+2+0+0&WAIAction=retrieve>

Intervenor Seeks Summary Affirmance of NHTSA's Confidentiality Rule on Early Warning Data

The Rubber Manufacturers Association has filed an appeal of the decision by the U.S. District Court for the District of Columbia in Public Citizen v. Mineta, (D.D.C., No. 04 CV 00463), insofar as the court held that early warning data submitted by vehicle and tire manufacturers were not covered by a categorical exemption under exemption

3 of the Freedom of Information Act. Rubber Manufacturers Ass'n v. Peters, (D.C. Cir. No. 06-5304).

Both Public Citizen and the Rubber Manufacturers Association had originally challenged NHTSA's rule providing that some, but not all, of the "early warning data" required by the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 ("TREAD Act"), P.L. No. 106-414, will be treated as confidential information and not be released in response to Freedom of Information Act requests.

The TREAD Act requires vehicle and tire manufacturers to submit "early warning data," such as data on warranty claims, consumer complaints, and reports of deaths and injuries, in order to give NHTSA the ability to identify potential safety defects. 49 U.S.C. 30166. NHTSA determined through a rulemaking proceeding that some, but not all, of the early warning data consists of confidential material that should not be publicly released in response to a Freedom of Information Act request. NHTSA therefore created a class determination stating these types of early warning data will be treated as confidential information without any need for the manufacturer to file a request for confidential treatment.

Public Citizen had contended that FOIA does not allow an agency to issue class determinations by rule, that NHTSA had failed to give adequate notice of its intention to establish a class determination that much of the data will be deemed confidential, and that the record did not support NHTSA's

decision. The district court granted Public Citizen's motion for summary judgment only on the ground that NHTSA's notice of proposed rulemaking had not given the public adequate notice of the final decision.

The Rubber Manufacturers Association had counter-argued that the TREAD Act created a categorical exemption under Exemption 3 of FOIA that bars the release of any early warning data unless the Secretary makes certain findings prescribed by Congress.

On July 30 the court issued a supplemental opinion holding that Exemption 3 is inapplicable. The Rubber Manufacturers Association filed an appeal. Public Citizen, an intervenor, filed a motion for summary affirmance. NHTSA's response stated that the case was not appropriate for summary affirmance. The motion is still pending.

NHTSA's final rule is available at:

http://dmses.dot.gov/docimages/pdf87/249581_web.pdf

The court's supplemental opinion is available at:

<http://www.dcd.uscourts.gov/opinions/2006/Leon/2004-CV-463~13:49:0~8-22-2006-a.pdf>

State of California Seeks NHTSA Preemption Documents in FOIA Suit

The State of California has named NHTSA, DOT, and OMB as defendants in a suit filed in the U.S. District Court

for the Northern District of California appealing decisions of DOT and OMB denying California's FOIA requests for all documents related to NHTSA's statements in the preamble to its light truck CAFE standard regarding the preemptive effect of the standards on State requirements limiting CO₂ emissions. The case, California v. NHTSA, (N.D. Calif. No. 06-02654), originally named only OMB as a defendant, but was subsequently amended to include NHTSA and DOT.

The Department has filed an answer and has provided documents responsive in whole or in part to the requester, and has submitted an index of the documents that the Department asserts are exempt from disclosure. Cross motions for summary judgment are due on March 16, and a summary judgment hearing is scheduled for April 20.

Auto Industry Preemption Challenge to California Limits on Vehicle CO₂ Emissions Survives Motion for Judgment on the Pleadings

The coalition of plaintiffs in Central Valley Chrysler-Jeep, Inc. v. Witherpoon, (C.D. Cal. No. 04-06663), composed primarily of automobile dealers and manufacturers, is challenging California Air Resources Board (CARB) regulations limiting the release of CO₂ from new motor vehicles sold in California beginning in the 2009 model year. The Department is not participating in this case, but some of the issues raised in the case are related to those arising in litigation concerning CO₂ emissions generally and NHTSA's

corporate average fuel economy (CAFE) standards specifically.

Plaintiffs allege five grounds for challenging the regulations: (1) the regulations are preempted because they conflict with the Federal Energy Policy and Conservation Act (EPCA), which authorizes NHTSA to set CAFE standards for manufacturers' fleets of new vehicles; (2) the regulations are expressly preempted by the Federal Clean Air Act (CAA) as the CAA has been construed by EPA; (3) the regulations are preempted because they conflict with the Federal government's policies regarding the impact of greenhouse gases on global warming and weaken the United States' diplomatic leverage in negotiations with other nations on greenhouse gas standards; (4) the regulations violate the dormant Commerce Clause of the U.S. Constitution because the economic burdens they create outweigh any economic benefits they might create; and (5) the regulations are contrary to the Federal antitrust laws because they would require cooperation among competing manufacturers in the California new-vehicle market.

