



U.S. Department of  
Transportation

# DOT LITIGATION NEWS

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## **Supreme Court Litigation**

### **Supreme Court Rejects EPA's Refusal to Regulate CO<sub>2</sub> Emissions**

On April 2, the Supreme Court in Massachusetts v. EPA, (Supreme Court No. 05-1120), ruled that EPA has the statutory authority to regulate carbon dioxide (CO<sub>2</sub>) and other greenhouse gas (GHG) emissions from automobiles. Massachusetts and other parties had challenged EPA's refusal to adopt regulations under the Clean Air Act (CAA) that would regulate CO<sub>2</sub> emissions.

As a threshold matter, the Supreme Court determined that Massachusetts had standing to seek judicial review of EPA's decision based on its allegations of coastal property loss and other expected injuries from climate change. On the merits, the Court held that CO<sub>2</sub> and other GHGs "fit well within" the CAA's "sweeping definition" of "air pollutant," a term that includes "any physical, chemical . . . substance or matter," and that EPA thus had the authority under the CAA to regulate CO<sub>2</sub> and other GHG vehicle emissions. The Court also rejected the argument that EPA regulation of CO<sub>2</sub> emissions from automobiles under the CAA would displace fuel economy standards issued by the DOT under the Energy Policy and Conservation Act (EPCA), finding a place for such regulation under both statutory schemes.

The Court also rejected EPA's refusal to exercise its discretion to regulate GHGs, noting that EPA offered no "reasoned explanation" for its refusal to decide whether GHGs contribute to climate

change. The Court rejected the policy concerns that were articulated by EPA, such as ongoing voluntary efforts or the potential cost and magnitude of regulations, as irrelevant to the central inquiry under the CAA: whether CO<sub>2</sub> endangers public health or welfare. The Court did not order EPA to regulate GHG emissions at this time, but sent the case back to EPA for further consideration in light of the statutory standard.

Although the Department was not a party to this case, DOT reviewed the briefs and participated in the preparation for oral argument because the Court's decision may have implications for NHTSA's regulation of motor vehicle fuel economy given that the only feasible method of reducing CO<sub>2</sub> emissions from automobiles is by increasing their fuel economy.

The decision also has implications for pending cases related to CO<sub>2</sub> emissions regulation, including the Ninth Circuit case challenging NHTSA light truck fuel economy standards, Center for Biological Diversity v. NHTSA, and a number of cases challenging State attempts to regulate CO<sub>2</sub> emissions.

A recent decision in one of the latter cases, Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie (D. Vt., 2:05-cv-302) relies in part on the Massachusetts decision in holding that EPCA does not preempt state CO<sub>2</sub> emissions regulations if EPA grants a waiver for such regulations under the CAA. (The decision in Green Mountain Chrysler is discussed below.)

The Supreme Court's decision is available at:

<http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>.

The United States' merits brief is available at:

<http://www.usdoj.gov/osg/briefs/2006/3mer/2mer/2005-1120.mer.aa.pdf>

### **United States Supports First Circuit's Holding that Maine Motor Carrier Provisions Are Preempted**

On October 11 the United States filed an amicus brief in Rowe v. New Hampshire Motor Transport Association, (Supreme Court No. 06-457), urging the Court to affirm a decision by the U.S. Court of Appeals for the First Circuit concluding that several provisions of a Maine law restricting the delivery of tobacco products to minors were preempted by a provision of the Federal Aviation Administration Authorization Act of 1994, which prohibits state regulations "related to a price, route, or service" of motor carriers. Argument is scheduled to take place before the Court on November 28.

The First Circuit left standing most of the Maine statutory provisions aimed at deterring the sale of tobacco products to minors, but struck those portions of the Maine law that required carriers to take specific steps to ensure that deliveries were not made to under-age addressees, and that required carriers to change their packaging procedures in order to avoid statutorily-imputed knowledge that a given package contained tobacco products. The First Circuit held that

those provisions impermissibly sought to dictate the services to be offered by commercial motor carriers.

On May 25, at the invitation of the Court, the United States filed a brief arguing at the certiorari stage that the First Circuit's decision was correct and urging the Court not to review the decision, which was then pending before the Court on a certiorari petition. The Court nevertheless granted the pending certiorari petition and agreed to hear the case.

The Maine laws at issue (1) required retailers of tobacco to use only delivery services that required a signature and valid identification from the addressee of packages of tobacco products, and (2) imputed to the carriers knowledge of the contents of packages containing tobacco products when the outside of the packages are properly marked (in accordance with other provisions) to indicate the presence of tobacco products.

The State of Maine had argued unsuccessfully below that the Federal preemption provisions applied only to economic regulations rather than to public health laws like those arguably at issue, and that Maine's laws did not "relate to" a rate, route or service because they either did not reference motor carriers or because they did not have any significant effect on the operations of such carriers. The First Circuit, however, ruled that Federal preemption was not limited to state economic regulation, and that the Maine laws either directly regulated motor carriers or had a forbidden significant effect on their commercial operations.

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

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

### **United States Urges Expansive View of 4-R Act**

On July 30 the United States filed an amicus brief before the United States Supreme Court in CSX Transportation, Inc. v. Georgia State Board of Equalization (Supreme Court No. 06-1287) urging the Court to broadly interpret the scope of the Railroad Revitalization and Regulatory reform Act ("4-R Act"). Our brief argues that the 4-R Act, which generally protects railroads from unreasonable or discriminatory property taxation rates imposed by States, provides a basis for a railroad to challenge in Federal District Court a State's chosen methodology for the valuation of railroad property that is subject to State taxation. The decision below by the U.S. Court of Appeals for the Eleventh Circuit found no right under the Act for a railroad to challenge a State's methodology, holding instead that the 4-R Act only allowed challenges to discriminatory rates imposed on rail carriers.

The proper application of the 4-R Act, which originally was enacted to address and remedy State taxation practices that were unfair and discriminatory to railroads, has been of great importance to DOT and FRA. At our request the United States has previously participated in a number of 4-R Act cases, and has argued what we view to be the proper

expansive application of the remedial terms of that statute.

The issue presented by the present case is a recurring one: whether a Federal district court under section 306 the 4-R Act in determining the "true market value" of railroad property for purposes of analyzing discriminatory taxation practices must accept the valuation method or valuation methodology chosen by the State.

The Federal circuit courts have split on this issue. The Eleventh Circuit in the case now before the Court, and the Fourth Circuit, in Chesapeake Western Ry. v. Frost, 938 F.2d 528 (4th Cir. 1991) have ruled that Section 306 does not permit a rail carrier to challenge State valuation methodologies because the statute does not contain a clear statement authorizing such challenges. By contrast, the Second and Ninth Circuits have held that in a 4-R Act challenge to the reasonableness of State taxation practices railroads may prove the "true market value" of their property by the use of appraisal methods different than those employed by the State tax authorities. See Consolidated Rail Corp. v. Hyde Park, 47 F.3d 473 (2d Cir. 1995), Burlington N. R.R. v. Dep't of Revenue, 23 F.3d 239 (9th Cir. 1994).

The United States' brief urged the Court to uphold the approach followed by the Second and Ninth Circuit. This is consistent as well with the position that the Solicitor General's Office has taken on behalf of the United States before the Supreme Court on two prior occasions: in Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454 (1987), and

Burlington N. R.R. v. Lennen, No. 83-802, cert. denied, 467 U.S. 1230 (1984).

The case is scheduled to be argued on November 5.

The Eleventh Circuit's decision is available at:

<http://www.ca11.uscourts.gov/opinions/ops/200516000.pdf>

The United States' merits brief is available at:

<http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2006-1287.mer.ami.pdf>

## **Departmental Litigation in Other Federal Courts**

### **Ninth and D.C. Circuit Each Reject Emergency Stay Motions Challenging Mexican Truck NAFTA Demonstration Project**

On August 28, 2007, a collection of interest groups, including the Sierra Club, Public Citizen, and the Teamsters, petitioned for review of the Department's Mexican Truck NAFTA Demonstration Project in the U.S. Court of Appeals for the Ninth Circuit and asked the court for an emergency stay of the Project. The next day, DOT filed a brief opposing the stay request, arguing that the petitioners had not met the legal requirements for such emergency relief by showing that proceeding with the Project would cause irreparable harm and that they were likely to prevail in the case. DOT also argued that a stay would harm relations between the United States and Mexico. The court denied the request for an emergency stay on August 31, agreeing with DOT that the petitioners had not met the legal requirements for such emergency relief.

On September 7, the day after FMCSA issued operating authority to the first

Mexican carrier to participate in the project, the Owner Operator Independent Drivers Association (OOIDA) sought judicial review and an emergency stay of the Project in the U.S. Court of Appeals for the District of Columbia Circuit. DOT opposed the stay request on the same grounds asserted against the Ninth Circuit petitioners. DOT also requested that the court transfer OOIDA's case to the Ninth Circuit to be consolidated with the petition previously filed in that court. OOIDA initially opposed this request, but after the D.C. Circuit ordered DOT to refer the transfer matter to the Judicial Panel on Multidistrict Litigation for random selection of either the D.C. or Ninth Circuit as the venue for both cases, OOIDA withdrew its opposition to transfer to the Ninth Circuit and the D.C. Circuit transferred the case to the Ninth Circuit, where the cases will likely be consolidated.

Briefing on the merits of the case, Sierra Club v. DOT, (9th Cir. No. 07-73415), is scheduled for October and November 2007, and oral argument is scheduled for February 2008.

Information concerning the Department's Mexican Truck NAFTA Demonstration Project is available at:

[http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/rule-programs/rule\\_making\\_details.asp?ruleid=203&year=2007&cat=notice](http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/rule-programs/rule_making_details.asp?ruleid=203&year=2007&cat=notice).

### **DC Circuit Vacates Two Hours of Service Provisions, Upholds a Third**

On July 24, the U.S. Court of Appeals for the District of Columbia Circuit struck down two provisions of the Federal Motor Carrier Safety Administration's 2005 final rule on hours of service (HOS) drivers. In Owner Operator Independent Driver Assoc. ("OOIDA") v. FMCSA, (D.C. Cir. Nos. 06-1035), the court held that the agency violated the Administrative Procedure Act by failing to allow comment on the methodology of the crash-risk model that the agency used to justify an increase in the maximum daily and weekly hours that truck drivers could drive and work. The court also held the agency failed to provide an explanation for critical elements of that methodology. The court therefore vacated the portions of the 2005 rule that increased the daily driving limit from 10 to 11 hours and that permit an off-duty period of 34 hours to "restart" drivers' weekly on-duty limits.

The court rejected separate challenges by OOIDA to the agency's revised sleeper berth rule and the non-extendable 14-hour on-duty rule, however. The sleeper berth provision

allows drivers of trucks equipped with sleeper berths to return to driving after 8 consecutive hours in the sleeper berth, provided the drivers take an additional 2-hour period either in the sleeper berth or off duty. The 14-hour on duty rule prohibits drivers from driving after they have been on duty 14 hours, and replaces a pre-2003 rule that allowed drivers to extend a 15-hour duty limit by taking short breaks. The court also held that the agency had met its statutory obligation to "deal with" the issue of loading and unloading.

Following the issuance of the D.C. Circuit's decision, the American Trucking Associations (ATA), which had intervened in the case in support of FMCSA, sought an 8-month stay of the ruling. DOT supported ATA's request and asked for a 12-month stay. Public Citizen, one of the petitioners in the case, opposed the stay request.

In support of a stay, DOT and ATA argued that the court's decision created confusion and uncertainty among the trucking, shipping, and enforcement communities, that it would be impossible for the trucking community to transition from the current HOS rule to the pre-existing rule in the short span of time otherwise necessitated by the court's decision, and that experience under the current rule demonstrated that it had not diminished safety. Additionally, OOIDA, which had challenged the sleeper berth provisions of the rule, sought rehearing or rehearing en banc. On September 28, the court agreed to stay the effect of its decision for 90 days, that is, until December 27, and denied OOIDA's rehearing requests.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200707/06-1035a.pdf>.

