U.S. Department of Transportation

DOT LITIGATION NEWS

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Highlights

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Supreme Court Litigation

Supreme Court Decides Carmack Amendment Case

In a June 21 decision, the Supreme Court unanimously ruled that the Carmack Amendment to the Interstate Commerce Act applies only to rail transportation that originates domestically (either physically or with a separate bill of lading issued by a railroad) and that also terminates in the U.S. or an adjacent country. The decision in Kawasaki Kisen Kaisha Ltd., et al. v. Regal-Beloit Corp., et al., 130 S.Ct. 2433 (2010), reversed a decision of the U.S. Court of Appeals for the Ninth Circuit and resolved a split in the circuits regarding the application of the the Carmack Amendment with regard to the inland leg of international intermodal shipments covered by a single "through" bill of lading. In so ruling, the Court agreed with the position of the United States in the government's amicus brief filed in support of the petitioner ocean and rail carriers.

In this case, an ocean carrier, Kawasaki Kisen Kaisha Ltd. (K-Line) issued a through bill of lading covering the entire transportation of containerized freight from China to points in the U.S. Midwest. The ocean carrier contracted with Union Pacific railroad to transport the cargo from Long Beach, California to its ultimate destinations. The train on which the freight was carried derailed, and the shippers sought to recover for damages. The dispute in this case centers on the applicable law, which would determine the validity of provisions in the bill of lading and railroad contract that limit the liability of the carriers for loss or damage and that select a particular forum for bringing damage claims.

In addition to the Carmack Amendment, the relevant statutes at issue were the Carriage of Goods by Sea Act (COGSA) and provisions of the Interstate Commerce Act (ICA) governing exemptions and railroad contracts. The Carmack Amendment imposes a regime of strict liability on rail carriers for damage to freight in the course of certain rail transportation. Shippers and railroads may agree to different liability terms, but only if the carrier has first offered a rate that provides full coverage for loss or damage. The Carmack Amendment also prescribes the venues in which actions to recover damages may be brought. COGSA governs international ocean carriage and may be extended by shippers and carriers to inland transportation. It also allows parties to agree on forum selection and on liability limits above a certain minimum. Finally, traffic (like containerized freight) that has been exempted from the ICA is still subject to the Carmack Amendment, but traffic that is transported according to the terms of a contract with a railroad is not subject to any part of the ICA, including the Carmack Amendment.

In the decision below, the Ninth Circuit held that K-Line was a "rail carrier" within the meaning of the ICA and that the Carmack Amendment applied to the traffic at issue, thereby negating the parties' selection of a foreign forum (Tokyo), which did not comport with the Carmack Amendment's prescriptions. The court also concluded that the provision of the ICA that allows rail contracts to set *all* the parties' rights and obligations is not applicable to exempt traffic like that at issue, which must therefore still comply with the Carmack Amendment. The appeals court remanded for the district court to determine whether the shippers had been offered full liability coverage in compliance with the Carmack Amendment prior to agreeing to the limited liability contained in the bill of lading.

The U.S. amicus brief argued that the terms of the Carmack Amendment restricted its application to rail transportation that was either wholly interstate within the United States or to "adjacent foreign countries" (Canada and Mexico). The Carmack Amendment placed liability in these circumstances on railroads that receive freight from shippers, not on rail carriers that deal with and obtain freight from ocean carriers for inbound international movements and that never have any contact with shippers themselves. The government also contended that the Ninth Circuit had erred in deeming K-Line a rail carrier within the meaning of the ICA.

The Court agreed with the United States the ocean carriers like K-Line are not rail carriers within the meaning of the ICA and that property originating overseas with an ocean carrier that issues a through bill of lading covering inland U.S. transportation is not subject to the Carmack Amendment's requirements. The Court also pointed out that this outcome both recognized the different statutory regimes governing domestic and international transportation (the Carmack Amendment and COGSA) and facilitated both types of commerce.

The opinion is reported at 130 S.Ct. 753 (2010) and is available at: http://www.supremecourt.gov/opinions/09pdf/08-1553.pdf.

Supreme Court Grants Certiorari in Case Involving Preemption under National Traffic and Motor Vehicle Safety Act

On May 24, the Supreme Court granted the petition for certiorari in Williamson v. Mazda Motor Company of America, Inc. (No. 08-1314), in which petitioner seeks review of a decision by a California state court of appeals holding that Federal Motor Vehicle Safety Standard (FMVSS) No. 208 preempts a state common law tort action involving a lap seatbelt in a minivan. The Court had invited the Solicitor General to file a brief at the certiorari stage of this case, and that brief, filed on April 23, 2010, urged the Court to take the case. On August 6, 2010, the United States filed an amicus brief arguing that the judgment below should be reversed. Argument in the case is scheduled for November 3, 2010.

Ten years ago in Geier v. American Honda Motor Co., 529 U.S. 861 (2000), the Court recognized conflict preemption under the National Traffic and Motor Vehicle Safety Act (Safety Act), one of NHTSA's principal statutes. Under this doctrine, a state law tort claim is preempted if it conflicts with an FMVSS, issued by NHTSA pursuant to the Safety Act, that affirmatively encourages the adoption of diverse mechanisms for compliance.

Williamson generally raises questions regarding the scope of Geier. Here, a couple and their daughter were traveling in a 1993 Mazda MPV minivan. The father was the driver, wearing a lap/shoulder seatbelt (termed a "Type 2" seatbelt in the regulations). Their daughter was seated directly behind him in the middle-row left outboard seat of the vehicle, also wearing a lap/shoulder seatbelt. The mother was seated in the middle row to her daughter's right. Because that seat was adjacent to the aisle, it was a "non-outboard rear seating position" under FMVSS No. 208. However, the mother wore the lap seatbelt (termed a "Type 1" seatbelt in the regulations) installed by Mazda in that seating position, as FMVSS No. 208 permitted at the time. The mother died from serious injuries incurred in a vehicle collision.

The California Court of Appeal affirmed the trial court's demurrer of plaintiffs' state law tort claims against Mazda, contending that Mazda should have installed a lap/shoulder seatbelt (as opposed to a lap seatbelt) in Mrs. Williamson's seating position. In its decision, the court noted that Geier is binding on it, but distinguishable because Geier dealt with passive restraints. Nonetheless, the court found persuasive the holdings of other courts that have found that FMVSS No. 208 preempts "lap seatbelt only" state tort law actions involving non-outboard rear seating positions. The court concluded that to the extent that plaintiffs contend that Mazda is liable for failing to install a lap/shoulder seatbelt in that seating position, their claims were barred. The California Supreme Court subsequently declined discretionary review.

Among other things, the United States argues in its amicus brief that the California Court of Appeal erred when it found a conflict between the Williamsons' state tort law action and the policies embodied in the applicable amendments to FMVSS No. 208 governing seatbelts in this seating position. Although NHTSA decided at that time not to impose a federal requirement to install Type 2 seatbelts in all rear non-outboard seating positions, the United States notes that NHTSA's policy objectives would have been fully met if manufacturers had immediately installed Type 2 seatbelts in those positions. In contrast, the NHTSA decision at issue in Geier—to phase-in a mixture of airbags and other passive restraints over time—would have been frustrated if state common law had forced all manufacturers to install airbags immediately. In other words, the state tort duty in Geier conflicted with FMVSS No. 208; the state tort duty in the Williamsons' case does not.

The California Court of Appeal's decision (as modified following denial of rehearing on November 18, 2008) is reported at: Williamson v. Mazda Motor Co. of America, Inc., 167 Cal.App.4th 905, 84 Cal.Rptr.3d 545 (2008).

All of the briefs associated with the case are available at http://www.abanet.org/publiced/preview/briefs/nov2010.shtml#williamson.

Supreme Court Grants Certiorari in Railroad Revitalization and Regulatory Reform Act Case

On June 14, the Supreme Court granted certiorari in CSX Transportation, Inc. v. Alabama Department of Revenue (No. 09-10772) in which petitioner seeks review of a decision by the U.S. Court of Appeals for the Eleventh Circuit holding that Alabama's exemption of railroad competitors, but not railroads, from a generally applicable sales

and use tax is not subject to challenge under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). (CSX Transp. v Ala. Dep't of Revenue, No. 09-10772 (11th Cir. 2009)).

The Supreme Court had invited the Solicitor General to file an amicus brief expressing the views of the United States in this case, and on May 14, 2010, the United States urged the Court to grant certiorari, but limited to the following question: whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as another tax that discriminates against a rail carrier. The Court granted certiorari and limited its review to the question presented by the United States.

Consistent with the initial amicus brief, the United States supported CSX's argument that a non-property tax that rail carriers are required to pay, but from which competing transportation providers are exempt, *may* constitute discrimination under the 4-R Act. The United States distinguished the Supreme Court's holding in Department of Revenue v. ACF Industries, 510 U.S. 332 (1994), as that case addressed property taxes, as opposed to non-property taxes. While the United States advised the Court to hold that a state non-property tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under the 4-R Act, the United States expressed no view on whether CSX will ultimately be able to prove a 4-R Act violation and advised the Court to remand the case to the district court for further factual inquiry.

On August, 12, 2010, CSX filed its merits brief, and State of Alabama filed its brief on September 27, 2010. The Association of American Railroads, the Council on State Taxation, and the Tax Foundation filed amicus briefs in support of CSX. The American Trucking Associations, the Multi-State Tax Commission, a group of 19 states, and a group of 12 Alabama educational institutions filed amicus briefs in support of the State of Alabama.

This case is scheduled for oral argument on November 10, 2010. All of the briefs associated with the case are available at http://www.abanet.org/publiced/preview/briefs/nov2010.shtml#csx.

Departmental Litigation in Other Federal Courts

Second Circuit Holds that Regulations Encouraging Hybrid Taxicabs in New York City are Preempted

On July 27, the U.S. Court of Appeals for the Second Circuit in Metropolitan Taxicab Board of Trade v. City of New York, 2010 WL 2902501 (2d Cir. 2010), affirmed an order of the U.S. District Court for the Southern District of New York enjoining New York City taxicab regulations (the TLC regulations) on the ground that they are preempted by the Energy Policy and Conservation Act (EPCA), 49 U.S.C. § 32901 *et seq.* The district court had also held that the TLC regulations were preempted by the Clean Air Act (CAA), but the circuit court

declined to reach that issue after finding EPCA preemption.

Under EPCA, NHTSA administers the Corporate Average Fuel Economy (CAFE) program. The New York City Taxicab & Limousine Commission (TLC) had promulgated regulations to promote the purchase of hybrid and clean diesel taxicabs by taxicab operators by reducing the rates at which the taxicab owners may lease other vehicles to taxi drivers and increasing those rates with respect to hybrid vehicles.

