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DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Limits Damages against Government in Privacy Act Cases

On March 28, 2012, the Supreme Court ruled in the Department's favor in FAA v. Cooper (No. 10-1024), limiting the recovery available to private litigants under the Privacy Act (the Act). The Court held that a plaintiff may not obtain damages for emotional injuries allegedly resulting from violations of the Act. The Court concluded that the language of the Act does not unequivocally authorize an award of damages for mental or emotional distress and accordingly does not waive the government's sovereign immunity from liability for such harms. A contrary result would have opened the Department and other Federal agencies to expanded liability in a broad set of cases arising under the Act.

This case arose out of "Operation Safe Pilot," an investigation by the DOT Inspector General and the Social Security Administration (SSA) Inspector General that examined data on pilots in northern California to determine whether any of them had reported medical issues to the SSA that had not been disclosed to FAA on the pilot's medical application. The data revealed that Stanmore Cooper was a pilot who had claimed disability from SSA based on his HIV status, but had failed to report that condition to FAA. Thus, Mr. Cooper had falsified his pilot medical application on several occasions.

Following his indictment, Mr. Cooper pled guilty to a misdemeanor. He then sued FAA, DOT, and SSA for the improper disclosure of information under the Act and sought damages for mental and emotional distress. The U.S. District Court for the Northern District of California ruled that the exchange and disclosure of Mr. Cooper's information was a breach of the Act, but that Mr. Cooper had no "actual damages" as that term is used in the Act, which did not cover compensation for pure mental anguish. Cooper v. FAA, No. 07-1383, 2008 WL 8648952 (N.D. Cal. Aug. 22, 2008).

Mr. Cooper appealed, and the Ninth Circuit reversed. Cooper v. FAA, 622 F.3d 1016 (9th Cir. 2010). Although it noted a split in the circuits on the issue, the court concluded that the intent of Congress in enacting the Privacy Act was "to extend recovery beyond pure economic loss." The court came to this conclusion after considering the text of other sections of the Act, the purposes of the Act, and decisions interpreting the words "actual damages" under the Fair Credit Reporting Act, which Congress passed in a contemporaneous timeframe. The Ninth Circuit also rejected the argument that the government's waiver of sovereign immunity through the Act should be narrowly construed, with damages limited to economic loss.

The United States petitioned for panel rehearing or, in the alternative, rehearing en banc, which were both denied. However, eight judges of the court joined in a written dissent from the denial of en banc review. The United States petitioned for certiorari, and the Supreme Court granted the petition on June 20, 2011.

Justice Alito, writing for a five-Justice majority, began his analysis by reiterating "that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." If "there is a plausible interpretation of the statute that would not authorize money damages against the Government," then the text is ambiguous on the issue of sovereign immunity, and this ambiguity must be construed "in favor of the sovereign." Applying these principles, the Court concluded that the Privacy Act's use of the term "actual damages" was ambiguous, because Congress had not defined it, its meaning was unclear, and it had been interpreted differently in other contexts, giving the term a "chameleon-like quality." For example, in some other statutes, "actual damages" referred only to economic harm, rather than emotional injury.

The Court also ruled that the Act "serve[d] interests similar to those protected by defamation and privacy torts." In those contexts, plaintiffs may typically recover "general damages" only if they prove "special damages," i.e., "actual pecuniary loss." Thus, the majority reasoned, Congress likely intended the term "actual damages" in the Privacy Act to mean "special damages," such that a plaintiff would have to show some form of pecuniary harm before obtaining any recovery. Indeed, Congress had refused to authorize "general damages" under the Act, showing that it must have intended for recovery only for "special damages" as that term is understood in defamation cases (namely, as economic harm).

The Court recognized that its decision would effectively permit recovery for a very minor pecuniary loss while denying recovery altogether for a plaintiff who alleges severe emotional injury. However, the Court held that it was reasonable for Congress to limit the Government's liability to instances in which liability "can be substantiated by proof of tangible economic loss."

Justice Sotomayor issued a dissenting opinion, joined by Justices Ginsburg and Breyer. The dissent argued that the majority had unduly limited the scope of the Act, since Congress must have known that emotional and mental injuries would be the type typically suffered by plaintiffs seeking relief under the Act. "Actual damages," according to the dissent, simply means damages for harm actually suffered and proved, and is therefore "synonymous with compensatory damages," whether pecuniary or not.

Justice Kagan took no part in the consideration or decision of the case.

The Supreme Court's decision is available at http://www.supremecourt.gov/opinions/11pdf/10-1024.pdf. The merits briefs in the case are available at http://www.americanbar.org/publications/preview_home/10-1024.html.

Supreme Court Holds that Locomotive Inspection Act Preempts State Common Law Claims Related to Work in Locomotive Repair Shops

On February 29, 2012, the Supreme Court issued its decision in Kurns v. Railroad Friction Products, et al. (No. 10-879), a case that arose out of a decision of the U.S. Court of Appeals for the Third Circuit. The Third Circuit held that Congress preempted the field of railroad parts and appurtenances by enacting the Locomotive Inspection Act (LIA), thereby precluding the state common law claim of a former railroad employee against manufacturers of locomotive parts. See Kurns v. A.W. Chesterton, Inc., 620 F.3d 392 (3d Cir. 2010). The state common law claim sought damages for asbestos exposure that allegedly occurred in the railroad maintenance shop environment.

The question before the Court was whether the LIA preempts state common law claims by individuals who allege to have been exposed to asbestos-containing materials in the course of repairing locomotives at railroad maintenance facilities. In a ruling primarily based on stare decisis, the Supreme Court found that petitioners' claims were preempted by the LIA.

The LIA states that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances – (1) are in proper condition and safe to operate without unnecessary danger of personal injury; (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and (3) can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. § 20701. In Napier v. Atlantic Coast Line R.R. Co., the Supreme Court determined that the LIA occupied the field of regulating locomotive equipment safety and extended to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. 605, 611 (1926). Since Napier, many courts have held that the scope of the LIA encompasses state common law tort claims.

The Kurns case was initiated as a result of asbestos-related injuries allegedly suffered by George Corson, a locomotive maintenance worker, while he was employed by the Chicago, Milwaukee, St. Paul, & Pacific Railroad from 1947 to 1994. His job responsibilities required him to remove insulation from locomotive boilers and to install brake shoes on locomotives. It was alleged that he was repeatedly exposed to asbestos in the insulation and the brake shoes. He was diagnosed with malignant mesothelioma, an asbestos-related disease, in 2007 and died in 2008. Prior to his death, he brought suit against his railroad employer under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which included an allegation that the railroad had violated the LIA. Additionally, he sued numerous manufacturers under state common law alleging, among other things, that his asbestos-related injuries were caused by the negligence of various locomotive part manufacturers. Respondents Railroad Friction Products Corporation and Viad Corp are two manufacturers that successfully raised the defense of federal preemption under the LIA. Petitioners are Mr. Corson's widow and the executrix of his estate, Gloria Kurns.

The petitioners argued that the field preempted by the LIA does not include state common law claims against manufacturers of locomotives and locomotive parts by workers injured in railroad maintenance facilities. They asserted that the text of the LIA makes clear that it only regulates the "use" of a locomotive "on [a] railroad line" and locomotives are not in "use" under the terms of the statute when they are being serviced in railroad repair facilities. Therefore, Napier is best read as limiting only those state law claims that implicate a locomotive's "fitness for service." Moreover, petitioners contended that there is no basis for applying the LIA in this case because the events giving rise to Mr. Corson's exposure happened prior to the time when manufacturers became subject to the LIA. Prior to a series of amendments beginning in 1988 that broadened the scope of the LIA to include manufacturers of locomotives and locomotive parts, such manufacturers were not covered by the statute.

The respondents argued that the Court's decision in Napier supports preempting the petitioners' state law claims. The respondents contended that the LIA delegates to the Department of Transportation exclusive authority over the design and manufacture of locomotive equipment. In the respondents' view, the petitioners mistakenly limit the field governed by the LIA to those locomotives that are actively being used on a railroad line. Respondents argued that such reasoning is at odds with the Supreme Court's previous statement in Napier that the scope of the LIA extends to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." Respondents further emphasized that there is a long line of precedent consistently holding that the preemptive scope of the LIA extends to locomotives that are not in use.

The United States appeared as an amicus and argued in support of the petitioners. The United States took the position that the LIA establishes a nationwide standard of care that preempts the field of safety for locomotives, tenders, and their parts and appurtenances used on railroad lines. However, Congress did not intend for the LIA to preempt all state law claims related to locomotives that are not operational, such as locomotives undergoing repairs in a railroad maintenance facility. Therefore, the United States concluded that the Third Circuit incorrectly held that the LIA establishes a field of regulation that precludes all of petitioners' claims whether the locomotives Mr. Corson was servicing were in use or not in use. The United States did recognize that some of petitioners' claims may be preempted under the principles of conflict preemption where the claims stand as an obstacle to the LIA's objective of uniform nationwide standards governing the safe use of locomotives. For instance, petitioners alleged as part of their state common law claim that locomotive parts containing asbestos are unreasonably dangerous for any use. This type of claim could be preempted if it resulted in different states imposing different rules governing when a locomotive is safe for use. However, petitioners also assert that respondents negligently failed to warn Mr. Corson how to protect himself while working with asbestos-containing products in the maintenance repair shop environment. This type of claim likely would not be preempted under conflict preemption analysis because it does not speak to the safe use of locomotives, tenders, or their parts and appurtenances. Notwithstanding, because the issue of conflict preemption was not considered by the lower court, the United States urged that the case be remanded to the Third Circuit to allow it to apply conflict preemption principles.

In a 6 to 3 decision, the Court held that petitioners' common-law claims for defective design and failure-to-warn were aimed at the equipment of locomotives and fall within the preempted field. The Court did not have the same circumscribed view of Napier as did the United States. In its view, the United States' argument attempted to re-define the preempted field by limiting the field only to locomotives that were in use. The Court understood the Napier decision to be much broader, stating that it "did not distinguish between hazards arising from repair and maintenance as opposed to those arising from use on the line." As a result, any design-defect or failure-to-warn claims concerning a locomotive part or appurtenance – whether the place of injury was on the railroad line or in a repair shop – would be preempted because such a claim necessarily is "aimed at the equipment of the locomotives." Additionally, the Court rejected arguments by the petitioners that the Federal Railroad Safety Act limited or supplanted the LIA's preemptive scope and that the LIA was inapplicable to railroad employees working in repair shops at the time of Mr. Corson's exposure to asbestos.

Justice Kagan wrote in concurrence with the majority. She described Napier as an "anachronism" and doubted that the Court would decide the 1926 case in the same way if it were before the Court today. Notwithstanding her feelings on Napier, Justice Kagan stated that it governed the present action. In her view, under Napier, the United States has authority to regulate the design of locomotive equipment, such as asbestos-containing brake shoes, to prevent dangers arising from the repair or maintenance of a locomotive or its use on the line. This regulatory power would include banning asbestos-containing brake shoes, as well as lesser restrictions such as conditioning the use of asbestos-containing brake shoes on whether the shoes have a proper warning.

Justice Sotomayor, joined by Justices Ginsburg and Breyer, concurred in part and dissented in part. They agreed with the majority that design-defect claims were preempted by the LIA pursuant to Napier. However, in their view, failure-to-warn claims should not be preempted where they would not impact the design of the locomotive, but merely require the manufacturer to caution users about non-obvious dangers or provide instructions for use. The dissent argued that if the Court were to preserve failure-to-warn claims, its decision would better fit within the regulatory regime as understood by FRA because the agency has generally not regulated locomotive maintenance and repair facilities – determining that OSHA bears primary responsibility for those workplace safety issues.

The opinions in the case are available at http://www.supremecourt.gov/opinions/11pdf/10-879.pdf. The briefs in the case are available at http://www.americanbar.org/publications/preview_home/10-879.html.

United States Files Amicus Brief in Supreme Court Case Regarding Creditors' Right to "Credit Bid"

On December 12, 2011, the Supreme Court granted certiorari in RadLAX Gateway Hotel, LLC, et al. v. Amalgamated Bank (No. 11-166). The petition sought review of a unanimous decision by the U.S. Court of Appeals for the Seventh Circuit that affirmed a bankruptcy court's determination regarding a debtor's proposed Chapter 11 plan. The court of appeals agreed with the bankruptcy court and held that pursuant to 11 U.S.C. § 1129(b)(2)(A), when secured creditors object to a debtor's proposed Chapter 11 plan to sell an encumbered asset free and clear of a lien, the plan cannot be confirmed if it does not permit the secured creditor to credit bid at an auction sale of the asset.

This case arises out of a Chapter 11 bankruptcy case filed in the U.S. Bankruptcy Court for the Northern District of Illinois. In 2007, the debtors purchased the property known as the Radisson Hotel at Los Angeles International Airport with the intent of renovating the hotel and building a parking structure. To finance the purchase of the hotel and the planned renovation and construction, the debtors secured loans totaling approximately $142 million. However, the debtors ran out of funds during the construction of the parking structure, and were unable to negotiate the loan of additional funds from Amalgamated Bank, which was administering the debtors' loans. Shortly thereafter, the debtors filed a voluntary Chapter 11 bankruptcy petition. At the time they filed their Chapter 11 bankruptcy petition, the debtors owed at least $120 million on the loans. In addition, more than $15 million in mechanics' liens have been asserted against debtors' properties. The debtors continue to operate their businesses as debtors-in-possession.

In June 2010, the debtors submitted a reorganization plan to the bankruptcy court that proposed to fund the Chapter 11 plan by selling substantially all of the debtors' assets at auction. Contemporaneously, the debtors filed a motion seeking approval of procedures to govern the sale. The motion included a request to preclude the debtors' secured creditors from credit bidding, both as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii) and for cause, a matter of fact, under 11 U.S.C. § 363(k). As defined by Section 363(k), credit bidding is the ability of a secured lienholder to bid at an auction sale of the property subject to the lien by offsetting the lienholder's claim against the purchase price of the property rather than bidding cash. Amalgamated Bank objected to the aspect of the debtors' proposed bid procedures that precluded credit bidding.

The bankruptcy court denied the debtors' motion to approve their proposed auction procedures, because the court concluded that the procedures did not comply with Section 1129(b)(2)(A)'s requirements for confirmation of a plan over the objections of Amalgamated Bank, a class of secured creditors. In addition, the court also found that the debtors had not established "cause" for precluding credit bidding. At the debtors' request, the bankruptcy court certified the case for direct review in the court of appeals.

The court of appeals authorized the appeal and affirmed the bankruptcy court's holding. The court of appeals agreed with the bankruptcy court's determination that the debtor's plan did not satisfy Section 1129(b)(2)(A)'s requirement that in order to be confirmed over the objection of secured creditors, the plan must be "fair and equitable" with respect to that class of creditors. Specifically, the court of appeals found that the debtors' plan could not be confirmed because the proposed plan provided for the sale of collateral free and clear of the secured creditor's lien without permitting the lienholders to credit bid. See 11 U.S.C. § 1129(b)(2)(A)(ii).

The debtors' petition to the Supreme Court for certiorari was granted on December 12, 2011. The United States is not a party to the case but the government filed an amicus brief in support of the Amalgamated Bank because the government is often a secured creditor in bankruptcy. The government's ability to credit bid the allowed amount of its claim at any collateral sale is critical to its ability to enforce its security interests in bankruptcy and, accordingly, the United States has a substantial interest in the Court's resolution of the question presented. The Supreme Court has set oral argument for April 23.