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

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

### **Flight Attendants Seek Review of Department's Virgin America Citizenship Decision**

On July 27 the Association of Flight Attendants – CWA (“AFA”), filed a petition seeking review of the Department's final order (Order 2007-5-11), issued May 18, granting Virgin America, Inc. (“Virgin America”) a certificate of public convenience and necessity under 49 U.S.C. § 41102 to engage in interstate scheduled air transportation of persons, property, and mail. Association of Flight Attendants – CWA v. Department of Transportation, (9th Cir. No. 07-72960). Virgin America has moved to intervene in the 9th Circuit proceeding in support of the Department's decision.

On December 27, the Department issued a show cause order proposing to find that Virgin America had failed to establish in its application that it would be owned by and remain under the actual control of U.S. citizens. In response, Virgin America filed a substantially revised application proposing material changes in its financial arrangements, its management, and its corporate

governance. Based on these changes, and upon additional conditions proposed by the Department, on March 20, the Department issued a second show cause order proposing to find that Virgin America had addressed our prior concerns and, as restructured, satisfied all citizenship requirements.

Various domestic carriers that had earlier protested Virgin America's citizenship compliance did not oppose the second show cause order. However, AFA responded to the order, arguing that Virgin America had still failed to satisfy the citizenship requirements, and that its formation advances the commercial interests of a foreign national who also controls foreign airlines with which U.S. airlines compete.

The Department's final order granting Virgin America's request for a certificate dismissed AFA arguments. The Department noted that the arguments were previously raised by other interested parties, considered and addressed comprehensively in the Department's issuance of the tentative fitness determination. Virgin America began commercial flight operations in the U.S. on August 8.

The petitioner's brief was scheduled to be filed in the Ninth Circuit on October 15, and the Department's brief was due November 14. However, on October 5 the Department filed a motion seeking to have the case transferred to the U.S. Court of Appeals for the District of Columbia Circuit. Our motion argues that for purposes of the venue requirements set forth in 49 U.S.C. § 46110 AFA, an unincorporated

association, resides in the District of Columbia, where it has its principal place of business. Since section 46110 requires challenges to the Department's orders to be filed either in the D.C. Circuit or where the petitioner resides (also in the District of Columbia) the motion argues that there is no venue for AFA to pursue its arguments in the Ninth Circuit.

We are awaiting the Ninth Circuit's decision on the transfer motion and, pursuant to Ninth Circuit rules, all briefing is stayed in the interim.

The Department's Final Decision granting Virgin America's operating certificate is available at:

[http://dmses.dot.gov/docimages/pdf102/483515\\_web.pdf](http://dmses.dot.gov/docimages/pdf102/483515_web.pdf)

### **Air Carriers Seek Review of DOT's Decisions in LAX Rates and Charges Case**

On June 15 seven U.S. airlines filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit seeking review of the Department's final decision issued on the same date adjudicating two complaints that challenged the reasonableness of increased terminal charges at Los Angeles International Airport ("LAX"). On June 20, the Los Angeles World Airports ("LAWA"), which operates LAX, filed a cross petition for review. Subsequently, on August 9, twenty-one foreign air carriers that had participated in the administrative proceeding before the Department, filed their own petition

challenging both the final decision and DOT's refund order.

An earlier petition for review filed by the same seven U.S. airlines challenged the scope of Department's instituting order, issued March 16, which had set the two complaints for a hearing before an Administrative Law Judge, was dismissed on September 26 pursuant to a motion filed by the Department arguing that the instituting order was not a final order for purposes of triggering judicial review.

The Department's final decision found that the new and increased maintenance and operations fees imposed by LAWA are reasonable and not unjustly discriminatory. However, the Department also concluded that LAWA's imposition of a market-based methodology for terminal fees at one domestic terminal was not reasonably applied because it was not based on an objective determination of market value. The decision also concluded that LAWA's new fee methodology to capture common area (e.g., lobby and restroom) costs at two domestic terminals was reasonable because it was cost-based, but was nevertheless unjustly discriminatory because it was unreasonably applied to some airlines at the airport but not to others.

The Final Decision also held that domestic carriers may challenge fees imposed upon them as holdover tenants after their leases have expired. Consistent with the D.C. Circuit's prior decision in Port Authority of New York and New Jersey v. DOT, (D.C. Cir. No. 05-1122), the Department concluded that the expedited rates and charges



procedures enacted by Congress were not available to foreign air carriers.

The Department's subsequent refund order, issued on July 13, implemented the final decision and directed LAWA to refund the complaining domestic carriers a total of \$7.7 million in fees paid under protest while the case was pending.

All pending petitions have been consolidated for briefing and oral argument. The consolidated case is Alaska Airlines, Inc. v. DOT, (D.C. Cir. No. 07-1142). No date has been set for briefing or oral argument.

The Department's final order in the proceeding is available at:

[http://dmses.dot.gov/docimages/pdf101/473065\\_web.pdf](http://dmses.dot.gov/docimages/pdf101/473065_web.pdf)

### **Ninth Circuit Hears Arguments in Challenge to EPA Clean Water Act Exception for Vessel Discharges**

On August 14, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in Northwest Environmental Advocates v. EPA, (9th Cir., No. 06-17187), an appeal of the decision of the U.S. District Court for the Northern District of California vacating EPA's longstanding regulatory exclusion of ballast water and other discharges incidental to the normal operation of a vessel from the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting requirements. The court ordered EPA to

issue permitting regulations by September 2008.

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

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

We are now awaiting decision by the Ninth Circuit.

## Vermont Court Finds No Preemption of State Greenhouse Gas Emissions Standards

On September 12, the U.S. District Court for the District of Vermont in Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, (D. Vt. Nos. 05-302, 05-304), held that the Energy Policy and Conservation Act (EPCA), under which NHTSA promulgates Corporate Average Fuel Economy (CAFE) standards, does not preempt Vermont's greenhouse gas emissions (GHG) standards for automobiles. The holding is inconsistent with the position DOT has taken on EPCA preemption of such state standards in NHTSA's 2005 light truck CAFE standard rulemaking and in litigation over that rulemaking in Center for Biological Diversity v. NHTSA, discussed above.

Green Mountain Chrysler was brought by automobile manufacturers and dealers who sought declaratory and injunctive relief setting aside regulations adopted by Vermont that establish standards for emissions of CO<sub>2</sub> and three other GHGs from new cars and light trucks. The standards are identical to those adopted by California in 2004, and since adopted by 11 other states, including Vermont. Under Section 209 of the Clean Air Act (CAA), California may develop its own vehicle emissions standards that apply in lieu of EPA CAA standards if EPA grants a waiver of Federal preemption under the CAA. Under Section 177 of the CAA, other states may adopt California motor vehicle emissions standards so long as "such standards are identical to the California standards for which a waiver has been granted for

such model year." The standards will not go into effect unless EPA grants California's pending waiver request.

Citing the nearly one-to-one ratio between a motor vehicle's fuel economy and its CO<sub>2</sub> tailpipe emissions, the manufacturers asserted in Green Mountain Chrysler that the Vermont standards are de facto fuel economy standards and are expressly preempted by a provision in EPCA preempting state laws and regulations that are "related to fuel economy standards." 49 U.S.C. § 32919(a). They further argued that the Vermont standards are impliedly preempted because the level of the CAFE standards reflects the careful balancing of the competing statutory goals set forth in EPCA, and the adoption and enforcement of State standards more stringent than the federal ones would upset that balancing.

The court rejected these arguments. The Court concluded that preemption principles had no application in this case because under EPCA, California emission standards become, in essence, Federal standards when California obtains a waiver of CAA preemption for them. And, the court found, even if this were not the case, Vermont's GHG emissions standards are sufficiently unrelated to fuel economy standards as not to be expressly preempted.

Finally, the court held that there is no implied preemption for two reasons. First, the court concluded that Congress did not intend EPCA's CAFE standards to occupy the field of fuel economy exclusively because NHTSA must coordinate with other federal agencies, like EPA. Second, citing the Supreme

Court's decision in Massachusetts v. EPA, discussed above, the court concluded that there is no inherent conflict between the Vermont GHG standards and the CAFE program, noting that DOT setting "mileage standards in no way licenses EPA to shirk its environmental responsibilities . . . The two obligations may overlap, but there is no reason to think the two agencies cannot administer their obligations and yet avoid inconsistency."

Plaintiffs have filed a notice of appeal of the district court's decision in the U.S. Court of Appeals for the Second Circuit. The United States is considering whether to file an amicus brief supporting their position.

The district court's opinion is available at:

<http://www.vtd.uscourts.gov/Cases/05cv302.html>.

### **Supplemental Briefing Addresses Impact of 9/11 Legislation in D.C. HazMat Litigation**

On August 20 the United States filed a supplemental brief in CSX Corp., Inc. v. Fenty, (D.D.C. No. 05-338 (EGS)), addressing the impact of the recent enactment of the "Implementing the Recommendations of the 9/11 Commission Act of 2007" (P.L. 110-53) on the pending litigation. The Act requires DOT to issue a Final Rule based on an earlier PHMSA Notice of Proposed Rulemaking, and provides that the Final Rule include, among other things, the requirement that rail carriers

select routes for the transportation of security-sensitive materials based on risk assessments and alternative route analyses that the Final Rule is to require rail carriers to conduct. Our supplemental brief argues that the 2007 9/11 Act does not directly affect the outcome of the pending motions for summary judgment, but is nonetheless further evidence that the Department's approach to addressing en route security is the proper one.

Cross-motions for summary judgment addressing whether the underlying District of Columbia ordinance, which purports to restrict any through rail or highway movements of certain hazardous materials within 2.2 miles of the United States Capitol is preempted by Federal law, are still pending before the court. The motions were argued on January 23.

CSX Transportation ("CSX") originally brought this case against the District, arguing that a temporary ordinance enacted by D.C. was preempted under the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"), and that it violated the Commerce Clause of the Constitution. The United States filed Statements of Interest supporting CSX. The Sierra Club intervened in the case in support of the District.

The district court denied CSX's motion for a preliminary injunction, but in May 2005, the U.S. Court of Appeals for the District of Columbia Circuit, in CSX Transportation, Inc. v. Williams, (D.C. Cir. No. 05-5131), reversed the district court and ordered it to enjoin enforcement of the emergency measure.

The D.C. Circuit's decision rested solely on the FRSA, administered by the FRA, although a concurring opinion suggested that the ordinance is likely preempted as well under the HMTA, administered by PHMSA. Since the D.C. Circuit's holding related only to the requested injunction, the matter was remanded to the district court.

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

We are awaiting the district court's decision on the cross summary judgment motions.

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

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

### **New York and Florida Courts Grapple with Constitutionality of Vicarious Liability Provision for Auto Leasing Companies**

Last year in Graham v. Dunkley, (Sup. Ct., Queens County N.Y., No. 6123/2006), Judge Thomas Plolizzi held unconstitutional provisions of SAFETEA-LU set forth at 49 U.S.C. § 30106. Those provisions bar a State

such as New York from imposing vicarious tort liability on anyone leasing or renting motor vehicles to individual drivers in circumstances where there is an accident and where the person providing the leased vehicle is not itself negligent.

The Graham court held that the provisions are contrary to New York statutory and common law and are unconstitutional under the Tenth Amendment.