The United States had filed an amicus brief in the case at the court's invitation in which it supported reversal of the district court on the ground that the TLC regulations are not preempted. In its brief, the United States had argued that Second Circuit did not need to determine whether the TLC regulations are "related to" fuel economy standards within the meaning of the EPCA (or CAA) preemption clause. Instead, the government contended that the issue was the antecedent question of whether the City of New York has adopted or enforced regulations of the type that Congress sought to preempt under EPCA or the CAA, particularly since the regulation of taxi services has been the subject of pervasive local regulation for decades prior to passage of EPCA and the CAA in the 1960s and 1970s.

The Second Circuit rejected the arguments of the City and the United States and held that the TLC regulations were "based expressly on the fuel economy of a leased vehicle" and thus "plainly fall within the scope of the EPCA preemption provision."

The district court's opinion is reported at Metropolitan Taxicab Bd. of Trade v. City of New York, 633 F.Supp.2d 85 (S.D.N.Y. 2009)

D.C. Circuit Upholds New Rates and Charges Policy

On July 13, the U.S. Court of Appeals for the District of Columbia Circuit upheld amendments to DOT's Rates and Charges Policy that permit airports to charge air carriers higher landing fees at peak period times in order to reduce congestion. In Air Transport Association v. DOT, 613 F.3d 206 (D.C. Cir. 2010), the court rejected a challenge to the July, 2008 DOT and FAA amendment to the 1996 "Policy Regarding the Establishment of Airport Rates and Charges." The Air Transport Association (ATA) challenge focused on three amendments to the 1996 Policy (two modifications and one clarification). These amendments are intended to provide greater flexibility to operators of congested airports to use landing fees as incentives for air carriers to use the airport at less congested times or to use alternate airports to meet regional air service needs. Specifically, the amendments permit peak period fees to include the costs of facilities under construction and for related secondary airports and permit the use of a two-part landing fee (consisting of a per-operation charge and a weight-based charge) giving airlines an incentive to relieve congestion by operating fewer flights with larger aircraft.

In rejecting the ATA challenge to the amendments, the court ruled that the newly-permitted fees were neither

unreasonable nor unjustly discriminatory, did not violate the Airport and Airways Improvement Act or the Anti-Head Tax Act, and were not preempted by the Airline Deregulation Act. The court noted that DOT's efforts to address congestion were part of the agency's "continuing mandate to manage the Nation's air transportation system."

The D.C. Circuit's opinion is available at http://pacer.cadc.uscourts.gov/docs/common/opinions/201007/08-1293-1254699.pdf.

Oral Argument Held in Preemption Challenge to Application of State Liquor Laws to Air Carrier

On September 20, the U.S. Court of Appeals for the Tenth Circuit heard oral argument in US Airways v. O'Donnell (10th Cir. 09-2271), an appeal of a district court decision holding that New Mexico could subject US Airways to State alcoholic beverage regulations if the airline serves alcoholic beverages on flights into and out of the State. Such regulations include a training regime for flight attendants serving alcoholic beverages on board. New Mexico's attempt to regulate the airline came after a US Airways passenger, who was served alcohol on a flight to New Mexico, caused a car accident with multiple deaths a few hours after landing.

The Justice Department filed an amicus brief on behalf of DOT in this case on February 10, 2010. In its brief, the government argues that New Mexico's regulations as applied to an airline are preempted by the Airline Deregulation Act (ADA), which bars State and local regulations related to airline "prices, routes, and services." The brief also argues that the New Mexico regulations are preempted because on board alcohol service and flight attendant training is within the field of aviation safety reserved exclusively to the FAA, which has its own alcohol service and training requirements. The government also argues that the Twenty-first Amendment's grant of power to the states to regulate alcohol, if implicated at all, does not save New Mexico law because, under the circumstances of this case, the federal interest in airline competition and uniformity of safety regulation outweighs the State's interest. Ten former Secretaries of Transportation also filed an amicus brief supporting US Airways and arguing that New Mexico's attempted regulation was preempted by the ADA and FAA's safety regulatory regime.

Court Hears Argument in Air Charter Broker Challenge to DOT Interpretation of Aviation Consumer Protection Requirements

On September 21, the U.S. Court of Appeals for the District of Columbia Circuit heard argument in CSI Aviation Services, Inc. v. DOT (D.C. Cir. No. 09-1307) in which the petitioner, an air charter broker, is challenging a letter issued by DOT's Office of Aviation Enforcement and Proceedings warning it to cease and desist from further activity that would result in it engaging in indirect air transportation.

DOT had initiated an investigation into CSI Aviation Services (CSI) in March, 2009 to determine whether the charter broker violated 49 U.S.C. §§ 41101 and 41712 and 14 C.F.R. part 399 by engaging in indirect air transportation without holding either economic authority from the Department or a certificate of public convenience and necessity as required by statute. The records produced by CSI to DOT during the investigation revealed that CSI, through the GSA schedule, had acted as a principal and appeared to be entering into contracts with U.S. government agency charterers, and then also as a principal, entering into separate contracts with direct air carriers to operate the actual charter flights. Such indirect air transportation without proper economic authority or certification is unlawful and also violates aviation consumer protection statutes, which prohibit unfair and deceptive trade practices.

CSI denied that its actions are unlawful and sought from DOT an exemption from the statutory requirements that prohibit air charter brokers' contracts with U.S. government agencies. In its exemption application, CSI argued that it provides a vital service and that the need for consumer protections pertaining to charter brokers who deal with the public at large is not necessary for its contracts with U.S. government agencies that have unique safeguards in place not available to the travelling public. DOT granted the exemption for one year and indicated that CSI could apply for renewals of the exemption.

In its opening brief, CSI argued that DOT's letter was reviewable final agency action, that DOT acted beyond its statutory authority in issuing the letter, and that DOT's action was arbitrary and capricious. In response, DOT argued that the case was moot because DOT had granted CSI the exemption authority it had requested and that, in any event, the DOT letter was not final agency action and was within the Department's statutory authority.

Court Finds Port of Los Angeles Concession Agreement Not Preempted, Partially Stays Order Pending Appeal

On August 26, the U.S. District Court for the Central District of California in American Trucking Associations, Inc. v. City of Los Angeles, 2010 WL 3386436 (C.D. Cal. 2010), held that a mandatory concession agreement imposed by the Port of Los Angeles on motor carriers operating at the Port is not preempted by the Federal Aviation Administration Authorization Act (FAAAA), which preempts state and local regulation "related to a price, route, or service of any motor carrier." The concession agreements were intended to implement the Port's Clean Trucks Program, impose requirements on motor carriers relating to port safety and security, and phase out the hiring of independent contractor carriers. On October 25, the district court stayed its order permitting the concession agreement to go into effect as to the phase out the hiring of independent contractor carriers.

The August 26 decision was the district court's third decision in this case and came after two decisions by the U.S. Court of Appeals for the Ninth Circuit in

the matter. Plaintiff American Trucking Associations (ATA) sought an injunction against the Los Angeles agreement, arguing that several of its provisions (though not the Clean Trucks Program) violate the preemption provision of the FAAAA. DOT filed an amicus brief supporting ATA in the first appeal, in which the Ninth Circuit held in March 2009 that some of the provisions of the concession agreements were likely preempted by the FAAAA. Subsequently, the district court enjoined provisions of the agreement that involved economic regulation, such as the phase out of independent contractors, but did not enjoin safety and security requirements that duplicated existing federal requirements or the Port's authority to bar carriers that do not comply with those requirements.

ATA appealed again, and the Ninth Circuit agreed with the district court that the safety and security provisions fell under an exception to the preemption provision the permits state and local safety regulation. The appeals court also upheld the Port's authority to bar non-compliant carriers, though it stated that this issue might be reconsidered in further proceedings.

In its August decision, which followed an April 2010 trial, the district court denied a permanent injunction against the agreement, holding that its provisions were not preempted by the FAAAA because they were excepted from preemption under the market-participant doctrine. Under this doctrine, state and local actions that would be otherwise preempted are permissible if those actions are proprietary rather than regulatory in nature. The district court had rejected the Port's market-participant defense in its first decision on plaintiff's motion for a preliminary injunction in 2008, but reversed itself based on the trial record. In later granting a stay pending appeal of its order as to the port's independent contractor phase out, the court noted "that the interpretation and application of the market participant doctrine in this case present substantial and novel legal questions," that the Ninth Circuit previously had ruled that allowing the phase out to go into effect would result in irreparable harm, and that the balance of equities and public interest considerations favored ATA.

On September 16, ATA appealed the district court decision to the U.S. Court of Appeals for the Ninth Circuit (9th Cir. 10-56465).

Challenge to Metrorail Dulles Extension Dismissed, Decision Appealed

On April 6, the U.S. District Court for the Eastern District of Virginia ruled in favor of FHWA and FTA in Parkridge 6 LLC et al. v. DOT, et al., 2010 WL 1404421 (E.D. Va. 2010), in which plaintiffs challenge the Washington Metrorail extension to Dulles International Airport. The defendants are DOT, FTA, FHWA, the Virginia Department of Transportation, and the Metropolitan Washington Airports Authority (MWAA). Plaintiffs alleged 15 separate violations of the FTA, FHWA, and FAA authorization statutes, the Virginia constitution, the Virginia Public-Private Partnership Act, and the

terms of MWAA's lease of the Dulles access right-of-way from DOT.

The Court denied the plaintiffs' request to stop further construction, ruling that plaintiffs had no standing to sue any of the federal defendants or MWAA. Even if the plaintiffs had standing, the Court held, the claims would have been dismissed because VDOT had not waived sovereign immunity and because MWAA's actions were authorized by federal law. On April 14, the plaintiffs appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. Briefing in Parkridge 6 LLC et al. v. DOT, et al. (4th Cir., No. 10-1443) has been completed, but no oral argument date has been set.

United States Granted Leave to Move to Dismiss Individual Capacity Civil Rights Claims in Challenge to Arlington Project

On October 26, the United States was granted leave to file a motion to dismiss personal capacity claims against the Secretary, the FHWA Administrator, and an FHWA employee in County Board of Arlington v. DOT, et al. (D.D.C. No. 09-01570). In this case, the County Board of Arlington, Virginia seeks injunctive relief against agency defendants and money damages from agency officials over FHWA's decision to deem a portion of an I-95/I-395 HOT Lanes project to be categorically excluded from environmental review. The project involves the I-95/I-395 corridor in Northern Virginia from Spotsylvania County to Eads Street/Pentagon Reservation interchange. Specifically, the Northern Section from Prince William County to Pentagon Reservation in Arlington is in controversy.

Plaintiff alleges that the project, based upon a 2006 public-private partnership agreement, was unlawfully narrowly defined and segmented to the point of allowing the Northern Section of the project to be deemed a Categorical Exclusion (CE). Plaintiff challenges FHWA's January 9, 2009 announcement that it did not need to examine the environmental impacts of the Northern Section. The County alleges violations of NEPA and the Clean Air Act in FHWA's failure to properly consider air quality impacts, impacts on historical neighborhoods, effects on HOV lanes, and impacts on minority and vulnerable communities and facilities near the project. With respect to the project's impacts on minority communities, the County also alleges violations of federal civil rights laws.