The United States' amicus brief is available at: http://www.justice.gov/osg/briefs/2011/3mer/1ami/2011-0166.mer.ami.pdf. All other briefs associated with the case are available at: http://www.americanbar.org/publications/preview_home/11-166.html.

Supreme Court Invites Views of the United States in Preemption Challenge to California's Regulation of Vessel Fuels

On October 3, 2011, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States in Pacific Merchant Shipping Association v. Goldstene (No. 10-1555). The case arises out of California's attempt to regulate the conduct of seagoing vessels by placing restrictions upon their use of sulfurous fuels. In an attempt to reduce air pollution, the California Air Resources Board (CARB) has imposed Vessel Fuel Rules covering vessels calling at California ports. Vessels subject to the regulations must switch to low-sulfur fuels once they are within twenty-four miles of California's coast. CARB's limits on fuel sulfur content are scheduled to become increasingly stringent within the next several years.

The petitioner, the Pacific Merchant Shipping Association (PMSA), is a non-profit mutual benefit membership corporation whose members are both United States- and foreign-flagged vessels subject to the CARB regulations. PMSA sought injunctive and declaratory relief against the CARB fuel regulations in federal district court in California, arguing that CARB's regulations are preempted under the Submerged Lands Act (SLA), 43 U.S.C. § 1301 *et seq.*, and are also invalid under the Supremacy and Commerce Clauses of the federal Constitution, insofar as the regulations purported to regulate conduct more than three miles from California's coast. The district court denied PMSA's motion for summary judgment, but certified its decision for appellate review under 28 U.S.C. § 1292(b).

The U.S. Court of Appeals for the Ninth Circuit granted permission to appeal and affirmed the district court's ruling. The Ninth Circuit recognized that this case involves a unique and far-reaching attempt by a state to regulate conduct beyond its borders. Furthermore, the Ninth Circuit recognized the Supreme Court's decision in United States v. Locke, 529 U.S. 89 (2000), which held as preempted under the Ports and Waterways Safety Act of 1972 certain parts of a Washington statute setting various requirements for the operation of oil tankers. In that case, the Supreme Court had recognized that the federal government had exercised supreme authority over maritime commerce and navigation since the Founding, and determined that Washington's regulations impermissibly intruded into the federal sphere. Nonetheless, the Ninth Circuit held that it was appropriate to apply a presumption against preemption of CARB's vessel fuel regulations in this case, given California's interest in public health and safety.

The Ninth Circuit held that the SLA did not preempt California's regulations, since that statute was primarily directed at the ownership of "submerged lands" and the natural resources contained within them. Furthermore, the court rejected PMSA's constitutional and maritime arguments. The court noted that Annex VI of the International Convention for the Prevention of Pollution from Ships also set sulfur limitations for seagoing vessels in a geographic area overlapping with the CARB regulations. However, the Ninth Circuit performed a "balancing test" and decided that California's health and safety interests outweighed any concerns in this case about disrupting "uniformity" in foreign relations and trade.

PMSA filed its petition for writ of certiorari on June 23, 2011, arguing that the Supreme Court should grant certiorari to address concerns about field preemption and the Supremacy and Commerce Clauses, and to curb California's attempt to regulate maritime conduct beyond the borders set by the SLA. The Court has invited the Solicitor General Office to file a brief expressing the views of the United States on whether certiorari should be granted. The Department of Transportation is in the process of working with the Solicitor General to help determine the government's views.

Departmental Litigation in Other Courts

D.C. Circuit Vacates DOT Order Reallocating Reagan National Airport Slot Exemptions

On January 6, 2012, the U.S. Court of Appeals for the D.C. Circuit in Republic Airlines, Inc. v. USDOT (D.C. Cir. No. 11-1018) vacated DOT's reallocation of slot exemptions at Reagan National Airport from Republic Airline Inc. (Republic) to Sun Country Airlines (Sun Country).

At Reagan National, the total number of flights and the allocation of those flights among air carriers are determined by statute and regulation. Under the so-called "High Density Rule" (HDR), FAA has allocated "slots" to air carriers. A "slot" is simply a takeoff or landing authority. Congress has also authorized DOT to issue a certain number of slot "exemptions." Slot exemptions are special authorities to land and takeoff, to supplement the slots available under the HDR. The statute directs the Secretary to distribute slot exemptions under specified criteria. The statute also provided that no slot exemption "may be bought, sold, leased, or otherwise transferred by the carrier to which it is granted." (Under the FAA Reauthorization and Reform Act of 2011, P.L. 112-95 (Feb. 14, 2012), Congress recently amended the slot exemption transfer provision to permit transfers in the case of air carrier mergers and acquisitions.)

Midwest Airlines, Inc. (Midwest) was formerly awarded two slot exemptions for service at Reagan National. After Republic merged with Midwest, Midwest ceased all scheduled operations under its DOT and FAA certificates, and returned its aircraft to the lessor, the Boeing Company. In both an informal letter and a final order, DOT found that Republic's merger with Midwest constituted a transfer of slot exemptions prohibited by the statute. DOT subsequently reallocated the slot exemptions to Sun Country, following a competitive proceeding. The Court held that DOT's decision had departed, without adequate explanation, from its slot exemption transfer precedents that had permitted transfers in the case of certain air carrier mergers. It therefore vacated DOT's slot exemption reallocation order as arbitrary and capricious.

The D.C. Circuit's decision is available at: http://www.cadc.uscourts.gov/internet/opinions.nsf/72F14D9698C6D0708525797D005408D8/$file/11-1018-1351383.pdf.

Briefs Filed in Air Carrier Challenge to DOT Airline Passenger Consumer Protection Rule

The parties have filed their briefs in Spirit Airlines, Inc., et al. v. USDOT (D.C. Cir. Nos. 11-1219, 11-1222). In this case, Spirit Airlines (Spirit), Allegiant Air (Allegiant), and Southwest Airlines are seeking review in the U.S. Court of Appeals for the District of Columbia Circuit of certain provisions of an April, 2011 DOT final rule designed to protect airline passengers from unfair and deceptive practices.

The airlines' briefs, along with the amicus briefs of the Air Transport Association of America, Inc. and International Air Transport Association supporting the airlines, were filed in November 2011. DOT's brief was filed in late December 2011. The Interactive Travel Services Association filed an amicus brief supporting DOT in January 2012. The American Society of Travel Agents, Inc. also intervened in support of DOT, but did not file a separate brief. While the case is now fully briefed, oral argument has not yet been scheduled.

DOT's final rule, Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110 (Apr. 25, 2011), contains many new requirements to improve the air travel environment for consumers, expanding upon the passenger rights included in its first consumer rulemaking. In their petition for review, the airlines assert that the rule unlawfully: (1) ends the practice of permitting sellers of air transportation to exclude government taxes and fees from the advertised price (the so-called "Airfare Advertising Rule"); (2) prohibits the sale of nonrefundable tickets by requiring airlines to hold reservations at the quoted fare without payment or cancel without penalty for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure (the so-called "Refund Rule"); (3) prohibits post purchase price increases, including increases in the price of ancillary products and services, after the initial ticket sale (the so-called "Price Rule"); (4) requires baggage fees be disclosed on e-ticket confirmations; and (5) mandates notification of flight schedule changes. The airlines contend that these provisions of DOT's final rule are arbitrary and capricious because they allegedly interfere with airline pricing and services, impermissibly re-regulate airline business practices, and are not supported by the administrative record.

In their briefs, the airlines contend that the Airfare Advertising Rule is arbitrary and capricious, and indistinguishable from the advertising practices of virtually every other industry in the United States. They also contend that the rule limits the information that customers receive, thus violating the airlines' free speech rights under the First Amendment. In response, DOT argues in its brief that the Airfare Advertising Rule was a reasonable response to changes in airline sales and advertising practices in the last five years. Increasingly, airlines such as Spirit seek to minimize the "base fare" and charge consumers for ancillary services to make up the cost, and multiple surcharges makes it difficult for consumers to determine the true cost of air travel. In disclosing the full price that the consumer will actually pay for air travel, airlines may communicate additional information, such as the portion of that total price that constitutes government taxes and fees, in a manner that does not inhibit the customer's ability to discern the total price. DOT also argues that requiring full disclosure while permitting communication of other truthful information is also consistent with the First Amendment. Disclosure requirements constitute minimal impositions on commercial speech, particularly where, as here, the seller must merely provide purely factual and uncontroversial information about the terms of the service available.

The airlines next contend that the Refund Rule is arbitrary and capricious as well because, among other things, it fails to consider the costs of compliance. For example, they contend the rule would have devastating consequences for low-cost air airlines such as themselves: they contend that over 90% of Spirit and Allegiant tickets are sold at least a week before departure. The airlines also contend that DOT has no authority to regulate airfares and related conditions after airline deregulation. In contrast, DOT argues that the requirement that consumers be permitted either to reserve a seat at the quoted fare without payment, or cancel without penalty within 24 hours of purchase, arose from concerns, documented in a series of Inspector General reports, that airlines' lack of adherence to their voluntary customer-service plans resulted in unfair treatment of passengers. And any harm to airlines that must expand their courtesy-refund practices is outweighed by the benefit of assuring consumers that they can cancel unwanted purchases promptly without unexpected fees.

Finally, the airlines argue that the Price Rule is arbitrary and capricious because DOT failed to identify evidence that it is unfair or deceptive to charge the price of an optional service as of the time the service is purchased. They further maintain that the Price Rule is procedurally unlawful under the Administrative Procedure Act because the final rule was significantly different from the proposed rule. DOT disagrees, and maintains that the prohibition on post-purchase price increases prevents airlines from enticing consumers with low fares and ancillary charges only to raise the price once the consumer has paid for the (often nonrefundable) ticket. With carriers like Spirit employing business models revolving around unbundled services, DOT reasonably concluded that it was unfair to entice a consumer with a promise of, for example, a low baggage fee only to raise that fee unilaterally once the consumer has purchased a ticket. Moreover, the airlines also acknowledge that they do not currently raise ticket prices after purchase, and are thus largely unaffected by the rule.

Dismissal of Tenants' Challenge to FHWA and FTA Los Angeles Projects Appealed

On December 16, 2011, plaintiffs in Gaxiola v. City of Los Angeles appealed the dismissal of their suit by the U.S. District Court for the Central District of California to the U.S. Court of Appeals for the Ninth Circuit (9th Cir. No. 11-57205). On January 4, 2012, the Ninth Circuit issued an order limiting scope of the appeal to plaintiffs' November 2011 Motion for Reconsideration, which the district court had denied as untimely.

This case is a pro se lawsuit brought by several individuals displaced from their residences in the "Pickle Works Building," which is in the footprint of the FHWA-funded First Street Viaduct Widening Project and the FTA-funded Los Angeles County Metropolitan Transportation Authority East Side Light Rail project. Plaintiffs had alleged violations of the First, Fourth, Fifth, and Fourteenth Amendments, the Fair Housing Act (FHA), the Uniform Relocation Act, the Civil Rights Statutes (42 U.S.C. §§ 1981, 1982, 1983, and 1985), and the Administrative Procedure Act. Plaintiffs sought injunctive and declaratory relief, and compensatory damages. In September 2011, the court dismissed all claims against FHWA and FTA for lack of subject matter jurisdiction.

DOT Issues Order Finding Hawaii's Invasive Species Inspection Fee Statute Preempted as to Air Carriers

On January 23, 2012, DOT in Hawaii Inspection Fee Proceeding (DOT Docket DOT-OST-2010-0243) issued a declaratory order finding that Hawaii's invasive species inspection fee statute as applied to air carriers is preempted by federal law.

The State of Hawaii inspects incoming freight from foreign and domestic sources, including non-postal service letters and packages, in order to protect the natural environment from invasive plant and animal species. Hawaii maintains its own inspection program independent of the Federal government, which scrutinizes freight from foreign sources through the Department of Agriculture's Animal and Plant Health Inspection Service. Since 2008, Hawaii has imposed a fee on air and maritime shippers in order to fund these inspections.

Under the statute, Hawaii imposes a fee of 75 cents per thousand pounds of freight (net weight, not including container weight) on "the person responsible for paying the freight charges" (i.e., the shipper in most instances) to the "transportation company" (i.e., the carrier by air or water). Air and ocean carriers themselves are not liable for the fee. However, the carriers are required to bill the fee within 15 days of the delivery of the freight, and to remit the fee to Hawaii within 45 days of collecting the fee. In addition to being responsible under the inspection fee statute for billing, collecting and remitting fees, air carriers are subject to specified monetary penalties for failure to do so and within the statute's required time periods. Hawaii penalizes carriers that fail to comply and within the specified periods of time by imposing a fine equal to the higher of twice the inspection fee or $50.

In 2010, Airlines for America (A4A), formerly known at the Air Transport Association of America, petitioned DOT for a declaratory ruling that the Hawaiian statute as applied to air carriers is preempted by the Airline Deregulation Act (ADA), 49 U.S.C. § 41713, and the Anti-Head Tax Act (AHTA), 49 U.S.C. § 40116. DOT subsequently issued an order instituting a docketed proceeding to determine the lawfulness of the Hawaiian statute as applied to air carriers. After receiving and reviewing briefs from A4A and the State of Hawaii, as well as comments from other stakeholders and the public, DOT concluded that the Hawaii fee is preempted by the ADA and the AHTA, and issued a declaratory order explaining the reasons for its conclusion.

The ADA contains an express preemption clause, which provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." DOT found that Hawaii's statute is preempted by the ADA because it is related to air carrier services and prices, two of three possible grounds for finding ADA preemption. It directly regulates the "services" of air carriers by commanding them to conform their service of shipping freight by air transportation in ways not voluntarily undertaken by them and further, not dictated by the market to bill, collect, and remit fees on behalf of its shipper customers. The statute also is related to air carrier "prices" because it imposes costs on air carriers that are likely to be recovered by increased pricing for air transportation. In addition, DOT found that Hawaii's statute is preempted by the AHTA because a state under that act may not levy or collect a fee or other charge, directly or indirectly, on the sale of "air transportation," a term which includes the air transportation of freight into Hawaii.

In a related proceeding, A4A filed suit against Hawaii shortly after submitting its petition to DOT, in a case styled Air Transport Association v. Abercrombie (D. Haw. No. 10-00444). The complaint alleges that the fees and fines imposed by the statute are preempted by the AHTA and the ADA, raises other Federal constitutional and statutory causes of action, and seeks both declaratory and injunctive relief. The complaint also asserts that DOT has primary jurisdiction over this matter. By stipulation of the parties, the district court action was stayed pending DOT's decision in the declaratory order proceeding.

On February 27, 2012, the State of Hawaii represented to the district court that Hawaii has decided to abide by DOT's declaratory order finding the statute preempted. Hawaii is currently working with A4A to wind down all matters relating to DOT's decision, including the settlement and dismissal of the district court litigation. Hawaii and A4A are also exchanging information on the amounts collected under the statute to be reimbursed by Hawaii to air carriers.

DOT's declaratory order is available at: http://www.regulations.gov/#!documentDetail;D=DOT-OST-2010-0243-0029

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Ninth Circuit Denies Petition for Review in Glen Canyon Overflight Case

On February 14, 2012, the U.S. Court of Appeals for the Ninth Circuit in American Aviation, Inc. et al. v. FAA, No. 10-72772. 2012 WL 453746 (9th Cir. Feb. 14, 2012) denied American Aviation, Inc.'s (American Aviation) petition for review of an FAA order. FAA had granted the air tour operator Interim Operating Authority (IOA) under the National Parks Air Tour Management Act (NPATMA). Under the agency's final order, American Aviation received authority to conduct 462 annual sightseeing flights over the Glen Canyon Recreation Area (Glen Canyon), while its competitors were granted authority to conduct substantially more flights. During the agency's administrative proceeding on which the challenged order was based, American Aviation initially claimed rights to over 4,000 IOA, but later abandoned any claim to more than 462 IOA. In its petition, American Aviation also argued that the allocation of IOA to its competitors was improper.