In a September 22, decision, the court granted defendant's motion as to the Commerce Clause and antitrust law claims, but denied the motion as to the other claims. The case was expected to proceed to trial on these claims. On January 12, however, the court stayed the proceedings based on CARB's concession that the CAA preempts its regulations, unless EPA grants a waiver of the CAA's preemption provision, a request which is still under consideration at the agency.

The district court will revisit the need for a stay once the Supreme Court rules in Massachusetts v. EPA, discussed earlier in this edition of Litigation News. The district court concluded that if the Supreme Court holds that EPA lacks authority to regulate greenhouse gases, as the agency argued, then the CAA's broad preemption of State emissions regulations would preempt the State regulatory scheme with no possibility of a waiver. In that event, the court concluded, the issue of EPCA preemption need never arise.

D.C. Circuit Hears Argument in Challenges to Rule on Warning Systems for Low Tire Pressure

On February 16, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument on several consolidated petitions for review of two NHTSA decisions on tire pressure monitoring systems ("TPMSs"). Public Citizen v. Mineta, (D.C. Cir. No. 05-1188).

Public Citizen, several tire manufacturers, and the tire manufacturer trade association challenged a final NHTSA rule requiring car manufacturers to install TPMSs in new cars that will warn drivers when one or more of a car's tires is under-inflated. NHTSA adopted that rule pursuant to section 13 of the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 ("TREAD Act"), P.L. No. 106-414. That statute directed NHTSA to establish a rule requiring car manufacturers to install TPMSs on all vehicles. The petitioners argue that NHTSA's rule is inadequate because it

does not require TPMSs for replacement tires and because the warning will not, in their view, appear soon enough.

The tire manufacturers are also challenging a related NHTSA decision, the denial of their petition for a rule requiring car manufacturers to establish recommended tire pressures based on a maximum load for automobiles that would include a tire pressure reserve. The tire manufacturers argued that such a rule was needed to ensure that drivers would always be aware of under-inflated tires. NHTSA denied the petition after concluding that the rule sought by the tire manufacturers was unnecessary, costly, and based on incorrect assumptions.

NHTSA is defending its decisions on the merits and also arguing that NHTSA's governing statute does not give the Court jurisdiction to hear its denial of the rulemaking petition.

Federal Transit Administration

Second Circuit Upholds Random Search Program for Vermont Ferries

On November 29, the U.S. Court of Appeals for the Second Circuit in Cassidy v. Chertoff, (2d. Cir. No. 05-1835-cv) upheld as constitutional the Vessel Security Plan (VSP) of the Lake Champlain Transportation Company (LCT), which calls for random searches of carry-on items and vehicle trunks of passengers boarding commuter ferries

operating between Vermont and New York City.

Closely tracking the Second Circuit's own holding in MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006), where the Court of Appeals upheld a program to randomly search carry-on items of passengers boarding the New York City subway, the Court in Cassidy denied plaintiffs' Fourth Amendment challenge to the program. Unlike in MacWade, however, Cassidy involved a Federally-mandated Coast Guard program calling for VSPs at the Nation's ports. See Maritime Transportation Security Act of 2002, 46 U.S.C. §§ 70101-70119 (MTSA). In this "special needs" case -- that is, one involving warrantless searches, not based upon probable cause developed during a typical crime investigation -- the Court held that the threat of terrorism to large commuter vehicles presented such a "special need" that the VSP reasonably achieved its goal of deterrence and that the VSP did not unreasonably intrude on passengers' privacy rights.

Although LCT operates as a private entity, the case may affect FTA grantees operating ferry systems regulated by the Coast Guard under the MTSA.

District Court Declines to Reach WMATA's Sovereign Immunity Defense Concerning ADA Claims

In a December 14 decision the U.S. District Court for the District of Columbia refused to rule on an argument asserted by the Washington Metropolitan Area Transit Authority (WMATA), an

FTA grantee, that the doctrine of sovereign immunity bars plaintiffs' ADA claims against WMATA in Disability Rights Council of Greater Washington v. WMATA, (D.D.C. No. 1:04-cv-00498-HHK-JMF), reported at 2006 WL 3704656.