Plaintiff subsequently moved for leave to amend its complaint to include money damage claims against the individual defendants in their personal capacity and to add an FHWA Virginia division employee as a defendant also sued in his personal capacity. The court granted the County's motion for leave to amend and suspended the time to answer or otherwise respond to the amended complaint. The government's motion for leave to file a motion to dismiss the remaining individual capacity claims argued the importance of resolving the individual defendants' qualified immunity defenses early in litigation and notes that two of these defendants, Secretary and the FHWA Administrator, were not in office at the time the CE was issued.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Ninth Circuit Denies Rehearing of Decision Holding that Non-Pecuniary Damages May Be Awarded under Privacy Act

On September 16, the U.S. Court of Appeals for the Ninth Circuit denied the government's panel and en banc rehearing requests in Cooper v. FAA, et al. (No. 08-17074 9th Cir. 2010). In this case, the court had previously reversed the district court and held that "actual damages" under the Privacy Act is not limited to pecuniary damages.

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

Following his indictment, Cooper pled guilty to a misdemeanor. He then sued FAA, DOT, and SSA for the improper disclosure of information under the Privacy Act. The district court held that the exchange and disclosure of Cooper's information was a breach of the Privacy Act, but that Cooper had no "actual damages" because he could not be compensated for pure "mental anguish" under the Privacy Act. Without addressing the other elements of a cause of action under the Privacy Act, the district court dismissed the complaint.

The Ninth Circuit disagreed. Although it noted a split in the circuits on the issue, the court concluded that the intent of Congress in enacting the Privacy Act was "to extend recovery beyond pure economic loss." The court came to this conclusion after considering the text of other sections of the Privacy Act, the purposes of the Act, and decisions interpreting the words "actual damages" under the Fair Credit Reporting Act, which Congress passed in a contemporaneous timeframe. The Ninth Circuit also rejected the argument that the government's waiver of sovereign immunity through the Privacy Act should be narrowly construed, with damages limited to economic loss. The court remanded the case to the district court for further proceedings. The government is currently considering whether to seek further review of the decision.

The United States petitioned for panel rehearing or, in the alternative, rehearing en banc, which were both denied. Judge O'Scannlain, in an opinion joined by seven other judges on the court, dissented from the denial of en banc review, concluding that "[t]he effect of today's order [denying rehearing en banc] is to open wide the United States Treasury to a whole new class of claims without warrant." The United States is considering whether to seek Supreme Court review of the Ninth Circuit's decision.

The Ninth Circuit opinion and dissent to the its en banc denial are available at: http://www.ca9.uscourts.gov/datastore/opinions/2010/09/16/08-17074.pdf.

Fifth Circuit Affirms Summary Judgment for FAA in ADEA Case

On August 9, the United States Court of Appeals for the Fifth Circuit issued an opinion in Ligon v. LaHood, et al., 615 F.3d 150 (5th Cir. 2010), which affirmed the district court's grant of summary judgment in favor of the FAA, but on different grounds. The appellant brought an action in district court under the Age Discrimination in Employment Act (ADEA) based on the FAA's termination of certain areas of his authority as a Designated Engineering Representative (DER). In the district court, the FAA argued that the court had no jurisdiction to consider the ADEA claim because it was inescapably intertwined with the agency's decision to reduce plaintiff Ligon's DER authority and, therefore, was subject to the exclusive jurisdiction of the court of appeals pursuant to 49 U.S.C. § 46110. Alternatively, the FAA urged the district court to dismiss the complaint because a DER, like other qualified private persons appointed by the Administrator, is not an employee of the FAA and, thus, does not fall within the provisions of the ADEA.

The district court did not consider the jurisdiction argument and dismissed the complaint on the basis that Ligon was not an FAA employee; there was no cause of action under the ADEA. After the appeal briefs had been filed and the case was awaiting oral argument, the Department of Justice decided that it could no longer support the jurisdiction argument and advised the Fifth Circuit that it was withdrawing that argument. Notwithstanding that neither party now challenged the district court's jurisdiction, the court of appeals addressed the issue de novo. After reviewing the relevant case law, the court held that the ADEA claim was inescapably intertwined with the merits of the decision concerning the scope of the DER authority and, therefore, could and should have been presented to the court of appeals under 49 U.S.C. § 46110. The district court's grant of summary judgment regarding the alleged violation of the ADEA was reversed and remanded with instructions to enter a judgment of dismissal for lack of subject matter jurisdiction.

Court Hears Challenge to FAA Decision Invalidating City of Santa Monica's Jet Ban

On October 14, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in City of Santa Monica v. FAA (D.C. Cir., No. 09-1233), a challenge to FAA's decision that the City of Santa Monica's ban on Category C and D aircraft operations at its airport violated its Federal grant assurance obligations.

The Santa Monica Municipal Airport is situated on a plateau surrounded by residential areas. As an older airport, it does not meet current standards for zones at the ends of the main runway to prevent or minimize damage in the event of aircraft overruns or undershoots. The City has for years attempted to reduce

operations at the airport and in 2008 adopted an ordinance banning certain categories of larger private jet aircraft on the basis that they cannot safely operate without standard runway protection zones. After an administrative proceeding, the FAA invalidated the ordinance and the City petitioned for review.

Santa Monica's major arguments were (1) that as an airport proprietor it had the authority and responsibility to make decisions about safety at the airport that the FAA could not preempt, and (2) that the FAA's decision that the City had violated assurances it had made in order to obtain federal grants was arbitrary and capricious because it failed to apply the proper standards and ignored evidence of record. The FAA countered that the safety-related decisions of airport proprietors receiving federal grants are subject to the FAA's acquiescence, and that in this case there was substantial evidence that the aircraft the City wanted to ban had safety records superior to the planes that would continue to operate at the airport. The FAA also asserted that its decision was reasonable because current runway protection zone standards are not mandatory, that there are alternatives available to provide equivalent protection, and that it had applied the appropriate safety standards for the aircraft in question.

D.C. Circuit Hears Oral Arguments in Challenge of Runway Expansion Project at Fort Lauderdale Airport

On September 14, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in City of Dania Beach, et al. v. FAA (D.C. Cir. Nos. 09-1064 & 09-1067). Petitioners, the Cities of Dania Beach and Hollywood, Florida and two Dania Beach residents, challenge FAA's Record of Decision (ROD) that approved the extension of Fort Lauderdale Airport's runway 9R/27L and other associated airport projects. The ROD was based on FAA's Final Environmental Impact Statement (EIS) prepared pursuant to NEPA. Petitioners argue that FAA's decision to allow for expansion of the Fort Lauderdale Airport is legally flawed under the DOT Act, Executive Order 11,990, and the Airport and Airway Improvement Act (AAIA).

Second Circuit Hears Oral Argument in Challenge to FAA Decision that Westchester County Did Not Violate its Grant Assurance Obligations

The U.S. Court of Appeals for the Second Circuit heard oral argument on October 21 in 41 North 73 West (AVITAT) v. FAA (2d Cir. No. 09-48103). In this case, petitioner Avitat challenges an FAA's final decision under 14 C.F.R. part 16 finding that Westchester County is in compliance with its federal grant obligations regarding economic discrimination and exclusive rights. Avitat is a larger-class fixed-based operator (FBO) at the Westchester County Airport servicing larger general aviation aircraft. Two other FBOs serving the airport, Westair and Panorama, are limited FBOs that service smaller aircraft. Avitat has a lease enabling it to dispense and sell jet fuel to any sized jet aircraft. The

Westair and Panorama leases included the right to sell jet fuel to smaller aircraft under certain conditions if approved by the County.

The County eventually granted the smaller FBOs the right to dispense and sell jet fuel to smaller aircraft. In its initial complaint to FAA, Avitat argued that by providing Westair and Panorama with the right to dispense and sell jet fuel to smaller aircraft, and subsidizing their rent, the County was in violation of its federal grant obligations regarding grant assurances relating to economic nondiscrimination, exclusive rights, and fee and rental structure. Under the grant assurances, the County must make its airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. Also, each FBO at the airport must be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other FBOs making the same or similar uses of such airport and utilizing the same or similar facilities. In the decision under review, FAA found that the County was in compliance with its grant assurances and did not provide more favorable treatment to the smaller FBOs.

Environmental Assessment of Oregon Airport Improvements Challenged

On March 19, three individuals sued the DOT and the FAA in the Ninth Circuit challenging the adequacy of an environmental assessment completed by the FAA for a third runway and associated taxiways, the relocation of an existing helicopter pad, and associated infrastructure improvements at the Hillsboro, Oregon Airport (HIO). HIO is the busiest general aviation airport in Oregon and, relative to total aircraft operations, is the second busiest airport in the state after Portland International. Petitioners in Barnes v. DOT (9th Cir. No. 10-70718) argue that an EIS should have been completed because this is a capacity project, that the FAA failed to analyze reasonably foreseeable indirect effects, that the FAA failed to analyze cumulative impacts, and that the FAA failed to consider a reasonable range of alternatives. In addition, Petitioners claim that the FAA violated the Administrative Procedures Act and the requirement to provide a public hearing under 49 U.S.C. 47106.

Petitioners filed a request for a voluntary stay on April 8, which the FAA denied. Petitioners have not filed a request for a stay with the Ninth Circuit to date.

The Port of Portland, the sponsor of HIO, requested and was granted intervenor status. Petitioners filed their opening brief on July 12, 2010. The federal respondents filed their brief on September 13, 2010. Petitioners filed their reply brief on September 27, 2010. The court has not yet scheduled of oral argument.

FAA Sued over Decision to Allow Hanger Replacement at Bedford/Hanscom Field

On August 16, local groups petitioned for review of an FAA action concerning

Bedford-Hanscom Field in Bedford, Massachusetts, a small general aviation airport with no commercial service operated by the Massachusetts Port Authority (Massport). Petitioners in Safeguarding the Historic Hanscom Area's Irreplaceable Resources v. FAA (1st Cir. No. 10-1972) challenge the validity of the FAA's decision to approve a request to modify the airport's layout plan.

The approved modification calls for the replacement of one of the hangers at the airport, Hangar 24, with a newer, larger hangar capable of housing and servicing modern aircraft. Hangar 24 was constructed in the 1930s in Savannah, Georgia. It was moved to Hanscom in 1948 and used by MIT for research until 2001. Local groups contend that Hanger 24 should be saved based on its historic qualities. The FAA, Massport, and the State Historic Preservation Officer entered into a memorandum of agreement that allows for the demolition of the building, but requires Massport to take certain actions to document its historic qualities.

The petition for review alleges the FAA violated NEPA, DOT Section 4(f), and Section 106 of the National Historic Preservation Act in approving the replacement of the hanger. Massport has moved to intervene in the lawsuit.

Air Tour Operator Challenges FAA Air Tour Allocation for Glen Canyon NRA

On September 10, American Aviation, Inc., filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging a recent FAA order that adjusted the Interim Operating Authority (IOA) under the National Parks Air Tour Management Act (NPATMA) for two of its competitors with respect to operations over Glen Canyon National Recreation Area (NRA). The petitioner in American Aviation, Inc. v. DOT (9th Cir. No. 10-72772) is an air tour operator located in Arizona.