In the Ninth Circuit, American Aviation argued that FAA's allocation of only 462 IOA was arbitrary, capricious, and contrary to NPATMA. FAA argued that American Aviation's abandonment of any claim to IOA above 462 during the administrative fact-finding hearing was tantamount to a waiver, thus preventing American Aviation from raising the issue of its IOA allocation in a petition for review.

In a memorandum decision, the court found no error in FAA's conduct and noted that the FAA's decision was based on evidence in the record and was in accordance with the statutory limitations in place. Specifically, the court held that NPATMA precluded FAA from awarding American Aviation more than 462 flights—the number dictated by NPATMA's statutory formula—without concurrence from the National Park Service. The court also rejected American Aviation's claims concerning the IOA allocated to its competitors, finding that FAA's order had *reduced* the number of IOA for those entities, rather than *increasing* the IOA.

American Aviation also claimed that FAA failed to act on the company's numerous applications for an increase in the number of sightseeing flights, which the FAA contended was a matter separate from the agency's decision on review. The Ninth Circuit dismissed American Aviation's claim as moot, noting that FAA had denied American Aviation's IOA increase application shortly after the oral argument.

The Ninth Circuit's opinion is available at http://www.ca9.uscourts.gov/datastore/memoranda/2012/02/14/10-72772.pdf.

District Court Dismisses Complaint Claiming Negligence in Improper Issuance of Airworthiness Certificate, Plaintiffs Appeal

On December 16, 2011, the U.S. District Court for the District of Rhode Island dismissed the complaint in Krivitsky, et al. v. United States, No. 10-219, 2011 WL 6326060 (D.R.I. Dec. 16, 2011), a negligence action brought against the government arising out of the alleged "improper certification" of an imported 1959 Alouette II helicopter. The helicopter, excessed by the German military, was purchased in 2006 by Donald H. Krivitsky and Joseph S. Jablecki with the intent of using the helicopter for sightseeing tours. Upon its arrival in the United States, the helicopter was issued a standard airworthiness certificate by an FAA Designated Airworthiness Representative (DAR). DARs are private individuals authorized by FAA to issue airworthiness certificates and to help ease FAA's workload.

Several years later, after a comprehensive review of Alouette helicopter records, FAA determined that many of the imported, excess military Alouettes did not have sufficient documentation to support the issuance of a standard airworthiness certificate. FAA notified owners of these Alouettes and began proceedings to revoke the standard airworthiness certificates.

Krivitsky and Jablecki alleged they had predicated their purchase of an Alouette based on a representation that they could obtain a standard airworthiness certificate, which they needed to conduct sightseeing tours. They sued the government upon learning that the airworthiness certificate had been improperly issued.

The United States moved to dismiss the complaint, arguing that the government is not responsible for the negligence non-government employees, including FAA DARs, under the Federal Tort Claims Act. The court accepted the government's position, which was based on firmly established case law holding that FAA designees, including DARs, are not federal employees for tort liability purposes. Jablecki and Krivitsky noticed an appeal of the district court's decision and filed their opening brief in the U.S. Court of Appeals for the First Circuit on February 27, 2012 (1^{st} Cir. 12-1147).

District Court Finds Controllers Partially Responsible for Two General Aviation Accidents

U.S. District Court for the Southern District of Florida found FAA air traffic controllers partially responsible for two separate general aviation accidents. First, on October 3, 2011, the court issued a decision in Daggett v. United States (S.D. Fla. Nos. 08-21026, 08-23108, 08-23320). The case arose out of the crash of a light aircraft operating in instrument meteorological conditions on an IFR flight plan. While the controller in contact with the airplane was performing the task of handing off a different aircraft to another sector, and therefore had his attention drawn away from the accident aircraft, the pilot allowed the accident aircraft to enter a left turn and began to descend. The flight path of the aircraft was a classic "graveyard spiral." The court agreed with the United States that the pilot was suffering from spatial disorientation and that he lost control of the aircraft.

The court also agreed that monitoring the flightpath of the flight was an "Additional Service" under the requirements of the Air Traffic Control Manual and that this was a lower priority duty than the necessary handoff of the other aircraft for which the controller was responsible. The court also accepted that by the time the controller finished the handoff action, the aircraft had reached an unrecoverable airspeed and altitude. By that time, no transmission from the controller to the pilot would have affected the outcome.

Nevertheless, the court found the failure of the controller to notice the descending turn and to warn the pilot of it to be 55% of the causal negligence in this accident, the remaining 45% attributable to the pilot. The court's reasoning was that the controller's workload was relatively light, and the existence of other duties did not relieve the controller from all obligations to monitor the accident aircraft. The court inexplicably found that the air traffic controller had "forgotten about" the aircraft and that proper monitoring would have allowed the controller to notice the aircraft's anomalous descent and to warn the pilot. The total award of damages to multiple claimants was close to $6 million.

In the second case, the court on November 2, 2011, issued an opinion in Zinn v. United States, No. 08-22056, 2011 WL 6202890 (S.D. Fla. Nov. 2, 2011), finding the United States 40 percent at fault in a fatal airplane accident that occurred after the pilot flew into an area of rain and thunderstorms that he knew about. The court awarded damages in the amount of $4.37 million.

The court's decision, following a bench trial under Federal Tort Claims Act (FTCA) more than two years earlier, related to the 2005 death of the pilot-owner of the airplane, which crashed near Port St. Lucie, Florida after flight into thunderstorm weather conditions, which he had observed and reported. Although the evidence indicated that the pilot was deviating around precipitation based on what he could see, the court held that the controller was negligent in not advising the pilot that his last announced deviation would take him into an area of heavy and, possibly, extreme precipitation that was depicted on the controller's radar. Although the court recounted numerous negligent actions by the pilot and attributed 60 percent of the fault to him, the court also found that if the controller had advised the pilot of the precipitation information on his radar display, the pilot "would have reconsidered his decision and altered his course." Although the damages awarded were substantial, they were significantly lower than those sought by the plaintiff, largely due to the court's acceptance of the methodology of the government's economic expert.

D.C. Circuit Holds NBAA Case in Abeyance after FAA Withdraws its New ASDI Policy

On December 6, 2012, the U.S. Court of Appeals for the District of Columbia Circuit issued an order in National Business Aviation Association, et al. v. FAA (D.C. Cir. No. 11-1241) holding the petition for review in abeyance pending the FAA's publication of a new, permanent policy regarding the blocking of the release of real time, or near real time, aircraft flight data to replace the policy that was under review and was withdrawn by FAA on December 1. In June 2011, the National Business Aviation Association (NBAA) and the Aircraft Owners and Pilots Association (AOPA) filed a petition for review challenging FAA's decision not to block the release of this flight data unless there is a valid security-related basis to do so. The data at issue is the Aircraft Situation Display to Industry (ASDI), which the FAA provides to certain Direct Subscribers. This data shows the position, call sign, altitude, speed, and destination of aircraft flying under the Instrument Flight Rules and of aircraft receiving flight following under the Visual Flight Rules. ASDI data is provided in either real time or near real time (5 minute delay), depending on whether the subscriber has a specific need for real time data (such as an air carrier dispatcher) or has only a more general need and the use of near real time data is sufficient.

FAA's decision to revisit its policy was compelled by a provision of the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, § 119A, 125 Stat. 552, 649 (Nov. 18, 2011), which prohibited FAA from using funds made available under the Act, or any prior Act, "to implement or to continue to implement any limitation on the ability of any owner or operator of a private aircraft to obtain, upon a request to the Administrator of the Federal Aviation Administration, a blocking of that owner's or operator's aircraft registration number from any display of FAA's Aircraft Situational Display to Industry data that is made available to the public, except data made available to a Government agency, for the noncommercial flights of that owner or operator." Accordingly, on December 1, 2011, FAA announced its decision to withdraw the policy, consistent with § 119A.

The court had previously scheduled oral arguments to take place on December 2, 2011, so the parties appeared for the argument. FAA notified the Court of its decision to withdraw the new policy. FAA also stated its intention to implement an interim policy, which would be published in the Federal Register, and that FAA would also develop a permanent policy that would be posted in the Federal Register for public comment. On December 6, 2012, the court issued an order holding the case in abeyance pending the FAA's publication of its new permanent policy. The court also directed FAA to file 30 day status reports.

FAA published its interim policy on December 16, 2011 (76 Fed. Reg. 78,328) and is in the process of drafting the permanent policy.

Briefs Filed, Oral Argument Held in Challenge to FAA's Approval of Capacity Enhancement Program at Philadelphia International Airport

On November 15, 2011, FAA filed its response brief in Township of Tinicum, et al. v. USDOT (3rd Cir. No. 11-1472), in which a group of petitioners, including the Township of Tinicum in Delaware County, Pennsylvania, challenge the FAA's December 30, 2010, Record of Decision (ROD). The court heard oral argument in the case on March 6, 2012.

The ROD approved a plan (referred to as Capacity Enhancement Program or CEP) to expand and re-configure Philadelphia International Airport (PHL) by adding a third parallel runway, extending an existing runway, and making various terminal and airfield improvements, including re-locating the air traffic control tower. The plan challenged requires the City of Philadelphia to purchase 72 homes and 80 businesses all located in Tinicum Township in order to relocate the UPS facility currently on the airport.

Petitioners argued that the FAA violated NEPA by failing to take a hard look at the air quality impacts of the CEP. In making their argument that the FAA's NEPA analysis was deficient, petitioners relied chiefly on the EPA's comments regarding the air quality analysis. EPA's comments on the DEIS, the General Conformity Determination, and the FEIS requested that FAA do dispersion modeling to describe air emissions for the construction period of CEP, that FAA use a wider area to describe the impacts of off-airport surface emissions resulting from increased passenger trips to PHL, that FAA conduct dispersion modeling of emissions from near-by stationary sources, and that FAA model the effect of building downwash on emissions from airport stationary sources (boilers). Petitioners also argued that FAA improperly relied on plans of the Delaware Valley Regional Planning Commission (DVRPC) to make its finding that the CEP was "consistent with plans ... of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport . . . ." 49 U.S.C. § 47106(a)(1).

FAA argued that it took the required hard look at air quality impacts. EPA's comments on the FEIS were ultimately resolved with EPA admitting that FAA had complied with NEPA's requirements and that none of the additional analyses it requested would have shown different air quality impacts or led to a different decision. EPA encouraged FAA to conduct the additional analyses that it requested for CEP in future projects. As to the argument that FAA's reliance on the DVRPC's plans was misplaced, FAA argued that the interpretation of section 47106(a)(1) was contrary to the intent of that section and had been rejected by every other court to consider the issue.

Brief Filed, Oral Argument Held in Challenge to Panel Study of Enclosed Marine Trash Transfer Station near LaGuardia Airport

On January 6, 2012, oral argument was held in Paskar and Friends of LaGuardia Airport, Inc. v. USDOT (2d Cir. No. 10-

4612), in which petitioners seek review of a September 2, 2010, letter transmitting the "Evaluation of the North Shore Marine Transfer Station and its Compatibility with Respect to Bird Strikes and Safe Air Operations at LaGuardia Airport." The report at issue was prepared by a blue-ribbon panel of bird hazard experts who examined the extent to which the Marine Transfer Station (MTS), a proposed enclosed trash transfer facility, if properly managed, would nonetheless constitute a wildlife attractant and would therefore be incompatible with safe airport operations at LaGuardia. In 2006, the City proposed refurbishing four closed transfer stations; one of them is located in Queens, less than one mile from LaGuardia Airport. The project garnered special attention after the "miracle on the Hudson River," during which a bird strike caused a US Airways flight taking off from LaGuardia to make an emergency landing in January of last year. The report included recommendations for action by the NYC Department of Sanitation and concluded that the MTS will be compatible with safe air operations so long as it is constructed and operated in accordance with the Report's recommendations. Construction of the facility is well underway.

Petitioners argue that the report's conclusion that the MTS was compatible with safe air operations if properly mitigated was arbitrary and capricious and not supported by substantial evidence. Petitioners challenged the report's view that the MTS was fully-enclosed and was not located in the Runway Protection Zone (RPZ). Petitioners requested that the matter be remanded back to FAA with an order directing FAA to declare the MTS incompatible with safe air operations or, in the alternative, be remanded back to FAA for reconsideration of its determination and a review of potential hazards to air navigation and wildlife hazards to air operations.

In its brief, the United States argued the September 2 FAA letter transmitting the report is not a final order subject to review. The United States noted that construction of the facility has begun, and it is New York City, not FAA or the Port Authority, that is building the facility. The government claimed FAA is without authority to prevent the facility from being built. The United States also asserted that the petitioners do not have standing since the report and FAA's letter did not cause petitioners' alleged injuries, nor could a court redress those alleged injuries through an order directed at FAA. If the court deems FAA's letter is a final order, the United States asserted that the petition should be denied because FAA's letter is supported by substantial evidence. The United States argued that the MTS was fully enclosed and was not in the RPZ, and that FAA's action was consistent with FAA guidance and studies concerning enclosed trash facilities. Additionally, the United States negated the petitioners' claim that the report was a wildlife hazard assessment or a No Hazard Determination. The United States closed its brief with the view that the court could not direct FAA to declare that the MTS was incompatible with safe operations.

Petitioners filed their reply brief on September 13, asserting again that the MTS is in the RPZ and is not a fully enclosed facility, and that it was improper for FAA to conclude that the facility was compatible with safe air operations, irrespective of any mitigating circumstances. Petitioners claimed that the panel failed to follow FAA guidance in researching and drafting its report, and that the decision to gather two months of bird survey data was inadequate. Petitioners closed their brief with the assertion that FAA failed to follow its statutory duty, its own regulations and guidance and failed to provide support for its decision, and again requested a remand.

Briefs Filed in Challenge to FAA's Partial Dismissal Complaint Regarding Enclosed Marine Trash Transfer Station near LaGuardia Airport

In a matter related to the LaGuardia Airport litigation described above, Kenneth D. Paskar and Friends of LaGuardia Airport, Inc. v. FAA (2d Cir. No. 11-2720), the same petitioners have challenged FAA's decision partially dismissing an administrative complaint over the MTS against the Port Authority of New York and New Jersey, and the City of New York under 14 C.F.R. part 16, FAA's Rules of Practice for Federally-Assisted Airport Enforcement Proceedings. The Director of the FAA Office of Airport Compliance and Management Analysis issued a Partial Dismissal Order and Notice of Docketing on May 24. The Director ordered that the City of New York was not properly named as a respondent in the proceeding and dismissed the City as a party, dismissed with prejudice the claim made in the complaint that the City is a properly named respondent, docketed the remaining portions of the complaint, and directed the Port Authority of New York and New Jersey to file an answer to the complaint within 20 days. The Port Authority answered the complaint, petitioners filed a reply, and the Port Authority filed a rebuttal. The Office of Airports is proceeding with its investigation of the Port Authority's alleged noncompliance.