In this ongoing case, plaintiffs challenge the adequacy of WMATA's paratransit services. As the Court explained, "Because the ADA's waiver of sovereign immunity has been called into question, the United States has intervened in this case for the limited purpose of defending that waiver." Specifically, the Federal government argued that, "(1) the court should not reach the question of the ADA's abrogation of WMATA's sovereign immunity, and (2) the abrogation is valid as to the class of cases, such as this one, implicating public transportation."

The Court agreed with the first argument, explaining that because WMATA clearly waived its immunity as to plaintiffs' Rehabilitation Act [RA] claims, and DOT's RA regulations require compliance with the ADA, "any violations of the ADA by WMATA are necessarily violations of the Rehabilitation Act."

The Court thus dismissed the ADA claims, but deemed "the allegations contained therein as stating substantive ADA claims brought pursuant to the Rehabilitation Act." The Court also granted plaintiffs' request for class certification under Rule 23 of the Federal Rules of Civil Procedure.

SEPTA Wins Summary Judgment in ADA Litigation

On November 17 the U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to the Southeastern Pennsylvania Transportation Authority (SEPTA), an FTA grantee, on both counts of plaintiffs' Fourth Amended Complaint in Disabled in Action of Pennsylvania v. SEPTA, 2006 WL 3392733 (E.D. Pa. No. 2:03-cv-01577-GP).

Plaintiffs sought a declaratory judgment finding SEPTA to be in violation of the ADA for failing to characterize two Center City subway stations as key stations and for failing to equip those stations with elevators.

The Court found plaintiffs' claims to be barred under the statute of limitations, and further held that plaintiffs lacked a private right of action under 49 CFR Section 37.47 to challenge SEPTA's determination as to which of its rail station are key stations for ADA purposes.

The Court also dismissed plaintiffs' claims under Section 1983 of the Civil Rights Act, holding that plaintiffs could not use Section 1983 to assert a claim unavailable under DOT's regulations.

Maritime Administration

Litigation Remains on Hold in AID Cargo Preference Challenge While DOJ Determines United States' Litigation Position

In America Cargo Transport, Inc. v. United States, (W.D. Wash. No. C05-393 JLR) American Cargo Transport ("ACT"), an operator of ocean going vessels registered in the United States, alleges that it was deprived of its right to carry U.S. preference cargo, which, consistent with the Cargo Preference Act of 1954, codified in section 901(b) of the Merchant Marine Act, 1936, 46 App. U.S.C. § 1241(b), is statutorily reserved in substantial part for carriage on vessels flying the U.S. flag.

ACT's amended complaint specifically names two Federal agencies as defendants: the Agency for International Development ("AID") – the agency statutorily charged with the obligation to arrange shipment of certain government impelled relief cargo, and MarAd – the agency statutorily charged with administering the cargo preference laws of the United States. DOJ's early representation in the case did not completely take into account the competing policy concerns of the two named Federal defendant agencies. The case is presently on hold as DOJ determines the ultimate litigation position the Federal government will take.

New Trial Rejected and Barge Damage Judgment in Favor of MarAd Sustained

United States v. Heartland Barge Management, L.L.C., (S.D. Tex. No. H-02-2314) is an action brought by the United States to recover damages to three Maritime Administration vessels hit by barges during a flash flood in Houston, Texas. Defendant Proler's barges caused the greatest damage. Proler offered the defense of "Act of God," arguing that the flood caused by the storm was not predicted.

The United States prevailed by showing that Proler did not exercise all skills and precautions that could have been taken to reasonably prevent the accident. Accordingly, a judgment was entered in favor of the United States of \$1,274,036.50.

Proler then filed a motion for a new trial and reconsideration. On February 2, Judge John D. Rainey denied that motion. Proler's remaining option is to appeal this decision to the Fifth Circuit. With interest, the judgment has a current value of around \$1,600,000.

Lockheed Martin Challenges HazMat Disposal Project

On January 29, MarAd was served with a complaint filed by Lockheed Martin Corporation in Lockheed Martin Corp. v. United States, (W.D. Wash. No. 06-1032). In addition to MarAd, the complaint names the Department of Defense, the Coast Guard, GSA, the Department of Interior (Indian Affairs) and the Department of Commerce

(NOAA) and alleges that the U.S. violated Federal law in arranging for the disposal of hazardous substances at a shipyard the United States owns in Harbor Island located in Seattle, Washington.