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

The Graham court ultimately denied the reargument request and the United States intervened on appeal and filed a brief again supporting the Constitutionality of the statute. The appeal is still pending, however in the wake of the trial court's decision five additional Constitutional challenges have been filed in New York State courts (Gonzales-Rosado v. Ryan, Stewart v. Hertz Vehicles, LLC, Radicchi v. Land Rover, Alberts v. Cook and Farrell v. Guardian Equipment Rental, Inc.), two cases have been filed in U.S. district courts in New York (Petukhova v. Leizeron (E.D.N.Y., No. 06-5874) and Green v. Toyota, (E.D.N.Y. No. 07-cv-0524)), and four more cases have been filed in Florida U.S. district courts. (Vanguard Car

Rental USA, Inc. v. Huchon, (S.D. Fla. No. 06-cv-10082), Vanguard Car Rental USA, Inc. v. Drouin, (S.D. Fla. No. 06-cv-10083), Szorosy v. Spence, (S.D. Fla. No. 07-cv-80529) and Dupuis v. Vanguard Car Rental USA, Inc., (M. D. Fla. No. 06-cv-1360).

Thus far two trial courts have upheld the Constitutionality of the provision, see Garcia v. Vanguard Car Rental USA, Inc., No. 5:06-cv-220, 2007 WL 686625 (M.D. Fla. March 5, 2007), and Seymour v. Penske Truck Leasing Co., No. 4:07cv015, slip op. at 3 (S.D. Ga. July 30, 2007). In addition to the original Graham decision, one court has ruled against the constitutionality of the provision. See Vanguard Car Rental USA, Inc. v. Huchon, (S.D. Fla. No. 01-10082-civ-Moore/Garbe, slip op. of September 14, 2007.)

### **Eighth Circuit Seeks Views of the United States in Constitutional Challenge to New Rail Preemption Provisions**

The U.S. Court of Appeals for the Eighth Circuit has asked for the United States' views concerning arguments set forth in a September 17 brief filed by the Canadian Pacific Railway in Lundeen v. Canadian Pacific Railway Co., (8th Cir. No. 04-03220). There the railroad has challenged the constitutionality of newly-amended provisions of the Federal Railroad Safety Act addressing circumstances in which tort cases may be brought urging a violation of a duty of care imposed pursuant to Federal regulations. On October 26 the United States filed an amicus brief arguing that the provisions are Constitutional and do

not offend separation of powers principles.

The provision at issue is section 1528 of the Implementing the Recommendations of the 9/11 Act of 2007, which amended the preemption provisions of the Federal Railroad Safety Act to clarify that even in circumstances where the Department has preempted State rail safety jurisdiction a private action seeking damages may nonetheless be brought if a railroad is alleged to have violated the Federal standard. The provision was enacted in response to decisions in the district court and the U.S. Court of Appeals for the Eighth Circuit holding that actions seeking damages related to a 2002 rail derailment in Minot, North Dakota were preempted even if it could be shown that the railroad violated Federal regulations and thereby caused the derailment that released hazardous gasses.

The litigation concerning the Minot derailment is ongoing, and Canadian Pacific's supplemental brief argues that since the legislation seeks to reverse prior decisions of Article III Federal district courts the new provision is unconstitutional as an ex post facto law and a violation of separation of powers, due process and equal protection provisions.

### **Florida District Court Holds Forum Non Conveniens Dismissals Are Available in Cases Brought under the Montreal Convention**

On September 27 the U.S. District Court for the Southern District of Florida in In

re: West Caribbean Airways, S.A. (S.D. Fla. No. 06-22748-civ-Ungaro) held that the Montreal Convention, to which the United States is a signatory, allows a district court to determine whether to dismiss an international aviation negligence action in circumstances where it is argued that the United States is not the most convenient forum in which to bring suit. The case involves an air crash in which foreign passengers were killed and where the foreign aircraft crashed en route in a flight from Panama to Martinique. The only ties to the United States in the case are the fact that an organization that was involved in securing the aircraft used for the foreign operations is located within the State of Florida.

The court held that a dismissal, under the doctrine of forum non conveniens (FNC) is available under the Montreal Convention. The Florida court had asked for the views of the United States and we previously filed a brief arguing that dismissals based on the inconvenience of the forum are proper under the Convention.

The courts are split on this issue. With the exception of the Ninth Circuit, most federal courts under both the Montreal Convention and the previously-applicable Warsaw Convention have applied the doctrine of forum non conveniens to determine whether the action should proceed in the United States or be transferred to the courts of another country participating in the Convention. See, e.g., Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1162

(5th Cir. 1987) (applying FNC but denying motion to dismiss); In re Air Crash Off Long Island New York, on July 17, 1996, 65 F. Supp.2d 207, 214 (S.D.N.Y. 1999) (denying motion to dismiss after applying FNC criteria); In re Disaster at Riyadh Airport Saudi Arabia on Aug. 19, 1980, 540 F. Supp. 1141 (D.C. Cir. 1982) (granting FNC motion to dismiss).

In contrast to the many federal courts applying FNC in Warsaw Convention cases, the United States Court of Appeals for the Ninth Circuit, in Hosaka v. United Airlines, 305 F.3d 989 (9th Cir. 2002), cert. denied, 537 U.S. 1227 (2003), has held that the doctrine is incompatible with the intent of the contracting parties to the Warsaw Convention and therefore is inapplicable in actions brought under it. That court specifically declined to address whether the same result would obtain under the Montreal Convention

The district court's September 27 decision, consistent with arguments advanced in our brief, concludes that an FNC motion is procedural in nature and that the Montreal Convention specifically contemplates that the forum in which a suit has been brought is free to apply its own procedural rules.

The court's decision reached only the applicability of FNC motions under the Montreal Convention. It has not as yet decided whether the case before it should, in fact, be dismissed on that basis, nor did the United States take a position on that issue.

## **Recent Litigation News from DOT Modal Administrations**

### **Federal Aviation Administration**

#### **Seventh Circuit Upholds Chicago O'Hare Modernization Program**

On September 13, the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the U.S. District Court for the Northern District of Illinois in St. John's United Church of Christ v. City of Chicago, (7th Cir. Nos. 05-4418), relating to Chicago's proposed modernization of O'Hare Airport.

Two churches on behalf of two cemeteries (St. Johannes and Rest Haven) and municipalities brought action in May 2003 in the U.S. District Court for the Northern District of Illinois against the Chicago, Illinois and the FAA challenging the proposed expansion of O'Hare Airport before FAA had completed its environmental Record of Decision. FAA issued the Record of Decision for O'Hare Modernization in September 2005. Subsequently, Judge Coar issued a ruling denying Plaintiffs' motion for leave to file a second amended complaint and for preliminary injunction (See St. John's United Church of Christ v. City of Chicago, 401 F.Supp.2d 887 (N.D. Ill. Nov 16, 2005)).

Petitioners filed three separate appeals from the decisions, which were consolidated. Petitioners challenge to the FAA Record of Decision in the D.C. Circuit Court in September 2005 was denied. (See Village of Bensenville v.

Federal Aviation Admin., 457 F.3d 52 (D.C. Cir. Aug 04, 2006) (No. 05-1383)

Regarding claims against the FAA, the N.D. Ill. District Court found that it lacked jurisdiction to review Municipal Plaintiffs' and Rest Haven's claims because these claims fell within the exclusive jurisdiction of the Courts of Appeals under 49 U.S.C. § 46110. Plaintiffs argued that the district court had authority to consider claims against FAA to correct the underlying record and that the Religious Freedom Restoration Act (RFRA) entitled them to an Article III proceeding in which to resolve disputed issues of fact. The Court held that "review of an agency action in the court of appeals surely qualifies as an Article III judicial proceeding".

In addition, the Court noted that Plaintiffs made these same arguments before the Court of Appeals for the D.C. Circuit, which rejected them. See Bensenville, 457 F.3d at 72-73. The Seventh Circuit panel also noted that "even if we did not think this issue was under the court of appeals' exclusive jurisdiction, we do not think it is wise to allow either Municipal Plaintiffs or Rest Haven to litigate the same issues, either concurrently or seriatim, in separate federal courts."

Regarding claims against Chicago, St. John's argued that St. Johannes Cemetery (which will be relocated pursuant to the FAA-approved O'Hare Airport Layout Plan) was entitled to the protection of the Illinois Religious Freedom Restoration Act (ILRFRA). ILRFRA was amended pursuant to the Illinois O'Hare Modernization Act

(OMA). The Court noted that the OMA was enacted, in part, to ensure that “legal impediments to the completion of the [O’Hare] project be eliminated.” OMA § 5(b). The Court held that the amendment to ILRFRA did not violate St. John’s rights under the Free Exercise Clause.

In addition, the Court also indicated that the pleadings support that “the O’Hare Modernization Program (OMP) represents the least restrictive alternative”. A dissenting opinion stated that the amendments to ILRFRA in the OMA violated the Free Exercise clause and must be subject to strict scrutiny.

St. John’s also argued that relocation of St. Johannes Cemetery violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) because the OMA is a “zoning type law since the cemetery is to be designated “airport property”. The Court disagreed and held that “eminent domain” is not “zoning” and rejected the argument that “the City’s plan to condemn St. Johannes Cemetery under the OMA is an act of zoning”.

Separately, these Plaintiffs are also currently challenging two FAA decisions in the D.C. Circuit relating to issuance of a \$29.3 million grant for the construction of the first new runway and the FAA’s approval of Chicago’s application for authorization to impose and use Passenger Facility Charges (\$1.2 billion) for land acquisition and runway construction for the OMP.

The Seventh Circuit’s decision is available at:

<http://www.ca7.uscourts.gov/tmp/7D0R RNA3.pdf>

The appellate oral argument is also available and can be planed back at:

<http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=05-4418&submit=showdkt&yr=05&num=4418>

### **Approval of \$1.2 Billion Passenger Facility and \$29 Million Grant Funding for the O’Hare Modernization Program Challenged in DC Circuit**

On September 12, opponents of the O’Hare Modernization Program (OMP) filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the FAA’s September 4, 2007, final agency decision (FAD) authorizing the City of Chicago to collect and use \$1,290,509,174 in passenger facility charges (PFCs) for one land acquisition and three runway construction projects that are part of the O’Hare Modernization Program (OMP) at O’Hare International Airport (ORD).

At the City’s request, a prior decision approving collection of PFCs at ORD at \$3.00 for use at Gary/Chicago International Airport for railroad relocation and runway extension, was consolidated with the decision on this application. This was done to achieve a uniform \$4.50 collection level. To avoid confusion for passengers and administrative burden, a uniform rate is preferable where, as here, FAA finds that the combined projects as a whole



qualify for collection at the higher rate. United Church of Christ v. FAA (D.C. Cir. No. 07-1362). This certified index to the administrative record is due to be filed on November 5.

This is the fourth challenge to the OMP before the DC Circuit. The OMP is the City of Chicago's major undertaking aimed at addressing overcrowded airspace and delays at O'Hare, which often create delays throughout the National Airspace System.

The third challenge was the petition filed in the D.C. Circuit on November 26, by mostly the same petitioners challenging the award to the City of Chicago of a \$29 million Airport Improvement Program (AIP) grant for site preparation for future Runway 9L-27R at O'Hare International Airport. United Church of Christ v. FAA, No. 06-1386 (D.C. Cir). Petitioners also filed a motion for summary reversal or expedited review which was denied on January 24.

Petitioners argue in their initial brief that the issuance of the grant violates the Religious Freedom Restoration Act (RFRA) because it will, in their view, lead to the destruction of a cemetery, and that the agency failed to meet statutory requirements for grant issuance. In our responsive brief, filed July 20, the United States argues that the Court lacks jurisdiction because third parties may not challenge AIP grants, and petitioners lack standing because they lack redressability. Alternatively the United States argues that the RFRA issue was resolved by the Court in a previous case, and that the FAA met the requirements for issuing a grant under 49 U.S.C. §

47101 et seq. Petitioners filed their Reply brief on October 11.

The grant at issue in the third challenge was the first grant issued under the Letter of Intent (LOI) to provide \$337,200,000 in AIP grants over the next 15 years to support the OM. The LOI itself was the subject of the second challenge to the OMP before the D.C. Circuit by mostly the same petitioners.