Petitioners filed a petition for review of the partial dismissal under 49 U.S.C. § 46110, challenging FAA's determination that the City of New York was not a proper respondent in the administrative proceeding. On December 1, 2011, petitioners filed their opening brief, arguing that FAA's position that the City is not the owner of LaGuardia Airport "... is patently absurd," and that there is no doubt that the City owns the land upon which LaGuardia Airport sits. They assert that the lease between the City and the Port Authority specifically states that the City owns all of the airport infrastructure as well. They further allege that FAA has no legal or factual basis for its conclusion that the City is not the owner of LaGuardia Airport, and that its decision to dismiss the City as a party was arbitrary and capricious and not in accordance with the law. Petitioners further argue that FAA's decision that the term "Respondent" in the Part 16 Rules is synonymous with the term "sponsor" is not consistent with Congressional intent to hold all persons liable who are causing noncompliance at airports, not solely "sponsors." In their view, the plain language of the definition of "Respondent" is broad enough to include not only sponsors, but any person who is alleged to have caused noncompliance at a federally-assisted airport. Under petitioners' theory, the City would be a proper Respondent because the City owes duties to FAA as one of two proprietors of LaGuardia Airport, and as the Port Authority's delegate under the grant agreements. Therefore, FAA's decision to dismiss the City was arbitrary and capricious and in violation of law.

The United States filed its brief on March 1, 2012, arguing that FAA properly dismissed petitioners' complaint against the city of New York because the city is not a proper respondent in the Part 16 proceeding. The United States argued that the Port Authority of New York and New Jersey, as the entity that has committed to comply with the federal grant assurances, is the only proper respondent in FAA's administrative proceeding. The United States asserted that FAA reasonably interpreted "Person Responsible For Noncompliance" in Part 16 and Petitioners' argument that FAA has erred in interpreting its regulations cannot be squared with the substantial deference accorded agencies when interpreting their own regulations. Petitioners contended that if FAA's interpretation of its regulation is correct, that interpretation is nonetheless contrary to law. The United States stated that this argument also fails, and that FAA's reasonable interpretation of ambiguous statutory language is entitled to deference under Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984), and that petitioners wholly failed to demonstrate that FAA has engaged in an impermissible interpretation of 49 U.S.C. § 47107.

The United States next argued that petitioners' argument that the City is a proper respondent because it is a "proprietor" of LaGuardia Airport must be rejected, that status as a "proprietor" does not serve as an independent basis for being a proper respondent under Part 16, and that the City is not a proprietor.

Petitioners suggested that the Port Authority may not have been the only entity to sign FAA grant agreements for LaGuardia Airport and that New York City may have signed some grant agreements. However, the United States pointed out that petitioners never made such an argument to FAA, as required for review under 49 U.S.C. § 46110(d), and petitioners have thus waived this argument. In any event, the United States stated that FAA did review the grant agreements for projects at LaGuardia Airport funded under the Airport and Airway Improvement Act and confirmed that New York City did not sign any of the grant agreements and that the Port Authority is the sole sponsor.

Petitioners also argued that the grant agreements between FAA and the Port Authority were improper because the Port Authority did not have a long term lease with the City until November 24, 2004. Again, petitioners did not raise this issue before FAA, and it is therefore waived. In any event, the United States pointed out that to ensure compliance, FAA included special conditions in its grant agreements relating to LaGuardia Airport prior to the Port Authority's long term lease. These special conditions provided that the Port Authority will refund a portion of the federal grant money received if it ceases to be the operator of LaGuardia Airport.

Briefs Filed, Oral Argument Heard in EAJA Fee Petition for Review

The parties filed their briefs and, on March 12, 2012, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in Green Aviation LLC v. FAA (D.C. Cir. No. 11-1260), a petition for review challenging a decision of the FAA Administrator affirming an Administrative Law Judge's (ALJ) denial of petitioner's application for the award of attorney's fees associated with a civil penalty enforcement matter.

Following preliminary civil penalty enforcement proceedings before and before any hearing on the merits, FAA withdrew a civil penalty complaint against Green Aviation LLC (Green). The ALJ then dismissed the case with prejudice as he was required to do under the FAA's regulations, 14 C.F.R. § 13.215. Thereafter, Green sought attorney's fees under the Equal Access to Justice Act (EAJA), arguing that it was the prevailing party because the dismissal was with prejudice. The ALJ denied the application, and Green appealed to the Administrator, who also denied the award of attorney's fees under EAJA. The Administrator determined that Green was not the prevailing party for the purposes of EAJA under the principles set forth in Buckhannon Board and Care Home, Inc. v. West Virginia Dept of Health and Human Services, 532 U.S. 598 (2001). Specifically, the Administrator held that where, as here, a dismissal with prejudice is obtained through the nondiscretionary application of a regulation, it lacks the "judicial imprimatur" that is the hallmark of a decision on the merits.

On review, Green contends that the ALJ's dismissal of the proceeding with prejudice was a discretionary act because the ALJ did so after considering its motion to dismiss. Green also contends that another section of the FAA procedural rules, 14 C.F.R. § 13.219, which creates an interlocutory appeal of right from an ALJ's failure to dismiss proceedings in accordance with section 13.215, implies that the ALJ exercised discretion in dismissing the proceeding with prejudice. Green further argues that Buckhannon should not be extended to apply to the meaning of "prevailing party" under EAJA's administrative provision, 5 U.S.C. § 504(a)(1), because policy concerns in the administrative context differ from those in civil actions such as the one at issue in Buckhannon. Nevertheless, Green contends that the ALJ's dismissal of the proceeding with prejudice satisfies Buckhannon because it resulted in a "court-ordered change" in the relationship between the parties. Specifically, Green notes that under the doctrine of *res judicata*, a dismissal with prejudice prevents FAA from initiating another administrative action based on the same set of facts.

In response, FAA contends that because courts have consistently applied Buckhannon to the "prevailing party" requirement in EAJA's civil action provision, 28 U.S.C. § 2412(d)(1)(A), and there are no relevant distinctions between that provision and EAJA's administrative provision, Buckhannon should apply to administrative EAJA and control Green's request for attorney's fees. FAA argues that Green is not a prevailing party under

Buckhannon because the relief granted was entirely the result of FAA's voluntary withdrawal of its complaint and the operation of a mandatory procedural rule. FAA notes that 14 C.F.R. § 13.215 unambiguously states that when the agency attorney withdraws the complaint, the ALJ "shall dismiss the proceedings . . . with prejudice." Accordingly, FAA contends that the ALJ had no discretion in dismissing the proceeding and thus, the change in the legal relationship between the parties lacked the judicial or quasi-judicial imprimatur necessary to confer prevailing party status.

Briefs Filed in Challenge Concerning Airport Sponsor Authority to Deny Lease Agreement to Aircraft Demolition Business

The parties have filed their briefs in BMI Salvage Corp., et al. v. FAA, et al. (11th Cir. No. 11-12583), a petition for review in the U.S. Court of Appeals for the Eleventh Circuit challenging FAA's April 15, 2011 final decision in a Part 16 administrative complaint. BMI Salvage is a small aviation business specializing in the deconstruction and demolition of aircraft. BMI is owned by Stephen O'Neal, who also established Blueside Services, a proposed tenant at the Airport, to provide fixed-base operator (FBO), and aircraft repair services and to eventually absorb BMI's demolition business.

On July 25, 2006, FAA issued an initial decision in response to a formal Part 16 complaint filed by O'Neal. In its August 2005 complaint, BMI/Blueside argued that the airport sponsor, Miami-Dade County, Florida (County), had violated Grant Assurance 22, Economic Nondiscrimination, in its operation of Opa-Locka Executive Airport. The violations alleged related to proposed airport procedures, as well as to the County's denial of salvage and FBO leases to BMI/Blueside while allowing long-term leases and access to airport buildings to existing airport tenants that the complainants claimed were similarly situated. FAA found no grant assurance violations, finding that BMI as a salvage operation was a hybrid aeronautical/non-aeronautical operation and therefore was not similarly situated to other airport tenants with wholly aeronautical operations. FAA also found that it was proper for the County to differentiate between existing airport tenants and proposed new tenants, like Blueside, and that the County made reasonable efforts to provide BMI and Blueside access to the airport.

The complainant appealed the final order to the Eleventh Circuit, and the court remanded the case back to FAA to allow the parties to submit additional evidence. The court found that there was no evidence in the record to support FAA's distinction between existing FBOs and BMI as a new business and as a salvage operation. The court found the non-aeronautical element of BMI's business was "at most de minimis" and found the current explanation for the apparently disparate treatment in this case to be deficient.

On April 15, 2011, FAA issued a second final order affirming that the County was not in violation of Grant Assurance 22. FAA concluded that demolition activities are "purely non-aeronautical" because aeronautical activities must be directly related to the operation of aircraft and because salvage and demolition activity is analogous to aircraft manufacturing, which has long been considered to be a non-aeronautical activity. FAA reasoned that because salvage activities are non-aeronautical, they are not protected by the grant assurances. FAA further stated that even if BMI's salvage operation were to be considered a hybrid aeronautical/non-aeronautical operation, the County would still be found to be in compliance because BMI and Blueside are not similarly situated to other FBOs on the airport. FAA reviewed O'Neal's development plans and found that the specific parcel of land he requested was leased by other developers. Though the County attempted to negotiate with O'Neal, the parties were not able to reach agreement. FAA found that the County "is not obligated to provide [BMI/Blueside] with exactly the agreement they prefer." Finally, FAA found that BMI and Blueside are not similarly situated to other FBOs on the airport because the other FBOs had "different business purposes, different space needs on the Airport, and previous leasing history."

On June 9, 2011, BMI/Blueside petitioned for review of the agency's final order in the Eleventh Circuit. Petitioners filed their initial brief on September 27, 2011, arguing that the law of the case doctrine bars FAA from revisiting and revising its prior policy on salvage/demolition activity; the County unjustly discriminated against BMI/Blueside in treating other FBOs differently; and the County lacked valid reasons for not providing BMI/Blueside with a development lease.

The United States filed its brief on November 30, 2011, arguing that FAA's policy clarification that salvage and demolition activities are non-aeronautical is reasonable and entitled to deference. The United States noted that the court's 2008 decision did not preclude agency reexamination of this policy. Furthermore, petitioners were not subject to unjust discrimination, because BMI and Blueside were not similarly situated to existing airport tenants. These tenants conducted different types of business than BMI/Blueside, were existing airport tenants, and had different space and site requirements that distinguished them from BMI/Blueside. Additionally, though petitioner claims that the County failed to provide reasonable access in the form of a long-term development lease and unjustly discriminated against BMI/Blueside as compared to similarly situated tenants, these arguments are without merit. Petitioner's reasonable access was inhibited not by the County, but by petitioner's unreasonable demands and the limited number of development sites available.

On December 2, 2011, the Miami-Dade County filed an initial brief, arguing that petitioners' case rests on a false premise: they assume that the grant assurances preclude the County from drawing distinctions in tenancies, and believe that a mere difference in outcome between themselves and other tenants is evidence of unjust economic discrimination. But the grant assurances allow the County to draw distinctions between different tenants. As a result the County asserts, a claim for unjust discrimination under the grant assurances demands that petitioners demonstrate that they are similarly situated with others who received favorable treatment, not merely that other dissimilar tenants were treated more favorably. The County argued that petitioners are neither similarly situated to Clero or MEA. The County next asserted that the grant assurances do not require the County to provide petitioners with a lease on their precise desired terms, at their precise desired location on the airport.

On December 16, 2011, petitioners filed their reply brief with the court, arguing that FAA's determination that there exists substantial evidence to support the County's decision not to provide a development lease to petitioners is without support in the record. They argue that the County as airport sponsor supports demolition activities on the airport and that any other position "is a sham created solely for this litigation…." They also argue that the reason why petitioners did not provide financial information to the County was that the County never requested such information from petitioners, and that this fact is both reasonable and logical. Petitioners also assert that the record fails to demonstrate why the County was able to retake leased FBO space from another FBO and award it to competitor MEA for a development lease but was unable to do the same for petitioners. They also argue that Clero Aviation cannot be distinguished from petitioners, and that their development efforts were blocked at every turn by the County.

Oral argument has been tentatively calendared for the week of May 21, 2012.

City of Warwick Challenges TF Green Airport Improvement Program

On November 21, 2011, the City of Warwick (Warwick) filed a Petition for Review in the U.S. Court of Appeals for the District of Columbia Circuit challenging FAA's September 23, 2011, Record of Decision (ROD) for the TF Green Airport Improvement Program (TF Green AIP). TF Green Airport (PVD), located in Warwick, Rhode Island, is the busiest airport in the state. It is operated by the Rhode Island Airport Corporation (RIAC), which is a subsidiary public corporation of the Rhode Island Economic Development Corporation.

The purpose of the TF Green AIP is to enhance both the safety and efficiency of PVD in order to allow the airport to more fully meet its current and anticipated demand for aviation services. In order to meet these goals, the TF Green AIP consists of various improvements. The most critical of these are the safety enhancements to be made to the runway safety area of PVD's crosswind runway and the proposed 1534 foot extension of PVD's primary runway. Anticipated significant impacts from the TF Green AIP include significant noise and compatible land use impacts, significant wetlands and floodplains impacts, significant impacts to Section 4(f)/Section 6(f) resources, and significant impacts to historic, architectural, archaeological, and cultural resources.

On December 22, 2011, Warwick submitted its "Statement of Issues to be Raised" in which it alleged that FAA violated the Clean Air Act, the Federal Water Pollution Control Act, NEPA, and Section 4(f) of the DOT Act. The court has granted RIAC's Motion to Intervene as a respondent in City of Warwick, Rhode Island v. USDOT (D.C. Cir. No. 11-1448). Warwick's opening brief is due April 2, 2012. On March 1, the City of Warwick and RIAC reached an agreement to potentially settle and dismiss the pending litigation.

Stratford, Connecticut Challenges NTSB-Recommended Runway Safety Area Project at Bridgeport Sikorsky Memorial Airport

On November 23, 2011, the Town of Stratford, Connecticut filed a Petition for Review in the U.S. Court of Appeals for the Second Circuit against FAA challenging a Record of Decision (ROD) issued on September 28, 2011, for Sikorsky Memorial Airport (BDR). Town of Stratford v. FAA (2d Cir. 11-5042). BDR is located in Stratford, however, the airport sponsor is the neighboring City of Bridgeport. FAA completed a Written Re-evaluation (WR) of an earlier 1999 Environmental Impact Statement (EIS) and concluded in the 2011 ROD that a supplement to the 1999 EIS was not required. The ROD approved construction of a Runway Safety Area (RSA) that includes an Engineered Materials Arresting System (EMAS). An EMAS provides a crushable material in the RSA that allows an aircraft, unable to stop on the active runway, to gradually decrease its speed and allow the aircraft to come to a stop without serious structural damage.

FAA previously litigated a 1999 ROD for BDR that was issued after completing the 1999 EIS that approved a different type of RSA project that was never constructed. The 1999 RSA project was approved, in part, in response to a fatal accident that occurred on April 27, 1994, when a twin-engine charter aircraft overshot Runway 6-24 at BDR in instrument conditions and struck the blast fence at the northeast end of Runway 6-24. Eight passengers were killed. The National Transportation Safety Board (NTSB) investigated the fatal accident and issued NTSB Report AAR-94/08 in 1995. NTSB issued recommendations to FAA, the Connecticut Department of Transportation, Bridgeport, and Stratford recommending the removal of the non-frangible blast fence and assuring an adequate runway safety area at the end of runway 6.