New Litigation Again Seeks Removal of James River Fleet

Clark v. United States, (E.D. Va. No. 4:04cv49) is yet another action seeking to compel MarAd and EPA to remove vessels from the James River Reserve Fleet in Fort Eustis, Virginia. The complaint seeks to have the vessels exported abroad.

Plaintiff claims that the vessels constitute imminent dangers under the Resource Conservation Recovery Act and the Federal Water Pollution Control Act. The United States has filed a summary judgment motion, and briefing on that motion and Clark's cross motion should be completed in March.

Northrup Grumman Files FOIA Complaint Against MarAd

In Northrup Grumman Ship Systems, Inc. v. DOT, (S.D. Miss. No. 1:07CV11 LG JMR) plaintiff has challenged MarAd's decisions relating to disclosure of Title XI documents sought under FOIA. This matter arises out of litigation brought by Searex, Inc., against Northrup Grumman incident to the Searex' bankruptcy proceedings.

Northrup Grumman claims that MarAd, as the Title XI loan guarantor for Searex, Inc., has relevant documents and that

MarAd has been too slow in responding to FOIA requests.

The litigation is in the earliest of stages; the United States' answer has not been filed.

Pipeline and Hazardous Materials Safety Administration

D.C. Circuit Rejects Challenge to Rules Defining Scope of DOT's Hazardous Materials Regulation

On October 13 the U.S. Court of Appeals for the District of Columbia Circuit issued a two-to-one decision dismissing the petition for review in American Chemistry Council v. DOT, (D.C. Cir. No. 05-1191), a challenge to the "HM-223" rulemaking in which the Department clarified where in the process of shipping hazardous materials its regulation of those materials begins and ends and where State, local, and other Federal agency regulations instead apply. The Department did so by defining the statutory terms "loading," "unloading," and "storage" incidental to the movement of hazardous materials.

The petitioners, a number of industry trade associations, alleged that the rules violate the hazardous materials laws and are arbitrary and capricious because they do not extend the scope of DOT regulation far enough, to the exclusion of State, local, and other Federal regulation that would otherwise apply. Additionally, petitioners claimed that the

rule fails to take into account security concerns.

The court never reached the merits of these issues, however, instead ruling that none of the petitioners had demonstrated that the rule would cause them any concrete harm, and that therefore they had failed to establish standing under the U.S. Constitution to challenge the rule. The court subsequently denied petitioners' petition for rehearing.

The D. C. Circuit's panel decision is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200610/03-1456a.pdf>.

First Circuit Denies Petition for Writ of Mandamus to Compel PHMSA to Issue LNG Facility Safety Standards

On November 28 the U.S. Court of Appeals for the First Circuit denied a mandamus petition filed by the States of Massachusetts and Rhode Island, and by the City of Fall River, which sought to compel PHMSA to prescribe minimum safety standards for deciding on the location of new liquefied natural gas (LNG) facilities.

In In re City of Fall River, Massachusetts, (1st Cir. No. 06-2310), petitioners alleged that PHMSA had failed to comply with a mandate to prescribe such standards under the Pipeline Safety Act of 1979, and also had failed to act on a petition for rulemaking filed two years ago.

PHMSA subsequently issued a decision denying the rulemaking petition. As to petitioners' other arguments, DOT responded that it had adopted the relevant regulations in January 1980, and that no basis exists to commence a new rulemaking on this subject.

The court held that the mandamus petition was moot to the extent it sought a decision by PHMSA on the rulemaking petition. As to petitioners' effort to force PHMSA to issue new LNG plant siting regulations, the court held that mandamus was not an appropriate remedy because petitioners could pursue that relief through appeal of their recently-denied rulemaking petition or through the filing of a new rulemaking petition with PHMSA.

The First Circuit's decision is available at:

<http://www.ca1.uscourts.gov/pdf/opinions/06-2310-01A.pdf>.

Federal Motor Carrier Safety Administration

Oral Argument Held in Hours of Service Case

On December 4 the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in consolidated challenges to FMCSA's 2005 motor carrier hours of service (HOS) rules: Public Citizen, Inc. v. FMCSA, (D.C. Cir., No. 06-1078), and Owner-Operator Independent Drivers Association, Inc. v. FMCSA, (D.C. Cir. No. 06-1035).

In July 2004 the court vacated FMCSA's 2003 HOS rule, holding that the agency failed to satisfy its duty to consider effects on driver health. Congress directed the agency to adopt a new rule within one year. The agency did so in August 2005 and was again sued, this time by both Public Citizen and other advocacy groups, as well as industry groups.