Earlier litigation concerning this same project is discussed in the immediately preceding entry.

### **D.C. Circuit Rejects Repair Station Contractors' Challenge to FAA Drug Testing Program**

In a July 17 decision a divided D.C. Circuit largely affirmed the FAA's rule clarifying certain aspects of the agency's drug testing rules. In March 2006 the Aeronautical Repair Station Association, Inc. ("ARSA"), a trade association of aviation maintenance and repairs firms, filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit in Aeronautical Repair Station Association v. FAA, (D.C. Cir. No. 06-1091), challenging the FAA's final rule.

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

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

On behalf of the “newly-covered” maintenance facilities ARSA challenged the rule and sought an emergency stay in court, contending that the agency had exceeded its statutory authority, failed to comply with the Regulatory Flexibility Act (RFA), violated the Administrative Procedure Act, and promulgated a rule that was unconstitutionally vague. The stay request was denied.

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

The United States’ brief, filed last January, countered that Congress had clearly provided the FAA with authority to extend testing to all those performing safety-sensitive functions, that the RFA did not apply because the agency did not directly regulate the facilities brought within the rule (and that even then the FAA had substantially complied with the statute), that all pertinent comments were addressed and the APA was otherwise fully satisfied, and that substantial precedent upheld drug testing of safety-sensitive personnel in the aviation industry against constitutional challenges similar to those at issue.

The only issue on which the D.C. Circuit disagreed with the United States’ position related to the Regulatory Flexibility Act. On that issue the Court held that the RFA applied and had not been substantially complied with; at the same time the Court ruled that the public interest in aviation safety warranted permitting the FAA rule to remain in effect while the agency conducted the required analysis of the rule’s effects on small business.

Judge Sentelle in dissent was of the view that the FAA did not have authority to extend its drug testing rules.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200707/06-1091a.pdf>

**D.C. Circuit Finds New FAA  
Runway Utilization  
Interpretation to be Final  
Agency Action Triggering NEPA**

On May 11, the U.S. Court of Appeals for the District of Columbia Circuit in City of Dania Beach, Florida v. FAA, (D.C. Cir. No. 05-1328) ruled that an FAA letter providing a new interpretation of the Fort Lauderdale-Hollywood International Airport's noise compatibility program was a final reviewable order of the FAA, and that, as a result, the agency was required to undertake a NEPA environmental analysis before issuing the interpretation.

The FAA's letter changed the runway use procedures at Fort Lauderdale-Hollywood International Airport in light of increasing congestion at the air field. The City of Dania Beach argued before the D.C. Circuit that the new procedures would route more jet aircraft onto two previously restricted runways, thus increasing noise, soot, and exhaust fumes over residential areas. They contended that the FAA made this change without engaging in the required environmental review process.

The United States argued that the letter was not reviewable because it merely explained the existing procedures and did not actually change the manner in which the runways would be used.

The D.C. Circuit disagreed. The FAA's letter, in the court's view, provided new "marching orders" about how air traffic will be managed at the airport. As a result, the court concluded that the FAA letter was final action requiring review

under section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), and an environmental assessment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.

The court's determination that NEPA and section 4(f) environmental constraints attach in the context of a relatively informal agency letter allowing re-allocation of runways during certain peak hours in order to alleviate airport congestion is potentially problematic, particularly if applied in the context of other informal agency correspondence relating to other transportation projects.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200705/05-1328a.pdf>

**Las Vegas Seeks Ninth Circuit  
Review of New Right Turn  
Procedure at McCarran Airport**

The City of Las Vegas and other local petitioners have challenged the Finding of No Significant Impact/Record of Decision ("FONSI/ROD") for the modification of the Four-Corner Post Plan ("4CP") for McCarran International Airport in Las Vegas, Nevada in City of Las Vegas v. DOT, (9th Cir. No. 07-70121). Petitioners challenge the adequacy of the environmental assessment.

In October 2001, the FAA issued a FONSI/ROD for the original 4CP. The plan was developed to address growing airspace and air traffic control

inefficiencies caused by increases in air traffic in the Las Vegas Terminal Radar Approach Control (TRACON) airspace. Prior to implementation of 4CP, FAA permitted departures from Runway 25, which went west for four miles then turned right to head east. After 4CP, that procedure was rarely used (but remained a published procedure), and 95% of aircraft departing Runway 25 made a left-hand turn. Eastbound departures from Runway 25 converged with eastbound departures from Runway 19 at a single waypoint.

In order to meet separation and spacing requirements, air traffic controllers had to provide sufficient time between departures to avoid simultaneous convergence on the same waypoint. A significant rise in traffic demand combined with the constraint of routing aircraft over the same waypoint caused departure delays at the airport.

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

The City of Las Vegas then filed a petition for review of the FONSI/ROD on January 10. The petition alleges that FAA failed to comply with the National Environmental Policy Act (NEPA) and the Clean Air Act (CAA). On January 15, the City requested FAA to stay the effectiveness of the FONSI/ROD which

the FAA denied. The petitioners then filed an emergency motion for a stay pending review of agency order prior to the implementation of the flight procedure. The Ninth Circuit U.S. Court of Appeals denied the emergency motion on March 19. After publishing the flight procedure and notifying pilots and airlines, the FAA instituted the flight procedure on March 20.

On June 8, the petitioners filed their brief on the merits arguing, among other things, the inadequacy of the analysis based on a flight procedure waiver, general conformity, noise, description of the no action alternative and the project description. They also filed several motions for judicial notice and supplementation of the administrative record which the FAA opposed on August 9. Petitioners filed their reply and additional motions on September 12, and FAA filed its oppositions to the additional motions on September 24. Petitioners have requested an oral argument, but the Court has not acted on that request as of this writing.

### **District Court Concludes That Federal Law Preempts Tennessee's Regulation of Avionics in Air Ambulances**

In November of 2006 the United States filed a Statement of Interest in Air Evac EMS, Inc. v. Robinson, (M.D. Tenn., No. 3:06-0239), arguing that Tennessee regulations purporting to require the installation of specific avionics equipment on FAA-certificated air ambulances are preempted by Federal law. On May 7 the district court issued an opinion agreeing with that argument

and holding the Tennessee regulations invalid.

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

Air Evac EMS, Inc. is an air ambulance provider within the State; although at least some of its helicopter fleet does not have the equipment prescribed by the Tennessee Board, the carrier is fully certified by the FAA to operate under visual flight rule (VFR) conditions. When the State Board cited Air Evac EMS for failing to comply with State equipment requirements, the carrier argued in administrative proceedings that the Tennessee regulations are preempted by Federal law. The Board ruled against Air Evac, which then commenced this lawsuit raising the same claim. The complaint sought declaratory and injunctive relief and Air Evac moved for summary judgment.

The United States' statement of interest argued that the FAA has exclusive authority over the field of aviation safety, and that there is thus no room for State regulation even though the avionics equipment required by the Board was among that accepted by the FAA for use in aircraft. Our brief also

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

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

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

In its brief, filed in January, the State Board asserted that the FAA had not regulated air ambulances or equipment in a comprehensive manner and that there was no field preemption. The Board also argued that various FAA notices and advisory circulars on the subject of operations in unforeseen IFR conditions were consistent with the State's regulations mandating specific IFR avionics, and thus there was no conflict preemption. Lastly, the State agency denied that equipment requirements "related to" air carrier services within the meaning of the statute.

After deciding that it would not abstain from exercising jurisdiction (as urged by the State agency), the court in its May 7 decision outlined the comprehensive nature of FAA regulation of aviation safety and hewed to Sixth Circuit precedent holding that the Federal government had occupied this field. The State did not appeal.

The court's decision is reported at: 486 F.Supp.2d 713 (M.D. Tenn. 2007).

**New York/New  
Jersey/Philadelphia  
Metropolitan Area Airspace  
Redesign  
Faces Seven Legal Challenges**

On September 5, the FAA issued a Record of Decision (ROD) for the much anticipated New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign. This project updates the airspace in the NY/NJ/PHL Metropolitan area as a means to reduce delays and congestion. Once fully implemented, the FAA will be able to more efficiently move aircraft in and around the airspace and thus reduce fuel burn and pollution and reduce delays by up to 20% compared to taking no action. The redesigned airspace includes changes to procedures at LaGuardia, JFK, Philadelphia, Newark Liberty International and Teterboro Airports. It also includes changes to the airspace and the way air traffic controllers move planes.

The project will cause some individuals to experience increased noise but will reduce the overall number of individuals exposed to 45 DNL dB or higher noise

levels. Approximately 310 individuals residing near Newark Airport will experience a reduction in significant noise levels under the first stage of implementation. Long term, by 2011, over 3,000 individuals residing around Newark will experience such a reduction. Approximately 550 individuals in the vicinity of PHL will experience significant noise increases in the short term. However these increases will be eliminated by 2011 when the project is fully implemented.

Seven lawsuits have been filed against the Airspace Redesign Project. The nature and status of each case is summarized below.

District Court Litigation

On September 4, 2007, the City of Elizabeth, NJ filed a complaint in the U.S. District Court for the District of New Jersey. City of Elizabeth v. FAA, (D. N.J. No. 07-4240). The complaint alleges that the final EIS violates the National Environmental Policy Act and the Administrative Procedure Act. On October 16 the FAA filed a motion to dismiss the complaint for lack of jurisdiction. On October 23 plaintiffs opposed this motion and filed a cross motion for a preliminary injunction under 49 USC §46110.

Circuit Court Litigation

On September 13, the County of Rockland, NY filed a Petition for Review of the ROD in the U.S. Court of Appeals for the D.C. Circuit. County of Rockland v. FAA, (D.C. Cir. No. 07-1361). Based on comments made during the EIS process, Rockland County is

likely to raise issues relating to the adequacy of the EIS, including the analysis of cumulative impacts, impacts on quality of life, environmental justice, and parks, historic properties, wildlife and waterfowl refuges. The FAA is currently compiling and reviewing an extensive administrative record spanning a period of over ten years. The index to the Administrative Record is due to be filed on November 1. The FAA has requested an extension of time until December 3.

On September 14, the County of Delaware, PA and various officials and individuals filed a Petition for Review of the ROD in the U.S. Court of Appeals for the Third Circuit. County of Delaware v. DOT, (3d Cir. No. 07-3738). On September 18, the same group of individuals requested that the FAA stay implementation of the Airspace Redesign project pending the outcome of litigation. The application for administrative stay contended that the project will increase capacity and raises issues about the adequacy of the analysis of air quality, noise, and cumulative impacts and impacts on the John Heinz National Wildlife Refuge. On October 5 we denied the County's request to stay implementation of the ARD, finding that the County had filed to meet the requirements of a stay.

On September 26, Delaware County and the City of Las Vegas filed a related case in the D.C. Circuit challenging the inclusion of air traffic activities in FAA's List of Actions Presumed to Conform under Section 176(c) of the Clean Air Act, County of Delaware v DOT, (D.C. Cir. No. 07-1385).

On October 5, 2007, the Board of Chosen Freeholders of the County of Bergen filed a Petition for Review. Board of Chosen Freeholders of the County of Bergen, New Jersey, 07-3959 (3d Cir.). The Third Circuit has consolidated this case with the County of Delaware, PA action. On October 16, the DOJ filed a motion to transfer these cases to the DC Circuit, relying upon 28 USC §2112. Based on the comments raised by the Board of Chosen Freeholders during the EIS process, we expect that they will advocate selection of the ocean routing alternative and raise issues concerning the adequacy of the noise and air quality analysis.