Stratford petitioned for review of the FAA's 1999 ROD and challenged FAA's approval of Bridgeport's airport plan for reconstruction of airport runways and disposal of land from nearby army engine plant. The court denied the petition and held that Stratford lacked prudential standing to challenge FAA's EIS under NEPA and that FAA complied with Airports and Airways Improvement Act. See Town of Stratford, Connecticut v. FAA, 285 F.3d 84 (D.C Cir. 2002). Notwithstanding the court's decision, the original project was never completed and additional discussions have been ongoing since 2002. The new RSA project approved in the 2011 ROD has less environmental impacts than the 1999 approved RSA project, since EMAS is utilized. Stratford's opening brief is due on April 23, 2012.

FedEx Sued to Recover over $1.5 Million in Civil Penalties

On December 20, 2011, the United States filed suit in the U.S. District Court for the Western District of Tennessee against Federal Express Corporation (FedEx) to recover $1,550,000 in civil penalties for violations of FAA regulations. The civil penalty claims at issue in United States v. Federal Express Corporation, d/b/a FedEx Express (W.D. Tenn. No. 11-03106) arose from FedEx's use of 14 battery-powered refrigerated cargo containers, commonly known as cargo unit load devices (ULDs), when FedEx had not revised its maintenance program regarding those ULDs. The ULDs in this case are cooling containers that are used for shipping temperature-sensitive freight.

As set out in the government's complaint, by letter dated March 18, 2008, FAA notified FedEx that the carrier was using the ULDs in violation of published FAA standards and without approved maintenance and operation procedures. For example, FedEx failed to ensure the use of approved standards, inspections, and time-limits. The United States' complaint further alleges that after FedEx received the March 18 letter, it continued to operate the aircraft on which the ULDs were installed on 124 revenue flights, over a period of more than three weeks, in violation of FAA regulations.

Federal Highway Administration

Eleventh Circuit Upholds FHWA Decision Approving Florida Bridge Project

On February 6, 2012 in Citizens for Smart Growth v. FHWA, 669 F.3d 1203 (11^{th} Cir. 2012), the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court grant of summary judgment to defendants in this challenge to the proposed Indian Street Bridge (Project) in Martin County, Florida. Plaintiffs, who live near the site of the Project, brought the appeal and challenged a decision by FHWA to provide funding for the project, alleging that the agency violated the NEPA and Section 4(f) of the DOT Act.

On appeal, plaintiffs argued that FHWA wrongfully phased the construction of the project, improperly incorporated a Florida DOT feasibility and corridor study into the Final EIS, and failed to articulate a project purpose and need, study area, alternatives and Section 4(f) impact analysis in the FEIS that comported with applicable law. Defendants' responses argued that plaintiffs did not meet their burden showing that the FEIS and ROD were arbitrary or capricious agency actions, or in any way contrary to law. Interestingly, the state also argued that there was no jurisdiction over Florida DOT under the Administrative Procedures Act, since the Act does not provide for a private right of action against a non federal agency.

In affirming the district court's ruling, the appellate court concluded that it had jurisdiction over Florida DOT because of that agency's close involvement in the project, as well as the fact that plaintiffs only sought injunctive relief against Florida DOT. Turning to the NEPA claims, the court concluded that FHWA permissibly relied upon a feasibility study and corridor report prepared by the County and Florida DOT to eliminate various alternatives from detailed consideration in the EIS. The court also found that the purpose and need statement in the EIS was not unduly narrow and that FHWA appropriately analyzed environmental impacts to a variety of resources, including essential fish habitat, wetlands, floodplains, and cumulative and indirect impacts associated with land use, induced growth, and other topics.

The court declined to address plaintiffs' argument that a supplemental EIS should have been prepared due to a change in construction sequencing because the claim was not properly alleged in plaintiffs' complaint. Finally, the court found that the EIS contained a lengthy discussion of impacts to Section 4(f) properties and appropriately referenced additional discussion in the corridor report, all of which provided a sufficient basis for FHWA's conclusion that there were no other prudent or feasible alternatives to the selected bridge route.

Fourth Circuit Dismisses Appeal in Virginia I-81 Improvement Project

On February 17, 2012, the U.S. Court of Appeals for the Fourth Circuit dismissed the appeal filed by the appellants in Shenandoah Valley Network v. Capka, 669 F.3d 194 (4th Cir. 2012).

The project involves improvements to I-81 in Virginia, which extends 325 miles in a southwest to northeast direction in western Virginia from the Tennessee border north to the West Virginia border. On March 21, 2007, the Agencies issued a Tier 1 Final Environmental Impact Statement (FEIS) and a Tier 1 Record of Decision on June 6, 2007. Conceptual-level improvements to the entire 325-mile length of I-81 in Virginia were evaluated in the Tier 1 EIS. The improvement concept advanced to Tier 2 is a non-separated variable lane highway facility that involves constructing no more than two general-purpose lanes in each direction along I-81. In addition, several independent short-term safety and operational improvement projects were also advanced to Tier 2.

On September 3, 2009, the U.S. District Court for the Western District of Virginia granted summary judgment in favor of FHWA and the Virginia Department of Transportation. The district court rejected claims that the Tier 1 Record of Decision violated NEPA and that FHWA's issuance of a 180-day statute of limitations notice at the conclusion of Tier 1 violated constitutional due process.

On appeal, the challengers to the project argued that the district court's ruling will serve to foreclose them from challenging future decisions made during Tier 2 of the NEPA process. Defendants argued that the appeal presented no live controversy and merely sought an advisory opinion on what could and could not be challenged at the conclusion of Tier 2. The Fourth Circuit agreed that the appeal presented no injury or imminent threat of injury. In addition, the Fourth Circuit also declined to vacate the district court's ruling that the NEPA process should be allowed to move beyond Tier 1 to Tier 2.

FHWA Wins Summary Judgment in Kentucky Highway Challenge, Plaintiffs Appeal

On November 2, 2011, the U.S. District Court for the Western District of Kentucky granted defendants' Motion for Summary Judgment in Karst Environmental Education and Protection, Inc. v. FHWA, No. 10-00164, 2011 WL 5301589 (W.D. Ky. Nov. 2, 2011). In this case, plaintiff alleged numerous NEPA violations by FHWA and its officials when approving the U.S. 68/KY 80 to I-65 Connector Project near Bowling Green, Kentucky.

The court ruled for FHWA on each of the plaintiff's NEPA issues. First, the court upheld the economic forecast, traffic and safety reports, holding that these reports used a sound methodology. The court found that FHWA properly considered the impact of increased traffic congestion and safety concerns raised by an unreasonable number of fatal and non-fatal accidents.

Second, the court found FHWA properly analyzed the impact of the CSX railroad spur in reducing traffic in the project area and adequately explained why the possibility of freight transport by railroad would not affect traffic flows based on the fact that no rail-to-truck transfer facility is planned in the vicinity of the City or the Project and that the presence of any rail-to-truck switching station facility in or around other areas would not alter the traffic forecasts for the Project area.

Third, the court found that FHWA did not unreasonably narrow the definition of the Project nor consider an insufficient number of alternatives. FHWA reviewed six different alternatives and a no-build alternative and chose the preferred alternative after properly considering congestion, efficiency, impact on truck traffic, effects on the endangered gray bat population, and effects on existing residential, commercial, and farming uses for the land in and near the project area.

Fourth, the court found the partial-build alternative was not significantly different from the first phase of construction associated with Alternative 6. A full analysis was unwarranted since the partial-build alternative was not distinguishable from the southern half of Alternative 6 and there was no evidence to suggest its environmental impacts would be significantly different. FHWA adequately considered the impacts of this truncated version of Alternative 5 when it settled on its preferred alternative. In addition, the Court noted FHWA withheld the discretion not to complete Alternative 6 in its entirety.

Fifth, the court found FHWA's cost-benefit analysis described in detail why the vehicle hours travelled and vehicle miles travelled measurements highlighted the shortcomings for the Corridor's road network and how the metric was used in the administrative process.

Sixth, the court upheld the FHWA decision's consideration of water impacts, cave shrimp habitats, air quality, and the indirect and cumulative effect of the project on wetlands, cultural resources, and socioeconomic resources. The court agreed with the defendants that applicable regulations do not require a floodplain analysis in this case and that FHWA properly relied upon past floodplain analyses.

Finally, the court agreed with the FHWA's explanation that an indirect effect analysis of project growth effects is only triggered where the federal action causes the growth inducing effects.

On January 2, 2012, plaintiffs filed a Notice of Appeal before with the U.S. Court of Appeals for the Sixth Circuit (6^{th} Cir. No. 12-5008).

Arizona District Court Split on Whether FTCA 2-Year Statute of Limitations is Jurisdictional, One Decision Appealed

On February 16, 2012, the U.S. District Court for the District of Arizona denied the United States' Motion to Dismiss for lack of subject matter jurisdiction in Dunlap v. United States, No. 11-01360, 2012 WL 510532 (D. Ariz. Feb. 16, 2012). The court relied on recent Supreme Court decisions and concluded that the Federal Tort Claims Act (FTCA) two-year statute of limitations is a claim-processing rule and is thus not jurisdictional. Dunlap is one of four FTCA tort claims that allege that FHWA was negligent in allowing installation of 3-cable low-tension median barriers that were not crash tested in accordance with NCHRP Report 350. On November 1, 2011, in another case with similar facts and allegations, June v. United States (D. Ariz. No. 11-00901), the court dismissed plaintiff's FTCA claim based on the FTCA two-year statute of limitations/lack of subject matter jurisdiction argument. Plaintiff appealed, and the case and is currently pending before the U.S. Court of Appeals for the Ninth Circuit (No. 11-17776). The other two similar cases, Keller v. United States (D. Ariz. No 11-00536) and DeVries v. United States (D. Ariz. No. 11-01822), are pending in district court. The government has filed a motion to dismiss for lack of subject-matter jurisdiction in DeVries.

FHWA Wins Challenge to Cleveland Innerbelt Bridge

On January 10, 2012, the U.S. District Court for the Northern District of Ohio denied plaintiffs' Motion to Amend its Complaint and granted the Federal Defendant's Motion to Dismiss in Cronin v. FHWA (N.D. Oh. No. 09-2699). The litigation arose as a challenge to the proposed Innerbelt Bridge project in downtown Cleveland. Plaintiffs filed their Complaint on behalf of the ClevelandBikes Organization. Plaintiffs originally alleged under the APA that the defendants violated NEPA. On March 31, 2011, the Court denied the federal defendant's previous Motion to Dismiss plaintiffs' Complaint in its entirety and held that plaintiffs had stated a claim under the APA. Plaintiffs then filed an amended complaint on June 28, 2011, and sought to add an Equal Protection claim. Plaintiffs' Equal Protection allegation was premised on an alleged disparate impact upon African American residents of Cleveland who do not drive.

The federal defendants moved to dismiss plaintiffs' Equal Protection Clause and APA claims based upon a lack of standing. The court agreed and dismissed the Equal Protection claim because plaintiffs failed to allege that any of the members of the ClevelandBikes organization were African American residents of Cleveland who would be affected by the project. The court further stated that the plaintiffs' claims amounted to generalized grievances and were insufficient to demonstrate injury-in-fact and confer standing.

Similarly, the court dismissed the APA claim stating that plaintiffs failed to identify that any of them had/will imminently suffer a particular injury. Standing to bring NEPA claims under the APA require specificity of an injury in fact. The court reasoned that the plaintiffs are not relieved of their burden of demonstrating concrete injury simply because they are suing under the APA. The court required plaintiffs to show that their members have suffered a concrete injury to aesthetic, recreational, or scientific interest.

As a result of this decision, there are no longer any pending federal legal actions against the proposed Innerbelt Bridge Project. An earlier lawsuit was settled between the parties.

Appeal Filed over Court's Dismissal of Kentucky Ring Road Litigation

On March 15, 2011, Patricia McGehee and Richard McGehee jointly filed a Complaint against the FHWA, the U.S. Army Corps of Engineers (COE), and the Commonwealth of Kentucky Transportation Cabinet and Department of Highways (KYTC) in McGehee v. U.S. Army Corps of Engineers, et al. (W.D. Ky. No. 11-00160). Plaintiffs are residents and owners of a farm in Hardin County, Kentucky, who sought to halt the construction of two bridges and three culverts forming a part of the State's Ring Road Extension Project.

The Ring Road Extension Project is a 1.78-mile highway project that extends the Ring Road from Hwy 62 to the Western Kentucky Parkway. According to the complaint, on June 29, 2006, KYTC obtained a Section 404 Clean Water Act (CWA) permit from COE for the construction of three culverts and two bridges to extend Ring Road. The first segment of the project was opened to traffic on August 6, 2009, and plaintiffs challenged the incomplete second segment of the project. Investigations indicated that there are no Federal-Aid Highway funds in the project, and the only COE involvement was the issuance of the CWA permit.

In their complaint, plaintiffs alleged that the defendants abused their discretion and acted in bad faith in connection with the Ring Road by condemning plaintiffs' home, farm buildings, and a portion of road frontage of their property, which is listed on the Register of National Historic Places. They claimed this action violated Section 106 of the National Historic Preservation Act, Section 404 of the CWA, the Safe Drinking Water Act, and NEPA. Plaintiffs also alleged violations of the Uniform Relocation Assistance and Real Properties Acquisition Act.

On April 6, 2011, FHWA and COE jointly filed a Motion to Dismiss based on the lack of federal funding in the project and COE's compliance with all Section 404 permitting requirements. In

October 2011, plaintiffs and state defendants agreed to settle the case, with plaintiffs agreeing to seek dismissal of the case as to all defendants. On January 6, 2012, the court dismissed the case as "settled" after a hearing on a state motion to dismiss. That order of dismissal was premised upon a finding that a settlement agreement reached by the parties was enforceable and valid. Plaintiffs' counsel then withdrew from the case, and on February 2nd 2012, plaintiffs' new counsel filed an appeal with the U.S. Court of Appeals for the Sixth Circuit (6th Cir. No. 12-5112). The issue on appeal identified by appellants is whether the district court erred in finding the final settlement agreement valid and enforceable and issuing its order of dismissal without allowing time for a response to be filed.

FHWA Loses Bid Protest Action

On January 31, 2012, the U.S. Court of Federal Claims ruled against FHWA in Virgin Islands Paving, Inc. v. United States, No. 11-00687, 2012 WL 274032 (Fed. Cl. Jan. 31, 2012). This bid protest involved the reconstruction of Frenchman's Bay Road in Saint Thomas, V.I. FHWA issued an Invitation for Bids for the project on July 25, 2011. FHWA opened bids on August 26, 2011, and two bids were received. The protester's bid was 21% below the agency's estimate of how much the work should cost. The other bid was 7% below the agency's estimate. Because it was near the end of the fiscal year, FHWA had completed the paperwork to award, but did not actually award, the contract to the protester. However, based on input from the Virgin Islands government and because of the protester's poor performance on prior government contracts, FHWA decided to request documentation from the protester to demonstrate that its bid did not contain a mistake. When the protester failed to provide sufficient evidence to support its low bid, FHWA rejected its bid and awarded the contract to the second low bidder.

In its bid protest, the protester alleged that FHWA improperly rejected its bid. The court acknowledged that 48 C.F.R. § 14.407-3(g)(5) authorizes an agency to reject a bid that contains a suspected mistake. However, the court ruled that the administrative record did not contain sufficient information to demonstrate that the agency's decision was rational. The court remanded the case back to the agency to take appropriate measures consistent with its opinion.