Congress passed NPATMA in 2000 out of its concern that noise from air tour operations over national parks could impair visitors' experiences and natural, cultural, and historic resources. NPATMA requires the FAA and the National Park Service to develop air tour management plans (ATMPs) for national parks and abutting tribal lands. ATMPs establish controls over air tours, including flight routes, altitudes, time-of-day restrictions, and maximum number of flights for a given period of time, or prohibit air tours altogether.

The ATMP process has taken longer than anticipated, and the FAA has yet to implement ATMPs for a number of national parks, including an ATMP for the Glen Canyon NRA, where American Aviation and its competitors operate. In the interim, the FAA has followed a process under NPATMA that allows air tour operators to obtain interim operating authority (IOA). An air tour operator's IOA specifies the number of air tours that an air tour operator may conduct annually over a specified national park based on the number of air tours conducted in the years prior to NPATMA's enactment.

As a result of the IOA provision, the number of air tours an operator may conduct over a national park was frozen at pre-NPATMA levels and will remain so until an ATMP is implemented. Meanwhile, air tour operators may only increase their number of air tour operations through an approved increase, merger, or acquisition.

In 2000, American Aviation was one of several operators providing air tours over Glen Canyon NRA. Another operator, Sunrise Airlines, closed its doors shortly after NPATMA was enacted. Three competing air tour operators (including American) purchased assets of the defunct Sunrise or otherwise claimed to be its successor in interest. Subsequently, all three operators claimed that they were entitled to inherit Sunrise's IOA entitlement. All three applied to the FAA to obtain more air tour allocations based on Sunrise's IOA entitlement.

The FAA ultimately concluded that none of the operators had purchased the assets and liabilities of the defunct Sunrise, and therefore none of the operators were entitled to Sunrise's IOA. However, the agency recognized the importance of preserving the air tour availability status quo in light of a major air tour operator ceasing operations. The status quo could not be maintained if the agency eliminated all of the air tours previously conducted by Sunrise. The FAA's final order, of which American Aviation now seeks review, set forth an equitable distribution of the Sunrise IOA entitlement among American's two competitors. The FAA did not include American in its equitable distribution because the company withdrew its claim to the Sunrise entitlement before FAA issued its final order.

Petitioner's opening brief is due on November 29, 2010, and respondent's answering brief is due on December 29, 2010.

Court Grants Summary Judgment in Case Addressing Conflicts between Contractual and Federal Grant Conditions

On September 28, U.S. District Court for the Southern District of California granted summary judgment to the United States in City of Oceanside v. AELD, LLC and FAA, 2010 WL 3790077 (S.D. Cal. 2010). In this case, the City of Oceanside, California (Oceanside) sought declaratory and injunctive relief against AELD, LLC and FAA to permit it to proceed with the sale of land. The complaint stems from conflicting contractual and grant-related conditions associated with a small parcel of land the City acquired for airport purposes from an adjacent property owner (AELD's predecessor) using FAA airport improvement funds. The parcel was needed to help bring the Airport into compliance with FAA design standards. In exchange for the federal funding, Oceanside entered into a grant agreement that imposed conditions on the City's ownership, development and use of the 14.7-Acre Parcel. In particular, the grant assurances prohibit Oceanside's sale of the 14.7-Acre Parcel without the consent of the FAA.

In direct conflict with the Grant Agreement and Assurances is a prior settlement agreement between

Oceanside and AELD's predecessor. The agreement, now assigned to AELD, provides AELD with an option to repurchase the 14.7-Acre Parcel if certain airport-related development does not occur on the property within a five-year period. However, if enforced, the agreement would limit the FAA's ability to establish the terms and conditions for development of the 14.7-Acre Parcel, including how long Oceanside can take to develop the property. It also would deprive the FAA of its right to prevent Oceanside's sale of the property without the FAA's consent.

The district court found that the comprehensive statutory scheme demonstrated the dominance of the federal interest in aviation safety as related to land use for airport facilities and, therefore, the City's attempt to regulate the use of airport land through a buy-back provision of the settlement agreement is preempted. The Court found that the buy-back provision directly conflicts with the regulations and assurances that preclude the City from modifying the existing airport layout plan without FAA's consent. The only remaining claim is AELD's claim of fraudulent inducement to contract against Oceanside.

Court Finds FAA Controllers Not Negligent in Crash of Private Plane in Virginia

On September 8, the United States District Court for the Middle District of North Carolina issued a decision in Turner v. United States, 2010 WL 3553860 (M.D.N.C. 2010), and in all related cases, holding that the United States was not negligent in connection with a 2004 crash of a Beechcraft Super King Air 200 owned by prominent NASCAR participant Hendrick Motorsports, Inc. The case was tried in two phases in April and July of 2009. The first phase involved claims primarily against Hendrick Motorsports, which were tried to a jury. The second phase was limited to claims against the United States under the Federal Tort Claims Act, for which a jury trial is not authorized.

The court found no causative negligence on the part of FAA air traffic controllers for their failure to notice that the aircraft, which was on an instrument approach to Martinsville, Virginia and was no longer in direct radio contact, had overflown the airport and was continuing toward rising terrain. Instead, the court found that the cause of the accident was the pilots' failure to fly the approach procedure as published, and their subsequent failure to execute the published missed approach when the airport was not in sight. Notably, the court held that the controller did not have a duty to issue a safety alert once the aircraft had been instructed to change to the UNICOM frequency of the untowered airport at Martinsville. In addition, the court reiterated that it is the pilot's duty to follow the regulations and that controllers are not required to anticipate pilot negligence.

Court Finds FAA Controller not Negligent in Crash of Experimental Jet in Colorado

On June 17, the United States District Court for the District of Colorado issued

a decision in Excel-Jet, Inc. v. United States, 2010 WL 2501113 (D. Colo. 2010), holding that the air traffic controllers in the tower at Colorado Springs were not negligent in handling the takeoff clearance for the plaintiff's experimental jet. There were two principal issues in the case: Whether the controller had failed to issue a wake turbulence warning related to the departure of a preceding aircraft and whether the accident was caused by wake turbulence.

The court held that the United States was not liable on either theory. The court credited the testimony of the controller and found that the takeoff distances were such that no wake turbulence advisory was required. With respect to causation, the court rejected the plaintiff's "differential diagnosis" approach, in which the plaintiffs attempted to negate several possible scenarios that could have caused the accident, leaving only wake turbulence. The court concluded that the absence of evidence was insufficient for the plaintiffs to meet their burden of affirmatively establishing that wake turbulence caused the accident. The case was highlighted by the testimony of the plaintiff's expert who conceded that his initial "expert report" contained mistakes and was unreliable.

Briefing Completed in FOIA Case Remanded from the Supreme Court

Briefing on cross motions for summary judgment has been completed in Taylor v. Babbitt (D.D.C. No. 03-0173). The parties in this FOIA case, on remand from the Supreme Court, dispute whether aircraft design data (engineering drawings, blueprints, specifications, and other design information) for the Fairchild F-45, a 1930's-era prototype fighter aircraft, are exempt from disclosure under FOIA exemption 4, which covers confidential commercial information and trade secrets.

Manufacturers are required to submit aircraft design data to the FAA for type certification, a process through which the agency evaluates an airplane to determine whether it meets minimum safety standards. FOIA requesters often seek aircraft design data from the FAA for various reasons, such as to engineer repairs or modifications to the aircraft. In many instances, the requesters desire the lower cost of FOIA fees over the cost of purchasing the data from the manufacturer. The FAA routinely denies these requests under exemption 4.

Courts have generally agreed with the FAA that aircraft design data contains commercially valuable, confidential information and/or trade secrets. This case, however, presents a more nuanced issue: whether design data of an old, antique airplane, which is no longer in production or supported by the manufacturer (or its successor interest) still qualifies as a trade secret or confidential commercial information under exemption 4. Under exemption 4, the design data must be of value and a secret to be considered a trade secret. Taylor argues that the design data has no value, because resumed production is unrealistic. The FAA argues that exemption 4 remains applicable, because the design data still has value, in part evidenced by the FOIA request itself. In

addition, the FAA argues that the design data has value in the repair market. Concerning secrecy, Taylor contends that a letter from Fairchild to the FAA in the 1950s authorizing the FAA to loan the data in limited circumstances obviated the "secret." On the other hand, the FAA notes that Fairchild's authorization was later retracted, and Taylor cannot show that the FAA ever released the design data. Further, Fairchild's successor has not authorized the FAA to release the design data to Taylor.

The district court previously granted summary judgment to the FAA on claim preclusion grounds. Prior to Taylor's case, a close associate of Taylor, Gene Herrick, litigated his FOIA request for the Fairchild design data. The case went up to the Tenth Circuit where the FAA prevailed. Based on that decision, the district court found that Taylor had been "virtually represented" by Herrick. Therefore, Taylor's claim was barred under nonparty claim preclusion. The D.C. Circuit agreed, announcing a five factor "virtual representation" nonparty claim preclusion test. The Supreme Court vacated the D.C. Circuit opinion, disapproving of "virtual representation" theory, and remanded the case back to the district court. Taylor v. Sturgell, 553 U.S. 880 (2008).

Court Grants FAA Motion to Intervene in Runway Extension Case

On September 14, the United States District Court for the District of Connecticut granted the FAA's motion to intervene in the Town of Stratford v. City of Bridgeport (D. Conn. No. 10-00394). The case arises out of a complaint brought by Stratford in state court and removed to federal court by Bridgeport in a dispute over Bridgeport's plan to improve its airport by developing a runway safety area at the end of one runway. Stratford contends that this is tantamount to a "runway extension," which requires Stratford's approval under the terms of a settlement agreement that resolved prior litigation.

The FAA's interest is that the planned runway safety area would be developed on 1.075 acres of land now held by the FAA, following extensive negotiation with the Department of the Army, which agreed to carve that area out of a much larger parcel that it was trying to sell. The FAA intends to transfer the land to Bridgeport, but that plan would be thwarted if Stratford prevails in its litigation. In granting the motion to intervene, the court characterized Stratford's opposition, based on the contention that the FAA never had the right to transfer the land to Bridgeport because it did not have the allegedly required consent from Stratford, as "nonsensical."

Federal Highway Administration

FHWA Wins California Environmental Appeal

On July 1, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's award of summary judgment to FHWA in Rohnert Park Citizens to

Enforce CEQA, et al. v. DOT, 2010 WL 2640376 (9th Cir. 2010). The litigation arose from the Wilfred Avenue Interchange Project on U.S. Route 101 in Rohnert Park, Sonoma County, California. The project, which will cover a distance of approximately 1.6 miles, will modify the interchange and realign and widen US 101 from four to six lanes. The new lanes will be reserved for High Occupancy Vehicles. FHWA issued a Finding of No Significant Impact (FONSI) for the project in November 2006 and the project has been under construction since mid-2009.