On October 10, the New Jersey Citizens Against Aircraft Noise (NJCAAN) and the Borough of Emerson each filed separate Petitions for Review in the Third Circuit. NJCAAN v. FAA, (3d Cir. No. 07-3983) and The Borough of Emerson v. FAA, (3d Cir. No. 07-3984). Nine other municipalities, all located in Bergen County, N.J., joined the petition filed by the Borough of Emerson. The same attorney represents petitioners in both cases. On October 18 DOJ sent a letter to the 3rd Circuit Clerk of Court asking the Clerk to add the NJCAAN and the Borough of Emerson cases to the pending motion to transfer.

Finally, on October 23, the seventh lawsuit challenging airspace redesign was filed by Union County, NJ in the Third Circuit. Union County v. FAA, (3d Cir. No. 07-4120). We intend to also include this case in the pending motion to transfer all cases to the D.C. Circuit.

### **Oklahoma District Court Upholds Authority of FAA to Protect Federal Grant Funds From Judgment Creditors**

In a case of first impression, a Federal District Court in the Northern District of Oklahoma held in Mineta v. County of Delaware, 2006 W.L. 2711559 (N.D. Okla. 2006) that FAA has the constitutional authority under 49 U.S.C. §47111(f) to protect federal property, not only as to airport sponsors, but also judgment creditors.

In this case, a judgment creditor attempted to satisfy a judgment against the airport sponsor through a court ordered sale of the airport. While the sale was being challenged in court by the FAA, the airport sponsor conveyed the airport purchased with federal funds without FAA approval to another party in settlement of another lawsuit. In an action by the FAA under 49 U.S.C. §47111(f) to recoup the Federal investment, defendants argued that it would exceed congressional authority under the Spending Clause to restrict judgment creditors from attaching property purchased with federal funds. The court disagreed, stating that Defendant's interpretation of section 47111(f) would strip the FAA of its legitimate authority to ensure that Federal funds provided to local airport authorities are properly spent. The court held that "the FAA is clearly within its constitutional authority to protect federal property from judgment creditors. In addition, the court found that "the FAA has the authority to seek equitable relief to protect federal interests in airport property purchased with a federal grant."

Therefore, the court did not limit FAA to contract remedies only. The court said, "The FAA has authority to claim airport property and sell that property" in the event of a breach of the grant agreement. The court granted the government's motion for summary judgment, finding that the airport sponsors were liable for repayment of the federal grant funds for violations of the grant agreements

### **Challenge to FAA Advisory Circular on Airport Lighting Argued Before DC Circuit**

In Safe Extensions, Inc. v. FAA, (D.C. Cir. No. 06-1412), Safe Extensions, Inc. filed a petition seeking review of the of Advisory Circular 150/5345-42F, Specification For Airport Light Bases, Transformer Housings, Junction Boxes, and Accessories, which the FAA issued on October 17, 2006. The Circular contains specifications and tests applicable to certain equipment used by airports that receive federal grants.

Safe Extensions, which manufactures light bases that house lights that illuminate airport runways and taxiways, challenges the circular as arbitrary and capricious agency action violative of the APA. Essentially, it argues that the circular, which revised a prior agency issuance on the same subject, does not promote air safety and places the products it makes at an unfair competitive disadvantage.

The United States has argued that the court lacks jurisdiction over the petition for three reasons. First, the Circular is neither an order as defined under the FAA Act's provision authorizing



petitions for review, nor is the circular an agency action reviewable under the APA. Second, Petitioner lacks prudential standing to challenge the circular. Third, the circular is not reviewable because the matters it addresses are committed to agency discretion by law.

The United States alternatively argued that, on the merits, the circular meets the standards imposed upon agency action under the APA. We have argued that the FAA acted reasonably in imposing different technical requirements and tests on two competing light base technologies, especially given that one had a long history of reliability in the field that the other lacked. The agency's explanation for imposing this standard provided all the detail that the APA requires.

Oral argument was held on October 19, 2007. The panel (Henderson, Tatel, Kavanaugh) questioned the Federal Government concerning the argument that an advisory circular is not a final order under 49 U.S.C. § 46110(a). The panel questioned both parties on the timeliness of the petition for review and asked the parties to file affidavits on the latter issue within 5 days concerning purported statements by FAA employees.

### **Challenge to Florida Airport Relocation Project Briefed and Awaiting Oral Argument in Second Circuit**

In Natural Resources Defense Council, v. FAA, (2d Cir., No. 06-5267-ag), petitioners challenge FAA's approval of the relocation of the Panama City Bay

County International Airport (PFN) from its current location in Panama City, Florida, to a new location in western Bay County in the panhandle of Florida.

FAA issued the Record of Decision approving the relocation of PFN on September 15, 2006. The new airport will include a primary air carrier runway 8,400 feet in length and a crosswind runway 5,000 feet in length, airside and landside facilities to support the runway operations (such as taxiways, aprons, a commercial passenger terminal, access roads and parking, fuel storage facilities, and Air Traffic Control Tower, etc.), general aviation and fixed base operator facilities and navigational aids.

The airport sponsor identified a need for the relocation of the airport due to physical constraints at the existing airport which limit future growth, including residential neighborhoods and other non-compatible land uses to the north, east and south, and the presence of natural features, including the sensitive Goose Bayou, to the west, which Florida regulators have made clear will not be approved for use for airport expansion.

Although FAA forecasts indicated the need for additional runway length, the FAA's purpose and need in the EIS indicated a need for a primary runway of only 6,800 feet. Due to the difference between the airport sponsor's request for a runway length of 8,400 feet and FAA's planning which indicated a need for 6,800 feet, FAA analyzed a total of six action alternatives, three at the existing site and three at the relocation site. A combination of 6,800 foot and 8,400 foot alternatives were considered at each site.

Opponents challenge the FAA's EIS in the areas of alternatives analysis, disclosure of environmental impacts to wetlands, biotic communities, threatened and endangered species, and cumulative and induced impacts. They also allege that FAA has acted arbitrarily and capriciously in concluding that, consistent with 49 U.S.C. §47106(c)(1)(B), no possible and prudent alternative to the project existed and that every reasonable step had been taken to minimize the adverse effect. In particular, Petitioners point to the alternatives studied for expansion of the existing site, which would largely avoid wetland impacts, which are significant under all relocation alternatives.

Petitioners filed their opening brief on March 26,. On May 21, the FAA filed a responsive brief. All briefing was completed on the merits of the case on June 18, with the petitioners' filing of their reply brief. At this time the FAA is waiting for the Second Circuit to set a date for oral argument.

Following the completion of briefing, the airport authority and the St. Joe Company (which is donating land to the airport authority for construction of the relocated airport) began negotiations with NRDC in an effort to resolve the litigation through a stipulated settlement agreement, but these efforts likely will be unsuccessful.

## **Second Challenge to Approval of Realistic Bomber Training Initiative Filed in Fifth Circuit**

On August 6, Davis Mountains Trans-Pecos Heritage Association (DMTPHA) filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit in Davis Mountains Trans-Pecos Heritage Association v. FAA (5th Cir. No. 07-60595). Petitioners seek review of FAA's Record of Decision, dated April 11, relating to the Realistic Bomber Training Initiative (RBTI). The ROD announced the agency's decision not to change its previous decision described in the Non-Rulemaking Decision Document of December 11, 2001 for Lancer Military Operating Area and modified Military Training Route IR-178.

On December 19, 1997, the National Environmental Policy Act (NEPA) process for RBTI began with publication of the Notice of Intent (NOI) in the Federal Register. The Draft Environmental Impact Statement (EIS) was published in March 1999 (Volume 64, Number 53). The Final EIS, published and made available to the public in January 2000, identified the preferred alternative as Alternative B.

In March 2000, Air Force Deputy Chief of Staff for Air and Space Operations issued its initial Record of Decision (ROD) ((Air Force 2000b)), choosing Alternative B for implementation. The Air Force then submitted to the FAA its formal airspace proposal to establish the Lancer Military Operating Area (MOA) in April 2000. After conducting its own independent evaluation, the FAA

adopted the Final EIS and gave its final approval for the RBTI airspace on December 11, 2001, with an effective date of February 21, 2002.

After issuance of the Air Force ROD (Air Force 2000b), the Air Force and FAA were sued by parties alleging that the Air Force and FAA failed to comply with NEPA. In March 2003, the U.S. District Court, Northern District of Texas, Lubbock Division, granted summary judgment in favor of the United States.

The plaintiffs appealed to the U.S. Court of Appeals for the Fifth Circuit. One of the plaintiffs also filed a separate petition in the Fifth Circuit alleging that the FAA had failed to comply with NEPA in approving the RBTI airspace. In a single opinion covering both the Air Force and FAA cases, the Court of Appeals (October 2004) upheld the adequacy of the Final EIS in most respects, but remanded the action to the Air Force and FAA to prepare a Supplemental EIS addressing the impact of wake vortices on ground structures and complying with the Council on Environmental Quality and Air Force requirements for addressing FAA comments.

In response to the Court of Appeals opinion, the Air Force, with the FAA as a cooperating agency, published a NOI in the Federal Register on January 12, 2005 to prepare a Supplemental EIS. After completing the NEPA process for the SEIS, the Air Force issued its ROD on March 20.

The administrative record was filed on October 17. No briefing schedule has been established.

### **Air Carriers Challenge Municipality's Fee for Use of Airport Runways within Town Boundaries**

In Township of Tinicum v. Frontier Airlines, (E.D. Pa., No. 2:07-CV-3409) a number of airlines are challenging the legality of fees imposed by the township of Tinicum, Pennsylvania related to aircraft use of Philadelphia International Airport (PHL). Although not a party to this case, the Department is very interested for several reasons in the issues presented.

Approximately 60 percent of PHL lies within the boundaries of a municipality immediately adjacent to Philadelphia, the Township of Tinicum. In July the Township passed an ordinance levying a "privilege fee" on air carriers taking off and landing on PHL runways, which are within Tinicum's borders. The township initiated the case in State court seeking to collect the charges from Frontier Airlines when the carrier failed to pay. The case was then removed to Federal court and virtually all the commercial carriers serving PHL are now parties.

The air carriers have moved to dismiss the action arguing that the ordinance is preempted by Federal law. They contend that the Anti-Head Tax Act (49 U.S.C. 40116), which both authorizes and limits various taxes and fees that can be imposed on air carriers, does not allow the Tinicum charges to be imposed. Specifically, the carriers assert that the statute broadly limits financial obligations unless a fee comes within the terms of a particular exception, and that

the two possible relevant exceptions do not apply:

The first possible exception allows only airport operators to impose landing fees, and, as the air carriers point out, Tincum does not operate PHL. The second possible exception authorizes charges exclusively applicable to businesses at an airport so long as the proceeds are wholly used for airport or aviation purposes, but the Township would not or does not so use the proceeds of its fee.

The carriers also argue that the provision permitting taxation of aircraft that land or take off within a political subdivision of a state, section 40116(c), read in conjunction with the remainder of the statute, is a limiting provision that does not support Tincum's charge. Finally, the air carriers argue that the Airline Deregulation Act's ban against state or local regulations that "relate to" airline rates, routes, and services preempts the privilege fee.

While the air carriers have sought a judicial determination that the fees are preempted, alternatively they have asked the court to stay the litigation pending administrative action by DOT. In this regard in their court filings they have offered to file a complaint with DOT asking the agency to declare the Tincum fee in violation of Federal law, and now have filed such a complaint.

The Township has countered that the plain language of 40116(c) authorizes its fee, that there is no support for the carriers' contention that the provision is a limitation on such fees rather than a source of authority for them, that

Tincum does indeed provide services and expend resources in support of PHL, that landing fees can be imposed by other than airport proprietors, and that the privilege fee is too remote to "relate to" airline rates, routes, or services within the meaning of the ADA. Finally, Tincum opposes the alternative of deferring to DOT as a delay tactic because no administrative complaint has been filed, and because the judiciary is competent to decide the appropriate construction of the statute.