Idaho District Court Grants Partial Dismissal of "Mega-loads" Litigation

On March 9, 2012, the U.S. District Court for the District of Idaho granted in part and denied in part FHWA's motion to dismiss in Idaho Rivers United v. U.S Forest Service, et al., No. 11-095, 2012 WL 827108 (D. Idaho Mar. 9, 2012). Plaintiff, a regional conservation organization, filed an Amended Complaint on June 15, 2011 adding FHWA to litigation originally brought against the U.S. Forest Service (USFS), The case arises from a private venture under which Exxon Mobil and its Canadian subsidiary, Imperial Oil, would transfer oversize loads, labeled "mega-loads" due to extreme size and weight (in excess of 500,000 pounds), of oil extraction and mining equipment from barges docked at the Port of Lewiston, Idaho, to commercial trucks for transport on US Route 12 (US 12) in Idaho. The oversize loads would continue through Montana and then travel north to the Kearl Oil Sands in Canada.

The Amended Complaint includes two allegations against FHWA: (1) that the agency breached its duty under 23 U.S.C. 116(c) to enforce the terms of the highway easement deed for US 12, which was conveyed to the Idaho Transportation Department (ITD) by the USFS via federal land transfer; and (2) that FHWA violated its mandatory duties to ensure that federal projects are properly maintained in accordance with a Corridor Management Plan funded by an FHWA grant pursuant and FHWA's National Scenic Byways Interim Management Policy.

The ITD has permitted approximately 200 oversized loads for transport along US 12. Approval by FHWA is not required for this use of US 12. Currently, there are no federal-aid funded projects along US 12 in Idaho. FHWA recently learned that Exxon Mobil completed the transport of its oversized loads at the end of February 2012 by breaking them down and transporting via an alternate route.

On March 9, eight months after FHWA and USFS filed separate motions to dismiss, the district court issued a decision granting in part and denying in part FHWA's motion. The court dismissed those counts alleging FHWA had a mandatory duty under 23 U.S.C. 116(c) to protect the US 12 corridor, but left standing those counts alleging FHWA had "erroneously concluded [it] lacked the [discretionary] authority to take enforcement action" against the IDT. The USFS, which was sued under the Wild and Scenic Rivers Act and USFS regulations, also received a split ruling based on the same distinction between those counts alleging a "mandatory" agency duty to act and those alleging an erroneous agency conclusion that it lacked authority to take enforcement action.

In their motions to dismiss, both agencies relied on the unanimous 2004 Supreme Court case Norton v. Southern Utah Wilderness Alliance, 542 US 55 (SUWA), which greatly restricted judicial review of "agency inaction." However, the district court let the "discretion" claims stand in light of a 1990 Ninth Circuit decision, Montana Air Chapter No. 29 v. Fair Labor Relations Authority, 898 F.2d 753, which adopted an exception to the bar on judicial review of presumptively unreviewable agency decisions not to take enforcement action when the decision "is based solely on [the agency's] belief that [it] lacks jurisdiction to issue such a complaint." Slip. op. at 20-21, quoting Montana Air at 756. The district court noted that it is not clear if Montana Air survived SUWA, but considered plaintiff's' argument strong enough to survive at least a motion to dismiss.

Court Grants FHWA Partial Dismissal in Challenge to Houston-Area Project

On February 29, 2012, the U.S. District Court for the Southern District of Texas in Ware v. FHWA (S.D. Tex. No. 11-00848) dismissed with prejudice the claims of Richard Palumbo, one of the plaintiffs in the case, finding them timebarred. The court also granted FHWA's motion to dismiss plaintiffs' Fifth Amendment procedural due process claim. It granted plaintiffs leave to amend their Complaint by no later than March 30, 2012. The court criticized the plaintiffs' 35-paragraph due process claim as it complained of past and future actions of a non-party, the Texas Department of Transportation.

In this case, six residents and landowners of Harris County, Texas, seek to halt the construction of the US 290 Project until such time as FHWA completes a Supplemental EIS to take into account the noise regulations in 23 C.F.R. § 772. The US 290 Project entails the reconstruction of US 290 and the Hempstead Tollway. The Project covers a corridor of varying width that is approximately 38 miles long in Harris County. The overall vision for the US 290 Project includes freeway capacity reconstruction and widening. The Project will also provide improvements along the Hempstead Tollway and bicycle and pedestrian improvements.

Oregon Court Partially Dismisses Challenge to Mount Hood Safety Project

On February 7, 2012, the U.S. District Court for the District of Oregon adopted a magistrate judge's recommendations and dismissed some of plaintiffs' claims in Hereditary Chief Wilbur Slockish v. FHWA, No. 08-1169, 2012 WL 398989 (D. Or. Feb. 7, 2012), a challenge to a completed safety project on Mount Hood. Plaintiffs allege violations of NEPA, Section 4(f), the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act (NAGRPA), the public trust, the First Amendment, and the due process clause. Federal defendants previously unsuccessfully attempted to dismiss the case as moot.

The court dismissed the public trust claim and the due process claims based on right to travel, right to freely associate, and right to maintain and express traditional culture. The court let stand the plaintiffs' First Amendment free exercise of religion claim and the due process claim based on free exercise, thereby allowing those claims to proceed to a decision on the merits along with the claims based on environmental statutes. The court referred back to the magistrate judge plaintiffs' motion to supplement the record and conduct discovery. Finally, the court dismissed from the lawsuit the only state defendant, Matt Garrett, Director of the Oregon DOT, on Eleventh Amendment grounds.

Plaintiff Voluntarily Dismisses FHWA from Suit against Construction of Detroit River International Crossing

On November 30, 2011, the U.S. District Court for the District of Columbia granted plaintiffs' motion for voluntary dismissal without prejudice as to defendants FHWA and the Government of Canada in Detroit International Bridge Co., et al. v. The Government of Canada, et al. (D.D.C. 10-00476). Detroit International Bridge Company (DIBC) and its Canadian affiliate, owners and operators of the only bridge connecting Detroit to Windsor, Canada, brought this suit against the Department of Transportation, the Department of

Homeland Security (DHS), FHWA, the Coast Guard, and the Government of Canada, alleging that various actions taken by the defendants had deprived DIBC of its right to build a new bridge adjacent to its exiting span, in violation of DIBC's rights under the U.S. Constitution, the Boundary Waters Treaty, and various statutes. The relief requested in the suit includes declaratory judgments regarding DIBC's right to build its new bridge and an injunction against the construction the Detroit River International Crossing (DRIC), a planned new bridge between Detroit and Windsor downriver from DIBC's bridge. (FHWA has issued the environmental approval for the DRIC, and DIBC is a plaintiff in a separate suit challenging that approval and seeking to stop the DRIC's construction.)

In seeking voluntary dismissal. plaintiffs claimed that their case was moot to the extent it sought to prevent construction of the DRIC because the Michigan state legislature had not approved funding of the bridge. Though the government did not agree with plaintiffs' mootness argument, it did not oppose dismissal. Plaintiffs did not seek dismissal of their claims against DHS and the Coast Guard, which concern coast Guard approval of the bridge that plaintiffs have proposed.

FHWA Settles Contract Claim from New Mexico Project

On October 21, 2011, upon joint motion of the parties after reaching settlement, the U.S. Court of Federal Claims dismissed the plaintiff's complaint with prejudice in Delhur Industries, Inc. v. U.S. (Fed. Cl. No. 10-144C). The complaint was an appeal of a government claim against the prime contractor on the 7.68 mile long Sacramento River Road reconstruction project in Lincoln National Forest, near Alamogordo, New Mexico. The government claimed $98,703 in damages from the prime contractor under the Contract Disputes Act due to latent defects in the form of cracked pavement, which occurred approximately one year after completion of construction. The parties agreed to settle the claim for an $80,000 payment to the government by the prime contractor, inclusive of attorney's fees, costs, and interest.

Appeal in North Carolina Toll Road Case

On October 31, 2011, plaintiffs in North Carolina Wildlife Federation v. North Carolina Department of Transportation, et al. 2011 WL 5042075 (E.D.N.C. Oct. 24, 2011) filed a notice of appeal following the district court's grant of defendants' Motion for Summary Judgment in this challenge to the Monroe Connector/Bypass Project in Mecklenburg County.

Plaintiffs, three North Carolina environmental groups represented by the Southern Environmental Law Center (SELC), appealed the district court decision to the U.S. Court of Appeals for the Fourth Circuit (No. 11-2210) and filed their opening brief on December 20, 2011. Defendants filed their response brief on January 20, 2012, and plaintiffs filed their reply on February 1, 2012. On appeal, plaintiffs allege that (1) defendants' NEPA review was arbitrary and capricious because it failed to analyze project impacts; (2) defendants' alternatives analysis violated NEPA by failing to consider a reasonable range of alternatives and relied upon the same socio-economic data for the build and no-build alternatives; and (3) defendants violated NEPA by providing false and misleading information to the public during the administrative process. In addition, plaintiffs allege the district court erred in refusing to allow the record to be supplemented.

Defendants argued in their response brief that NCTA and FHWA complied with NEPA by taking a hard look at project impacts and thoroughly evaluating a reasonable range of alternatives in light of the project's stated need and purpose. Defendants also argued that plaintiff's characterization of the same socio-economic data being used for the build and no-build alternatives is an oversimplified and inaccurate characterization and pointed to exhaustive efforts to confirm and clarify assumptions about the project modeling with the local jurisdictions that provided the information to the local metropolitan planning organization. Defendants argue plaintiffs' allegations of providing false and misleading information rests on a willful misinterpretation of an agency response to one comment in the record of decision, which cannot stand in light of the carefully documented decision making that characterize the NEPA documentation as a whole. Finally, defendants argue the district court did not abuse its discretion in rejecting plaintiffs' motion to supplement the administrative record. Oral argument was held in Richmond, Virginia on March 21, 2012.

Appeal Filed in Oregon Contract Case

On January 6, 2012, plaintiff appealed the September 7, 2011, decision of the U.S. Court of Federal Claims in White Buffalo Construction, Inc. v. United States, 2011 WL 4402355 (Fed. Cl. 2011), to the U.S. Court of Appeals for the Federal Circuit (Fed. Cir. No.99-00961). The Court of Federal Claims found that the government did not act in bad faith in terminating the Plaintiff's contract and awarded the exact amount in termination for convenience costs recommended by the government. Plaintiff, the prime contractor on the repair of 16 intermittent sites in the Siskiyou National Forest in southern Oregon under the Emergency Relief for Federally Owned Roads program, was originally terminated for default in 1998. This default was converted to a termination for convenience in 2004. Plaintiff sought nearly $1.1million in damages under the Contract Disputes Act based on allegations that the government terminated its contract in bad faith and had not awarded it enough costs under the Contracting Officer's Decision for the termination for convenience. An eleven-day bench trail was held in Portland, Oregon in the summer of 2009, during which the focus of the evidence and testimony was primarily on the plaintiff's allegations that the government acted in bad faith throughout the performance of the contract.

Virginia HOT Lanes Decision Appealed

On October 17, 2011, Arthur West appealed to the U.S. Court of Appeals for the District of Columbia Circuit the decision of the U.S. District Court for the District of Columbia granting federal defendants' Motion to Dismiss with prejudice in West v. Horner, et al. (D.C. Cir. 11-5273). In his complaint, pro se plaintiff Arthur West, a resident of the State of Washington and an occasional visitor to the Washington, D.C., metropolitan area, claimed that the federal and state officials who approved the I-95/395 High Occupancy Toll Lanes Project failed to comply with NEPA by improperly issuing a Categorical Exclusion (CE) and not preparing an Environmental Impact Statement or an Environmental Assessment with a finding of no significant impact. He also asserted that the federal defendants improperly delegated NEPA authority in conducting their environmental review.

The district court found that FHWA has rescinded its approval and CE document for construction work on the Project and that the Virginia Department of Transportation (VDOT) has withdrawn its proposal for the Project. Therefore, the court held, there is no longer a live controversy for which the Court can grant any relief. The Court further opined that although plaintiff's claims regarding the Project are now moot, his proposed new claims regarding VDOT's new project suffered from the opposite problem: a lack of finality of the challenged action. On February 9, 2012, the government moved for summary affirmance of the district court's decision.

Summary Judgment Motions filed in Challenge to Charlottesville Project

On October 18, 2011, plaintiffs in Coalition to Preserve McIntire Park, et al. v. Mendez (W.D. Va. 11-00015) filed a Motion for Summary Judgment in their challenge to the Route 250 Bypass Interchange at McIntire Road project in Charlottesville, Virginia. The Motion argued that (1) FHWA violated section 4(f) of the DOT Act by selecting Alternative G1 instead of a feasible and prudent alternative that did not take land from McIntire Park; (2) because of the significance of the aggregate environmental impacts of the project, FHWA was required to prepare an Environmental Impact Statement (EIS) rather than an Environmental Assessment (EA); and (3) even if FHWA was not required to prepare an EIS rather than an EA, the EA was legally deficient because it failed to disclose or analyze the cumulative impacts of the project and failed to evaluate reasonable alternatives to Preferred Alternative G1.

On November 17, 2011, the government filed a Cross-Motion for Summary Judgment arguing that (1) FHWA did not violate section 4(f) by concluding that Avoidance Alternative 2 was not a feasible and prudent alternative as Avoidance Alternative 2 failed to meet three of the five elements of the purpose and need statement; (2) FHWA's decision to prepare an EA as opposed to an EIS was appropriate given the consideration of each of the ten factors relevant to triggering an EIS and the fact that the project is a separate federally-funded project with independent utility;

and (3) the EA sufficiently disclosed and analyzed the cumulative impacts of the project by providing a detailed analysis of the environmental impacts of the project while the FONSI provided a summary of the environmental impacts and the significance of the impacts.

On December 27, 2011, plaintiffs filed an Opposition to Defendant's Motion for Summary Judgment, and on January 17, 2012, the Government filed a Reply to Plaintiffs' Response to Defendant's Motion for Summary Judgment. Oral argument on the motions is scheduled for April 25, 2012, in Charlottesville, Virginia.

District of Columbia Trail Challenged

On November 1, 2011, five individuals who allege they are being deprived of their right to use a public resource in the District of Columbia, Klingle Road, filed suit against numerous federal, District, and Virginia defendants, including Secretary LaHood. This litigation, Black v. LaHood (D.D.C., No. 11-01928), is related to an ongoing debate regarding the reopening of Klingle Road, which runs from Beach Drive in Rock Creek Park to the Washington National Cathedral in northwest Washington, D.C. The 0.7-mile segment of roadway within Klingle Valley from Porter Street, N.W., to Cortland Place, N.W., was barricaded to traffic in 1991 due to severe deterioration of the roadway, headwalls, and underlying stormwater management systems. It is currently impassable for vehicular traffic and unsafe for pedestrians and cyclists.

The Klingle Road Restoration Act of 2003 (2003 Act) directed the repair and reconstruction of the barricaded segment of Klingle Road and required the road to be reopened to motor vehicle traffic. In March 2004, a Notice of Intent (NOI) was published in the Federal Register declaring FHWA and DDOT's intent to prepare an Environmental Impact Statement (EIS) for reconstruction of the portion of Klingle Road between Porter Street and Cortland Place. Prior to the completion of the Final EIS, the project was put on hold. In June 2008, D.C. City Council passed the Klingle Road Sustainable Development Amendment Act of 2008 (2008 Act) that amended the 2003 Act and ended studies to reopen the barricaded segment of Klingle Road to vehicular traffic. The 2008 Act stated the barricaded portion of Klingle Road shall not be reopened to the public for motor vehicle traffic, but shall be used instead as a multi-use trail (Klingle Valley Trail).