The 2005 rule requires that drivers may not operate vehicles more than 11 hours (a 1-hour increase over the pre-2003 limit) without 10 consecutive hours off duty (a 2-hour increase). The new rule also requires driving to cease after 14 hours following the time a driver begins duty. The pre-2003 rule allowed drivers to extend their on-duty periods by taking short breaks. The new rule also provides a "restart" of weekly on-duty limits if the driver is off duty 34 consecutive hours. The 2005 rule allows drivers to accumulate 10 hours "off-duty" time by taking 8 consecutive hours in the sleeper berth and a separate period of 2 hours in the sleeper berth or off duty.

Public Citizen and the other advocacy groups argue the rule is contrary to law and arbitrary and capricious in increasing daily and weekly driving hours without establishing that the increases are safe. Petitioners allege (a) an inconsistency between FMCSA's safety analysis and its cost/benefit analysis, (b) the increased risk from crashes during the 11th driving hour is not justified, (c) the 34-hour restart increases cumulative fatigue and inhibits recovery, and (d) the agency's regulatory impact analysis is flawed. Petitioners also argue that the rule is arbitrary and capricious because it fails to "ensure"

protection of driver health. Petitioners claim an increased risk of lung cancer, hearing loss, back disorders, and other health effects from working longer hours.

FMCSA maintains the evidence on risk from driving 11 hours is inconclusive, but that even if there is some increased risk, the costs of imposing a 10-hour limit outweigh the safety benefits. The agency also claims the 34-hour recovery period is sufficient. Moreover, the non-extendable 14-hour on-duty driving window and new 10 hours off duty rule create more opportunity for rest under the new rule. The agency also disputes Public Citizens' characterization of FMCSA's burden to ensure protection of driver health.

In their separate petition for review the Owner-Operator Independent Drivers Association ("OOIDA") has challenged other aspects of the new rule, principally the requirement that all sleeper berth drivers remain in the berth 8 consecutive hours. They allege the agency failed to deal with loading and unloading issues and violated APA notice and comment requirements. OOIDA argues the sleeper berth provisions are arbitrary and capricious because FMCSA failed to consider positive effects of nap breaks, the conflict with FMCSA rules on hazardous materials drivers, and the adverse economic impacts on team drivers. OOIDA also claims FMCSA ignored driver health issues, including circadian rhythms and the effects of discouraging rest breaks.

FMCSA counters that the rule did address loading and unloading issues and that the sleeper berth provision is

based upon sound science demonstrating the risk of split sleep and higher crash rates for sleeper berth drivers.

The Insurance Institute for Highway Safety filed an amicus brief in support of Public Citizen. ATA, NASSTRAC, the Health & Personal Care Logistics Conference, UPS and the National Industrial Transportation League intervened in support of the rule. The International Brotherhood of Teamsters and three trucking associations intervened in support of the OOIDA.

We are awaiting the court's decision in the case.

The court's July 16, 2004 opinion is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200407/03-1165a.pdf>

Information concerning FMCSA's 2005 rule, including the rule itself, is available at:

<http://www.fmcsa.dot.gov/rules-regulations/topics/hos/hos-2005.htm>

D.C. Circuit Remands FMCSA Curbside Bus Decision

On December 19, the U.S. Court of Appeals for the D.C. Circuit in Peter Pan Lines, Inc., v. FMCSA, (D.C. Cir. No. 05-1436), reversed the FMCSA's decision granting a certificate of operation to Fung Wah Bus Transportation, Inc., a bus company that allegedly does not comply DOT regulations implementing the Americans with Disability Act ("ADA").

This case arose when petitioners, Peter Pan Bus Lines, Inc. and Bonanza Acquisition LLC, sought review of a decision by the FMCSA to grant two certificates of operation for interstate and intrastate commerce between Boston, Massachusetts and New York, New York to Fung Wah, a private bus company that does not receive governmental assistance. The statute at issue, 49 U.S.C. § 13902(a)(1), gives the agency authority to register a for-hire carrier if the agency finds that the carrier is willing and able to comply with "this part and applicable regulations of the Secretary" as well as other safety and financial responsibility requirements.

Peter Pan and Bonanza protested under 49 U.S.C. § 365.203 based upon Fung Wah's "asserted unwillingness and/or inability to comply with regulations of the Secretary implementing the Americans with Disability Act" set forth at 49 C.F.R. Part 37. Petitioners cited, among other things, to one incident in which a blind passenger was allegedly denied transportation by Fung Wah.