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

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

Clark County, through the Clark County Department of Aviation, operates airports in Nevada. The FAA and the Bureau of Land Management have begun work on an environmental impact statement (EIS) for a new supplemental commercial service airport in the

Ivanpah Valley, Nevada. Clark County would be the operator of that airport if construction of a new airport is the action selected by the decision makers after completion of the EIS.

Clark County raises a variety of issues in the preliminary statement accompanying its petition for review. These include whether the FAA exceeded its authority or otherwise erred by relying on an interpretation of its pre-1987 regulations (codified at Part 77 of Title 14 of the Code of Federal Regulations) that is allegedly inconsistent with 1987 amendments to the enabling statute, now codified at 49 U.S.C. 44718; whether the FAA exceeded its authority or otherwise erred by failing to consider whether the almost 400-foot-high proposed wind turbines may interfere with radar facilities that are necessary for aircraft landing and taking off from existing and planned Clark County airports; and whether the FAA otherwise exceeded its authority or otherwise erred by arguably failing to comply with the controlling statute, or with established procedures in regulations and/or guidelines.

Briefing has been repeatedly deferred pending settlement discussions

### **District Court Dismisses Action against FAA Alleging Controller Error in Waukegan General Aviation Crash**

On September 28, the United States District Court for the Northern District of Illinois in Collins v. United States, (N.D. Ill., No. 03-C-2958) ruled in favor of the United States on suits brought under the Federal Tort Claims

Act, 28 U.S.C. § 1346(b), 2671-80 (“FTCA”) that arose out of a February 8, 2000 midair collision between two general aviation aircraft on approach to Waukegan Regional Airport near Chicago, Illinois.

On a clear winter day, private pilot Bob Collins, a Chicago radio personality, and his experienced pilot-passenger, were flying on the final approach to the Waukegan airport when they rear-ended a student pilot and sole occupant of another aircraft that was also flying on the same final approach flight path. After the midair collision, both aircraft crashed, killing all three occupants. Mr. Collins’ aircraft crashed into a cancer treatment center, also causing \$32 million in property damage and injuring several people in the building.

The Waukegan airport has an air traffic control tower that is maintained and owned by the FAA but staffed by air traffic controllers employed by a contractor under the FAA contract tower program. While the FAA mandates that the controllers employed by its contractors must be certified and follow procedures approved by the FAA, the agency does not directly supervise the controllers. The contractor is required to supervise the controllers, set their work schedules, and evaluate the controller’s performance.

On the date of the accident, the controllers at Waukegan tower were operating in a visual environment. In other words, they performed their duties by looking out the window of the tower. Waukegan, like many low-level activity towers across the nation, did not have a radar system in the tower cab to assist

the controllers in “seeing” aircraft. At this type of air traffic control tower, controllers are responsible for sequencing airborne aircraft that are inbound for landing and separating aircraft on the taxiways and runways. They are not responsible for separating aircraft in the air. That responsibility falls upon the pilots, who must see and avoid each other while flying near the airport.

In the lawsuit, the pilots’ estates and the cancer treatment facility alleged that the FAA was to blame for the accident, arguing that (1) the FAA should be held vicariously liable for the negligence of its contractor’s controller; and/or (2) the FAA should have installed an inexpensive tower radar display, referred to as “TARDIS,” in the tower cab, which would have enabled the tower controller to see that Mr. Collins was coming within an unsafe proximity to the student pilot. Plaintiffs argued that the accident could have been prevented if the controller had warned the pilots of their unsafe proximity to each other.

The government filed a motion to dismiss based on lack of jurisdiction. In the motion, the government argued that it could not be held vicariously liable for the negligence of its contractors. The FTCA waives sovereign immunity and allows recovery only for damages caused by the negligence of Federal employees. Under the exception, often referred to as “the independent contractor exception,” it is well settled that a contractor is not considered an “employee of the government,” unless the government controls the physical conduct of the employee. 28 U.S.C. § 2671; Orleans v. United States, 425 U.S.

807, 814 (1976); Logue v. United States, 412 U.S. 521, 527 (1973).

Concerning the installation of the tower radar system, the United States argued that court lacked jurisdiction to hear such a claim, because the FTCA shields the government from claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency. . . whether or not the discretion be abused.” 28 U.S.C. § 2680(a). The government argued that this provision, referred to as the “discretionary function exception,” precluded the court from finding liability, because the decision to or not to install a piece of radar equipment was one grounded in public policy considerations, and thus a “discretionary function” of the government.

The district court, initially unconvinced by the government’s arguments, denied the motion to dismiss, and the case went to trial in February 2007. The controller and the controller’s employer, also named defendants, settled on the eve of trial.

The judge’s rulings following trial were a complete victory for the United States. On plaintiff’s claim that the government should be held vicariously liable for the negligence of the contract tower controller, the Court followed the Seventh Circuit’s decision in Alinsky v. United States, 415 F.3d 644 (2005) where it was held that the United States could not be liable for the negligence of an air traffic controller that was employed by an independent contractor. The Court also applied the well-accepted discretionary function test and concluded

that the FAA's decision not to equip Waukegan with a tower radar display was a judgment or choice grounded in public policy considerations thus precluding the court from having jurisdiction over the claim.

## **Federal Highway Administration**

### **Oral Arguments Take Place in Challenge to ROD Approving Maryland Inter-County Connector**

Two oral arguments were held on cross-motions for summary judgment in the Maryland Inter-County Connector ("ICC") case, Audubon Naturalist Society v. DOT, (D. Md. No. 8:06-cv-03386-RWT). One argument dealing with NEPA allegations was held on October 1, and the second argument addressing the Clean Air Act allegations in the case was held on October 29. The court has indicated that it will rule expeditiously, most likely sometime in November. In the interim, under an agreement reached among the parties, initial work on the ICC has already commenced.

Two lawsuits, now consolidated, were filed last December, challenging the Department's Record of Decision ("ROD") approving the construction of the ICC, an EO 13274 Priority Project. The \$2.4 billion ICC project is a controlled access multi modal electronic toll highway with eight interchanges, extending approximately 18 miles from I-370/I-270 near the Shady Grove

Metrorail Station to U.S. 1 between Beltsville and Laurel, Maryland.

The ICC follows a route laid out and/or reserved in local plans and legislation, which created the parks it traverses. It represents a significant departure from prior rejected iterations of the project and the process by which it was adopted. A comprehensive \$370 million package of mitigation and stewardship activities is a condition of funding the project. The study completed in anticipation of the project was conducted with unprecedented public involvement including an interactive website. Dozens of neighborhood meetings and public hearings were held and over 7000 letters and comments were received from the public.

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

### **Utah District Court Upholds FHWA Decisions in Litigation Challenging Two Highway Projects**

On September 21, the U.S. District Court for the District of Utah in Jones v. Peters, (D. Utah No. 2:06-CV-00084BSJ) denied the plaintiffs' request for summary judgment, and entered judgment in favor of FHWA. This was an unusual case challenging two separate

highway projects in metropolitan Salt Lake City, Utah in one legal filing.

In January 2006, two individuals living near the proposed projects filed a single complaint alleging violations for both projects under the National Environmental Policy Act (NEPA) and Section 4(f) of the Department of Transportation Act of 1966. The complaint was brought against both FHWA and the Utah Department of Transportation (UDOT).

The first challenged project, 11400 South, is an east-west road project that would connect to I-15 on the east, add a new interchange with Bangerter Highway on the west, and close a gap in the road by placing a new bridge over the Jordan River. An Environmental Impact Statement (EIS) and Section 4(f) Evaluation were prepared for the 11400 South Project.

The second project, 10400 South, is a smaller 2.2-mile widening project and an EA/FONSI and Section 4(f) Evaluation were prepared for that project.

The district court upheld FHWA's decisions on all counts in a 55 page decision. In upholding FHWA's decisions the court noted that its role was not to second guess the agency's decisions and deferred to the agency's reliance on its experts. The court specifically held that "the arduous public process undertaken with reference to these projects over a period of several years took the requisite 'hard look' required of these agencies in assessing and evaluation impacts and alternatives, and in reviewing and approving transportation projects after receiving

informed and interested public comment, as reflected in the extensive Administrative Record. They have indeed 'let the public know that the agency's decisionmaking process includes environmental concerns.'"

The court dismissed plaintiffs' novel claim that FHWA should have prepared a "regional EIS," stating that "the FHWA did not abuse its discretion in deciding to issue a separate environmental [document] for each individual project rather than a single, more expansive regional EIS embracing most or all of the projects generated from the . . . regional transportation plan. Absent a breach of a mandatory legal duty to issue a regional EIS, plaintiffs have established no sufficient legal basis for this court to enter an order requiring the agencies to prepare one."

It is likely that the decision will be appealed to the U.S. Court of Appeals for the Tenth Circuit.

### **District Court Upholds Most of FHWA Decision on West Virginia Public/Private Project**

On September 5, the District Court, in Affiliated Construction Trades v. FHWA, CV No. : 2-041344 (S.D. W. Va., No. 02-041344) upheld most of FHWA's decision to enter into a negotiated contract without engaging in a competitive bidding process in the context of a novel West Virginia highway project. The only aspect of the agency's decision that the court did not agree with was FHWA's argument that that the project was exempt from Federal



wage requirements set forth in the Davis-Bacon Act.

The case involves a joint development initiative or innovative partnership concept between the West Virginia Department of Transportation and private industry for construction of a portion of the King Coal Highway, a 93-mile portion of the overall I-73/74 Corridor that runs through southern West Virginia.

In the Red Jacket Project portion of the corridor, traditional construction costs would have reached approximately \$300 million, but under the public private partnership costs are expected to be approximately \$155 million. This is being accomplished because the West Virginia Department of Transportation has allowed slight shifts in the alignment of a 12-mile portion of the highway in order to allow private industry to remove coal and then utilize excess mining material in a constructive fashion to shape future highway fills.

Plaintiffs challenged the project seeking declaratory judgment and injunctive relief. They alleged that FHWA supported or approved an agreement between the West Virginia Department of Transportation Division of Highways and a private contracting company and that this allegedly violated Federal competitive requirements and was contrary to wage provisions set forth in the "Davis-Bacon" Act.

Having agreed only with plaintiffs' Davis-Bacon argument, the court ordered the plaintiff to submit a memorandum with respect to the

appropriate declaratory relief, which FHWA responded to in mid-October.

### **New NEPA Lawsuit Challenges FHWA Approval of I-10 Reconfiguration in Riverside, California**

On July 10, Flying J, Inc., one of the largest operators of truck stops in the United States, served FHWA with a copy of a complaint, Flying J, Inc. v. Peters, (C.D. Ca No. 5:07-cv-01017-VAP-OP). The complaint challenges FHWA's approval of a project to reconfigure the Interstate 10 interchange at Ramon Road/Bob Hope Drive in Riverside County, California.

Flying J alleges that FHWA violated the National Environmental Policy Act (NEPA) by: (1) failing to prepare an environmental impact statement for the project (FHWA issued a Finding of No Significant Impact instead); (2) failing properly to define the scope of the project; (3) failing to analyze fully the direct, indirect, and cumulative impacts of the project; (4) failing to adequately analyze economic impacts associated with the Project; and (5) improperly deferring analysis of environmental impacts, or improperly segmenting or piecemealing environmental analysis of different components of the project. The complaint also alleges the Federal defendants have taken Flying J's property without just compensation in violation of the U.S. Constitution. Flying J seeks declaratory and injunctive relief, compensatory damages, and attorneys' fees.

The U.S. Attorney's Office has removed the case to the U.S. District Court for the Central District of California, pursuant to 28 USC 1442(a). We are currently working on a motion to dismiss based on the principle of derivative jurisdiction. Under that principle in circumstances where a State court lacks subject-matter jurisdiction the Federal court acquires none, even if it would have had jurisdiction had the matter been brought there in the first place. The U.S. Attorney's Office has advised that such a motion is viable in cases where removal is based on § 1442(a).