On September 6, 2007, plaintiffs filed a complaint against the California Department of Transportation (Caltrans), the United States Department of Transportation, and FHWA. Against FHWA, plaintiffs alleged the agency violated NEPA by not preparing an environmental impact statement (EIS) or reevaluation tied to alleged significant cumulative environmental impacts associated with the proposed Graton Rancheria Casino and Hotel Project. The casino remains only in the planning stages to this day. The complaint's separate causes of action against Caltrans were dismissed along with the State in March 2008, pursuant to the 11th Amendment.

On March 5, 2009, the District Court found FHWA had properly considered the impacts of the casino, especially given the speculative nature of the latter project. Plaintiffs filed a motion for emergency relief in the Ninth Circuit on May 7, 2009 that the Ninth Circuit denied on June 4, 2009.

The Ninth Circuit heard oral argument on the merits of the case on March 11, 2010. In a four-page unpublished memorandum decision affirming the District Court's opinion, the Court held that FHWA's decision was not arbitrary or capricious because of the lack of information about the casino project's likely effects on traffic. The Court found that a NEPA document's failure to analyze unknown environmental effects of reasonably foreseeable future actions does not render its cumulative impacts analysis arbitrary or capricious.

Plaintiff Files Appeal in Washington Road Widening Challenge

On April 20, plaintiffs appealed the March 8 decision of the U.S. District Court for the Eastern District of Washington in Hamilton v. DOT, 2010 WL 889964 (E.D. Wash. 2010), to the U.S. Court of Appeals for the Ninth Circuit (9th Cir. No. 10-35406). The district court upheld FHWA's Environmental Assessment (EA), Finding of No Significant Impact (FONSI), and section 4(f) determination on use of a school sports field. The case involves a proposed 8.6-mile safety improvement project for Bigelow Gulch Road and Forker Road in Spokane County, WA. The proposed project would widen the existing two-lane road to four lanes with shoulders, and straighten dangerous curves along the alignment. The district court rejected plaintiff's argument that the length of the EA and agency criticism in the record on the EA were evidence of agency admissions that an Environmental Impact Statement (EIS) was required.

The district court found that FHWA regulations do not automatically require an EIS for a new four-lane highway at a new location. Since 71% of the project is on existing alignment, and it does not clearly fall into any of the three categories requiring a specific type of environmental document in FHWA's regulations, the court found that FHWA's initial determination to conduct an EA was within the agency's discretion.

FHWA Wins Virginia I-66 Environmental Challenge

On April 30, the U.S. District Court for the Eastern District of Virginia granted summary judgment in favor of FHWA and the Commonwealth of Virginia in Clement v. LaHood (E.D. Va. No. 07-00066). The project involves improvements to the acceleration and deceleration lanes within the existing right of way along I-66. FHWA approved the project as a Categorical Exclusion (CE).

The complaint alleged that the project was improperly segmented, that an environmental controversy existed making CE classification improper, that the project was inconsistent with an earlier feasibility study that examined ways to improve west-bound mobility in the I-66 corridor inside the Capital Beltway, that the noise abatement measures violated FHWA's regulations, and that the public meetings violated §128(a) of the Federal Aid Highway Act. The complaint also alleged that the project was inconsistent with the 1977 Decision issued by Secretary Coleman approving construction of I-66 inside the Capital Beltway. The Coleman decision was vacated in large part by §357(a) of the 2000 DOT Appropriations Act, and plaintiffs argued that §357(a) was unconstitutional.

The court rejected the plaintiffs' segmentation argument and stated, "Plaintiffs have not shown that the termini, the acceleration/deceleration lane extensions, are illogical." The court also declined to find that Arlington County's opposition to the project constituted "controversy on environmental grounds." The court found that the defendants made reasonable decisions concerning noise abatement that the public hearing requirement did not apply to the I-66 project because it was a CE, which by definition would cause no significant impact. The court also rejected the plaintiffs' arguments concerning the constitutionality of §357(a) of the 2000 DOT Appropriations Act. The court found that Congress did not overstep its authority in enacting §357(a) and that §357(a) did not improperly abrogate an executive branch decision. Furthermore, the Court determined that even if §357(a) was unconstitutional and if the Coleman Decision retained its full effect, no relief could be granted because the Coleman Decision's lane restrictions did not apply to the I-66 project. The Coleman Decision restricted future widening of I-66 inside the beltway beyond the four lanes being approved without prior Secretarial approval, except acceleration/deceleration lanes at interchange locations. The court held that the I-66 project fell within the acceleration/deceleration lane exception and did not violate the Coleman Decision.

FHWA Wins North Carolina Beltway Challenge

On May 19, the U.S. District Court for the Middle District of North Carolina granted FHWA's motion for summary judgment and dismissed all of plaintiffs' claims regarding the Winston-Salem Northern Beltway project. Plaintiffs in North Carolina Alliance for Transportation v. DOT, 2010 WL 1992816 (M.D.N.C. 2010), sought to stop construction on three projects collectively known as the Winston-Salem Northern Beltway.

Plaintiffs filed two related cases involving challenges to the Beltway project. In their first case, the Court entered an Order of Dismissal by consent of all parties on June 29, 1999, which prohibited further work on the project until certain enumerated actions occurred. Defendants contended they had satisfied all terms of the 1999 Order and thus moved to jointly dissolve it. Plaintiffs contested that compliance with the 1999 had occurred and opposed the motion to dissolve. The Court granted defendants' joint motion to dissolve. In plaintiffs' second case, plaintiffs again challenged further construction on the Beltway project. Plaintiffs sought summary judgment on the grounds that the environmental analysis failed to 1) evaluate the effect the project would have on global climate change through the production of greenhouse gases and 2) account for the impact of two future connecting road construction projects not contained in the Beltway project. Plaintiffs alleged these failures constituted violations of NEPA and the North Carolina Environmental Policy Act (NCEPA). Defendants opposed plaintiffs' motion and sought summary judgment themselves on the grounds that the alleged omissions did not violate federal law.

Concerning the global climate change claim, the court found that defendants had reasonably considered the major environmental consequences of the Beltway project and had provided a rational basis for their decision not to quantitatively analyze the potential effect greenhouse gas emissions may have on global climate change, and so did not violate NEPA. The court found that proposed EPA regulations that did not apply to highway projects and that post-dated the ROD did not require FHWA to analyze greenhouse gas emissions for the Beltway project. The court also noted that EPA was consulted during the administrative process and allowed to comment on the EIS, but EPA never suggested that FHWA was required to analyze greenhouse gases. Additionally, the court found that defendants did not violate NEPA by determining not to address climate change based on vehicle miles traveled when other variables also affect the amount of greenhouse gas emissions.

Concerning the connecting roads claim, the court found that the connecting roads to the project constituted a mere proposal, not reasonably foreseeable, as the roads were unfunded and not sufficiently definite to require NEPA analysis. Therefore, the defendants did not violate NEPA by failing to assess the cumulative impacts from the potential but unfunded roads.

Court Dismisses Challenge to EA in Washington

On June 25, the U.S. District Court for the Western District of Washington granted FHWA's motion to dismiss Campbell v. Jilik, 2010 WL 2605239 (W.D. Wash. 2010), for lack of subject matter jurisdiction. The court dismissed the matter in its entirety without prejudice and without costs or fees to any party and struck plaintiff's pending motion for a preliminary injunction. Plaintiffs' complaint alleged violations of NEPA related to Seattle's S. Holgate to S. King Street Viaduct Replacement Project, the southern portion of the Alaskan Way Viaduct and Seawall Replacement Program. The complaint challenged the decision to prepare and Environmental Assessment (EA) and not an Environmental Impact Statement, to segment the project for NEPA review, and to not use plaintiffs' preferred alternative. Plaintiffs also objected to the alternatives and cumulative impacts analysis in the EA. The court found that plaintiffs did not have standing because their procedural injuries did not constitute a sufficiently concrete interest in the challenged project.

FHWA Wins D.C. FOIA Case, Plaintiff Appeals

On August 11, the U.S. District Court for the District of Columbia granted FHWA's motion for summary judgment in Wilson v. DOT, 2010 WL 3184300 (D.D.C. 2010). The lawsuit arose from four separate FOIA requests. The Court ruled that, with respect to two FOIA requests, plaintiff failed to exhaust his administrative remedies, and with respect to the two remaining FOIA requests, DOT satisfied its FOIA obligations.

Plaintiff had requested copies of documents relating to FHWA employee surveys in 2007 and 2008 and all harassment, discrimination, and Equal Employment Opportunity (EEO) complaints directed at the FHWA Office of the Chief Financial Officer. Notwithstanding plaintiff's argument that FHWA improperly withheld responsive documents, the Court found that FHWA's declarations demonstrated that the agency: (1) conducted a reasonable search in response to plaintiff's FOIA requests; (2) reasonably interpreted the scope of plaintiff's FOIA requests; and (3) properly withheld individual names from FHWA's EEO Counseling Log under FOIA Exemption 6.

Plaintiff also sought to challenge the DOT Departmental Office of Civil Rights' determination that a report of investigation and multiple EEO letters were exempt under FOIA Exemption 7, but because he never filed an administrative appeal of DOCR's initial determination, this issue was not properly before the Court.

On September 8, plaintiff appealed the district court decision to the U.S. Court of Appeals for the District of Columbia Circuit (No. 10-5295).

FHWA Wins Partial Summary Judgment in Arizona Negligence Case

On June 18, the U.S. District Court for the District of Arizona granted partial summary judgment for FHWA in Melvin v. United States (D. Ariz. No. 08-1666). The court dismissed one count under the discretionary function exemption of the Federal Tort Claims Act, but found a genuine issue of material fact as to whether compliance with NCHRP Report 350 re: median barrier design was mandatory or advisory.

The case arose from an Arizona highway accident in which plaintiff was injured by a car that crossed a 3-cable median barrier. Plaintiff filed a Federal Tort Claims Act claim alleging three counts of negligence by FHWA: negligence related to decisions made by FHWA employees who were part of a 1998 FHWA-AASHTO Task Force regarding implementation of NCHRP Report 350, negligence in accepting the three-strand cable median barrier as NCHRP Report 350 compliant, and negligence in authorizing federal funds for the SR51 Cable Median Barrier Project.

The court found that the discretionary function exemption applied to count 3 -- FHWA authorization of funds for the SR51 Cable Median Barrier Project -- because FHWA had discretion in determining whether to approve federal funding for the project. However, for counts 1 and 2, the court found that the applicability of the discretionary function exemption depends on "whether the guidelines in Report 350 are mandatory or advisory." The court stated: "Based on the evidence in the record, the Court finds that a genuine issue of material fact exists as to the nature of the recommendations in Report 350," and "cannot conclude as a matter of law that the discretionary function applies." Accordingly, the court granted Defendant's motion for summary judgment only as to count 3.