FHWA and DDOT prepared an Environmental Assessment (EA) for the Klingle Valley Trail project. The purpose of the proposed action is to construct a multi-use facility using context-sensitive design to provide safe, non-motorized transportation and recreational opportunities to the residents of and visitors to the District.

In their suit, plaintiffs allege that: (1) defendants violated NEPA by failing to evaluate all reasonable alternatives; (2) defendants used a premature or inadequate basis to approve a change in land use; (3) defendants violated NEPA by not considering effects of the undertaking; (4) defendants violated the FAHA and FHWA regulations; and (5) defendants failed to address the environmental justice issues. Plaintiffs seek an injunction and attorney fees.

On February 13, 2012, federal defendants moved to dismiss this case for lack of subject matter jurisdiction and failure to state a valid claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The federal defendants argued: (1) the allegations in plaintiffs' complaint fail to establish standing to challenge the federal defendants' decision to authorize the Klingle Valley Trail Project; (2) plaintiffs' allegations fail to establish any alleged injury that is traceable to the challenged federal agency decision because their alleged injuries all stem from the independent act of a third party - the District of Columbia Council - that is not a defendant in this action; (3)plaintiffs' allegations fail to establish any alleged injury that is redressable by an order setting aside the EA/FONSI; (4) the allegations in plaintiffs' complaint fail to state a claim upon which relief can be granted. On March 6, 2012, A Motion to Intervene as Defendants was filed by Friends of the Earth, Inc. and Sierra Club.

Complaint and Motions for TRO and Preliminary Injunction Motion Filed Against Trans Mountain Project

On February 6, 2012, Sierra Club brought suit against the Federal Highway Administration (FHWA), Victor M. Mendez, in his official capacity as FHWA Administrator, the Texas Department of Transportation (TxDOT) and Phil Wilson, in his official capacity as TxDOT Executive Director in the U.S. District Court for the Western District of Texas alleging violations of the APA, NEPA, and Section 4(f) of the DOT Act in connection with the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued for the Trans Mountain Project. On March 20, plaintiff in the case, Sierra Club v. FHWA (W.D. Tex. No. 12-116), filed a Motion for Hearing and Preliminary Injunction. The motion alleges that the EA/FONSI did not complete a Section 4(f) analysis although the project runs adjacent to the Franklin Mountains State Park. Plaintiff sought a temporary restraining order on March 27, claiming that because construction is underway, there will be no opportunity to obtain an effective remedy if the project is not halted immediately.

The project in question involves the reconstruction of a segment of Loop 375 located in El Paso, Texas and is referred to as the Trans Mountain Project. The $85 million project would expand a 3.5 mile stretch of the highway from a two-lane highway to a four-lane divided, limited-access highway. Additionally, the project will add four overpasses and several street lights. The project is currently under construction, with clearing and grading activities underway and also drilling for the overpass supports.

In its Motion for Hearing and Preliminary Injunction, plaintiff argues that the issues of habitat fragmentation, impacts on wildlife dispersion and migration, noise impacts on wildlife, noise impacts on the park and the project's cumulative impacts were not evaluated.

Federal Motor Carrier Safety Administration

FMCSA Successfully Seeks Injunction, Consent Decree against East Coast Curbside Passenger Carrier

On January 20, 2012, the Department of Justice, on behalf of FMCSA, filed an action against Double Happyness Travel, Inc., Lun Bing Chen, president, and Linda Chen, manager, in DOT v. Double Happyness (E.D. Pa. No. 12-00304), seeking to enjoin the defendants from engaging in motor carrier operations and from operating any commercial motor vehicle in or affecting interstate commerce.

Double Happyness, aided by the Chens, continued to operate as a passenger carrier despite being ordered to cease operations pursuant to an imminent hazard out-of-service order issued on December 23, 2011. The order also revoked Double Happyness's operating authority registration. The imminent hazard order was issued following a December 22, 2011 compliance review, during which FMCSA found widespread and flagrant violations of the Federal Motor Carrier Safety Regulations, including hours-of-service, driver qualification, drug and alcohol testing, and vehicle maintenance and inspection violations.

On January 25, the U.S. District Court for the Eastern District of Pennsylvania issued a 60-day temporary restraining order enjoining the defendants as requested. On March 21 the court entered a consent decree resolving the case. Under the terms of the consent decree, Double Happyness (1) must comply fully with FMCSA's earlier imminent hazard order placing Double Happyness out of service; (2) is enjoined from (a) operating any commercial motor vehicle in interstate commerce, (b) contracting with third parties to operate commercial motor vehicles until it receives operating authority from FMCSA, and (c) applying for a new USDOT number or FMCSA operating authority under any other name or the name of any other legal entity; and (3) will pay FMCSA $25,000 in compromised civil penalties, which were the subject of a related notice of claim issued by FMCSA for its violations.

FMCSA Successfully Seeks Injunction against Las Vegas Motorcoach Operator

On November 3, 2011, the Department of Justice, on behalf of FMCSA, filed an action against Avatar Tours, LLC, and its owners in LaHood v. Avatar Tours LLC, et al. (D. Nev. No. 11-01768) seeking to enjoin the company from continuing to operate as a for-hire passenger motor carrier. Avatar Tours operates out of Las Vegas, Nevada and is owned by Sean and Brenden Delaney, who are also drivers for the carrier.
FMCSA ordered Avatar Tours to cease operations effective August 28, 2011, based on the carrier's unsatisfactory safety rating and also revoked the carrier's operating authority registration.
Avatar Tours continued to operate as a motor carrier transporting passengers in interstate commerce despite the unsatisfactory safety rating, an FMCSA Order to Cease Operations, and revocation of its operating authority. Specifically, roadside enforcement

officers stopped two Avatar Tour buses transporting interstate passengers on September 27, 2011 and placed them out-of-service.

On December 23, 2011, the district court approved a consent decree permanently enjoining Avatar Tours and the Delaneys from operating any commercial motor vehicle unless and until (1) they take necessary corrective action, (2) FMCSA upgrades Avatar's safety rating and rescinds the out of service order, and (3) the company has obtained valid and active operating authority. Sean and Brenden Delaney were also enjoined from assisting any other person or entity in operating a commercial motor vehicle in violation of FMCSA orders and/or without operating authority, and from applying to FMCSA for a DOT number and/or operating authority in any other name or as any other entity.

FMCSA Successfully Seeks Injunction against Oregon Passenger Carrier

On November 29, 2011, the Department of Justice, on behalf of FMCSA, filed an action against R C Investments, Inc. d/b/a Prestige Limousines in LaHood v. R C Investments, Inc. d/b/a Prestige Limousines, et al. (D. Or. No. 11-1437) seeking to enjoin the company from continuing to operate as a for-hire passenger motor carrier.

FMCSA had ordered R C Investments to cease operations effective August 28, 2011 based on the carrier's unsatisfactory safety rating and had also revoked the carrier's operating authority registration. R C Investments failed to correct its serious and widespread safety management deficiencies and continued to operate as a motor carrier transporting passengers in interstate commerce. On November 10, 2011, FMCSA declared R C Investments an imminent hazard and issued an additional operations out-of-service order. Notwithstanding these actions, R C Investments continued passenger motor carrier operations.

On February 2, 2012, the District Court approved a consent decree for permanent injunction and declaratory relief. R C Investments and its owner were enjoined from operating any commercial motor vehicle in interstate commerce unless and until FMCSA rescinds its imminent hazard and order to cease operations, and defendants have valid and active operating authority. Defendants were also enjoined from assisting any other person or entity in conducting motor carrier operations in violation of FMCSA orders and/or without operating authority, and from applying to FMCSA for a DOT number and/or operating authority in any other name or as any other entity.

Briefs Filed in Challenge to Mexico Long Haul Trucking Pilot Program

On December 21, 2011, the Owner-Operator Independent Drivers Association (OOIDA) and the International Brotherhood of Teamsters joined by Public Citizen filed their opening briefs in OOIDA v. DOT, et al. (D.C. Cir. No. 11-1251.) and Int'l Bhd. of Teamsters, et al. v. DOT., et al. (D.C. Cir. No. 11-72606). Both suits seek review of FMCSA's long-haul trucking pilot program for Mexico-domiciled motor carriers. The Teamsters/Public

Citizen petition for review was transferred to the D.C. Circuit from the Ninth Circuit Court of Appeals on November 4, 2011. The United States filed its response briefs on February 15, 2012. Amicus briefs supporting the United States were filed by the Government of Mexico and the California Agricultural Issues Forum.

OOIDA challenges FMCSA's authority to (1) issue operating authority to Mexican carriers under existing statutory standards, (2) approve commercial motor vehicle operation in the United States by drivers holding Mexican commercial licenses, (3) accept medical certification for drivers that is not issued by medical examiners registered with FMCSA, (4) conduct the pilot program without making equivalence determinations under 49 U.S.C. § 31315(b), (5) exempt Mexican carriers from DOT drug and alcohol testing requirements, and (6) proceed with the pilot program when OOIDA asserts that FMCSA has not determined the equivalent level of safety provided by certain Mexican laws.

Teamsters/Public Citizen argues that FMCSA's decision to proceed with the pilot program is arbitrary and capricious because (1) FMCSA allows Mexican commercial motor vehicles to enter the United States when they do not comply with certification requirements in the Motor Vehicle Safety Act, (2) the program is not designed to produce statistically valid findings, (3) FMCSA's determination that acceptance of Mexican vision standards for commercial drivers will achieve an equivalent level of safety is unsupported by the record and contrary to the Agency's long-standing position, (4) the program improperly grants credit to Mexico-domiciled carriers that participated in the prior demonstration project, and (5) the program does not ensure that U.S. motor carriers will receive reciprocal access to Mexican roadways. Additionally, Teamsters/Public Citizen argue that FMCSA failed to adhere to applicable NEPA requirements during the planning of the pilot program and before the decision to proceed with the program.

In response, the government brief in the OOIDA case argues that (1) OOIDA has not met its burden to establish standing, (2) the pilot program requires Mexico-domiciled carriers to comply with all existing laws and regulations governing their operations outside the commercial zones, plus additional requirements unique to the program, (3) the pilot program's requirements are consistent with all motor carrier safety statutes and regulations, including those controlling commercial driver's licenses, medical testing, and drug specimen collection, and (4) petitioner's remaining arguments lack merit.

In the Teamsters case, the government argues that (1) petitioners had not met their burden to establish standing and (2) that the pilot program's requirements are consistent with all motor carrier safety statutes and regulations, including the Federal Motor Vehicle Safety standards, the vision testing standards, the credit being given to prior demonstration project participants, statistical validity of the pilot program and the comparable authority granted to U.S. carriers by Mexico. The government also argued that FMCSA complied with NEPA when it properly limited its NEPA review, reasonably declined to study the petitioner's proposed alternatives, and conducted a timely NEPA review.

The D.C. Circuit ordered that the cases be argued on the same day before the same panel, but did not set a date for argument or otherwise consolidate the two cases.

Attorney Fees and Mandate Sought in EOBR Litigation

On December 23, 2011, three individual-driver petitioners sought attorney fees under the Equal Access to Justice Act (EAJA) in Owner-Operator Independent Drivers Association, et al. v. FMCSA (7th Cir. No. 10-2340). The motion follows the Seventh Circuit's August 2011 decision vacating FMCSA's 2010 Electronic On-Board Recorder (EOBR) rule due to the agency's failure to adequately address driver harassment pursuant to 49 U.S.C. § 31137(a). See 656 F.3d 580 (7th Cir. 2011).

Petitioners seek attorney fees in the amount of $325,028 and expenses of $9,679, and argue that they were prevailing parties in the underlying litigation, FMCSA's position in the litigation was not substantially justified, the hours expended by petitioners' counsel in the proceeding were reasonable and that petitioners are entitled to an hourly rate above the $125 statutory rate under EAJA due to "an increase in the cost of living" and "a special factor, such as the limited availability of qualified attorneys for the proceedings involved" pursuant to 28 U.S.C. § 2412 (d)(2)(A)(i).

In the Opposition to petitioners' motion filed on February 6, 2012, FMCSA argued that petitioners are ineligible for any fees or expenses because OOIDA, the real party in interest with respect to fees, has a net worth that exceeds the statutory net worth limitations for eligibility under EAJA. FMCSA further argues that fees should not be awarded because the United States' position in the litigation was substantially justified. Alternatively, FMCSA argues that the fees should be reduced because petitioners (a) are ineligible for a fee enhancement based on expertise; (b) incorrectly calculate a cost-of-living increase; (c) may not recover fees for claims unaddressed and unrelated to the claim on which they succeeded; and (d) claim excessive and vague attorney time. On February 13, 2012, petitioners filed a reply brief. The parties are awaiting a ruling from the Seventh Circuit on the fee petition.

On January 19, 2012, petitioners filed a motion seeking to enforce the court's mandate in its August 2011 decision vacating the EOBR final rule by directing FMCSA to cease and desist from conduct that is allegedly inconsistent with that decision. OOIDA seeks to preclude FMCSA "from authorizing, sanctioning or in any way encouraging the use of electronic monitoring devices to increase compliance with hours-of-service regulations, until it has promulgated regulations that ensure that such devices will not be used to harass drivers." The court denied the motion without comment on March 21.

The request for a mandate arose from a November 28, 2011 letter in which FMCSA took the position that carriers may voluntarily use EOBRs as long as they meet the preexisting regulatory requirements for automatic on-board recording devices (AOBRDs) at 49 C.F.R. § 395.15. OOIDA asked the court to set aside the FMCSA determination as an improper *de facto* regulatory amendment issued without notice and comment rulemaking. OOIDA alternatively argued that its motion should be treated as a petition for review of this FMCSA action under the Hobbs Act.

On February 17, 2012, FMCSA filed its opposition arguing that its actions do not contravene the August 2011 decision as the voluntary use of EOBRs is consistent with Federal Motor Carrier Safety Regulations that existed prior to the vacated EOBR rule and were not vacated by the court in its decision. Moreover, FMCSA asserts that the court should dismiss any "petition for review" because the November 28, 2011 letter was not a "final order" reviewable under the Hobbs Act as it did not fix or intend to fix any new legal rights. FMCSA additionally argued that the petitioners lacked standing to challenge the purported "*de facto* amendment" to FMCSA's rules and that OOIDA's petition for review is frivolous.

ATA and Safety Advocates Challenge FMCSA's Final Hours-of-Service Rule

On February 14, 2012, American Trucking Associations, Inc. filed a petition for review in American Trucking Associations, Inc. v. FMCSA (D.C. Cir. No. 12-1092) challenging DOT's final hours-of-service rule published on December 27, 2011. On February 24, 2012, Public Citizen, Advocates for Highway Safety, Truck Safety Coalition, Mildred A. Ball, and Dana E. Logan sought review of the same rule in Public Citizen, et al v. FMCSA (D.C. Cir. 12-1113). On February 27, 2012, the court consolidated the two cases.

The recently-filed petitions follow an earlier challenge to the agency's hours-of-service rules in Public Citizen, et al. v. FMCSA (D.C. Cir. No. 09-1094). Petitioners in that case were Public Citizen, Advocates for Auto and Highway Safety, Truck Safety Coalition, and the International Brotherhood of Teamsters. Intervenors on behalf of the agency included the American Trucking Associations and the Owner Operator Independent Driver Association. The court dismissed this petition for review after the parties filed a joint motion to dismiss upon publication of the December, 2011 final hours-of-service rule as agreed to in a previously-negotiated settlement.