### **New Hampshire FHWA Decision Overturned on NEPA Grounds**

On August 30, the U.S. District Court for the District of New Hampshire in Conservation Law Foundation v FHWA, (D.N.H., No. 06-45-PB), overturned an FHWA decision premised on an Environmental Impact Statement (EIS) that the court concluded failed to adequately consider the effects of predicted population growth on traffic congestion.

This Priority Project, at issue in the case, involves the decision to widen a 19.8-mile segment of I-93 from the Massachusetts/New Hampshire state line northward through the towns of Salem, Windham, Derry and Londonderry, and ending at the I-93/I-293 interchange in the City of Manchester.

After the publication of both a draft EIS and the final EIS, the plaintiff and others raised questions about the incorporation of projections by an analytic panel (the Delphi panel) concerning blended

average population growth projection. The plaintiffs argued that the projections did not account for population growth that would be induced by the widened roadway. From this they argued that the expected level of service to be provided by the widened roadway would be diminished because of this deficiency.

In response to those comments, the FEIS and the ROD offered several explanations, notably that "the projections generated by the Delphi study are already recognized and accounted for at some level within the Statewide Transportation Model and as a result, there is some overlap between the Statewide Transportation Model and the Delphi study projections, and the Delphi projections are not truly additive."

After the publication of the FEIS, but before the ROD was issued, the New Hampshire Department of Transportation conducted a traffic sensitivity analysis ("TSA") replacing the 1994 population projections with the Delphi panel's blended average population growth projection. The TSA was conducted at the direction of FHWA to further address the concerns raised repeatedly during the public NEPA process. The TSA was not published for public review and comment prior to the issuance of the ROD. The ROD stated that the FEIS' overall conclusion, that operations and safety will be improved compared to the existing condition, was not altered by the traffic sensitivity analysis. In addition, the ROD explained that even considering the information in the TSA, the EIS conclusions supported the widening of the road remained valid.

The Court disagreed, however, and found that in using the statewide model to project traffic for 2020, FHWA and New Hampshire had relied on an “outdated” population growth forecast rather than on more recent growth that were approximately ten percent higher and that projected congested conditions. The court concluded that while “NEPA does not require an agency to update its population forecasts whenever new forecasts become available,” the agency “ordinarily may not rely on outdated forecasts when it sets out to prepare an EIS even though more recent forecasts from the agency’s own experts are readily available.”

The court rejected the arguments of FHWA and New Hampshire that the blended Delphi average was too speculative to be used in the 2020 traffic projections. The Court explained that the governments’ “willingness to consider the effects of induced population growth in other areas such as land use, water quality, and wildlife, where the effects of population growth are less well understood, belies [their] contention that the traffic-generating effects of induced population changes are too speculative to be considered in this case. Thus, having convened the Delphi Panel for the purpose of forecasting induced population growth, and having decided to rely upon the panel’s induced growth forecast for certain purposes, Defendants were not free, at least without substantial additional explanation, to treat induced population growth as a non-existent factor in their traffic projections.” The Court also noted that “defendants should have performed the TSA, disclosed its results in the FEIS, and explained why

the analysis did not affect their decision to proceed with the Four Lane Alternative.”

The Court concluded that failure to do so was error, and that the error was not harmless. The Court ultimately ordered an SEIS that “specifically considers how the Delphi Panel’s population forecasts affect Defendants’ analysis of both the effectiveness of the Selected Alternative as a traffic congestion reduction measure and the indirect effects of the additional population predicted by those forecasts on secondary road traffic and air quality issues.”

### **Sixth Circuit Hears Arguments in Cleveland’s Challenge to Decision Upholding Competition Requirements**

On April 18, oral argument was held in the U.S. Court of Appeals for the Sixth Circuit in City of Cleveland v. Ohio, (6th Cir. No. 06-3611), the City of Cleveland’s appeal of the decision of the District Court for the Southern District of Ohio that upheld the FHWA regulations concerning competitive bidding.

This case arose after the FHWA informed the Ohio Department of Transportation (“ODOT”) that it was withdrawing funds for the Kinsman Road project in Cleveland, Ohio, because Cleveland’s local hiring preference violated the provisions of 23 C.F.R. 635.117(b), which forbids a State from imposing requirements that operate to discriminate against the employment of labor from another State. Cleveland’s ordinance requires that 20%

of construction worker hours on City projects be performed by residents of the City.

FHWA has consistently taken the position that the FHWA regulation applies to preferences that discriminate against employment within a State as well. It has been FHWA's position that local labor preferences also violate the requirements for full and open competition contained in 23 U.S.C. § 112 and 23 C.F.R. 635.104.

The complaint originally filed by the City of Cleveland challenged the State's disapproval of Cleveland's local labor preferences as applied to the Kinsman project in Cleveland. The State of Ohio and ODOT then filed a third party complaint in State court to join FHWA. The complaint was later removed to Federal court.

On January 13 the district court granted FHWA's motion for summary judgment. The court held that FHWA's decision to withdraw Federal funds from the Kinsman Road project is subject to review under the Administrative Procedure Act. Applying this standard, the court held that FHWA did not act arbitrarily or capriciously in determining that the local hiring requirement violated the competitive bidding requirements of 23 U.S.C. § 112.

The district court's decision confirmed a long-standing interpretation by FHWA. It is also significant because interest in local hiring preferences appears to be increasing as local governments are examining ways to increase employment among their residents. This interest may increase further in light of Section 1920

of SAFETEA-LU, which contains a "sense of Congress" provision encouraging local workforce investment.

FHWA is now awaiting the decision of the Sixth Circuit.

## **Federal Railroad Administration**

### **Washington D.C. Law Firm Withdraws Loan Application FOIA Suit**

In Manatt, Phelps & Phillips, LLP v. DOT, (D.D.C. No. 07-369 (RCL)), a law firm in D.C. had challenged the pace of release of documents in response to its Freedom of Information Act request seeking records related to FRA's loans to, and loan applications from, the Dakota, Minnesota and Eastern Railroad under the FRA's Railroad Rehabilitation and Improvement Financing Program. The suit was filed in April 2007.

FRA made a series of record disclosures over the ensuing months (working with the railroad through the Executive Order 12,600 submitter consultation process) in accordance with a schedule agreed to by the parties. Thereafter the plaintiff voluntarily withdrew the case on August 27.

## **National Highway Traffic Safety Administration**

### **D.C. Circuit Hears Standing Arguments in Tire Pressure Monitoring Challenge**

On June 15, the Court of Appeals for the District of Columbia Circuit issued a decision in the tire pressure monitoring (TPMS) challenge brought by several public interest groups. Public Citizen v. Mineta, (D.C. Cir. No. 05-1188). The decision did not address the merits of either of the challenged NHTSA actions, but rather dealt solely with a jurisdictional issue and with problems concerning petitioners' standing to bring the action. The Court requested additional briefing on the standing issue and heard another round of oral argument solely on that issue on October 11.

The case originated when Public Citizen, several tire manufacturers, and the tire manufacturer trade association challenged a final NHTSA rule requiring car manufacturers to install TPMSs in new cars that will warn drivers when one or more of a car's tires is under-inflated. NHTSA adopted that rule pursuant to section 13 of the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 ("TREAD Act"), P.L. No. 106-414. That statute directed NHTSA to establish a rule requiring car manufacturers to install TPMSs on all vehicles. The petitioners argue that NHTSA's rule is inadequate because it does not require TPMSs for replacement tires and because the

warning will not, in their view, appear soon enough.

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

As noted, the June 15 decision did not reach the merits of the dispute. First, the Court held that a challenge to the denial of a petition for a TPMS rulemaking is to be heard in the district court, rather than a court of appeals. Accordingly, the court dismissed the petition for review of the denial of the petition for rulemaking for lack of jurisdiction.

Second, as to the challenge to the TPMS rule itself, the Court held that the tire company petitioners, which were not regulated by the rule, lacked standing to challenge it. The court therefore dismissed their petitions. The court ordered more briefing on the standing of petitioner Public Citizen and issued an order with a briefing schedule. Standing had been raised by intervenor Alliance of Automobile Manufacturers but not by DOT/NHTSA.

The order required Public Citizen to show whether NHTSA's TPMS Standard created a substantial increase in the risk of death, physical injury, or

property loss and whether the ultimate risk of harm to which Public Citizen's members are exposed, including the increase allegedly due to NHTSA's action, is "substantial" and sufficient "to take a suit out of the category of the hypothetical." Public Citizen also was required to demonstrate causation by showing a substantial probability that automakers would not adopt safety standards more stringent than NHTSA specified, and that consumers on their own would not check their tires so as to prevent injuries to others and consumers would pay attention to the warning lights.

We are now awaiting the court's supplemental decision addressing the standing issues argued on October 11.

The court's June 15 initial decision is available at"

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200706/05-1188a.pdf>

### **D.C. Circuit Hears Arguments on Challenge to NHTSA's Confidentiality Rule on Early Warning Data**

On October 15, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in Rubber Manufacturers Ass'n v. Peters, (D.C. Cir. No. 06-5304), an appeal by the Rubber Manufacturers Association from a decision by the U.S. District Court for the District of Columbia which held that early warning data submitted by vehicle and tire manufacturers were not covered by a categorical exemption under exemption 3 of the Freedom of Information Act.

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

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

Public Citizen had contended that FOIA does not allow an agency to issue class determinations by rule, that NHTSA had failed to give adequate notice of its intention to establish a class determination that much of the data will be deemed confidential, and that the record did not support NHTSA's decision. The district court granted Public Citizen's motion for summary judgment only on the ground that NHTSA's notice of proposed

rulemaking had not given the public adequate notice of the final decision.

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

On July 30 the district court issued a supplemental opinion holding that Exemption 3 is inapplicable and the Rubber Manufacturers Association filed an appeal.

NHTSA's final rule is available at:

[http://dmses.dot.gov/docimages/pdf87/249581\\_web.pdf](http://dmses.dot.gov/docimages/pdf87/249581_web.pdf)

The court's supplemental opinion is available at:

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

### **Ninth Circuit Hears Arguments in Challenge to NHTSA CAFE Rules**

On May 14, the U.S. Court of Appeals for the Ninth Circuit heard oral arguments in Center for Biological Diversity v. NHTSA (9th Cir. No. 06-71891), a case challenging NHTSA's April 2006 final rule setting Corporate Average Fuel Economy (CAFE) standards for light trucks.

The case was brought by the Center for Biological Diversity, the Sierra Club,

Public Citizen, Environmental Defense, Natural Resources Defense Fund, the State of Minnesota, and a coalition of twelve States and cities (including California, the State and City of New York, and the District of Columbia). These petitioners challenge the merits of the CAFE standards claiming that NHTSA improperly ignored benefits of carbon dioxide (CO<sub>2</sub>) emissions reductions that might result from stricter fuel economy standards. They also challenge the sufficiency of NHTSA's environmental review of the standards, including whether NHTSA improperly failed to consider the full impact of CO<sub>2</sub> emissions in its review. Finally, they challenge NHTSA's position that the standards preempt State requirements limiting CO<sub>2</sub> emissions. The court expedited briefing and argument in this case, and a decision is expected in the near future.

We are now awaiting the court's decision.

NHTSA's Final Rule is available at:

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

### **Court Grants Government's Motion for Summary Judgment in State of California FOIA Suit Seeking CAFE Preemption Documents**

In rulings issued on May 8 and June 12, the U.S. District Court for the Northern District of California granted the government's summary judgment motion and thus rejected the State of

California's requested review of the decisions of DOT and OMB denying California's FOIA requests for documents related to NHTSA's statements in the preamble to its light truck CAFE standard regarding the preemptive effect of the standards on State requirements limiting CO<sub>2</sub> emissions. The case, California v. NHTSA, (N.D. Calif. No. 06-02654), originally named only OMB as a defendant, but was subsequently amended to include NHTSA and DOT.