The FMCSA denied the protest and concluded that its licensing regulations do not permit it to withhold issuance of a certificate of operation for failure to comply with ADA requirements. FMCSA determined that the statutory term "applicable regulations of the Secretary" does not encompass ADA regulations found at 49 C.F.R. Part 37, but rather, was intended to refer to pre-existing registration requirements formerly administered by the now defunct Interstate Commerce Commission. FMCSA then referred the underlying ADA issue to the Department of Justice for its consideration.

The petitioners argued before the court of appeals that the agency's issuance of the certificates to Fung Wah was arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law. They also claimed that FMCSA's issuance of the certificates should be set aside because the agency erred when it concluded that compliance with the ADA is not a fitness standard under 49 U.S.C. § 13902(a)(1).

The court rejected FMCSA's strict interpretation of its authority and found that the term "applicable regulations of the Secretary" was ambiguous because it could indeed include those regulations promulgated by DOT under its more general authority to regulate motor carriers. The court said, however, that the "it is not for the court to 'choose between competing meanings'" of the statute, and therefore remanded the case for FMCSA to "fill in the gap" consistent with a step two Chevron analysis.

The D.C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200612/05-1436a.pdf>

Motor Carrier Challenge to FMCSA Self-Insurance Program Voluntarily Dismissed

In KLLM, Inc. v. FMCSA, (D.C. Cir., No. 06-1152) a self-insured interstate motor carrier filed a petition for review seeking to reverse a decision of FMCSA imposing heightened financial security

conditions on the carrier. After being denied a stay of the administrative decision during the pendency of the litigation, the carrier agreed to comply with new conditions and to dismissal of this lawsuit on mootness grounds. The case was voluntarily dismissed on January 10. A discussion of the underlying facts in the case is set forth in the October 3, 2006 edition of DOT Litigation News.

Appeal of Default Order Dismissed by Eighth Circuit on Timeliness Grounds

In an unpublished decision in New Prime v. FMCSA, (8th Cir. No. 05-3908) the U.S. Court of Appeals for the Eighth Circuit has dismissed a challenge to an FMCSA order issued on default after finding that the appeal had not been filed in a timely manner.

On August 3, 2004, FMCSA issued a Final Agency Order (FAO), which was a default order against New Prime, Inc. dba Prime, Inc. (Prime) for failing to timely reply to a Notice of Claim. On August 5 and 10, 2004, Prime submitted two motions to the Agency: the first for leave to reply out of time to the Notice of Claim and the second to vacate the FAO. On July 5, 2005, FMCSA denied both motions. The Agency treated Prime's motion to vacate the FAO as a petition for reconsideration of that order.

In three separate pleadings beginning on July 16, 2005, Prime moved for reconsideration of the July 5, 2005, order denying its motions. On September 30, 2005, the Agency denied these motions, finding that they were "nothing more

than additional attempts to have the final agency order reconsidered. This it may not do. The Rules of Practice do not provide for a petition for reconsideration of an order on reconsideration....”

Prime filed a notice of appeal with the U.S. Court of Appeals for the Eighth Circuit in October of 2005. In its unpublished December 1 opinion (2006-WL 3455108), the Eighth Circuit held that Prime’s petition for review was untimely and dismissed it. The court found that the petition for review was required to have been filed within 30 days of the issuance of the FAO on August 3, 2004. “[T]he FAO at issue here became final for purposes of judicial review when the FAO was issued, despite Prime’s filing of a motion to vacate. See 5 U.S.C. § 704 (except as otherwise expressly required by statute, agency action otherwise final is final for purposes of judicial review whether or not there has been presented or determined any form of reconsideration)....”

The court held that “[e]ven if a motion for reconsideration could toll the time for filing a petition for review, we agree with FMCSA that Prime’s August 10, 2004, motion to vacate the FAO was a motion to reconsider, and thus Prime would have had thirty days from the July 5, 2005, order denying that motion to file the instant petition for review, which it failed to do. . . . Prime’s subsequent July 16, 2005, motion to reconsider, which FMCSA viewed as an unauthorized successive motion to reconsider, was ineffective to further toll the time to file a petition for judicial review.”

While the Eighth Circuit’s decision is not officially published, it is available on line at:

<http://www.ca8.uscourts.gov/opndir/06/12/053908U.pdf>

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