Preliminary Injunction Denied in Illinois DBE Program Challenge

On September 3, a Chicago guardrail and fencing company filed a constitutional challenge to FHWA's Disadvantaged Business Enterprise (DBE) Program. Plaintiff in Midwest Fence Corporation v. LaHood, et al (N.D. Ill. No. 10-05627) is a non-DBE contractor for the Illinois Department of Transportation (IDOT). The lawsuit challenges the constitutionality of the Federal disadvantaged business enterprise (DBE) program on its face and as applied by US DOT, FHWA, and IDOT. Essentially, plaintiff claims that the statute authorizing the DBE program is an unconstitutional delegation by Congress of legislative authority to the Secretary to establish and determine substantive rights based on race, ethnicity, and gender, in violation of the separation of powers clause and that it fails to articulate a compelling need for a race-based affirmative action program in violation of the equal protection guarantees in the Fifth and Fourteenth amendments. In addition, plaintiff claims the DBE regulations exceed the authority conferred by Congress in the authorizing statute, are not narrowly

tailored because of the undue burden placed on non-DBE subcontractors, fail to tailor the preference accorded DBEs based on the relative degree of discrimination individual groups may have endured, encourages implementation of a quota program through vague good faith efforts standards, and improperly delegates Federal authority to State departments of transportation. The complaint also challenges the constitutionality of the State's local DBE program implemented on wholly state funded contracts.

Shortly after filing its complaint, plaintiff sought a TRO to prevent IDOT from using DBE project goals in a September 17 bidding. After a September 14 evidentiary hearing, in which it converted plaintiff's motion to a motion for a preliminary injunction, the court denied the motion, finding that plaintiff had not shown imminent harm or a likelihood of success on the merits.

Court Denies Preliminary Injunction in Environmental Suit to Halt New Detroit-Windsor Bridge

On August 4, the U.S. District Court for the Eastern District of Michigan denied plaintiffs' motion for a preliminary injunction against the construction of the Detroit River International Crossing (DRIC), a new highway bridge connecting Detroit and Windsor, Ontario. The suit, Latin Americans for Social and Economic Development v. FHWA (E.D. Mich. No. 09-00897), was filed by six Detroit-area community groups and the Detroit International Bridge Company (DIBC) and alleges that the agency violated NEPA and the APA, section 4(f) of the DOT Act, and the National Historic Preservation Act (NHPA) in its environmental review supporting the DRIC. DIBC owns and operates the Ambassador Bridge, the only existing bridge linking the Detroit area to Canada.

The complaint alleges, among other things, that the project's Final EIS relied upon erroneous traffic data and is otherwise not supported by the record, lacked a reasonable range of alternatives and did not adequately compare the preferred alternative to others, improperly segmented DRIC from a nearby transportation project and otherwise inadequately addressed effects of other projects in the area, inadequately addressed environmental justice issues related to low-income and minority populations of Detroit's Delray neighborhood, and inadequately addressed air quality impacts on Delray and Southwest Detroit.

The 4(f) claim is based on the allegation that DRIC construction would be on protected parkland, recreational areas, and historic sites, despite the existence of feasible and prudent alternatives, and that FHWA failed to engage in all possible planning to minimize harm, including the consideration of less harmful alternatives. The NHPA claim is based on FHWA's alleged failure to fully document DRIC's impact on sites eligible for listing in the National Register of Historic Places and to consider alternatives that would have minimized or eliminated such impacts.

Plaintiffs seek to enjoin any action taken in reliance on the DRIC ROD and seek

to disqualify FHWA and the Department from acting as the lead agency on the DRIC EIS based on the allegation that FHWA, and specifically the FHWA Michigan Division Administrator, co-defendant James Steele, have impermissibly acted as advocates for DRIC. The case will now proceed to summary judgment briefing.

United States Moves to Transfer Detroit International Bridge Company Suit Seeking to Permit Construction of Its Bridge, Stop Construction of Bridge Approved by FHWA

On July 8, the United States moved to transfer Detroit International Bridge Company, et al. v. The Government of Canada, et al. (D.D.C. 10-00476), to the U.S. District Court for the Eastern District of Michigan. The court has deferred ruling on the motion pending completion of discovery on the transfer issue. Detroit International Bridge Company (DIBC) and its Canadian affiliate, owners and operators of the only bridge connecting Detroit to Windsor, Canada, brought suit against the Departments of Transportation and Homeland Security, FHWA, the Coast Guard, and the Government of Canada, alleging that various actions taken by the defendants had deprived DIBC of its right to build a new bridge adjacent to its exiting span, in violation of DIBC's rights under the U.S. Constitution, the Boundary Waters Treaty, and various statutes. The relief requested in the suit includes declaratory judgments regarding DIBC's right to build its new bridge and an injunction against the construction the Detroit River International Crossing (DRIC), a planned new bridge between Detroit and Windsor downriver from DIBC's bridge. FHWA has issued the environmental approval for the DRIC, and DIBC is a plaintiff in a separate suit, also reported in this issue, challenging that approval and seeking to stop the DRIC's construction.

Court Grants Summary Judgment to United States in Detroit Bridge Takings Case

On June 29, the U.S. District Court for the Eastern District of Michigan granted the United States' motion for summary judgment in Commodities Export Co. v. City of Detroit, et al., 2010 WL 2633042 (E.D. Mich. 2010). The government sought summary judgment on the issue of whether the Detroit International Bridge Company (DIBC) is a "federal instrumentality" for the purposes of adjudicating takings claims associated with construction at DIBC's Ambassador Bridge linking Detroit and Windsor, Ontario. The United States maintained, and the court agreed, that DIBC, a co-defendant in the case, is not a federal instrumentality for any purpose. DIBC maintained that it was a federal instrumentality for takings purposes, relying in part on a 2008 Michigan Supreme Court decision that so held. DIBC has moved the court to reconsider its decision, and that motion is still pending. The underlying takings claim is being brought by a Detroit business that claims DIBC's construction of new bridge facilities has diminished the value of its property.

FHWA Settles Challenge to Charleston Marine Terminal and Interstate Project

On August 6, the U.S. District Court for the District of South Carolina dismissed with prejudice South Carolina Coastal Conservation League v. United States Army Corps of Engineers, Charleston District, et al. (D.S.C., No. 07-3802) based on a settlement between the FHWA and plaintiff. Plaintiff had challenged the decision by FHWA and the Army Corps of Engineers to approve construction of a new $1.2 billion marine container terminal and access highway linking the terminal to I-26, Charleston, SC (Charleston Terminal Project). Plaintiff challenged the Corps' decision to limit the scope of the EIS to two segments of the overall project, although analysis of traffic impacts revealed that construction of those components could not proceed as planned unless the project included the widening of portions of I-26. The complaint alleged that FHWA had delayed issuing a final decision on the project and so was a necessary party due to its responsibility as a cooperating agency in the EIS and its jurisdiction over the interchange modification and I-26 widening components of the overall project.

On November 17, 2009, the court joined FHWA as a defendant in response to the plaintiff's second amended complaint filed in July, 2009. Plaintiff had filed the second amended complaint after previous attempts to join FHWA to the lawsuit had failed. On December 23, 2009, the FHWA filed a motion to dismiss. The case was settled and dismissed with prejudice, with no ruling from the court on FHWA's motion.

FHWA Wins Texas Toll Road Environmental Challenge, Plaintiffs Appeal

On May 19, the United States District Court for the Southern District of Texas granted FHWA summary judgment and dismissed all claims in Sierra Club v. FHWA, 2010 WL 2036209 (S.D. Tex. No. 2010), in which plaintiffs alleged NEPA violations regarding Segment E of Houston's Grand Parkway.

The fifteen-mile project is intended to connect I-10 in the Katy area west of Houston to US 290 northwest of Houston. Segment E is planned as a four-lane controlled access toll facility. This segment is just one part of the planned 170-mile highway loop around the Houston metropolitan area. Current plans divide the Grand Parkway into eleven lettered segments with most segments of the loop still in the planning stages. The proposed route of the tollway takes it through the Katy Prairie, an area plaintiffs have claimed is environmentally sensitive. Plaintiffs Sierra Club and Houston Audubon sought to stop construction of the project by challenging the FHWA decision to approve the Segment E project.

The plaintiffs' amended complaint alleged that the defendants violated the APA, NEPA, and FHWA's NEPA regulations in multiple ways, primarily through inadequate consideration of alternatives and air quality impacts. In upholding the FHWA decision, the Court's opinion is noteworthy in its

discussion of the alternatives analysis and the air quality analysis. The Court held that FHWA's consideration of build and no-build alternatives that included multiple alternatives under those two umbrella terms was sufficient consideration of the range of alternatives required by NEPA. The Court upheld the decision to consider air quality impacts from air toxics and particulates based on the EPA's Clean Air Act framework, finding that the decision to follow the EPA's framework cannot be considered arbitrary or capricious. The Court upheld the FHWA's decision despite's the agency's failure to consider greenhouse gas emissions because no law or regulation required such consideration for an adequate NEPA decision.

On July 16, plaintiffs appealed the case to the U.S. Court of Appeals for the Fifth Circuit (No. 10-20502).

New Challenge to Cleveland Innerbelt Project

On April 14, several Cleveland groups filed a complaint in the U.S. District Court for the Northern District of Ohio alleging NEPA and other violations in the Cleveland Innerbelt Project. In Ohio Midtown Cleveland, Inc. v. FHWA (N.D. Ohio No. 10-00776), plaintiffs challenge a proposed project cutting through downtown Cleveland, including, but not limited to, rebuilding a major bridge, expansion and straightening of a major highway, and redesigning local arterial road linkage to the highway. Plaintiffs' allegations focus mainly upon the Innerbelt Trench portion of the Project. Plaintiffs allege that FHWA violated NEPA, the Federal Aid Highway Act, and Section 4(f) in approving the EIS. Plaintiffs request a judgment to segment the Innerbelt Trench portion from the rest of the project to allow for further consideration of alternatives. Plaintiffs allege "recent changes in circumstances" that require defendants to perform a Supplemental EIS, which should include an economic impact analysis regarding the effects of removing existing interchanges.

This is the second lawsuit filed regarding this project. The first law suit, Cronin v. FHWA (N.D. Ohio. No. 09-2699), deals specifically with the alleged need for a bike bridge to accompany the replacement of the bridge in this project.

DOT Makes Claim through TIFIA in SBX Bankruptcy

On March 22, the South Bay Expressway Limited Partnership (SBX) filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of California. SBX holds the toll road concession franchise with the California Department of Transportation for South Bay Expressway (the South Bay Project), a 9-mile toll road in eastern San Diego County. SBX received a loan from the Transportation Infrastructure Finance and Innovation Act (TIFIA) credit program for $140 million in May 2003, along with other financing from private equity, a consortium of ten senior banks (the Senior Banks), and donated right-of-way.