Household Goods Carrier Seeks Review of Mandatory $25,000 Penalty

On July 25, 2011, a household goods motor carrier filed a petition in Dandino, Inc. v. USDOT, et al. (9th Cir. No. 11-72113) seeking a stay and review of a Final Agency Order in an FMCSA civil penalty proceeding. The enforcement case stemmed from an October 2010 Notice of Claim charging Dandino, Inc. with one violation of transporting household goods (HHG) in interstate commerce without operating authority. On June 23, 2011, FMCSA issued a Final Order in the civil penalty case denying Dandino's request for a hearing and finding that the evidence established the violation. FMCSA further found that the proposed $25,000 penalty was the minimum penalty that could be assessed under the statutory provision in 49

U.S.C. § 14901(d)(3), which sets a penalty of "not less than $25,000" for the unauthorized transportation of household goods. The agency ordered Dandino to pay the $25,000 penalty within 30 days.

On October 4, 2011, petitioner filed a motion for an emergency stay of FMCSA's Final Order. The court denied petitioner's stay requests on October 25, 2011. FMCSA's order to cease operations based on petitioner's failure to pay the civil penalty therefore became effective on October 27, 2011. Petitioner's opening brief was filed on December 2, 2011, FMCSA answered on January 19, 2012, and petitioner filed a reply brief on February 6, 2012.

Dandino asserts that, at all times, it was a properly-registered interstate motor carrier of HHG and that the temporary revocation of its operating authority based on lack of insurance did not support a violation of operating without authority and imposition of the minimum $25,000 penalty under section 14901(d)(3). Dandino argues that FMCSA exceeded its authority by defining operating authority, 49 C.F.R. 390.5, in the context of motor carrier registration under 49 U.S.C. §§ 13901 and 14901(d)(3). The United States argues in response that the Court lacks jurisdiction because Dandino failed to file its petition for review within the 30-day jurisdictional time limit prescribed by 49 U.S.C. § 521(b)(9). Additionally, the government argues that FMCSA's determination that petitioner violated the registration requirement of 49 U.S.C. § 14901(d)(3) by transporting property without operating authority under 49 C.F.R. § 392.9a(a) is supported by substantial evidence in the record and is otherwise in accordance with law.

Federal Railroad Administration

Association of American Railroads Seeks Summary Judgment in Constitutional Challenge to FRA's Metrics and Standards for Intercity Passenger Rail Service

On August 19, 2011, the Association of American Railroads (AAR) filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). Association of American Railroads v. DOT, et al. (D.D.C. No. 11-01499). Section 207 of PRIIA charged FRA and Amtrak jointly, in consultation with other parties, with developing new or improving existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. The complaint alleges that PRIIA is unconstitutional because it improperly delegates rulemaking authority to Amtrak. The complaint further alleges that PRIIA is unconstitutional because it violates the due process rights of the freight railroads by allowing Amtrak to use legislative and rulemaking authority to enhance its commercial position at the expense of the freight railroads.

On December 2, 2011, AAR filed a Motion for Summary Judgment. In its Motion, AAR argues that Amtrak is a private entity and that, as a result, it cannot exercise governmental power under the non-delegation and separation-of-powers principles of the Constitution. AAR also contends that Amtrak's involvement in developing the Metrics and Standards for Intercity Passenger Rail Service (Metrics and Standards) violates the Due Process Clause. It asserts that Amtrak cannot exercise governmental authority because it is a private entity that has a financial interest in the content of the Metrics and Standards, owing to a statutory provision that permits Amtrak to receive certain fines levied by the Surface Transportation Board. In response, on February 3, 2012, the government filed an opposition to AAR's Motion. FRA contends that even if Amtrak is a private entity for purposes of AAR's claims, AAR's claims fall short because a private entity can exercise governmental authority if the government retains control, which it did in this case. Moreover, though the Court need not determine whether Amtrak is part of the government for purposes of AAR's claims to decide the case, in fact, Amtrak is a part of the government for these purposes. Lastly, FRA asserts that Amtrak's role in the development of the Metrics and Standards passes the applicable Due Process Clause requirements.

United Transportation Union Seeks Review of FRA's Interpretation of "Designated Terminal" Provision of the Hours of Service Laws

On October 28, 2012, the United Transportation Union (UTU) sought review in the U.S. Court of Appeals for the Ninth Circuit of FRA's application of the "designated terminal" provision of the hours of service laws (HSL) in United Transportation Union v. LaHood et al. (9th Cir. No. 11-73258).

The case arose out of a May 18 letter to FRA in which UTU claimed that the Union Pacific Railroad Company's (UP) establishment of a designated terminal at Big Rock/Wash, California would violate the existing collective bargaining agreement (CBA) with UP and sought an order from FRA to prevent the establishment of the proposed designated terminal. When FRA investigated UTU's claims, UP responded that the proposed designated terminal is to accommodate new service and that the CBA permits such a designated terminal to be established on a trial basis while negotiations continue or the matter is submitted to arbitration. In FRA's September 30 response letter to UTU, the agency agreed with UTU that the HSL require that the location of designated terminals be determined by reference to CBAs applicable to a particular crew assignment, but FRA pointed out that the agency lacks the statutory authority to make that determination. FRA's letter further stated that only a body duly constituted under the Railway Labor Act is authorized to render such a determination.

In its January 12, 2012 opening brief, UTU argued that FRA's conclusion that it did not have the authority to review and interpret CBAs is arbitrary and capricious because (1) FRA has the sole authority to enforce the HSL to ensure that railroads comply with its designated terminal provisions and (2) the duty to interpret CBAs is ministerial. UTU further argued that even if the Ninth Circuit determined that FRA does not have the authority to review CBAs, UP cannot unilaterally create a designated terminal. Furthermore, UP has the burden of proving that an agreement had been reached with UTU regarding the establishment of such a designated terminal.

In its February 14, 2012 response brief, the government argued that FRA was not arbitrary and capricious in concluding that it does not have the statutory authority to interpret CBAs because (1) only a body duly constituted under the Railway Labor Act is authorized to interpret CBAs, (2) FRA has historically maintained this position, and (3) analyzing CBAs is not a ministerial duty, but a substantive one, which falls outside of FRA's authority and expertise. Additionally, the Government argued that the resolution of whether UP unilaterally created a designated terminal ultimately depends on the substance of the CBA and requires an interpretation of the CBA, which is beyond FRA's statutory authority.

Federal Transit Administration

Court Upholds Denver Union Station Record of Decision

On December 30, 2011, the U.S. District Court for the District of Colorado affirmed FTA's Record of Decision (ROD) related to the Denver Union Station (DUS) project in Colorado Rail Passenger Association v. FTA, No. 09-01135, 2011 WL 6934100 (D. Colo. Dec. 30, 2011). Plaintiff's arguments against the Final Environmental Impact Statement (FEIS) and ROD were as follows: the DEIS and FEIS prepared in this case were flawed due to a conflict of interest on the part of a preparer; FTA improperly limited the scope of the FEIS by failing to include connected actions and failing to fully consider the cumulative effect of the project; FTA failed to consider all reasonable alternatives; and FTA failed to comply with DOT Act Section 4(f) requirements. The court ruled in favor of FTA on all counts. The decision regarding the conflict of interest question was based in part on Associations Working for Aurora's Residential Environment (AWARE) v. Colorado Dept. of Transp., 153 F. 3d 1122 (10th Cir. 1998). The AWARE case has set the standard for NEPA conflict of interest questions. Seminal to the determination was the fact that FTA had exercised sufficient oversight throughout the process that any conflict did not impermissibly compromise the NEPA process. Plaintiff argued in its second claim that private development affected the selection of the Build Alternative. The court disagreed. With regard to alternatives, plaintiff claimed that NEPA was violated because FTA failed to consider all reasonable alternatives. The court found that plaintiff failed to cite a specific alternative that should have been considered in more detail. Finally, the court found that plaintiff lacked standing to raise a challenge under Section 4(f) of the DOT Act of the National Historic Preservation Act.

FTA Wins Second Avenue Subway Litigation, Plaintiffs Appeal

On December 1, 2011, the U.S. District Court for the Southern District of New York granted the motions to dismiss of FTA and the New York Metropolitan Transportation Authority (MTA) and denied the request by plaintiffs in Yorkshire Towers Company, L.P. v. USDOT, No. 11-01058, 2011 WL 6003959 (S.D.N.Y. Dec. 1, 2011), to enjoin construction of the ingress and egress for the 86th Street Station on the Second Avenue Subway. FTA is providing $1.3 billion in Section 5309 New Starts funds to help finance the 4.4-mile first operable segment of the Second Avenue Subway, per the Full Funding Grant Agreement with the MTA executed in January 2008. The court rejected plaintiffs' argument that their most recent proposals for elevators across the street from their condominium building, proffered several months after the deadline for suit, constituted "new information" that would require additional environmental study by FTA and MTA, thereby tolling the 180-day statute of limitations at 23 U.S.C. § 139(l)(2). In its decision, the court took pains to differentiate the principles of "equitable tolling" from those of "equitable estoppel," finding neither available to the plaintiffs, albeit the opinion provides a lucid explanation of the circumstances in which the joint FTA/FHWA environmental impact procedures requiring supplemental NEPA study (23 C.F.R. § 771.130) could operate as a *de facto* exception to the 180-day statute of limitations. On February 2, 2012, Yorkshire Towers appealed the district court's ruling to the U.S. Court of Appeals for the Second Circuit (2d Cir. No. 12-477).

Court Orders Preparation of an SEIS to Address Lost Commercial Revenues Attributable to Construction of Light Rail in St. Paul

On January 23, 2012, the U.S. District Court for the District of Minnesota granted a motion by plaintiffs to "enforce" his ruling of several months ago in Saint Paul Branch of the National Association of Colored People, et al. v. USDOT, et al. (D. Minn. No. 10-147), in which the court obliged FTA and the Metropolitan Council to supplement the Environmental Impact Statement (EIS) for the Central Corridor light rail extension from downtown Minneapolis to downtown St. Paul to address the potential loss of revenues to businesses along the alignment during project construction. FTA is providing $474 million in Section 5309 New Starts funds to help finance the eleven-mile light rail extension, per the Full Funding Grant Agreement (FFGA) with Met Council executed in April 2011. Plaintiffs are not satisfied with the betterments that Met Council is currently providing, including a significant grant and loan program to compensate the enterprises that may lose business during project construction. In response to the court's original ruling, FTA published a supplemental Environmental Assessment (EA) and Finding of No Significant Impact. The court indicated that what the defendants had completed was not an EIS as required by his order and reiterated that FTA must complete an EIS. He indicated that he did not evaluate the supplemental EA for sufficiency. Again, however, the court declined to enjoin construction of the Central Corridor Light Rail, finding that the "significant public benefits" in the project outweigh the harms to the named plaintiffs, and expressed a "hope that all parties involved" can reach an amicable resolution of the matter.

New Lawsuit Filed Related to Crenshaw Subway Project in Los Angeles

On February 29, 2012, a new lawsuit was filed against FTA and DOT challenging FTA's Record of Decision for the Crenshaw Subway project in Los Angeles, Crenshaw Subway Coalition v. FTA, et al. (C.D. Cal. No. 12-01672). Previously, on November 18, 2011, FTA removed the first lawsuit by the group of community activists challenging the adequacy of the state and federal environmental studies for the eight-mile light rail extension in the Crenshaw corridor of Los Angles from California Superior Court to the U.S. District Court for the Central District of California. Crenshaw Subway Coalition v. Los Angeles County Metropolitan Transportation Authority (LACMTA), et al., (C.D. Cal. No. 11-9603). Last fall, President Obama identified the Crenshaw extension as one of 14 infrastructure projects of national importance to be "fast-tracked" for approval, in support of job creation in areas of particular economic distress, but the plaintiffs seek a subway alignment for a certain segment of the light rail, rather than the at-grade alignment that has been designed by LACMTA, and they seek the design and construction of an additional station in the Liemert Park Village, which is a community of African-American owned businesses. Subsequent to the filing of the first lawsuit, which focused primarily on California Environmental Quality Act issues, FTA issued its ROD. In exchange for dismissing FTA from the first lawsuit, plaintiffs agreed to file a new complaint challenging FTA's ROD and a motion to consolidate the two cases.

Maritime Administration

Trial, Settlement Talks in Veridyne Contract Litigation

Veridyne, Inc., v. United States (Ct. Cl. Nos. 06-150C & 07-687C) arises from MarAd's decision to terminate its contract with Veridyne, Inc. after a September, 2004 DOT IG report found a five-year contract extension of the contract had been obtained by fraud. Veridyne brought suit for approximately $3 million in unpaid invoices, unbilled indirect costs, and various alleged breach damages.

The government raised fraud as defense and counterclaimed in fraud under common law fraud, the forfeiture statute, the False Claims Act, and the Contract Disputes Act. During seven years of litigation the Government overcame two of Veridyne's original claims totaling more than $743,000 upon motions for summary judgment. An eight-day trial on the remaining invoices and the government's fraud counterclaims ended on January 19, 2012.

After Veridyne rested, the court ruled that Veridyne could not recover any more than $1.16 million of its remaining

$2.2 million in unpaid invoices. This decision was based on the contract's limitation of funds clause. At the end of trial, the court also indicated in discussions with the parties that the evidence presented supported a finding that Veridyne' proposal to obtain the contract extension was a false claim.

Two weeks after the trial ended, the court held a teleconference in which it directed the parties' attention to a recent COFC decision that held that overstated invoices were False Claims Act violations. She indicated that based on this case and similar law, the government's remaining False Claims Act counterclaims on the overstated invoices were likely to be upheld. She further noted that forfeiture of Veridyne's entire claim was also likely under the Contract Disputes Act's fraud provision.

Veridyne has since proposed settlement discussions, which are planned for the first week in April. The Justice Department and MarAd are preparing a settlement position. Veridyne's post-trial brief is due March 20th; the government's post-trial brief is due April 20th; Veridyne's final brief is due May 17th. Absent post-trial settlement, a decision is expected in August.

Pipeline and Hazardous Materials Safety Administration

San Francisco Sues DOT over Alleged Violations of Pipeline Safety Laws

On February 14, 2012, the City and County of San Francisco filed suit against DOT and PHMSA in the U.S. District Court for the Northern District of California alleging that defendants violated, and continue to violate, the Pipeline Safety Laws. Specifically, plaintiffs in City and County of San Francisco v. USDOT (N.D. Cal. No. 12-00711) allege that defendants violated the laws by (1) failing to prescribe minimum safety standards, (2) failing to ensure that certified State authorities, including the California Public Utilities Commission (CPUC), are satisfactorily enforcing compliance with the minimum federal pipeline safety standards, and to enforce such standards itself to the extent that state authorities do not, and (3) disbursing federal funds to the CPUC without having the means of determining whether the CPUC is effectively carrying out its intrastate gas pipeline program. The suit seeks declaratory judgment, injunctive relief, and attorney's fees recoverable under the statute. The pipeline safety laws provide a private right of action in 49 U.S.C. § 60121.

The suit relates to the September 9, 2010 rupture in San Bruno, CA of a 30-inch intrastate natural gas transmission line operated by Pacific Gas & Electric. The ensuing explosion resulted in eight fatalities, multiple injuries, and the destruction of 38 homes. NTSB investigated the accident and issued findings, recommendations, and conclusions in August 2011. The ruptured line is regulated by CPUC under delegated authority from PHMSA through its state certification.

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