The Department had provided non-exempt responsive documents in whole or in part to the requester, and had submitted an index of the documents that the Department asserted were exempt from disclosure. By the conclusion of briefing, the State abandoned its efforts to obtain withheld DOT documents, and the court refused to order release of all but three documents withheld by co-defendant OMB. After the court reviewed those three documents in camera, it refused to order their release.

### **State of California Seeks Additional CAFE Preemption Documents in Second FOIA Suit**

The State of California has named NHTSA, DOT, OMB, and EPA as defendants in a suit filed in the U.S. District Court for the Northern District of California appealing agency decisions denying California's FOIA requests for documents related to NHTSA's statements in the preamble to its light truck CAFE standard regarding the preemptive effect of the standards on State requirements limiting CO<sub>2</sub>

emissions and documents related to certain meetings regarding the standard. The Department has filed an answer in the case, California v. NHTSA, (N.D. Calif. No. 07-02055), has provided responsive documents in whole or in part to the requester, and has submitted an index of the documents that the Department asserts are exempt from disclosure. Summary judgment briefing is scheduled for November and December 2007, and oral argument on the summary judgment motions is scheduled for January 18, 2008.

## **Federal Transit Administration**

### **Court in Rochester Hands Down Interim Decision Favorable to FTA, But Litigation Continues**

On August 28, the U.S. District Court for the Western District of New York in Rochester-Genesee Regional Transportation Authority v. Federal Transit Administration, (W.D.N.Y. No. 6:07-cv-06378-DGL-JWF) granted in part, and denied in part, the Rochester-Genesee Regional Transportation Authority's (RGRTA) motion to stay enforcement of an FTA decision directing RGRTA to cease and desist from operating impermissible school bus service.

RGRTA requested an emergency stay against enforcement of FTA's decision pending resolution of the litigation, in which RGRTA claims it operates permissible "tripper service," as opposed to school bus service. The Court granted RGRTA only a five-week reprieve,



holding that RGRTA is unlikely to prevail in its challenge to FTA's decision ("I see little basis at this point upon which the Court could set aside the FTA's decision."). The Court entered the "brief stay" to avoid imminent chaos among students and their families at the beginning of the school year: "Postponing the effective date of FTA's action [for five weeks] will enable the parties and the [School] District to take the steps necessary to provide for reliable school bus service for Rochester students, while still giving effect to the FTA's ruling implementing Congress' prohibition on the operation of school bus services by federally subsidized public transportation providers."

The Court also chastised RGRTA and the Rochester City School District for an "ostrich-like" mentality in not making contingency plans, even though FTA signaled its concern with RGRTA's service as early as January 2007, when FTA issued an initial decision against RGRTA's service. The Court thus placed some pressure on the School District to arrange for alternative service, entering a "modest stay . . . principally to allow [the School District] to provide alternative bus service, through [co-defendant Laidlaw, a private school bus company] or some other provider, or to work with the FTA and RGRTA to design appropriate so-called 'tripper-service' which is permitted under the relevant FTA regulations."

FTA and RGRTA met on September 19 to discuss a new RGRTA proposal for what the transit system deems "tripper service." FTA will make a determination shortly; in the meantime,

all parties agreed to an extension of the Court's stay through November 2.

### **FTA Wins Summary Judgment in Lake Tahoe NEPA and Section 4(f) Litigation**

On April 30, the U.S. District Court for the Eastern District of California granted summary judgment to FTA and its co-defendants in Tahoe Tavern Property Owners Association v. United States Forest Service, (E.D. Cal. April 30, 2007), a NEPA and Section 4(f) suit in which two condominium associations on the south shore of Lake Tahoe sought to enjoin Placer County, California's construction of a six-bus, 130-parking space transit center on a parcel of land owned by the Forest Service adjacent to plaintiffs' residences. See 2007 WL 1279496.

The Court agreed with FTA that Section 4(f)'s protections for parklands and recreational areas do not apply to the subject property because the Forest Service and Placer County had planned both a recreational area and transit center for the property since 1983, when the Forest Service acquired the property from the U.S. Department of Interior's Bureau of Reclamation. Specifically, the judge approved FTA's use of the "joint planning" exception to Section 4(f), covering property designated "for the specific purpose of . . . concurrent development . . . for both the potential transportation project and the section 4(f) resource." 23 CFR Section 771.135(p)(5)(v)(A). The Court found fault with the evaluation of alternatives in the Forest Service's NEPA record, but determined that Placer County had cured

those deficiencies through its subsequent analyses required by the California Environmental Quality Act.

Plaintiffs have appealed the decision.

### **City of Colorado Springs Brings Suit to Overturn USDOL's Section 5333(b) Certification of Labor Protections**

On July 24, the City of Colorado Springs brought suit in the U.S. District Court for the District of Colorado against the U.S. Department of Labor (USDOL), seeking to overturn the USDOL's most recent certifications of labor protections that serve as a prerequisite to FTA grant awards to the City. City of Colorado Springs v. Chao, (D. Col. No. 07-1559 LTB-KLM).

The City contracts with Laidlaw Transit Services for its public transportation system. Local 19 of the Amalgamated Transit Union (ATU) and its members have engaged in collective bargaining with the company. The City's original "Section 13(c) Agreement" with ATU and a previous contractor dates back to March 1981, and earlier this year, Laidlaw sent notice to terminate one of its two service contracts with the City "because of increased costs imposed by demands under the 1981 13(c) Agreement." (Quoting the complaint in the City's lawsuit; in 1996, "Section 13(c)" was recodified at 49 U.S.C. Section 5333(b)).

Specifically, the City alleges that the most recent USDOL certifications exceed both statutory requirements and USDOL's guidelines at 29 CFR Part 215

by compelling the City to engage in interest arbitration and accede to "new jobs" clauses, guarantees of continued employment, and an "economic floor" on collective bargaining.

The Court has set November 28, for a scheduling conference.

### **FTA Receives Request for Information in Second Taxpayer Refund Action Involving FTA-Approved Leveraged Leases**

The U.S. Department of Justice (USDOJ) recently contacted FTA concerning discovery requests in a taxpayer refund action against the United States seeking to overturn Treasury Department determinations adverse to an investor in several FTA-approved leveraged lease transactions. In a separate (and similar) taxpayer refund action pending in the Southern District of New York, FTA worked closely with USDOJ in responding to discovery requests propounded by counsel for plaintiff Altria, Inc., parent corporation to Philip Morris. Altria challenges Treasury rulings on several lease transactions entered by Philip Morris, including one approved by FTA in 1997 involving assets of the New York Metropolitan Transportation Authority.

Now in another taxpayer refund case – this one pending before the U.S. Court of Federal Claims – Wells Fargo challenges Treasury determinations to withhold tax benefits the banking company anticipated when it entered over ten FTA-approved lease transactions. Before FTA suspended its

15-year lease program in 2003, FTA approved more than 100 leveraged lease transactions as consistent with USDOT requirements, but never opined on the tax aspects of the transactions. Plaintiffs in these cases, however, undoubtedly will attempt to treat FTA's approval of the transactions as somehow inconsistent with Treasury's ruling.

## **Maritime Administration**

### **DOJ Sides with MARAD in Long-Standing AID Cargo Preference Dispute**

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

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

concerns of the two named Federal defendant agencies.

DOT objected to the litigation strategy of the United States in a December, 2005 letter to the Department of Justice. After two years of deliberation DOJ in September decided that AID had, in fact, acted contrary to MARAD's regulations when it allowed foreign carriage of a full vessel load of AID cargo in circumstances where the U.S. flag vessel offered by ACT was available to carry the cargo. The United States has now sought dismissal of the underlying complaint, arguing that the matter is now moot and has been resolved in ACT's favor for future cases.

### **Injunctive Relief Denied in Ongoing Vessel Dismantling Litigation**

Marine Environmental Services, Inc. v. Bay Bridges Enterprises, LLC, (E.D. Va. No. 2:07 cv 408) is an action and seizure in rem by Marine Environmental Services, Inc. against the VULCAN. Marine Environmental Services alleges it is an unpaid subcontractor working on the recycling of the VULCAN. Bay Bridges Enterprises allegedly failed to pay Marine Environmental Services for water removal services from the VULCAN because Bay Bridges contends that the infiltration of water was attributable to the actions of Marine Environmental Services, Inc.

Marine Environmental Services was advised that title to the scrap metal is held by the United States. Accordingly, the seizure of United States property was improper. As a result, it voluntarily

dismissed its in rem seizure. Questions also existed as to whether a vessel dismantling contract was within the admiralty jurisdiction of the United States as well as whether Marine Environmental Services had a valid maritime lien for its work on that contract.

Following dismissal of the in rem seizure, Marine Environmental Services, sought a TRO to halt work on the dismantling of the vessel in order to allow its experts to examine the vessel to prepare its defense for Bay Bridges Enterprises' inundation-related claims/defenses. The court denied the TRO, but instructed the parties to work it out among themselves. Marine Environmental Services and Bay Bridges Enterprises agreed to briefly halt performance on the recycling of the VULCAN to allow a joint survey. That survey should have already occurred.

The Maritime Administration has advised Bay Bridges Enterprises, LLC that it is holding it to its performance schedule.

### **Settlement Reached in Northrop Grumman FOIA Litigation**

Northrop Grumman Ship Systems v DOT, (S. D. Miss. No. 1:07cv11LG-JMR) is a FOIA case that arose from discovery efforts made by Ingalls Shipyard, now owned by Northrop Grumman Ship Systems, in connection with the litigation in Chiasson v. Ingalls Shipbuilding, (S.D. Miss. No. 1:04-cv-628). Chiasson was a suit by the trustee in the bankruptcy of SeaRex Inc. to recover from Ingalls for damage to

SeaRex's vessels under construction while at Ingalls' shipyard. Both parties, but primarily Northrop Grumman, sought to obtain records from the Maritime Administration relating to Title XI financing of the SeaRex project.

The Maritime Administration produced thousands of documents under FOIA, but refused to produce certain documents under a number of different claims of privilege, including that of attorney-work product, deliberative process, and attorney-client communications.

Various hearings were held and orders issued regarding the production of FOIA documents, with respect to which the Maritime Administration voluntarily complied. The Maritime Administration filed a motion to dismiss stating that the United States was never properly served as a party in the Northrop Grumman suit. As the trial in Chiasson approached, a compromise was reached with Northrop Grumman settling the case in exchange for certain documents.

Subsequently, the dispute in Chiasson was resolved after mediation for \$4,000,000.

## **Pipeline and Hazardous Materials Safety Administration**

### **Letica Corporation Files Petition for Review in United States Court of Appeals for the Sixth Circuit**

On May 10, 2004, PHMSA brought two civil enforcement actions against Letica Corporation (Letica), a manufacturer of hazardous materials packagings located in Rochester, MI. PHMSA brought these actions after two of Letica's packagings failed testing at the Department of the Army's Logistics Support Activity center (LOGSA). PHMSA had purchased two packaging designs that were manufactured and certified to a United Nations performance standard by Letica.

In response to the Notice of Probable Violation, Letica failed to preserve its right to a formal hearing before an Administrative Law Judge (ALJ).

PHMSA was unable to compromise the case with Letica and the case was sent to the Chief Counsel for review of Letica's request for a formal hearing with a request for an Order. PHMSA denied the request for a formal hearing citing Letica's failure to follow the minimal procedural requirements for obtaining a formal hearing. PHMSA then issued an Order finding 2 violations of the HMR and imposing a \$16,800 civil penalty.

After exhausting all of its administrative appeals, Letica filed the present petition. In its petition, Letica seeks to have the case remanded to PHMSA with a finding that Letica is entitled to a formal hearing before an ALJ. DOJ Civil Appellate has recently assigned an attorney to the matter and will be defending the case before the Sixth Circuit.

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