SBX filed for bankruptcy primarily due to substantial construction-related claims against SBX by Otay River Constructors

(ORC), as well as lackluster revenue performance. DOT, acting by and through the Federal Highway Administrator, filed a Proof of Claim with the bankruptcy court in In re SBX (Bankr. S.D. Cal. No. 10-04516) for the outstanding balance of the loan, including accrued interest. Pursuant to the TIFIA statute, 23 U.S.C. 603(b)(6), TIFIA's debt sprang to parity with that of the Senior Banks upon SBX's bankruptcy filing. Although SBX is in bankruptcy, it is not in payment default on the TIFIA loan because the first TIFIA interest payment is not due until June 30, 2012.

The key issue remaining in dispute in the bankruptcy is the priority of a mechanic's lien filed by ORC against the South Bay Project in September 2009 in the amount of $145.5 million, which is comprised of $80.9 million of construction-related claims and $65.6 million of unpaid amounts allegedly due to ORC. The priority of the mechanic's lien is being litigated by SBX, ORC, DOT, and the Senior Banks in a trial before the bankruptcy court.

Federal Railroad Administration

D.C. Circuit Denies Petition for Review of Certification Decision

On October 12, U.S. Court of Appeals for the District of Columbia Circuit denied the petition for review in Smith v. FRA (D.C. Cir. No. 09-1230). Petitioner L.R. Smith, a Union Pacific Railroad Company (UP) locomotive engineer, and co-petitioner the Brotherhood of Locomotive Engineers and Trainmen sought review of FRA's denial of the engineer's appeal from a decision by FRA's Locomotive Engineer Review Board (LERB) dismissing Mr. Smith's petition for review on the grounds that the petition was incomplete. The Administrator's decision affirmed the findings of the LERB that Smith did not file a timely and complete petition, and its dismissal of Smith's petition to the LERB. Specifically, the Administrator found that Smith did not submit documents that had been requested by FRA and did not demonstrate excusable neglect for not doing so. Further, the Administrator found that it was Smith's responsibility to correctly file all of the documents necessary to process his petition for review from the alleged decertification.

At issue in this case was whether FRA acted improperly and violated the due process rights of Mr. Smith by (a) allegedly revoking his engineer certification without a hearing required by 49 CFR Part 240 and (b) dismissing his petition for review of his locomotive engineer certification on the basis that the petition was incomplete. In a per curiam opinion, the court affirmed the Administrator's decision in all respects.

FRA Settles Suit for Indemnity Regarding Northeast Corridor Improvement Project

FRA has settled Parsons Transportation Group, Inc. v. United States (Fed. Cl. No. 08-79C), in which Parsons Transportation Group (Parsons) sued FRA under an indemnity clause contained in the Parsons-FRA contract

for design work in connection with the original Northeast Corridor Improvement Project, much of the work for which took place in the 1980s. The indemnity made the Government responsible for certain claims (under certain conditions) above a $1 million deductible, up to $100 million. Parsons has had to pay damages in connection with various lawsuits in which it has been a defendant.

Most of the claims against the United States are the subject of a settlement agreement, entered into in September 2010, under which the United States has paid Parsons $632,800. A key factor in the case, and the subsequent settlement, was the court's dismissal of the government's motion for summary judgment, finding that a broad release in favor of the government of one of the subsidiary claims did not prevent Parsons from including that claim as part of the deductible amount, thus supporting other claims it had above $1 million. Claims relating to contaminated soils in the Wilmington yard are the subject of ongoing litigation in Delaware state court, and the United States and Parsons will seek to resolve that claim upon the conclusion of the state litigation.

FRA Seeks Dismissal of Petition for Review Relating to the Issuance of Metrics and Standards for Intercity Passenger Rail Service

On July 2, the Association of American Railroads (AAR) filed a petition for review in the U. S. Court of Appeals for the District of Columbia challenging Metrics and Standards (for measuring the performance and service quality of intercity passenger train operations) developed by FRA jointly with Amtrak pursuant to Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). In Association of American Railroads v. FRA, et al. (D.C. Cir. No. 10-1154), AAR raises the following issues: (1) whether section 207 of PRIIA is unconstitutional; and (2) whether the Metrics and Standards are a product of arbitrary and capricious decision-making in violation of the Administrative Procedure Act because they are not the product of reasoned agency decision-making and they are not supported by substantial evidence in the rulemaking record. The government filed a motion to dismiss the petition for review for lack of jurisdiction on August 23, arguing that the case should have been filed in a federal district court. On September 3, AAR filed a response to the motion to dismiss in which it did not object to the dismissal of the case without prejudice should the court determine that it is without jurisdiction. The parties are waiting for the D.C. Circuit's ruling on the motion to dismiss.

FRA Challenged on Determination of Its Safety Jurisdiction over the Port of Shreveport-Bossier

On April 23, the Port of Shreveport-Bossier (the Port) filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit challenging FRA's determination that the Port is subject to FRA's safety jurisdiction. In Port of Shreveport-Bossier v. FRA (5th Cir. No. 10-60324), the Port is challenging a

February 22, 2010, determination in which FRA notified the Port that it is a railroad carrier within the meaning of the railroad safety laws and is therefore subject to FRA's jurisdiction.

Although FRA's statutory jurisdiction extends to all railroad carriers, FRA has chosen as a matter of policy not to impose its regulations on certain categories of operations, such as "plant railroads." "Plant railroads" are railroads whose entire operations are confined to an industrial installation that is not part of the general railroad system of transportation (general system).

The Port asserts that its rail operation is a plant railroad and that FRA's jurisdiction determination is contrary to FRA's regulations and an improper attempt to expand its jurisdiction outside of the rulemaking process. FRA argues that the Port provides railroad transportation because it switches rail cars in service for fourteen different tenants, rather than for its own purposes or industrial processes, which characterizes operation on the general railroad system of transportation (general system). The case has been fully briefed. The court has not yet set an oral argument date.

Association of American Railroads Seeks D.C. Circuit Review of FRA's Positive Train Control Final Rule

On July 28, the Association of American Railroads (AAR) filed a petition for review in the U.S Court of Appeals for the District of Columbia Circuit of FRA's denial of its petition for reconsideration of FRA's final rule on positive train control (PTC). In Association of American Railroads v. FRA, et al. (D.C. Cir. No. 10-1198), AAR has identified three specific challenges to FRA's PTC final rule. First, AAR contends that FRA acted in an arbitrary and capricious manner by adopting a 2008 (the year that the implementing statute was passed) baseline for determining the routes on which PTC must be installed. Second, AAR questions whether FRA acted in an arbitrary and capricious manner by mandating that a PTC screen be visible to each member of the train crew. Finally, AAR challenges whether the PTC final rule or portions of the underlying statute violate the U.S. Constitution.

Federal Transit Administration

D.C. Circuit Denies Rehearing Petitions in Charter Bus Litigation

On March 24, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition by the United Motorcoach Association for rehearing or rehearing en banc of the court's summary affirmance of judgment for FTA in United Motorcoach Association v. Rogoff (D.C. Cir. No. 09-5211), a suit under the Administrative Procedure Act contesting an FTA charter decision from June 2008, issued under 49 C.F.R. Part 604, which allowed King County Metro (KCM)—an FTA grantee and the principal bus operator in metropolitan

Seattle—to continue to provide game-day shuttle service through the end of the Seattle Mariners' 2008 baseball season. FTA rendered that decision when it became clear that a local private charter bus operator and the Mariners would not be able to agree on the price for the same level of service that KCM had provided to Mariners fans the previous ten years.

Oral Argument Held in Constitutional Challenge to Charter Bus Appropriations Provision

On September 23, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in American Bus Association and United Motorcoach Association v. Rogoff (D.C. Cir. Nos. 10-5213 & 10-5214), the government's appeal of an adverse district court decision in the case. The case involves a constitutional challenge to the "Murray Amendment," which was included in Fiscal Year 2010 Appropriations Act and prevents any funds from being used to enforce FTA's charter regulation, 49 CFR Part 604, against King County Metro (KCM) in Seattle. As a result, KCM is providing charter transportation to Seattle Mariner's games. On July 13, the D.C. Circuit granted the government's motions for a stay and an expedited appeal of the trial court's earlier order in American Bus Association and United Motorcoach Association v. Rogoff (D.D.C. 10-00686).

The district court had determined that the "Murray Amendment" violated the First Amendment's Petition Clause and had struck the provision as being unconstitutional. In its briefs to the D.C. Circuit, the government argued that the trial court erred by applying a "heightened scrutiny" stricter than the rational basis test when the trial court held that the "Murray Amendment" violated the rights of private charter bus operators under the Petition Clause. Also, the Government argued that the "Murray Amendment" is rationally related to legitimate governmental goals of ensuring affordable public transportation to Seattle Mariners' baseball games and transportation that is accessible to persons with disabilities.

Government Seeks Summary Judgment in Environmental Justice Challenge to Minnesota Light-Rail Project

On September 15, the United States filed its summary judgment brief in The St. Paul Branch of the NAACP, et al. v. DOT, et al. (D. Minn. No. 10-00147). The litigation arises out of the Record of Decision issued for an 11-mile light rail line transit project that will include 18 new stations and five existing stations and will connect the central business districts between Minneapolis and St. Paul. Plaintiffs contend that the Environmental Impact Statement failed to adequately address the adverse impacts of the project on the historic Rondo Community, a collection of predominately African-American neighborhoods in downtown St. Paul. Plaintiffs allege violations of NEPA in the defendants' failures to adequately analyze the disproportionate effects of the project on minority and low-income populations, develop sufficient measures

to mitigate those effects, and consider the cumulative effects of previous Federal actions, including the way in which the construction of I-94 in the 1950s split the Rondo neighborhoods and displaced hundreds of residents and businesses. Plaintiffs also allege that defendants violated NEPA by improperly segmenting the project covered by the original environmental impact statement from the current supplemental NEPA studies for three additional "infill" stations along the alignment. A hearing before the court is scheduled for November 5, 2010.

Maritime Administration

Oral Argument Heard in Cargo Preference Act Appeal

On September 1, the United States Court of Appeals for the Ninth Circuit heard oral argument in America Cargo Transport, Inc. v. United States (9th Cir. Nos. 08-35010 & 08-35276), a U.S.-flag carrier appeal of the 2007 dismissal of its law suit and rejection of the award of legal fees. America Cargo Transport (ACT) brought suit in the U.S. District Court for the Western District of Washington when the Agency for International Development (AID) rejected ACT's bid to carry a full shipload lot of cargo without MARAD's concurrence. In the district court case, the Department of Justice belatedly accepted MARAD's construction of relevant provisions of the Cargo Preference Act, which coincided with plaintiff's arguments. On the basis of the Justice Department's position, that only MARAD can make a determination that a U.S.-flag vessel is not available for a full shipload lot of cargo, the district court dismissed ACT's suit as moot. However, on appeal, ACT challenged the mootness determination and denial of legal fees under the Equal Access to Justice Act.

Consent Decree Approved in Reserve Fleet Environmental Litigation

A Consent Decree reflecting MARAD's and plaintiffs' settlement in Arc Ecology et al. v. DOT (E.D. Cal. No. 07-2320) was approved by the court on April 13. Pursuant to the Consent Decree, MARAD filed a Notice of Intent for coverage under the State of California's General Stormwater Permit, which Notice was approved by the California Water Resources Control Board. The Consent Decree and the Stormwater Permit set forth schedules and objectives in connection with environmental remediation of certain vessels moored in the Suisun Bay Reserve Fleet (SBRF). Supporting last month's first annual joint inspection of the SBRF facility pursuant to the terms of the Consent Decree, the first required quarterly status report was filed by the Department of Justice with the Court. Reflective of the ongoing endeavor to regularize required compliance efforts, that report included copies of manifests of all hazardous waste removed from the SBRF during the reporting period. Plaintiffs appear to be more than satisfied with the progress MARAD has made thus far in its remediation efforts at the SBRF.

MARAD Recovers Cash Collateral in Bankruptcy Case

In C. Michael Chiasson, Trustee v. Phoenix Searex Associates, LP, as collateral agency for Phoenix Enterprises, LLC, and United States of America, Department of Transportation, Maritime Administration (Bankr. E.D. La. No. 07-01149). MARAD proceeded against the trustee in bankruptcy for recovery of cash collateral that was unaccounted when the trustee presented his final accounting. MARAD prevailed against the trustee in various court proceedings and now has recovered the entire amount of its previously missing cash collateral.

On January 18, 2000, Searex Energy Services, Inc., and Searex, Inc., filed for chapter 11 protection. On October 31, 2000, the cases were converted to chapter 7, and C. Michael Chiasson was appointed trustee. Searex, Inc., received $77,269,000 in Title XI loan guarantees from MARAD. When MARAD paid out on its guarantee, it was able to obtain relief from the automatic stay and foreclosed on its vessel collateral. The last item remaining in the estate is the issue of MARAD's cash collateral in the amount of $164,000 . In the process of winding down the estate, the Trustee filed his first and final accounting of the estate, which contained less than $70,000. MARAD objected.

A July 21, 2009, ruling by the Bankruptcy Court denied the Trustee's final accounting and ordered the Trustee to recalculate the accounting to "somehow account for and pay to MARAD $163,950.29." Instead of producing a revised accounting, the Trustee filed a complaint to surcharge MARAD. A motion to dismiss this complaint was filed, and the Bankruptcy Court granted MARAD's motion. Following this, the Trustee paid the funds to the Department of Justice.

Federal Motor Carrier Safety Administration

Court Holds that FMCSA Safety Regulations Apply to Mobile Cranes

On April 27, the U.S. Court of Appeals for the Tenth Circuit issued its decision affirming the government's position in Midwest Crane & Rigging, Inc. v. FMCSA, 603 F.3d 837 (10th Cir. 2010). The central issue in this appeal was whether self-propelled mobile cranes operating on the highway are "commercial motor vehicles" and therefore subject to FMCSA safety regulation. The applicable statutory definition of "commercial motor vehicles" references the transportation of "passengers or property," but the statute does not define "property." The FMCSA administrative decision under review held that the crane apparatus permanently mounted on appellant's vehicles constituted "property" and that joining a crane to a truck bed did not change its character. Midwest Crane had argued that the crane apparatus and truck constitute a single unitized object, with the result that mobile cranes carry no "property" and are therefore outside FMCSA's regulatory authority.

The Tenth Circuit disagreed. The Court observed that where Congress is silent on the meaning of a term, the agency's interpretation is given substantial deference so long as it is reasonable. Here FMCSA had relied upon an older district court decision that had found a vehicle with cement-pumping equipment permanently affixed to its chassis was still subject to federal motor carrier safety regulation. The district court reasoned that the pumping equipment had nothing to do with the transportation function of the truck, that there was no question of regulatory authority over a vehicle transporting the same equipment separate from the truck, and that it would be unreasonable to rule that the safety-enhancing act of joining equipment to a chassis also removed such a vehicle from federal safety regulatory authority. The Tenth Circuit concluded that the instant case was analogous in all relevant particulars to that precedent and therefore that FMCSA's reliance on it was reasonable.

D.C. Circuit Grants Mandamus Petition on Supporting Documents Rule

On September 30, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for mandamus in American Trucking Associations, Inc. v. LaHood (D.C. Cir. No. 10-1009) directing FMCSA to issue by December 30, 2010, an NPRM concerning the supporting documents motor carriers and commercial truck drivers are required to maintain to establish compliance with the hours-of-service regulations. The rules were required to be promulgated within 18 months of the enactment of Section 113 of the Hazardous Materials Transportation Act of 1994. An NPRM was issued in 1998 and was supplemented in 2004. However, it was subsequently discovered that the original Paperwork Reduction Act analysis relied upon for the 1998 NPRM was deficient. FMCSA therefore withdrew the supplemental NPRM in October 2007.

Petitioner ATA contended it was entitled to relief under the Administrative Procedure Act for "agency action unlawfully withheld" based upon FMCSA's failure to promulgate a final rule specifying the requirements for the supporting documents. ATA further argued that was entitled to relief under traditional mandamus factors and controlling case law in the circuit.
At a settlement meeting on March 19, FMCSA committed to finalizing internal guidance and publishing a Federal Register notice on supporting documents requirements within ten weeks. FMCSA published the notice in the Federal Register on June 10 and invited public comment. On May 27, the court ordered the case held in abeyance pending further order and directed the parties to file a status report and motions to govern further proceedings within 30 days. However, on July 22, ATA filed a motion to reinstate briefing and requested the court to order FMCSA to respond to the petition.

On August 16, FMCSA filed a Response in Opposition to the Petition for a Writ of Mandamus arguing, that the Agency is in the process of promulgating a rule on supporting documents and that a writ of mandamus is appropriate only when an agency refuses to act. The court's

order granting the mandamus petition followed thereafter.

EOBR Rule Challenged in Seventh Circuit

On June 3, the Owner-Operator Independent Drivers Association (OOIDA) filed a petition for review in the U.S. Court of Appeals for the Seventh Circuit. In Owner-Operator Independent Drivers Ass'n, Inc., et al. v. DOT, et al. (7th Cir. No. 10-2340), OOIDA and three individual commercial motor vehicle operators challenged FMCSA's final rule "Electronic On-Board Recorders for Hours-of-Service Compliance" (EOBR rule).

The EOBR rule amends FMCSA regulations to incorporate new performance standards for electronic on-board recorders (EOBRs) installed in commercial motor vehicles that are manufactured on or after June 4, 2012. Additionally, the rule mandates that motor carriers who demonstrate serious noncompliance with the hours of service rules will be subject to mandatory installation of EOBRs that meet the new performance standards. Motor carriers must comply with the EOBR Final Rule by June 4, 2012.

OOIDA' filed its opening brief on October 5. FMCSA's response brief is due November 4.

Moving Company Challenges Civil Penalty in Ninth Circuit

On September 10, Air 1 Moving and Storage, Inc. (Air 1) filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit seeking review of a final order of the FMCSA Assistant Administrator that imposed civil penalties against Air 1 totaling $27,030 and a subsequent final order denying Air 1's motion for reconsideration. The petitioner in Air 1 Moving & Storage, Inc. v. DOT, et al. (9th Cir. No. 10-72797) also requested the court to stay FMCSA's enforcement of the Final Order.

FMCSA imposed the civil penalties as a result of its determination that Air 1 allowed a commercial motor vehicle to be operated by a driver who did not possess a valid commercial driver license and that the company engaged in interstate transportation of household goods without proper operating authority. The Assistant Administrator denied the motion for reconsideration as untimely and without merit.

On September 29, FMCSA filed its response in opposition to the motion to stay enforcement of the Final Order imposing civil penalties. Air 1 must file its opening brief by December 2, 2010. FMCSA's response brief is due January 3, 2011.

National Highway Traffic Safety Administration

D.C. Circuit Considers Challenges to Light Duty Vehicle Fuel Economy and Greenhouse Gas Emission Rules

On April 1, the Secretary and the Administrator of EPA signed a joint rule setting fuel economy

standards/greenhouse gas emission standards for MY 2012 – 2016 light duty vehicles (i.e., passenger cars, light trucks and medium duty passenger vehicles). On May 11, the Southeastern Legal Foundation (SELF), various Members of Congress, and numerous Georgia businesses filed a petition for review of the rule in the U.S. Court of Appeals for the District of Columbia Circuit. The Alliance of Automobile Manufacturers, Natural Resources Defense Council, the Environmental Defense Fund, and the Sierra Club intervened supporting the rule. Later, on June 29, the Competitive Enterprise Institute, Freedomworks, and the National Science and Environmental Policy Project filed a petition for review in the D.C. Circuit as well. Each of the two petitions noted above named NHTSA as a respondent, in addition to EPA. Numerous other petitions for review only name EPA as the respondent. The two cases involving NHTSA are consolidated in Coalition for Responsible Regulation v. EPA (D.C. Cir. No. 10-1092).

This litigation is in its early stages. At this time, there are four major sets of separately consolidated cases pending before the Court, only one of which involves challenges to the light duty vehicle rule. Some petitioners recently filed a motion to coordinate certain cases before a single panel of judges, short of consolidation, which the government has opposed to the extent the light duty vehicle rule would be coordinated with actions that have nothing to do with regulating greenhouse gases from mobile sources. The parties are negotiating a schedule in which procedural motions will briefed and ruled upon before any merits briefing. Merits briefs probably will not be filed until sometime in winter 2011.

Pipeline and Hazardous Materials Safety Administration

Alyeska Pipeline Service Company Challenges PHMSA Civil Penalty

On August 2, Alyeska Pipeline Service Company (Alyeska), the operator of the 800-mile-long Trans Alaska Pipeline System, filed a complaint in the U.S. District Court for the District of Alaska alleging that the PHSMA violated section 706 of the Administrative Procedure Act in a January 13, 2010, final order that found that Alyeska had violated PHMSA's Pipeline Integrity Management Requirements. Alyeska alleges in Alyeska Pipeline Service Company v. DOT (D. Alaska 10-00177) that the order is not based on substantial evidence, that PHMSA had assessed the Company an excessive civil penalty of $173,000 for the violation, and that PHMSA had not issued the final order in a timely manner as required by law. The U.S. Attorneys' Office in Anchorage filed an answer to the complaint on October 22.

Government Sues BP Exploration (Alaska) for Failure to Comply with PHMSA Corrective Action Order

On March 31, the Justice Department filed a complaint on behalf of PHMSA and EPA in the U.S. District Court for the District of Alaska against BP

Exploration (Alaska), Inc. (BPXA), an operator of oil and gas pipelines on the Alaskan North Slope. The complaint in United States v. BP Exploration (Alaska), Inc. (D. Alaska No. 09-00064) alleges that BPXA failed to timely comply with a PHMSA Corrective Action Order requiring the company to take certain remedial actions to reduce safety risks in the aftermath of a large oil spill from a BP pipeline in March 2006. The complaint also sets out several Clean Water Act and Clean Air Act claims on behalf of EPA. The EPA claims also arose from the March 2006 spill and another spill later that year. Discovery is currently underway.

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